

**IN RE: GREGORY A. HESSION****NO. BD-2013-065****S.J.C. Order of Term Suspension entered by Justice Cordy on August 27, 2013, with an effective date of September 26, 2013.¹**

S.J.C. Judgment of Reinstatement entered by Justice Cordy on March 20, 2015

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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
BD-2013-065

IN RE: GREGORY A. HESSION

MEMORANDUM OF DECISION

This matter is before me on an Information filed by the Board of Bar Overseers (board) recommending that respondent Gregory A. Hession be suspended from the practice of law for one year and one day. The respondent objects to several of the board's findings, and urges the Court to impose the sanction of public reprimand, which was recommended by the hearing committee. Bar counsel, on the other hand, agrees with the board's findings but asks that the respondent be suspended indefinitely. I adopt the board's recommendation.

1. Background. The following facts were found by the board, and are largely adopted from the hearing committee except where noted. The respondent was retained by Jane¹ to represent her in a care and protection proceeding concerning her young

¹ A pseudonym. Because the charges have arisen in connection with care and protection proceedings, a protective order was granted to keep confidential the record and identities of the individuals involved.

son, Richard,² who had been removed from her care. The Department of Children & Families (DCF),³ who had custody of Richard, placed him in a foster home. During the course of the representation, in about July 2007, Jane's daughter Sally,⁴ who was nearly seventeen years old at the time, came to Massachusetts from a southern state where she had been living with her father, who had legal and physical custody of her. Sally began to live with Jane, as did Sally's twenty-eight year old boyfriend.

In late August 2007, DCF received a report pursuant to G. L. c. 119, § 51A, alleging neglect of Sally by Jane and began a investigation of the allegation pursuant to G. L. c. 119, § 51B. On September 11, 2007, following an incident where Sally was hospitalized for a suspected drug and alcohol overdose, DCF started a proceeding for Sally's care and protection in the juvenile court and obtained temporary custody of Sally pursuant to an ex parte order entered in that proceeding. DCF then forcibly removed Sally from Jane's home on an emergency basis pursuant to G. L. c. 119, § 51B (3), and placed her in a group home. The order granting temporary custody of Sally to DCF was continued and remained in effect until November 20, 2007.

² Also a pseudonym.

³ Then known as the Department of Social Services (DSS).

⁴ Also a pseudonym.

By law, Jane was entitled to a hearing in juvenile court within seventy-two hours of DCF's taking custody of Sally. The hearing was scheduled for Friday, September 14, 2007. On that day, the respondent, Jane and counsel for Sally appeared in juvenile court. The respondent and Sally's counsel argued that Sally's father had custody of her and that he had not been properly notified of the hearing. The judge thereafter entered an order giving temporary custody of Sally to DCF, and continued the hearing until September 19, 2007 before a different judge.

On the night of September 14, 2007, Jane learned from Sally's boyfriend that Sally and the other residents of the group home were going to a movie. Jane went to the theater and took Sally away in a taxi. Because Jane was worried that DCF would look for Sally at Jane's home, she left Sally in the rain in the woods near a parking lot. Sally was terrified. Jane then called the respondent, told him she had taken Sally from the group home, informed him where she had left Sally, and asked him to pick her up. The respondent picked up Sally that evening.

The respondent's primary concern that night was Sally's safety. He did not call the police or DCF because Sally had just had bad experiences with both. Although he advised Sally to go back to the group home or DCF, she insisted she was not going back into custody. The respondent called friends (who

were also clients of his), asked them to let Sally stay at their house for the night, and they agreed. The respondent did not disclose to the friends that Sally had been removed from DCF custody by her mother, nor did he disclose her true name; he simply told them that she needed a place to stay. Sally stayed with them overnight.

The next day, the respondent and his wife went to the friends' house and discussed options with Sally. The respondent urged her to go back and work things out with DCF, but she refused to do so. The respondent also urged her to wait for the next court hearing so they could address the custody issue at that time. Sally insisted that she intended to return to her father, who lived in a southern state, and that she would hitchhike if necessary.⁵

Having failed in his effort to get Sally to return to the group home and DCF custody, he and his wife provided Sally with clothing and \$300 cash for a bus ticket so she could return to her father's home. The respondent was concerned that DCF and the police were looking for Sally. Jane was informed that Sally had left to go to her father's home. The next day, the respondent was informed by telephone that Sally had arrived

⁵ The hearing committee credited Sally's testimony that she thought the respondent spoke to her about calling her lawyer, and that he probably encouraged her to do so and encouraged her to return to the group home, but she was not sure.

safely. Jane was also informed of Sally's safe arrival, and the respondent knew that Jane had been so informed.

On Wednesday, September 19, 2007, the respondent and Jane appeared in the juvenile court before the new judge for a continuation of the 72-hour hearing in Sally's care and protection proceeding. Also before the judge was a status matter concerning Richard. In addition to the respondent and Jane, counsel for Sally, for Richard, and for DCF appeared. Towards the beginning of the hearing, the respondent alerted the judge that, in regard to Sally, "as you may be aware, this child apparently has left the custody of the Department [inaudible] is not known where [inaudible] so that may affect how this decision is made as to what [inaudible]. . . ." Counsel for DCF informed the judge that Sally had not returned from a group outing on Friday, September 14. Counsel for DCF asked the court "to inquire of mother under oath if she has any idea where she may be. And try to help the Department find her. But she is right now on the run."

Following up on the comment that Sally was on the run, the respondent stated: "And that may, that may obviate the need for an immediate hearing. Because clearly, I'm sure, the department is looking for the child and it would be somewhat moot until that would happen. [Inaudible] . . . diminishes the urgency of the hearing at the moment, your Honor." There followed some

discussion among the court, counsel for Sally, and counsel for DCF as to whether Sally needed to be in DCF custody in order for the hearing to proceed. The respondent observed "that without the child here, I think it's going to be difficult to have a real hearing."

After some discussion about Richard's case, the court asked: "[D]oes mother have any idea where the young lady is?"

The respondent answered:

What she told me was that she heard [inaudible] the child. It appeared to the mom that it was, like a very [inaudible] borrowed a cell phone or something from somebody and called, because she called back on the number. You know, like, did a redial back on the number and got some stranger or whatever, who said yeah somebody borrowed my phone and called, so she really doesn't have a, she thought she was local, is what she told me. I don't think she knows much more than that.

Counsel for DCF explained that the reason she wanted the judge to put the mother under oath "is because [Jane had] spoken to the social worker and said, if you bring this child's medicine to a place and mother would pick it up, she would get it to the child. So" The respondent asked to speak with Jane before she went on the stand and a recess was declared.

After some more discussion about scheduling, the judge expressed concern that "we don't want a seventeen-year-old out on the streets where she can get hurt or used or exploited." The judge explained to Jane that counsel for DCF was "[j]ust going to ask a few simple questions regarding [Sally's] possible

whereabouts. . . ." Counsel for DCF then asked Jane a series of questions regarding what she knew about Sally's whereabouts. Jane testified that she had "heard from [Sally] a few times," since her disappearance, with the first time being by phone on September 15. She stated that she asked Sally and although Sally would not tell her, Jane believed that she was somewhere in the New England area. She said that Sally assured her she would appear in court that day. She also testified that she had asked Sally's boyfriend to stay at her home "so that [her] home telephone could be manned in case [her] daughter came, there would be somebody there for her because she doesn't have keys." Finally, she testified that she would contact DCF in the event Sally were to return home.

2. The disciplinary process. Bar counsel filed a four-count petition for discipline in August, 2011. Counts two and three form the principal basis of the board's recommended disposition and are the focus of this appeal. Count two charged the respondent essentially with assisting in Sally's flight from DCF custody, in violation of a court order. Count three alleged that the respondent made knowing misrepresentations to the court after Sally's flight from custody and failed to take action to remediate Jane's intentional misrepresentations to the court.⁶

⁶ Under count one, the hearing committee found that the respondent engaged in an unconsented and unwaiveable conflict of

Following a three day hearing in April and May of 2012, the hearing committee found that the respondent was concerned about both the effect on Richard's care and protection case of revealing Jane's actions to the juvenile court, as well as Jane's potential liability for taking Sally from DCF custody. It concluded that he believed he had an ethical duty to Jane not to disclose to the court and DCF her actions with regard to taking Sally from the group home. It found that the respondent was also concerned about revealing his own actions to the court and DCF with respect to Sally departing Massachusetts. It credited his testimony that the whole situation had been very difficult for him and he found his duties to the client and the court to conflict. It cited his testimony that he had reviewed some MCLE material and law review articles concerning conflicts

interest by representing Jane in Richard's care and protection proceeding while at the same time representing the foster parents in whose home Richard resided concerning allegations that the foster father had sexually abused his niece. The hearing committee found violations of Mass. R. Prof. C. 1.7 (a) (prohibiting representation of one client that is adverse to another client, absent consent); 1.7 (b) prohibiting representation of a client that may be materially limited by responsibilities to another client, absent consent); and 1.16 (a) (failure timely to withdraw from representation). Count four alleged that the respondent revealed confidential information and engaged in a conflict of interest by including confidential information learned from Jane in a statement to police, prepared on behalf of Sally and her boyfriend, regarding threats of violence made by Jane. The hearing committee found this allegation unsubstantiated. Neither bar counsel nor the respondent challenges the findings on counts one and four.

between Mass. R. Prof. C. 1.6 (confidentiality of information), 3.3 (candor toward the tribunal) and 4.1 (truthfulness in statements to others), and concluded that the authorities disagreed over the proper course of action. The committee reviewed the respondent's comments to the judge, to the effect that the mother "really did not have a, she thought [Sally] was local, is what she told me." It described this testimony as uncontradicted and true, observing that the Jane's testimony corroborated these statements. It credited the respondent's testimony that the answers he and Jane gave to the court were technically correct and were not false.

The committee concluded, as to count two, that the respondent violated Mass. R. Prof. C. 1.2 (e) (when lawyer knows that client expects assistance not permitted by the rules of professional conduct or other law, lawyer shall consult with client regarding relevant limitations on lawyer's conduct); 1.7 (b) (prohibiting representation of a client which may be materially limited by responsibilities to another client, absent consent); 1.4 (b) (lawyer shall explain matter to extent reasonably necessary to permit client to make informed decisions regarding representation); and 1.16 (a) (describing circumstances where withdrawal is necessary). As to count three, the hearing committee found no violations, concluding that bar counsel had failed to prove the charges. The committee

recommended that the respondent receive the sanction of public reprimand.

Bar counsel appealed to the board, objecting to the committee's findings under counts two and three and in mitigation, and to the absence of findings on aggravation. The board exercised its authority to revise the committee's findings of fact and conclusions of law, while deferring to the committee's role as the sole judge of credibility. S.J.C. Rule 4:01, § 8 (5) (a); B.B.O Rules § 3.53; Matter of Kerlinsky, 428 Mass. 656, 663 (1999). As to count two, the board concluded that in addition to the violations found by the committee, in furthering Jane's plan and in helping Sally to leave DCF custody and the Commonwealth, the respondent also violated rules 1.2 (d), 3.4 (c), 8.4 (a), (c), (d), and 8.4 (h) by knowingly disobeying a court order. As to count three, the board concluded that the respondent's statements to the court were "calculatedly misleading," and that "in some instances, they were simply false; in others, they deliberately created a false impression." Accordingly, the misrepresentations "consciously undercut the court's effort to reach the truth," and as such, violated rules 3.3 (a) (1), (2), 8.4 (c), (d), and (h). Further, the board found that the respondent's failure to correct Jane's misrepresentations constituted an additional rules violation under rules 3.3 (a) (2), (4), and 8.4 (c), (d)

and (h). The board disagreed with the committee's finding that Jane's status as a difficult client constituted a mitigating factor. It recommended that the respondent be suspended from the practice of law for one year and one day.

Bar counsel appeals, seeking an indefinite suspension, while the respondent seeks the sanction recommended by the hearing committee of a public reprimand.

3. Discussion. a. Rules violations. The Supreme Judicial Court retains the ultimate authority in determining who may practice law in the Commonwealth. Matter of Prager, 422 Mass. 86 (1996). However, although the board's findings and recommendations are not binding on this court, they are entitled to great weight. Matter of Fordham, 423 Mass. 481, 487 (1996). "[S]ubsidiary facts found by the board and contained in its report filed with the information shall be upheld if supported by substantial evidence." S.J.C. Rule 4:01, § 8 (6); Matter of Brauer, 452 Mass. 56, 66 (2008).

I agree with the board's conclusion that the hearing committee erred by finding violations under only rules 1.2 (e) and 1.7 (b). As to count two, the respondent was aware that the court had entered a continuing custody order and that that order was in effect when he assisted Sally in her flight from DCF custody. It matters not that the respondent had doubts concerning the validity of that order or that he planned to

challenge it, he was not free to disregard it. Nor does it matter that Sally announced her intention to flee even in the absence of the respondent's assistance. In furthering Jane's plan and in helping Sally to leave DCF custody and the Commonwealth, the respondent violated rules 1.2 (d), 3.4 (c), 8.4 (a), (c), (d), and 8.4 (h) by knowingly disobeying a court order. See Matter of Phillips, 24 Mass. Att'y Disc. Rep. 547, 550-551 (2008) (finding violation of rules 3.4 (c), 8.4 (d) and (h), 1.2 (d) and 1.3 where attorney knowingly violated probate court order concerning the establishment of a trust, and counseled and assisted his client in illegal and fraudulent conduct concerning the trust); Matter of Munro, 26 Mass. Att'y Disc. R. 385, 391 (2010) (finding violation of rules 1.2 (a), 3.4 (c), 8.4 (a) and (d) where attorney, in derogation of injunction, deposited funds to his own account and assisted clients in undermining court order).

As to count three, I again agree with the board that the hearing committee "took too myopic a view of both the statements made at the hearing and the scope of the pertinent rules" when it found no rules violation. As the board aptly emphasized, "the central point of the court's questions about Sally was to determine her whereabouts, her safety and the likelihood of her appearance at court." The court's questions were obviously not aimed merely at determining Sally's exact whereabouts at that

particular instance. The respondent admitted in his answer that "[t]he circumstances of Sally's elopement from custody and her whereabouts were material to the issue then before the court." I agree with the board that, "in light of these concerns, the respondent's statements to the court range from strongly disingenuous to entirely false."

First, the respondent's statement to the court that Sally had "apparently" left DCF custody was highly misleading, because it implied both that there was some doubt in the matter and that the respondent knew nothing about Sally's elopement. Next, when asked by the judge whether Jane had any idea where Sally was, the respondent affirmatively misrepresented the extent of Jane's knowledge. While his response may have been technically accurate in regards to Sally's whereabouts at that exact moment, again, the court was concerned with Sally's whereabouts and the circumstances of her elopement more generally. The respondent knew that the mother had picked up Sally from the group outing, that he himself had brought her from the parking lot to a friend's house and later provided her with money for a bus ticket, and that she had arrived at her father's home in a southern state days later. His answer to the court's question was clearly intended to mislead the court.⁷ See Kannavos v.

⁷ The hearing committee's decision to credit the respondent's testimony that what he said was true does not deserve deference

Annino, 356 Mass. 42, 48 (1969) ("Fragmentary information may be as misleading . . . as active misrepresentation, and half-truths may be actionable as whole lies" [citation omitted]); Matter of Pemstein, 16 Mass. Att'y Disc. R. 339, 348 (2000) (court observed that letter to client concerning deposit of funds, while literally true, "begged the false inference that the funds were still in the account"). The rules of professional conduct "prohibit more than 'outright perjury.' They proscribe conduct involving dishonest, fraud, deceit, or misrepresentation, conduct prejudicial to the administration of justice, and conduct that adversely reflects on the fitness to practice law." Matter of Moore, 442 Mass, 285, 292, n.10 (2004). The respondent's representations to the court ranged from calculatedly misleading to plainly false, and seriously undermined the court's efforts to reach the truth. As such, they violated rules 3.3 (a) (1), (2), 8.4 (c), (d) and (h).

The respondent similarly failed to correct Jane's misleading and affirmatively false testimony to the court regarding Sally's whereabouts, and in doing so violated rules 3.3 (a) (2), (4), and 8.4 (c), (d) and (h). While the respondent argues that he faced an inherent conflict between the duty of confidentiality he owed to Jane (as well as his desire

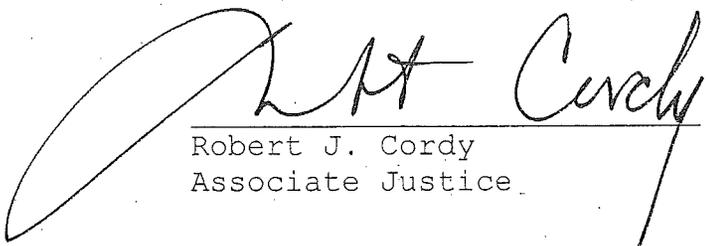
as a credibility determination. The factual record plainly establishes that the respondent intended to mislead the court as to Sally's elopement from DCF custody.

not to subject her to criminal or civil liability) and the duty of candor he owed to the tribunal, he was not free to resolve that conflict in favor of knowingly permitting his client to testify falsely. Where an attorney's duty to uphold the court's integrity "is in seeming conflict with the client's interest in zealous representation, the latter's interest must yield, [otherwise], the integrity of the judicial process would be vitiated." Matter of Neitlich, 413 Mass. 416, 423 (1992).

b. Appropriateness of sanction. To determine whether the sanction imposed in this case is appropriate, I must decide whether the board's recommendation "is 'markedly disparate' from the sanction imposed in other similar cases." Matter of Brown, 12 Mass. Att'y Disc. Rep. 23, 27 (1996), quoting Matter of Alter, 389 Mass. 153, 156 (1983).

In light of the more serious rules violations found by the board (as compared to those found by the hearing committee), it is clear that the public reprimand recommended by the hearing committee is an inadequate sanction. The presumptive sanction for misrepresentation to a tribunal in a statement not under oath is a one-year suspension. Neitlich, supra at 423-424 (one-year suspension for fraud on court and actively misrepresenting terms of client's real estate transaction); Matter of McCarthy, 416 Mass. 423, 431 (1993) (one-year suspension for eliciting false testimony and offering false documents before rent control

board). Here, in addition to his own misrepresentations to the court and his failure to correct his client's false testimony, the respondent knowingly disobeyed a court order and engaged in a conflict of interest. The board properly considered these serial violations, as well as others found by the hearing committee, in recommending a suspension of a one-year and one-day. See Matter of Saab, 406 Mass. 315, 326 (1989). The fact that the respondent did not receive any pecuniary benefit as a result of his actions, while a relevant factor, does not preclude the imposition of this sanction. Therefore, I adopt the recommendation of the board of a suspension of one year and one day.


 Robert J. Cordy
 Associate Justice



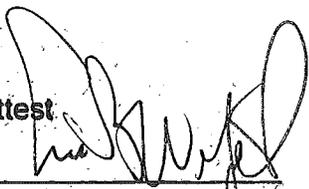
Entered: August 27, 2013

A True Copy

Attest

8-27-13

Date


 Assistant Clerk