IN RE: DAVID S. D'AMATO

NO. BD-2013-003

S.J.C. Order of Term Suspension entered by Justice Duffly on December 11, 2013.[1]

(S.J.C. Judgment of Reinstatement entered by Justice Duffly on July 22, 2014.)

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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

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: BD-2013-003

IN RE: David S. D'Amato

ORDER OF TERM SUSPENSION

This matter came before the Court, Duffly, J., on an Information and Record of Proceedings pursuant to S.J.C. Rule 4:01, § 8(4), with the Recommendation and the Vote of the Board of Bar Overseers (Board) filed by the Board on November 25, 2013. On November 27, 2013, counsel for the lawyer filed a letter confirming waiver of hearing and assenting to the order of term suspension, up to that recommended by the Board. Upon consideration thereof, it is ORDERED that;

1. David S. D'Amato is hereby suspended from the practice of law in the Commonwealth of Massachusetts for a period of six (6) months. In accordance with S.J.C. Rule 4:01, § 17(3), the suspension shall be effective thirty days after the date of the entry of this Order. The lawyer, after the entry of this Order, shall not accept any new retainer or engage as a lawyer for another in any new case or legal matter of any nature. During

the period between the entry date of this Order and its effective date, however, the lawyer may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

It is FURTHER ORDERED that:

2. Within fourteen (14) days of the date of entry of this Order, the lawyer shall:

a) file a notice of withdrawal as of the effective date of the suspension with every court, agency, or tribunal before which a matter is pending, together with a copy of the notices sent pursuant to paragraphs 2(c) and 2(d) of this Order, the client's or clients' place of residence, and the case caption and docket number of the client's or clients' proceedings;

b) resign as of the effective date of the suspension all appointments as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary, attaching to the resignation a copy of the notices sent to the wards, heirs, or beneficiaries pursuant to paragraphs 2(c) and 2(d) of this Order, the place of residence of the wards, heirs, or beneficiaries, and the case caption and docket number of the proceedings, if any;

c) provide notice to all clients and to all wards, heirs, and beneficiaries that the lawyer has been

suspended; that he is disqualified from acting as a lawyer after the effective date of the suspension; and that, if not represented by co-counsel, the client, ward, heir, or beneficiary should act promptly to substitute another lawyer or fiduciary or to seek legal advice elsewhere, calling attention to any urgency arising from the circumstances of the case;

d) provide notice to counsel for all parties (or, in the absence of counsel, the parties) in pending matters that the lawyer has been suspended and, as a consequence, is disqualified from acting as a lawyer after the effective date of the suspension;

e) make available to all clients being represented in pending matters any papers or other property to which they are entitled, calling attention to any urgency for obtaining the papers or other property;

f) refund any part of any fees paid in advance that have not been earned; and

g) close every IOLTA, client, trust or other fiduciary account and properly disburse or otherwise transfer all client and fiduciary funds in his possession, custody or control.

All notices required by this paragraph shall be served by certified mail, return receipt requested, in a form approved by

the Board.

3. Within twenty-one (21) days after the date of entry of this Order, the lawyer shall file with the Office of the Bar Counsel an affidavit certifying that the lawyer has fully complied with the provisions of this Order and with bar disciplinary rules. Appended to the affidavit of compliance shall be:

a) a copy of each form of notice, the names and addresses of the clients, wards, heirs, beneficiaries, attorneys, courts and agencies to which notices were sent, and all return receipts or returned mail received up to the date of the affidavit. Supplemental affidavits shall be filed covering subsequent return receipts and returned mail. Such names and addresses of clients shall remain confidential unless otherwise requested in writing by the lawyer or ordered by the court;

b) a schedule showing the location, title and account number of every bank account designated as an IOLTA, client, trust or other fiduciary account and of every account in which the lawyer holds or held as of the entry date of this Order any client, trust or fiduciary funds;

c) a schedule describing the lawyer's disposition of all client and fiduciary funds in the lawyer's possession, custody or control as of the entry date of this Order or

thereafter;

d) such proof of the proper distribution of such funds and the closing of such accounts as has been requested by the bar counsel, including copies of checks and other instruments;

e) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice; and

f) the residence or other street address where communications to the lawyer may thereafter be directed.

The lawyer shall retain copies of all notices sent and shall maintain complete records of the steps taken to comply with the notice requirements of S.J.C. Rule 4:01, § 17.

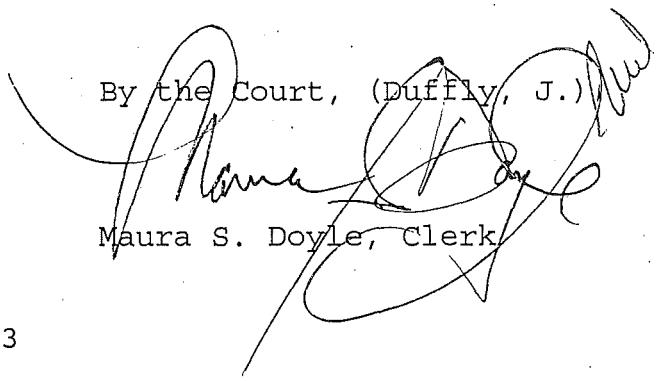
4. Within twenty-one (21) days after the entry date of this Order, the lawyer shall file with the Clerk of the Supreme Judicial Court for Suffolk County:

a) a copy of the affidavit of compliance required by paragraph 3 of this Order;

b) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice; and

c) the residence or other street address where communications to the lawyer may thereafter be directed.

By the Court, (Duffly, J.)



Maura S. Doyle, Clerk

Entered: December 11, 2013

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

BAR COUNSEL, **Petitioner**	)
v.	)
DAVID S. D'AMATO, ESQ., **Respondent**	)

BOARD MEMORANDUM

The respondent admitted the facts in the petition for discipline. These included failure to disclose complete information on his statement to the Board of Bar Examiners (BBE) in support of his request for admission to the bar, failure to supplement his statement, failure to inform the Supreme Judicial Court of criminal charges, and failure to report convictions to bar counsel or the BBE. In an application for admission to the Illinois bar, the respondent provided incomplete, false and misleading information. The respondent did not request to be heard in mitigation, and waived a hearing on the merits. The parties disagree as to the appropriate sanction for the respondent's misconduct. Bar counsel seeks a six-month suspension. The respondent argues in favor of an admonition or public reprimand. Oral argument on disposition was held before the Board on September 23, 2013.

Undisputed Facts

The respondent graduated from the New England School of Law in May, 2010. On or about May 7, 2010, he filed a petition with the Supreme Judicial Court to be admitted to the Massachusetts bar. As part of his petition for admission, he falsely answered "no" to a question asking if he had ever "been charged with or been the subject of any investigation for a felony or misdemeanor other than a minor traffic charge." In fact, in 2003, the respondent had been charged with a felony (assault and battery with a dangerous weapon) and a misdemeanor (threatening to commit a crime) as a result of charges brought against him by his sister after an

argument.[1] The respondent signed the statement to the BBE on or about May 5, 2010. He certified "that each of the foregoing answers is true, complete and candid and that [he had] not altered the wording of any question." The certification was false due to the respondent's failure to disclose the 2003 charges. The application also included the following statement: "I agree to inform the Supreme Judicial Court Clerk's Office for Suffolk County, in writing, of any changes or additions to answers that I have made on this application. I understand that this obligation shall continue until I am admitted to the practice of law in the Commonwealth of Massachusetts, or until such time as my application is withdrawn or denied by the Supreme Judicial Court."

On or about September 11, 2010, while his petition for admission was pending, the respondent drove an automobile, with a passenger, while under the influence of alcohol. His car flipped over. The Gloucester police and the state police investigated the accident. The respondent admitted that he had been drinking and was very drunk. On or about November 3, 2010, the Gloucester District Court issued a complaint against the respondent, charging him with operating under the influence and reckless operation of a motor vehicle, and requiring him to appear for arraignment on December 7, 2010. The respondent received a notice of the complaint in due course. Nonetheless, he did not inform the clerk, prior to November 23, 2010 when he was sworn in to the bar, of the investigation and charges. In fact, he did not disclose the charges to the BBE until November 2012.

Once a member of the Massachusetts bar, the respondent was required by S.J.C. Rule 4:01, § 12(8), to report convictions to bar counsel within ten days. On March 7, 2011, after having been sworn in, the respondent was convicted in Gloucester District Court of operating under the influence, and he admitted to sufficient facts to one count of reckless operation. An admission to sufficient facts constitutes a conviction, as defined by S.J.C. Rule 4:01, § 12(1). At

[1] Both matters were continued and finally disposed of on July 15, 2004, without pretrial probation or any finding or admission to criminal conduct.

all relevant times, both of these crimes were misdemeanors. The respondent did not timely report these convictions to bar counsel.

On or about March 31, 2011, the respondent applied to the Illinois Board of Admission to the Bar for admission to the Illinois bar. As part of his application, the respondent submitted a character and fitness questionnaire to the Illinois bar authorities. In response to a question asking whether he had ever defaulted on a student loan, the respondent falsely answered "no" when he knew that he was behind in his student loan payments. He also falsely answered "no" to a question asking whether he had ever been charged with an offense against the law. The respondent did disclose on his March 2011 questionnaire his conviction, in the Gloucester District Court, of operating under the influence, but he incorrectly described it as a felony. The questionnaire reminded the respondent that he had "a continuous reporting obligation" and "must notify the Board of Admissions of any changes or additions to the information provided in your application . . . ."

Beginning on June 22, 2011, the Illinois board repeatedly informed the respondent that one of the requirements for admission to its bar was that he notify the Massachusetts bar authorities of the 2011 criminal charges and conviction. The respondent failed the July 2011 Illinois bar exam. On October 31, 2011, he petitioned to sit for the February 2012 exam. He submitted a character and fitness questionnaire on or about October 31, 2011, that required him to supplement the earlier-provided information. Again, he failed to disclose that he had student loans that were in arrears.

The respondent failed the February 2012 bar exam. By email dated March 16, 2012, the Illinois board informed the respondent that it had obtained his credit report, which showed student loan debts not disclosed in any application to the Illinois bar. On or about May 1, 2012, the respondent filed a supplemental questionnaire with the Illinois board to sit for the July 2012 bar exam. He passed the exam, but his application for admission to the Illinois bar is still pending. While the Illinois board had repeatedly told the respondent that he had to notify the

Massachusetts bar authorities of the 2011 criminal charges and conviction, the respondent did not do so until approximately November 20, 2012.

By way of mitigation, the respondent states that at the time of the September 2010 violations, he had not yet been admitted to the bar. He argues that the underlying conduct was personal in nature and affected no clients. As to the 2003 charges, he claims he was eighteen years old at the time and that the conduct involved his sister, who is five years older than he is. None of the alleged misconduct occurred in the practice of law.

Bar counsel asks that the board recommend a suspension of six months. Bar counsel's brief reflects that prior to 2004, misrepresentations on a bar application resulted in relatively light suspensions of from one to three months. However, in its decision in Matter of Moore, 442 Mass. 285, 295, 20 Mass. Att'y Disc. R. 400 (2004), the Court ordered a two-year suspension for a lawyer who had failed to disclose unfavorable information on his bar application. It put the bar on notice that, going forward, future sanctions would be more severe and could include disbarment.

The respondent claims his circumstances are unique citing, among other things, the allegedly mitigating factors listed above. He insists that he disclosed the 2011 convictions to the Illinois authorities, undermining (in his view) any claim that he intentionally withheld that information in Massachusetts. He claims that the "gravamen" of this case is the omissions, and argues that in cases involving omissions, suspensions are measured in months, not years.

The starting point for our analysis is Matter of Moore. Moore was found to have given deliberately false answers, with intent to deceive, to two questions on his bar and supplementary applications. Among other things, he neglected to disclose that he had resigned from the Connecticut bar while under investigation for various charges, among them forgery and failure to remit client funds. He also failed to list certain employment and professional engagements, review of which could have led to information likely to harm his chances of admission. The hearing committee rejected his claims that he had not intended to deceive, and that "his answers

to the questions were responsive to the precise language of the questions and, read literally, accurate." 442 Mass. at 288-289, 20 Mass. Att'y Disc. R. at 404.

In the course of enunciating prospective standards for deceptive conduct in the bar admission context, the Court observed that "the disciplinary rules prohibit more than 'outright perjury. ' They proscribe conduct involving dishonesty, fraud, deceit, or misrepresentation, conduct prejudicial to the administration of justice, and conduct that adversely reflects on the fitness to practice law." 442 Mass. at 292 n.10, 20 Mass. Att'y Disc. R. at 408 n.10. Cf. Kannavos v. Annino, 356 Mass. 42, 48 (1969) ("Fragmentary information may be as misleading . . . as active misrepresentation, and half-truths may be as actionable as whole lies . . . .") (citation and quotations omitted). The Court observed in Moore that while disbarment would be a 'markedly disparate 'sanction for the misconduct, earlier cases reflected a range of suspensions for similar conduct.[2] The Court warned that future conduct would be subject to "much harsher sanctions, including disbarment":

> "There can be no tolerance in our system of justice for deception." . . . Whether an individual is of good moral character and fit to practice law in the Commonwealth is a most serious issue. Questions exploring this issue are not to be answered by gamesmanship. Bar applicants should always err on the side of full disclosure. If the meaning or scope of a particular bar application question is unclear to them, they should contact the Board of Bar Examiners to ascertain exactly what information is being sought in response to that question.

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[2] E.g., Matter of Finn, 433 Mass. 418, 421-422, 17 Mass. Att'y Disc. R. 200, 208-209 (2001) (three-month suspension for reckless and intentionally false statements on Georgia bar application in response to questions pertaining to student loans and default); Matter of McGarvey, 15 Mass. Att'y Disc. R. 390, 391-392 (1999) (two-month suspension for false answer to question concerning discipline in any other profession and for failing to disclose place of employment at the time of the disciplinary incident); Matter of Ruzzo, 10 Mass. Att'y Disc. R. 233, 233 (1994) (one-month suspension for failure to list a jurisdiction where lawyer had applied for admission and false answer as to whether he had ever been a party to a proceeding); Matter of Donovan, 13 Mass. Att'y Disc. R. 142, 143-144 (1997) (18-month suspension for failure to disclose on bar application ongoing investigation for student loan fraud). Cf. Matter of Marshall, SJC No. BD-2000-059 (November 21, 2000) (indefinite suspension for intentional and fraudulent appropriation of another lawyer's identity; misconduct included submission of fabricated and fraudulently procured documents, and featured a pattern of misconduct showing planning and premeditation).

Matter of Moore, 442 Mass. at 295, 20 Mass. Att'y Disc. R. at 412 (citation omitted). See Matter of Resnick, 26 Mass. Att'y Disc. R. 544, 552 (2010) (one-year suspension with reinstatement conditioned on the lawyer's obtaining a character and fitness report from the BBE for false statements and omissions as to complaints filed against the lawyer in another professional capacity, and complaints filed by her).

We do not agree with the respondent that his situation is "unique." We see a repeated and extended failure (beginning in September, 2010 and extending through November 12, 2012) to disclose relevant and mandatory information to the Massachusetts BBE and to bar counsel. We note a failure to disclose and a want of candor towards to the Illinois authorities. We are struck by the length, breadth, and audacity of the respondent's misconduct, particularly his refusal, despite the urging of the Illinois authorities beginning in June of 2011, to make disclosure in Massachusetts until November of 2012. Such behavior, which ranges over a substantial period of time, merits a more severe sanction than do isolated or temporally limited acts. See Matter of Aufiero, 13 Mass. Att'y Disc. R. 6, 25-26 (1997).

Contrary to the respondent's argument, we do not find Matter of Garnett, P.R. No. 2013-01 (January 31, 2013), or Matter of Betts, 26 Mass. Att'y Disc. R. 44 (2010), to be persuasive authority in these circumstances. Garnett also had a conviction for operating under the influence, but that appears to be the extent of the similarity; there is no suggestion that he failed to report his conduct to bar counsel or otherwise undermined bar admission processes. Betts was convicted of two misdemeanors and failed to disclose in his petition for admission various instances of criminal conduct and investigations. He received a twelve-month suspension, with six months stayed. We disagree with the respondent's contention that Betts' misconduct was "demonstrably more egregious," and in any event the sanction Betts received was more severe than what the hearing committee has recommended here.

Finally, we do not agree with the respondent's complaint that he has been punished enough. This argument has never been very compelling in the bar discipline context. See, e.g., Matter of Nickerson, 422 Mass. 333, 337, 12 Mass. Att'y. Disc. R. 367, 375 (1996) ("'[t]he

question is not whether the respondent has been 'punished' enough. To make that the test would be to give undue weight to his private interests, whereas the true test must always be the public welfare.'") (citation omitted). Nor does the respondent's citation to the ABA Standards advance his case. These standards treat as aggravating factors the lawyer's dishonest or selfish motive, a pattern of misconduct, and multiple offenses, all three of which are manifest here. ABA Standards 9.23(b), (c), and (d). .

Dishonesty on an application for bar admission does not augur well for an applicant's moral or professional rigor. To the contrary, it strongly suggests a want of character and discretion wholly inconsistent with the practice of law. Stiff sanctions are necessary to redress this behavior in order "'to reassure the bar and the public that such conduct is completely contrary to the oath of office taken by every lawyer, and to underscore that, when it is uncovered, such conduct will be treated with the utmost severity.'" Matter of Moore, 442 Mass. at 295, 20 Mass. Att'y Disc. R. at 413 (citation omitted).

Conclusion

For all of the foregoing reasons, we agree with the hearing committee that a six-month suspension is appropriate. An information shall be filed with the Supreme Judicial Court for Suffolk County recommending that the respondent, David S. D'Amato, be suspended from the practice of law for six months.

Respectfully submitted,

BOARD OF BAR OVERSEERS,

By: Regina Roman
Regina Roman
Secretary

Voted: September 23, 2013