**IN RE: AUSTIN S. O'TOOLE**

**NO. BD-2015-049**

**S.J.C. Order of Term Suspension entered by Justice Lenk on August 26, 2015, with an effective date of September 25, 2015.**[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-2015-049

IN RE: AUSTIN S. O'TOOLE

MEMORANDUM OF DECISION

This matter came before me on an information filed by the Board of Bar Overseers (board) pursuant to S.J.C. Rule 4:01, § 8(6), recommending that the respondent be suspended from the practice of law in the Commonwealth for six months. The respondent does not contest the findings of fact on which the board's recommendation is founded, but he maintains that a lesser sanction is warranted. For the reasons explained below, the recommendation of the board shall be adopted.

1. Facts. The specific acts for which discipline is sought are a statement that the respondent made to opposing counsel, other statements he made to a judge, and an unwaived conflict of interest between the respondent and a client. According to the facts found by the hearing committee and adopted by the board, these acts occurred over the course of the

respondent's representation of two defendants, an individual and his corporation (collectively client), who had been sued by two customers (plaintiffs) in the Superior Court.

The plaintiffs brought suit in January, 2005. They then sought and obtained a preliminary injunction requiring the client to maintain $300,000 in two specified bank accounts.[1]

Several months later, the respondent asked the client to verify that he was complying with the injunction. The client provided the respondent with a statement from a different account than those named in the injunction. This account showed a balance of approximately $166,500. The client apologized for his "lack of candor," and said that he "hoped there would not be too much attention paid beyond the fact that [he had] the funds." The respondent did not demand additional documentation, and did not point out to the client the ways in which the injunction apparently was being violated. He did, however, tell the client, "You have to hold [the funds] aside in those accounts."

In January, 2008, after an arbitration proceeding, a Superior Court judge entered judgment for the plaintiffs in the

[1] Bar counsel initially alleged that the respondent had represented falsely that the accounts contained $300,000, but the hearing committee did not so find.

amount of approximately $192,500.[2] An execution issued for approximately $211,000, including interest. An attorney for the plaintiffs commenced a protracted correspondence with the respondent in an effort to collect the judgment. The respondent, in turn, communicated frequently with the client about the plaintiffs' collection efforts.

The client dithered and dawdled. In May, 2008, the client wired $50,000 to the respondent. A week later, the plaintiffs' attorney inquired whether payment was forthcoming. The respondent answered that he had received $50,000 and that the balance would arrive within several days. In truth, the respondent believed that the client would send him some additional funds, but not the entire balance.[3] The plaintiffs' attorney, expecting that the entire amount would soon be available, told the respondent not to worry about immediately transmitting the $50,000 to her.

On July 2, 2008, the client wired another $145,000 to the respondent. The respondent informed the plaintiffs' attorney

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[2] Both the respondent and the plaintiffs' attorney assumed that the preliminary injunction remained in force. They were mistaken, as the final judgment superseded the injunction.

[3] Similarly, the respondent told the plaintiffs' attorney both on July 1, 2008, and on the following day, that he expected to receive the entire amount of the judgment promptly, even though he did not believe that the full amount would be arriving.

that he now had $192,500 available for payment. The plaintiffs' attorney responded that a transfer of this amount to the plaintiffs could be arranged, but she noted that the execution, including interest, totaled approximately $211,000.

In mid-July, the client's accountant requested that the respondent transfer approximately $35,000 back to the client, so that the client could meet his payroll obligations. The respondent complied. Early in August, the client himself instructed the respondent to return to him all of the funds that remained in the respondent's possession. The respondent did so.

In August, 2008, the plaintiffs' attorney wrote to the respondent that the plaintiffs intended to commence execution proceedings. In response, the respondent made the first statement for which discipline is sought. In a voicemail message to the plaintiffs' attorney, the respondent said that "the money . . . is available to the extent that it was available previously." In theory, this statement could have meant that the client was still willing to pay the plaintiffs $192,500. In context, however, it would have been understood to mean that that sum was still in the respondent's possession, available to be paid. By this point, however, the respondent knew that the client was unlikely to be capable of satisfying the judgment against him.

In January, 2009, the plaintiffs filed a complaint for contempt against the client and the respondent. Among other things, the complaint alleged that the respondent had failed to pay the plaintiffs money that he had received from the client. In early February, 2009, a Superior Court judge dismissed the complaint against the respondent, reasoning that the judgment in the plaintiffs' favor did not require the respondent to decline his client's request that the client's money be returned to him.

The plaintiffs moved for reconsideration. At a hearing on the motion, held in March, 2009, the respondent made the other statements for which the board seeks discipline. The respondent said to the judge that the attorney for the plaintiffs with whom he had dealt, who was not present at the hearing, "told [him] specifically when [he] brought funds in . . . which weren't sufficient . . . that she didn't want the funds until the full amount was available." The respondent added that he "had received a certain amount of funds . . . [and] . . . the [plaintiffs] had indicated they didn't want that amount." Paraphrasing, the judge asked: "Your claim is that . . . there was a message to you that unless you had them all, they didn't want them . . . ?" The respondent confirmed. In theory, the respondent's statements could have referred to opposing counsel's initial remark that the respondent need not transmit the first $50,000 to her immediately. But, in context, the

statements indicated (incorrectly) that the plaintiffs' attorney had refused to accept the entire sum of $192,500 that the respondent had received.

The next day, the plaintiffs' attorney filed an affidavit denying that she ever declined tc accept $192,500 from the respondent. Attached to the affidavit were copies of electronic mail exchanges between the attorney and the respondent. Soon thereafter, the respondent filed an unsworn response, in which he claimed that he had said in court only "that [the plaintiffs' attorney] told him not to send a first tranche of funds received by [the respondent]." The plaintiffs' motion for reconsideration eventually was denied, essentially because of the same reasons for which the judge initially dismissed the complaint against the respondent.

The respondent's undisclosed conflict of interest occurred during the contempt proceedings. Although the respondent was named along with his client as a defendant in those proceedings, he did not believe that his interests and those of the client were inconsistent. This view, which the respondent communicated to the client soon after the complaint was filed, was shortsighted. The contempt proceedings were likely to call upon the respondent to defend himself against the suggestion that he had facilitated violations of the preliminary injunction by the client. There was a significant risk that, to defend himself

against such charges, the respondent would need to reveal that the client was not at first candid with the respondent about the state of his bank accounts. Similarly, it would have been natural for the respondent to point out that he had instructed the client to "hold [the funds] aside in those accounts." Arguments in this vein, however, would have damaged the client's ability to contend that his disobedience of the preliminary injunction had not been willful and knowing.[4] The respondent failed to recognize these potential conflicts, and he consequently failed to explain them to his client.

2. Procedural history. The hearing committee determined that the respondent's voicemail message to the plaintiffs' attorney amounted to "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation of Mass. R. Prof. C. 8.4(c), and that this conduct "adversely reflect[ed] on [the respondent's] fitness to practice law" within the meaning of Mass. R. Prof. C. 8.4(h). The committee did not think, however, that the voicemail message was a "false statement of material fact or law to a third person" in violation of Mass. R. Prof. C.

[4] The respondent disparaged his client's credibility at the first contempt hearing, saying that he "had some difficulty getting information . . . that [the respondent] consider[ed] to be accurate from [the client]." The hearing committee did not, however, find that this statement resulted from the respondent's conflict of interest.

4.1(a), essentially because the message was "facially ambiguous."

The committee took a similar view of the respondent's comments to the Superior Court judge, deeming them "conduct involving dishonesty, fraud, deceit or misrepresentation," Mass. R. Prof. C. 8.4(c), that "adversely reflect[ed] on [the respondent's] fitness to practice law," Mass. R. Prof. C. 8.4(h). Given that these statements were made to a judge, the committee also considered them to be "prejudicial to the administration of justice." Mass. R. Prof. C. 8.4(d). But the facial ambiguity of these statements rendered them, too, in the committee's eyes, something short of a "false statement of fact or law to a tribunal." Mass. R. Prof. C. 3.3(a)(1).

The committee determined that, by failing to disclose his conflict of interest adequately, the respondent violated Mass. R. Prof. C. 1.4(a) (required communications with client), 1.4(b) (explanations necessary for client to make informed decisions), and 1.16(a)(a) (withdrawal where representation violates rules of professional conduct). The committee stated, however, that these violations did not affect its view of the appropriate disciplinary sanction, both because the contempt proceedings were predestined to fail and because the respondent had reason to believe that he could continue to represent his client satisfactorily.

The committee did not find any aggravating or mitigating factors. It noted, however, that the respondent had no prior discipline. The committee recommended that the respondent receive a public reprimand. The respondent and bar counsel filed cross-appeals.

The board adopted the hearing committee's findings of fact. It did not, however, share the committee's legal analysis of those facts. In essence, the board ascribed little significance to the literal ambiguity of the respondent's communications to opposing counsel and to the judge, given that each communication, "in the context in which it was made . . . carried an objectively apparent and sufficiently clear meaning." The board therefore concluded that, in addition to the infractions identified by the hearing committee, the respondent had made "false statements" to a tribunal and to a third person, in violation of Mass. R. Prof. C. 3.3(a)(1), 4.1(a). The board stated that the respondent's conflict of interest should not be discounted entirely in the analysis of the appropriate sanction; it recommended that the respondent be suspended from the practice of law for six months.

At a hearing before me, bar counsel stated that she accepts the board's recommendation, although she previously had sought a longer suspension, of up to one year. The respondent argued that the hearing committee had taken the better approach, both

as to the violations committed by the respondent and as to the appropriate sanction. He also argued that, even if his representations are deemed to have been false statements, a shorter term of suspension, such as three months, is warranted.

3. Discussion. The most important factor in determining an appropriate sanction in attorney discipline proceedings 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). The sanction imposed should not be "markedly disparate from judgments in comparable cases," Matter of Foley, 439 Mass. 324, 333 (2003), quoting Matter of Finn, 433 Mass. 418, 422-423 (2001), but "[e]ach case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances." Matter of Pudlo, 460 Mass. 400, 404 (2011), quoting Matter of Crossen, supra. "[S]ubstantial deference" is given to the board's recommendation. See Matter of Crossen, supra, quoting Matter of Griffith, 440 Mass. 500, 507 (2003). In this case, the sanction recommended is appropriate.

The board did not err in its determination that the respondent's voicemail message to the plaintiffs' counsel, as well as his remarks to the judge, were false statements in violation of Mass. R. Prof. C. 3.3(a)(1) and 4.1(a). As the respondent argues, "distinctions have been made between an

'affirmative misrepresentation' and the failure fully to disclose." Matter of the Discipline of an Attorney, 448 Mass. 819, 832 (2007), and cases cited. But, here, the respondent engaged in affirmative misrepresentations. It matters little that he crafted those misrepresentations in formulations that, while facially ambiguous, could be expected to deceive, and did so. "[H]alf-truths may be as actionable as whole lies." Kannavos v. Annino, 356 Mass. 42, 48 (1969), and sources cited. Statements that are "technically accurate" or "literally true," but that nevertheless are "clearly intended to mislead" or "beg[] [a] false inference" amount, in appropriate cases, to false statements within the meaning of Mass. R. Prof. C. 3.3(a)(1) and 4.1(a). See Matter of Hession, No. BD-2013-065 (Aug. 27, 2013), quoting Matter of Pemstein, 16 Mass. Att'y Disc. Rep. 339, 348 (2000).

This was such a case. The hearing committee found that the respondent's voicemail message to opposing counsel "had a specific enough meaning in the context in which it was made, by which the respondent attempted to lead [opposing counsel] down the garden path to avoid the court's discovery of what he thought was his client's contempt." This communication was thus, according to the hearing committee, "deceitful and made with intent to mislead." Similarly, the hearing committee determined that the respondent's remarks to the judge were

"deceptive and misleading" because the respondent "knew his statements would be understood to mean that the entire $192,500 had been turned down, and he meant them to be understood that way." These descriptions support the characterization of the communications at issue as "false statements."

The sanction recommended by the board also is appropriate. In some cases, false statements to a tribunal warrant a full year's suspension. See Matter of McCarthy, 416 Mass. 423 (1993); Matter of Neitlich, 413 Mass. 416 (1992). The board here recognized, however, that a lesser sanction, in the range of a six-month suspension, is often sufficient where an attorney's misrepresentations amount to less than a full-blown "fraud on the court." See, e.g., Matter of Surprenant, 27 Mass. Att'y Discipline Rep. 855 (2011) (six-month suspension for falsely certifying client's awareness of court documents); Matter of Smoot, 26 Mass. Att'y Discipline Rep. 631 (2010) (six-month suspension, three of them suspended, for misrepresenting that motion had been served on opposing party); Matter of Shuman, 17 Mass. Att'y Discipline Rep. 510 (2001) (six-month suspension for falsely identifying expert witness and describing his expected testimony).

The board did not err in viewing this matter as belonging to the latter category of cases. As the board explained, although the respondent's statements created mistaken

impressions, the respondent did not "creat[e] [his] misrepresentations out of whole cloth." He also did not overtly argue the potential significance of his misrepresentations to the judge, namely, that because the plaintiffs had refused to take possession of $192,500, the respondent could not have violated any order. In addition, the judge ultimately did not rely on the respondent's misrepresentations in reaching his decision. Finally, as the board noted, "the respondent was facing a personal attack" in the contempt proceedings, where he, too, was named as a defendant.[5] In these ways, the respondent's misconduct amounted to less than a thorough fraud on the court of the kind that warrants a year-long suspension.

On the other hand, a sanction of less than a six-month suspension, as requested by the respondent, would not be appropriate. The respondent's misrepresentations, both to the judge and to opposing counsel, were close to the hearts of the matters then at stake (namely, whether payment from the client would be forthcoming, and whether the respondent had failed

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[5] Still, this "attack" on the respondent did not mitigate the seriousness of his misconduct to the degree present where, for instance, an attorney strays across ethical lines in the course of his or her own emotionally-charged divorce proceedings. See, e.g., Matter of Ring, 427 Mass. 186 (1998); Matter of Finnerty, 418 Mass. 821 (1994); Matter of Leahy, 28 Mass. Att'y Discipline Rep. 529 (2012); Matter of Kilkenny, 26 Mass. Att'y Discipline Rep. 288 (2010).

wrongly to transmit funds to the plaintiffs). The respondent's misrepresentation to the plaintiffs' attorney was not made in the heat of a courtroom battle; it was delivered in an apparently deliberate manner, in a carefully-crafted message. Moreover, the specific misrepresentations for which discipline is sought were made in the context of the respondent's prolonged inaction in the face of his client's violation of the preliminary injunction, and his sustained efforts to maintain the false impression that full payment from the client was imminent. These factors counsel against undue lenity. So, too, does the respondent's additional misconduct in failing to disclose his conflict of interest to his client in an adequate manner.

4. Conclusion. For the foregoing reasons, an order shall enter suspending the respondent from the practice of law in the Commonwealth for a period of six months.

By the Court

Barbara A. Lenk
Associate Justice

Entered: August 26, 2015