

IN RE: GEORGE FORREST LEAHY

NO. BD-2011-080

S.J.C. Order of Term Suspension entered by Justice Lenk on August 2, 2012.¹

(S.J.C. Judgment of Reinstatement entered by Justice Lenk on November 19, 2012.)

Page Down to View Memorandum of Decision

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

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: BD-2011-080

IN RE: George F. Leahy

MEMORANDUM OF DECISION

This matter came before me on an information and record of proceedings, together with a vote of the Board of Bar Overseers (board) recommending that the respondent be suspended from the practice of law for one year, with imposition of the suspension stayed for two years. See S.J.C. Rule 4:01, § 8(6). As the respondent does not dispute the conduct found by the board to support its recommendation for discipline, the sole issue before me is the sanction to be imposed.

1. Background. On May 23, 2006, a judge in the Probate and Family Court held the respondent in civil contempt pursuant to complaints brought in connection with the respondent's own divorce. That judgment was upheld by an unpublished decision of the Appeals Court. Leahy v. Leahy, 72 Mass. App. Ct. 1115 (2008) (table of unpublished decisions). The board determined, and the respondent does not contest, that he is precluded by principles of collateral estoppel from re-litigating the Probate and Family

Court judges's findings, as affirmed by the Appeals Court. See Bar Counsel v. Board of Bar Overseers, 420 Mass. 6 (1995).

i. Contempt of court. During the pendency of the respondent's divorce proceedings, the Probate and Family Court judge entered a series of orders governing the couple's affairs pending the outcome of their divorce action. As relevant here, these orders temporarily awarded to the respondent's wife sole legal and physical custody of the couple's school-age children; established a visitation schedule for each spouse's use of the vacation home in Maine with their children; required the respondent to make certain payments to his spouse;¹ and sequestered probable trial witnesses.

To varying extent, the respondent knowingly violated each of the above orders. He facilitated his daughters' move from the wife's home to his own apartment and refused requests by his wife and local police to return the daughters to the wife's custody, took his elder daughter on a trip to visit college campuses, and enrolled his son in religious education classes in Maine.² He

¹ Among other things, the respondent was directed to pay weekly support to his wife, one half of certain of the children's uninsured medical expenses and certain sums toward the interest on the couple's home equity line of credit.

² The respondent's elder daughter had recently been diagnosed with a serious health problem, a diagnosis which the Hearing Officer found that the respondent had not fully acknowledged. Further, in the words of the respondent's treating psychologist, who was credited by the Hearing Officer, the respondent had a "determined fixed ideation that his children,"

interfered with his wife's use of the Maine home by, among other things, changing the locks on the property. He failed to meet, in part, certain of his financial obligations to his wife. And, finally, he gave a potential trial witness a partial transcript of a guardian ad litem's trial testimony.

The hearing officer's findings, however, also disclose that aside from his violation of the custody order, many of the respondent's infractions were minor. He timely paid the vast majority of his financial commitments to his wife and children;³ his attorney did not call the potential witness to testify and the Hearing Officer found that he had no intent to influence likely trial testimony; and his enrollment of his son in religious education classes was consistent with the couple's prior practice. Accordingly, the Hearing Officer emphasized that the "length of the suspension [he recommended] turn[ed] primarily on the contempts" related to the temporary custody order.

ii. Misrepresentations to the court and the children's guardian ad litem. In a sworn affidavit filed with the Probate and Family Court on December 6, 2004, the respondent falsely

particularly his daughters, "were in a dangerous . . . environment" (ellipses in original), put at continual risk by his wife's parenting choices.

³ For example, the Hearing Officer found that his arrears on spousal support payments over the course of two years of litigation amounted to less than 1% of his total \$200,000 support obligation over that same period.

suggested that his wife was mentally ill, suffering specific named conditions. The respondent made similar allegations to the children's guardian ad litem. The respondent's wife has never been diagnosed with these conditions. The respondent asserted also that he had removed a gun from the family home out of concern for his wife's safety, an assertion which the judge found to be false. The Probate and Family Court judge awarded attorney's fees to the respondent's wife, relying in part on the judge's findings that the respondent had made false allegations concerning her mental health.

Subsequently, in a post-judgment proceeding pursuant to G. L. c. 209A, a different Probate and Family Court judge described the respondent's exaggerated allegations as amounting to "an attack on [his wife's] mental well-being through pleadings and affidavits submitted in this Court and in the Superior Court. His affidavits submitted to this Court have become so outrageous that there is a current Order that Mr. Leahy shall be required to submit all potential filings to the Registrar for approval prior to such documents being filed." Leahy v. Leahy, 74 Mass. App. Ct. 1114, 2009 WL 1492249, *1 n.4 (2009) (table of unpublished decisions) (quoting findings of the trial judge).

iii. Prior proceedings. The respondent was admitted to the bar of the Commonwealth in 1983. Bar Counsel filed a petition for discipline on September 1, 2009, and evidentiary hearings

were held on June 4 and July 1, 2010.

Relying largely on findings made by the Probate and Family Court judge, the Hearing Officer concluded that the respondent had violated Mass. R. Prof. C. 3.4(c) (knowing disobedience of an obligation under the rules of a tribunal), 8.4(d) (conduct that is prejudicial to the administration of justice), and 8.4(h) (conduct that adversely reflects on his or her fitness to practice law), through his repeated and knowing violations of the Probate and Family Court judge's orders. The Hearing Officer found also that the respondent's false allegations and affidavits violated Mass. R. Prof. C. 3.3(a)(1) (false statements of material fact or law to a tribunal) and 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), 8.4(d) (conduct that is prejudicial to the administration of justice) and 8.4(h) (conduct that adversely reflects on his or her fitness to practice law).

The Board of Bar Overseers adopted the Hearing Officer's findings of fact and conclusions of law, but rejected his recommended sanction of a one-year suspension with six-months stayed. The Board recommended instead that the respondent be sanctioned by a one year suspension, fully stayed for a period of two years subject to conditions.⁴ Bar counsel contests the

⁴ The stay would be conditional on the respondent's continued psychiatric treatment and his compliance with all orders related to his divorce or collateral proceedings.

propriety of this recommended sentence.

2. Appropriate sanction. The board's recommended sanction merits substantial deference. See Matter of Griffith, 440 Mass. 500, 507 (2003). Nonetheless, I "must ultimately decide every case 'on its own merits such that every offending attorney . . . receives the disposition most appropriate in the circumstances.'" Matter of Lupo, 447 Mass. 345, 356 (2006), quoting Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984). Here, were I to adopt the board's recommendation, the respondent would be unlikely to serve a single day of his suspension. For that reason, I conclude that the board's recommended sanction is "markedly disparate" from the sanctions imposed on other attorneys who have committed comparable violations. See Matter of Goldberg, 434 Mass. 1022, 1023 (2001), and cases cited. I therefore decline to impose that sanction and instead order that the respondent be suspended from the practice of law for a period of two months.

The case at bar presents atypical facts, and neither party has directed me to closely analogous precedent. Some guidance, however, is provided by prior cases involving attorneys who "engaged in self-destructive conduct, but only with respect to [their spouses] and the divorce process." Matter of Ring, 427 Mass. 186, 186 (1998) (Ring).

In Ring, supra at 186-188, the respondent transferred almost

half-a-million dollars in marital assets out of the United States, and then refused to pay his wife court-ordered support, costs and fees in the amount of \$140,000. He repeatedly disobeyed court orders, resulting in at least seven separate adjudications of contempt, issuance of three warrants for his arrest and two incarcerations. He complied with his obligations only after he was incarcerated. Id. at 192. Despite some misgivings to the effect that the proposed sanction was too mild, the court acceded to the board's recommendation of a three-month suspension, considering in mitigation also that the attorney was clinically depressed on account of the break-up of his thirty-five year marriage. Id. at 192-193. The same three-month sanction was imposed in Matter of Kersey, 432 Mass. 1020 (2000) (Kersey), a case involving an attorney's willful and prolonged non-compliance with the asset division orders of the Vermont Family Court, which had resulted in the issuance in Vermont of a warrant for the attorney's arrest.

We have imposed suspensions of similar length where attorneys have made misrepresentations to the Probate and Family Court in the course of their own divorce and child custody proceedings. See, e.g., Matter of Angwafo, 453 Mass. 28, 37, 39 (2009) (attorney failed to disclose bank accounts, but failure did not amount to a misrepresentation, and there were significant mitigating factors; suspension of one month); Matter of Finnerty,

418 Mass. 821, 830 (1994) (attorney hid substantial assets in divorce proceeding; suspension for six months); Matter of Kilkenney, 26 Mass. Att'y Disc. Reports 288, 290 (2010) (on three occasions, attorney misrepresented her assets to the Probate and Family Court during contested divorce proceeding by failing to disclose substantial increase in income; suspension for five months).

Common to each of the above cases, however, and generally absent from this case, is the presence of any evident financial motive for the attorney's misconduct. In Ring, supra at 192, "[t]he attorney's recalcitrance concerned money; it was not, for example, an emotional reaction to an order concerning custody of a child." Similarly, in Kersey, supra, the attorney failed to turn over certain property including stock certificates that had been apportioned to his spouse. In Matter of Finnerty, supra at 829, and Matter of Angwafo, supra, the respondents misstated their financial assets in documents filed with the Probate and Family Court.

Here, in contrast, the most substantial of the respondent's violations formed part of an attempt to obtain custody of his children. Such infractions, motivated in substantial part by deep disagreements with his wife over his eldest daughter's healthcare and educational needs, appear a poor predictor of future professional misconduct, particularly as regards client

matters. Cf. Matter of Alter, 389 Mass. 153, 156 (1983) ("factor [in determining appropriate discipline] is the effect upon . . . the public").

Further, as the Hearing Officer noted, the respondent's misrepresentations did not relate to "a factual matter unalloyed by subjective opinion." Rather, the respondent's contentions as to his wife's mental health, while unfounded, were as much opinion as fact. This stands in contrast to the false testimony offered at a criminal trial by the attorney in Matter of Balliro, 453 Mass. 75, 88 (2009), who received a six-month suspension notwithstanding the presence of "unique and compelling mitigating circumstances."⁵

Nonetheless, as we have noted, "[a]n effective judicial system depends on the honesty and integrity of lawyers who appear in their tribunals," and "we cannot approve of any practice in which an attorney misleads a court. Were we to condone such conduct by an attorney, whether as a litigant or as counsel, the integrity of the judicial process would be vitiated." Matter of Finnerty, 418 Mass. 821, 829 (1994) (internal quotations and citations omitted). The respondent's repeated violation of court

⁵ The attorney in Matter of Balliro, 453 Mass. 75, 76-77 (2009), had been assaulted by her boy friend, but did not wish to press charges. When police persisted in their investigation, she fabricated a story to account for her injuries. Id. at 77. She repeated a variant of this story to multiple individuals (attorneys and law enforcement officials), and then testified to her fabrication under oath in open court. Id. at 78.

orders and the misrepresentations he made to the court, whatever their motivation, reflect a troubling disregard for the court, an institution of which he is an officer. The respondent has not brought to my attention a single case in which violations of the nature at issue here have resulted in something less than a suspension.

Further, I consider in aggravation that the respondent failed to acknowledge the wrongfulness of much of his conduct, Matter of Eisenhauer, 426 Mass. 448, 456 (1998), and that each form of misconduct -- dishonesty to the tribunal and failure to comply with its orders -- compounds the other.⁶ In re Hrones, 457 Mass. 844, 855 (2010).

Although I am cognizant that the board's recommendation "is entitled to substantial deference," In re Finn, 433 Mass. 418, 423 (2001), quoting Matter of Doyle, 429 Mass. 1013, 1013 (1999), the sanction recommended by the board would not require the

⁶ The respondent emphasizes, in further mitigation, testimony that he acted under unusual stressors that were caused either by an adjustment disorder or by post-traumatic stress disorder. Although I consider this as a mitigating factor, its impact is diluted by the Hearing Officer's finding that the respondent failed to accept responsibility for his actions or acknowledge them as ethically improper. Contrast Matter of Balliro, 453 Mass. 75, 88 (2009) ("because the respondent has accepted responsibility for her actions and has received psychological treatment, she is highly unlikely to breach her ethical duties again").

respondent to serve even a single day of his suspension.⁷ That result would be unprecedented for an attorney found to have made misrepresentations to a court, and to have defied the orders of a court, regardless of the context out of which such misconduct arose. The respondent is not entitled to a free pass simply because "the matter about which [h]e testified falsely was a private one that arose in the context of a purely personal relationship." Matter of Balliro, supra at 88,

Attorneys who have acted improperly in the course of their own divorce and child custody proceedings have generally been suspended for a period of three or more months. See Ring, supra (three months); Kersey, supra (three months); Matter of Finnerty, supra (six months); Matter of Kilkenny, supra (five months). However, a substantially shorter suspension may be justified in cases involving substantial mitigating factors. See Matter of Angwafo, supra (one month).

Unlike the attorneys in Matter of Finnerty, supra and Matter of Kilkenny, supra, the respondent did not make misrepresentations to the court in hope of pecuniary gain, or solely out of spite toward his estranged wife. Rather, his misconduct resulted, at least in part, from his (misplaced) concern for his children's well being; a concern that was

⁷ The respondent is not subject to a temporary or administrative order of suspension.

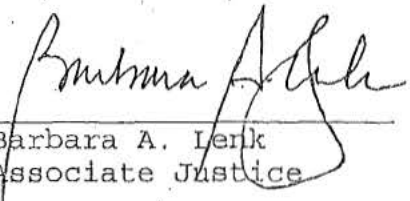
exacerbated by the respondent's unstable psychological condition and his difficulty dealing with his eldest daughter's medical condition. Further, his misrepresentations were "not comparable to the complex conniving seen in Matter of Finnerty, supra," and analogous cases, see Matter of Angwafo, supra, and his non-compliance with court orders was less sustained and obdurate than that at issue in Ring, supra, and Kersey, supra. The respondent's sanction ought to reflect these distinctions, and a suspension of less than three months is therefore appropriate.

Nor, however, would it be appropriate to impose upon the respondent the same one month suspension imposed in Matter of Angwafo, supra. Not only were the mitigating circumstances in that case unique and "powerful," id. at 38, but the case involved only a failure to disclose material information, not, as here, a "knowing[] . . . false statement of material fact." Id. at 34, quoting Mass. R. Prof. C. 3.3(a)(1). I therefore impose a term of suspension between those imposed in Ring, supra, and Kersey, supra, on the one hand, and Matter of Angwafo, supra, on the other: a suspension of two-months.⁸

⁸ The stay imposed by the board was conditional on the respondent's continued psychiatric treatment and his continued compliance with court orders related to his divorce. Proceedings in this matter have now been under way for more than three years, and there is no allegation on the record that the respondent has failed to attend treatment sessions or that he has continued to violate court orders. In any event, there are more direct methods of ensuring that the respondent's psychological state does not interfere with his ability to represent clients. See

4. Disposition. An order shall enter suspending the respondent from the practice of law in the Commonwealth for two months.

By the Court



Barbara A. Lenk
Associate Justice

Entered: August 2, 2012