IN RE: MATTER DAVID WAYNE PARKER
BBO No. 681017

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL, **Petitioner,** **vs.** **DAVID W. PARKER, ESQ.,** **Respondent.**	**BBO File No. C6-19-259297**

MEMORANDUM OF BOARD DECISION

A hearing committee has recommended a suspension of the respondent's law license for six months, with the sanction stayed for two years conditioned on the respondent's compliance with certain requirements. Neither party appealed from the committee's report. On our review, we issued a preliminary decision to reject the recommendation in favor of a six-month suspension, with no stay. B.B.O. Rules, § 3.52. Pursuant to the rule, the parties have briefed the question of sanction. The respondent argues for the sanction recommended by the hearing committee. Bar counsel urges us to reject a stay and recommend an immediate suspension. For the reasons that follow, we reject the recommendation of the hearing committee; instead, we recommend that the Supreme Judicial Court suspend the respondent's law license for six months, with no stay. Two of our members dissent from the recommendation, preferring a six-month suspension stayed for two years.

In connection with our review under Sections 3.52 and 3.53, the respondent moved to reopen the record to allow him to present additional evidence to the hearing committee relative

to the sanction. Because we find that the respondent has failed to demonstrate the need for additional evidence, we deny the motion to reopen the record.

Factual and Procedural Background

On June 30, 2021, bar counsel filed a one-count Petition for Discipline against the respondent, David Parker. Following an evidentiary hearing, the hearing committee issued a report on March 8, 2022. The committee found that the respondent, while representing a minor child in a care and protection proceeding, engaged in conduct that was a contributing factor to a report (a so-called 51A report) filed against the child's father, which in turn led to the father losing custody. The committee concluded that the respondent's conduct violated Rules 1.3 (act with reasonable diligence); 8.4(b) (commit a criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness to practice law); 8.4(d) (engage in conduct prejudicial to administration of justice); and 8.4(h) (conduct that reflects adversely on fitness to practice law) of the Massachusetts Rules of Professional Conduct.

The relevant facts, which we adopt from the hearing report, are as follows: The respondent has been admitted to practice in 2011 and has an office in Springfield. On February 5, 2019, he was appointed to represent a minor child in a care and protection action in Holyoke Juvenile Court. On February 7, 2019, the court ordered temporary custody to the child's biological father. The court set conditions: that the father refrain from use of illegal substances and ensure a sober caretaker for the child at all times. The respondent received the order as well as other documents indicating the father had a history of alcohol use, which was a concern to the Department of Families and Children (DCF). Despite the information, the respondent did no further investigation into the father, which the hearing committee found was a failure of diligence in his role as attorney for the child. The father was represented by his own lawyer.

Although the father had separate counsel, he and the respondent communicated. On March 8, 2019, the two discussed a party the father wanted to throw for the child. The respondent offered to pay for the party. On March 9, 2019, the father picked up the respondent and drove him to an ATM where the respondent withdrew money, which he gave to the father. In the car were two minor children, the sister of the respondent's client as well as her friend.

During the car ride, the father offered the respondent a beer, which he accepted and which at the time (but not currently) violated Mass. G. L. c. 90, § 241 (the open container law). According to his own testimony, the respondent had been drinking heavily for several weeks and hoped that the beer would help him feel better. They then drove to a liquor store at the respondent's suggestion.[1] The respondent purchased a fifth of cognac for himself and one-ounce containers of whiskey for the father. He did so despite his knowledge that the Juvenile Court had concerns about the father's alcohol use and had ordered him to abstain. Also, the respondent bought alcohol when he knew there were minor children in the back seat of the father's car.

After dropping the respondent at his home, the father went to a hockey game. After becoming visibly intoxicated, he was unable to drive home. Authorities had to escort the father from the arena.

Based on the events at the hockey game, a report under Mass. G.L. c. 119, § 51A was filed against the father with DCF. The 51A report mentioned and implicated the respondent as a contributing factor to the father's behavior. After an emergency hearing, the minor child was

[1] The hearing committee rejected as not credible the respondent's testimony that it was the father's idea to buy alcohol. We will not disturb the committee's finding as to credibility. B.B.O. Rules, § 3.53. There is no dispute that the respondent was, at the very least, an alacritous traveling companion and did nothing to prevent the purchase or consumption of alcohol by the father. The respondent's vigorous argument that the idea to go to the liquor store did not originate with him ignores the fact that he should not have been in the car in the first place, and he apparently did nothing to dissuade the father.

removed from the father's custody and placed in the custody of DCF. The Juvenile Court judge ordered the respondent to withdraw from representing the child. The hearing committee found, based on substantial evidence, that the respondent's conduct was a contributing factor to the father's loss of temporary custody and that in providing alcohol to the father, the respondent acted contrary to the interests of his client, the minor child.

The hearing committee heard testimony about the respondent's challenges with alcohol. He testified that, since the order to withdraw from representing the child, he has attended meetings of Alcoholics Anonymous four or five times weekly and has been in contact with Lawyers Concerned for Lawyers (LCL), where he attends monthly meetings, and the Law Office Management Assistance Program (LOMAP). On May 20, 2019, the respondent signed a two-year monitoring agreement with LCL and the Child and Family Law Division of the Committee for Public Counsel Services. The respondent testified, and the hearing committee found, that he has not stayed sober for the entire period of the agreement, in his words, "there have been a few times I've fallen down."

The hearing committee concluded that the respondent violated Mass. R. Prof. C. 1.3, 8.4(b), 8.4(d), and 8.4(h).

In mitigation, the hearing committee considered whether the respondent had satisfied his burden to prove that alcohol use had contributed to the misconduct and that he had remained sober. Matter of Levy, 32 Mass. Att'y Disc. R. 334, (2016). Concluding that he had not carried the burden, the committee noted that the respondent was able to carry on an active law practice at the time (including approximately 30 other DCF cases and collection cases). The committee took note of the respondent's admission that he had "fallen down a few times" since March 2019.

The committee considered a few factors in aggravation, including the vulnerability of the client. The committee further concluded that the respondent had engaged in uncharged misconduct, namely his lack of competence in failing to determine whether the father's continued custody would be in his client's best interests (Mass. R. Prof. C. 1.1).

Recommending a suspension of six months stayed for two years, the hearing committee noted that the respondent had not resolved his issues with alcohol use. It reasoned that a suspension stayed with conditions would encourage the respondent to maintain sobriety.

Conclusions of Law

We agree with and adopt the hearing committee's legal conclusions. For the reasons set forth above, the respondent violated Rules 1.3, 8.4(b), 8.4(d), and 8.4(h). We also agree with the conclusion that the vulnerability of the client should be considered as an aggravating factor.

We disagree with the committee's decision to use uncharged misconduct as an aggravating factor, specifically the respondent's incompetence in failing to investigate the father's substance use. (Hearing Committee Report, ¶ 42). Bar counsel had charged the respondent with lack of diligence (Mass. R. Prof. C. 1.3) by acting contrary to his client's interest in living with his parent. The committee concluded that bar counsel proved the violation. While bar counsel could have charged the respondent with violating Mass. R. Prof. C. 1.1 (competence) by failing to investigate his client's living situation and the father's fitness as a parent, bar counsel did not do so. Without notice that these alleged failures would be an issue in the case, the respondent did not present a defense to the allegations. Yet, the hearing committee accepted at face value the charge of incompetence and considered it as an aggravating factor. Doing so deprived the respondent of notice and an opportunity to defend against them.

We agree with the hearing committee's conclusion that the respondent's alcohol use is not mitigating. Our cases place the burden of proof on a respondent to demonstrate (1) that a condition such as alcohol use disorder was a contributing factor to the misconduct and (2) that he has taken steps to maintain sobriety. Matter of Corbett, 478 Mass. 1004, 33 Mass. Att'y Disc. R. 99 (2017); Matter of Levy, 32 Mass. Att'y Disc. R. 334 (2016); Matter of Johnson, 444 Mass. 1002, 21 Mass. Att'y Disc. R. 355 (2005); Matter of Barrat, 20 Mass. Att'y Disc. R. 31, 34-35 (2004).[2] Here, the committee concluded that there was no causal connection between the respondent's misconduct – admittedly the result of a lack of judgment – with his alcohol use disorder. It also noted the respondent's own testimony that he had "fallen down a few times" in his efforts to maintain sobriety. We have been provided with no evidence to question those conclusions.

As the hearing committee noted, the respondent's misconduct was unrelated to his alcohol use issues. As an initial matter, he apparently did no work on the case. He had no information about the underlying family situation and whether the father was an appropriate custodial parent. He had some sort of relationship with the father of his minor client, in a case where the dispute centered on custody. He had frequent contact with the father, even though the father was represented by a lawyer. He allowed a person known to have issues with alcohol to give him a beer and drive a car with two children in the backseat. He bought whiskey for this person. His recklessness led to the father becoming belligerent to such an extent that he had to

[2] In his motion to reopen, the respondent argues that he has successfully addressed his alcohol use issues. He disputes the hearing committee's finding that his sobriety has not been consistent. The argument is immaterial for purposes of mitigation. As discussed above, we adopt the hearing committee's conclusion that the respondent failed to prove that his alcohol use was a contributing factor to the misconduct. Having failed to satisfy that requirement, the question of his recovery is irrelevant to the issue of mitigation.

be removed from a hockey arena. The chain of events unsurprisingly ended in the respondent's client being removed from the father's home.[3] None of this resulted from alcohol use.

Sanction Recommendation

The purpose of bar discipline is to protect the public and maintain confidence in the integrity of the bar and the fairness and impartiality of the legal system. Matter of Curry, 450 Mass. 503, 520-521 (2008). Our cases aspire to achieve consistency in the sanctions imposed on attorneys who are found to have engaged in the same or similar conduct. Matter of Alter, 389 Mass. 153, 3 Mass. Att'y Disc. R. 3, 6-7 (1983). Each case must be decided on its own merits and "every offending attorney must receive the disposition most appropriate in the circumstances." Matter of Murray, 455 Mass. 872, 883, 26 Mass. Att'y Disc. R. 406, 418 (2010).

This case involves considerable wrongdoing with considerable consequences. In cases involving neglect causing serious harm or potentially serious harm (as here), the typical sanction is a term suspension. Matter of Kane, 13 Mass. Att'y Disc. R. 321, 327-328 (1997). Conduct prejudicial to the administration of justice may result in a license suspension of between twelve and eighteen months. Matter of Nadeau, 34 Mass. Att'y Disc. R. 405 (2018).

Matter of Sargent, 30 Mass. Att'y Disc. R. 355 (2014), is not to the contrary. In that case, the respondent's incompetence and lack of diligence caused his client to lose custody of her

[3] For this reason, we have denied the respondent's motion to reopen the hearing. He asks to present evidence such as family stress, binge-drinking, poor judgment and professional functioning, his compliance with the 2019 monitoring agreement, and his continued efforts to maintain sobriety. The facts he seeks to present to the committee would be immaterial to the disposition of the case. The hearing committee found (findings which we adopt) that the respondent's alcohol use and poor judgment were unrelated to his behavior. None of the proffered evidence would change the finding. Even if the facts were relevant, there is no reason the facts could not have been offered when the hearing took place. None of the proffered evidence is newly discovered.

children. We recommended a license suspension of three months, stayed for six months. The case mostly focused on the lawyer's neglect. By contrast, the facts in this matter are more egregious, involving reckless behavior. The lack of judgment is astounding.

For the reasons we agree with the committee on mitigation, we disagree with the committee's recommendation of a stayed suspension. The two recommendations are inconsistent.

The hearing committee concluded that the respondent's alcohol use was not a cause of the misconduct. Since the condition was not causally related, there is neither a basis nor a reason to stay the suspension. Ordinarily, staying all or part of a suspension on the condition that the respondent seek treatment for some disorder is appropriate where the disorder casually contributed to the misconduct. *See, e.g.*, Matter of Sharif, 459 Mass. 558, 562, 571 (2011); Matter of O'Neill, 30 Mass. Att'y Disc. R. 289 (2014), *citing* Matter Bizinkauskas, 30 Mass. Att'y Disc. R. 27 (2014). In such cases, the condition appropriately incentivizes the attorney to treat the underlying disorder and, so, to avoid repeating the same or similar misconduct in the future. But, in a case such as this one - where there is an express finding that the disorder did not cause the misconduct - the rationale for imposing the condition disappears. Because we accept the finding that the respondent's alcohol use disorder did not cause any of the misconduct, the respondent should not have to seek alcohol treatment any more than he should be required to take an IOLTA record-keeping course or to submit to a mentoring agreement. *See* Matter of O'Neill, *supra*, ("[W]e believe stayed suspensions are not appropriate where such incentives and deterrents are not needed, as is the case here."). In short, if alcohol abuse had nothing to do with causing the misconduct, then it should have nothing to do with our discipline.

In addition, the hearing committee reasoned that, even if alcohol were the cause of the misconduct, the respondent had presented insufficient evidence to support the second requirement for a mitigation defense: significant steps toward treatment. We will not disturb the committee's finding that the respondent has not successfully pursued recovery. Given our conclusion that alcohol use was not a contributing factor to the misconduct, we need not reach this issue.

Stayed suspensions are the exception, not the rule. We recommend them in few cases. When we do, we intend to incentivize a lawyer to maintain appropriate conduct such as treatment for substance use issues. And we do not recommend stays as a means to reduce the overall sanction. The questions are distinct: (1) what is the appropriate sanction for the misconduct and (2) would a stayed suspension (or some other condition) further our objective to protect the public?

Accordingly, we recommend a six-month suspension without a stay. An Information shall be filed with the County Court, recommending the suspension of the respondent's license to practice law for six months.

/s/ Jesse M. Boodoo
Jesse M. Boodoo, Esq.
Secretary *pro tem*

Dated: December 12, 2022

DISSENT

We agree with our colleagues that a six-month suspension is appropriate in this case in light of the considerable misconduct and stunning lack of judgment. We agree that the

misconduct was aggravated by the vulnerability of the respondent's client and not mitigated by the respondent's alcohol use, because the alcohol use was not a cause of the misconduct.

We part with the majority regarding whether the suspension should be stayed for two years, as recommended by the hearing committee. As the respondent points out in his motion to reopen, he has taken significant steps toward recovery from alcohol use disorder. Although he may not have been completely and flawlessly successful, we do not view 100% success as the standard by which to impose a stayed suspension. We should not demand perfection.

Even against a high standard, the respondent has accomplished a great deal. As he explains in his motion to reopen, he successfully complied with a two-year monitoring agreement. After completing the monitoring program, he continued to attend voluntarily monthly LCL meetings as well as AA meetings four to five times per week. On his own initiative, he has attended fifty hours of mindfulness classes, which have helped him manage stress.

In rebuffing the respondent's efforts at sobriety, the hearing committee imposed on him an unduly high burden. Unfortunately, our colleagues in the majority have perpetuated the misunderstanding. The committee derided the respondent's own testimony as to his sobriety, apparently because it deemed the testimony self-serving. (Hearing Committee Report, ¶ 39). The analysis is both factually and legally incorrect. As a factual matter, the committee had before it (as do we) evidence of the respondent's compliance with the two-year monitoring agreement as well as documents from Dr. Jeffrey Fortgang of LCL, in addition to the respondent's testimony about his attendance at meetings. There was no evidence to contradict the respondent's narrative. As a legal matter, we have relied on a similar quantum of evidence in

concluding that a respondent has shown sufficient progress to merit a stayed suspension. Matter of Crowley, 9 Mass. Att'y Disc. R. 75, 76 (1989).

We agree with our colleagues that the question of mitigation should be considered separately from whether to recommend a stayed suspension. For this reason, we examine the respondent's recovery on its own, regardless of the role alcohol played in the misconduct. There is no question that the respondent suffers from alcohol use disorder. To be a competent, effective, and ethical lawyer, he will need to continue his recovery. Imposing a stayed suspension with conditions is the most efficacious means to achieve this goal. We view this as a matter of public protection, not leniency. A straight six-month suspension without conditions will not achieve these goals.

/s/ Ernest L. Sarason, Jr.
Ernest L. Sarason, Jr. Esq.

/s/ A. Clarissa Wright
A. Clarissa Wright, Esq.