IN RE: FABIAN POWELL

NO. BD-2014-029

S.J.C. Order of Term Suspension entered by Justice Spina on September 4, 2014.[†]

(Page Down to View Memorandum of Decision)

[†] 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
DOCKET NO. BD-2014-029

IN THE MATTER OF
FABIAN POWELL

MEMORANDUM OF DECISION

This matter came before me for hearing on the Information filed by the Board of Bar Overseers, which recommends that respondent Fabian Powell be suspended from the practice of law for six months and one day, and that he be required to take and pass the MultiState Professional Responsibility Examination as a condition of reinstatement. The facts found by the hearing committee and adopted by the board are not in dispute. They are summarized as follows.

The respondent was admitted to the Massachusetts bar on December 11, 2008. He is a 2008 graduate of the Southern New England School of Law (law school).[1] Gregory Langadinos had attended the law school in the late 1990's, and had been introduced to the respondent by Paul Pezza, an attorney and fellow alumnus of the law school.

In 2008, Langadinos filed a lawsuit in Suffolk County Superior Court, captioned Langadinos v. Southern New England School of Law and Robert Victor Ward, Jr., docket number CA08-2064B. The complaint alleged that the defendants had violated a settlement agreement in a prior case, that they defamed Langadinos, and that they caused him emotional distress. Langadinos represented himself. Ward was represented by

[1] As of 2010, the law school became the University of Massachusetts Law School.

Attorney Kenneth Kurnos.

In 2011, Langadinos filed two lawsuits in Middlesex County Superior Court. The first, captioned Langadinos v. Kurnos and Ward, docket number CV2011-02356, sought a restraining order against Kurnos and Ward based on allegations that they were stalking and harassing Langadinos. The second, captioned Langadinos v. Southern New England School of Law, docket number CV2011-02357, sought monetary damages and injunctive relief, including orders preventing the defendant from making certain arguments in the Suffolk County case.

Langadinos and Pezza had asked the respondent to submit an affidavit in support of Langadinos's requests for injunctive relief, which the respondent provided on or about June 15, 2011. The respondent knew that Langadinos intended to file the affidavit in one or both actions in Middlesex County. It was in fact filed in the second Middlesex County action. Langadinos failed to obtain injunctive relief, and both Middlesex County actions eventually were dismissed. The respondent's affidavit contained false statements that he knew were false. However, they were not material to the allegations in Langadinos's civil actions. Nevertheless, the board found they had "the potential to cause serious injury to Ward," who was dean of the law school, "both in general by virtue of the affidavit's attack on [Ward's] integrity, professionalism, and emotional stability, and specifically in the context of the suit(s) in which it was offered."

A sanction imposed for professional misconduct must not be "markedly disparate" from sanctions imposed in comparable cases. Matter of Alter, 389 Mass. 153, 156 (1983). This standard does not require mathematical precision. The overriding consideration in bar discipline is "the effect upon, and perception of, the public and the bar." Matter of Finnerty, 418 Mass. 821, 829 (1994). The board's analysis began with the presumptive sanction that misrepresentation of a material fact to a court is a one-year suspension. See Matter of McCarthy, 416 Mass. 423, 428 (1993); Matter of Neitlich, 413 Mass. 416, 422

(1992).[2] The board observed, apropos to this case, that a "downward departure [from the presumptive sanction] may be warranted where the matter misrepresented, while material to some matter for determination by the court, is not relevant to the core dispute before the court." See Matter of Smoot, 26 Mass. Att'y Discipline Rep. 631 (2010) (six-month and one day suspension for misrepresenting that service was made on opposing counsel who was deceased at the time); Matter of Long, 16 Mass. Att'y Discipline Rep. 250 (2000) (six-month suspension for misrepresentation to obtain continuance, with other violations).

Unlike both Smoot and Long, the respondent's misrepresentations did not contribute to erroneous action by the trial court. Nor did the respondent's affidavit go to a material fact in dispute; and it did not cause actual harm, where Langadinos's requests for injunctive relief were denied and his suits were dismissed. Nevertheless, the respondent's misrepresentations were under oath and the board determined they had potential to cause serious harm to Dean Ward. A downward departure from the presumptive sanction thus is warranted, and a six-month and one day suspension is not markedly disparate from comparable cases.

The respondent argues that there is good reason to impose a lesser term of suspension than six months and one day. He contends that distinctions have been made between misconduct occurring in the course of the practice of law and misconduct that does not occur during the practice of law but nevertheless reflects adversely on a lawyer's fitness to practice. Compare Matter of Barrett, 447 Mass. 453, 464-465 (2006) (misappropriation of client funds warrants more severe sanction than misappropriation of non-client funds).

There are distinctions that we have recognized in the area of attorney

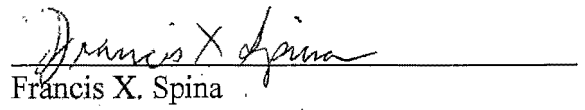
---

[2] Cases involving an attorney's false live testimony concerning a material fact usually warrant a two-year suspension. See Matter of Finneran, 455 Mass. 722, 731-732, n.13 (2010); Matter of Shaw, 427 Mass. 764, 768-769 (1998). Cases involving false affidavits usually result in a one-year suspension. See Commonwealth v. Livingstone, S.J.C. for Suffolk County, No. BD-2011-005.

misrepresentation, but they have been highly nuanced, and they have not differentiated between misrepresentations made by an attorney in his capacity as advocate and misrepresentations made by an attorney acting as a private individual. Rather, they have looked to whether the misrepresentations were given under oath, whether they were made in the course of live testimony, the attorney's motive, whether they were misrepresentations of material fact, and the harm caused, if any. See cases cited on page 3 and note 2, infra. The respondent relies on Matter of Balliro, 453 Mass. 75, 86 (2009), where a six-month suspension was imposed for false testimony under oath. In that case there was no showing that the misrepresentations rose to the level of perjury, and there was compelling evidence of mitigation (not present here) that warranted a downward departure from the presumptive sanction of a two-year suspension for giving live testimony. Here, there has been a downward departure from the presumptive one-year sanction based on the absence of materiality of the misrepresentations. There was no finding of mitigation in this case, unlike Balliro. In aggravation, the board found that the respondent's misrepresentations had the potential to cause serious harm to Dean Ward.

The type of searching analysis requested by the respondent has been performed by the board in its determination that the respondent should be suspended from the practice of law for a term of six months and one day, and that he be required to pass the MultiState Professional Responsibility Examination as a condition of reinstatement. I am satisfied that such a sanction is appropriate in the circumstances of this case.

An order of suspension, as sought, shall be entered in due course.



Francis X. Spina
Associate Justice

ENTERED: September 4, 2014