COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No: BD-2024-052

IN RE: STEVEN DOMINIC DILIBERO

MEMORANDUM OF DECISION

This matter came before me on an information filed by the Board of Bar Overseers (board), which concluded that the respondent violated a number of the Rules of Professional Conduct by giving incorrect legal advice to a client, and by failing to cooperate with that client's successor counsel.[1] The board requests that the respondent be suspended from the practice of law for one year, with six months plus one day to serve, the balance stayed for one year subject to certain conditions of reinstatement.

The respondent challenges several factual findings that were made by the hearing committee (committee) and then adopted by the board, and also argues that he deserves no more than a public reprimand. Bar counsel, on the other hand, contends that

[1] Specifically, the board concluded that the respondent had violated Rules 1.1 (competence); 1.2(a) (must seek lawful objectives of client); 1.3 (diligence); 1.4(b) (communication with client); 1.15A(b) (client files must be made available to former client); 1.16(d) (must protect client's interests upon terminating representation); 8.4(c) (dishonesty); and 8.4(d) (conduct prejudicial to the administration of justice).

the board's recommended sanction is insufficient and asks that I impose a two-year suspension.

After consideration of the parties' filings and oral argument, I determine that the board's findings are supported by substantial evidence and conclude that the charged misconduct has been established. I further conclude that the board's recommended sanction -- a one year suspension, with six months plus one day to serve -- is appropriate.

Background. With two exceptions noted infra, the board adopted the committee's findings of fact, which I summarize here.

a. Incorrect legal advice. In 2001, Stanley Santana was arrested on several charges and neglected to appear for a court date, resulting in a warrant issuing. In 2013 he hired the respondent to clear that warrant, as well as another warrant issued in connection with a driver's license matter. The respondent successfully moved to remove the defaults and obtained a dismissal of some of the pending charges; what remained was a charge of possession with intent to distribute heroin and the driver's license matter.

Santana was a permanent resident who hoped to become a citizen, and informed the respondent that preserving a path to citizenship was his primary goal in resolving the pending

maters.[2] The respondent recommended that Santana accept a six-month continuance without a finding (CWOF), advising him that a CWOF for less than one year would have no immigration-related consequences. Following that advice, on March 22, 2017, Santana admitted to sufficient facts as to one count of possession of heroin with intent to distribute, and the case was continued without a finding for six months.

Contrary to the respondent's advice, Santana's CWOF could indeed have serious immigration consequences. As the board laid out:

> "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. He would be permanently inadmissible to the United States and ineligible for citizenship."[3]

A subsequent conversation with an immigration attorney alerted Santana to the fact that the respondent had given him incorrect advice. When Santana then confronted the respondent about this, the respondent essentially doubled down, insisting (incorrectly)

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[2] Santana managed a convenience store and was in a long-term relationship with a United States citizen. The couple had three children together, all of whom were also citizens.

[3] The board declined to adopt the committee's finding that "but for the respondent's advice, Santana would not have accepted the plea deal for a six-month CWOF."

that Santana's six-month CWOF would not count as a conviction under Federal law.[4]

b. Successor counsel. On August 18, 2018 Santana retained successor counsel, Attorney Murat Erkan, for the purpose of seeking postconviction relief from the CWOF. Attorney Erkan sent the respondent a letter that day requesting Santana's file, and when the respondent did not reply, he sent follow-up letters on August 27 and December 27; the latter included a request for an affidavit regarding the CWOF.

Finally replying on January 16, 2019, the respondent denied ever advising Santana that there would be no immigration consequences from the CWOF, a statement the committee found to be knowingly false in light of the evidence to the contrary. The respondent sent successor counsel only an incomplete case file and no affidavit, and never responded to several further requests for the items. Nevertheless, in April 2019 Attorney Erkan successfully moved to vacate Santana's admission to sufficient facts, with the government ultimately agreeing to

[4] This conversation, which took place in Rhode Island, was surreptitiously recorded by Santana's partner.

During this conversation the responded stated, "[Avoiding jail] is my first for anyone I represent. I don't give a shit about immigration." From this and other evidence the committee found that "failure to consider immigration consequences was consistent with the respondent's general practice." The board refused to adopt this finding, deeming it speculative, and I do not consider it here.

imposition of only pretrial probation -- a resolution that would not count as a conviction for Federal immigration purposes.

c. Third party contact. Both before and after the motion to vacate was decided, Santana was contacted by Hans "Manny" Familia. Familia is a friend and associate of the respondent: the two have known each other for twenty years, Familia has provided interpretation services for the respondent, and Santana understood Familia to be the respondent's "representative."

On July 30, 2019, approximately two weeks before the hearing on the motion to vacate, Familia sent several text messages to Santana, including one claiming that the respondent had asked Familia to contact Santana. Those texts were followed by a phone call, where Familia attempted to get Santana to admit that he was satisfied with the respondent's representation.

Familia reached out again to Santana in April of 2020, during the pendency of this disciplinary case. As a result, Santana met with Familia, at Familia's office. At that meeting Familia told Santana that the respondent would prepare an affidavit for Santana's signature, and warned Santana that the respondent could sue him.[5]

[5] The basis for the potential suit appears to be the recording of Santana's conversation with the respondent in Rhode Island. Although surreptitious recording with only one party's consent is illegal in Massachusetts, where Santana's conversation with Familia occurred, it is not illegal in Rhode Island, where the recording of Santana's conversation with the respondent occurred.

d. Factors in mitigation and aggravation. In considering what sanction to recommend, the board adopted the committee's determination that there were no applicable factors in mitigation, but several factors in aggravation: the respondent's experience as an attorney; his lack of remorse, and lack of understanding as to his ethical responsibilities; Santana's vulnerability, as an immigrant facing deportation; and the risk of harm caused by the respondent's incorrect immigration advice and follow-up conversations.[6]

e. Procedural history. Bar counsel commenced disciplinary proceedings against the respondent on September 30, 2021, and the board held a four-day public hearing in fall of 2022. On June 8, 2023, the committee issued its report, which found numerous violations of the Rules of Professional Responsibility and recommended that the respondent be suspended from the practice of law for two years. The responded appealed to the board and, after oral argument, on February 12, 2024 the board

[6] The board did not adopt the committee's finding as to an additional aggravating factor, that the respondent had a "selfish motive" when lying to successor counsel. And, as discussed further infra, the board also did not weigh Familia's actions in aggravation:

> "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."

voted to file the instant information, recommending that the respondent "be suspended from the practice of law for one year; six months and one day to serve, the balance suspended on the condition that the respondent attend five hours of CLE approved by the Office of the Bar Counsel." Bar counsel and the respondent filed briefs in this court, and oral argument before me occurred in July of 2024.

Discussion. a. Findings of Fact. The respondent first argues that several of the facts found by committee and adopted by the board were incorrect and unsupported. See Matter of Zankowski, 487 Mass. 140, 144 (2021) (findings must be "supported by substantial evidence"), quoting S.J.C. Rule 4:01, § 8 (6). However, the respondent's problems with the findings of fact are, at bottom, disagreements with the committee's decision to credit Santana's testimony on certain matters (e.g., that the wrong advice was given, and that Santana's primary goal was citizenship). "The hearing committee . . . is the sole judge of credibility." Matter of Diviacchi, 475 Mass. 1013, 1018-1019 (2016), quoting Matter of McBride, 449 Mass. 154, 161-162 (2007). Accordingly, I will not disturb the committee's decision to credit Santana. I conclude that the board's

findings of fact are supported, and that they establish the charged misconduct.[7]

b. Appropriate discipline. When determining the appropriate discipline, the single justice considers the sanctions that have been imposed in comparable cases. See Matter of Finn, 433 Mass. 418, 423 (2001). The sanction imposed should not be "markedly disparate" from sanctions imposed on other attorneys for similar misconduct, though it is "not necessary" to "find perfectly analogous cases." Matter of Foster, 492 Mass. 724, 746 (2023). Ultimately "[e]ach case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances." Matter of Discipline of an Attorney, 392 Mass. 827, 834, 837 (1984).

When an attorney has failed to act with reasonable diligence or neglected a client, the lodestar for the appropriate sanction is Matter of Kane, 13 Mass. Att'y Discipline Rep. 321, 327-328 (1997). The board's decision in Kane articulated a framework of presumptive sanctions in such

[7] The respondent also contends that a member of the hearing committee had a conflict of interest arising from a past working relationship with an expert witness who testified at the hearing, and that certain findings of fact were therefore tainted. As the respondent did not object to that member's participation at the hearing after the potential conflict was disclosed, the board correctly deemed that argument waived. See Matter of Foster, 492 Mass. 724, 760 n.16 (2023).

cases, and reasons to depart upwards or downwards. See Foster, 492 Mass. at 752 ("This court has endorsed [Kane's] principles"). The respondent, urging me to order no more than a public reprimand, correctly identifies that under the Kane framework "[p]ublic reprimand is generally appropriate where a lawyer has failed to act with reasonable diligence in representing a client or otherwise has neglected a legal matter and the lawyer's misconduct causes serious injury or potentially serious injury to a client." A presumptive sanction of suspension, conversely, is "generally appropriate for misconduct involving repeated failures" or "a pattern of neglect." Kane, 13 Mass. Att'y Discipline Rep. at 327-328.

But Kane's presumptive sanctions are just that: presumptions, offered "generally" and providing a baseline "[a]bsent aggravating and mitigating factors." Id. Two considerations in the instant case indicate that a suspension, and not a reprimand, is appropriate. First, the respondent has committed additional violations beyond the Kane framework. As charged and proven, he not only acted without diligence and neglected his client, but also lied to and otherwise failed to cooperate with successor counsel. Any sanction must address the totality of the respondent's misconduct. Second, there are aggravating factors present, and no mitigating factors. See Kane at 328 (listing "[r]efusal to acknowledge the wrongful

nature of the conduct" as example of aggravating factor relevant to consideration of departure from presumptive sanction).

Suspensions have been imposed in other cases under analogous circumstances. In Matter of O'Reilly, 26 Mass. Att'y Discipline Rep. 466 (2010), for example, the single justice noted that the respondent's neglect of a single matter "typically would call for a public reprimand," but imposed the board-recommended suspension of one year and one day in light of the multiple instances of misrepresentation committed in the wake of the neglect. See also, e.g., Matter of Finn, 36 Mass. Att'y Discipline Rep. 175 (2020) (imposing six-month suspension when years-long neglect of one matter resulted in harm to client, aggravated by refusing to participate in disciplinary proceedings and prior suspension); Matter of Bayless, 26 Mass. Att'y Discipline Rep. 30 (2010) (six-month suspension where attorney neglected one matter and misrepresented status of case, aggravated by previous discipline and mitigated by fact that attorney had suffered deaths in family during pendency of case); Matter of Cohen, 26 Mass. Att'y Discipline Rep. 83 (2010) (suspension of one year and one day for failures of competence and diligence in single matter, aggravated by misrepresentations to bar counsel and impeding investigation); Matter of Roberts, 25 Mass. Att'y Discipline Rep. 534 (2009) (six-month suspension where attorney neglected a single matter, misrepresented his

intentions to his client, failed to cooperate with bar counsel, and had previous admonition for similar neglect); Matter of McCarthy, 17 Mass. Att'y Discipline Rep. 411 (2001) (suspension of one year and one day for neglect of one matter, misrepresentations to client, and misrepresentations to bar counsel). Cf. Matter of Shaughnessy, 442 Mass. 1012, 1014 (2004) (ordering a six-month suspension under pre-Kane standards where respondent neglected one matter, made misrepresentations to client and cocounsel, threatened to file a baseless claim against client's new counsel, and failed to appreciate wrongdoing).

The suspensions in these comparator cases range in length from six months to one year and one day. Bar counsel, however, argues that a suspension in this range would be insufficient, instead requesting that I impose a two-year suspension. In support bar counsel contends that the board misread the committee's report, which led to it not considering the contact between Santana and the respondent's associate Familia in aggravation, and thus ultimately recommending a suspension of insufficient length. See note 6, supra. Thus instead of the board's recommendation, bar counsel urges me to follow the committee's reasoning and recommendation.

Bar counsel is correct that the board appears to have misread the committee's report when it wrote that "the committee

did not conclude that the conduct violated any rules, nor did the committee consider the facts in aggravation." True, Familia's contact with Santana did not form the basis for any charged violation of the Rules of Professional Conduct, and the committee did not list it during under the portion of its discussion labeled "FACTORS IN AGGRAVATION." But the committee made factual findings on the matter and factored it into its analysis of the appropriate sanction, where it characterized the contact as an attempt by the respondent to "intimidate and deter Santana" and highlighted this fact in support of a two-year suspension. The board's conclusion to the contrary is incorrect, and to the extent the board relied on that conclusion to decline to consider the Familia-related events in its own sanction analysis, then that too was incorrect.

Generally, in determining the appropriate sanction in a particular case, "the board's recommendation is entitled to substantial deference." Matter of Tobin, 417 Mass. 81, 88 (1994). However, I agree with bar counsel that where, as here, the board's recommended sanction relies on an incorrect reading of the committee's report on a matter of some significance, the board's recommendation is not due its customary deference. Cf. Matter of Foley, 439 Mass. 324, 334 (2003) (single justice did not defer to board's recommendation premised on incorrect findings).

That said, declining to show deference to the board's recommended sanction does not mean that the committee's two-year recommendation is appropriate. Quoting Kane, the committee found that the respondent had committed "repeated failures to act with reasonable diligence." But under the Kane framework, neglect of a single matter, as occurred here, presumptively merits a public reprimand, not a suspension. See Foster, 724 Mass. at 753-754; O'Reilly, 26 Mass. Att'y Discipline Rep. at 469. The board correctly recognized this. The board also correctly noted that the matter the committee used as a main comparator, Matter of Grayer, 483 Mass. 1013 (2019), featured neglect and failures of diligence across four different clients, distinguishing it from the instant matter (notwithstanding that both involved incorrect immigration advice).

More crucially, as discussed supra, a two-year suspension is distinguishable from the closest cases, which are in the range of six months to a year and a day. This conclusion is further buttressed by the fact that cases that do result in two-year suspensions generally contain elements not present here. For example, a number concern neglect across multiple matters, or fraud on the court. See, e.g., Matter of Maroun, 38 Mass. Att'y Discipline Rep. 313 (2022) (two-year suspension for failures of diligence in two immigration matters, failure to communicate with clients, numerous misrepresentations to clients

and court, charging excessive fees, and failure to comply with responsibilities upon withdrawal); Matter of Raymond, 24 Mass. Att'y Discipline Rep. 597 (2008) (two-year suspension for neglect of three divorce cases, misrepresentations to client concerning case status, resulting harm and potential harm, aggravated by a history of discipline for neglect, and mitigated by depression); Matter of Ozulumba, 23 Mass. Att'y Discipline Rep. 515 (2007) (two-year suspension after neglecting immigration matter, making misrepresentations to court, and leading client to provide false affidavit).

In sum, after applying the Kane framework, considering the additional misconduct, weighing the factors in aggravation, and examining the most similar cases, I conclude that the board's recommended sanction is indeed appropriate. A suspension of one year, with six months and one day to serve, is not markedly disparate from similar cases. Further, given the respondent's deficiencies in understanding his ethical obligations, it is also appropriate that his reinstatement be conditioned on his taking and passing the Multistate Professional Responsibility Examination and attending five hours of continuing legal education classes pre-approved by bar counsel.

Conclusion. Accordingly, an order shall enter suspending the respondent from the practice of law in the Commonwealth for a period of one (1) year, with six (6) months and one (1) day to

be served, and the balance of the suspension stayed for a period of one (1) year from the entry date of this order contingent on the following conditions:

The lawyer shall take and pass the Multistate Professional Responsibility Examination and attend five hours of continuing legal education classes pre-approved by the Office of Bar Counsel.

By the Court,

/s/ Scott L. Kafker
Scott L. Kafker
Associate Justice

Dated: January 9, 2025