SJC-12642

IN THE MATTER OF CLAUDE DAVID GRAYER.

December 2, 2019.

Attorney at Law, Disciplinary proceeding, Suspension.

The respondent, Claude David Grayer, appeals from an order of a single justice of this court, acting on an information filed by the Board of Bar Overseers (board), suspending him from the practice of law for one year and a day. We affirm.[1]

1. Background. Bar counsel filed a five-count petition for discipline with the board, alleging the respondent's misconduct in connection with his representation of four clients. That misconduct included failure of competence and diligence; negligence resulting in harm to clients; intentional disobedience of a subpoena and an order of the court; and failure to communicate the scope and basis of his fees, to provide an accounting on request, and to account for or return unearned fees when the representation concluded. The petition also charged that the respondent failed to cooperate with bar counsel's investigation of these matters. After requesting and receiving several extensions of time to answer, the respondent filed an answer on his own behalf.

A hearing committee of the board conducted a two-day evidentiary hearing, at which five witnesses testified and twenty-four exhibits were received in evidence. The hearing

[1] This bar discipline appeal is subject to S.J.C. Rule 2:23 (b), 471 Mass. 1303 (2015). Pursuant to the rule, we dispense with oral argument, and decide the case on the basis of the respondent's preliminary memorandum and other materials filed by the respondent.

committee determined that bar counsel proved the petition's allegations and issued a report recommending that the respondent be suspended for one year and one day. The respondent appealed to the board. The board adopted the hearing committee's findings and its recommendation, and voted to file an information to that effect in the county court.

After a hearing, a single justice accepted the hearing committee's findings, as adopted by the board, and entered an order suspending the respondent from the practice of law for one year and one day. The respondent appeals.

2. Disciplinary violations. The single justice reviewed the record establishing the respondent's misconduct, accepted the hearing committee's role as the "sole judge of the credibility of the testimony presented at the hearing," S.J.C. Rule 4:01, § 8 (5) (a), as appearing in 453 Mass. 1310 (2009), and determined that the board's findings of misconduct were supported by substantial evidence. See Matter of Moran, 479 Mass. 1016, 1017 (2018). On review, we summarize the hearing committee's subsidiary findings of facts concerning each count of the petition, which were adopted by the board.[2] See S.J.C. Rule 4:01, § 8 (6). The hearing committee's ultimate "findings . . . , as adopted by the board, are entitled to deference, although they are not binding on this court." Matter of Ellis, 457 Mass. 413, 415 (2010). We conclude that the respondent's claim that the hearing committee's findings are flawed is without merit. There was no error in the single justice's determination that the respondent violated multiple rules of professional conduct. See Matter of Weiss, 474 Mass. 1001, 1002 (2016).

a. Count one. In 2014, the respondent agreed to represent a client charged with criminal violation of a restraining order. The client paid the respondent a total of $3,000 in connection with the representation. The respondent neither provided the client with a written fee agreement nor explained the basis for his fee in writing.

The client informed the respondent that he was not a citizen of the United States, and expressed his concern that the disposition of the charge could adversely affect his immigration status. The respondent understood the client's concern. The

[2] The board adopted the hearing committee's findings, and its memorandum briefly summarizes those findings.

respondent nonetheless advised the client to admit to sufficient facts to establish violation of the restraining order, and to accept disposition of the case with a continuance without a finding. In the plea colloquy, the judge informed the client of the possible immigration consequences of the plea. When asked, the respondent assured the client that it was "okay," and explained that the judge was using terminology read to everyone. The respondent did not fully explain to the client the potential immigration consequences of the plea that the respondent advised the client to accept. An admission to sufficient facts is considered a conviction under Federal law. See 8 U.S.C. § 1101(a)(48)(A).

In July 2015, the Immigration and Customs Enforcement (ICE) arrested the client due to his admission to sufficient facts for violating the restraining order. The client retained postconviction counsel to vacate the admission to sufficient facts on the ground of ineffective assistance of counsel. See Commonwealth v. Lavrinenko, 473 Mass. 42, 53 (2015). The respondent failed to cooperate with the client and the client's successor counsel, and gave inconsistent descriptions of his communications with and advice to the client. The client's motion initially was denied on the ground that the "defendant has not provided an affidavit from his plea counsel addressing counsel's alleged strikingly deficient advice."

The client's second postconviction attorney subpoenaed the respondent to testify at a hearing to reconsider the denial of the client's motion to vacate the plea. Although the respondent first was served with a subpoena containing an incorrect date, a corrected subpoena was served on the respondent by a constable, in hand, directing him to appear in court on December 14, 2015. Despite service of the corrected subpoena, and despite a telephone call from counsel confirming the hearing date, the respondent did not move to quash the subpoena, and failed to appear in court. Instead, the respondent appeared the following day, purporting to comply with the misdated subpoena. The hearing committee found that the respondent did not want to appear at the December 14 hearing, and that his failure to do so was intentional. The judge allowed the client's motion to vacate the plea, crediting the client's testimony, "bolstered by the failure of plea counsel to cooperate." The judge found that "[i]t 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." The client spent six months in ICE detention before he was released.

On appeal, the respondent contends that he adequately communicated with the client concerning the immigration consequences associated with his admission to sufficient facts. The respondent argues that, in light of his own substantial experience in immigration matters, and the judge's plea colloquy, the hearing committee ought to have credited his testimony rather than that of the client.[3] He also challenges the hearing committee's rejection of his assertion that he informed successor plea counsel that he was unable to attend the hearing on December 14. The hearing committee, however, is the "sole judge of credibility, and arguments hinging on such determinations generally fall outside the proper scope of our review." Matter of McBride, 449 Mass. 154, 161-162 (2007). S.J.C. Rule 4:01, § 8 (5) (a). The hearing committee's credibility determinations "will not be rejected unless it can be said with certainty that the finding was wholly inconsistent with another implicit finding" (quotations and alteration omitted). Matter of Murray, 455 Mass. 872, 880 (2010). See Matter of Finneran, 455 Mass. 722, 730 (2012); S.J.C. Rule 4:01, § 8 (4). We therefore decline to consider those credibility determinations further.

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[3] The respondent also claims that the single justice inaccurately described the advice given to the client. The client testified that the respondent advised him that, if he accepted a continuance without a finding, and stayed away from the victim, "everything will go away after a year. . . . If I did everything I was asked by the court that I was going to be fine," and "everything was going to be 'all right.'" After the plea colloquy, the client testified, he asked the respondent about the immigration warning the judge gave. The client testified that the respondent told him, "Don't worry about it, that's just terminology they use. They usually read that to everybody, that it was like a formality type thing." The client also said the respondent told him, "Yes, that is okay. That is just terminology they use. They read it to everyone." The single justice's description of the communication is consistent with the testimony. [4] There is no dispute that the respondent satisfied the judgment after the hearing before the hearing committee.

The respondent's failure to determine, understand, and advise the client of the immigration consequences of an admission to sufficient facts, despite knowing the client's immigration status, violated Mass. R. Prof. C. 1.1, as appearing in 471 Mass. 1311 (2015) (competence); Mass. R. Prof. C. 1.2 (a), as appearing in 471 Mass. 1313 (2015) (seeking lawful objectives); and Mass. R. Prof. C. 1.4 (a), as appearing in 471 Mass. 1319 (2015) (communication with client). The respondent also violated Mass. R. Prof. C. 8.4 (d), as appearing in 471 Mass. 1483 (2015) (conduct prejudicial to administration of justice), and Mass. R. Prof. C. 8.4 (h) (conduct adversely reflecting on fitness to practice), by failing to comply with the subpoena served on him; and Mass. R. Prof. C. 1.5 (b) (1), as appearing in 463 Mass. 1302 (2012), by failing to describe to the client the basis of his fee in writing.

b. Count two. In October 2016, a second client obtained a default judgment against the respondent in the amount of $7,150 for costs associated with the respondent's failure to properly conclude a divorce settlement. On October 4, 2016, the court ordered the respondent either to pay that amount by November 3, 2016, or to appear for a payment review on November 4, 2016. The respondent did neither, and a capias issued against him. Between December 2016 and January 2017, bar counsel notified the respondent four times about the capias. Represented by counsel, on January 17, 2017, the respondent moved for relief from the default judgment, but he neglected to state any grounds. After a hearing, the judge denied the motion, observing that no grounds were stated and that there was a "lack of any credible testimony at the hearing from [the respondent]" regarding his failure to appear.[4]

On appeal, the respondent contends that he was not served with proper notice of the October 4, 2016, order. The hearing committee's contrary finding is supported by substantial evidence. While the court's docket does not contain a separate docket entry with respect to notice, the board's investigator testified that a copy of the notice sent to the parties was in the court's file, and that there was no indication that any mail had been returned to the court. In addition, the respondent testified that he was "unsure" about whether he received notice and, notably, the respondent did not support his motion to

[4] There is no dispute that the respondent satisfied the judgment after the hearing before the hearing committee.

vacate the default judgment by claiming lack of notice. As the motion judge ruled, the respondent did not produce any credible testimony regarding his failure to appear.

By knowingly failing to appear at the payment review hearing without having appealed or satisfied the judgment, the respondent knowingly disobeyed the court's rules, in violation of Mass. R. Prof. C. 3.4 (c), as appearing in 471 Mass. 1425 (2015). The respondent's conduct also violated Mass. R. Prof. C. 8.4 (d) (conduct prejudicial to administration of justice) and 8.4 (h) (conduct adversely reflecting on fitness to practice law).

c. Count three. In April 2016, the respondent agreed to represent a third client in an uncontested divorce. The client told the respondent that "she had major financial concerns and that she just needed to know how much money this was going to cost her." She also told him that she wanted the divorce expeditiously. The client paid the respondent $700 by check, and she sent multiple electronic mail messages to him concerning the cost of the divorce, the fees incurred, and the timing of her payments. The respondent did not provide a written description of the scope of the representation, the basis for the fee, or the expenses for which she would be responsible.

On April 14, 2016, the respondent filed a joint petition for divorce and an affidavit attesting to the irretrievable breakdown of the marriage, which had been previously prepared by the client and her spouse. The respondent reviewed the documents with the client. As filed, the petition was internally inconsistent: it requested both that the parties' separation agreement be merged into the judgment and that the agreement not be merged and survive as an independent agreement. In addition, the client's spouse was on active military duty and stationed in another State. Although the spouse was cooperative, the respondent failed to obtain both an original signed financial statement from him and an affidavit of inability to attend the hearing on the divorce. The respondent did not file a motion to waive the spouse's appearance.

In June 2016, the respondent instructed the client to meet him at the court house. When she arrived at the court house on June 9, 2016, accompanied by her pastoral counsellor, the respondent gave vague explanations to the client and the counsellor about the status of the proceedings, would not answer

directly questions concerning whether the divorce would be finalized that day, and then went to "file something." When he returned, he informed the client and the counsellor that the divorce could not be finalized because of court congestion that day. He also said that the proceeding might become adversarial.

After several weeks, the client and the counsellor went to the court house. They were told that the respondent had not filed anything on June 9, and that three documents were necessary to finalize the divorce: the spouse's original signed financial statement; the spouse's original signed affidavit of unavailability; and a motion to waive the spouse's appearance. The client obtained the documents, and she discharged the respondent on July 18, 2016. She appeared in court on August 1, 2016, with the necessary documents, and obtained a judgment of divorce nisi.

The respondent's claim on appeal that a written fee agreement was not required because the client paid him $500 for attorney services and $250 for court filing fees, rather than $700 as the hearing committee determined, is unavailing. See Mass. R. Prof. C. 1.5 (b) (2) (writing not required where total fee expected to be "less than $500"). The evidence supports the conclusion that the client gave the respondent a check for $700, they had no discussion about the basis for the fee, and the check was not for "expenses or fees." Likewise, the hearing committee was not required to credit the respondent's testimony that, when he reviewed the petition with the client, the "petition merger check boxes" were unchecked and remained unchecked when he filed the petition for divorce; the filings demonstrate otherwise.[5]

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[5] We acknowledge the respondent's claim that the notice he received from bar counsel concerning the client's unavailability (due to illness) to testify at the hearing was inadequate to permit him to prepare for cross-examination of the pastoral counsellor, whom bar counsel called as a witness instead. Nonetheless, the respondent could have caused a subpoena to issue to compel the client's attendance, but he did not; further, he did not seek to preserve and present the witness's testimony through a deposition, and he has not alleged any resulting prejudice. See Rules of the Board of Bar Overseers §§ 4.5, 10 (2009); id. at § 4.5B (2011). The respondent did not object to the pastoral counsellor's testimony. The respondent has not demonstrated error in the single justice's conclusion

By failing diligently to represent the client, to carry out her lawful instructions, and to adequately communicate with and advise her what was required to finalize her divorce, the respondent violated Mass. R. Prof. C. 1.2 (a) (seek client's lawful objectives); Mass. R. Prof. C. 1.3, as appearing in 471 Mass. 1318 (2105) (diligence); and Mass. R. Prof. C. 1.4 (a) (communication with client). In addition, by failing to provide the client with a written statement of the basis of his fee and the scope of his work, the respondent violated Mass. R. Prof. C. 1.5 (b) (1).

d. Count four. In January 2015, the respondent agreed to represent a fourth client in connection with two matters: a request for a restraining order, and defense of the client against a charge that he violated a restraining order. The client paid the respondent $2,500, and an additional $300 as a "consultation fee." As with the other matters described supra, there was no written fee agreement, nor did the respondent provide the client with a written description of the fee and scope of the representation. The respondent appeared with the client in court on June 7, 2015, and said he would reschedule the trial. At that time, he requested an additional $2,500 from the client. The client discharged the respondent before the matter was scheduled for trial. Successor counsel filed his appearance on July 8, 2015. The client requested a bill from the respondent for services rendered, and a refund for the balance. He received neither.

By failing to comply with the client's request to provide an accounting, the respondent violated Mass. R. Prof. C. 1.15 (d), as appearing in 471 Mass. 1380 (2015). By failing, upon termination of the representation, to return any unearned portion of the prepaid fees, the respondent violated Mass. R. Prof. C. 1.16 (d), as appearing in 471 Mass. 1396 (2015). By failing to communicate in writing the basis of the fee, the respondent violated Mass. R. Prof. C. 1.5 (b) (1).

e. Count five. After the respondent failed to comply with bar counsel's requests for information in two matters, bar

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that "proceedings before the board and hearing committee need not comply with the rules of evidence." Matter of Strauss, 479 Mass. 294, 299 (2018). The respondent points to no fact found by the board that was not supported by substantial evidence.

counsel compelled his attendance, by means of a subpoena, at a meeting on June 14, 2016. Bar counsel requested additional information and records both orally and in writing, and provided a deadline of July 10, 2016. When the deadline was not met, the respondent was administratively suspended from the practice of law on August 12, 2016. With bar counsel's assent, the respondent was reinstated on September 20, 2016. Over the course of the next few months, the respondent failed to comply with bar counsel's requests for information, and failed to respond to bar counsel's request for an answer to a complaint filed by the client referenced in count two of the petition.

By failing without good cause to cooperate with bar counsel, and by failing to respond to bar counsel's requests for information, the respondent violated Mass. R. Prof. C. 8.4 (g) and S.J.C. Rule 4:01, § 3, as amended, 430 Mass. 1314 (1999).

3. Appropriate sanction. The findings adopted by the board demonstrate that the respondent violated multiple rules of professional conduct, spanning his representation of four different clients. While many of those violations, viewed individually, would not warrant a suspension, our task is to view them collectively. See Matter of Zak, 476 Mass. 1034, 1039 (2017).

In considering the appropriate choice of sanction, we consider whether the sanction imposed by the single justice is "markedly disparate from those ordinarily entered by the various single justices in similar cases." Matter of Alter, 389 Mass. 153, 156 (1983). See Matter of Goldberg, 434 Mass. 1022, 1023 (2001). "While the review is de novo in the sense that no special deference is given to the single justice's determination, we, like the single justice before us, must be 'mindful that the board's recommendation is entitled to special deference.'" Matter of Doyle, 429 Mass. 1013, 1013 (1999), quoting Matter of Tobin, 417 Mass. 81, 88 (1994). Ultimately, we strive to "decide every case on its own merits such that every offending attorney receives the disposition most appropriate in the circumstances" (quotation and alterations omitted). Matter of Lupo, 447 Mass. 345, 356 (2006). A suspension for one year and one day is appropriate here.

When an attorney has engaged in misconduct "involving repeated failures to act with reasonable diligence, or when a lawyer has engaged in a pattern of negligence, and the lawyer's

misconduct causes serious injury or potentially serious injury to a client or others," a suspension is warranted. Matter of Kane, 13 Mass. Att'y Discipline Rep. 321, 328 (1997). In this case, the respondent failed to provide competent representation in one matter, and neglected another. At least one client was harmed. The respondent also failed to communicate reasonably with his clients and successor counsel, and to cooperate with bar counsel. See Matter of Scannell, 21 Mass. Att'y Discipline Rep. 580, 582-584 (2005) (suspension for one year and one day for neglect, including failure to provide competent representation and to act with reasonable diligence, involving three client matters, where aggravating factors present). See also Matter of Garabedian, 416 Mass. 20, 25 (1993) (six-month suspension for failure to cooperate, where previously disciplined for same conduct). In addition, the respondent failed to comply with a court order, and knowingly failed to appear in response to a subpoena. See Matter of Cohen, 435 Mass. 7, 13-17 (2001) (suspension for one year and one day based on multiple violations of orders restraining class action lawsuits); Matter of Kersey, 432 Mass. 1020, 1020-1021 (2000) (three-month suspension where attorney found in contempt three times for violation of orders in his divorce proceeding). In two matters, he failed to provide an accounting when requested by his clients and, in one, to return an unearned portion of the fee. See Matter of Disaia, 33 Mass. Att'y Discipline Rep. 131, 132-133 (2017) (suspension for one year and one day for neglect in two matters, failure to maintain reasonable communication with client, failure to have written contingent fee agreement, failure to provide client files to successor counsel, and intentional violation of court orders to appear); Matter of Manoff, 32 Mass. Att'y Discipline Rep. 366 (2016) (suspension for one year and one day for neglect of two matters, failure to communicate with clients, failure to return unearned portion of fee, failure to comply with order of administrative suspension, and material misrepresentations to two clients, aggravated by prior public reprimand).

Neither the hearing committee, the board, nor the single justice found special factors to be weighed in mitigation of sanction. See Matter of Alter, 389 Mass. at 156-157. Several factors, however, properly were weighed in aggravation. The respondent is an experienced attorney, having been admitted to the bar in 1973. See Matter of Crossen, 450 Mass. 533, 574 (2008); Matter of Luongo, 416 Mass. 308, 312 (1993). He committed multiple violations of the rules of professional

conduct, involving multiple clients. See Matter of Saab, 406 Mass. 315, 326-327 (1989). One client was vulnerable because of his immigration status, and another was financially vulnerable. See Matter of Zak, 476 Mass. at 1039; Matter of Green, 476 Mass. 1006, 1010 (2016). At least one client was harmed. See Matter of Pike, 408 Mass 740, 745 (1990) (harm to client correctly weighed in aggravation of sanction). As the hearing committee found, and the board accepted, the respondent's misconduct demonstrated a lack of understanding of his obligations to his clients. See Matter of Clooney, 403 Mass. 654, 657 (1988). See also Matter of Cobb, 445 Mass. 452, 480 (2005). He also has a history of prior discipline. See Matter of Grayer, 23 Mass. Att'y Discipline Rep. 215 (2007) (one-year suspension for misconduct including delegation of client matters to unaffiliated attorneys, collecting excessive fees, division of fees without client consent, commingling client funds, failing to return unearned fees, and failing to comply with client requests for accountings). See also Matter of Chambers, 421 Mass. 256, 260 (1995) ("in the absence of mitigating factors, discipline should proceed in increments of escalating severity").

4. Conclusion. Considering the respondent's misconduct as a whole, weighing in aggravation the factors described supra, and giving due deference to the board's recommendation, we conclude that a suspension for one year and one day is appropriate.

Order of term suspension affirmed.

The case was submitted on the record, accompanied by a memorandum of law.

Claude David Grayer, pro se.

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