NO. BD-2004-082

IN RE: DAVID T. BARRAT

S.J.C. Order of Term Suspension (6 months) entered by Justice Ireland on November 30, 2004, with an effective date of December 29, 2004. [1]

(S.J.C. Judgment of Reinstatement entered by Justice Ireland on December 26, 2007.)

APPEAL PANEL REPORT

The parties have filed cross-appeals from the report of a special hearing officer who recommended that the respondent, David T. Barrat, be suspended for six months for misconduct in two matters and be required to petition for reinstatement. The respondent seeks a public reprimand; Bar Counsel asks that we extend the term of suspension to a year and a day. Upon consideration, we adopt and incorporate by reference the hearing officer's subsidiary findings and conclusions of law with respect to both counts, and we join in the hearing officer's recommendation for discipline. We set out below a summary of the two counts, with analysis of the respondent's objections, followed by a discussion of issues in mitigation and aggravation as well as the grounds for the sanction we recommend.

Facts. In the first matter, the respondent undertook to represent a client in connection with injuries she had sustained in an automobile accident. Three days before the statute of limitations was due to expire, the respondent filed a complaint against the other driver in the Superior Court. Service was timely made upon the defendant at her last and usual address in Acton. The court dismissed the complaint on the ground that a recovery in excess of $25,000 was unlikely. A month later, the respondent refiled the action in the Concord District Court, but he did not attempt to serve the defendant, who, he had learned, had moved out of state. The court later dismissed the action for failure to complete service. The respondent took no action to vacate the dismissal for more than a year and a half.

Although the respondent knew the matter had been dismissed, he represented to the defendant's insurer that there was a case pending. The insurer denied the claim on the ground that the statute of limitations had run before the District Court action was filed. The respondent did not accept the insurer's invitation to explain any error in its reasoning. To his client, with whom he maintained scant and desultory contact, the respondent meanwhile expressed optimism that a timely settlement could be achieved. He did not advise her that the insurer had denied the claim or that the action had been dismissed.

The respondent made limited efforts to locate the defendant, none of which bore fruit until sometime in the last quarter of 2000, when an investigator produced a San Antonio address. On September 21, 2000, the respondent invoked the new address as grounds for moving to set aside the order of dismissal; he recited his erroneous belief that the defendant's absence from the Commonwealth tolled the statute of limitations. The court found no good cause to excuse the failure to serve because the respondent had not previously moved for an extension of time to complete service and had not detailed his unsuccessful efforts to locate the defendant. The client eventually retained other counsel, who brought a malpractice action against the respondent. The respondent's insurer settled the matter for approximately $20,000.

The special hearing officer found that the respondent had neglected the case by failing to make diligent efforts to locate and serve the defendant over a period of four years, in violation of Mass. R. Prof. C. 1.1, 1.2(a), and 1.3, and that he had failed to keep his client

adequately informed about the case and failed to respond to her inquiries in a timely manner, in violation of Mass. R. Prof. C. 1.4(a) and 1.4(b). The hearing officer found that the respondent had violated Mass. R. Prof. C. 1.4(a), 1.4(b), 8.4(c), and 8.4(h) by falsely stating or implying to his client that her claim was viable and that he was optimistic about settlement when he knew that the claim had been denied by the insurer and dismissed by the court, and by representing to the client that he was trying to effect service on the defendant when he was intending to refile the case in the mistaken belief that the statute of limitations was tolled.[2]

In the second matter, the respondent drew a will for a client and maintained custody of the original. Shortly after the client died, the client's brother, who was named executor under the will, called the respondent in an effort to locate it. The respondent tried but failed to locate the will, largely because he did not consult a handwritten list of stored wills maintained by his secretary. He did not advise the brother that could not find the will, and he failed to respond to two subsequent letters and at least two other calls from the brother. Some two months after the first request was made for the will, the respondent succeeded in locating it, but he did not send it to the brother. The brother threatened to file a grievance with the Office of Bar Counsel, and still the respondent did not send the will or advise him of the results of his search. Only after a grievance was filed did the respondent finally deliver the will.

The hearing officer concluded that the respondent had violated Canon Nine, DR 9-102(B)(2) and (B)(3), by failing maintain adequate records of the will's location; Canon One, DR 1-102(A)(5) and DR 1-102(A)(6), by failing to deliver the will to the executor within thirty days after being notified of his client's death, as required by G.L. c. 191, § 13; and Canon Six, DR 6-101(A)(3), and Canon Seven, DR 7-101(A)(2), by failing to maintain a list of wills in his safe deposit box, failing to conduct an adequate search for the will, and failing to send it to the executor promptly after its ultimate retrieval.

In aggravation of the respondent's misconduct, the hearing officer considered the respondent's history of discipline. He received an admonition in 1991 for neglect and failure to communicate with a client, and in 1995 he was publicly reprimanded for mishandling his trust accounts; disposition by reprimand was conditioned on terms of probation calling for accounting supervision and office management consulting. Matter of Barrat, 11 Mass. Att'y Disc. R. 6 (1995). He later failed to comply with many of the probationary conditions of the reprimand—a failure he ascribes to his inability to pay the requisite professionals, but he did not apprise Bar Counsel of these difficulties or suggest alternative arrangements.

In mitigation, the respondent offered evidence that he suffered from depression, triggered or exacerbated in part by the loss of several close family members. Although he had declined psychotherapy, the respondent treated with his primary care physician, whose letter was proffered as evidence of his condition, its causal relationship to his misconduct, the course of his treatment, and the extent of his recovery since he began taking anti-depressants in the spring of 2002.[3] The hearing officer accepted the letter but did not credit the doctor's opinions as to causation and remission because the internist was "not an expert in the field of mental health." The hearing officer also reported that she was not persuaded, based on her own observations of the respondent during the hearing, his longstanding history of disorganization and disciplinary problems, and the absence of a formal diagnosis or consultation with a mental health expert, that a depressive disorder was the cause of the respondent's misconduct or, if it was, that it was in remission. She expressed concern that there was a substantial likelihood that the respondent would experience further professional problems. Consequently, although she proposed a six-month suspension, she recommended that he be required to undergo a hearing before reinstatement at which he might demonstrate that he had taken adequate steps to deal with his depression and to organize his office.

Procedural objections. The respondent raises numerous, scattershot issues on appeal. His procedural objections need not detain us. His claim of ineffective assistance of counsel fails

because there is no right to counsel in the sense understood in the criminal context, see Matter of Jones, 425 Mass. 1005, 1007, 13 Mass. Att'y Disc. R. 290, 295 (1997) (rescript); Matter of Eisenhauer, 426 Mass. 448, 455, 14 Mass. Att'y Disc. R. 251, 259 (1998), and because, in any event, it is plain from our independent review of the proceedings before the hearing officer that the respondent mounted an adequate defense. We have no way of ascertaining in the present posture whether, as he claims, he was not allowed to participate in the pre-hearing conference, but even assuming this to be the case, he has referred us to no prejudice flowing from his purported exclusion. Bar Counsel has demonstrated that copies of all exhibits were provided to the respondent's counsel.

Substantive objections. The issues of substance raised in the respondent's brief reduce, essentially, to two complaints. First, he objects to the hearing officer's findings under the first count—that he neglected the matter, failed to communicate with his client, and made misrepresentations to her—on the ground that they fail to take into account that he harbored a reasonable, if erroneous, belief that the statute of limitations was tolled while the defendant was out of state. In support of the reasonableness of that belief, he cites Walsh v. Ogorzalek, 372 Mass. 271 (1977), for the proposition that the statute may be tolled when an absent defendant is not amenable to service. Putting to one side that he admits he was unaware of the case at the time, we share Bar Counsel's doubts that Walsh can be read to excuse service where such paltry efforts were made to locate the defendant. It was the respondent's lack of diligence, not his misreading of the law, that underlay the court's order denying his motion to vacate the dismissal. He did not convince the court that there was good cause for his failure to locate and serve the defendant between filing the action in February 1999 and moving to vacate the dismissal in December 2000.

The hearing officer's findings reflect the same, independent conclusion. She found that during this period the respondent only "made limited efforts" to locate the defendant, and she went on to list steps he could have taken but did not, such as serving through the registry of motor vehicles, moving for an extension of time to serve, documenting his attempts to locate the defendant, making demand on the insurer, and keeping his client apprised of the status of the case. When all these factors are considered, it is evident that the respondent did not provide diligent representation or maintain adequate communication. It also follows that the representations he did make to the client were false.

The respondent's second objection pertains to the hearing officer's determination not to credit his internist's opinions regarding his depression. The respondent renews his request, already denied by the Board Chair, to remand the matter to the hearing officer to take live testimony from the internist. We decline the request.

The principal basis stated for the hearing officer's refusal to credit the doctor was his lack of mental health expertise. We readily agree with the hearing officer that the internist would not have qualified as an expert witness on the subject of depression in a court of the Commonwealth. It is also true, however, that the rules of evidence do not apply in a bar discipline proceeding, see Rules of the Board of Bar Overseers, Section 3.39, and primary care doctors provide mental health treatment on a daily basis throughout the nation. We need not decide the evidentiary question here, however, for we would recommend suspension even if the hearing officer had credited the doctor's written opinions in their entirety.[5] Accordingly, we assume that the respondent suffered from a depressive disorder during the relevant period, that the disorder bore some causal relation to his misconduct, and that he has made substantial steps toward recovery from his depression.

Sanction. The respondent engaged in misconduct in two matters, involving neglect, failure to communicate, lack of preparation, and (in the first matter) misrepresentations to the client. While there was little or no harm caused by the inability to produce the will promptly in the second matter, there clearly was injury in the extinguishment of the client's claim in the first matter—an injury palliated to some considerable extent by the client's recovery from the respondent's professional liability carrier.[5] These circumstances would generally call for a

term suspension under the principles enunciated in Matter of Kane, 13 Mass. Att'y Disc. R. 321, 327-329 (1997). "Suspension is generally appropriate for misconduct involving repeated failures to act with reasonable diligence, or when a lawyer has engaged in a pattern of neglect, and the lawyer's misconduct causes serious injury or potentially serious injury to a client or others." Id. at 328. Any question whether suspension is appropriate here is dispelled by the respondent's disciplinary history (an admonition and a public reprimand), particularly since the prior misconduct is related to the new misconduct. See Matter of Gross, 435 Mass. 444, 453, 17 Mass. Att'y Disc. R. 281, 280-281 (2001). It is thus appropriate to take the "next step" up the ladder of disciplinary sanctions. See Matter of Provanzano, 5 Mass. Att'y Disc. R. 300, 305 (1987).

This case does not call for a suspension for a year and a day, as Bar Counsel urges. The hearing officer properly distinguished the respondent's acts from the more egregious misconduct that warranted a year's suspension in Matter of Shaughnessy, S.J.C. No. BD-2002-061 (July 3, 2003) (Sosman, J.). Bar Counsel rightly points out that the conduct in Shaughnessy predated the standards announced in Kane, and that Shaughnessey had a less extensive disciplinary history than the respondent. But Shaughnessy did not struggle with the depression that we have assumed to have figured in the respondent's actions. The mitigating circumstances here counsel against a lengthier suspension.

In the end, while the respondent's history of depression may explain to some extent the disorganization of his office, and we have taken his emotional disorder into account in moderating the length of the suspension, it remains true that he failed to carry through on the probationary conditions imposed when he was publicly reprimanded. Furthermore, the hearing officer based her recommendation to a large extent on her observations of the respondent during the hearing, from which she took away the distinct concern that he might experience further difficulties. Some deference is due those observations. We join in her judgment that a short suspension is in order and that the interests of the public require that the respondent undergo a hearing at which he might demonstrate the steps, emotional and professional, he has taken to see that similar misconduct will never recur.

Conclusion. For all of the foregoing reasons, we adopt the special hearing officer's findings of fact, conclusions of law, and recommendation that the respondent, David T. Barrat, be suspended from the practice of law for six months and that he be required to petition for reinstatement under the terms of S.J.C. Rule 4:01, § 18(2). Respectfully submitted,
Thomas E. Peisch, Chair
David Rind, M.D., Member
Janet Kenton-Walker, Member

Dated: July 19, 2004

FOOTNOTES

[1] The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

[2] The hearing officer rejected a charge that the respondent's statement to the insurer that the case was "pending" amounted to a deliberate misrepresentation because, she found, Bar Counsel had failed to prove that the respondent knew dismissal could not be vacated. Bar Counsel has not appealed from this determination and we express no opinion regarding it.

[3] The respondent offered other mitigating evidence, tending to show good character, community service, and the deleterious impact of a term of suspension. The hearing officer rightly characterized this evidence as "typical mitigation" that normally will not stave off suspension. See, e.g., Matter of Alter, 389 Mass. 153, 156, 3 Mass. Att'y Disc. R. 3, 6-7

(1983).

[4] Similarly, because we credit the doctor's written opinions for purposes of this appeal, no purpose would be served by reopening the proceeding to receive his live testimony, where they would be exposed to possible impeachment on cross-examination. Were we not inclined to accept Dr. Krasner's letter and to presume the validity of his opinion to the extent indicated above, we would have remanded this matter to the special hearing officer to hear and assess the doctor's live testimony.

[5] The parties quarrel over the question whether a malpractice settlement is a "mitigating factor." This seems a largely pointless inquiry: of course, the client was harmed when the claim was lost, and of course the client's harm was mitigated to some extent by the insurance payment. The net result, in our view, is that the payment lessens, without eliminating, the injury sustained by the client.