

IN RE: LAURA MARSHARD

NO. BD-2018-052

S.J.C. Order of Term Suspension entered by Justice Cypher on October 22, 2018, with an effective date of November 21, 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-2018-052

IN RE: LAURA MARSHARD

CORRECTED MEMORANDUM OF DECISION

This matter came before the court, Cypher, J., on an Information filed by the Board of Bar Overseers (board) under S.J.C. Rule 4:01, § 8 (6), regarding the character and conduct of the respondent, Laura Marshard, who was admitted to the bar of the Commonwealth on May 20, 1991. The respondent was charged with three counts of violating disciplinary rules. The hearing committee determined that the respondent had only violated Mass. R. Prof. C. 4.2 and S.J.C. Rule 4:01, § 8.4 (d), when she met with a represented witness without the witness's attorney. The board affirmed the hearing committee's decision that the respondent did not violate the Rules of Professional Conduct as charged in counts 1 and 3 and agreed that she violated the rules as charged in count 2.

The board has recommended that the respondent be suspended from the practice of law for one month and be required to attend a continuing legal education course (CLE) approved by the Office of Bar Counsel. The respondent has accepted the one-month suspension and has attended two courses, which she contends directly relate to the ethical issues that were the subject of the suspension. The respondent requested that Bar Counsel approve at least one of the courses and deem her CLE requirement satisfied. Bar Counsel has declined this request, on the grounds that the courses were conducted by the respondent's office or attended on-line and the sanctions were unlikely to instill confidence in the system of justice.

It is undisputed that the respondent participated in the following two courses:

(1) On June 14, 2018, the Cape & Islands District Attorney Michael O'Keefe hosted a course entitled "Ethical Considerations Training." The course was sponsored by the National Association of Attorneys General. There were three speakers at the course, Tigran Eldred, Professor of Law, New England School of Law; Brendan Ruane, Professional Development Consultant and Lead Instruction, National Attorneys General Training and Research Institute; and Judy Zeprun Kalman, General Counsel, Massachusetts Attorney General's Office. None of the instructors was affiliated with the District Attorney's Office.

The instructors made presentations totaling 4.25 ethics hours. The course provided the attendees with reference and resource materials and a Uniform Certificate of Attendance. Participants were able to ask questions. The agenda from the course indicates that the topics covered included: conflicts (Rules 1.7 - 1.11); discovery (Rule 3.8); witness preparation (Rule 3.4); ex parte communication (Rule 4.2); deception by law enforcement (Rule 8.4); defense ethics in plea bargaining (Rules 3.3, 3.4) and ethics of jury selection (Rules 3.6, 4.4).

(2) On July 31, 2018, the respondent participated in an on-line webinar sponsored by Massachusetts Continuing Legal Education (MCLE) entitled "Criminal Law Ethical Landmines." The program was chaired by the then chair of the Board of Bar Overseers and the assistant bar counsel prosecuting this matter was one of the speakers. There were also instructors from the Suffolk County District Attorney's office, the Attorney General's Office, and an attorney in private practice. The course qualified for 3.0 ethics hours and the respondent received a signed certificate of attendance.

The agenda from the course indicates that the topics covered included: Applicable Rules of Professional Conduct and Case Law; Common Ethical Issues Encountered in Criminal

Practice; Best Practices for Handling Ethical Issues; What To Do When You Get In Trouble; Transitions: How to Approach Ethics When Your Practice Changes, and a discussion of hypothetical problems and questions and answers.

The advertisement for the course offered an option for participants to view the course online, either live or after it had been broadcast.

Discussion. The only issue before me is whether the courses attended by the respondent satisfy the education requirement established by the board. With regard to the requirements of the course, the board specified only that the respondent be reinstated "conditioned on the successful completion of a legal ethics class approved by bar counsel." The respondent's lawyer requested from Bar Counsel approval of either one of the classes as satisfaction of the CLE requirement. Counsel for the respondent provided Bar Counsel with the program information for the two classes. Bar Counsel declined to provide such approval and proposed that the respondent attend a Suffolk University Law School class in one of their clinical programs. Counsel for the respondent sought clarification and Bar Counsel advised her that she "did not think that bar counsel should approve a course sponsored by the Cape and Island DA's office" as she thought such a course would be "very unlikely to instill confidence in the system of justice as sanctions are meant to do." Bar Counsel indicated that the MCLE course "might be better in terms of the impact of the sanction, the course is not live, and so would not allow someone taking it now to explore her thinking with faculty and students." Bar Counsel expressed concern that neither program was sufficiently directed to the ethical issues presented in the disciplinary case to be approved by Bar Counsel for purposes of the sanction.

The parties appeared before me for oral argument on September 12, 2018. At oral argument, Bar Counsel indicated that part of the reason she did not deem the courses that the

respondent attended adequate was because one was sponsored by the District Attorney's office and the other one was on-line.

After oral argument, review of the record, and review of the material provided regarding the courses attended by the respondent, I am persuaded that the program organized by the Cape and Island's District Attorney's office was independent of the control of the District Attorney. The speakers were all experts in their fields and did not work for the District Attorney. The District Attorney hosted the program on his own initiative for his entire office and not just for the respondent. The District Attorney was not required to provide this training and should be commended for such an initiative. It also appears, contrary to Bar Counsel's conclusion, that the topics covered in the training directly addressed the ethical issues presented in the matter. I conclude that the program hosted by the Cape and Island's District Attorney and sponsored by the National Association of Attorneys General fulfilled the education requirement established by the board and that Bar Counsel should not have withheld approval of this program.

I am also persuaded that the MCLE program that the respondent attended on-line satisfied the education requirement. Bar Counsel's reasoning that because the course was on-line it was inadequate is contradicted by the fact that the program was advertised as: taught, in part, by Bar Counsel; available on-line; and as providing up to three CLE ethics credits.

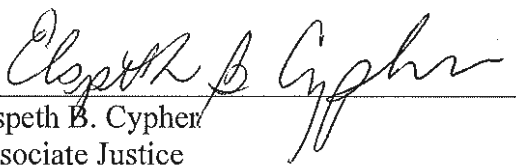
At oral argument, Bar Counsel stated that the ease of taking the courses the respondent completed was not sufficient punishment. The one-month suspension was a punishment. The educational component of the sanction is corrective in nature and is not a punishment. Whether such a class is sufficiently inconvenient is not an appropriate consideration. Bar Counsel does not appear to appreciate the significant commuting difficulty for an attorney living on Martha's

Vineyard to attend, in person, a rarely offered course in Boston. I am also persuaded that the MCLE course sufficiently addressed the ethical issues of concern to the board. Additionally, the only alternative course proposed by Bar Counsel as adequate was one that she herself was teaching at Suffolk University Law School.

The respondent accepted responsibility for the ethical violation found by the board, accepted the sanction imposed by the board of a one-month suspension, and participated in two different ethics programs, that I find sufficiently addressed the concerns of the board.

Conclusion. Having considered the underlying facts, the respondent's acceptance of responsibility and acceptance of the sanction, as well as considering discipline imposed in other cases, I conclude that the one-month suspension was appropriate and that the courses attended by the respondent satisfy the CLE requirement imposed by the board. The respondent may petition for reinstatement upon filing an affidavit of compliance.

By the Court,


Elspeth B. Cypher
Associate Justice

ENTERED NUNC PRO TUNC: October 16, 2018

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

_____)		
BAR COUNSEL,)		
)		
Petitioner,)		
)		
v.)	B.B.O. File Nos.	C1-14-0055
)		C5-16-0008
LAURA MARSHARD,)		
)		
Respondent.)		
_____)		

BOARD MEMORANDUM

A hearing committee concluded that the respondent, an assistant district attorney, violated Mass. R. Prof. C. 4.2 and 8.4(d) when she met with a represented witness without the consent of the witness’s lawyer. For the reasons set forth in this Memorandum, we affirm and adopt the committee’s factual findings and legal conclusions. Because we conclude that the respondent abused her prosecutorial power – aggravated by her misrepresentations to a judge – we disagree with the recommended sanction of public reprimand; instead we recommend that the respondent be suspended for one month with her reinstatement conditioned on the successful completion of a legal ethics class approved by bar counsel.¹

¹ Neither party has appealed the hearing report, so we review it pursuant to Section 3.52 of our rules. After the hearing committee issued its report, bar counsel and the respondent filed a Stipulation, agreeing that the respondent should receive a public reprimand and at the same time submitting a proposed public statement about the case that they asked the board to approve and issue. A condition of the stipulation was that the board issue the statement verbatim. We declined to do so, since we found the statement to be inaccurate. As a general matter, the board will not agree to statements drafted by the parties, particularly if they do not reflect the facts of the case as found by the hearing committee. Furthermore, as we discuss in this Memorandum, the respondent’s conduct warrants a more severe sanction than a public reprimand.

The Committee's Findings of Fact and Conclusions of Law

We affirm the facts found by the hearing committee, as they are supported by the evidence and not erroneous. BBO Rules, § 3.53.

The Petition for Discipline charged the respondent in three counts, only one of which is relevant here.² In Count 2 of the petition, bar counsel alleged that the respondent violated Rule 4.2 of the Massachusetts Rules of Professional Conduct when she met with a witness who was represented by a lawyer without first seeking the consent of the lawyer. The meeting took place at the courthouse in Edgartown, Massachusetts and concerned a prosecution for several felonies and misdemeanors arising out of a brawl.

On or about July 27, 2014, Patrice Petersen was involved in a fight with two other individuals, Clayton Santos and Dave Sylvia. The District Attorney charged Petersen with assault and battery with a dangerous weapon, assault and battery on a police officer, mayhem, resisting arrest, and disturbing the peace.

The respondent knew Sylvia, having prosecuted him on numerous misdemeanor charges in the Edgartown District Court over a period of about ten years. On August 11, 2014, about two weeks after the fight, the respondent and an Edgartown police detective met with Sylvia to obtain a statement and ascertain his willingness to cooperate as a prosecution witness. Although initially concerned about retaliation from the other participants in the fight, Sylvia agreed to cooperate and provided a written statement.

² As discussed at the conclusion of this Memorandum, we affirm the hearing committee's decision that the respondent did not violate the Rules of Professional Conduct as charged in Counts 1 and 3.

Because some of the charges against Petersen were felonies, the district court held a probable cause hearing on September 22, 2014. Mass.R.Crim.P. 3(f). At the first call of the case, Petersen's lawyer suggested to the judge that the court appoint counsel for Sylvia and Santos concerning their rights against self-incrimination under the Fifth Amendment. The court appointed Attorney Timothy Moriarty to represent Sylvia, who was in court that day for a magistrate clerk's hearing to determine whether a criminal complaint should issue against him and Santos for the same fight.

After the appointment of Attorney Moriarty, the court held the case for a second call of the list. The respondent asked a police detective to locate Sylvia (who was not in the courtroom when counsel was appointed for him) and bring him to the courthouse law library, which he did. The respondent walked to the library to meet with Sylvia, passing Attorney Moriarty, who was sitting on a bench in the hallway. The respondent's memory of her conversation with Moriarty was imprecise. She could not recall if Moriarty said anything specific to her. She testified that she, "might have said I am going to speak with Mr. Sylvia briefly," and Moriarty said nothing in response. (Hearing Transcript, Volume VII, lines 136-137). Moriarty did not follow her into the library.

Based on the testimony and admissions of the respondent and a memorandum by a detective who was at the meeting, the hearing committee found the following facts with respect to the ensuing conversation with Sylvia in the law library. According to the detective's memorandum, Sylvia seemed agitated, did not understand the conversation, and asked to meet with his court-appointed lawyer. The respondent wanted to inform Sylvia that he was not in trouble, unlike when she had talked with him on other cases in which he was a defendant with appointed counsel, and to explain to him his Fifth Amendment rights. The hearing committee

found that the respondent discussed the case with Sylvia and explicitly assured him that he was not being charged with a crime, was not a target, and would not be charged, all for the purposes of convincing him to testify, a finding that we do not disturb. BBO Rules, § 3.53.

When the judge later asked the respondent if Attorney Moriarty was at the meeting, the respondent initially denied that he had been appointed at the time, an assertion that Moriarty immediately corrected in open court. Obviously, the respondent knew that Moriarty represented Sylvia, since she was in court when Moriarty was appointed, and she had a limited interaction with him on her way to speak with his client.

Eventually, Sylvia waived his Fifth Amendment privilege, and the judge denied Petersen's motion to preclude his testimony, finding that the government had not offered Sylvia any promises, rewards or inducements for his testimony.³

The hearing committee concluded that the respondent violated Rules 4.2 and 8.4(d), because she failed to obtain Attorney Moriarty's consent before she met with his client, Sylvia. This finding is not erroneous. As she headed toward the meeting with Sylvia, the respondent – accompanied by two police officers – walked directly past his lawyer. She did not pause to explain what she was doing other than (perhaps) a cursory statement that she was going to meet with Sylvia. She did not ask for Moriarty's consent. She did not obtain Moriarty's consent.

Given these facts, we affirm the conclusion that the respondent violated Rules 4.2 and 8.4(d). Knowing that Moriarty represented Sylvia and that she was about to speak to Sylvia about matters for which Moriarty had been appointed, the respondent was required stop, ask for

³ Whether the respondent's statement to Sylvia that he would not be charged for the fight constitutes an impermissible "promise, reward, or inducement" for his testimony in the sense at issue before the judge, *see* Mass. R. Crim. P. 14(a)(1)(A)(ix), is not directly relevant to the case before us. Our concern is whether the respondent spoke with Sylvia about matters within the scope of Moriarty's representation. For this purpose, the committee's finding that the respondent told Sylvia that he was not a target in order to persuade him to testify, after Moriarty had been appointed to advise him on this very point, is unimpeachably correct.

consent and obtain consent in a clear manner. This requirement is neither unreasonable nor onerous. The respondent flouted it.

This case illustrates the importance of the rule. Sylvia, who had little education, was confused and frightened. He thought that he was facing criminal charges. While his lawyer sat in the hallway, he was denied the benefit of counsel. He confronted a seasoned prosecutor and two police officers who were pushing him to testify in favor of the government. The respondent had prosecuted Sylvia in the past so her promise (that he would not be charged with a crime if he testified) would naturally carry a great deal of weight. According to the officer's memo, which the respondent did not deny, she discussed with Sylvia his Fifth Amendment rights, a conversation that should have occurred with his lawyer, not the prosecutor.

In addition to the above facts, we note (as did the hearing committee) that the respondent did not deny the allegation in the Petition for Discipline that she "failed to seek permission from Sylvia's counsel to discuss with Sylvia the subject of that counsel's representation of Sylvia." (Petition for Discipline, ¶ 45). Under our rules, allegations in a petition are deemed admitted if not specifically denied. Thus, as a matter of pleading, the respondent has admitted her failure to obtain Moriarty's consent.

Factors in Aggravation and Mitigation

We affirm the hearing committee's findings in aggravation. These include her experience as a prosecutor and her lack of understanding of her ethical obligations on display during her testimony. She also demonstrated a lack of candor before the hearing committee, including outright falsehoods. In addition to lack of candor before the hearing committee, the respondent misled the judge when she falsely told him that Moriarty had not been appointed at the time she met with Sylvia. She knew this statement to be false, because she had been in court

earlier the same day when the court appointed Moriarty. She also misled the judge when she failed to inform him that the government had offered to not prosecute Sylvia if he testified. We affirm the hearing committee's findings to the contrary, specifically that the government had promised Sylvia during the *ex parte* meeting that he would not be prosecuted. Lastly, the respondent's testimony to the hearing committee was false when she testified that at some point during the probable cause hearing she admitted to the judge that she had assured Sylvia that he was not in trouble. There is no evidence in the court transcript to support her version of events.

Although the hearing committee discussed the public nature of this case, it did not rely on it when determining the sanction, and neither do we. However, the Supreme Judicial Court has charged us to consider the "effect upon, and perception of the public of, the public and the bar." Matter of Zak, 476 Mass. 1034, 73 N.E.3d 262, 271 (2017). We also recognize that the rules of professional conduct and the disciplinary proceedings, "[e]xist to protect the public and maintain its confidence in the integrity of the bar and the fairness and impartiality of our legal system ... Accordingly, the appropriate level of discipline is that which is necessary to deter other attorneys and to protect the public." Id., at 268.

Affirming the hearing committee, we find no mitigating factors.

Disposition

The hearing committee has recommended a public reprimand. As the committee recognized, unadorned violations of Rule 4.2 typically result in an admonition. AD No. 16-20, 32 Mass. Att'y Disc. R. --- (2016); AD No. 00-46, 16 Mass. Att'y Disc. R. 519 (2000); AD No. 99-77, 15 Mass. Att'y Disc. R. 795 (1999); see also Matter of Kent, 21 Mass. Att'y Disc. R. 366 (2005) (public reprimand for both communicating with unrepresented party and, when that party was later unrepresented, presenting papers for execution without disclosing that he was acting in

the interest of a different party). The committee recommended a reprimand based on its view that the respondent intentionally violated Rule 4.2 and exhibited lack of candor at the hearing as well as other aggravating factors discussed above.

While we agree with the committee's findings and conclusions, we believe that they warrant the more serious sanction of a suspension. We are particularly troubled by the fact that the respondent tried to mislead a judge when she said that the witness did not have appointed counsel at the time she spoke with him and when she failed to inform the judge that the government had offered not to prosecute the witness if he testified. These were lies. The respondent had been in court when counsel was appointed and she admitted at the disciplinary hearing that she had some (albeit limited) interaction with the lawyer on her way to meet with his client. As the hearing committee found, the government *had* offered to not prosecute Sylvia if he testified.

An intentional misrepresentation to a court typically results in a suspension of at least one year. Matter of Moran, ___ Mass. Att'y Disc. R. ___, 479 Mass. 1016 (2018) (rescript); Matter of Neitlich, 8 Mass. Att'y Disc. R. 167, 413 Mass. 416, 422-423 (1992). "As an officer of the court, an attorney is a 'key component of a system of justice,' *Nix v. Whiteside*, 475 U.S. 158, 174 (1986), and is bound to uphold the integrity of that system by being truthful to the court and opposing counsel." Neitlich, 8 Mass. Att'y Disc. R. at 175. As Justice Lowy recently noted, "Truthfulness and candor are the cornerstones upon which the legal profession is built." Matter of Walckner, BD-2017-081, p. 8, n. 4 (March 27, 2018). These traits were notably lacking in this case.

Although bar counsel did not charge the respondent with a violation of Mass. R. Prof. C. 3.3(a) (false statement to a tribunal), we may consider it as a factor in aggravation. Matter of

Strauss, ___ Mass. Att’y Disc. R. ___, 479 Mass. 294, n. 9 (2018); Matter of the Discipline of an Attorney, 448 Mass. 819, 825, n. 6 (2007). Given the multiple misrepresentations to the court, it is appropriate to consider the respondent’s falsehoods in aggravation. Accordingly, and cognizant of our responsibility to educate the bar and the public about the bounds of ethical conduct, *see, e.g., Zak, supra.*, a suspension is warranted. We also recommend that the Court require the respondent to complete a class on legal ethics with the approval of bar counsel.

Finally, and while this has no bearing on the outcome of the case, the hearing committee noted that *ex parte* meetings with represented persons are apparently a regular occurrence in the district attorney’s office where the respondent works. This is troubling coming from prosecutors, whose broad discretion carries with it “the responsibility of a minister of justice and not simply that of an advocate.” Mass. R. Prof. C. 3.8, Comment (1). While Rule 4.2 plays an important role in protecting litigants in all types of cases, we note its special significance in criminal law, where the balance of power tilts strongly in favor of the government. As shown in this case, the government can bring huge resources to bear on a witness. Even if unintentional, the presence of uniformed officers can be intimidating. The threat of prosecution is real. The consequences can be severe.

Findings and Conclusions as to Counts 1 and 3

The hearing committee found no violations of the Rules of Professional Conduct as charged in Counts 1 and 3 of the petition, a conclusion that we do not disturb. In Count 1, which arose out of a different case than Count 2, bar counsel alleged that the respondent violated Mass. R. Prof. C. 3.4(a), 3.4(c), and 8.4(d) when she failed to disclose exculpatory evidence to defense counsel and that she violated Rules 3.4(a), 3.4(e) (as in effect before July 1, 2015), 4.4 and 8.4(c) and (d) when she raised without a good faith basis defense witnesses’ potential self-

incrimination. In essence, the hearing committee found that the evidence was not new exculpatory evidence and the respondent had a good faith basis for her Fifth Amendment argument.

We agree. Count 1 concerned a separate criminal case arising out of a bar fight in which bar counsel alleged that the respondent withheld exculpatory evidence from the defendants. Based on detailed findings, the committee found that the evidence – a statement by the bar’s owner – was cumulative of information already available to the defendants and therefore not “material” as that term is defined in the criminal law. *See* Mass. R. Crim. P. 14(a)(1)(A)(iii); Commonwealth v. Wilson, 381 Mass. 90, 107 (1980). At the time of the underlying events, the law was unsettled whether a prosecutor’s obligations under Mass. R. Prof. C. 3.8(d) were more extensive than under the criminal law.⁴ A subsequent comment to Rule 3.8(d) unequivocally expanded its scope to require disclosure, “without regard to the anticipated impact of the information.” *See* Mass. R. Prof. C. 3.8, comment 3[A]. But at the time of this case, there was no reason for a prosecutor in the position of the respondent to view her ethical obligations as broader than those under criminal law. Accordingly, bar counsel did not meet her burden to show that the respondent violated Rule 3.8(d) or 8.4(d) when she did not turn over evidence that the hearing committee found was cumulative of information previously known to the defendants.

Also on Count 1, bar counsel alleged that the respondent tried to obstruct justice by improperly raising issues of self-incrimination on the part of three defense witnesses. The hearing committee properly concluded that the respondent had a legitimate legal and factual basis for raising the witnesses’ Fifth Amendment issues. Indeed, as to one witness, the issue was raised by the trial judge, not the respondent.

⁴ Rule 3.8(d) requires that a prosecutor timely disclose to the defense, “all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, ...”

In Count 3, arising out of a third underlying case, bar counsel alleged violations of Rules 3.3(a)(4) (as in effect before July 1, 2015) and 8.4(c) and (h) when she failed to correct grand jury testimony she later learned was false or failed to adequately prepare for the grand jury in violation of Rules 1.1, 1.2, 1.3 and 8.4(d) and (h). The hearing committee concluded that bar counsel had not met her burden of proving that the respondent intentionally misled the grand jury or failed to prepare adequately, characterizing her conduct as a “mistake” by an overworked prosecutor. Again, we affirm this finding and conclusion.