IN RE: JOSE LUIS SERPA

NO. BD-2014-025

S.J.C. Order of Term Suspension entered by Justice Spina on May 1, 2014.[†]

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[†] 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
DOCKET NO. BD-2014-025

IN RE: JOSE LUIS SERPA

MEMORANDUM OF DECISION

Bar Counsel filed a petition for discipline alleging that Jose Luis Serpa, the respondent, represented Damian McNulty in 1998 on a criminal complaint for operation of a motor while under the influence of intoxicating liquor, operating a motor vehicle without a license, and leaving the scene of a property damage accident. The petition alleges that the respondent had been assigned to represent McNulty through the Suffolk County Bar Advocate Program, acting on behalf of the Committee for Public Counsel Services (CPCS). In his agreement with the bar advocate program the respondent agreed that he would not accept any form of payment for cases to which he was assigned other than through CPCS. Nevertheless, he entered into an agreement with McNulty for payment of $1,250 for representation through trial. McNulty's case was disposed of by guilty plea. The complaint further alleges that the respondent received approximately $2,000 from McNulty and $450 from CPCS.

The petition further alleges that McNulty, represented by new counsel, filed a motion for a new trial in 2011. McNulty alleged that the respondent advised him to plead guilty because if he went to trial and lost, a representative of immigration services would detain him immediately. McNulty further alleged that he had paid the respondent

to represent him. The respondent filed an affidavit with the court in which he swore that McNulty's allegations were "fabricated ... from whole cloth." He specifically denied that he had been paid a fee by McNulty. After a hearing, the motion for a new trial was denied. On reconsideration, and based in part on new information that included the respondent's receipt for a $400 cash payment from McNulty toward the respondent's fee, the court allowed the motion for a new trial. The complaint against McNulty subsequently was dismissed.

Bar counsel's petition also alleges that the fee which the respondent charged McNulty while simultaneously serving as his assigned counsel was illegal and a violation of Mass. R. Prof. C. 1.5 (a) [illegal fee] and 8.4 (c) [dishonesty, fraud, deceit, or misrepresentation]. Bar counsel further claimed that the respondent's misrepresentations to the court and successor counsel that he was not paid a fee by McNulty violated of Mass. R. Prof. C. 3.3 (a) [knowingly making a false statement of material fact or law to a tribunal], 8.4 (c) [dishonesty, fraud, deceit, or misrepresentation], 8.4 (d) [conduct that is prejudicial to the administration of justice], and 8.4 (h) [conduct that adversely reflects on the lawyer's fitness to practice law].

A hearing committee found facts, summarized as follows. The respondent, who was admitted to the Massachusetts bar on December 29, 1995, signed an agreement to provide legal services with the Suffolk County Bar Advocate Program on July 8, 1998. One provision in that agreement states:

> "The Attorney agrees not to accept any other form of payment from or on behalf of an assigned client for the representation to which the Attorney is assigned except from the Commonwealth of Massachusetts through billings submitted to CPCS."

The CPCS manual for assigned counsel contains a similar provision. The hearing committee further found: "In addition, the respondent was required to certify on his bills

to CPCS that he had not received nor will accept any other payment for his services."[1]

The respondent was assigned to represent McNulty on July 22, 1998. On August 12, 1998, a pretrial conference was held, and trial was scheduled for October 29, 1998. By undated letter the respondent informed McNulty that "[t]he cost of pretrial motions, hearings, and trial itself will be $1,250." On October 13, McNulty paid $400 and obtained a receipt from the respondent's receptionist. On October 29, McNulty tendered a guilty plea, and was placed on probation for one year. On November 5, the respondent submitted a bill to CPCS in the amount of $562.50 for 18.75 hours of work. CPCS accepted 15 hours and paid the respondent $450.

On March 28, 2011, represented by new counsel, McNulty filed a motion for a new trial alleging that the respondent was ineffective. McNulty filed an affidavit in support of his motion stating, inter alia, that he had paid the respondent $2,500 for a trial; that on the day of trial the respondent advised him that he should plead guilty because "some representatives from Immigration were present and if [he] went to trial and lost

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[1] This finding is not entirely correct. Bills may be submitted to CPCS in one of two ways – manually, or by "telebill." Each procedure contains a certification by counsel, and they are different. The certification on the manual (paper) billing form states: "I certify under the pains and penalties fo [*sic*] perjury, that I have been appointed to the above case, that I have provided the services and incurred the costs described on the date and for the times listed, and that I have provided representation consistent with CPCS Performance Guidelines and Standards, and that all charges for legal services reflected on this bill are based upon my contemporaneous time records maintained in accordance with the CPCS Policies and Procedures Manual and regulations which I have received and read." The telebill form, by contrast, contains the following certification: "I certify under the pains and penalties fo [*sic*] perjury, that I have been appointed to the above case, that I have provided the services and incurred the costs described and that I have not received, nor will accept any other payment for these services." (Emphasis added.) Neither form appears to contain a certification that the lawyer did not and will not accept a fee other than from CPCS for services rendered in an assigned case. There is a "PIN Agreement" that operates in conjunction with the telebill procedure – but not with the manual procedure. The PIN Agreement does not include a requirement that the attorney refrain from accepting other compensation in telebilled cases. See note 6, *infra*.

[he] would be detained;"[2] that he pleaded guilty solely because of the respondent's advice; that because he had no record he should have received a continuance without a finding (CWOF) if requested by the respondent; that the respondent did not request a CWOF and McNulty instead was "convicted."[3] Upon reading McNulty's affidavit, which McNulty's new attorney sent to the respondent, the respondent felt deeply offended.

The respondent prepared an unsolicited counter affidavit in which he stated, inter alia, that McNulty did not hire him or pay him a fee, and that he did not tell McNulty that immigration officials were present and would detain him if he went to trial. On his own initiative the respondent attended the hearing on the motion for a new trial and brought his affidavit. At the hearing he reasserted essentially the same statements contained in his affidavit.

The motion for a new trial was denied on May 20, 2011. A further hearing took place on September 12, 2011, at which McNulty presented three items: (1) a receipt for $400 that he paid to the respondent on October 13, 1998; (2) an undated letter from the respondent outlining a fee of $1,250 for representation through trial; and (3) a letter dated January 4, 1999, outlining work done by the respondent for McNulty in an administrative appeal before the Registry of Motor Vehicles in which he sought the return of his license, together with a confirmation of their agreement on a fee of $200 for representation in that

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[2] At the hearing, McNulty testified that a perfect stranger advised him to "plead out." He testified that he then spoke to the respondent, who told him there was a possibility he could be deported.

[3] McNulty was found guilty of OUI and placed on probation for one year. He was ordered to attend the driver-alcohol program and ordered to surrender his license for forty-five days. He was found guilty of leaving the scene of a property damage accident and placed on probation for one year. The charge of operating without a license was dismissed.

matter. The judge asked rhetorically: "Can you trust anything that flows from that relationship?" On September 15, the judge vacated the earlier denial of McNulty's motion for a new trial and granted McNulty a new trial. The judge referred the matter to bar counsel. On October 13, 2011, the criminal complaint against McNulty was dismissed.

The hearing committee credited the respondent's testimony before the committee that he would not have told McNulty that he would have been detained by immigration officials if he went to trial and lost. It found that the respondent's statements in his affidavit and his statements to the court that he had not being retained by McNulty and had not been paid by McNulty were false. However, it said it did not find that the statements were knowingly and intentionally false or made with willful blindness. Instead, it found that those statements were "intemperate and negligent to the point of being reckless," particularly where, in the respondent's own words, they had been made "foolishly," "without reflection, without [first] looking at the CPCS billing," and "kind of in the heat of the moment."[4] The hearing committee credited the respondent's testimony that his "primary concern for making the statements in which he denied having billed or

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[4] The respondent's affidavit filed with the court contained a further assertion that the hearing committee determined was false. He stated that he had "never been disciplined by any bar association in my seventeen years of practice." The hearing committee found that this statement was false because the respondent had received a private admonition from CPCS for charging a fee to an indigent client in a different case for which he was previously assigned, in violation of CPCS policy. Setting aside the technical question whether CPCS is a bar association and the fact that bar associations do not discipline lawyers, the hearing committee credited the respondent's testimony that this incident, which occurred in 2000, "'never crossed [his] mind' and that he 'never thought about it' when he was preparing his affidavit in the McNulty matter." The hearing committee said they "do not believe this statement [in the affidavit] was knowingly and intentionally false or made with willful blindness," or that the respondent was trying to mislead the hearing committee by referring to "bar associations" in his affidavit instead of CPCS or the Board of Bar Overseers. The hearing committee cited, in contrast, *Matter of Fitzgerald*, 16 Mass. Att'y Discipline Rep. 164, 171-172 (2000).

been paid by McNulty were his concern for his reputation and his anger."

The hearing committee found that the respondent violated Mass. R. Prof. C. 1.5 (a) and 8.4 (c) by charging McNulty an illegal fee. It reasoned that S.J.C. Rule 3:10 forbids solicitation of a fee for a case in which the lawyer is assigned counsel, unless authorized by a court pursuant to G. L. c. 211D, § 2A. The respondent accepted money from McNulty without court authorization.

The hearing committee found that the respondent violated Mass. R. Prof. C. 8.4 (c). It reasoned that by signing the billing certifications, he "made repeated misrepresentations that he would not, and had not, charged the client a fee, and in direct contradiction of them, requested and received private payment." This conduct, it concluded, "constituted conduct involving dishonesty, fraud, deceit and misrepresentation in violation of Rule 8.4 (c)." Although it found that the respondent was unaware of the rule against charging an indigent client in an assigned case, it declined to accept his lack of awareness as a defense to a violation of rule 1.5 (a), as ignorance is not a defense. The hearing committee relied on the court's opinion in *Borman* v. *Borman*, 378 Mass. 775, 787 (1979), where the court stated that attorneys "are expected to know and comply" with their professional obligations.

The hearing committee also rejected the respondent's reliance upon New York law with respect to "mixed billing"[5] as irrelevant, immaterial, and without foundation.[6] The

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[5] There was testimony that under New York law, so-called "18B contract attorneys," alongside whom the respondent had worked when he practiced in New York, regularly collected privately negotiated fees from appointed clients, but only *after* an appointed case was converted to a private case *with prior court approval.* However, the respondent was never an "18B contract attorney," and he had no recollection of the 18B billing practices and procedures.

[6] There was evidence that the respondent's bill to CPCS did not include all work during the period from July 30, 1998, to October 24, 1998, when he obviously had rendered services to McNulty, suggesting that the money McNulty paid the respondent

hearing committee generously suggested that the respondent not pursue the "mixed billing" issue because it necessarily would require him to admit that by not "double billing," his allocation of some services for billing CPCS and other services for billing McNulty constituted a level of knowledge of the billing requirements that could lead to a finding of more serious misconduct. See, *e.g.*, *Matter of Levine*, 19 Mass. Att'y Discipline Rep. 239 (2003).

The hearing committee found that the respondent violated Mass. R. Prof. C. 8.4 (d) and 8.4 (h) by filing an unknowingly false affidavit and giving unknowingly false testimony in court. The hearing committee reasoned that although the respondent's statements were not intentionally false or intentionally misleading, his conduct in the preparation of the affidavit and appearing at the court hearing "uninvited or unannounced," driven by the "heat of the moment," "without [consideration] that McNulty's affidavit could have been correct, was negligent to the point of recklessness." The hearing committee concluded that this conduct was prejudicial to the administration of justice (rule 8.4 [d]) and adversely reflected on the respondent's fitness to practice law (rule 8.4 [h]).

The hearing committee rejected bar counsel's argument that it should find in aggravation that McNulty, being indigent, was a vulnerable client. The hearing committee found that although McNulty was indigent, he was neither vulnerable, unsophisticated, nor elderly. It also rejected bar counsel's contention that the respondent lacked candor, and instead noted that generally the respondent was credible at the hearing. The hearing committee expressed mild concern for the respondent's "faint 'regret'" about the affidavit he filed with the court. However, on reflection, it found that his responses

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might have been for those services. McNulty's payment of $400 to the respondent was made on October 13, 1998. The hearing committee made no findings on this issue of mixed billing. See note 1, infra.

to questioning on this subject did not rise to the level of a lack of awareness of his misconduct or an unwillingness to acknowledge it. In this regard it was persuaded by "the respondent's demeanor during his testimony," finding it "indicative of contrition and remorse."

The hearing committee rejected the respondent's plea in mitigation that he was inexperienced. It reasoned that he knew from his experience as a legal aid lawyer in New York, defending indigent criminal defendants, that he could not charge indigent clients. In any event, the respondent was not inexperienced when he filed his affidavit. In the final analysis, the hearing committee concluded that there were no "special" mitigating circumstances, only "typical" mitigating circumstances, i.e., the respondent's clean disciplinary history, his good character and reputation in the community, and the under-served nature of the clients he represents, that do not warrant any change in disposition. *Matter of Jackman*, 444 Mass. 1013, 1014 (2005); *Matter of Finn*, 433 Mass. 418, 425 (2001); *Matter of Dawkins*, 412 Mass. 90, 97 (1992).

The hearing committee concluded that because the respondent's affidavit was not *knowingly* false, a term suspension is not warranted. It recommended a public reprimand based on the respondent's agreement for, and his receipt of, an illegal fee. It determined that the respondent's violation of rules 8.4 (d) and 8.4 (h), involving his recklessly false affidavit and testimony, did not warrant an increase in the sanction it recommended.

Both bar counsel and the respondent appealed the decision of the hearing committee. The respondent argued that the hearing committee erred in finding he made misrepresentations to CPCS, and that his misconduct warrants no more than an admonition. Bar counsel argued that the hearing committee's findings warranted a six-month suspension. The Board of Bar Overseers adopted the hearing committee's findings of fact and conclusions of law, but voted to file an information with the Supreme

Judicial Court with a recommendation that the respondent be suspended from the practice of law for six months.

The board first addressed the respondent's argument that there was no evidence that he submitted his bill in the McNulty case to CPCS under its telebill procedure, which, with the "PIN Agreement," ostensibly contained the more inculpatory billing certification. The board rejected the argument, citing the respondent's testimony that he had no specific recollection whether he submitted a manual bill or a telebill, but instead had a "vivid memory of telebilling" and "only remember[s] the telebill." Moreover, the board noted that he had signed an agreement with the bar advocate program stating he would not bill clients he had been assigned to represent. The board next rejected the respondent's argument in mitigation based on an assertion of lack of harm to McNulty. The respondent has never repaid McNulty the $400 he received. The board determined that the harm lay in "misconduct [that] affects adversely the [legal] profession and the public's confidence in its integrity." Finally, the board rejected the respondent's assertion of inexperience as a mitigating factor. The board noted the clear and unambiguous prohibition in the bar advocate contract against billing indigent clients, signed by the respondent. "[E]xtensive experience," it reasoned, was not necessary in the circumstances.

The board determined that the appropriate sanction for charging an illegal or excessive fee is a public reprimand. See, *e.g.*, *Matter of Fordham*, 423 Mass. 481 (1996); *Matter of Olchowski*, 24 Mass. Atty' Discipline Rep. 520 (2008); *Matter of Kliger*, 18 Mass. Att'y Discipline Rep. 350 (2002). The board distinguished cases cited by the respondent as not involving illegal or clearly excessive fees, and restitution had been made in several cases. Thus, the starting point in the board's analysis was a public reprimand.

The finding of misrepresentation made to CPCS was significant in the board's analysis. The board relied on cases where term suspensions were imposed for misrepresentations to CPCS concerning malpractice insurance coverage. See *Matter of Durodola*, SJ-BD-2012-093 (2012) (two-month suspension); *Matter of O'Meara*, SJ-BD-2011-132 (2011) (two-month suspension); *Matter of Powers*, 26 Mass. Att'y Discipline Rep. 518 (2010) (year-and-a-day suspension for misrepresentations as to malpractice coverage over seven years, with annual certifications supported by declaration pages of a policy previously in place that were altered to mislead CPCS into believing the policies were current for the years in question).

In addition, the respondent's reckless misrepresentation to the court added weight to the board's balance in determining the appropriate sanction. The board cited an attorney's obligation to uphold the integrity of the judicial process by being truthful to the court and opposing counsel. It reasoned that the duty is breached by reckless misrepresentations as well as intentional misrepresentations, even though the culpability of the former is below that of the latter. *Matter of McCarthy*, 416 Mass. 423, 431 (1993) (one year suspension for knowingly eliciting false testimony); *Matter of Neitlich*, 413 Mass. 416, 421 (1992) (one year suspension for knowingly misrepresenting terms of client's pending real estate transaction).

Weighing the cumulative effects of these violations, see *Matter of Saab*, 406 Mass. 315, 326-327 (1989), the board concluded that a six-month suspension is appropriate, and has recommended this sanction to the single justice.

The respondent argues that the finding of a misrepresentation to CPCS in his billing statement, based on the certification of acceptance of no other compensation, is erroneous. He contends that the error arises out of confusion regarding the form of the bill (paper bill *vs.* telebill) submitted. The respondent maintains that the evidence clearly

established that the bill he submitted to CPCS must have been a paper bill, which does *not* include the certification that no other compensation was accepted. The PIN agreement, which applies only to telebilling, states that "Bills of $250 or less . . . may be telebilled . . . . A telebill cannot exceed six service dates nor can a [tele]bill be subdivided to avoid the six-line telebill maximum." He argues that because the bill submitted by the respondent for the McNulty matter exceeded each of the quantitative limits on telebills (the bill included seven line items and totaled $450, in excess of the $250 limit for telebilling), the automated system would have rejected the McNulty bill, and therefore it can only have been a paper bill.

The record does not contain the actual bill submitted by the respondent. Rather, the record contains a computer abstract of the billing. The abstract does not indicate whether the billing was submitted on paper or through the telebilling procedure. The respondent does not cite any place in the record which supports his assertion that "[i]f telebilled, the automated system would have rejected the McNulty bill." Bar counsel cites the respondent's testimony, on which the board relied, that the respondent "only remember[s] the telebill" and that he had "a vivid memory of telebilling." I conclude that there is substantial evidence to support a finding that the respondent telebilled his bill to CPCS. However, this does not end the inquiry whether there is record support for the finding by both the hearing committee and the board that the respondent *misrepresented* to CPCS that he had not charged McNulty a fee.

The certifications in the manual and telebill forms do not contain a representation that the attorney has accepted no compensation from any other source. The certification in the PIN Agreement is similarly lacking. The only conclusion that can be drawn is that the respondent breached his agreement with the Suffolk Bar Advocate Program, but he did not misrepresent to CPCS that he accepted no other compensation for his

representation of McNulty in this assigned case. There is no finding that the respondent billed both CPCS and McNulty for the same services. That is the thrust of his certification. There was evidence that could support a finding that the respondent provided services to McNulty between July 30, 1998, and October 24, 1998, for which he accepted payment from McNulty and did not bill CPCS.

The respondent also contests the finding that the misrepresentations in his affidavit filed with the court in opposition to McNulty's motion for a new trial were "reckless." He correctly points out that he did not acknowledge that he was "reckless," contrary to a statement by the board. The respondent relies heavily on the hearing committee's description of his misrepresentation as an "*honest*, although ill-advised mistake" (emphasis added). The respondent misconstrues the hearing committee's use of the word "honest." It used that word to signify that his misrepresentation was not intentional, or corrupt. The hearing committee expressly found that his misrepresentations were reckless, and in the respondent's own words, "foolish[] . . . without reflection . . . without looking at the CPCS billing . . . kind of in the heat of the moment." The hearing committee also noted that the respondent had prepared his affidavit "without [consideration] that McNulty's affidavit could have been correct." There was no error in finding that the respondent prepared his affidavit recklessly.

I note that the respondent was an experienced criminal defense lawyer at the time he prepared his affidavit, and that it was prepared, ostensibly, with the intent of affecting the decision on McNulty's motion for a new trial. As a seasoned defense lawyer, the respondent had to appreciate the importance of that motion to McNulty, *and*, to the judge – who was trying to impart justice in an even-handed manner. The respondent's reckless misrepresentations are particularly troublesome because they contaminated a process that, as the respondent well knows, is likely to have had an impact on a person's

liberty. The potential effect of reckless participation in that process can have dire consequences, and cannot be condoned. Stating facts correctly under oath is a matter of the gravest importance in the trial of all cases, but especially in criminal cases. Although not rising to the same level of culpability as an intentional misrepresentation under oath, see *Matter of Gross*, 435 Mass. 445 (2001), and *Matter of McCarthy*, 416 Mass. 423 (1993), the respondent's reckless misrepresentations under oath warrant a sanction in addition to the sanction for charging an illegal fee.

I believe that the public's trust in the integrity of the legal profession, see *Matter of Finnerty*, 418 Mass. 821, 829 (1994), requires a term suspension. This case falls far short of the culpability imposed in cases involving an intentional representation, and below the six-month sanction recommended by the board. That recommendation included consideration of a finding that the respondent made misrepresentations to CPCS that he did not accept a fee from McNulty, a finding that I have determined is not supported by the record. I believe that the appropriate sanction in this case is a term suspension of sixty (60) days. A judgment to that effect shall be entered.

So ordered.

Francis X. Spina
Associate Justice

ENTERED: May 1, 2014