

IN RE: JONATHAN HURLEY

NO. BD-2016-095

S.J.C. Order of Term Suspension entered by Justice Botsford on March 7, 2017.¹

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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-2016-095

IN RE: JONATHAN D. HURLEY

MEMORANDUM OF DECISION

The Board of Bar Overseers (board) has filed an information recommending the suspension of the respondent, Jonathan D. Hurley, for a period of one year and one day. Based on the record before me, and after hearing, I adopt the board's recommendation.

Background.¹ The respondent has been a member of the Massachusetts bar since November 29, 2005. He was retained by Brian DeIorio² in 2011 to defend him in two lawsuits brought by Brian's sister, Darlene, in the Probate and Family Court (Probate Court). Ultimately, Darlene dismissed those suits, and agreed to "join forces" with Brian against their Aunt June. In 2012, the siblings retained the respondent for the purpose of asserting a claim to their Great Aunt Angelina's properties. Angelina had died in 2008.

Through research at the Registry of Deeds, the respondent learned that the properties at issue, which had belonged to Angelina, were now owned by June – and not,

¹ The board adopted the findings of fact and conclusions of law of the hearing committee, and the background facts set out in the text are based on those findings.

² Because there are several members of the DeIorio family discussed in the findings, to avoid confusion, I refer to all of them hereafter by their first names.

as Brian and Darlene informed the respondent, by their grandmother Margaret, who was Angelina's sister and June's mother. The respondent also learned that Angelina had both a will and a trust. Thereafter, the respondent devised the following plan: (1) to rescind the deed or deeds held by June to Angelina's real estate; (2) to gain control over Margaret's affairs in order to challenge Angelina's estate plan on Margaret's behalf; and (3) to get Margaret's estate under the siblings' control. The respondent decided to file a petition for appointment of a conservator for Margaret in the Probate Court, and to have Brian appointed as Margaret's conservator.

The respondent had never before handled a conservatorship. Without obtaining a clinical diagnosis of Margaret, the respondent proceeded on a theory that Margaret's ability to make decisions was impaired due to June's undue influence. On December 27, 2012, he attempted to file in the Probate Court a petition to appoint Brian as conservator for Margaret, but neglected to research the notice requirements and failed to serve Margaret or June. The respondent also filed an ex parte motion to waive or permit late filing of a statutorily required medical certificate. See G. L. c. 190B, § 5-401 (c). He attached in support an affidavit of Darlene.

Also on December 27, 2012, the respondent commenced a separate action on Brian's behalf in the Superior Court. The respondent filed a civil action cover sheet, a complaint, and an ex parte motion seeking a preliminary injunction, trustee process, and a real estate attachment. The complaint sought to recover from June damages for the wrongful death of Angelina as well as real estate owned by Angelina before her death that was claimed to be worth \$572,500. However, the pleadings and related documents that the respondent filed falsely represented, inter alia, that Brian was Margaret's

conservator, that Angelina had died intestate and left no will, and that Brian was qualified to be appointed as Angelina's personal representative.

Margaret was forced to retain counsel to represent her in both matters, and she voluntarily submitted to a physical examination, in which her primary care physician concluded guardianship or conservatorship "absolutely" did not need to be considered at that time.

In the Superior Court matter, a judge of that court denied the motion for real estate attachment, noting that several obstacles, including lack of standing, appeared to lie in the way of the lawsuit proceeding. In the Probate Court matter, a Probate Court judge allowed the petition without the requisite medical certificate, but immediately entered a stay and appointed a guardian ad litem (GAL). The GAL reported that there was no evidence Margaret was under the undue influence of June. After receiving the GAL report, the respondent filed additional affidavits and a memorandum of law in support of his petition to appoint a conservator that directed the court to a 2010 California article on undue influence.

Ultimately, the Probate Court judge found insufficient evidence to order an independent medical examination of Margaret, and dismissed the petition for appointment of a conservator. The judge also awarded Margaret attorney's fees, stating that Brian's and Darlene's acknowledgement that Margaret was not incompetent should have put them on notice of the shaky foundation for their conservatorship action.

Despite the fact that the dismissal of the Probate Court petition meant Brian did not have standing to prosecute the claims he purported to be raising on Margaret's behalf in the Superior Court, the respondent took no action to dismiss the Superior Court case.

Ultimately, the Superior Court judge dismissed the case on motions to dismiss filed by June and Margaret.

The hearing committee did not credit the respondent's claim that Brian's and Darlene's motivation in coming to him was to help their grandmother, Margaret. Instead, it found that the respondent pressed to get Brian appointed as conservator in order to try to have Margaret's will altered in favor of Brian and Darlene, and to obtain money or property the siblings thought June had unfairly obtained.

The hearing committee further rejected the respondent's assertions that he had a good faith basis for proposing Brian as conservator and that his investigation into the case was adequate. It pointed out that the respondent knew, at a minimum, that Brian as well as Darlene had criminal records, and was aware of red flags as to their true motivations for pursuing the two cases. The hearing committee also noted that the respondent made no attempt to contact or observe Margaret or to communicate with anyone outside the family, such as Margaret's physician, concerning Margaret's mental capacity. It further found that the respondent did not have a competent understanding of the meaning or concept of undue influence, and was factually uninformed about how it might apply to his clients' case. As a result, the hearing committee ruled that the undue influence claim was frivolous and without factual support. Similarly, the hearing committee rejected the respondent's contention that undue influence was a reasonable basis for a conservatorship petition, finding his vague citation to the previously mentioned California article neither persuasive nor pertinent.

With respect to the Superior Court filing, the hearing committee found that the respondent knew Brian was not Angelina's personal representative or Margaret's

conservator, in light of the Probate Court's rejection of his ex parte motion for Brian's appointment as conservator. It also found the respondent's investigation "substandard," noting that it was particularly unreasonable for the respondent to say that he "didn't even consider looking" at Angelina's death certificate before filing the wrongful death complaint.

The hearing committee concluded that bar counsel had proved that the respondent violated Mass. R. Prof. C. 1.2(d) (counseling or assisting client in conduct lawyer knows is fraudulent); 3.1 (requiring good faith, non-frivolous basis for action or defense, which includes a good faith argument for change to existing law); 3.3(a)(1) (knowing false statement of material fact or law to tribunal);³ 8.4(d) (conduct prejudicial to administration of justice); and 8.4(h) (conduct that adversely reflects on fitness to practice).

The hearing committee found no mitigating factors and several aggravating ones. In particular, it noted that Margaret was elderly and vulnerable when the events took place, that the respondent caused harm in the form of attorney's fees incurred by June and Margaret, and that the respondent committed multiple disciplinary violations. It also took into consideration its finding that the Superior Court filings contained false statements that were not charged in the petition for discipline, its finding that the respondent was motivated by pecuniary gain, and its conclusion that the respondent lacked candor, lacked remorse, and failed to recognize the wrongfulness of his conduct. The hearing committee

³ The hearing committee unanimously found that the respondent's representations in the Superior Court action violated Mass. R. Prof. R. 3.3(a)(1). Only one of the committee members found knowing falsity in violation of rule 3.3(a)(1) with respect to the Probate Court action.

recommended, by a two-to-one vote, that the respondent be suspended for one year and one day; the third member of the committee recommended a fifteen-month suspension.

As noted previously, the board adopted the hearing committee's findings, and also its conclusions of law. The board recommends a suspension of one year and one day.

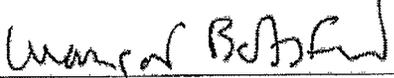
Discussion. The respondent argues on appeal that there was insufficient evidence to support a finding (1) that he was not candid with the Superior Court, (2) that he brought a proceeding that was wholly insubstantial, frivolous, and not in good faith, and (3) that he knowingly assisted his clients in a fraudulent scheme. As discussed in the board's memorandum, these arguments, at bottom, turn on the hearing committee's decision not to credit the respondent's version of events. However, the hearing committee is the sole judge of credibility, and arguments hinging on credibility determinations generally fall outside the proper scope of this court's review, unless it can be said with certainty that a determination was wholly inconsistent with another implicit finding. See Matter of Haese, 468 Mass. 1002, 1007 (2014), and cases cited. No such inconsistency is apparent on this record, nor has the respondent demonstrated any other reason to depart from the hearing committee's findings.

With respect to the appropriate sanction, a one-year suspension is typical for an intentional misrepresentation to a tribunal. See, e.g., Matter of Neitlich, 413 Mass. 416, 423 (1992). Given the other misconduct and aggravating factors in this case, I agree with the board that it is important to require the respondent to petition for reinstatement, a goal that is achieved by suspending him for one year and one day. See S.J.C. Rule 4:01, § 18. This court gives the board's factual findings and recommendations great weight, and

upholds them if supported by substantial evidence. See Hacse, supra; S.J.C. Rule 4:01, § 8(6)(1). I find substantial evidence supports the board's findings and recommendations in this case, and agree that a suspension of one year and one day is the appropriate sanction.

ORDER

For the foregoing reasons, it is ORDERED that judgment enter suspending the respondent from the practice of law for a period of one year and one day.



Margot Betsford
Associate Justice

Dated: March 6, 2017