IN RE: MATTER OF STEVEN DOMENIC DiLIBERO
BBO NO. 638547

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

BAR COUNSEL, Petitioner, v. STEVEN DOMINIC DiLIBERO, Respondent.	)	B.B.O. File No. C1-19-261689

CORRECTED MEMORANDUM OF BOARD DECISION

Representing the defendant in a criminal case, the respondent incorrectly advised his client that agreeing to a Continuance without a Finding (CWOF) would not have immigration consequences. When the client retained a new lawyer, who filed a motion to withdraw the Admission to Sufficient Facts and vacate the CWOF, the respondent failed to cooperate with successor counsel and falsely represented that he had given the correct advice. Having found these facts and concluded that the respondent violated several of our Rules of Professional Conduct, a hearing committee has recommended a two-year license suspension. While we agree with most of the committee's findings and conclusions, we disagree with its recommended sanction. We recommend that the Supreme Judicial Court suspend the respondent's license for one year, with six months plus one day to serve, the balance stayed for one year. We also recommend certain conditions as outlined below.

Factual and Procedural Background

Unless otherwise noted, we adopt the following facts found by the hearing committee, as they rest on substantial evidence. B.B.O. Rule 3.53.

In 2001, Stanley Santana was arrested in Lawrence, Massachusetts. In Lawrence District Court, he was charged with possession of heroin with intent to distribute, distribution of heroin in a school zone, and ancillary charges. For unknown reasons, the drug charges were dismissed but then reinstated. Santana did not appear in court and a warrant issued for his arrest in connection with the drug charges as well as an unrelated driver's license matter. For many years, Santana lived and worked under an assumed name.[1]

In 2013, Santana hired the respondent to represent him in clearing the warrants. The respondent successfully moved for removal of the defaults, only to have Santana fail to appear for a subsequent hearing, leading to additional warrants. On the respondent's motion, the court dismissed the school zone charges,[2] leaving only the charge of possession with intent to distribute heroin and the driver's license matter. In March 2017, the Lawrence Court held a pretrial hearing on the remaining charges.

Santana informed the respondent that his primary objective was preserving his right to remain in the United States. Santana was a legal resident alien who in 2000 had entered the country lawfully from the Dominican Republic at the age of seventeen. Subsequently, he became a permanent resident.[3] He hoped to become a citizen. At the time of the events in this case, he had a long-standing relationship with Mayelin Baez, a U.S. citizen, and together they had three children, all citizens of the United States. He managed a convenience store.

[1] There is an immaterial dispute as to the reasons for the long period of default. The respondent claims Santana was simply hiding from the law. Bar counsel asserts (based on Santana's testimony) that he could not afford a lawyer.
[2] The respondent proved that the conduct occurred outside the statutorily-defined school zone.
[3] One step below full citizenship, legal permanent residents may remain in the United States indefinitely, although they are deportable, for example if convicted of certain crimes.

Shortly before the March 2017 hearing, the respondent and Santana discussed possible resolutions. The government wanted Santana to plead guilty in exchange for six months of probation. The respondent on behalf of his client proposed a six-month CWOF.

In response to Santana's concern about his immigration status, the respondent assured his client that a CWOF for less than one year would have no negative consequences. He advised Santana to answer "yes" to all questions from the judge about the plea.[4] Following the respondent's advice, on March 22, 2017, Santana admitted to sufficient facts as to one count of possession of heroin with intent to distribute in violation of Mass. G.L. c. 94C, §32(a). The judge accepted the tender. The case was continued without a finding for six months.

The crime Santana admitted is an aggravated felony under federal immigration law, which rendered him immediately deportable, subject to mandatory detention, and ineligible for any defense to removal other than certain very limited defenses that would not pertain to his situation.[5] He would be permanently inadmissible to the United States and ineligible for citizenship. Put simply, Santana's CWOF ruined his chance for the one thing he told the respondent was his paramount objective: becoming a citizen of the United States.[6]

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[4] The respondent did not testify at the disciplinary hearing. In a recorded deposition during bar counsel's investigation, he disputed Santana's version of the conversation and maintained that he warned his client about potential immigration consequences of a CWOF, even one of only six months. The hearing committee rejected his testimony, finding Santana credible on this point. (Hearing Committee Report, ("HCR") ¶ 13). We will not disturb the finding, which was based not only on the committee's credibility determination but on other facts, which we will discuss later in this opinion. (HCR ¶ 13; B.B.O. Rule 3.53). Contrary to bar counsel's argument, we do not hold against the respondent his decision to not testify at the disciplinary hearing. He was not obligated to do so. However, having elected to remain silent, the committee had only the transcripts from his pre-hearing deposition.

[5] Under immigration law, a "conviction" of a serious felony occurs when the defendant admits to sufficient facts and is subject to either punishment or a restrain on liberty. The six-month probationary term qualified as a restraint on liberty. In other words, a CWOF is a conviction. There is no dispute on this underlying legal issue.

[6] As we will discuss later, the hearing committee rejected the respondent's assertion that Santana's primary goal was avoiding jail, not preserving his immigration status. The finding is based on the committee's assessment of Santana's credibility, and we have been directed to no contrary facts other than the respondent's hypothesis that a prison sentence would be as bad or worse than probation. The question is immaterial. Regardless of Santana's objectives, the respondent advised him there would be no immigration impact for a six-month CWOF.

Santana successfully completed his six months of probation, thereby clearing up his potential criminal exposure on the charges to which he admitted sufficient facts. With the criminal case in the rear-view mirror, he met with an immigration lawyer, because others had suggested to him that the CWOF was not the innocuous affair the respondent had suggested. The immigration lawyer confirmed the adverse consequences of the CWOF, including permanent ineligibility for citizenship and the possibility of immediate removal. With this information, Santana and Mayelin Baez met with the respondent. Unbeknownst to the respondent, Baez recorded the audio of the meeting on her phone.[7] As reflected in the audio recording, the respondent disputed forcefully that the CWOF made Santana deportable, and he impugned the qualifications and knowledge of the immigration lawyer who had given them contrary advice. As the hearing committee found, the respondent expressed total confidence in the advice he had given Santana. (HCR ¶¶. 26-29). In the meeting, he was recorded saying the following: "[L]ifetime deportation? You got a CWOF, under a year? … It was continued without a finding … it's not a conviction." (HCR ¶ 26).[8] In other words, he continued to labor under the misimpression that a CWOF of less than one year would not have an impact on Santana's immigration status. The respondent apparently did not know (either at the time of the plea deal or about one year later at the meeting with Santana and Baez) that a conviction for possession of heroin with intent to distribute was an aggravated felony under immigration law, which would render a defendant deportable and ineligible for reentry and citizenship.[9]

[7] The meeting took place in Rhode Island, where surreptitious one-way recording is lawful.

[8] The respondent continued: "It's not a deportable case, you understand that? I don't care what anyone tells you, that's not deportable. You can go back and forth, I have people … tons of people like him, back and forth, in and out of the country without any problems okay? I'll get you permission to do that." (HCR ¶ 28). Either the respondent grossly misconstrued immigration law, or he was attempting to give his client false hope.

[9] The respondent's statements to Santana and Baez provide further evidence to support the hearing committee's finding that the respondent failed to understand the immigration consequences of his client's plea and that he gave him the wrong advice.

In addition (and somewhat to the contrary), the respondent told Santana and Baez that his (the respondent's) primary objective for the engagement was not avoiding deleterious immigration impacts, but to avoid prison time. In salty language, which we quote verbatim, he laid bare his strategy:

> Listen! Stanley, I didn't give one fucking iota about any immigration issues when I pled the case … I wanted to get this case resolved without jail, with any. I don't care about that … My whole take on this was to keep you out of jail. That's my first for anyone I represent. I don't give a shit about immigration.

(HCR ¶ 30).

On August 18, 2018, Santana hired Attorney Murat Erkan to file a motion for post-conviction relief from the CWOF. The same day, Erkan mailed a copy of his appearance to the respondent along with a request for Santana's file. In addition, he asked the respondent to provide an affidavit to include a description of any discussions he had with Santana regarding the CWOF and its immigration consequences. Although he received Erkan's letter, the respondent did not reply, nor did he reply to a follow-up letter sent to him on August 27, 2018. Erkan sent a third letter on December 27, 2018. As did the first two letters, the December correspondence requested a copy of Santana's file. In addition, Erkan's December letter specifically referred to the respondent's advice to accept the offer of a CWOF and asserted that such advice amounted to ineffective assistance of counsel. Erkan told the respondent of his plan to file a motion for post-conviction relief on the theory of ineffective assistance of counsel. Erkan specifically requested that the respondent provide an affidavit admitting the advice he gave his former client.

Responding on January 16, 2019 (more than five months after the initial request), the respondent specifically denied that he had provided Santana with incorrect legal advice. He asserted that he had fully explained to his former client the consequences of his plea and denied

telling him there would be no immigration consequences from the CWOF. He sent an incomplete copy of Santana's file. The hearing committee found the respondent's statements in his January letter were knowingly false. Specifically, they were inconsistent with his conversation with Santana and Baez at their meeting on February 22, 2018. They were also inconsistent with Santana's testimony about the advice from the respondent at the time of the plea.

Erkan sent a follow-up email to the respondent on January 18, 2019, again requesting the affidavit. The respondent did not write back, nor did he provide the affidavit or additional parts of Santana's file. He failed to reply to a certified letter sent on January 30, 2019.

In April 2019, Erkan filed a Motion to Vacate Admission to Sufficient Facts, along with a memorandum of law and affidavits from Santana and Baez. Erkan explained to the court that he had contacted the respondent about the case, and the respondent claimed to have properly advised his client about the immigration consequences of his plea. The respondent received copies of the pleadings. However, Erkan never heard from him.

Fortunately for Erkan and his client, they had the tapes. After Erkan provided the recording of the February 2018 to the Assistant District Attorney, the government assented to the motion to vacate the CWOF. The court allowed the motion. The government agreed to resolve the criminal case through pretrial probation, which is not a conviction under immigration law. Bar counsel presented an expert witness, Jennifer Klein, Esq., who testified (as did Erkan) that without the tape, it was more likely than not that the motion to vacate would have failed. As Klein explained to the committee, courts often rely on the presumed candor of the lawyer who represented the defendant at the plea hearing. Absent testimony from plea counsel admitting to a mistake, criminal defendants face a steep climb. (HCR ¶ 49).

After being retained, Erkan requested Santana's file from the respondent on August 13, 2018, August 27, 2018, and December 27, 2018, all before the respondent provided anything to him on January 16, 2019, over five months after the initial request. Even then, the respondent provided only a portion of his file, which was missing his research, case notes, correspondence, pleadings and other papers, investigation and attorney work product.

The saga continued. Hans Familia (a/k/a "Manny") and the respondent have known each for over twenty years. Familia owns a business in Dorchester and allows the respondent to use an office there when he has business in Boston. At times, the respondent has provided free legal services to Familia. Familia has worked as an interpreter for the respondent. Their families have taken vacations together, and they speak to each other every other day. Santana met Familia and understood him to be a "helper," "interpreter" or "representative" of the respondent.

On July 30, 2019, about one year after Erkan first contacted the respondent (August 2018) and about two weeks before the hearing on his motion to vacate, Santana received a series of text messages from Familia. In one message, Familia told Santana that, "Steven wants me to explain something about your case." (HCR ¶ 57). In a phone call the same day, Familia attempted to elicit statements from Santana that he was satisfied with the respondent's representation. On October 7, 2019 (after the successful litigation of the motion to vacate), Erkan filed a request for investigation of the respondent with the Office of Bar Counsel. Bar counsel filed a Petition for Discipline on September 30, 2021. On April 11, 2022, a few weeks after the prehearing conference in this case, Familia renewed his efforts to arrange a meeting with Santana. After a few failed attempts, they met in Familia's office in May 2022. Familia told Santana that the respondent would prepare an affidavit for Santana's signature and if he

refused to sign it, the respondent would sue him based on the "illegal" recording of the February 22, 2018 meeting. (HCR ¶¶ 62-63).[10]

Bar counsel filed a single-count Petition for Discipline on September 30, 2021. The petition charged violations of the following Rules of Professional Conduct: 1.1 (competence); 1.2(a) (scope of representation and allocation of authority between client and lawyer); 1.3 (diligence); 1.4(b) (communication); 1.15A(b) (client files); 1.16(d) (declining or terminating representation); 3.3(a) (candor toward the tribunal); and 8.4(a), (c) and (d) (misconduct).

Following four days of evidence, the hearing committee concluded that the respondent violated all the charged rules apart from Rules 3.3(a) and 8.4(a). The hearing committee found that the advice to accept the CWOF was, "[w]rong, incompetent, and constituted ineffective assistance of counsel." (HCR ¶ 18). Further, the committee determined that but for the respondent's advice, Santana would not have accepted the plea deal for a six-month CWOF. (HCR ¶ 20).[11] The committee accepted the testimony of bar counsel's expert, Attorney Jennifer Klein, that Santana would likely have failed in his efforts to vacate the CWOF without the audio recording of the meeting with the respondent. (HCR ¶ 49). It also determined, based on the respondent's diatribe during the meeting with Santana and Baez, that "a failure to consider immigration consequences was consistent with the respondent's general practice." (HCR ¶ 31).[12]

The hearing committee found that Familia's attempts to obtain a helpful affidavit from Santana were undertaken at the respondent's behest and on his behalf. (HCR ¶ 66). The

[10] Erkat still represented Santana at this time.
[11] We do not adopt this finding. It is speculative.
[12] We do not adopt this finding. It is speculative.

committee found that Familia was acting as the respondent's agent. However, the committee did not conclude that the interactions via Familia violated any disciplinary rules.

The committee found no facts in mitigation and many in aggravation: the respondent's experience as an attorney; his lack of remorse or understanding of the nature of his misconduct; Santana's vulnerability; the respondent's selfish motive; and the substantial risk of harm to his client.

Relying principally on Matter of Grayer, 483 Mass. 1013, 35 Mass. Att'y Disc. R. 231 (2019), the hearing committee recommended a suspension of two years. The respondent has appealed.

Discussion

We start with the respondent's advice to his client concerning the immigration consequences of his agreement to admit to sufficient facts. The hearing committee found that the respondent wrongly advised his client that a six-month CWOF to a charge of possession of heroin with intent to distribute would not expose him to deportation and exclusion from reentry. We adopt this finding, as it has ample support in the record, and we have been directed to no contrary facts.[13] We also adopt the committee's finding that Santana's primary objective was to preserve his right to remain in the United States and eventually apply for citizenship.

In Padilla v. Kentucky, 559 U.S. 356 (2010), the United States Supreme Court held that the failure of a criminal defense attorney to advise a noncitizen client of the impact that a criminal disposition would have on his immigration status constituted ineffective assistance of

[13] Indeed, the respondent continued to labor under the misimpression that a six-month CWOF carried no immigration consequences when he met with Santana and Baez after the plea hearing.

counsel. If a criminal defense lawyer does not advise the defendant of the potential immigration consequences and the defendant is prejudiced, the defendant may be entitled to withdraw his plea. The same holds true under Massachusetts law. Commonwealth v. DeJesus, 468 Mass. `74 (2014). The failure to advise about immigration consequences showed a lack of competence in violation of Mass. R. Prof. C. 1.1. Even if a lawyer possesses the requisite amount of competence generally or in a specific subject area, he may violate the rule if, on the matter in question, he failed to act competently. In other words, competence is not static; it is situational. *See, e.g.*, Matter of Moran, 479 Mass. 1016, 34 Mass. Att'y Disc. R. 376 (2018) (lawyer with substantial experience in field where misconduct took place may violate Rule 1.1 by not acting competently in the matter at issue). As noted in comment [5] to Rule 1.1, "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation."

The same actions violated Rule 1.3, which requires a lawyer to act with diligence. Again, our inquiry focuses on the specific conduct, not the general way the respondent handled the case.[14] By giving erroneous legal advice, a lawyer violates both Mass. R. Prof. C. 1.1 and 1.3. Matter of O'Neill, 30 Mass. Att'y Disc. R. 297 (2014); Matter of Airewele, 28 Mass. Att'y Disc. R. 3 (2012).

Similarly, the misconduct violated Rule 1.2(a), which requires a lawyer to seek the lawful objectives of his client. Clearly, the respondent failed to do so. The hearing committee found that Santana's primary goal – as communicated to the respondent – was to preserve his resident

[14]Indeed, with respect to both Rules 1.1 and 1.3, the respondent's representation had much to commend it. He successfully moved to dismiss the school zone charges. Aside from the immigration repercussions, negotiating a 6-month CWOF on the facts presented was a laudatory achievement.

alien status and his dream one day to become a United States citizen. Taking a CWOF on a charge of possession with intent to distribute undermined that objective. Obviously, the same conduct violated Rule 1.4(b), which requires a lawyer to explain a matter to his client so that the client may make an informed decision.

On appeal, the respondent argues that Santana likely would have been convicted if he had taken the case to trial, which would have placed him in an identical or potentially worse immigration status. The implication of the argument appears to be that Santana had few if any viable options and a plea deal was preferable to a jail sentence, which could have been the result of a trial. While that may be hypothetically true, the argument is impertinent. The strength of the prosecution's case is irrelevant to the disciplinary issues. Regardless of the risks of going to trial, the respondent gave his client the wrong advice. Nor is the strength of the prosecution's case relevant to the respondent's factual argument that he gave his client the correct advice and the client chose to take a plea nonetheless, because he wanted to avoid prison. (Respondent's Appeal Brief, p. 4-5). The argument rests on speculation. It is contradicted by other evidence: Santana's testimony that the respondent told him a six-month CWOF carried no immigration consequences (testimony the committee found credible and which we will not ignore since there is no contrary evidence); Santana's testimony that his primary concern was staying in the country; the affidavit he filed with his motion for post-conviction relief (in which he swore the respondent had told him there would be no negative effects from a CWOF (Hearing Exhibit 13)), and the respondent's statements to Santana and Baez that a six-month CWOF would not affect Santana's status.

The respondent also argues that bar counsel had to prove that Santana did not know of the immigration consequences of the CWOF and, being fully advised, would have rejected the offer.

More specifically, he points out that, regardless of whether the respondent informed Santana of the immigration consequences of a CWOF, the judge warned him about the same thing. (Respondent's Appeal Brief, p. 9).[15] The argument is misplaced. The client's knowledge of the potential repercussions does not excuse the attorney's obligation to discuss the issue with him. It is immaterial to the ethical responsibilities of the attorney. There is a non-trivial difference between a statement from a judge during a change-of-plea hearing and a thorough explanation from a defendant's lawyer, with the attendant opportunity for the client to ask questions of his attorney.

Relatedly, whether Santana would have agreed to a six-month CWOF (because, according to the respondent, immigration was secondary to staying out of jail) is likewise irrelevant. Bar counsel is not required to prove the hypothetical outcome that would have resulted if the respondent had given the correct advice. Disciplinary matters are not torts. A violation of the rules is a violation of the rules. There is no requirement under Rules 1.1, 1.2, 1.3 or 1.4 that bar counsel prove that the incorrect legal advice materially impacted the client's decision or the outcome of the matter. Nor does bar counsel have to prove causation between the lawyer's misconduct and the ensuing harm, if any. Our inquiry stops with the finding that the respondent gave the wrong advice.[16] In addition to Santana's testimony that the respondent informed him there would be no deleterious consequences of a six-month CWOF, there is no evidence (from the respondent or another source) that the respondent advised his client about the impact of rejecting the CWOF and going to trial (likely conviction followed by likely deportation

[15] The standard plea colloquy from the judge includes a standard immigration warning. That warning is pro forma and is phrased in conditional terms, *i.e.*, a plea may have implications for the defendant's immigration status. It does not substitute for the detailed discussion that a competent, diligent and ethical lawyer must have with his client.
[16] Moreover, Santana testified that he would not have agreed to a six-month CWOF if he had been advised about its repercussions. In other words, bar counsel went beyond what he was required to do.

and a permanent ban on reentry). In other words, the neglect was two-fold: not only the incorrect advice about the CWOF, but the failure to discuss the impact of losing at trial.

We adopt the hearing committee's conclusion that the respondent violated Mass. R. Prof. C. 1.15A(b), which requires a lawyer to make a former client's file available to the client within a reasonable time following a request as well as Rule 1.16(d), which requires a lawyer upon termination of an engagement to take reasonably practicable steps to protect the client's interests. As should be obvious from our factual narrative, the respondent violated these rules. He failed to turn over his file. He failed to cooperate with successor counsel. Indeed, he undermined Santana's case by his false representations that he had provided his client with effective assistance of counsel. The respondent placed his self-interests over those of his client.

We adopt the hearing committee's legal conclusions that the respondent violated Mass. R. Prof. C. 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 8.4(d) (conduct prejudicial to the administration of justice). In the course of post-conviction litigation, the respondent informed successor counsel (by letter) that he had discussed the immigration issues with his client. This was a lie. The hearing committee found that no such conversation took place. The conduct was dishonest, and it was prejudicial to the administration of justice in that it impeded fair post-conviction relief for the respondent's former client.

On the other hand, the hearing committee concluded that the respondent did not violate Rule 8.4(a) (violating or attempting to violate a rule of professional conduct) by his attempted violation of Rule 3.3(a) (knowing false statement of fact or law to a tribunal). Bar counsel's theory of the case was that the respondent's false statement to successor counsel (Erkan) about his advice to Santana was an attempt to mislead the court that he <u>had</u> given his client the proper legal advice. The respondent wrote to Erkan that he had given the correct advice (which

obviously was not what Erkan had assume and which would not bolster Santana's motion to withdraw his plea). The respondent did not intend his letter to be filed in court. The committee concluded that, since the respondent did not communicate directly with the court, he did not attempt to mislead a tribunal. We agree. A lawyer does not violate Rule 8.4(a) by an indirect attempt to mislead a tribunal.

Matters in Mitigation and Aggravation

We agree with and adopt the committee's findings that the respondent proved no special mitigating factors.

We agree as to several factors in aggravation: the respondent's substantial experience as a lawyer; his lack of remorse and understanding as to his ethical responsibilities; the vulnerability of his client, an immigrant facing criminal charges; and the substantial risk of harm caused by his incorrect advice as well as his deception about the advice he gave his client. There is one aggravating factor with which we disagree. The hearing committee found that the respondent had a "selfish motive" when he lied to successor counsel about his conversation with Santana. Specifically, the committee determined that the respondent sought to "avoid being called out or admitting … to having provided ineffective assistance of counsel." (HCR ¶ 95). Our cases constrain "selfish motive" to instances of greed or seeking monetary gain. Preservation of one's reputation is not a selfish motive.

Recommendation

The respondent incompetently and neglectfully gave his client incorrect legal advice. In these circumstances, our leading case is Matter of Kane, 13 Mass. Att'y Disc. R. 321 (1997). Under Kane, we will impose a public reprimand in cases of neglect where the misconduct causes

harm or a serious risk of harm. Id., at 327-328. Suspension may be appropriate in the presence of aggravating factors, such as making misrepresentations to the client to conceal the neglect; prior discipline; failure to cooperate with bar counsel; refusal to acknowledge the wrongfulness of the conduct; or abandonment of the practice of law. Id., at 328. If the case involved only incorrect legal advice, we would likely have recommended a public reprimand or a stayed suspension. However, several of the Kane factors are present here, most notably the misrepresentations to the client (and successor counsel) to conceal the neglect. In addition, this case presents additional circumstances, such as the vulnerability of the client and the respondent's lack of remorse.

The respondent lied and placed his own interests ahead of his client. When asked by successor counsel to submit an affidavit to support Santana's motion to vacate his plea, the respondent wrote that he had advised his client of the plea's immigration consequences. The statement was knowingly false. (HCR ¶ 37). We find this post-event misconduct particularly problematic.

For violations of Mass. R. Prof. C. 8.4(c), the sanction varies depending on the circumstances of the case. In all but the most harmless instances of deceit, the misconduct warrants a suspension. The respondent's misconduct falls on the lower end of the spectrum. He lied on a single occasion – in a letter to successor counsel. While the circumstances and potential consequences were significant, the isolated nature of the event counsels a short suspension. *See, e.g.*, Matter of MacDonald, 23 Mass. Att'y Dic. R. 411 (2007) (six-month license suspension for neglecting multiple matters and then proffering falsified documents to cover up mistakes); Matter of Barat, 20 Mass. Att'y Disc. R. 27 (2004) (six-month suspension for neglect, including harm to one client, and misrepresentations to conceal neglect); Matter of

Ghitelman, 20 Mass. Att'y Disc R. 162 (2004) (suspension one year and one day where respondent neglected client's immigration matter then sent false documents to success counsel; misconduct aggravated by two prior disciplinary cases and mitigated by respondent's depression).[17]

A two-year license suspension as recommended by the hearing committee is too long. In landing on a two-year recommendation, the committee relied on Matter of Grayer, 483 Mass. 1013, 35 Mass. Att'y Disc. R. 231 (2019). Grayer involved more serious and wide-ranging misconduct in five separate client matters, including: failing to correctly advise a criminal defense client about the immigration impact of a guilty plea; intentionally ignoring a court order and subpoena and failing to appear at a court hearing when a former client successfully sued him for costs arising out of a divorce; neglecting another divorce case; failing to return the unearned portion of a retainer upon the termination of an engagement in a civil case; and failing to cooperate with bar counsel's investigation. In all of the cases, the respondent failed to provide his clients with a document setting out the scope of the engagement in violation of Mass. R. Prof. C. 1.5(b). As in this case, there were several aggravating factors in Grayer, including the respondent's history of prior discipline. Even with all of this misconduct, the Supreme Judicial Court suspended Grayer for one year and one day.[18] In light of that sanction, there is no basis for a two-year suspension in this case.

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[17] Misrepresentations to a tribunal, which generally are considered more serious than misrepresentation outside of court, carry a presumptive license suspension of one year. Matter of Zimmerman, 17 Mass. Att'y Disc. R. 633 (2001). In this, case, the hearing committee found that the respondent did not lie (or attempt to lie) to the district court.

[18] The hearing committee concluded that the misconduct in this case was worse than Grayer, because the respondent attempted to cover up his neglect by misrepresenting to successor counsel that he had given the appropriate advice. (HCR ¶ 101). The committee relied on Rule 8.4(c). However, the respondent in Grayer likewise tried to conceal his neglect by giving "inconsistent descriptions of his communications with and advice to the client." Matter of Grayer, 35 Mass. Att'y Disc. R. at 233. And, as in this case, Grayer failed to cooperate with successor counsel. As we

With Kane as our benchmark and recognizing that Grayer involved more widespread misconduct, we recommend a suspension of one year, six months of which should be stayed. We base this recommendation on the single incident of incompetence and neglect, the post-event misrepresentation, the failure to cooperate with successor counsel, and the several additional aggravating factors.[19] Unlike cases such as Grayer, the respondent did not engage in a pattern of neglect and deceit.

Based on the respondent's tirade in his meeting with Santana and Baez, the hearing committee speculated that the respondent may have ignored the immigration consequences of other clients who are not citizens. The committee wrote that, "[w]e are concerned that the respondent may have other non-citizen clients whose guilty pleas or CWOFs to aggravated felonies may be immigration time bombs for them." (HCR, p. 34). Bar counsel likewise urges us to consider the respondent's statements as evidence that the respondent provided incorrect advice to other clients. (Bar counsel's Appeal Brief, p. 16). There is no basis for this speculation, and it plays no role in our recommendation. Whether the respondent referred only to Santana' matter or was revealing his general approach to immigration cases is unclear. The import is ambiguous and subject to several interpretations. We view the comments as impassioned hyperbole in response to being accused by a former client of negligent advice. The comments are not relevant to our conclusions and recommendations.

discussed earlier, even where a lawyer engages in deception to cover up his neglect, the typical sanction is less than two years. Matter of MacDonald, *supra*, Matter of Barat, *supra*.

[19] One item on which we do not base our recommendation is the series of events involving "Manny" Familia, during the post-conviction litigation and during bar counsel's investigation. Although the hearing committee discussed the facts of these events in its report, the committee did not conclude that the conduct violated any rules, nor did the committee consider the facts in aggravation.

In addition to the license suspension, we recommend the respondent be required to take and pass the Multistate Professional Responsibility Examination (MPRE) as a condition to reinstatement. We also recommend that the respondent be required to attend five hours of continuing legal education classes in criminal law and immigration law, including on the topic of the relationship between the two. These measures will help to ensure the respondent's compliance with his obligation to understand the area of the law in which he practices.

For the first time on appeal, the respondent argues that one of the three members of the hearing committee had a disqualifying conflict of interest. On the third day of trial, prior to the testimony of bar counsel's expert, Jennifer Klein, the committee member disclosed for the first time that he had worked with Attorney Klein at the Committee for Public Counsel Services. He advised that he could remain impartial, and the respondent raised no objection to his continuing to sit on the case. The same committee member cross examined "Manny" Familia for many pages of transcript (although contrary to the respondent' argument we found the examination not unduly aggressive). We are troubled by the delayed disclosure by the hearing committee member. Klein was identified as bar counsel's expert witness at the prehearing conference stage, almost one year before the hearing. The disclosure should have been made at that time. By waiting until the third day of trial, the committee member placed the respondent and his capable lawyer in an untenable situation of continuing with the hearing or objecting at that time, which likely would have required a new hearing. However, while we sympathize with these challenges, the respondent did not raise an objection at the time. Accordingly, the argument is waived.

Conclusion

We recommend that the Supreme Judicial Court suspend the respondent's law license for one year, with six months plus one day to serve, the balance suspended. We also recommend that the court impose on the respondent the conditions that, prior to reinstatement he take and pass the Multistate Professional Responsibility Examination (which is required for suspensions longer than one year) and attend five hours of continuing legal education classes pre-approved by bar counsel.

An information shall be filed in the Country Court recommending the suspension of the respondent's law license for one year, with six months and one day to serve, the balance suspended on conditions as outlined herein.

Frank E. Hill, III

Dated: February 12, 2024 Frank E. Hill, III Secretary