COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, *ss.*

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. BD-2023-004

IN RE: DAVID W. PARKER

MEMORANDUM OF DECISION

This matter comes before the court, Cypher, J., on an information filed by the Board of Bar Overseers (board) under S.J.C. Rule 4:01, § 8 (6), as appearing in 453 Mass. 1310 (2009). The respondent, David W. Parker, was charged with a one-count petition for failing to act with reasonable diligence in representing a minor child, committing a criminal act that reflected adversely on the respondent's fitness to practice law, and conduct prejudicial to the administration of justice.

A hearing was held on March 9, 2023, attended by assistant bar counsel and the respondent with his counsel. On consideration thereof, and for the reasons set forth below, it is ordered that the respondent is suspended for a term of six months, stayed for a period of two years, pending successful completion of a monitoring agreement.[1]

1. Background. The following facts were found by the hearing committee.

At all times relevant, the respondent practiced law as Parker Law Firm in Springfield. In February 2018, the respondent began accepting custody cases for the Children and Family Law Division of the Committee for Public Counsel Services (CPCS). On February 5, 2019, the respondent was appointed to represent a minor child in a care and protection action in Holyoke

[1] The conditions of the monitoring agreement are set forth in full in an order that will issue with this memorandum.

Juvenile Court. A judge ordered temporary custody to the child's biological father and set conditions; namely, that the father refrain from consuming illegal substances and ensure a sober caretaker for the child. The respondent received the court's order as well as other documents indicating that the father had a history of alcohol abuse, an ongoing concern for the Department of Families and Children (DCF). Despite possessing this information, the respondent did not investigate further.[2]

The respondent and the father communicated frequently.[3] On March 8, 2019, they discussed a party the father wanted to have for the child. The respondent offered to pay for the party and the father accepted. The next day, the father picked up the respondent and drove him to an ATM from which he withdrew money and gave it to the father. Also in the car were two minor children, the respondent's client's sister, and her friend.

During the ride, the respondent informed the father that he did not feel well, because he had been drinking the day before. In response, the father offered a twelve-ounce can of beer to the respondent. The respondent accepted the can of beer, opened it, and drank it in the vehicle in violation of G. L. c. 90, § 241, the open container law.[4] Leading up to this incident, the respondent had been drinking heavily for several weeks.

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[2] The hearing committee found this inaction to be a failure of diligence given the respondent's role as the attorney for the child. See Mass. R. Prof. C. 1.3, as appearing in 471 Mass. 1318 (2015).

[3] The record is unclear regarding the start of their relationship. What is clear, however, is that during this time, the father was represented by his own attorney. The respondent knew about the attorney but did not inform counsel that he was communicating with her client.

[4] The hearing committee took administrative notice of the fact that, in Commonwealth v. Mansur, 484 Mass. 172 (2020), this court held that the State's open container statute is a civil infraction rather than a criminal offense. See G. L. c. 90, § 241.

At the respondent's suggestion, the father drove to a liquor store.[5] The respondent purchased a fifth of cognac for himself and several one-ounce containers of whiskey for the father. After leaving the respondent at his home, the father went to a hockey game with his daughter and her friend. The father subsequently became intoxicated and had to be escorted from the arena by authorities. His daughter and her friend were driven home by a third party.

Based on the father's behavior at the game, a report under G. L. c. 119, § 51A (51A report), was filed with DCF. The 51A report mentioned the respondent as a contributing factor to the father's behavior that night. Following an emergency hearing on March 20, 2019, the child was removed from the father's custody and placed into the care of DCF. A juvenile court judge subsequently ordered the respondent to withdraw from representing the child.

2. Disciplinary proceedings. In June 2021, the respondent was charged with one count of violating the disciplinary rules of Massachusetts, alleging that the respondent failed to act with reasonable diligence in representing a minor child, committed a criminal act that reflected adversely on his fitness to practice law, and engaged in conduct prejudicial to the administration of justice. See Mass. R. Prof. C. 1.3, and 8.4 (b), (d), and (h), as appearing in 471 Mass. 1483 (2015).

In his answer, the respondent admitted to most of the facts, but denied that his conduct violated the rules charged and, in the alternative, that mitigating factors were present.

a. Hearing committee. A remote disciplinary hearing was held on November 29, 2021. Twelve exhibits were admitted in evidence, and two witnesses testified: the respondent and the

[5] The hearing committee rejected as not credible the respondent's testimony that it was the father's idea to purchase alcohol. Instead, the committee credited the respondent's prior sworn testimony to bar counsel that he went to "get something to drink so hopefully it would make [him] feel better." The board elected not to disturb the committee's findings of credibility. See B.B.O. Rules § 3.53.

attorney for the father. The hearing committee heard testimony regarding the respondent's challenges with alcohol. Specifically, the respondent testified that, since being ordered to withdraw from representing the child, he has been attending meetings of Alcoholics Anonymous (AA) four or five times weekly. Additionally, the respondent testified that he was attending monthly meetings at Lawyers Concerned for Lawyers (LCL) and had signed a two-year monitoring agreement with LCL and the Child and Family Law Division of CPCS. The respondent testified, and the hearing committee found, that he had not remained sober for the entire period of the agreement.[6]

Bar counsel filed proposed findings of fact, conclusions of law, and recommended disposition (PFC's) on January 6, 2022, and filed amended PFC's on January 12, 2022. The respondent filed his PFC's on January 12, 2022.

The hearing committee found that the respondent's conduct was a contributing factor to the father's loss of temporary custody and that, by providing alcohol to the father, the respondent acted contrary to his client's interests. As such, the hearing committee determined that bar counsel proved that the respondent violated Mass. R. Prof. C. 1.3 failing to act with reasonable diligence in representing a client; Mass. R. Prof. C. 8.4 (b), committing a criminal act reflecting adversely on one's fitness as an attorney; Mass. R. Prof. C. 8.4 (d), engaging in conduct prejudicial to the administration of justice; and Mass. R. Prof. C. 8.4 (h), engaging in conduct that reflects adversely on an attorney's fitness to practice law.

As a mitigating factor, the committee considered whether the respondent satisfied his burden to prove that (i) his alcohol abuse caused the misconduct, and (ii) he had remained sober

[6] When asked about his progress in AA, the respondent testified that "there have been a few times I've fallen down."

since that time.[7] See Matter of Levy, 32 Mass Att'y Discipline Rep. 334 (2016) (for impairment resulting from substance abuse to be considered mitigating, there must be causal connection between impairment and misconduct); B.B.O. R. § 3.28. In concluding that the petitioner had not carried his burden, the committee observed that he was able to manage an active law practice at the time of the incident, handling approximately thirty other DCF cases. The committee also took note of the respondent's admission that he had "fallen down a few times" regarding his sobriety since the day of the incident.

As aggravating factors, the hearing committee found that the respondent's representation caused harm to a vulnerable client. Further, the committee concluded that the respondent had engaged in uncharged conduct because the respondent, after agreeing to represent the child, failed to determine whether the father's continued custody would be in his client's best interest in violation of Mass. R. Prof. C. 1.1, as appearing in 471 Mass. 1311 (2015). See Matter of Kirby, 29 Mass. Att'y Discipline Rep. 366 (2013).

The hearing committee recommended that the respondent be suspended for a term of six months, stayed for two years. In support, the committee reasoned that a stayed suspension would

[7] As additional proposed factors in mitigation, the respondent asserted that he had no prior discipline and had been "punished enough." In addition, the respondent argued that any public reprimand could prevent him from practicing law in the future. The hearing committee afforded no weight to these assertions. See, e.g., Matter of Greene, 477 Mass. 1019, 1021 (2017) (absence of prior attorney discipline "'typical' mitigating circumstance[] that do[es] not weigh in mitigation of sanction"); Matter of Keenan, 314 Mass. 544, 547 (1943) ("The question is not whether the respondent has been 'punished' enough. To make that the test would be to give undue weight to his private interests, whereas the true test must always be the public welfare"); Matter of Luongo, 416 Mass. 308, 311-312 (1993) (rejecting as mitigating factor fact that respondent's suspension would mean he never could return to practice of law).

encourage the respondent to maintain sobriety.[8] Neither party appealed from the hearing committee's report.

b. Sanction rejected by the board. On April 11, 2022, the board issued its preliminary decision, rejecting the hearing committee's proposed six-month stayed suspension in favor of a six-month suspension without a stay. See B.B.O. Rules, § 3.52 (providing for review by board when neither party appeals decision of hearing committee, and board makes preliminary determination that "the [committee's] decision . . . should not be affirmed"). The parties were asked to file briefs in response to the proposed disposition by May 5, 2022. On May 5, 2022, bar counsel filed a brief in support of the disposition. The respondent did not file a brief.

On May 11, 2022, the respondent filed a request for an extension, to which bar counsel did not object. The respondent subsequently retained new counsel and, on September 16, 2022, filed a "petition to reopen the record to present additional evidence relative to the sanction or, in the alternative, to adopt the sanction recommendation of the hearing committee."

On December 12, 2022, the board released its memorandum of law. The board affirmed the hearing committee's finding that the respondent violated Mass. R. Prof. C. 1.3, and 8.4 (b), (d), and (h), and that his client was vulnerable for the purposes of aggravation. Additionally, the board agreed that the respondent's alcohol use was not a contributing factor to the misconduct and, therefore, his recovery was irrelevant.[9]

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[8] The hearing committee recommended that the stay come paired with a "monitoring agreement," similar to the one that the respondent had entered voluntarily with LCL and CPCS.

[9] For this reason, the board also denied the respondent's motion to reopen the hearing:

> "[The respondent] 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

The board disagreed with the hearing committee's decision to weigh uncharged misconduct, Mass. R. Prof. C. 1.1 (competence), as an aggravating factor. Rather, the board noted that bar counsel could have charged the respondent with violating rule 1.1; failure to do so, however, deprived the respondent of notice and a fair opportunity to defend against the charge.

In considering the appropriate sanction, the board drew on cases involving lawyers whose lack of diligence and reckless judgment caused clients to lose custody of their children. The board ultimately recommended a suspension of six months without a stay.[10] Two board members dissented from that recommendation.[11]

c. Information and record of proceedings before this court. The board filed an information and record of proceedings before this court, pursuant to S.J.C. Rule 4:01, § 8 (6), on December 27, 2022. A hearing was held before a single justice on March 9, 2023. At the hearing, counsel for the respondent acknowledged that the respondent's conduct was "serious," but argued that a stayed suspension with conditions related to alcohol is the proper sanction to protect the public. Assistant bar counsel argued that the sanction was proper relative to the cases on which the board relied.

3. Discussion. a. Standard of review. We uphold "[t]he subsidiary findings of the

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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."

[10] In reasoning against a stay, the majority could not square the hearing committee's finding that the use of alcohol was not a mitigating factor with their recommendation of a stayed suspension.

[11] The dissent would adopt the hearing committee's recommendation because "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."

hearing committee, as adopted by the board, '. . . if [they are] supported by substantial evidence.'" Matter of Weiss, 474 Mass. 1001, 1001 n.1 (2016), quoting S.J.C. Rule 4:01, § 18 (5), as appearing in 453 Mass. 1315 (2009). See Matter of Abbott, 437 Mass. 384, 391 (2002), and cases cited. "[T]he hearing committee's ultimate 'findings and recommendations, as adopted by the board, are entitled to deference, although they are not binding on this court.'" Matter of Weiss, supra, quoting Matter of Ellis, 457 Mass. 413, 415 (2010). See Matter of Lupo, 447 Mass. 345, 356 (2006); Matter of Hiss, 368 Mass. 447, 461 (1975). The hearing committee is the sole judge of credibility. Matter of Zankowski, 487 Mass. 140, 144 (2021). Accordingly, its "credibility determinations will not be rejected unless it can be said with certainty that the finding was wholly inconsistent with another implicit finding" (internal quotations omitted). Matter of Haese, 468 Mass. 1002, 1007 (2014).

b. Mass. R. Prof. C. 1.3. Rule 1.3 states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." See Matter of Discipline of an Att'y, 489 Mass. 1018 (2022) (concluding that respondent failed to act diligently as guardian of ward in violation of rule 1.3 by "failing to file annual care plans,[] and failing to secure a [clean] home for the ward"). The record provides ample support that the respondent violated this rule.

As an initial matter, the respondent acknowledged that he was given court documents attesting to the father's issues with alcohol. Rather than investigate the living situation dutifully to see whether it comported with his client's best interests, the respondent undertook no inquiry whatsoever. See Mass. R. Prof. C. 1.3, comment 1 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor").

Moreover, the respondent learned first-hand that the father was not providing a sober home for his client in violation of the conditions the judge had set. Rather than report this fact

to DCF – as he was obliged to do – the respondent provided the father with alcohol, setting in motion the chain of events that would culminate in the father losing custody of the child. There is no doubt that the respondent represented his client without reasonable diligence.

c. Mass. R. Prof. C. 8.4 (b). Rule 8.4 states that "[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

Ultimately, a lawyer "should be professionally answerable only for [those] offenses that indicate lack of those characteristics relevant to practice" (emphasis added). Mass. R. Prof. C. 8.4 (b), comment 2.[12] A single violation of the State's open container law, G. L. c. 90, § 241, a civil infraction, does not qualify. See id. ("Many kinds of illegal conduct reflect adversely on fitness to practice law . . . [o]ffenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category"); Mansur, 484 Mass. at 179.

While the hearing committee found that the respondent's open container violated rule 8.4 (b), neither the committee nor the board factored this violation into their respective sanctions. Accordingly, I will do the same. The respondent's violation of G. L. c. 90, § 241, is relevant to discipline only to the extent that the conduct reflected adversely on his fitness to practice law. See Mass. R. Prof. R. 8.4 (h); § 3 (e), ante.

d. Mass. R. Prof. C. 8.4 (d). Rule 8.4 (d) provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice[.]" Specifically, rule 8.4 (d) concerns behavior that "undermines[s] the legitimacy of the judicial

[12] See, e.g., In re Greene, 476 Mass. 1006 (2016) (violating anti-kickback law); In re Eberle, 25 Mass. Att'y Discipline Rep. 181 (2009) (operating vehicle under influence of alcohol, shoplifting, and larceny); In the Matter of Grella, 17 Mass. Att'y Discipline Rep. (2001) (assault and battery).

process." In re Discipline of an Att'y, 442 Mass. 660, 668 (2004).

In the case at bar, the hearing committee found that the respondent was, or should have been, aware of the court order that the "[f]ather will ensure there is a sober caretaker for the child at all times." Despite this knowledge, the respondent bought whiskey for the father. The respondent's conduct was in direct contravention of the judge's order. Accordingly, the respondent violated rule 8.4 (d). See Matter of Grayer, 483 Mass. 1013, 1015-1016 (2013) (violation of rule 8.4 [d] for lawyer to violate knowingly subpoenas, orders, and rules issued by judge).

e. Mass. R. Prof. C. 8.4 (h). Rule 8.4 (h) provides that "[i]t is professional misconduct for a lawyer to: . . . engage in any other conduct that adversely reflects on his . . . fitness to practice law." This rule "prohibits conduct that adversely reflects on a lawyer's fitness to practice law, even if the conduct does not constitute a criminal, dishonest, fraudulent, or other act. . . ." Mass. R. Prof. C. 8.4, comment 7.

The hearing committee's conclusion that the respondent violated rule 8.4 (h) finds ample support. First, the respondent had direct and unsanctioned communications with the father despite knowing that he was represented by counsel. See, e.g., Mass. R. Prof. C. 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so"). Second, the respondent consumed alcohol in a moving vehicle – a criminal offense at the time – with two minors in the backseat. See G. L. c. 90, § 241; Nash v. Lathrop, 142 Mass. 28, 35 (1886) ("Every citizen is presumed to know the law thus declared"). Finally, the respondent purchased whiskey for the father, thus positioning the father to violate a court order of which the respondent was, or should have been, aware. Accordingly, the respondent violated rule 8.4 (h).

f. Aggravating factors. The hearing committee concluded that the respondent's harm to a vulnerable client, see Matter of Pemstein, 16 Mass. Att'y Discipline Rep. 339, 345 (2000), and uncharged violation for rule 1.1 (lack of competence for failing to investigate whether living with father was in client's best interests) were aggravating factors. The board agreed that the respondent's harm to a vulnerable client should be considered aggravating but disagreed that the uncharged rule violation may constitute an aggravating factor. I concur with the board.

The respondent's client was "vulnerable" by any definition. See In the Matter of James P. Long, 29 Mass. Att'y Discipline R. 416 (2013) (finding minor beneficiary of trust, where attorney served as trustee, to be vulnerable); In the Matter of Michael J. Early, 21 Mass. Att'y Discipline R. 220 (2005) (adopting hearing committee's finding that "[the] mentally and physically incapacitated minor client" was "extremely vulnerable" for aggravation purposes); ABA Standard 9.2(h). See e.g., Matter of Lupo, 447 Mass. at 354 ("vulnerable client" not synonymous with "elderly" client).[13]

Further, the board properly rejected the committee's conclusion that the uncharged rule violation, rule 1.1, is aggravating. Rather, the board correctly noted that the respondent was deprived of a fair opportunity to defend himself. See Matter of Kenney, 399 Mass. 431, 436 (1987) ("In a [disciplinary] proceeding an attorney is entitled to procedural due process which includes fair notice of the charges and an opportunity for explanation and defense").

g. Mitigating factors. The hearing committee did not find any mitigating factors, and

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[13] Additionally, per our case law, clients with limited education, or who are considered unsophisticated, are "vulnerable" for the purposes of aggravation. See Lupo, 447 Mass. at 354; Matter of Hayes, BBO No. 226790, 2022 WL 9591182 (June 13, 2022) (limited education). The respondent's client, a child in a care and protection action, certainly lacked formal education and a requisite degree of sophistication and, as such, must be considered "vulnerable."

the board adopted this finding. There is nothing in the record to upset that determination.[14]

h. Appropriate sanction. The "primary concern in bar discipline cases is 'the effect upon, and perception of, the public and the bar.'" Matter of Crossen, 450 Mass. 533, 573 (2008), quoting Matter of Finnerty, 418 Mass. 821, 829 (1994). See, e.g., Matter of Alter, 389 Mass. 153, 156 (1983). "The purpose of the disciplinary rules and accompanying proceedings is to protect the public and maintain its confidence in the integrity of the bar and the fairness and impartiality of our legal system." Matter of Curry, 450 Mass. 503, 520-521 (2008). "The appropriate level of discipline is that which is necessary to deter other attorneys and to protect the public." Id. at 530, citing Matter of Concemi, 422 Mass. 326, 329 (1996). While the sanction imposed should not be "markedly disparate" from sanctions imposed on other attorneys for similar misconduct, each case should be decided on its own merits, and the attorney should receive "the disposition most appropriate in the circumstances." See Matter of Pudlo, 460 Mass. 400, 404 (2011), quoting Matter of the Discipline of an Att'y, 392 Mass. 827, 837 (1984).

This case is atypical insofar as there does not appear to be a comparable fact pattern. The petitioner relies on Matter of Donohue, 35 Mass. Att'y Discipline Rep. 89 (2019) (public reprimand for failure to point out obvious inconsistencies in alleged victim's testimony), and Matter of Kane, 13 Mass. Att'y Discipline Rep. 321 (1997) (public reprimand where attorney failed diligently to represent client and to communicate adequately with client, where client

[14] The hearing committee found that although the respondent struggled with alcohol, it was not, strictly speaking, a causal factor of his misconduct. Compare In re Bizinkauskas, 30 Mass. Att'y Discipline Rep. 27 (2014) (considered treatment for alcoholism as mitigating factor when charged conduct was operating under influence), with Matter of Johnson, 444 Mass. 1002, 1002 (2005) (respondent failed to show that alcohol consumption caused him to misappropriate client funds). Crucially, at the time of the incident, the respondent was able to handle approximately thirty other DCF cases, all without incident. Furthermore, the respondent was not so impaired by alcohol, having only consumed one twelve-ounce beer, when he decided to purchase whiskey for the father.

"was not ultimately harmed"), to suggest that a public reprimand is a proper sanction.[15] I disagree.

The respondent emphasizes that although the misconduct caused serious injury to the client, it was a single incident; thus, under the Kane standard, a public reprimand is the appropriate sanction. See 13 Mass. Att'y Discipline Rep. at 321. See also Mass. R. Prof. C. 1.3. In Kane, the board adopted new guidelines for cases involving neglect or failure of zealous representation: (1) admonition generally is appropriate for neglect resulting in little or no potential injury to a client or others; (2) public reprimand generally is appropriate for neglect resulting in serious injury or potentially serious injury to a client or others; and (3) suspension generally is appropriate for repeated instances of neglect, or a pattern of neglect, and the neglect causes serious injury or potentially serious injury to a client or others. Id. at 327. However, the guidelines do not take aggravating or mitigating factors into account. See The Board of Bar Overseers of the Supreme Judicial Court, The Massachusetts Bar Discipline: History, Practice, and Procedure 120 (2018). The presence of an aggravating factor lifts the sanction into the realm of suspension. See id.; In Matter of O'Reilly, 26 Mass. Att'y Discipline Rep. 466 (2010) (typically, failure to file estate tax returns calls for public reprimand under Kane standard, but together with attorney's attempts in concealing misconduct, aggravating factor, suspension was warranted). Unlike Kane, the facts here are more egregious because the respondent's conduct caused serious harm to a vulnerable client.

Similarly, the instant facts are more egregious than those in Matter of Donohue, 35

[15] During hearing, the respondent also relied on Matter of Lee, 17 Mass. Att'y Discipline Rep. 358 (2001). In that case, a six-month suspension with the final three months stayed, subject to certain conditions, was imposed on an attorney convicted of felony domestic violence and violating multiple abuse prevention orders. Id. However, Lee appears to be an outlier; given the seriousness of the attorney's conduct, a far higher sanction should have been levied.

Mass. Att'y Discipline Rep. 89. In that case, the attorney received a public reprimand when he failed to discredit the victim's identification of his client despite knowledge of the victim's severe visual impairment. Id. Here, the respondent purchased alcohol for the father despite awareness of the court order that the father must provide a sober caretaker for his child at all times. Not mincing words, the board referred to this act as a "stunning" lack of judgment. As such, a public reprimand is not the appropriate sanction.

Alternatively, the board urges me to suspend the respondent for six months, unstayed.[16] The board principally relied on two cases: Matter of Sargent, 30 Mass. Att'y Discipline Rep. 355 (2014), and Matter of Nadeau, 34 Mass. Att'y Discipline Rep. 405 (2018). I find neither of these cases to be on all fours with the present facts.

In Matter of Nadeau, the court suspended a Maine probate judge for eighteen months. 34 Mass. Att'y Discipline Rep. 405 (2018). The judge in Nadeau exhibited a pattern of gross misconduct, which included using his position to remove certain attorneys he disliked from the court-appointed attorney list and ordering the destruction of evidence. Id.

By contrast, in Matter of Sargent, an attorney received a three-month suspension, stayed for six months, on condition that he arrange an audit of his practice for, among other failures of diligence, failing to respond to discovery requests, failing to subpoena and interview witnesses, failing to timely file witness lists, and failing to adequately prepare his clients for trial. 34 Mass. Att'y Discipline Rep. 405. Relevant to the case at bar, one failure resulted in his client's losing custody of her daughter to the father, id., however, in mitigation, the court also considered that

[16] The proposed sanction has been increased several times throughout the lifespan of this matter. Initially, bar counsel recommended a public reprimand. Following hearing, the committee recommended a six-month suspension, stayed for two years. Finally, the board, pursuant to B.B.O. Rule § 3.52, rejected a stay and ultimately proposed a flat six-month suspension.

the attorney's sole legal assistant stopped doing her job during the relevant period. Id.

Ultimately, the respondent's conduct falls somewhere between Matter of Nadeau and Matter of Sargent. While both Sargent and the case at bar involve a loss of custody resulting from attorney negligence, a material difference exists that distinguishes the two fact patterns. Here, the respondent's client was the child, not the parent. The fact that the child was removed from his father's custody into DCF's – and the circumstances in which he was removed – undoubtedly have had a significant impact on the child's well-being. See Custody of Minor, 377 Mass. 876, 882 (1979) ("the interest of the child is thought to be best served in the stable, continuous environment of his own family"). Put differently, the child has experienced trauma because of the respondent. Consequently, the respondent's sanction must be more severe than that administered in Sargent, where the father, a blood relative, received custody.

The respondent's misconduct, however, is less egregious than that of the attorney in Nadeau. As an initial observation, the attorney in Nadeau was a judge, and his misconduct involved the abuse of power, ill intent, and the prospect of material gain. Conversely, while the respondent's misconduct undoubtedly evidenced a "stunning lack of judgment" in a role of trust, there was no ill intent, nor was there personal gain.

The nature of the respondent's misconduct can best be characterized as gross negligence and lack of judgment in violation of rules 1.3 and 8.4 (d) and (h). The respondent has no prior disciplinary history; rather, he has collaborated with the investigation and shown no pattern of neglect. However, the misconduct did cause serious harm to a vulnerable client, a factor in aggravation, thus the committee's recommendation of a six-month suspension is warranted.

Next, the issue of a stay. I agree with the hearing committee and the board that the respondent's alcohol issue was not a causal factor of his misconduct. However, the primary purpose of a stay is to "function[] as an incentive or a deterrent . . . to encourage or discourage

certain conduct, whether for the sake of safeguarding the public or assisting the lawyer to take certain remedial steps, or both." Matter of O'Neill, 30 Mass. Att'y Discipline Rep. 289 (2014). Although not a causal factor, his struggle with alcohol "does serve to provide context for the misconduct."[17] See Matter of Discipline of an Att'y, 489 Mass. 1018, 1024 (2022). Indeed, it was implicit in the hearing committee's recommendation that a stay would further the goal of protecting the public and helping the respondent. See id.

Here, a stay is not a sign of leniency. Cold calculus determines that the public interest will best be served by a stayed suspension. The respondent has taken significant, albeit imperfect,[18] steps toward his recovery, such as regularly attending AA and LCL meetings, and entering into a two-year monitoring agreement with LCL. Imposing a six-month suspension on the respondent, unstayed, very well could drive him back into a state of alcohol dependency. Then, following the expiration of his suspension, he would reenter the profession all the worse off, and the public along with him.

Alternatively, a two-year stay would provide a great incentive for the respondent to maintain his sobriety and continue to better himself and his practice. The respondent's future clients would best be served and protected by an attorney who admits he has a problem and, in

[17] To ignore the respondent's struggle with alcohol is to ignore a crucial aspect of addiction; namely, that addiction affects a person not just during the period of intoxication, but, rather, its effects creep into other aspects of a person's life, even when he or she is not consuming. See S. Mosel, Effects of Alcohol on the Brain (Long & Short Term Effects), AM. ADDICTION CENT. (Sep. 15, 2022), https://americanaddictioncenters.org/alcoholism-treatment/mental-effects.

[18] We should not demand perfection. Indeed, the majority of individuals who suffer from alcoholism and receive treatment will have at least one relapse event in the first twelve months following treatment. See K. Witkiewitz & K.E. Masyn, Drinking Trajectories Following an Initial Lapse, 22 PSYCHOLOGY ADDICTIVE BEHAVIORS 157, 157 (2008).

turn, is assisted by members of his profession to work to resolve said problem.[19] Put another way, a stay is warranted in this case because it can better achieve the goal of safeguarding the public and assisting the respondent in his recovery. See Matter of Discipline of an Att'y, 489 Mass. at 1024.

Accordingly, I reverse the board and adopt the hearing committee's recommendation of a six-month suspension stayed for two years, with conditions as set forth in the accompanying order of term suspension/stayed.

By the Court,

/s/ Elspeth B. Cypher
Associate Justice
Supreme Judicial Court

ENTERED: March 24, 2023

[19] It bears mentioning that the respondent no longer represents children or other vulnerable clients.