IN RE: ALESIA H. DAYS

NO. BD-2014-078

S.J.C. Order of Term Suspension entered by Justice Cordy on October 9, 2014. [1]
S.J.C. Judgment of Reinstatement entered by Justice Cordy on February 26, 2015.
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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
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL,
Petitioner

vs.

ALESIA H. DAYS, ESQ.,
Respondent

BOARD MEMORANDUM

The respondent, Alesia H. Days, Esq., has appealed from a hearing committee report that recommended public discipline for (1) misrepresenting to the registration department of the Board of Bar Overseers and, derivatively, to the Committee for Public Counsel Services (CPCS) that she maintained malpractice insurance coverage, and (2) representing CPCS clients while uninsured, a violation of the terms of her contract with CPCS. On June 2, 2014, we heard oral argument. For the reasons set forth below, we reject the respondent's objections to the hearing committee's findings of fact and conclusions of law, which we adopt. While the committee could not agree on disposition (the three members offered three different sanctions), we recommend a two-month suspension.

The Committee's Findings

We summarize here the committee's findings and adduce additional findings and evidence from the record as they become pertinent to the discussion.

The respondent was admitted to practice in 2000. She received training and certification from CPCS in 2003 to represent criminal defendants in the trial courts. In 2008, she was trained and certified to handle appeals.

CPCS required that the attorneys it assigned to represent indigent defendants maintain malpractice insurance coverage. Through 2008, and until sometime during 2009, CPCS required that the attorneys it assigned to criminal representation provide it with proof of insurance. In 2009, CPCS changed its policy so as to rely in the first instance on the new requirement under S.J.C. Rule 4:02, § 2A, that attorneys certify whether they have professional liability insurance on their annual bar registration statements. CPCS also conducted random audits to confirm that appointed counsel did in fact have coverage. It did not change its requirement that certain billing forms certify the billing attorney's compliance with CPCS policies.

From July 31, 2009, to January 5, 2012, the respondent did not have professional liability coverage, yet during that time she accepted thirteen CPCS appointments. She did not report to the board, as required by S.J.C. Rule 4:02, § 2A, when her coverage lapsed on July 31, 2009, and after that she twice falsely certified in her annual registration statement that she was maintaining malpractice coverage.

The respondent admitted that she did not check to ensure she had coverage in July 2010. A majority of the committee found that the respondent's false certification to the board that month was made with willful blindness to its falsity, a finding that is the functional equivalent of a knowing misrepresentation. See Matter of Zimmerman, 17 Mass. Att'y Disc. R. 633, 645-646 (2001). The third member would have found actual knowledge. The committee unanimously found that a second certification of coverage, signed by the respondent on May 1, 2011, was knowingly false.

A random audit CPCS commenced in December 2011 brought to light the respondent's lack of coverage. The hearing committee found that certain statements the respondent made to CPCS in connection with that audit were knowingly false.

Based on these basic findings, and others discussed below, the committee found that the respondent had violated the following Rules of Professional Conduct by the following acts:

- Rules 8.4(c) (dishonesty, deceit, misrepresentation, or fraud) and 8.4(h) (other conduct reflecting adversely on fitness to practice), by twice falsely certifying to the board's registration department that she had malpractice coverage, with knowledge of the falsity or its functional equivalent;
- Rules 8.4(c), 8.4(d) (conduct prejudicial to the administration of justice), and 8.4(h), by handling CPCS cases when she knew she did not have malpractice coverage.

In aggravation, the committee found that the respondent gave knowingly false testimony during the disciplinary hearing and failed to accept responsibility for her misconduct. The committee gave no weight to the respondent's proffer of what the committee characterized as "typical" mitigation evidence: good character and a good reputation. It also rejected the respondent's claim that chaotic events in her personal life and a natural disaster had contributed to her misconduct.

Discussion

The respondent's appeal focuses on the finding that she knew she did not have malpractice coverage when she certified to the board that she did, and when she continued to accept and represent CPCS clients. We find no error.

The respondent knew from her training that CPCS required she maintain malpractice insurance. She acknowledged providing at least one coverage declaration page to CPCS as proof. Ex. 2, at EX000042. Because until 2009 CPCS required proof of insurance, we find that for each of the years until 2009 during which she accepted CPCS appointments, she had provided similar proof of coverage. The respondent also knew she was required to purchase a policy each year and that coverage would lapse if she did not do so; she had obtained insurance, had worked with an insurance agent, and had not previously had problems renewing her insurance. Tr. I:131-132, 150-151. Given the respondent's accumulated knowledge and all of these circumstances, the committee did not err in finding that the respondent's admitted failure to check whether she had coverage before making a false certification to the board's registration department in July

2010 constituted at least willful blindness. The facts that put the respondent on notice and that she failed to investigate regarding the absence of insurance were substantial and obvious, and we agree with the committee that the respondent knew as much or simply closed her eyes to them by failing to check her own records. Contrast Matter of Driscoll, 447 Mass. 678, 685, 22 Mass. Att'y Disc. R. 282, 294 (2006) (forgery was not as "substantial and obvious" as the facts left uninvestigated in Zimmerman).

The respondent argues that the committee's finding of willful blindness is undercut by two considerations. First, she was then employed in an in-house (and largely non-legal) position and was not then not focusing on the incidents of legal practice. The argument is not persuasive. Maintaining malpractice coverage was no mere incident to the respondent's acceptance of CPCS work; it was an absolute pre-requisite, as she knew. Whatever the burden of her duties as in-house counsel, she was still continuing to accept court appointments from CPCS at the time. The committee, which is the sole judge of the credibility of her testimony, see, e.g., Matter of Barrett, 447 Mass. 453, 463-465, 22 Mass. Att'y Disc. R. 58, 70-72 (2006), rejected her claim that the obligation slipped her mind due to the distraction of her in-house duties.

Second, she argues that she was adjusting to her recent divorce and to her new role as the single mother of two children. Again, the hearing committee did not credit her testimony to this effect (see Hearing Report. ¶ 51), and on this record we are not free to overturn that credibility determination.

Two subsidiary findings lie at the heart of the committee's finding that the respondent made a knowingly false certification of coverage in May 2011. First, on May 1, 2011, she signed a registration statement that contained a certification of coverage that was plainly false and then mailed it to the board. Second, only a few days later she submitted an application to an insurer for malpractice coverage in which she certified that she then had no coverage in effect.

The respondent testified that she meant to date the registration statement May 11

and that the May 1 date was simply a mistake. The statement of certification, she argues, was not submitted with "actual knowledge" that she was not covered because she filed it with the board substantially contemporaneously with her application for coverage, which she expected to obtain almost immediately. The problem, again, is that the committee did not believe her. It found instead that she wrote out her registration statement on the date it bears, May 1, 2011 (H.R. ¶¶ 18, 21), a finding that is in turn buttressed by evidence that she mailed it no later than May 10, 2011 – before, that is, she applied for malpractice coverage. The committee's finding was supported by (a) the date on the document itself, (b) the envelope in which the registration statement was mailed (it was postmarked May 10, 2011),[1] and (c) the committee's rejection of the respondent's testimony that she signed the registration statement on the eleventh but wrote "5-1-11" by mistake. In the absence of any credible explanation to the contrary, the committee made no error in finding that the respondent had filled out the registration statement claiming coverage on the date it bears – May 1, 2011 – and filed it with the board before she had applied for coverage.

The respondent cannot contend that she negligently asserted coverage on May 1, later discovered her mistake, and then promptly applied for coverage. Such a scenario is precluded by her own testimony that her registration statement and her insurance application were prepared virtually simultaneously. While the committee found this testimony false, her resorting to it is a tacit admission that she did not discover and promptly seek to correct an erroneous registration statement.

Combining all of these facts with the circumstances adduced in connection with the July 2010 false certification, the committee correctly concluded that the respondent

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[1] The committee also noted that it was unlikely the respondent would have dated the document later than the day it was mailed. We add that, if we are to believe that the respondent was then thinking that her registration statement was substantially true because dated the same day as her application for insurance, it is unlikely the respondent would have made a mistake in dating it, and she had no reason to post-date it. The respondent's narrative about her own motivations and thoughts at the time is far from convincing.

knew she did not have insurance coverage when she completed and submitted her May 2011 registration statement. See Mass. R. Prof. C. 9.1(f) ("A person's knowledge may be inferred from circumstances."). Likewise, the committee did not err in rejecting her assertion that she had innocently relied on a simultaneous application for coverage.

Equally unavailing is the respondent's argument that the absence of coverage after these events in mid-May.2011 was merely the result of oversight and the press of events, which should be viewed as excusing or mitigating the falsity of the registration statement. She argues that her failure to follow up on her original application for insurance was compounded by a tornado that devastated her neighborhood and traumatized her family in June. The committee rightly rejected this excuse. The respondent knew that her application to the insurer did not establish coverage. On May 12, 2011, the insurer responded by quoting a premium, offering coverage, and requesting a response and payment before May 20, 2011. Ex. 11, at EX0000235. The respondent replied the same day, by e-mail, that she would "sign and return with payment." If the respondent had intended to obtain coverage virtually simultaneously with her registration statement to ensure the latter's truth, she would have followed up immediately.[2] She did not; she never paid the policy premium. And the committee expressly declined to credit her testimony that the tornado played any part in her failure to obtain coverage during and after mid-May 2011. See H.R. ¶ 52. Even if we had the authority and inclination to trench on the committee's credibility determination, the respondent has not explained why she could not have secured insurance during the two and a half weeks between her May 12 communications with the insurer and the arrival of the Springfield tornado.

For all of the foregoing reasons, we reject the respondent's challenges to the

[2] During oral argument, the respondent suggested that she had no reason to avoid coverage because the premium was small and could have been paid in installments. We are not persuaded. The respondent was accepting few appointments and could well have concluded that the stream of income they generated did not justify the cost of insurance. Still, the argument implicitly concedes that the respondent had no excuse for failing or refusing to make the minimum payment necessary to bind coverage.

committee's findings that her registration statements contained assertions of professional liability coverage that were knowingly false.

The committee also found that the respondent accepted new CPCS appointments and continued working on current appointments while knowing she was not insured. H.R. ¶ 44. We note that, from what appears in the record, some of the appointments might have occurred after the respondent had submitted her second false registration statement and her application for renewed coverage. Our discussion above also demonstrates that the committee did not err in finding that after those submissions the respondent still knew she was uninsured while she accepted or continued representing CPCS-appointed clients.[3]

The respondent challenges certain findings that she made various misrepresentations to CPCS in connection with its audit of her insurance during late 2011 and early 2012. These misrepresentations were not alleged or charged in the petition for discipline. Given the committee's careful findings concerning these uncharged misrepresentations, we understand them to be made for two purposes: to support the findings that after mid-May 2011 the respondent knew she was representing clients under CPCS appointments without the required coverage, and to establish that her misconduct was aggravated by giving knowingly false testimony at the hearing. See H.R. ¶¶ 31, 32, 37, 42, 44.

The respondent misrepresented to CPCS that she had "just learned" on January 25, 2012, that her insurance policy was cancelled on May 12, 2011. She argues that this was literally true because at the time of her statement to CPCS the policy was then

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[3] The petition charges the respondent with accepting appointments while uninsured. Petition, ¶¶ 3, 7, 8, 12. The committee found that the respondent accepted thirteen cases between July 31, 2009, and January 5, 2012, H.R. ¶ 8, but it does not identify when those appointments occurred. The committee considered irrelevant any distinction between accepting new representation and continuing prior representation. Our conclusion that the committee correctly found that after the second false registration statement the respondent still knew she was uninsured establishes that – whether the respondent accepted new cases or merely continued to handle existing cases – she did so knowing she did not have the required insurance.

"cancelled," even if the cancellation itself had occurred earlier. Still, the committee correctly found that the respondent had known since May 2011 that she had no coverage. Therefore, whatever the respondent meant by saying the policy "was cancelled," – i.e., whether the quoted phrase is viewed as a passive-voice verb (which would have been false) or instead a participial adjective describing a state of being cancelled (which would have been literally true, albeit misleading in context) – the statement was literally false because she had not "just learned" about it.

More fundamentally, the respondent's communications with CPCS were misleading and dishonestly invited false inferences. For instance, after receiving the audit notice the respondent told CPCS that her insurer "informed" her that payment "had not been received." While that statement might be literally true as a report of what the insurer said to the respondent, it was misleading. So expressed, her statement deliberately invited the false inference that she had sent the payment and that the insurer had given her new information about its non-receipt – all for the transparent purpose of framing her lack of insurance as innocent and unintended. Yet, as the respondent knew, no payment had been sent, and she did not learn something new from the insurer when it reported that no payment had been received.

The committee did not err in treating the respondent's dissembling[4] as additional and aggravating evidence of conscious deception. See, e.g., Matter of the Discipline of an Attorney, 448 Mass. 819, 825 n.6 (2007) (uncharged misconduct may be weighed in aggravation of charged violations).

The Appropriate Sanction

Our discussion above disposes of the respondent's argument that her misconduct

[4] Literal truth might defend a charge of perjury, but rule 8.4(c) prohibits more than outright perjury. Matter of an Attorney, SJC No. BD-2007-032 (June 21, 2007) (board memorandum) (failure to disclose material facts, creating misleading impression, and inviting false inferences constituted misrepresentation under rules 4.1(a) and 8.4(c)); Matter of Dittami, 12 Mass. Att'y Disc. R. 98, 112 (1996) (distinguishing perjury: "Attorneys may not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, and there can be little doubt that the respondent intended to mislead . . . .").

was less egregious than that in the two leading cases cited by the parties, Matter of Durodola, S.J.C. No. BD-2012-093 (October 1, 2012), and Matter of O'Meara, S.J.C. No. BD-2011-0132 (Dec. 28, 2011). In both cases, the attorney was suspended for two months for knowingly making false certifications to the board that the coverage was in place and for knowingly accepting CPCS appointments while uninsured. Bar counsel asks that we recommend a suspension of the same length here. While a case could be made that the aggravating factors found here might warrant a stiffer sanction than the two months imposed in Duradola and O'Meara, we recommend a suspension for two months.

Conclusion

For all of the foregoing reasons, we adopt the hearing committee's unanimous findings of fact[5] and conclusions of law. Information shall be filed recommending that the respondent, Alesia H. Days, Esq., be suspended from the practice of law for two months.

Respectfully submitted,

THE BOARD OF BAR OVERSEERS

By: _____
Donna Jalbert Patalano, Esq.
Secretary pro tem

Voted: July 14, 2014

[5] While there was not unanimity among the hearing officers as to whether the respondent's misrepresentations were made deliberately or with willful blindness as to their truth, the distinction need not detain us because willful blindness is the functional equivalent of intent for disciplinary purposes. See Matter of Zimmerman, supra.