

IN RE: JAMES N. ELLIS, SR.

NO. BD-2015-048

S.J.C. Order of Term Suspension/Stayed entered by Justice Duffy on March 23, 2016.¹

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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

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR THE COUNTY OF SUFFOLK
DOCKET NO. BD-2015-048

IN RE: JAMES N. ELLIS, SR.

MEMORANDUM OF DECISION

This matter comes before me on an information and record of proceedings and a vote of the Board of Bar Overseers (board) pursuant to S.J.C. Rule 4:01, § 8(6). The proceedings were initiated by a petition for discipline filed by bar counsel, and then assigned to a hearing committee. See S.J.C. Rule 4:01, § 8. The initial petition, filed in 2008, contained a single count, count one in the amended petition; the petition was stayed pending the respondent's appeal of the underlying action. After the appeal was resolved and the stay was lifted in 2012, bar counsel amended the petition to add five additional counts.

All of the counts concern the respondent's practice before the Department of Industrial Accidents (department), and related litigation in State and Federal courts, and involve what bar counsel contends were the respondent's improper tactics with respect to the filing of workers' compensation claims, the filing of frivolous claims, and the repeated filings of appeals from adverse rulings by the department in State and Federal courts.

The respondent maintains that his actions were not inappropriate; that he aggressively pursued claims on behalf of his clients; and that he appropriately filed claims in the Superior Court, based on then-applicable law, seeking enforcement of orders by the department that he be paid statutorily-mandated fees, rather than pursuing such claims first before the department. The majority of the misconduct at issue (counts four, five and six of the petition for discipline) involves these claims for enforcement of department-ordered fees. The respondent concedes that decisions by the Appeals Court have clarified it would be inappropriate to file such claims in the Superior Court in the first instance without having sought relief first before the department. Five of the counts also involve appeals that the respondent filed in response to decisions of the department, one to terminate his client's benefits, one to allow a limited payment of partial benefits, one denying benefits, one allowing benefits for additional treatment, and one to allow benefits for a specific period due to loss of function but denying benefits for disfigurement. All of these filings took place within ten months in 2008.

The hearing committee took the unusual step in this case of setting forth an "introductory comment," which I reproduce in full:

"As our findings below will illustrate, this case primarily concerns an attorney who has provided decades of

service to virtually countless clients seeking relief through Massachusetts' administrative system for the compensation of workers' industrial injuries. Unfortunately, the respondent has resisted a significantly changed administrative system, and he has attempted to compel it to conform to his views of practice as usual. That resistance to changes -- whether the changes resulted from statutory directive, from regulatory provisions, from the willingness of administrative judges to impose sanctions, or from stricter demands for proof and tougher litigation responses from insurers and their counsel -- has resulted in judges in the administrative system and in state and federal court imposing sanctions on him. While we do not find the level of egregious misconduct suggested by bar counsel's amended petition for discipline, we conclude that the respondent's resistance to the tide of change has on a number of occasions violated the rules of professional conduct and that, despite the respondent's decades of service[] to needy clients, some discipline is warranted."

The hearing committee recommended that the respondent be suspended from the practice of law for six months, with that suspension suspended for two years, on conditions, including that the respondent attend and pass the multi-State professional responsibility examination, attend continuing education classes on modern workers' compensation practice, and pay the ordered sanctions on a specified schedule over the course of the period of suspension.

Bar counsel and the respondent cross appealed. Bar counsel agreed with the hearing committee's findings of fact and conclusions of law, but contested the recommended sanction as too lenient.¹ The respondent disputed some of the committee's

¹ Before the hearing committee, bar counsel had sought a suspension of two and one-half years.

findings of fact as to the underlying misconduct, as well as its findings involving the disciplinary proceedings themselves, and his ability to pay sanctions. He also challenged the committee's legal conclusions, maintaining that there had been no violations of the disciplinary rules. The board stated that it adopted the committee's findings of fact and conclusions of law, "except as noted."

In addition to his other claims, before me the respondent renews his claims, made before the hearing committee and the board, that the board's orders concerning issue preclusion were unfair and hampered his ability to mount a defense.

For the reasons discussed below, I conclude that the board's recommendation of a six-month suspension from the practice of law is too harsh, and the hearing committee's recommendation of a six month suspension, stayed for two years on conditions, is appropriate in these unusual circumstances. As the hearing committee and board both noted, the respondent's conduct ordinarily would result in a private admonition or a public reprimand. The committee concluded that the welfare of the public and the bar would not necessitate suspension of the respondent. I adopt the committee's conclusion as most appropriate in this case.

Prior proceedings. After the disciplinary proceedings were initiated, substantial litigation ensued concerning bar counsel's

three motions on the question of issue preclusion, which findings of fact and rulings of law, if any, would be permitted to be litigated before the hearing committee, and which findings would be deemed previously litigated. The chair of the board designated the then chair of the hearing committee to resolve this question; he issued a detailed decision in which he concluded that the findings of fact made in earlier proceedings would be adopted and not relitigated, but that the question whether any of the respondent's conduct was unethical and in violation of the rules of professional conduct would be resolved anew. He also allowed the respondent to testify as to his reasons for having taken the actions he did in the underlying matters (where fact finding was precluded by the determinations on issue preclusion), as well as to present six attorney witnesses (one for each count of the petition for discipline) to testify to corroborate those reasons. The chair then recused himself and another chair was appointed to conduct the evidentiary hearing on bar counsel's petition for discipline. The parties thereafter entered into two stipulations of facts, and agreed upon five volumes of exhibits which were submitted at the evidentiary hearing. The parties also agreed that the same facts applicable to count one were applicable to all of the other counts. Nonetheless, there were numerous evidentiary objections at the hearing, which took place over six days, and at which 195

exhibits were introduced.

Following that hearing, the hearing committee concluded that the sanctions ordered by the department and the Superior Court against the respondent, largely with respect to his filings seeking orders for payment of statutorily-mandated fees, were appropriate.

The committee concluded also, however, that the respondent's conduct as to clients one, three, and four did not violate Mass. R. Prof. C. 3.1, which prohibits "frivolous litigation of claims or contentions." The committee concluded that litigation filed without "reasonable grounds" under G. L. c. 152, § 14, has a particular technical meaning within the context of the workers' compensation statute (which is designed to reduce costs, including attorney's fees, and encourage settlement), is not necessarily "frivolous" within the meaning of Mass. R. Prof. C. 3.1. The committee also found that, while the respondent did make misrepresentations in his written closing argument concerning the testimony and evidence entered at the hearing before the department, he did not violate Mass. R. Prof. C. 3.3(a) (candor towards the tribunal) and 8.4(c) (dishonesty and deceit), because bar counsel did not establish that, at the time he submitted the written closing, the respondent knew he was referring to matters not then in evidence, since rulings on then-pending motions before a department judge on the question of

issue preclusion in that matter had not yet been made.

The committee stated that the respondent's acts of misconduct, standing alone, ordinarily would warrant a private admonition or a public reprimand, but that the numerous violations warranted something further. Nonetheless, the committee found that the respondent did not act out of selfish motives or a desire to conceal his misconduct, or in an "attack" on the department's judges, but out of what he perceived to be the "interests of his clients generally in standing firm against what he thought was the overbearing conduct of insurers, their counsel, and judges who, he thought, were enabling those insurers." The committee concluded that the respondent was "an aggressive litigator representing disadvantaged clients, and he was responding to the aggressive behavior of well-financed opponents. While his aggression eventually crossed the ethical line, it did not run so far over that line that the welfare of the public or of the bar demands suspension."

As stated, upon cross appeals by the respondent and bar counsel, the board asserted that it adopted the committee's findings of fact and conclusions of law, but determined that a suspension of six months was appropriate. The board commented, as had the committee, that the respondent's misconduct ordinarily would be sanctionable by a private admonition or public reprimand; the board then noted "one exception," discussed infra,

concerning the issue of misrepresentation. Bar counsel also recommended that a six-month suspension is appropriate here.

The record before me was extensive; the filings in this court were accompanied by voluminous documentation previously submitted in other proceedings, transcripts of the proceedings before the hearing committee, exhibits introduced in evidence there, and other documents. After a hearing before me on October 15, 2015, bar counsel filed a letter with responses to certain questions raised at the hearing.

In his filings in this court, the respondent challenges the facts found by the board as not supported by substantial evidence. He contends that many facts upon which the committee and the board relied rested solely on findings in earlier proceedings that were deemed already decided in various courts of the Commonwealth, and therefore precluded, by the chair's orders on bar counsel's motions for issue preclusion. The respondent also asserts that the recommended sanction is too harsh. Bar counsel filed an extensive opposition to the respondent's brief, asserting, among other things, that the hearing committee's decisions on issue preclusion were correct. Bar counsel's brief focuses extensively on the fact that there were twenty-five different claims in the Superior Court (all seeking orders for payment of judgments issued by the department). Based on this, bar counsel argues that a six-month suspension is not disparate

from the discipline imposed in similar cases, and that the board's recommendation is appropriate.

Background. The following summarized facts are taken from the hearing committee's findings, adopted by the board.² The respondent was admitted to the practice of law in the Commonwealth in April, 1952. He has had a lengthy practice of law in the Commonwealth, focused primarily on a high-volume practice of workers' compensation claims. He is the lead attorney in his firm, which employs one other full-time attorney as well as a number of contract attorneys, several paralegals, a nurse, an office manager, a settlement specialist, and several litigation secretaries. The respondent generally performs the initial client intake, then assigns a matter to a member of his staff. He generally also assigns one of the contract attorneys to appear at hearings before the department.

Count one: Kendrick matter. Donald L. Kendrick Jr. was a client of the respondent who suffered a workplace injury and was awarded workers' compensation payments. The insurer for his employer thereafter terminated payment of Kendrick's benefits, and demanded that Kendrick, who had moved to Virginia where his family lived, submit to an independent medical examination (IME) in Massachusetts. Although Kendrick had obtained an airline

² The committee's findings are discussed as findings of the board, except as noted.

ticket to travel to Massachusetts, such travel, and the concurrent expense, was extremely difficult for him, his financial situation was "dire," and he sought the respondent's advice. The respondent told him not to travel to Massachusetts, and that the IME could be conducted in Virginia. The respondent's advice was based on then-current practice, as found by the board, that IMEs would be conducted in the State in which an injured worker lived, or that the insurer would pay for the injured worker to travel to Massachusetts. Under Massachusetts law, however, the insurer had the right to require an injured employee to travel to Massachusetts for an IME, and the respondent's advice to Kendrick was erroneous.

Both Kendrick and the respondent ultimately appeared at a hearing before an administrative judge of the department, and testified as to Kendrick's reasons for failing to appear at the IME appointment scheduled by the department. After that hearing, the department issued sanctions against the respondent for his incorrect advice to Kendrick. The insurer continued to refuse to pay Kendrick's benefits until Kendrick eventually prevailed in his appeal to the Appeals Court.³ The respondent did not prevail in his appeal of the sanctions order.

³ The Appeals Court concluded that the insurer's decision to terminate payment of workers' compensation benefits was erroneous as to one of his two claims, and that Kendrick was entitled to workers' compensation payments on that claim.

Bar counsel argued, and the board found, that the respondent's advice to Kendrick that he not travel to Massachusetts for the scheduled IME violated Mass. R. Prof. C. 1.2(a) (pursue lawful objectives of client), but did not violate Mass. R. Prof. C. 1.1 (competence) or 1.3 (diligence).

The board concluded that the respondent's advice not to travel to Massachusetts, on the ground that such travel was a financial hardship and it was then common practice for insurers to arrange to conduct such examinations in the State where an injured employee was living, risked harm to his client, and therefore violated Mass. R. Prof. C. 1.2(a).⁴ Even if based on past practice, the respondent's advice risked the result that ensued, that his client's claim for continued payment of benefits was denied; the board found that the respondent's advice had been based on his own decision to "take a stand against the insurer" rather than pursuing his client's interests."

The board determined further that by referring at the hearing before the department judge to facts and exhibits not in evidence (based on the judge's rulings on issue preclusion), the respondent violated Mass. R. Prof. C. 1.3, 3.4(e) (allude to matter attorney does not reasonably believe will be supported by

⁴ The board found also that the department's termination of Kendrick's benefits as to one of his two claims was appropriate, and thus the absence of the IME did not affect the decision to terminate benefits.

substantial evidence), and 8.4(d) (conduct prejudicial to the administration of justice).

Count two: McCarty matter. McCarty was one of the respondent's clients who had been injured in a workplace accident. While McCarty was at home and receiving workers' compensation benefits, McCarty's supervisor came to his house, and a physical altercation ensued which resulted in McCarty being injured. The respondent filed a civil claim against the employer, asserting that the injury received at McCarty's home was during the course of his employment; at the time he filed that action, the respondent had concluded, based on Laroque's Case, 31 Mass. App. Ct. 657 (1991), that McCarty would not be eligible for workers' compensation benefits as a result of the injury at his home. The respondent asserted before the hearing committee, as he does before me, that filing the civil claim was necessary in order to preserve McCarty's claim, due to an upcoming deadline under the applicable statute of limitations, in the event that the then-pending workers' compensation claim was denied on the ground that the second injury did not occur in the course of McCarty's employment.

The employer's motion for summary judgment, on the ground that the claim was precluded by the workers' compensation act, and was filed merely for purposes of harassment, was allowed. The motion judge then ordered the respondent to show cause why he

should not be sanctioned for having filed a frivolous action. The judge rejected the respondent's affidavit filed in response, and sanctioned him pursuant to Mass. R. Civ. P. 11, for "persisting in a baseless and harassing lawsuit." The respondent's appeal in the Federal courts was denied and the United States Court for the First Circuit affirmed the Superior Court judge's order imposing sanctions.

The board found that there was no open issue as to the scope of the workers' compensation act and its applicability to McCarty's claim in 2006 when the civil action was filed, and that, as a Federal District Court judge had determined, "the respondent could not have failed to recognize that McCarty's civil suit had no chance of success." The board concluded that, by filing an appeal from the dismissal of the claim by a department judge, filing a tort action in the Superior Court, and opposing summary judgment in the Federal District Court, the respondent violated Mass. R. Prof. C. 3.1, 8.4(d) and (h), because there was no basis that was not frivolous for opposing the dismissal, and the respondent did not make a good faith argument for an extension, modification, or reversal of existing law.

Count three: Neal matter. Neal was injured in a workplace accident and the respondent filed a workers' compensation claim on her behalf. Her employer's insurer offered to pay only a

portion of the claim, and declined to pay certain of her costs (approximately \$2,000) that had been advanced by the respondent. The respondent rejected this offer before he was able to reach Neal, and the insurer thereafter withdrew its offer of partial settlement. At a hearing before the department, the respondent instructed Neal not to appear, and sanctions were imposed against him after the respondent appeared and argued as to his reasons for having given such advice to Neal. Neal did appear before the hearing committee, where she testified that, had the respondent reached her, she would have rejected the settlement offer, and that she thought the respondent should have been paid the costs for his services on her behalf.

The board found that the respondent failed adequately to explain the proposed settlement to Neal, refused to obtain her consent to direct payment by the insurer, and risked subjecting her to a hearing not for her own benefit but because of "his own personal agenda against insurers and the workers' compensation system as then in place." Based on this, the board found that the respondent violated Mass. R. Prof. C. 1.2(a), 1.4(a), and 1.4(b).

Counts four and five: Adam and DeBurgo matters. In these two matters, as well as approximately twenty-five others, the respondent filed claims in the Superior Court seeking enforcement of department orders that he be paid fees for his services,

pursuant to G. L. c. 152, § 12, based on submission of a certified copy of a decision by a member of the department's reviewing board. At that time, 452 Code Mass. Regs. 1.19 (1) provided that, where a dispute existed concerning the amount of a fee or expense in a workers' compensation claim, an administrative judge of the department was required to determine the appropriate amount of the fee.

In addition, in the Adam matter, the board found that the respondent's advice to Adam to leave a hearing before a department judge, after the judge had stated at a sidebar that he intended to deny the respondent's motion to strike an IME stating that Adam's arm was not disfigured, did not violate any of the charged rules of professional misconduct, and that the respondent did not file a claim for disfigurement without a good faith basis, as bar counsel had alleged.⁵ The board found further that filing an appeal from the denial of the claim was not "frivolous" within the meaning of Mass. R. Prof. C. 3.1, even if sanctions were warranted under G. L. c. 152, § 14(1), a statute designed to reduce costs, encourage settlement, and discourage appeals in workers' compensation cases. The board found, however, that the respondent violated Mass. R. Prof. C. 3.4(c) and 8.4(d) and (h)

⁵ While bar counsel originally asserted that the respondent had filed a frivolous claim, the hearing committee found that the respondent had a good faith basis for filing the disfigurement claim, and pursued a reasonable strategy in focusing on the IME report in seeking to overturn the department's ruling on appeal.

by failing to pay the sanctions imposed by the department judge.

In the DeBurgo matter, the respondent obtained a favorable result for the client, and then filed a claim for additional medical costs for additional treatment. The respondent then sought payment of his costs. He obtained an order from a department judge to pay the costs, in an specified amount. When the insurer demanded documentation of the costs, the respondent did not provide what the insurer considered adequate documentation (copies of cancelled checks), but instead filed an action under Chapter 93A in the Superior Court, seeking enforcement of the department order pursuant to G. L. c. 152, § 12, that he be paid (unspecified) costs and attorneys' fees..

The insurer moved for judgment on the pleadings, on the ground that the respondent had not exhausted his administrative remedies under 452 Code Mass. Regs. 1.19 (1). The insurer argued that the department's order did not specify the amount of the costs owed and the respondent had not provided certain documents to support the amount of his costs. The respondent opposed the motion on the ground that he was entitled to seek enforcement in the Superior Court pursuant to G. L. c. 231, § 12. A Superior Court judge allowed the department's motion, concluding as a matter of law that the respondent's lawsuit (without first having pursued relief in the department) was frivolous under G. L. c. 231, § 6F, and warranted sanctions. The Appeals Court affirmed

the judge's decision. The respondent did not comply with the department's order to pay sanctions with respect to these filings.

The committee and the board found that the respondent's actions with respect to the pursuit of costs in the DeBurgo matter, and his failure to pay the department's sanctions, violated Mass. R. Prof. C. 3.1, 3.4(c), and 8.4(d) and (h). The committee commented that what it termed the respondent's "flurry of lawsuits against insurers" in 2008 was not the respondent's usual practice, and that he should have reviewed the current, pertinent law before making these filings.

Count six: motions for payment orders in the Superior Court.

After the respondent had filed the Adam and DeBurgo motions seeking enforcement of orders to pay costs, as well as the twenty-five other claims for costs at issue in count six, the Appeals Court issued a decision stating unequivocally that claims for fees in workers' compensation cases must be pursued in the first instance before the department. See Ellis v. Commissioner of Dept. of Indus. Accidents, 88 Mass. App. Ct. 381, 383 n.5 (2015), citing Ellis v. Travelers Indem. Co., 77 Mass App. Ct. 1104 (2010) (unpublished opinion). Nonetheless, even before this determination, as the hearing committee found, the respondent failed to exhaust available administrative remedies before he filed the lawsuit in the DeBurgo matter. The committee stated

that it believed the respondent had brought the actions in good faith and with a belief that he was acting properly on behalf of his clients, albeit that his testimony that he thought 452 Code Mass. Regs. § 1.19 did not apply in the circumstances was based on his failure to have consulted the relevant regulations.

The hearing committee noted, however, that all of the motions in the Superior Court for orders requiring payment of fees allowed by a department judge were filed in a ten-month period in 2008, the last one in October, and the Superior Court judge's decision in the DeBurgo matter (stating that such filings were to be made in the first instance before the department) was issued on January 13, 2009. The committee commented also that, for the most part, the amounts of the costs were undisputed, it was then common practice for a department judge to issue an order for payment "of costs" without specifying an amount, and that ultimately, in most cases, the insurers did pay the amounts requested after litigation began. The committee stated properly, however, that these facts had no bearing on a determination whether the filings in the Superior Court were "frivolous" without an order from a department judge requiring payment in a sum certain. At the hearing before me, as in his brief, the respondent conceded that the law is now undisputed that seeking enforcement of payment for fees and costs allowed must be pursued first before a department judge before any filing in the Superior

Court. See Ellis v. Commissioner of Dept. of Indus. Accidents, 88 Mass App. Ct. 381, 383 n.5 (2015), citing Ellis v. Travelers Indem. Co., 77 Mass App. Ct. 1104 (2010) (unpublished opinion).

Payment of department and trial court sanctions. Although there was no disciplinary count for nonpayment of sanctions, no evidence was introduced on the respondent's current financial condition, and no explicit findings of fact on the question were made, the hearing committee stated that it did not credit the respondent's statement that he was unable to pay those amounts, because his business apparently had significant incoming cash flow, as he was able to pay his administrative employees and contract attorneys, and he had advanced substantial amounts (with the expectation of future reimbursement) to pay clients' upfront costs.

This conclusion apparently underlies the committee's recommendation that the respondent pay the full amount of all of the sanctions, plus interest, over a two-year period as part of its conditions. The board asserted, based on this, that the hearing committee had found that the respondent had the current ability to pay. The hearing committee, and the board, concluded that the respondent likely has not paid the sanctions, at least in part, as a result of his "personal animus towards insurers and self-insurers." The board noted further that the respondent had had a previous opportunity to litigate the issue of the amount of

the sanctions imposed and the amount that he could afford, and declined to do so.

At the hearing before me, bar counsel suggested that the respondent has yet to pay the sanctions imposed on him with reference to these matters; bar counsel appeared to claim that the respondent has no intention of doing so. The respondent contended that he is unable to pay these amounts, and that the cash flow necessary to sustain the business does not generate adequate net income sufficient for him to be able to pay these amounts, but that he does intend to make payment as he is able. Neither party submitted documentation regarding the respondent's ability to pay the amounts of the sanctions imposed, although the respondent's counsel represented that there may be a question of a filing for bankruptcy.

Appropriate sanction. Review of attorney disciplinary proceedings is de novo, but a reviewing court gives substantial deference to the board's recommendations. See Matter of Murray, 455 Mass. 872, 882 (2010). The board's recommendations, however, are not binding, and "[w]hen deciding what sanction is appropriate we look to the discipline imposed in comparable cases." In re Angwafo, 453 Mass. 28, 34, 37 (2009). While the sanction imposed should not be "markedly disparate" from that imposed in similar cases, see Matter of Murray, supra at 882-883, the offending attorney also "must receive the disposition most

appropriate in the circumstances." Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984).

As he did before the board, the respondent challenged before me the decision of the chair of the hearing committee on issue preclusion, affirmed and upheld by the hearing committee and the board. As did the board, I conclude that the chair's decision on bar counsel's motions for issue preclusion was thoughtful and appropriate. See Matter of Brauer, 452 Mass. 56, 67 (2008); Matter of Cohen, 435 Mass. 7, 16-17 (2001). I reject the respondent's claim that the allowance of the motions for issue preclusion deprived him of due process on the ground that he had no prior opportunity to litigate the issue of sanctions. See Matter of Goldstone, 445 Mass. 551, 559 (2005); Matter of Foley, 439 Mass. 324, 336 n.13 (2003). I also reject the respondent's claim that the disciplinary violations were minor and no sanction should be imposed.

The board recommended a six-month suspension, based on what it determined were the aggravating factors of the respondent's lengthy practice and extensive experience in the field of workers' compensation, and the multiple acts of misconduct. The board also noted as an aggravating factor what it deemed the respondent's deliberate refusal to pay the sanctions imposed, and what it termed the respondent's "personal vendetta" against the workers' compensation system. Although it did not cite this as

an aggravating factor, the board also relied on its finding that the respondent made deliberate misrepresentations to a department judge with respect to the appeal in count one (the Kendrick matter) as reason to impose a term of suspension.

Bar counsel contends that the board's recommendation of a six-month suspension is appropriate, particularly considering what bar counsel asserts are the aggravating factors of the respondent's experience in the field of workers' compensation, the prejudice to three of his clients, and the repeated instances of misconduct with regard to the claims for enforcement of orders for payment of fees filed in the Superior Court rather than before the department.

The respondent contends that his claims were filed in the good faith belief that he was owed the fees due and that his filing in the Superior Court to collect the amounts, rather than seeking them in the first instance before the department, was appropriate at the time that he filed the claims, based on particular language within the workers' compensation statute that he argued before the Appeals Court trumped the usual requirement to exhaust all administrative remedies before filing a claim in the Superior Court.

As the board determined, and as bar counsel agrees, the presumptive sanction for filing frivolous litigation ordinarily would be an admonition or a public reprimand. For multiple

counts of such conduct, a stayed suspension has been imposed. See Matter of O'Leary, 25 Mass. Att'y Disc. R. 451 (2009) (stayed suspension of three months for filing of frivolous and unfounded lawsuit, where there was evidence of extended and persistent course of conduct, but where respondent recognized wrongdoing at hearing before the single justice). Here, the board and the hearing committee found that the respondent's numerous (twenty-five) filings were not frivolous within the meaning of Mass. R. Prof. C. 3.1., but, as bar counsel emphasizes, the respondent's repeated misconduct warranted sanctions under G. L. c. 152, § 14 (1), where the respondent should have been aware that he was required to exhaust administrative remedies before filing an action in the Superior Court. On the other hand, like the respondent in O'Leary, and contrary to the board's statement that the respondent has not acknowledged his misconduct, before me the respondent did acknowledge his understanding that such filings now would be inappropriate.

Moreover, the board's conclusion that a six-month imposed suspension is warranted, rather than the stayed suspension, relies in large part on apparently implicit findings that it made as to the respondent's credibility that differ from those of the hearing committee. See Matter of Murray, supra at 880 (credibility determinations of hearing committee will not be rejected unless it can be said with certainty that the finding

was wholly inconsistent with another implicit finding"); Matter of McBride, 449 Mass. 154, 161-162 (2007) (hearing committee "is the sole judge of credibility, and arguments hinging on such determinations generally fall outside the proper scope of our review"). The board stated particularly in its recommendation that an imposed suspension should be ordered because of the respondent's "knowing misrepresentation" to a department judge at an appeals hearing on the Kendrick matter. The hearing committee, however, found explicitly after hearing the respondent's testimony that the misrepresentation was not knowing when made. See In re Balliro, 453 Mass. 75, 84 (2009), quoting Matter of Fordham, 423 Mass. 481, 487 (1996), cert. denied, 519 U.S. 1149 (1997) ("The hearing committee is 'the sole judge of the credibility of the testimony presented at the hearing'"). As to this issue, bar counsel had asserted that the respondent made negligent misrepresentations. The committee found that, when the respondent filed his written closing argument, the order on issue preclusion had not been issued, and neither that nor the hearing report "on which it is based establish that the respondent knew at the time that he was referring to matters not then in evidence." The committee concluded, however, that while "the respondent's failure to take action to correct his error when he had learned of this mistake raised his conduct from mere negligence to knowing misconduct, that does not convert the

respondent's behavior into the type of misconduct rules 3.3(a) and 8.4(c) were intended to reach, especially where 3.4(c) appropriately captures the gravamen of the misconduct here." The committee stated also that, "we do not find that this misconduct constituted a violation of rule 1.1, inasmuch as that misconduct did not arise from lack of learning or competence, but rather from a lack of diligence in confirming that the conference exhibits had been placed in evidence."

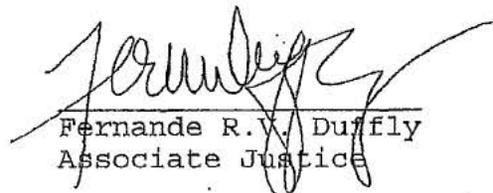
Likewise, the board considered the respondent's "personal vendetta" against the workers' compensation claim to be an aggravating factor, whereas the hearing committee discussed at some length that it concluded the respondent was not acting on a vendetta against the department.

In addition, the board noted as aggravating the respondent's experience and lengthy practice in the area of workers' compensation, notwithstanding that the respondent's following of former practices, in the face of what the hearing committee noted was a vastly changed system, lies at the heart of many of the allegations in this case. Indeed, the hearing committee both referenced the respondent's experience as aggravating, and ordered him to obtain continuing education in modern workers' compensation practice. The respondent has demonstrated that he has acquired learning on current law with respect to certain of his former practices. I conclude that, as the hearing committee

concluded, a requirement of continuing education in this area will serve to protect the public and the bar, while allowing the respondent to continue to serve his disadvantaged clients.

Conclusion. Having considered these facts and the discipline that has been imposed in other cases, I conclude that the appropriate sanction in this case is a six-month suspension, stayed for a period of two years, with conditions.

By the Court,



Fernande R.V. Duffly
Associate Justice

Entered: March 23, 2016