IN RE: JOSE A. ESPINOSA

NO. BD-2012-072

S.J.C. Order of Disbarment entered by Justice Botsford on October 11, 2012.[1]

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[1] The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL,
Petitioner

vs.

JOSE A. ESPINOSA, ESQ.,
Respondent

BOARD MEMORANDUM

A hearing committee recommended that the respondent, Jose A. Espinosa, be disbarred. The respondent appeals on procedural and substantive grounds. Finding no error, we adopt the findings, conclusions, and recommendation of the hearing committee.

Summary of Findings and Conclusions

The committee found that the respondent had neglected two immigration matters and a divorce; misrepresented the status of the cases to his clients and, in one of the matters, to an immigration judge both orally and in writing; misused an unearned retainer and later misrepresented to bar counsel the amount of work expended in an effort to justify retaining the unearned fee. We summarize the findings.

Count One

The respondent agreed to seek adjustment of the immigration status of a mother and her two minor sons. The mother wanted all three adjustments at the same time. The respondent, knowing this, failed to explain adequately that he planned to adjust the sons' status after the mother's. The pleadings the respondent prepared for the mother conveyed the misleading impression that the sons' cases were being filed simultaneously.

The mother became upset with the respondent after an immigration interview during which she learned that, while her status would be adjusted, no petitions had yet been filed for her sons. The respondent misrepresented to the mother that the income earned by her husband, the sons' stepfather and a naturalized citizen of the United States, was inadequate to support his sponsorship of her and her sons' petitions.

Despite the mother's follow-up calls and visits to the respondent, he continued to neglect the sons' matters. He gave the mother false assurances that the sons' petitions were being processed, again falsely attributing the delay to factors other than his lack of diligence. The mother, advised by the respondent that the sons would have their green cards by the next Christmas, bought them non-refundable airline tickets for a trip to Colombia that they had to forego lest they be unable to return to the United States.

The respondent then filed petitions on behalf of the sons based on outdated medical information. When the immigration service notified the respondent of this and other shortcomings in the filings, the respondent notified the mother of some, but not all, of the defects that needed to be cured. Because of the uncured defects, the sons' petitions for lawful resident status were denied.

The respondent failed to inform his client of this turn of events. After learning from a friend that the immigration website reported the petitions as denied, she confronted the respondent. He told her that there are often mistakes on the website and that the sons' petitions were still being processed. Even after the respondent had learned for himself that the petitions had been denied, he told the mother to obtain new medical examinations. When the mother offered the medical reports to the respondent, he told her to hold them while waiting for notice from immigration. He did not file new petitions for the sons.

After repeated visits to the respondent's office brought no resolution, the mother discharged the respondent and engaged successor counsel, who obtained green cards for the sons.

Based on these findings, the committee found that the respondent had:

- violated Mass. R. Prof. C. 1.1 (competence), 1.2(a) (pursue client's lawful objectives), and 1.3 (diligence) by failing to seek simultaneous adjustment for the mother and the sons and by failing to pursue the sons' adjustment after obtaining hers;
- violated Mass. R. Prof. C. 1.1, 1.2(a), and 1.3 by failing to respond to notice of the defect in the filings for the sons;
- violated Mass. R. Prof. C. 8.4(c) (dishonesty, misrepresentation, fraud, or deceit) and 8.4(h) (conduct otherwise reflecting adversely on fitness to practice) by assuring the mother that her sons' petitions were being processed or had been filed when neither assurance was true, by blaming delays on the stepfather's purportedly inadequate income, and by misleading the mother after the sons' petitions had been denied;
- violated Mass. R. Prof. C. 1.4(a) (communication with client) and 1.4(b) (explain matters to client for informed decision) by failing to explain his strategy to the mother, by failing to advise her honestly about the status of the sons' petitions, and by failing to advise her when their petitions were denied.

Count Two

The respondent was engaged to represent an immigration client who had entered the United States without a visa and, after marrying a United States citizen, had petitioned to adjust her immigration status. Because the client had been married for less than two years when she filed her petition, she had obtained only conditional resident status, and she and her husband were required to file a joint I-751 petition to remove the conditions on residency. Her separation from her husband made it impossible for her to proceed with the I-751 petition jointly. She engaged the respondent to help her complete the process of obtaining lawful resident status.

The respondent knew there were exceptions to the joint petition requirement. Two potentially applied to the client's case as things then stood. Arguably, the client had been a victim of her husband's abuse or extreme cruelty. Also, requiring a joint petition arguably would impose extreme hardship on the client's dependent minor daughter. A third exception, that the marriage had ended in divorce or annulment and the client was not at fault for being unable to meet the joint filing requirement, required the client to file for divorce.

When the client told the respondent of her separation from her husband, he advised her to obtain a divorce and proceed under the third exception as an abandoned spouse. The client asked the respondent to file the divorce for her.

The client received notice of an interview with immigration, and she was eligible to proceed with that interview without her husband under the same conditions that excused the joint petition requirement. On the respondent's advice, the client obtained affidavits from friends and neighbors to document the missing husband's abuse. The respondent presented these to the immigration interviewer, but the interviewer ruled that the client needed to proceed before a judge.

About two months later, in August 2006, the client paid the respondent $500 to file for her divorce.

About a month after that, immigration issued a formal decision denying the petition to remove conditions on residency and revoking the client's conditional status on the grounds that the client did not qualify for a joint I-751 petition or waiver of the joint filing requirement because there was insufficient evidence either of a bona fide marriage or that the marriage had been terminated by annulment or divorce. As a result of this ruling the client was deportable. Her case was referred to the immigration court, where formal deportation proceedings commenced.

The client and the respondent discussed using hardship as grounds to delay and perhaps prevent deportation. At some point, they also discussed obtaining status adjustment through a petition by the client's son, a United States citizen. Her son would be eligible to petition on the client's behalf in 2009, when he turned twenty-one years old.

The client and the respondent appeared at immigration court in February 2007, where the respondent told the judge he would be filing pleadings to contest deportation. The matter was continued to the following May. Meanwhile, the respondent completed a form answer to the charge of deportation that admitted deportability but indicated that the client would seek adjustment of status and to cancel deportation. He did not commence the client's divorce.

In May 2007, the respondent's associate appeared and filed the form answer. The case was put over to October 2007. Between May and October the respondent did nothing to advance it.

At the October 2007 hearing, the respondent represented to the court that he had filed an I-751 petition and request to waive the joint petition requirement, and he was waiting for a receipt for the filing. This representation was knowingly and intentionally false; the respondent had not filed the purported I-751 petition and waiver request. The court continued the matter to January 2008 to check the status of the (non-existent) waiver filing.

Sometime between the hearings in October 2007 and January 2008, the respondent caused the client to sign a new I-751 petition to remove conditions and to waive the joint filing requirement, as well as an affidavit describing the extreme hardship deportation would cause the client's young daughter. The affidavit represented that the client was "now in the process of getting a divorce" and that the client and her husband were "divorcing." These statements were false, but their appearance in the affidavit caused the client to believe the divorce was pending. The respondent caused these documents to be filed with immigration.

At the January hearing, the respondent's associate appeared with the client and gave the court a copy of the I-751 petition and the false affidavit. The court continued the matter to September 9, 2008 for a report on the status of the I-751 petition.

At a meeting sometime between January and September 2008, the respondent told the client that he was seeking a continuance and that she need not attend the hearing. He failed to file the motion to continue and, as a result, when neither the client nor the respondent appeared at immigration court on September 9, 2008, the client was ordered deported in absentia.

The respondent told the client that the order of deportation was the kind of mistake immigration makes, and that he would file a motion to reopen. The client refused to pay the filing fee, and the committee found that refusal justified in light of the respondent's mistakes.

In October 2008, the respondent drafted, and the client signed, an affidavit to support a motion to reopen. The affidavit stated that the client's non-appearance resulted from the

respondent's failure to confirm the hearing date and the client's obligation to attend. Still, the respondent did not file the motion to reopen.

Between October 2008 and September 2009, the client stayed in touch with the respondent, who told her that things moved slowly at the immigration court. The committee did not credit the respondent's testimony that he warned the client she was subject to arrest and deportation at any time, and it affirmatively found that, where the respondent had also talked with the client about hardship grounds and a motion to reopen, the client did not make an informed decision to wait, risking arrest, until her son became old enough to sponsor her status adjustment.

In May 2009, the respondent filed an I-130 petition to establish the son's relationship with his mother, as a predicate to her status adjustment. That petition was approved.

In September 2009, immigration officials arrested the client.

The client and her son contacted the respondent, and the respondent told the son that he had forgotten to file to motion to reopen.

The client obtained and paid successor counsel, who discovered an unsigned motion to reopen and supporting affidavit in the respondent's file. The respondent told successor counsel he would sign the motion, but did not do so. Successor counsel obtained the client's release after about a month of detention. The client eventually obtained permanent residency status.

Based on the foregoing findings, the committee found that the respondent had

- violated Mass. R. Prof. C. 1.1, 1.2(a), and 1.3 by lack of competence and diligence in pursuing the client's immigration case and divorce;
- violated Mass. R. Prof. C. 3.3(a)(1) (knowingly make false statement of material fact or law to a tribunal), 8.4(c), and 8.4(d) (conduct prejudicial to the administration of justice) by misrepresenting to the immigration court that he had filed an I-751 petition, and Mass. Rules Prof. C. 3.3(a)(4) (failure to remediate evidence known to be false) and 3.3(b) (continuing duty to remediate to conclusion of proceedings) by not correcting that misrepresentation;

- violated Mass. R. Prof. C. 8.4(c) and (h) by misrepresenting to the client that her divorce was pending and by impliedly misrepresenting that he had filed a motion to reopen her immigration proceeding;
- violated Mass. R. Prof. C. 1.4(a) and (b) by failing to advise the client that she was required to appear in the immigration court on September 9, 2008, failing to explain adequately the status of the client's proceedings and his actions on her behalf (including his failure to advise the client that he had not filed the motion to reopen), and failing to explain adequately that the strategy of petitioning for adjustment through the client's son presented a risk of immediate arrest;
- violated Mass. R. Prof. C. 3.3(a)(1), 3.3(a)(4), 8.4(a) (violation of ethical rules by self or through others), 8.4(c), and 8.4(d) by causing the client to sign the false affidavit and by causing his associate to submit it to the immigration court; and
- violated Mass. R. Prof. C. 1.1, 1.2(a), 1.3, 1.4(a) and 1.4(b) by advising the client she did not have to appear at the hearing on September 9, 2008, and failing to appear in court that day as her attorney, and violated Mass. Rule Prof. C. 3.4(c) (knowingly disobey obligations under the rules of a tribunal) by so advising the client and failing to file a motion to continue, then failing to appear.

Count Three

Around December 2007, the respondent was retained to act as successor counsel in a divorce case that had been marked "inactive" and was at risk of dismissal. The respondent, familiar with the pertinent probate court procedures, took a $2,000 retainer under a fee agreement declaring that retainer non-refundable, and then assigned the case to an associate. The associate performed about five hours of work on the matter before leaving for other employment, and earned no more than $925 in fees. After the associate's departure in February 2008, the respondent failed to take substantive action to advance the case, and did not obtain service of the complaint and summons.

Meanwhile, the respondent had deposited the entire retainer in his operating account and spent it within the next two weeks. The respondent did not issue the bills against the retainer called for by his fee agreement.

During four meetings with the client and other communications, the respondent represented that he had attempted to reach her husband's attorney without success, and that the divorce would be concluded by summer's end. These representations were misleading because they overstated the respondent's efforts and attempted to divert responsibility from his own inaction. In other instances, the respondent simply failed to respond to the client's efforts to reach him.

In July 2008, the court dismissed the case for inactivity. About two months later, the client fired the respondent and demanded a bill and a refund. The respondent did not reply. The client again demanded a refund and her file in December 2008. The respondent again did not reply, and he did not turn over the file until the client had retained his former associate to resume work on the case.

Faced with notice of a complaint to bar counsel and the client's 93A demand letter, the respondent contacted his former associate, who informed him of the approximately five hours she had worked on the case. The respondent, in turn, told bar counsel that the former associate had worked nine hours on the case, and that he had put in significant time trying to reach opposing divorce counsel in addition to his meetings with the client. As of the date of the disciplinary hearings, the respondent had not refunded the unearned portion of his fee or provided the client with an itemized bill.

Based on these findings, the committee found that the respondent had

- violated Mass. R. Prof. C. 1.1, 1.2(a), and 1.3 by failing to file an appearance, serve process, or take any action of substance in the client's divorce;
- violated Mass. R. Prof. C. 1.5(a) (clearly excessive or illegal fee) by charging and collecting a non-refundable fee that was not earned;
- violated Mass. R. Prof. C. 1.15(d)(1) (prompt written accounting due on final disposition of trust property) by failing to provide the client with an accounting of his use of her funds;

- violated Mass. R. Prof. C. 1.4(a) and (b) by failing to keep the client reasonably informed of the status of her case, to respond to reasonable requests for information, and to explain the matter sufficiently for informed decisions;
- violated Mass. R. Prof. C. 8.1(a) (knowingly make a false statement of material fact in connection with a bar disciplinary matter), 8.4(c), 8.4(d), and 8.4(h) by his knowing misrepresentations to bar counsel concerning the number of hours charged, and by his dishonesty with bar counsel concerning his efforts to reach opposing counsel;
- violated Mass. R. Prof. C. 1.16(d) (duties on withdrawal, including returning unearned fees paid in advance) by failing to return the unearned portion of the retainer after he was discharged.

The committee credited the respondent's evidence of serious illness, but found it not to be a convincing factor in mitigation because he had failed to demonstrate a causal connection between the illness and his misconduct. The committee rejected other evidence offered in mitigation concerning the respondent's purported litigation strategies and motivations.

In aggravation, the committee found that the respondent had harmed his clients, who were vulnerable, had committed multiple disciplinary violations, and had substantial experience in the practice of law at the time of his misconduct.

Further, the respondent has a history of related discipline. In 1991, the Court accepted the respondent's resignation and disbarred him. His affidavit of resignation admitted misconduct that spanned five matters, and included two instances of neglect and misrepresentation to clients concerning the status of their matters; misrepresentation to other counsel in a real estate closing concerning discharge of mortgages (in mitigation, the respondent was concerned that his client planned to pay off the mortgages with funds obtained illegally, and the respondent eventually caused the mortgages to be discharged with his own funds); the respondent used a personal check to cover his client's required contribution at a closing, the check was dishonored and the

respondent borrowed funds to cover it; and the respondent converted a real estate down payment, then when the closing did not go forward he failed to return the deposit for three years.

Discussion

Many of the respondent's substantive objections to the hearing report amount to no more than a disagreement with the committee's credibility determinations and the factual inferences drawn from them. These objections can be addressed summarily. Absent internal inconsistency not present here, we are bound to accept the committee's credibility determinations. Matter of Murray, 455 Mass. 872, 880 (2010); Matter of Saab, 406 Mass. 315, 328, 6 Mass. Att'y Disc. R. 278, 291-292 (1989); S.J.C. Rule 4:01, § 8(5). The committee's findings were based on substantial evidence and its inferences were fair, reasonable, and persuasive. The respondent's objections to the committee's subsidiary findings are without merit.

The respondent's objections to the committee's conclusions of law likewise lack merit. Those conclusions were amply supported by the subsidiary findings. Further, the respondent failed to present any argument – let alone reasoned analysis rising to the level of appellate advocacy – demonstrating any infirmity in the committee's conclusions.

The respondent argues on appeal that his former clients showed varying levels of familiarity with the immigration system and did not hesitate to complain about him and provide testimony. Therefore, he objects to the committee's finding that his clients were vulnerable. Their claimed familiarity with the system does not overcome the committee's findings that the respondent's clients faced language barriers in addressing serious legal problems, and that they placed trust in him because of a common language. The committee did not err in finding them vulnerable.

The respondent's procedural objections fare no better.

His objection that the committee should have re-opened proceedings to take testimony from his treating physician runs aground on his burden to prove matters in mitigation. B.B.O. Rules, § 3.28, second sentence. The committee carefully reviewed the respondent's evidence in mitigation concerning his health, including his medical records. The report sets forth detailed findings that support the conclusion that the respondent had not proved the required causal connection between illness and misconduct. See Matter of Johnson, 452 Mass. 1010, 1011, 24 Mass. Att'y Disc. R. 380, 383 (2008). The committee was not required to reach out for evidence in an effort to plug the gaps in the respondent's case.

The limits the committee placed on the respondent's cross-examination of his former clients were reasonable and did not violate his due process rights. The respondent was entitled to examine witnesses to present relevant evidence and to pursue relevant lines of questioning on cross-examination. See Matter of Foley, 439 Mass. 324, 336, 336-337, n.13, 19 Mass. Att'y Disc. R. 141, 155, n.13 (2003). He does not point to any relevant line of questioning truncated by the committee's rulings. Rather, he objects that the limitation placed on his inquiry about the immigration status of two of his clients before hiring him somehow restricted his ability to attack their credibility. It was clear to the committee that the respondent's clients had legal problems with immigration before they came to him. Therefore, the matters the respondent sought to probe were subject to the committee's discretionary power to exclude cumulative evidence. B.B.O. Rules, § 3.30. More fundamentally, the respondent sought to impeach his former clients with collateral evidence of wrongdoing. The committee had the power to terminate such potentially abusive cross-examination. See Massachusetts Guide to Evidence, Rule 608 (b) ("In general, specific instances of misconduct showing the witness to be untruthful are not admissible for the purpose of attacking or supporting the witness's credibility").

The Appropriate Sanction

The respondent's misconduct included a number of violations typically sanctioned with a term suspension. Viewing that misconduct cumulatively and together with his other violations, and in light of the aggravating factors, we conclude that disbarment is warranted.

The respondent's pattern of neglect over the course of three years and three cases, resulting in serious harm or potential harm to his clients, warrants a term suspension. See Matter of Sterritt, 17 Mass. Att'y Disc. R. 542 (2001) (year and a day suspension for multiple neglects resulting in loss of client claims and failure to notify clients of the negative outcome; alcoholism and attempted restitution were considered in mitigation); Matter of Kane, 13 Mass. Att'y Disc. R. 321 (1997) (generally, term suspension is appropriate for a pattern of neglect resulting in serious harm).

When we add into this mix the respondent's repeated misrepresentations in efforts to conceal his neglect from his clients, the appropriate term suspension is well over a year. See Matter of Raymond, 24 Mass. Att'y Disc. R. 597 (2008) (two-year suspension for neglect of three divorce cases; misrepresentations to client concerning case status; harm and potential harm; aggravated by a history of discipline for neglect; mitigated by depression); Matter of Davidson, 17 Mass. Att'y Disc. R. 161 (2001) (three-year suspension for multiple neglect, misrepresentations, and giving falsified court documents to clients). And the respondent's oral and written misrepresentations to the immigration court themselves warrant a term suspension. See Matter of McCarthy, 416 Mass. 423, 428-429, 9 Mass. Att'y Disc. R. 225, 231 (1993) (one-year suspension is presumptive sanction for misrepresentations to a tribunal), citing Matter of Neitlich, 413 Mass. 416, 423-424, 8 Mass. Att'y Disc. R. 167, 175-176 (1992).

Further, the respondent's intentional misuse of a client's unearned retainer in violation of his fee agreement, aggravated by his failure to return the unearned portion of the fee, also warrants a term suspension. Matter of Hopwood, 24 Mass. Att'y Disc. R. 354 (2008) (suspension for intentional misuse of retainer, aggravated by neglect and failure to turn over

files). See also Matter of Sharif, No. SJC10708 (April 27, 2011) (discussing sanctions for misuse of retainers).

In addition to these three separate bases for a term suspension, the respondent engaged in other misconduct that, standing alone, would warrant public discipline: the respondent's misrepresentations and deception towards bar counsel, see Matter of Fitzgerald, 16 Mass. Att'y Disc. R. 164, 174 (2000) (public reprimand for, among other things, lying to bar counsel during investigation, while not under oath), and his charging and attempting to collect a clearly excessive fee. See Matter of Fordham, 423 Mass. 481, 12 Mass. Att'y Disc. R. 161 (1996) (public reprimand), cert. denied, 519 U.S. 1149 (1997).

Were the matter to have ended there, a lengthy term suspension might have been appropriate. See e.g., Matter of Sharif, 459 Mass. 558 (2011); Matter of Sanders, SJC No. BD-2010-122 (June 17, 2011) (both cases: three-year suspension with third year stayed for intentional misuse of retainer, neglect, misrepresentation, and harm). The committee correctly found, however, a number of substantial factors in aggravation, including the vulnerability of the clients and the respondent's substantial experience in law at the time of his misconduct. Most tellingly, the respondent's disciplinary resignation in 1991 (the functional equivalent of disbarment) arose from very similar misconduct involving neglect, intentional misuse of trust funds, and misrepresentation. Prior discipline must always be considered in aggravation, Matter of Dawkins, 412 Mass. 90, 96, 8 Mass. Att'y Disc. R. 64, 71 (1992), and where the prior discipline was for related violations, it weighs more heavily than a history of unrelated misconduct. See, e.g., Matter of Chambers, 421 Mass. 256, 260, 11 Mass. Att'y Disc. R. 31, 36 (1995).

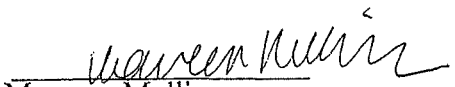
The sanction we recommend must be one "necessary to protect the public and deter other attorneys from the same behavior," and our overriding consideration must be "the effect upon, and perception of, the public and the bar." Matter of Balliro, 453 Mass. 75, 85-86, 25 Mass. Att'y Disc. R. 35, 47 (2009) (quotations and citations omitted). "Although no single act

committed by the [respondent] would, by itself, normally warrant this severe a penalty, [we] must consider the cumulative effect of the respondent's many infractions. ... Given the respondent's demonstrated unwillingness (or inability) to conform to the basic standards of his profession, [we] conclude that disbarment is necessary both to protect the public and to maintain its confidence in the integrity of the bar." Matter of Ulin, 18 Mass. Att'y Disc. R. 549, 555 (2002).

Conclusion

For all of the foregoing reasons, we adopt the hearing committee's findings of fact, conclusions of law, and recommendation for discipline. An information shall be filed with the Supreme Judicial Court recommending that the respondent be disbarred.

Respectfully submitted,



Maureen Mulligan
Secretary pro tem

Voted: July 9, 2012