

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
NO: BD-2020-020

IN RE: Kenneth M. Levine

ORDER OF IMMEDIATE TEMPORARY SUSPENSION

This matter came before the Court, Cypher, J., on a Petition for Temporary Suspension pursuant to SJC Rule 4:01, § 12A filed by the Office of Bar Counsel on February 7, 2020. and the Affidavit of Resignation submitted by Kenneth M. Levin with the recommendation and vote of the Board of Bar Overseers (Board) recommending that the affidavit of resignation be rejected for the reasons set forth in the memorandum filed by Bar Counsel as to the insufficiency of the lawyer's admission to the alleged misconduct and the affidavit is not in compliance with S.J.C. Rule 4:01, §15. After a telephone hearing was held on October 26, 2020, and in accordance with the Memorandum of Decision dated November 19, 2020;

It is ORDERED that:

1. Kenneth M. Levine is temporarily suspended from the practice of law in the Commonwealth pending further order of the

Court effective immediately upon the entry of this Order.

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 temporary 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 temporary 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 temporarily suspended; that he is disqualified from acting as a lawyer after the effective date of the temporary 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 temporarily suspended and, as a consequence, is disqualified from acting as a lawyer after the effective date of the temporary 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.

5. The matter is remanded to the Board for further proceedings as deemed appropriate.

By the Court, (Cypher, J.)

/s/ Maura S. Doyle

Maura S. Doyle, Clerk

Entered: November 19, 2020

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
NO: BD-2020-020

IN RE: KENNETH M. LEVINE.

MEMORANDUM OF DECISION

This matter comes before me on bar counsel's petition for temporary suspension of the respondent attorney, Kenneth M. Levine, from the practice of law; the respondent's affidavit of resignation, as supplemented; the vote and recommendation of the Board of Bar Overseers (board) that the affidavit be rejected on the ground that it fails to comply with S.J.C. Rule 4:01, § 15; bar counsel's objection to acceptance of the respondent's affidavit, and his supplemental memorandum; the respondent's replies to bar counsel's objection and supplemental memorandum; and other materials on file. After a hearing, I adopt the board's recommendation, reject the affidavit of resignation, and remand the matter to the board. The petition for temporary suspension is allowed.

Background. The respondent was admitted to the bar of the Commonwealth on December 18, 1981. On March 1, 2018, bar counsel received a letter from the United States Department of Justice, Office of Professional Responsibility (DOJ), referring for her attention allegations that the respondent had forged the signature of an Assistant United States Attorney on documents related to the settlement of a Federal tort case (the Pires matter). In addition, the letter stated that the United States Attorney's Office had "concerns regarding the disbursement of

the settlement funds" with respect to the Pires matter. After receiving the letter, bar counsel opened an investigation.

During the course of that investigation, the respondent produced to bar counsel, inter alia, an itemization of his expenses in the Pires matter, representing that the expenses totaled \$49,584.52; a number of cancelled checks that the respondent claimed were for expense payments in that same matter; and invoices and cover letters purporting to support the claimed expenses. On February 7, 2020, bar counsel filed a petition seeking the temporary suspension of the respondent from the practice of law during the pendency of the disciplinary proceedings. The petition summarized bar counsel's investigation, the scope of which had expanded after receipt of the DOJ letter, as follows:

"[t]he respondent forged the signature of an Assistant United States Attorney on three separate documents including two releases and one annuity application, intentionally misused client funds, made false statements to a [F]ederal court, and submitted fabricated documents and made false statements to bar counsel to conceal his misconduct."

With respect to client funds, bar counsel alleged that the respondent intentionally misused at least \$16,175 from the settlement of the Pires matter by intentionally inflating his expenses; that the misuse was both intentional and with the intent to deprive the client of the funds, and the client actually was deprived of those funds. Bar counsel alleged that the respondent's conduct, as the petition described more fully, violated Mass. R. Prof. C. 1.15 (b) and (c) ("Safekeeping Property"); 3.3 ("Candor Toward the Tribunal"); 8.1 (a) and (b) ("Bar Admission and Disciplinary Matters"), and 8.4 (c), (d) and (h) ("Misconduct").

On March 4, 2020, the respondent delivered an affidavit of resignation, including two attachments, to the board. See S.J.C. Rule 4:01, § 15 ("Resignations by Lawyers Under Disciplinary Investigation"). Bar counsel objected to the affidavit, arguing that it did not comply with the requirements of S.J.C Rule 4:01, § 15. In particular, bar counsel argued that, although

the petition for temporary suspension put the respondent on notice of specific and serious allegations of misconduct, including intentional misconduct, the affidavit did not reference the allegations of intentional misconduct, failed adequately to describe the allegations that were the subject of bar counsel's investigation, failed to acknowledge that bar counsel could prove the underlying factual predicates by a preponderance of the evidence, and blamed other people for his wrongdoing. The board made a preliminary determination to reject the affidavit "for the reasons set forth in the memorandum filed by Bar Counsel as to the insufficiency of the respondent's admission to the alleged misconduct; the affidavit is not in compliance with S.J.C. Rule 4:01, Sec. 15." In response, the respondent filed a supplemental affidavit, which incorporated the attachments to the original affidavit. After considering the record, on June 8, 2020, the board voted to recommend that the:

"affidavit of resignation be rejected for failure to comply with [S.J.C. Rule 4:01, § 15], specifically, the failure to admit [b]ar [c]ounsel's ability to prove by a preponderance of the evidence the material allegations concerning wrongdoing by him, primarily those concerning the mens rea required for finding rules violations that the respondent purports not to contest."

The affidavits of resignation, together with the board's vote and recommendation that the affidavits be rejected, and other materials, were filed in the county court.

Discussion. Pursuant to S.J.C. Rule 4:01, § 15, a lawyer who is under disciplinary investigation may seek to resign from the bar by submitting an affidavit stating, among other things, that:

(b) the lawyer is aware that there is currently pending an investigation into allegations that he or she has been guilty of misconduct, the nature of which shall be specifically set forth; and

(c) the lawyer acknowledges that the material facts, or specified material portions of them, upon which the complaint is predicated are true or can be proved by a preponderance of the evidence.

The respondent's original and supplemental affidavits suffer from the same flaw: they fail to "specifically set forth" the true nature of the allegations that are the subject of bar counsel's investigation. See Matter of Murawski, Jr., 28 Mass. Att'y Discipline Rep. 636 (2012). In particular, by omitting reference to allegations of intentional misconduct that -- if established -- might warrant disbarment, the respondent's affidavits do not fully and accurately describe the investigation. They also fail to acknowledge that the factual underpinning for bar counsel's allegations can, in material part, be proved. See Matter of Rosenthal, 8 Mass. Att'y Discipline Rep. 205 (1992).

"[T]he purpose of the resignation provision is to permit respondent attorneys who wish to exit the profession with dignity to do so forthwith, while saving Bar Counsel, the Board and the court the time and expense of lengthy disciplinary proceedings." Matter of Oates, 5 Mass. Att'y Discipline Rep. 274, 277 (1986). However, just as a respondent may not "put Bar Counsel to its proof, while retaining the option to resign if sufficient evidence to warrant disbarment is adduced," id., a respondent cannot claim the benefit of the rule without acknowledging with specificity the misconduct bar counsel can prove. Put another way, a respondent must set forth in the affidavit of resignation an accurate description of the nature of bar counsel's investigation, i.e., including allegations and predicate facts that may be serious enough to warrant disbarment. See, e.g., Matter of Schoepfer, 426 Mass. 183, 186 (1997) ("disbarment or indefinite suspension is the presumptive sanction if a lawyer has intentionally deprived a client of funds").

In this case, although the respondent has acknowledged some of the allegations being investigated, primarily with respect to negligent misconduct, his failure to acknowledge complaints of intentional misconduct -- indeed, expressly stating that he does "not acknowledge intentional, knowing misconduct" -- presents an inaccurate picture of the nature of the

investigation. While the rule does not require a respondent to admit to the truth of the allegations of misconduct; it does require that a respondent acknowledge that bar counsel could prove the allegations by a preponderance of the evidence. See Matter of Dahl, 429 Mass. 1009, 1010 (1999) (declaration that respondent did not "admit to factual guilt in signing affidavit" superfluous where affidavit of resignation provided "that the facts as alleged by bar counsel could be proved by a preponderance of the evidence at a hearing").

With respect to the petition for temporary suspension, after a hearing, I conclude that it must be allowed. See S.J.C. Rule 4:01, § 12A. The allegations of misconduct are serious: involving alleged forgery on three documents, intentional misuse of client funds, false statements to a Federal court, and submission of fabricated documents and false statements to bar counsel. The respondent has admitted to some of the allegations. Although the respondent represents that he holds no client funds and has closed his IOLTA account, that he has taken no new cases in 2020, and has withdrawn from all but one client matter, to protect the public from any further misconduct during the pendency of the disciplinary proceedings, the respondent must be temporarily suspended from the practice of law.

Conclusion. I adopt the recommendation of the board, and reject the affidavit of resignation. The matter is remanded to the board for further proceedings. Bar counsel's petition for temporary suspension is allowed.

So ordered.

/s/ Elspeth Cypher  
Elspeth Cypher  
Associate Justice

Dated: November 19, 2020