IN RE: MICHAEL W. BURNBAUM

NO. BD-2011-121

S.J.C. Order of Term Suspension entered by Justice Lenk on December 7, 2012.[1]

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[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-2011-121

IN RE: Michael W. Burnbaum

MEMORANDUM OF DECISION

This matter came before me on a notice of conviction and petition for reciprocal discipline by bar counsel pursuant to S.J.C. Rule 4:01, § 16, recommending that the respondent be reciprocally suspended from the practice of law in the Commonwealth. The respondent resigned from the practice of law in Florida in 1999, having pleaded guilty to a Federal drug charge. In violation of both S.J.C. Rule 4:01, §§ 12(8) and 16(6), the respondent neither notified bar counsel nor the Board of Bar Overseers (board) of his felony conviction or of his subsequent resignation from the Florida Bar.

The respondent does not contest the validity of bar counsel's allegations but, rather, asserts that reciprocal discipline is unwarranted given the unique circumstances of his case. The respondent asserts in the alternative that, if reciprocal discipline is warranted, any ensuing sanction should

be made retroactive to November 12, 1999, the date of acceptance of his resignation from the Florida Bar by the Supreme Court of Florida. Accordingly, the sole issue before me is the sanction, if any, to be imposed.

1. Background. The respondent, an attorney duly admitted to the practice of law in the Commonwealth in 1977, pleaded guilty to conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 841, in the United States District Court for the Southern District of Florida. On June 25, 1999, the respondent was sentenced to 105 months incarceration, followed by supervised release for four years. The respondent subsequently resigned from the Florida Bar during the pendency of a disciplinary proceeding against him, with leave to apply for readmission after five years. In violation of both S.J.C. Rule 4:01, §§ 412(8)and 16(6), the respondent failed to notify bar counsel of his conviction or subsequent resignation from the Florida Bar.

On November 23, 2011, after learning of the respondent's prior conviction and disciplinary resignation, bar counsel filed a notice of conviction and petition for reciprocal discipline. S.J.C. Rule 4:01, § 16(6) requires that, in imposing reciprocal discipline, the court is to act "[u]pon receipt of a certified copy of an order" that a lawyer has been suspended from the

practice of law in another jurisdiction. Here, however, due to the document retention policies of the Supreme Court of Florida, and the length of time that has passed between the respondent's disciplinary resignation and bar counsel's filing of the instant petition, all certified copies of the Florida disciplinary order were destroyed in the ordinary course of business. Therefore, along with his petition for discipline, bar counsel filed a motion requesting leave to proceed with a substitute disciplinary order -- to wit, a copy of the order as certified by the Florida Bar.

On May 4, 2012, I allowed bar counsel's motion, concluding that there was but a small risk of prejudice to the respondent from use of the records of the Florida Bar. Additionally, I determined that, had the respondent promptly notified bar counsel of his conviction and suspension as required by S.J.C. Rule 4:01, §§ 12(8) and 16(6), the court would not have been faced with the issue presented by bar counsel's motion, and that the respondent "should not receive any benefit from his failure to comply with [the rules]."

On May 23, 2012, at the request of bar counsel, the board was ordered to give notice to the respondent directing him to inform the court why imposition of reciprocal discipline would be unwarranted in this case. See S.J.C. Rule 4:01, § 16(1). The

respondent's reply was timely received.

Therein, the respondent argues that the imposition of reciprocal discipline is unwarranted because the respondent has already taken a "self-imposed" ten-year leave from the practice of law, and thus has not "enjoy[ed] or receiv[ed] any benefit by not reporting his conviction"; that he failed to notify bar counsel and the board of his conviction because "he simply did not know he had to"; and that it would be "fundamentally unfair" to impose reciprocal discipline on him "at this late stage." The respondent argues further that, if reciprocal discipline is warranted, any sanction should be made retroactive to November 12, 1999, the date of the respondent's resignation from the Florida Bar.

For the reasons set forth below, I find the respondent's arguments unpersuasive. Rather, I conclude that a three-year period of suspension from the practice of law in Massachusetts, effective upon issuance of the order, is appropriate.

2. Appropriate sanction. In determining the appropriate sanction to be imposed in a petition for reciprocal discipline, the undertaking involves more than replicating the sanction imposed in the foreign jurisdiction. I "may impose the identical discipline unless (a) imposition of the same discipline would result in grave injustice; (b) the misconduct established does

not justify the same discipline in this Commonwealth; or (c) the misconduct established is not adequately sanctioned by the same discipline in this Commonwealth." S.J.C. Rule 4:01, § 16(3). Thus, the task is "to mete out the sanction appropriate for this jurisdiction," In re Steinberg, 448 Mass. 1024, 1025 (2007), so that the sanction "is not markedly disparate from that ordered in comparable cases," In re Kersey, 444 Mass. 65, 70 (2005), even if it "exceeds, equals, or falls short of the discipline imposed in [the other] jurisdiction." In re Watt, 430 Mass. 232, 234 (1999).

The most consistently imposed discipline for attorneys who have been sanctioned in the Commonwealth for narcotic-related offenses has been a three-year suspension from the practice of law. See, e.g., In re Jean, 18 Mass. Att'y Disc. R. 331, 341 (2002) (suspending attorney for three years for two drug-related felony convictions); In re Siniscalchi, 9 Mass. Att'y Disc. R. 304, 305 (1993) (suspending attorney for three years for possessing a large quantity of marijuana); In re Crowley, 6 Mass. Att'y Disc. R. 75, 76 (1989) (suspending attorney for three years for distribution of cocaine).[1] Even so, bar counsel contends

[1] Some older disciplinary sanctions for narcotic-related offenses resulted in disbarment or indefinite suspension. See In re DiPersia, 4 Mass. Att'y Disc. R. 27, 27 (1985) (disbarring attorney for conspiracy to possess marijuana); In re Weinstein, 4 Mass. Att'y Disc. R. 152, 153 (1985) (suspending attorney

that, because the discipline imposed in Florida was a disciplinary resignation, the respondent should be similarly sanctioned by disciplinary resignation in Massachusetts, which would result, at a minimum, in an eight-year suspension of the respondent from the practice of law in the Commonwealth. See S.J.C. Rule 4:01, § 18(a)(2) (lawyer who has resigned "may not petition for reinstatement until three months prior to the expiration of at least eight years from the effective date of the . . . resignation").

Insofar as the respondent failed to notify bar counsel of his Florida conviction and ensuing suspension, the respondent's conduct is more egregious than in cases where attorneys were sanctioned for drug convictions alone. I nevertheless decline to impose the sanction suggested by bar counsel. Our disciplinary cases do not comport with bar counsel's suggestion that, in reciprocally sanctioning the respondent, I am simply to impose the same type of sanction as that imposed in Florida (i.e., resignation) without considering the severity of the sanction appropriate for Massachusetts. See In re Basbanes, 12 Mass Att'y

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indefinitely for possession of cocaine with intent to distribute). However, the more recent trend appears to be a three-year suspension. See In re Jean, 18 Mass. Att'y Disc. R. 331, 341 (2002) ("A three year suspension, without retroactive effect, appears to be the sanction most consistent with our precedent . . . ."); In re Siniscalchi, 9 Mass. Att'y Disc. R. 304, 305 (1993).

Disc. R. 9, 10 (1996) (declining to disbar attorney reciprocally as requested by bar counsel and, instead, suspending attorney for one year because such suspension was consistent with sanction typically imposed in Commonwealth for such conduct); In re Choroszej, 9 Mass. Att'y Disc. R. 64, 64 (1993) (declining to suspend attorney reciprocally as requested by bar counsel and, instead, publicly censuring attorney). See also In re Watt, 1999 Mass. LEXIS 301, *2-3 (Mass. May 26, 1999) ("In reciprocal discipline cases . . ., we accord deference to the judgment of a sister State, but we look to Massachusetts law in determining the appropriate sanction, if any, to be imposed").[2]

Thus, in imposing the sanction most appropriate in Massachusetts, I am persuaded that a three-year suspension befits the respondent, his conduct, and our disciplinary precedent. See In re Jean, supra at 341; In re Siniscalchi, supra at 305; In re

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[2] Although there are a handful of reciprocal discipline cases in which reciprocal resignation was imposed on an attorney as requested by bar counsel, such sanctions appear to be limited to instances where the attorney either: (1) agreed to reciprocal resignation, or (2) failed to respond to bar counsel's petition for reciprocal resignation. See In Re Tyler, 22 Mass. Att'y Disc. R. 782, 783 (2006) (imposing reciprocal resignation as requested by bar counsel where attorney failed to respond to bar counsel's petition and failed to appear at the disciplinary hearing); In re Tuttle, 20 Mass. Att'y Disc. R. 521, 521 (2004) (imposing reciprocal resignation on attorney who agreed to the sanction). Here, however, the respondent has not agreed to reciprocal resignation and has taken an active role in this disciplinary proceeding.

Crowley, supra at 76. I am unpersuaded by the respondent's contention that reciprocal punishment is unwarranted in this instance.

The respondent first argues that reciprocal discipline is unwarranted because he has already taken a "self-imposed" ten year leave from the practice of law and has thus not "enjoy[ed] or receiv[ed] any benefit by not reporting his conviction." However, the respondent's claims are not supported by the record. In his June 22, 2012, affidavit, the respondent states that he was employed from 2006-2008 by a New Jersey law firm preparing internal memoranda regarding "issues of [F]ederal law." Then, from 2008-2010, he was employed as a "document reviewer" by various New York law firms. Additionally, in his annual registration statements filed with the board, the respondent has maintained his "active" status continuously since 1999.

Moreover, numerous documents reveal that the respondent has benefitted by not reporting his conviction to the board. Indeed, relying on a Massachusetts certificate of admission and good standing, in April, 2011, the respondent petitioned and was admitted to represent a defendant pro hac vice in the United States District Court for the Southern District of New York. See Docket, United States v. Rothschild, #7:11-cr-00345-KMK (S.D.N.Y.

Apr. 22, 2011).[3] The respondent used the address of his Massachusetts law office for sending and receiving correspondence relative to that matter.

Second, the respondent argues that he failed to notify the board of his conviction and suspension because "he simply did not know he had to." The requirement to provide such notification is clearly set forth in the rules of professional conduct. See S.J.C. Rule 4:01, § 12(8) (requiring attorneys to notify bar counsel within ten days if convicted of crime); S.J.C. Rule 4:01, § 16(6) (requiring attorneys to notify bar counsel and board within ten days if disciplined in another jurisdiction). Moreover, it has long been held in the Commonwealth that "ignorance of the law is no defense," Commonwealth v. Everson, 140 Mass. 292, 295 (1885), a doctrine with plain application here. See Borman v. Borman, 378 Mass. 775, 787 (1979) (attorneys "are expected to know and comply" with their professional obligations).

Third, the respondent argues that it would be "fundamentally unfair" to discipline him reciprocally at "this late stage," and that the court "would simply be punishing the [r]espondent solely

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[3] This document is a matter of public record and I am entitled to take judicial notice of it. See Care & Protection of Zita, 455 Mass. 272, 276 n.11 (2009).

for his failure to self-report" his conviction and subsequent discipline in Florida. This argument is unavailing. The respondent's misconduct warranting sanction includes both failing to report his conviction and consequent disciplinary resignation from the Florida bar, in violation of S.J.C. Rule 4:01, §§ 12(8) and 16(6), and his felony conviction for conspiracy to possess cocaine with the intent to distribute, in violation of 21 U.S.C. § 841(a). Felony drug convictions have long provided an independent and sufficient basis for disciplinary suspension in the Commonwealth. See In re Crowley, supra at 76 (imposing three-year suspension solely due to respondent's felony drug-related conviction).

Lastly, the respondent argues that, if reciprocal discipline is imposed, "it should be 'true' reciprocal discipline, meaning discipline that mirrors that imposed by the Florida Bar" -- to wit, resignation with a five year reinstatement period retroactive to November 12, 1999. As stated, however, in determining the appropriate sanction to be imposed, the "task is not simply to replicate the sanction imposed" in the other jurisdiction, but "to mete out the sanction appropriate in this jurisdiction." In re Steinberg, supra at 1025.

Although it is not uncommon for suspensions based on felony

drug convictions to be made retroactive to either the date of temporary suspension or conviction, see, e.g., In re Siniscalchi, supra at 304; In re Quirk, 7 Mass. Att'y Discipline R. 241, 242 (1991), suspensions for such convictions may also be made effective upon issuance of the order if there is reason for so doing. See In re Jean, supra at 341 (making attorney's three-year suspension for felony drug offense effective on issuance of order and declining to impose retroactive suspension because of attorney's repeated failure to cooperate with bar counsel during disciplinary process).

In the present case, there is ample reason for declining to make the respondent's suspension retroactive.[4] Our disciplinary cases have frequently declined to do so where, as here, an attorney failed to notify the board or bar counsel of the disciplinary sanction imposed in a foreign jurisdiction. In In re Sheridan, 449 Mass. 1005, 1006 (2007), the respondent, a lawyer licensed to practice law in both New Hampshire and

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[4] I note also that retroactive suspensions for drug-related felonies are typically imposed only when the board recommends that a suspension be made retroactive. See In re Horan, 18 Mass. Att'y Disc. R. 323, 324 (2002) (adopting board's recommendation that suspension be made retroactive to prior disciplinary date); In re Siniscalchi, 9 Mass. Att'y Disc. R. at 304 (adopting board's recommendation that reciprocal discipline be made retroactive to date of conviction). Here, neither the board nor bar counsel has recommended that the respondent's suspension be made retroactive.

Massachusetts, was suspended by the New Hampshire Supreme Court for eighteen months for repeated misconduct. In violation of S.J.C. Rule 4:01, § 16(6), the attorney failed to inform the board or bar counsel of his suspension. After learning of the suspension, bar counsel filed a petition for reciprocal discipline. Id. Although the attorney agreed that reciprocal discipline was warranted, he argued that the sanction should be made retroactive to the date of a former suspension. Id. at 1007.

In affirming the single justice's decision declining to make the suspension retroactive, the Supreme Judicial Court determined that the attorney's failure to comply with S.J.C. Rule 4:01, § 16(6) was dispositive. "[T]he single justice properly declined to make [the attorney's] suspension retroactive because [the attorney], in violation of S.J.C. Rule 4:01, § 16(6), failed to notify bar counsel or the board of any of the disciplinary orders entered against him by the Supreme Court of New Hampshire." Id. at 1008. See also In re Cronin, 23 Mass. Att'y Disc. R. 90, 91 (2007) (no retroactivity where lawyer failed to report discipline pursuant to S.J.C. Rule 4:01, § 16(6)); In re Steinberg, 22 Mass. Att'y Disc. R. 745, 756 (2006) (same); In re Hager, 19 Mass. Att'y Disc. R. 192, 192 (2003) (same); In re Sussman, 18 Mass. Att'y Disc. R. 518, 519 (2002) (same); In re Albiani, 14 Mass.

Att'y Disc. R. 2, 4 (1998) (same). Because the respondent in the present matter similarly -- in fact, admittedly -- failed to comply with S.J.C. Rule 4:01, § 16(6), and because the respondent has indeed benefitted from his failure timely to provide such notification, I decline to make the respondent's three-year suspension retroactive.[5]

3. Disposition. An order shall enter suspending the respondent from the practice of law in the Commonwealth for three years, effective on issuance of the order.

By the Court.

Barbara A. Lenk
Associate Justice

Entered: December 7, 2012

[5] Moreover, adoption of the respondent's argument that reciprocal punishment should be made retroactive to the date of resignation would create a disincentive for lawyers to report their extra-jurisdictional discipline in the hopes that such discipline would go undiscovered by bar counsel for long enough such that, once discovered and a retroactive sanction imposed, the non-reporting lawyer would essentially receive no reciprocal discipline for the misconduct.