IN RE: CLAUDE DAVID GRAYER

NO. BD-2018-024

S.J.C. Order of Term Suspension entered by Justice Gaziano on October 16, 2018, with an effective date of November 15, 2018.[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-2018-024

IN RE: CLAUDE D. DAVID GRAYER a/k/a C. DAVID GRAYER

MEMORANDUM OF DECISION

This matter came before me on an information and recommendation by the Board of Bar Oversees (board) that the respondent be suspended from the practice of law in the Commonwealth for a period of one year and one day, for numerous violations of the rules of professional conduct involving four different clouts. Bar counsel's petition for discipline alleged, and the board found, that the respondent engaged in multiple instances of misconduct with respect to these clients. Among other things, the respondent's misconduct included lack of competence and diligence; negligence that resulted in harm to his clients; knowing failure to comply with a subpoena and an order of the court; failure to account for the fee earned; misappropriation by failure to return an unearned fee; failure to communicate in writing the scope of representation and the

basis and rate of the fee the client would be charged; and failure to cooperate with bar counsel. See Mass. R. Prof. C. 1.1 (competence); 1.2(a) (seek client's lawful objectives by reasonably available means), 1.3 (diligence); 1.4(a) (communication); 1.5(b((1) (scope of representation and fees); 1.15(d) (safekeeping of property); 1.6(d) (steps to be taken upon declining or termination of representation); 3.4(c) (fairness to opposing party and counsel); and 8.4(d) (conduct prejudicial to the administration of justice) and (h) (conduct that adversely reflects on attorney's fitness to practice law).

The respondent raises a number of challenges to the board's findings and rulings. Among other things, he contends that the board's subsidiary findings of fact are not supported by substantial evidence. For the reasons explained below, I conclude that the appropriate sanction is respondent's suspension from the practice of law in the Commonwealth for one year and one day.

1. Facts. I summarize the facts adopted by the board supplemented by uncontested facts contained in the record. The respondent was admitted to the Massachusetts bar on April 25, 1973.

The misconduct at issue here involved the respondent's neglect of clients, Mass. R. Prof. C. 1.1, 1.2 (a), 1.3, and 1.4 (a); failure to timely comply with a subpoena and court orders

in connection with a small claims case filed in the Boston Municipal Court, Mass. R. Prof. C. 3.4 (c), 8.4 (d), and 8.4 (h); failure to explain the basis of his fee in writing and to return the unearned portion of a fee, Mass. R. Prof. C. 1.5 (b) (1), 1.16 (d); and failure to cooperate with an investigation by bar counsel or provide requested information or documents, Mass. R. Prof. C. 8.4 (g).

a. Shumbusho matter. In September, 2014, the respondent agreed to represent Emmanuel Shumbusho, who was charged in the Quincy District Court with violating a restraining order. On or before October 3, 2014, Shumbusho paid the respondent a total of $3,000. The respondent did not provide Shumbusho a written fee agreement, or communicate the scope of representation or the basis or rate of the fee.

The case was scheduled for trial on October 3, 2014. That day, Shumbusho drove the respondent to the District Court and they discussed the case during the trip. The respondent told Shumbusho that he could resolve the case with a continuance without a finding (CWOF) disposition. Shumbuso, who was not a citizen of the United States, expressed concerns about his immigration status. The respondent did not address the immigration consequences of the disposition. Instead, he urged Shumbusho to admit to sufficient facts and accept a CWOF

disposition. The respondent assured Shumbusho that the matter would go away if he stayed away from the victim.

During the plea colloquy, the judge provided Shumbusho with an immigration warning as mandated by G. L. c. 278, § 79D. The respondent informed Shumbusho that it was "okay," and explained that the judge was using boilerplate language read to everybody. Shumbusho followed the respondent's advice and admitted to sufficient facts.

In July, 2015, Immigration Customs Enforcement arrested Shumbusho on the basis of his admission to sufficient facts for violating a restraining order. Shumbusho was detained in ICE custody for a period of six months. Shumbuso retained post-conviction counsel to vacate his admission to sufficient facts based on ineffective assistance of plea counsel. The respondent did not cooperate with post-conviction counsel and, when reached, gave inconsistent descriptions of the advice he provided to his client.

The judge denied Shumbuso's motion to vacate the plea. The judge noted that "The defendant has not provided an affidavit from his plea counsel addressing counsel's alleged strikingly deficient advice in light of Padilla and Clarke which predate defendant's plea."

Shumbuso retained a second post-conviction attorney. That lawyer subpoenaed the respondent to testify at a hearing on a

motion to vacate the admission to sufficient facts. The respondent did not appear in court notwithstanding a telephone conversation with post-conviction counsel where counsel confirmed the date of the hearing, and urged the respondent to inform her if he was unavailable. The respondent appeared in court the next day purporting to comply with a misdated subpoena that had been duly superseded.

The judge allowed Shumbusho's motion to vacate his guilty plea based on ineffective assistance of counsel. The judge credited Shumbusho's testimony "bolstered by the failure of plea counsel to appear." In so holding, the judge found "It has been clearly demonstrated that plea counsel is uncooperative. Plea counsel failed to attend the hearing. The court credits the detailed affidavit of efforts made to obtain cooperation and of plea counsel's failure to cooperate."

b. Henderson matter. In October, 2016, a former client, Samuel Henderson, obtained a default judgment in the amount of $7,150 against the respondent in a Boston Municipal Court small claims case. On October 4, 2016, the court entered an order requiring the respondent to appear for a payment review on November 4, 2016 unless payment in full was made on or before November 3, 2016. The respondent did not make any payments and failed to appear in court on November 4. As a result, the court issued a capias against the respondent.

Bar counsel notified the respondent of the existence of the capias four separate times during December, 2015 and January, 2016. On January 17, 2017, the respondent filed a motion to remove the default judgment, but neglected to state the grounds for relief. On February 23, 2017, the court held a hearing and denied the respondent's motion to remove the default judgment. The court found that the respondent did not produce "any credible testimony" regarding his two failures to appear.

c. LaFlamme matter. In April, 2016, the respondent agreed to represent Sarah LaFlamme in her uncontested divorce. LaFlamme paid the respondent $700. The respondent did not, however, provide a written description of the scope of representation, or the basis of his fee. On April 14, 2016, the respondent filed a joint petition for divorce, and an affidavit of irretrievable breakdown, which had been previously prepared by LaFlamme and her spouse. The petition was internally inconsistent; it requested that the parties' separation agreement be merged into the judgment, and also requested that the separation agreement not be merged and survive as an independent contract.

LaFlamme's spouse was on active military duty stationed in Hawaii. The respondent neglected to obtain from the spouse, who was cooperative, an original signed financial statement and an affidavit of inability to attend the hearing on the divorce.

The respondent also did not file a motion to waive the spouse's attendance.

In early June, 2016, the respondent instructed the client to appear at court for a hearing to finalize the divorce. On June 9, 2016, LaFlamme, accompanied by her Rabbi, met the respondent in the Probate and Family Court. The respondent did not provide LaFlamme clear answers to her questions about what was happening that day, whether he has filed all the necessary pleadings, and whether the divorce would be finalized that day. After excusing himself to file "something," in the case, the respondent returned and reported that the matter would not be heard that day due to court congestion. He also informed the client that the divorce might be contested, despite LaFlamme's understanding that her spouse "wanted out" of the marriage.

Eventually, on July 15, 2016, LaFlamme went to the Probate Court and learned that the respondent had not filed any pleadings on June 9, and that the case was not listed on the docket for June 9. LaFlamme, acting pro se, was able to obtain a judgment of divose nisi without the respondent's assistance.

d. Moiten matter. On January 26, 2015, the respondent agreed to represent Orville Moiten in a request for a restraining order and a criminal case pending in the Dorchester Division of the Municipal Court. Moiten gave the respondent a cashier's check in the amount of $2,500 and an additional

"consultation" fee of $300 in cash. The respondent did not inform Moiten in writing about the scope of his representation, or the terms of the fee. The respondent filed his appearance on April 10, 2015, and represented Moiten in court on June 7, 2015. Thereafter, the respondent informed Moiten that he would reschedule the trial, and demanded further payment of $2,500. Moiten discharged the respondent before the trial date. Moiten requested a bill, expecting to receive a refund of a portion of the $2,500 because the respondent had not done everything he thought was covered by the original fee. The respondent did not account for his time or services, and did not refund any advance payment that had not been earned.

e. Failure to cooperate. On June 14, 2016, the respondent appeared for a meeting with bar counsel under a subpoena issued by the board due to his failure to respond to requests for information in two matters. Bar counsel requested additional information from the respondent and provided a deadline of July 10, 2016. The respondent did not comply with this request for information. As a result, the court issued an administrative suspension of his license to practice law for failure to cooperate with an investigation.

On September 15, 2016, the respondent filed a compliance affidavit with this court and bar counsel's assent to

reinstatement. This court, on September 20, 2016, reinstated the respondent's license to practice law.

From late November, 2016 through January, 2017, bar counsel requested that the respondent provide a complete copy of his file in the LaFlamme matter within ten days. Bar counsel twice extended the time for the respondent to comply, yet the respondent did not provide the file. A month later, bar counsel sent the respondent a complaint in the Henderson matter, requesting a response within twenty days. The respondent did not respond to the complaint.

2. Discussion. Bar counsel has recommended a suspension for one year and one day. In challenging the board's decision, the respondent raises two issues with the factual findings. First, he argues that the factual findings were not supported by substantial evidence. Second, he argues that the board improperly relied on hearsay evidence. The respondent also maintains that the appropriate sanction, if any, should be a public reprimand or temporary suspension.

a. Standard of review. In deciding the appropriate sanction to impose, the primary consideration "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. 831, 829 (1994). See Matter of Alter, 389 Mass. 153,

156 (1983). The sanction should serve both to deter other attorneys from the same type of conduct and to protect the public. See Matter of Foley, 439 Mass. 324, 333 (2003), citing Matter of Concemi, 422 Mass. 326, 329 (1996). In addition, 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, 405-407 (2011).

b. The board's factual finding. The respondent presents an alternative narrative of the facts, based on his own testimony, and alleges that the board abused its discretion. We uphold subsidiary facts found by the board if supported by substantial evidence. See S.J.C. Rule 4:01 § 8(4). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." Matter of Angwafo, 453 Mass. 28, 34 (2009), quoting from G. L. c. 30A, § 1(6). In the case of disputed testimony, the hearing committee "is the sole judge of credibility and arguments hinging on such determinations generally fall outside the proper scope of our review." Matter of Diviacchi, 475 Mass. 1013, 1018-19 (2016) (internal quotation omitted). See Matter of McBride, 449 Mass. 154, 161-162 (2007) (credibility determinations will not be rejected unless it "can

be said with certainty that a finding was wholly inconsistent with another implicit finding").

Here, the hearing committee adequately explained its reasons from not crediting the respondent's testimony and those reasons are adequately supported by the record. For example, the respondent claimed that he informed Shumbusho that by admitting to sufficient facts and pleading to a CWOF he could be subject to removal from the United States. The hearing committee credited Shumbusho's testimony that he expressed a concern about the immigration consequences of his admission to sufficient facts, and that the respondent advised him to agree to the CWOF and the case would "disappear like it never happened" as long as he stayed away from the victim.

In addition, the respondent asserts error in bar counsel's failure to call LaFlamme as a witness before the hearing committee. Bar counsel explained that LaFlamme did not attend the hearing because she was ill and lived out of state. In her absence, bar counsel relied on documentary evidence and the testimony of LaFlamme's rabbi, who accompanied LaFlamme to court, and overheard critical conversations between the respondent and his client. The respondent has not shown that he was prejudiced by the admission of this evidence. See Matter of

Strauss, 479 Mass. 294, 299 (2018) (proceedings before board and hearing committee need not comply with rules of evidence).[1]

c. Disciplinary sanction. This case presents a combination of different misconducts by the respondent (neglect of two client matters, failure to communicate fee agreements, failure to return the unearned portion of a fee to one client, and failure to comply with court orders in a small claims case). It is difficult to find a comparable disciplinary case. At the same time, we have noted, "[t]he court 'need not endeavor to find perfectly analogous cases.'" Matter of Manoff, 29 Mass. Att'y Disc. R. 421, 425 (2013), quoting Matter of Hurley, 418 Mass. 649, 655 (1994).

A suspension is warranted for misconduct "involving repeated failures to act with reasonable diligence, or when a lawyer has engaged in a pattern of neglect, and the lawyer's misconduct causes serious injury or potentially serious injury to a client or others." Matter of Kane, 13 Mass. Att'y Disc. R. 321, 328 (1997). Matter of Scannell, 21 Mass. Att'y Disc. R. 580 (2005), for example, an attorney was suspended from the practice of law for one year and one day for his neglect of

[1] In the hearing before the Single Justice, counsel for the respondent raised the issue of age discrimination based upon bar counsel's discussions with the respondent suggesting that the respondent wind down his practice. I accept bar counsel's representation that he discuss retirement as a way to settle the matter short of a suspension.

three client matters. The attorney's neglect included a failure to provide competent representation and act with reasonable diligence. In aggravation, the respondent in that case had a history of public and private reprimands.

Similarly, in this matter, the respondent has a history of prior misconduct. See Matter of Grayer, 23 Mass. Att'y Disc. R. 215, 225 (2007).

Given the aggravating circumstances of the respondent's prior disciplinary history, the harm caused to Shumbusho from the respondent's ineffective assistance of counsel, the respondent's repeated failures to abide by court orders, and his failure to cooperate with this investigation, the appropriate sanction is a suspension from the practice of law for one year and one day.

3. Conclusion. Accordingly, an order shall enter suspending the respondent from the practice of law in the Commonwealth for a period of one year and one day.

By the Court,

Frank M. Gaziano
Associate Justice

Entered: October 16, 2018