NO. BD-2001-055

IN RE: JOSEPH B. SHANAHAN JR.

S.J.C. Judgment Prohibiting Application for Reinstatement before January 24, 2013 entered by Justice Botsford on March 9, 2010.[1]

MEMORANDUM AND ORDER

The respondent Joseph B. Shanahan, Jr., was disbarred in January, 2002. Presently before me is bar counsel's petition for contempt, asserting that the respondent has violated to comply with the judgment of disbarment. Pursuant to S.J.C. Rule 4:01, § 17 (8), as amended and appearing in 453 Mass. 1314 (2009), bar counsel also seeks entry of an order prohibiting the respondent from applying for reinstatement for a period of eight or ten additional years.[2] She asserts that Shanahan has held himself out as an attorney and that through his ongoing representation of clients before various local zoning and planning boards, has been practicing law.

Background. On October 26, 2001, respondent was convicted of bankruptcy fraud in the United States District Court for the District of Massachusetts. He was fined and sentenced to one year and a day in prison and two years supervised probation. See Matter of Shanahan, 18 Mass. Att'y Discipline Rep. 457 (2001). The respondent thereafter filed an affidavit of resignation that the court accepted upon recommendation of the Board of Bar Overseers (board). A judgment of disbarment entered on January 24, 2002, effective that date.[3]

In the fall of 2006, bar counsel learned that the respondent was representing a client or clients before the local planning board in the town of Chelmsford. Bar counsel informed the respondent that she considered such representation to constitute the practice of law in violation of the judgment of disbarment. The respondent agreed to withdraw from representing a particular client at the time while awaiting clarification on the issue.[4] Shortly thereafter, the respondent began working for Paul Finger Associates (PFA), a firm that specializes in site analysis and property development permitting consultation at the local, State, and Federal levels, but that employs no attorneys. After working there for almost two years, in May, 2009, the respondent opened his own firm in Chelmsford, Shanahan and Associates, to provide similar services. Bar counsel filed this petition for contempt after hearing from a member of the public that the respondent was continuing to represent property owners and permit seekers before local boards in Chelmsford.

The activities in which the respondent has been engaged include assisting clients in preparing real estate development project proposals, presentations and site plan analyses necessary to secure special permits, variances, approvals, and the like from local planning, zoning, and other boards, as well as permits from State agencies such as the Department of Environmental Protection. Before his disbarment, the respondent performed these same types of services for clients, but also performed additional services - such as drafting and negotiating purchase and sale agreements and conducting real estate closings - that he no longer undertakes. Rather, he refers his clients to licensed attorneys for these types of services.[5]

With the petition for contempt, bar counsel filed as an exhibit a printout of an Internet posting on www.jobfox.com, where the respondent described himself as a "Development, Zoning and Land Use Expert" with a "J.D. degree from Suffolk University Law School." The respondent states in his affidavit, however, that each of his clients, his former employers at

PFA, the local planning board members and much of the community of Chelmsford, where he lives and works, know he has been disbarred and is no longer an attorney.

Discussion. Under S.J.C. Rule 4:01, § 17 (1), (3), and (7), a disbarred lawyer is prohibited from engaging in the practice of law or in paralegal work, respectively. Bar counsel argues that the respondent violated the judgment of disbarment and should be found in contempt by "(1) holding himself out as a lawyer, and (2) engaging in the practice of law by giving legal advice to clients seeking permits and variances in the town of Chelmsford and representing his clients' interests before town boards in Chelmsford." I consider these arguments separately.

a. Holding oneself out as a lawyer. A disbarred attorney's holding himself out as being licensed to or engaged in the practice of law is, by itself, sufficient for a finding that he has engaged in the unauthorized practice of law. See Matter of McInerney, 389 Mass. 528, 536 n.l 1 (1983). However, the respondent's listing on the www.jobfox.com web site does not amount to holding himself out as a lawyer. Shanahan states that he has a juris doctor degree from Suffolk University, listed himself on the website as a "Development, Zoning and Land Use Expert," and described his services to clients as "consulting." Nothing has been presented to suggest that the Suffolk University J.D. degree listing is not accurate. I read it as a statement of educational credentials; it does not indicate anything about practicing law, or of being a member of the bar, and the "consulting" listing by itself does not suggest the practice of law either. Contrast Matter of Dawkins, 432 Mass. 1009, 1010 (2000) (indefinitely suspended respondent maintained listing as attorney in telephone directory and had accepted $600 [later returned] for agreeing to engage in legal services related to criminal matter); Matter of McInerney, supra at 536 (suspended attorney continued to list himself in telephone directory as attorney).

b. Engaging in the practice of law. Because of the difficulty in doing so, this court has never delineated the exact contours of what amounts to the practice of law. See Real Estate Bar Ass'n for Mass., Inc. v. National Real Estate Info. Servs., 609 F. Supp. 2d 135, 140 (D. Mass. 2009), citing Matter of Shoe Mfrs. Protective Ass'n. 295 Mass. 369 (1936). Generally, however, the court has described the practice of law as:

> "[T]he practice of directing and managing the enforcement of legal claims and the establishment of the legal rights of others,... the practice of giving or furnishing legal advice as to such rights and methods and the practice ... of drafting documents by which such rights are created, modified, surrendered or secured."

Id. at 372. See Opinion of the Justices, 289 Mass. 607, 613-614 (1935) (practice of law embraces conveyancing, giving legal advice, execution of legal instruments). The respondent's challenged activities fall within this definition. His presentations to various local boards in Chelmsford - e.g., the board of selectmen, the board of appeals, the planning board - that are included in the record (in the form of video or minutes) demonstrate that he is applying his knowledge of statutory and town bylaw requirements related to permitting, conservation, property subdivision and conveyancing to address the specific needs of his various clients. They indicate that the respondent is directly engaged in representing his clients - and appearing before the boards as their representative - in connection with their legal rights and obligations concerning their property; two sets of minutes separately state that "Mr. Shanahan advised the Board [of Appeals] that he is preparing his case for litigation." (Board of Appeals minutes, February 5, 2009; March 3, 2009.) While the respondent may not draft pleadings or purchase and sales agreements for his clients, he is clearly applying his professional legal training in assisting them to navigate the permitting process and advising them on the best course of action to secure the necessary permits and project approvals. In short, the respondent "invoke[s] his 'professional judgment in applying legal principles to address [his clients'] individualized needs,'" Matter of Chimko, 444 Mass, at 750, quoting Oregon State Bar v. Smith, 149 Or. App. 171, 183 (1997), cert, denied, 522 U.S. 1117 (1998).

The respondent argues that many non-lawyers - engineers, architects, landscape designers,

environmental scientists, and developers - provide exactly the same types of services as he does in the context of permitting processes; that they regularly appear before local boards on behalf of clients; that these professionals are clearly not engaged in the practice of law; and that therefore, he, too, is not engaged in practicing law when performing the same services. I recognize - as has the court for a very long time, see, e.g., Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 181-183 (1943) - that without violating the proscription against the unauthorized practice of law, many non-lawyer professionals use the law in working with their clients and perform services that lawyers also perform. But the respondent is a lawyer, not a non-lawyer professional. An activity that may not constitute practicing law when performed by another category of professional may well become the practice of law when a lawyer, disbarred or not, performs it. See Matter of Eastwood, 5 Mass. Att'y Discipline Rep. 70, 76-77 (1994) (disbarred real estate lawyer prohibited from work abstracting deeds for basic charge; single justice "view[ed] that activity to be the practice of law when conducted by a lawyer"); Matter of Behenna, 9 Mass. Att'y Discipline Rep. 17 (1993) (title examination, without rendering advice, constitutes practice of law). See also Matter of Levine, 2004 WL 5214985 (2004) (real estate attorney performing variety of services). When a discharged lawyer is engaged in the same area and type of work — in this case, land use planning and real estate development — that he was prior to being disbarred, the issue of public perception becomes particularly problematic. Cf. Matter of Rome, 10 Mass. Att'y Discipline Rep. 229, 231-232 (1994); Matter of Eastwood, 10 Mass. Att'y Discipline Rep. at 7 (both emphasizing inappropriateness of permitting suspended or disbarred attorneys to perform services in real estate field where attorneys' misconduct had related to their real estate practices). Cf. also Matter of Levine, supra at 2004 WL 5214985, p.7.

In sum, I find and conclude that the respondent has engaged in the practice of law in violation of S.J.C. Rule 4:01, § 17.

c. Contempt. Bar counsel also seeks a judgment of contempt in this case. A finding of contempt requires the court to find "clear and convincing evidence of disobedience of a clear and unequivocal command." Matter of Birchall, 454 Mass. 837, 853 (2009). There can be no question that the judgment of disbarment contains a clear and unequivocal command against practicing law. See S.J.C. Rule 4:01, § 17 (1) and (3). How to define practicing law, however, is not always clear. On the record presented, while I might find the respondent in contempt if a preponderance of the evidence standard were still applicable, given the somewhat blurry line between practicing law and performing services as a consultant in the particular real estate development context at issue here, and in the absence of evidence that the respondent affirmatively led others to believe he was an attorney representing clients (contrast Matter of Levine, supra), I am not able to say that bar counsel has proved contempt by clear and convincing evidence.[6]

d. Sanction. Under S.J.C. Rule 4:01, § 17 (8), as appearing in 453 Mass. 1315 (2009), my finding that the respondent has violated rule 4:01, § 17, requires me to extend the time before which the respondent may apply for reinstatement by a specific term. Imposition of the sanction under rule 4:01, § 17 (8) is not conditioned on a finding of contempt.

The effective date of the respondent's disbarment was January 24, 2002, and the respondent therefore became eligible to apply for readmission on January 24, 2010, absent any disqualifying circumstances. See S.J.C. Rule 4:01, § 18 (2) (a). Pursuant to rule 4:01, § 17 (8), bar counsel asks me to extend the term before which the respondent may apply for an additional eight or ten years.[7] I decline to order an eight- or ten-year extension. Rather, the respondent will be prohibited from applying for readmission for an additional period of three years from January 24, 2010, that is, until January 24, 2013.

ORDER

For the foregoing reasons, based on my finding that the respondent has violated S.J.C. Rule 4:01, § 17, it is ordered that the respondent, Joseph B. Shanahan, Jr., be prohibited from

applying for readmission to the bar of the Commonwealth until on or after January 24, 2013.

FOOTNOTES:

[1] The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

[2] See note 6, infra.

[3] The respondent had been subject to two prior disciplinary proceedings. See 6 Mass. Att'y Discipline Rep. 355 (1989) (private reprimand); 12 Mass. Att'y Discipline Rep. 656 (1996) (admonition). He also failed to comply with an order of temporary suspension that had entered on October 11, 2001, before the judgment of disbarment. This resulted in the judgment of disbarment being effective on the date of its entry rather than the earlier date of the temporary suspension order. See Matter of Shanahan. 18 Mass. Att'y Discipline Rep. 457, 457-458 (2002).

[4] Bar counsel contends that the respondent agreed to seek clarification from this court if he intended to continue to represent clients before local boards in Chelmsford. The respondent disagrees with bar counsel's account. As stated in the affidavit he filed in connection with this contempt petition, the respondent maintains that after being contacted by bar counsel in October or November of 2006, he told her that he would not represent individuals before local boards again until he heard back from bar counsel or "he had time to look into the issue and make an informed decision" himself. He further states in the affidavit that after several years of observing firms and individuals who were not attorneys appear on behalf of clients before municipal boards to present real estate development projects, he concluded "that there was no requirement that an individual must be an attorney, or that a firm or association include an attorney, in order to provide such services at local, state, or federal levels. Comfortable in that conclusion, I opened my own office for that purpose in May of 2009."

[5] The respondent also stresses that while being represented by him on a particular real estate project, most of his clients have also retained attorneys to represent them.

[6] Nonetheless, the respondent's conduct in relation to bar counsel is very troubling. While I cannot resolve without an evidentiary hearing the differences between bar counsel's and the respondent's respective accounts of their telephone conversation in the fall of 2006, the respondent acknowledges that there was a conversation. He also indicates he was on notice that bar counsel considered his representation of individuals before local boards in Chelmsford to constitute the practice of law. Bar counsel's opinion is not a substitute for the opinion or judgment of a court, but the respondent was aware at least that the issue of the propriety of his conduct had been squarely raised. Yet he did not undertake to pursue the issue further with bar counsel, or seek guidance from the court. Contrast Matter of Behenna, 9 Mass. Att'y Discipline Rep. at 17-18; Matter of Gates. 5 Mass. Att'y Discipline Rep. 274, 276-278 (1986). Rather, by his account, he relied solely on his own untested belief that his activities did not qualify as practicing law because he observed some non-lawyers performing similar services. This is a cavalier response to bar counsel's communication that almost rises to wilful blindness on the respondent's part.

[7] Bar counsel's petition for contempt seeks to extend the term for ten years, but her memorandum in support of the petition seeks an eight year extension. I treat the latter as her request.