IN RE: GLEN R. VASA

NO. BD-2016-015

S.J.C. Order of Term Suspension entered by Justice Hines on August 19, 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.

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SUPREME JUDICIAL COURT
THE COUNTY OF SUFFOLK

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. BD-2016-015

IN RE: GLEN R. VASA

MEMORANDUM OF DECISION

This matter came before me on an Information and Record of Proceedings filed pursuant to S.J.C. Rule 4:01, § 8 (6), as appearing in 453 Mass. 1310 (2009), recommending discipline against Glen R. Vasa (respondent). For the reasons set forth below, I conclude that the recommendation of the Board of Bar Overseers (board) -- a three-month suspension from the practice of law in the Commonwealth and the completion of a continuing legal education (CLE) course in ethics -- is the appropriate sanction for the conduct established by the substantial evidence in the record.

Background and procedural history. Bar counsel commenced disciplinary proceedings against the respondent, Daniel Hutton, and Jay Lipis before the board on August 22, 2014. The petition charged that the respondent and Hutton impermissibly assisted and allowed Lipis, a suspended attorney, to engage in the practice of law in their firm; that they failed to supervise him or make sure that measures were in place to assure that his

conduct complied with their ethical obligations; and that they allowed him to use a false name and to misrepresent himself as an attorney. Hutton filed an answer through counsel on September 9, 2014. The respondent filed a pro se answer on September 11, 2014, and amended the answer and a statement of mitigation through counsel on December 10, 2014. Bar counsel filed an amended petition March 17, 2015, omitting Lipis.[1] The hearing committee (committee) held hearings on March 19 and March 24, 2015. On May 26 and May 27, 2015, the parties filed their proposed findings and conclusions.

The committee issued a report of its findings and conclusions relating to Hutton and the respondent on July 14, 2015.[2] As to the respondent, the committee found no mitigating

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[1] Jay Lipis resolved the charges against him by stipulation.

[2] The hearing committee (committee) concluded that the conduct of respondent, Glen R. Vasa, violated Mass. R. Prof. C. 5.5 (a), 471 Mass. 1415 (2015) (lawyer shall not engage in or assist unauthorized practice of law); S.J.C. Rule 4:01, § 17 (7), as amended, 426 Mass. 1301 (1997) (lawyer or firm shall not knowingly employ or otherwise engage, directly or indirectly, in any capacity, a person who is suspended); Mass. R. Prof. C. 5.3 (a), 471 Mass. 1447 (2015) (partner shall make reasonable efforts to ensure that firm has in place measures to assure that nonlawyer's conduct is compatible with lawyer's obligations under rules); Mass. R. Prof. C. 5.3 (b), 471 Mass. 1447 (2015) (lawyer with supervisory authority over nonlawyer shall make reasonable efforts to assure that nonlawyer's conduct is compatible with lawyer's obligations under rules); Mass. R. Prof. C. 5.3 (c), 471 Mass. 1447 (2015) (if lawyer knows of or ratifies conduct of nonlawyer that would violate rules if engaged in by lawyer, lawyer responsible for such conduct); Mass. R. Prof. C. 8.4 (a), 471 Mass. 1483 (2015) (knowingly

factors, and found respondent's evasiveness, lack of contrition, and lack of insight as aggravating factors. Rejecting the six-month suspension sought by bar counsel against the respondent and Hutton, the hearing committee recommended a three-month suspension for the respondent and a public reprimand for Hutton, with each required to complete a CLE course in ethics. The respondent appealed the committee's findings and sanctions to the board on August 12, 2015, and bar counsel cross-appealed on September 16, 2015. The board held a hearing on November 9, 2015. On December 14, 2015, the board adopted the committee's findings of fact, conclusions of law, and voted unanimously to file an Information with this Court recommending the sanction decided by the committee.

The respondent was admitted to the bar of the Commonwealth on December 12, 2003. The respondent and Hutton both worked for several years at the Law Office of Jay Lipis, a personal injury firm. In 2006, Lipis sold the law practice and goodwill to Hutton and the respondent for one million dollars, payable in bi-weekly installments of $5000.[3] Lipis rejected other offers in favor of the respondent's and Hutton's offer because of their

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assist another to violate rules); and Mass. R. Prof. C. 8.4 (c), 471 Mass. 1483 (2015) (conduct involving dishonesty, fraud, deceit, or misrepresentation).

[3] The bi-weekly installments increased after two years to $6000.

agreement to run the firm as he had. After the sale, Hutton and the respondent became equal owners of the firm, and they changed its name to Vasa & Hutton, P.C. For the period relevant to this matter, William Serwetman was the only other attorney at the firm.

On October 10, 2008, Lipis's license to practice law in the Commonwealth was suspended for two years. On September 17, 2012, his petition for reinstatement was denied by this Court. Both the respondent and Hutton knew that Lipis's reinstatement bid was not successful.

In 2012, Hutton and the respondent were obligated to pay Lipis $14,100 per month, much more than the firm could afford. The respondent had Serwetman draft a letter to Lipis, resulting in a modification of the agreement that reduced the monthly payments. In June or early July, 2012, before the modification was signed, Lipis raised with Hutton the possibility of working for the firm on a volunteer basis.[4] Lipis's therapist had recently suggested that he should try to get some structure in his life as Lipis felt depressed and lonely at the time. Hutton concluded that a suspended attorney could possibly work as a volunteer, relying on Matter of Rome, 10 Mass. Att'y Disc. R. 229 (1994). He brought up the possibility in a meeting with the

[4] Beginning in 2010, Daniel Hutton had moved in with Lipis to Lipis's home.

respondent and the firm's tax lawyer, Jeff Cohen. Cohen advised against the plan, identifying two problems: Lipis might want to reclaim his status as the boss; and Lipis's presence would create the appearance of impropriety given his suspended license. Hutton stated at the meeting that the firm needed to get clearance from the board regarding volunteer work before bringing back Lipis.

On the day the modification agreement was signed, the respondent told Serwetman about the possibility of Lipis acting as a consultant to help settle some of the firm's cases. The respondent told Serwetman that Lipis's proficiency at settling cases, and at a good value, would benefit the firm. Serwetman and the respondent discussed whether the arrangement was permissible under the terms of Lipis's suspension. Serwetman contacted an attorney and, in his next conversation with the respondent, relayed that the attorney had read a recent decision of this Court stating that a suspended or disbarred attorney could not act as a mediator.[5] Serwetman told the respondent that he believed bringing Lipis back might be inappropriate.

The following Monday, July 23, 2012, the respondent sent an electronic mail (e-mail) to Lipis asking when a good start date would be, suggesting Wednesday. This communication was not sent

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[5] The recent case that William Serwetman had discussed is Matter of Bott, 462 Mass. 430 (2012), but Serwetman was not aware of the name of the case at the time.

to Hutton. Lipis replied that Wednesday was fine, but that Hutton wanted the board to approve of the arrangement before Lipis's work began. The respondent replied:

> "I was going to go by what you said the [board] represented to Paul [Epstein].[6] If he already cleared it with them to work in the office, so long as no misrepresentations are made to clients, I'm good with that. If there is a question as to whether it was really cleared with the [board], then let me know and we'll have to look into it. Otherwise, if your attorney already received permission from the [board] to go ahead with this type of work arrangement, that should be good enough for us."

The next day, Lipis e-mailed back that he wanted to obtain written permission from Linda Bauer, assistant bar counsel, before commencing work with the firm. The respondent approved of Lipis's plan, but the discussions apparently ceased.

On August 1, 2012, before Lipis began working on a volunteer basis for the firm, Hutton went to Germany to care for his sick father. The respondent told Lipis that if he was going to start, "now's the time." The respondent contests the finding that the respondent intentionally had Lipis start working while Hutton was gone and without Hutton's knowledge. The board, in adopting the hearing committee's findings, discredited Lipis's testimony that before he began work, he had spoken to Epstein, who said he had contacted assistant bar counsel for advice. Instead, the board credited Bauer's testimony that she received

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[6] Attorney Paul Epstein represented Lipis at his disciplinary and reinstatement hearings.

a call from Epstein on September 5, 2012, after Lipis had begun work. It found that the respondent never called the board -- and, moreover -- it stated that the respondent failed to obtain permission from this Court as required under S.J.C. Rule 4:01, § 17 (7), as amended, 426 Mass. 1301 (1997).

When Hutton returned from Europe on August 10, Lipis met Hutton at the door of their home and told him he was working at the firm. Hutton asked the respondent whether he had obtained board clearance for Lipis's work, and the respondent stated that he had.[7]

From August to October, 2012, Lipis worked for the firm as an unpaid "settlement consultant," and brought in approximately $117,000 in fees. He worked in the firm's conference room, across the hall from Hutton and the respondent. He reviewed files, valued cases, determined demand accounts, and negotiated settlements with insurance adjusters. Lipis used the system he had in place when he ran the firm. He was neither trained nor supervised by any lawyers in the firm. During this period, Lipis falsely identified himself to insurance adjusters as "Jeffrey Kreiger." Lipis used this alias because he worried that some adjusters may not want to deal with a suspended

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[7] Hutton relied on Lipis's word, and the committee found Hutton's reliance to be reasonable. Accordingly, the committee disciplined Hutton less seriously, a discipline which the respondent argues is disproportionate to his own.

attorney and also may think "ill" of him. The respondent became aware of Lipis's use of the false name towards the beginning of Lipis's work at the firm, but did and said nothing about it.

On August 17, 2012, the attorney that Serwetman had contacted sent him the name of the case discussing whether a suspended attorney could act as a mediator, Matter of Bott, 462 Mass. 430 (2012).[8] The next day, Serwetman explained the case to the respondent, who assured Serwetman that their situation would be treated differently because Lipis was unpaid.

Lipis's return was a financial boon and, in mid-October, the respondent offered to pay him $1000 per week to continue as settlement consultant. He instructed Lipis not to tell Hutton about the salary. The respondent also asked Lipis to do a so-called "voice shot," where his voice would be recorded saying he was Jay Lipis and was back at the firm. After learning about the salary offer, Hutton called Bauer and asked if the firm

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[8] In Matter of Bott, 462 Mass. at 439, the Supreme Judicial Court provided guidance to determine when a suspended attorney could serve as a mediator. Generally, the rules ban a suspended or disbarred attorney from the "practice of law." To determine what constitutes the practice of law in the context of bar disciplinary matters, the courts consider: (1) whether the type of work is customarily performed by lawyers in their legal practice; (2) whether the lawyer performed that work prior to suspension for misconduct; (3) whether, following suspension for misconduct, the lawyer has performed or seeks leave to perform the work in the same office or community; and (4) whether the work invokes the lawyer's professional judgment in applying legal principles to address the individual needs of clients. Id. at 438.

could hire Lipis in a nonlegal capacity to negotiate with insurance adjusters on bodily injury claims. Bauer informed Hutton that this was prohibited, referred him to S.J.C. Rule 4:01, § 17 (7), and confirmed her advice in a letter. Hutton fired Lipis after his conversation with Bauer.

Discussion. The respondent appeals several of the committee's factual findings affirmed by the board. "Although not binding . . . , the findings and recommendations of the board are entitled to great weight." 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." Matter of Saab, 406 Mass. 315, 328 (1989), quoting S.J.C. Rule 4:01, § 8 (3), as appearing in 381 Mass. 784 (1980). Subsidiary facts found by the board "shall be upheld if supported by substantial evidence." S.J.C. Rule 4:01, § 8 (6). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." Matter of Brauer, 452 Mass. 56, 66 (2008) quoting G. L. c. 30A, § 1 (6).

First, the respondent claims that the board erred in finding that he misled Hutton into believing that Lipis had board approval. The committee's findings, as adopted by the board, were based on substantial evidence, including but not limited to, the respondent's failure to include Hutton when he

e-mailed Lipis about starting work, starting Lipis's work at the firm while Hutton was out of the country, and his two proposals behind Hutton's back -- the "voice shot" and weekly salary. The respondent counters that Lipis misled him and that he genuinely believed that Lipis had board approval to commence "volunteer" work at the firm. According to the respondent, he did not mislead Hutton because he lacked knowledge that Lipis did not have approval. The findings in this instance came down to a credibility determination, and the respondent's version of events was deemed not credible. As found by the board, the respondent cannot claim he had a reasonable belief in Lipis's approval without written documentation where Lipis had indicated his intent to obtain the required written permission from the board. The board's finding that the respondent misled Hutton is supported by substantial evidence.

The respondent next challenges the finding that he deliberately asked Lipis to start working at the firm when Hutton was abroad, without his knowledge or approval, and was the "mover behind the arrangement." This finding also is based on the substantial evidence: that the respondent left Hutton out of the e-mail communication to get Lipis in the office and begin work, and only made this communication once Hutton left the country. The respondent points to the preliminary discussions to use Lipis's services as evidence that he did not

deliberately wait for Hutton to leave the country to begin the arrangement and that he was not the "mover behind the arrangement." However, the board adopted the committee's finding that the respondent told Lipis that if he was going to start, "now's the time," when Hutton left the country. In fact, Lipis did begin his work later that week. There is more than substantial evidence for the challenged findings.

The respondent also contends that he believed the arrangement with Lipis did not violate any rules because Lipis was not performing legal or paralegal work. However, S.J.C. Rule 4:01, § 17 (7), states that no lawyer shall knowingly employ or otherwise engage a suspended attorney in any capacity.[9] The "knowing" element requires proof that the respondent knew he was hiring or otherwise engaging a suspended attorney. Private Reprimand No. 91-27, 7 Mass. Att'y Disc. R. 366 (1991) (finding lawyer violated § 17 (7) "regardless of intent" where he hired lawyer he knew was disbarred to run errands, conduct investigations, and do legal research). The board properly rejected this argument.

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[9] "Except as provided in [S.J.C. Rule 4:01] section 18(3) of this rule, no lawyer who is disbarred or suspended, or who has resigned or been placed on disability inactive status under the provisions of this rule shall engage in legal or paralegal work, and no lawyer or law firm shall knowingly employ or otherwise engage, directly or indirectly, in any capacity, a person who is suspended or disbarred by any court or has resigned due to allegations of misconduct or who has been placed on disability inactive status." S.J.C Rule 4:01, § 17 (7).

The respondent argues that the board may not draw adverse inferences based on his failure to testify and asserted lack of culpability. "There is no doubt that a lawyer may not be sanctioned as a penalty for asserting the privilege against self-incrimination." Matter of Kenney, 399 Mass. 431, 434 (1987), citing Spevack v. Klein, 385 U.S. 511, 514 (1967) (plurality opinion). A lawyer's failure to acknowledge the nature, effects, and implication of his misconduct, however, may be considered when determining sanctions. See Matter of Cobb, 445 Mass. 452, 480 (2005). See also Matter of Clooney, 403 Mass. 654, 657-658 (1988).

Here, bar counsel more than sufficiently made the case that the respondent knowingly engaged the services of Lipis -- a lawyer he knew to be suspended from the practice of law -- as a settlement consultant for the firm without reliance on the respondent's failure to testify before the hearing committee. The failure to testify, however, was not irrelevant. In determining proper discipline, the board was entitled to consider his failure to testify, in conjunction with his self-serving deposition where he deflected all culpability in the matter. These were very relevant factors in determining the proper discipline because they reflected the respondent's failure to acknowledge the nature of his conduct and take responsibility.

Appropriate sanction. The respondent contends that the three-month suspension unfairly punishes him more harshly than Hutton, and that it is a markedly disparate sanction from similar disciplinary matters. The recommendations of the board are entitled to substantial deference. Matter of Foley, 439 Mass. 324, 333 (2003). Review of the board's recommendation is guided by our rule that disciplinary action against an attorney should not be "markedly disparate from those ordinarily entered by the various single justices in similar cases." Matter of Alter, 389 Mass. 153, 156 (1983).

As to the sanction, the respondent's first argument rests on his disagreement with the facts as found by the board. As discussed, supra at 6-9, there was no error in the finding that the respondent alone initiated Lipis's return to the firm, or that he deliberately started Lipis on the job while Hutton was out of the country, or that he told Lipis not to tell Hutton when he offered to pay him a salary. Likewise, the board rightly concluded that Hutton -- though responsible for violating the rules in his own right -- redeemed his conduct to a degree by eventually calling bar counsel and firing Lipis. Accordingly, I find no error in the board's recommended sanction against the respondent when compared to Hutton's sanction.

Moreover, the respondent's three-month suspension is not markedly disparate from that ordinarily entered by the single

justice in similar matters. Despite the respondent's contentions, Private Reprimand No. 90-2, 6 Mass. Att'y Disc. R. 391 (1990), does not present similar circumstances. There, the attorney's conduct involved a nonattorney employee's negotiating and initiating of a suit in one matter, and "did not feature the length and breadth of the arrangement at issue here, the lawyer's repeated refusal to address the legality of the situation, or [this respondent's] behavior in trying to fool and undermine his partner" as found by the board in this case.

Moreover, I agree with the board that Matter of O'Neill, SJC No. BD-2014-059 (June 19, 2014), is an appropriate analog for the sanction recommended here. There, the attorney received a three-month suspension for assisting in the unauthorized practice of law and failing to supervise where his paralegal held herself out as an attorney in her fee agreements and performed bankruptcy filings without any supervision for a period of nine months. Here, the respondent similarly allowed Lipis to hold himself out as an attorney while performing the legal work of negotiating settlements on several cases that amounted to $117,000 in legal fees.

Conclusion. For the foregoing reasons, I conclude that the sanction recommended by the board is not markedly disparate from penalties in similar cases. An order shall enter imposing a three-month suspension from the practice of law and requiring