

distinguished public career, do not warrant a departure from the presumptive sanction. We recommend that the respondent be disbarred.

Factual Background

On June 13, 2002, the Black Political Task Force and others filed suit in the United States District Court against numerous defendants. The plaintiffs claimed that the Massachusetts House of Representatives had intentionally redrawn the boundaries of House seats in 2001 by “superpack[ing] black and other minority voters into a few districts already represented by minority incumbents” while increasing “the percentage of white voters in districts represented by white incumbents.” Ex. 4, at 26. One of the defendants was the respondent, who was sued in his capacity as Speaker of the House. The plaintiffs alleged that the respondent’s own district “had been ‘whitened’ by carving off overwhelmingly minority precincts . . . and by adding largely white precincts” Id.

Although the respondent was eventually dismissed as a defendant in the case, he testified under oath at a deposition and voluntarily before the three-judge panel assigned to hear the matter. In his testimony he falsely diminished or denied the extent of his involvement in the redistricting process. The trial testimony supporting the respondent’s conviction was as follows:

Q. And did you review a number of the redistricting plans as the process proceeded?

A. No, I did not.

Q. Did you review any of the redistricting plans as the process proceeded?

A. Not as the process proceeded. No, sir.

Q. Okay. When was the first time you saw a redistricting plan?

A. It would have been after the committee on redistricting filed its plan with the House Clerk as a member who has an interest. All members do have an interest. I would have availed myself of it and made a review of it.

Q. So the first time you saw a redistricting plan was when the redistricting committee disseminated its plan to the full House; is that your testimony?

A. That is my testimony. Yes, sir.

Ex 12:8-9; 4:24-25.

In fact, the respondent “was consulted on and otherwise involved in virtually all of the difficult decisions made with regard to the [redistricting] plan.” Ex. 4, at 28 (plea colloquy). Contrary to his testimony that he never saw a redistricting plan until the relevant committee filed its plan with the House Clerk, the respondent had nine days before that filing attended “a redistricting working session with all the key players” at which he “reviewed the complete proposed plan and directed changes to his own district.” *Id.* at 29-30 (plea colloquy).

The plaintiffs prevailed in the federal action. On June 6, 2005, the respondent was indicted on charges of perjury and obstruction of justice in violation of 18 U.S.C. § 1502. On January 5, 2007, he reached a plea agreement with the government. The respondent entered a plea of guilty to so much of the indictment as alleged he had corruptly endeavored to influence, obstruct, or impede the due administration of justice by knowingly and willfully making false and misleading statements under oath in the federal court action, a felony. The government dropped the other charges. The respondent was placed on unsupervised probation for eighteen months, was fined \$25,000, and agreed not to run for any elective office for five years.

Disciplinary Proceedings

On January 23, 2007, a single justice entered an order temporarily suspending the respondent from the practice of law because of his felony conviction. Matter of Finneran, 23 Mass. Att’y Disc. R. 134 (2007). On March 13, 2007, bar counsel filed a petition for discipline alleging that the conduct established by the conviction violated Mass. R. Prof. C. 3.3(a)(1) and 8.4(b), (c), (d), and (h).

On May 10, 2007, the respondent sought and obtained a postponement of the disciplinary hearing. On October 1, 2007, he sought and obtained another continuance. The hearing was eventually held before a panel of the board on December 17 and 18, 2007. After the close of hearing, the respondent obtained extensions of time to file post-hearing submissions on February 1 and February 20, 2008, and he later sought and obtained leave to file a response to bar counsel’s post-hearing submissions. As a result of the respondent’s requests for time (bar counsel sought none), the filing of post-hearing paper was not completed until March 14, 2008.

On October 20, 2008, the hearing panel issued a report in which it found, as established by the respondent’s conviction, that he had corruptly endeavored to influence, obstruct, or impede the due administration of justice by knowingly and willfully making misleading and false statements under oath in the United States District Court. Such conduct, the panel ruled, violated Mass. R. Prof. C. 3.3(a)(1) (knowingly making a false statement of material fact or law to a tribunal) and 8.4(b) (criminal act that reflects adversely on honesty, trustworthiness, or fitness as a lawyer in other respects), (c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and (d) (conduct prejudicial to the administration of justice).

Making no findings in aggravation, the panel found in mitigation that physical pain suffered by the respondent, together with concern for his wife, who was being treated for an orthopedic condition in the hospital at the time he gave testimony before the court, “diminished his focus to a degree that could have adversely affected that [false] testimony.” Hearing Report at 10. The panel also found, based testimony by character witnesses, that the respondent’s false testimony was an “aberration” in the conduct of an otherwise “honest and straightforward person.” The panel noted that the respondent’s actions were not undertaken in his capacity as a lawyer, and that he had enjoyed a long and distinguished public career. Relying principally on cases involving lawyers who had given false testimony under oath but had not been convicted of a crime, the panel recommended a two-year suspension.

Both parties appealed, with bar counsel seeking disbarment and the respondent a one-year suspension. Briefing of the appeals was completed on November 12, 2008. The board allowed the respondent’s request for oral argument, which was originally scheduled to take place on December 8, the date of the board’s next regularly scheduled meeting. Because (1) the appeal was the only contested matter on the board’s agenda for that meeting, (2) the appointment of four new board members was then imminent, and (3) the three board members who had served on the panel would be disqualified from participating in the full board’s vote in any event,¹ the board chair put the matter over to the board’s January meeting. The parties subsequently waived oral argument, and the board considered the matter on the papers at its next three meetings, on January 20, February 9, and March 9, 2009.

¹ See Board Rule 3.50(g).

We adopt the hearing panel's subsidiary findings of fact and conclusions of law, allow bar counsel's appeal, deny the respondent's, and recommend entry of an order of disbarment. One member voted to adopt the hearing panel's recommendation for a two-year suspension. This memorandum is submitted to explain the reasons for the board's recommendation.

Discussion

We begin, as did the panel, with the Court's persistent declaration that disbarment is the usual and presumptive sanction for a lawyer who has been convicted of a felony, particularly one involving dishonesty. See, e.g., Matter of Knox, 412 Mass. 569, 570-571, 8 Mass. Att'y Disc. R. 127, 129-130 (1992); Matter of Concemi, 422 Mass. 326, 331 & n.5, 12 Mass. Att'y Disc. R. 63, 68-69 & n.5 (1996); Matter of Kennedy, 428 Mass. 156, 14 Mass. Att'y Disc. R. 383 (1998). The panel rejected disbarment here by advertent to a number of factors that, in its judgment, warrant a departure from the presumptive sanction. We do not find those factors, whether considered singly or in combination, to be a convincing basis for such a departure.

1. The panel cited cases that appear to establish a two-year suspension as the usual sanction for lawyers who testify falsely under oath. See Panel Report at 11, citing Matter of Shaw, 427 Mass. 764, 14 Mass. Att'y Disc. R. 699 (1998); Matter of Spallina, 15 Mass. Att'y Disc. R. 568 (1999). Those cases did not involve lawyers who had been convicted of a felony for giving such false testimony. Consequently, reliance on them ignores the "Court's special concern for the public interest when an attorney has been convicted of a serious crime" Matter of Alter, 389 Mass. 153, 156, 3 Mass. Att'y

Disc. R. 3, 6 (1983). Reliance instead must be placed on cases involving a felony conviction for such misconduct.

2. The panel also gave considerable weight to the respondent's long and distinguished public career. While such evidence is entitled to some weight, see Matter of Finnerty, 418 Mass. 821, 830, 10 Mass. Att'y Disc. R. 86, 95 (1994), it is questionable whether it rises much above what the Court has characterized as "typical" mitigating evidence that "has not diverted the Justices from the imposition of disbarment or suspension." Matter of Alter, 389 Mass. 153, 157, 3 Mass. Att'y Disc. R. 3, 7 (1983). The Court has indicated that "vast experience" and a "long and highly successful career" may "serve only to heighten the seriousness of [a lawyer's] offenses." Matter of Bailey, 439 Mass. 134, 152, 19 Mass. Att'y Disc. R. 12, 34 (2003). It is certainly the case that neither the Court nor the board found much mitigating force in the long and distinguished careers of Richard Donahue and Gary Crossen. See Matter of Crossen, 450 Mass. 533, 576 n.55 (2008); Matter of Donahue, 22 Mass. Att'y Disc. R. 194, 274 (2006). Whatever force it ought to be given here is not enough to avert disbarment. The public is entitled to expect as much from the bar's most prominent members as from its most ordinary.

3. The panel defended its departure from the usual sanction, in part, on the ground that the respondent's physical pain and his concern about his wife's orthopedic condition "at the time [he] was giving his District Court testimony . . . diminished his focus to a degree that could have adversely affected that testimony." Hearing Report at 10. "That effect," the panel found, "was a contributing factor to the misleading character of [his] testimony." Id. Assuming one should give force to so tentative a finding ("could have adversely affected"), the inference lacks support in the record, was contradicted by

the respondent himself, and cannot account for the particular nature of false testimony he gave, as it happens, on two different occasions, nine months apart.

The respondent testified that he had been suffering from pain in his hip for two or three years before testifying at the voting rights trial. Tr. 1:60, 197. We may not – and do not – fault the panel for crediting his testimony in this respect. See S.J.C. Rule 4:01, § 8(4). We are free, however, to draw our own inferences from such testimony and to disregard the panel’s so long as we do not disturb its subsidiary credibility determinations. See Matter of Dodd, 21 Mass. Att’y Disc. R. 196, 206 (2005) (board may draw “reasonable inferences” from the facts about lawyer’s state of mind and may depart from the committee’s findings “so long as those findings do not depend directly on the credibility determinations”), citing Matter of Carrigan, 414 Mass. 368, 373 n.6, 9 Mass. Att’y Disc. R. 54, 59 n.6 (1993). Having examined the record and giving due deference to the panel as the sole judge of credibility, we decline to adopt the inference.

At the disciplinary hearing, the respondent was asked directly whether he gave false and misleading testimony at the trial “because of the pain in your hip.” Tr. 1:197. He disclaimed such an inference:

A. No, that is not my testimony. I think it would have been a factor in the total experience, the entire day. It wasn’t – you know, my mind wasn’t so racked with pain that I could not focus on the questions.

Id. Bar counsel then asked him about his wife’s knee problems:

Q. It’s your testimony today that your concern about her actually affected your ability to give truthful testimony?

A. No, I am not – I don’t even want to suggest that, but it was a factor in being exasperated, part of the frustration, part of the – it has already been testified.

Tr. 1:198.

We stress, again, that we have no quarrel with the panel's determination to credit the respondent's testimony regarding his hip pain and his concerns for wife's health. Yet it was the respondent himself who disclaimed the inferences the panel chose to draw from these concerns. His own testimony establishes that, whatever the degree of his hip pain and the depth of his concern for his wife, and however much they may have fed his anger and frustration about the voting rights lawsuit, even the respondent himself did not view them as having affected his ability to testify truthfully.

And for good reason. A review of the respondent's false testimony reveals that the tack he chose to defend his conduct during the redistricting required precisely the sort of focus and attention to detail the panel inferred might have been "diminished" by these medical issues. The transcript of his trial testimony certainly evinces no distraction or lack of focus. To the contrary, in addition to denying repeatedly that he had seen any of the prior redistricting plans before the final one was filed with the House Clerk, the respondent focused rigorously on the specific questions asked, and he answered them carefully. He repeatedly denied having seen any earlier redistricting plan because "technically," as he put it at the disciplinary hearing, "there was no plan at all until it is submitted" formally for filing by the House Clerk. Tr. 1:54. As he himself explained, he was "playing a word game here," one in which he viewed his testimony as "[t]echnically not a lie" but as consisting of "hostile and combative and political responses" to questions he deemed hostile, combative, and political. Tr. 1:55. In other words, he was defending his conduct as Speaker with a verbal equivocation: that the truth depends on what the definition of "plan" is. Cf. Richard A. Posner, An Affair of State: The Investigation,

Impeachment and Trial of President Clinton ("It is not a defense to perjury that the declarant assigns private meanings to words, provided he knows they're private.").

That the respondent's formalistic parsing of the questions put to him sprang from an intent to mislead is established by his conviction of having corruptly endeavored to influence, obstruct, or impede the due administration of justice by knowingly and willfully making false and misleading statements under oath. More to the point for present purposes, such a strategy required, and its execution clearly evinced, a rigor of focus and attention to detail that comports with his blunt testimony at the disciplinary hearing, not with the tentative inferences drawn by the panel.

Any doubts we might have had in this regard are dispelled by the respondent's prior testimony given at a deposition taken on March 28, 2003, almost nine months before his trial testimony and before his wife's hospitalization. There he made essentially the same false and misleading statements – apparently taking the same tack and indulging the same “word game” – that he later repeated at the voting rights trial itself. In the deposition he testified, falsely, that he was not “specifically aware” of any redistricting plan proposed by the Joint Redistricting Committee “prior to the passage of the final House plan,” that he had no specific or even general memory of an “original” plan or its modification, and that he could not even recall whether the plan the Committee proposed was the same as the plan that was adopted. Ex. 11, at 82-84. His having given virtually identical false testimony nine months previously gravely undermines the panel's inference that subsequent stressors “could have adversely affected” his trial testimony in a manner sufficient to cause or mitigate its falseness.

4. In declining to recommend disbarment, the panel observed that the respondent's crime was not committed while representing a client or otherwise acting in his capacity as a lawyer. As a consequence, the panel reasoned, his felony conviction involved what the Court has described as "purely 'private' misconduct" for which a lesser sanction may be appropriate. See Matter of Concemi, 422 Mass. at 331 n.5, 12 Mass. Att'y Disc. R. at 68-69 n.5; Matter of Labovitz, 425 Mass. at 1008 n.1, 13 Mass. Att'y Disc. R. at 394 n.1. In the circumstances of this case, we cannot agree.

We pass the question whether a lawyer-legislator may not be said to be acting in a legal capacity when he participates in the enactment of law as Speaker of the House of Representatives and later testifies falsely about that lawmaking in a court of law. Suffice it to say here that the question is not resolved merely by observing that one need not be a lawyer to serve as a legislator. Cf. Matter of Eastwood, 10 Mass. Att'y Disc. R. 70, 71 (1994) (Wilkins, J.) (while non-lawyers may abstract registry deeds, such activity constitutes "the practice of law when conducted by a lawyer") (emphasis added). We appreciate that the respondent was not representing a client or otherwise engaged in what is classically viewed as the practice of law when he gave the testimony that led to his conviction.

It does not necessarily follow, however, that a lawyer serving as Speaker of the House is ipso facto engaging in "purely 'private' misconduct" because he has no client when he gives false testimony about his lawmaking actions in a court of law.² It is very

² The respondent argues on appeal that his false testimony could not have violated Mass. R. Prof. C. 3.3 because it was given in his capacity as a witness, not as a lawyer. He cites no authority for this proposition, which finds no support in the language of the rule itself. In commenting on the Model Rule from which the Massachusetts version is drawn, the Center for Professional Responsibility of the American Bar Association expressly disavows such a reading and devotes a comment to its routine application to lawyers who make false misrepresentations to a tribunal as witnesses, not advocates. See Annotated Rules

difficult to characterize the Speaker’s misleading defense of a House redistricting bill, while under oath at a federal voting rights trial, as the “purely private” act of a “private citizen.”

The conviction cases on which the panel relied involved lawyers whose criminal misconduct was either much less grave or far more remote from law and the courtroom than the conduct at issue here. In Matter of Coughlin, 10 Mass. Att’y Disc. R. 47 (1994), a lawyer was suspended for two years after being convicted of education fraud for providing false information on his child’s college loan application. In Matter of Driscoll, 447 Mass. 678, 22 Mass. Att’y Disc. R. 282 (2006), a one-year suspension was imposed against a lawyer whose conviction established only that he had falsely attested, in his capacity as a notary, that the spouse of a borrower (his longtime and trusted employee) had been present at a real estate closing and had signed the loan documents.

There is a more fundamental difficulty with the panel’s recommendation, however. The “private citizen” exception to the presumptive sanction for felony convictions would appear to respond to two related concerns about the nature of bar discipline. First, not every misdeed a lawyer commits, including even those that run afoul of the criminal law, should affect the right to continue practicing law if it does not also somehow call into question his fitness to do so. Second, a lawyer’s behavior in her private matters might not be indicative of how she would behave in her role as a lawyer. To accommodate these concerns, the ABA Model Code and many states draw a distinction between those criminal offenses that do or do not involve “moral turpitude.” See C.W. Wolfram, Modern Legal Ethics § 3.3.2, at 92-94 (1986).

of Professional Conduct 331 (5th ed. 2003) (annotation heading: “Rule Not Limited to Lawyer Representing a Client”) (collecting cases). There was no error.

In Massachusetts, the Court has made this accommodation, at least for purposes of deciding whether a temporary suspension should issue, with a rule that distinguishes between what it has denominated “serious” crimes from lesser criminal offenses. A “serious” crime includes “(a) any felony, and (b) any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another to commit a ‘serious crime.’” S.J.C. Rule 4:01, § 12(3). Viewed in this framework, the respondent’s conviction was for a “serious” crime on two counts: both because it was a felony and because it interfered with the administration of justice and involved false swearing and misrepresentation.

The locus classicus for the Court’s “private conduct” exception is a pair of footnotes in Matter of Concemi, 422 Mass. at 331, 332 nn.4&5, 12 Mass. Att’y Disc. R. at 69, 70 nn.4&5. The cases to which the Court referred in the first of those footnotes involved addicts convicted of alcohol-induced or drug-related offenses, Matter of Crowky, 6 Mass. Att’y Disc. R. 75 (1989) (distribution of cocaine); Matter of Campbell, 4 Mass. Att’y Disc. R. 13 (1985) (vehicular homicide while intoxicated), convictions not requiring specific intent, Matter of Rendle, 5 Mass. Att’y Disc. R. 310 (1987), or criminal wrongdoing that was “essentially civil in nature.” Matter of Hogan, 4 Mass. Att’y Disc. R. 49 (1984). The second footnote discussed sanctions imposed against lawyers who, like Concemi, had been convicted of bank fraud, but whose misconduct arose from real estate transactions undertaken on their own behalf, not a client’s. Matter of Griffin, 11

Mass. Att’y Disc. R. 100 (1995); Matter of Behenna, 10 Mass. Att’y Disc. R. 15 (1994); Matter of Bedinger, 10 Mass. Att’y Disc. R. 12 (1994).

In contrast to all these cases, (1) the respondent’s misconduct did not spring from an addiction or other disability, (2) a conviction for obstruction of justice can hardly be viewed as “essentially civil in nature,” (3) the offense required specific intent, and (4) his actions did not pertain to a transaction undertaken in his private life, such as obtaining financing for a condominium or for his child’s college education. None of the conviction cases the panel cited involved a conviction for related misconduct, and we have been directed to only one such case, a very early one decided long before the Court had declared disbarment as the presumptive sanction for a felony conviction. In Matter of Colson, 1 Mass. Att’y Disc. R. 64 (1975), a former special counsel to the President was indefinitely suspended following his conviction for obstruction of justice.

It must not be forgotten that the trial at which the respondent gave false and misleading testimony was hardly a simple civil action between private parties. It was a voting rights trial, one in which it was alleged that the most fundamental democratic rights of citizens of color had been violated.

It was also a meritorious action: the plaintiffs’ victory after trial before a three-judge panel established that their voting rights had been intentionally diluted along racial lines. The respondent’s own district was central to the claim. He interfered with the vindication of those basic rights when he (and here we track the wording of the criminal charges he admitted) corruptly endeavored to obstruct or impede the due administration of justice by knowingly and willfully making false and misleading statements under oath about the dilution of those basic rights. “Whatever the extent of the private-citizen

exception may be, it does not apply here.” Matter of Labovitz, 425 Mass. at 1008 n.1, 13 Mass. Att’y Disc. R. at 394 n.1. That his obstruction may have been driven by pique, exasperation, frustration, or anger at the false implication that his actions reflected racial animus does not mitigate the misconduct

Finally, we must bear in mind that the “primary factor” in selecting an appropriate sanction “is the effect upon, and perception of, the public and the bar.” Matter of Finnerty, 418 Mass. 821, 829, 10 Mass. Att’y Disc. R. 86, 95 (1994), citing Matter of Alter, 389 Mass. at 156, 3 Mass. Att’y Disc. R. 6. It is not difficult to envision the likely public response to a departure from the usual sanction of disbarment on the ground that the Speaker of the House had engaged in “purely private conduct” when he lied about his own actions as a public official in federal court, and which obstructed a meritorious action to vindicate the voting rights of people of color.³ The likely outrage would not spring from ignorance of legal process or of the law governing the conduct of lawyers. It would be justified. See Matter of Ring, 427 Mass. 186, 192, 14 Mass. Att’y Disc. R. 655, 662-663 (1998) (lawyer’s argument that repeated, contumacious violations of court orders in his own divorce involved a “private matter is patently without merit”); Matter of Balliro, 453 Mass. 75, 88 (2009) (even though a lawyer did not make her false statement “while she, herself, was engaged in the practice of law, [she] made such statement while participating in a formal legal proceeding at which she was obligated to give truthful testimony,” and the seriousness of her misconduct “cannot be downplayed simply by

³ Relying on “uncontroverted testimony from members of the Bar,” the panel opined “that the failure to impose greater discipline will not damage public perception of the Bar.” Hearing Report at 12. The testimony cited was character evidence, not expert testimony on the content and measurement of public opinion. The public interest, as bar counsel points out, “is a legal issue measured by the gravity of the misconduct and the need for even-handed results.” Bar Counsel’s Brief at 9, citing Matter of Finnerty, 418 Mass. 821, 829, 10 Mass. Att’y Disc. R. 86, 95 (1994).

saying that the matter about which she testified falsely was a private one that arose in the context of a purely personal relationship”). See also Matter of Hyatt, 23 Mass. Att’y Disc. R. 309, 310 (2007) (disbarment for lawyer following conviction for intimidation of a witness and for other misdemeanor offenses that interfered with the administration of justice). See also ABA Standards for Imposing Lawyer Sanctions § 6.11 (1992) (disbarment appropriate “when a lawyer, with intent to deceive the court, makes a false statement . . . and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding”). The Speaker did not engage in “purely private conduct,” and he should be disbarred.

Conclusion

For the foregoing reasons, we adopt the hearing panel’s subsidiary findings of fact and its conclusions of law, but reject its proposed disposition. An Information shall be filed with the Supreme Judicial Court recommending that the respondent, Thomas M. Finneran, be disbarred, retroactive to the effective date of his temporary suspension.

Respectfully submitted,

THE BOARD OF BAR OVERSEERS

By: _____
Lisa G. Arrowood
Secretary

Voted: March 9, 2009

Dissent from Recommended Sanction

With the greatest respect for my colleagues, I dissent from the recommended sanction of disbarment. I would recommend the sanction proposed by the hearing panel – which heard and judged the witnesses, including Mr. Finneran – of a two-year suspension retroactive to the January 23, 2007 order of temporary suspension, coupled with the requirement that Mr. Finneran undergo a reinstatement hearing prior to any reinstatement to the bar. In my view, that discipline is more consistent with the Supreme Judicial Court’s precedent and the public interest.

I agree that interfering with the administration of justice is a “serious crime” [SJC Rule 4:01, Section 12(3)]. Our inquiry, however, should not end with the question whether or not a statutory felony has been committed, but rather should also address the “seriousness” of the particular crime in the context in which it occurred. The circumstances in which Mr. Finneran’s felonious conduct occurred should lead to a lesser sanction than that of disbarment, i.e., the lesser sanction that the hearing panel recommended.

The issue of “seriousness” of a crime, as contrasted with whether or not a felony is, by definition, a “serious crime,” is a legitimate subject for inquiry by the Board. The SJC has never held the sanction of disbarment to be *automatic* in the case of an attorney who has pleaded guilty to a felony – any felony. The SJC’s precedent requires examination of the circumstances of the case which led to the guilty plea: were there, for example, mitigating circumstances; did the conduct represent aberrant behavior; and what was the “seriousness” of the crime? Precedent requires that we consider the nature of the

felony, including whether it was part of a broader criminal scheme. That was the case in Matter of Knox, 412 Mass. 569, in which the respondent had been convicted of money laundering illegal drug profits through the use of client trust accounts and was suspended for the five years of his two-year suspended jail term and three years of probation – but not disbarred. By contrast, Mr. Finneran’s sentence following his guilty plea was a fine and 18 months probation. And he did not launder drug money.

Apart from the comparison of this matter to Knox, I believe Mr. Finneran’s circumstances are closer in precedent to the Court’s disciplinary decision in Matter of Orfanello, 411 Mass. 551 (1992). Orfanello involved the Superior Court’s Administrator’s attempt to influence, in favor of a friend, a judge’s decision on the merits of a case. This was a very serious undercutting of the requirement of utter impartiality by the court system. Yet, the respondent received but a three-month suspension. If three months is an appropriate sanction in those egregious circumstances, then it is difficult to accept that disbarment is appropriate in these circumstances.

Perhaps the best description of the “seriousness” of Mr. Finneran’s obstruction of justice is that made by the Assistant U.S. Attorney who prosecuted the case and made the presentation before Judge Stearns. His presentation addressed this issue in some detail (pp. 38-39 of colloquy transcript attached to respondent’s answer):

“[T]he obstruction of justice in this case was unlike almost any other obstruction we see in this courthouse. This is not a case in which a defendant obstructed justice in the context of a criminal investigation, that is, a grand jury investigation. It is not a case where the defendant obstructed justice in the course of testifying in a criminal trial. Therefore, his obstruction was not designed to conceal a crime which he committed, nor was it designed to conceal a crime committed by another individual.... In addition, this obstruction was not aimed at, nor did it result in, any financial gain to the defendant.”

The Assistant U.S. Attorney’s presentation was made pursuant to 18 U.S.C. Section 3553, which concerns grounds for downward departures and variances from the federal sentencing guidelines. While not directly applicable to disciplinary matters, I believe the grounds are instructive. Evaluating those grounds – “the character of the defendant; the seriousness of the crime, the need to deter a particular defendant or others generally, the prospects of rehabilitation, the contributions that a defendant may have made to society prior to the crime, the criminal history [of the defendant]]” – Judge Stearns approved a significant downward departure from the federal guidelines.

I have found no case in which a lawyer has been disbarred for obstruction of justice where his/her conduct was not connected to an underlying crime, but was rather connected to a civil matter such as, in this case, a challenge to a re-districting plan which the Massachusetts Legislature proposed to adopt. The principal cases cited in the Board’s memo all involve crimes whose “seriousness” are beyond question: Kennedy involved a lawyer who was disbarred following his conviction for causing false financial statements to be submitted to the Dime Savings Bank; Coughlin involved education fraud; Driscoll involved a notary’s false attestation; Concemi concerned a closing lawyer who was guilty of concealing secondary financing in violation of 18 U.S.C. 1344 and 1014. Similarly, the cases cited by Bar Counsel in her appeal involved criminal conduct separate from and independent of any charge of obstructing justice.

There is no doubt Mr. Finneran made – as his counsel argued (p. 48 of colloquy transcript) – a “singular error of judgment in his life,” and that the re-districting plan was “illegal” in that it violated a federal statute (which does not, incidentally, require proof of invidious intent), but the plan’s adoption by the state legislature was not a “crime.” And

Mr. Finneran's testimony in support of that plan was not in furtherance of a crime, however illegal the plan may have been. This is not to excuse what he did in obstructing justice in the Court's consideration of this plan, but only to put his conduct in context, both as to the matter at issue in the underlying litigation and as to his character, as such.

Mr. Finneran's history is long and varied, but the evidence before the U.S.

District Court Judge and before the Hearing Panel on this matter is undisputed:

- He had no racial animus or a personal objective to "whiten" his district. (colloquy p.31)
- His intention was to disavow detailed knowledge of the re-districting plan and to deceive the court as to his role in it. (colloquy, p.31)
- He wanted to maintain his reputation of fairness as to all classes or origins of people in his district, which he had represented for decades
- Other than in this matter, he had an unblemished record for honesty, fairness and integrity

The critical facts, for purposes of attorney discipline, are:

- His conduct did not occur in the context of some independent crime, apart from his obstruction of justice
- It occurred in a civil context, i.e., a challenge to the Massachusetts re-districting plan
- There were no victims of his conduct, apart from himself
- His history, apart from the events in question, reflects conduct marked by integrity and honesty;
- He was not engaged in the practice of law; and
- His conduct did not result in any personal financial gain

"The ultimate consideration in all bar discipline cases is the public welfare," Knox, p.

570. Mr. Finneran's conduct occurred in court, but concerned the political arena, and he has been punished for that conduct in that arena. He was forced out of office, he has had to pay a fine, was placed on 18-months probation and agreed not to run for office for five years. The public is well aware that Mr. Finneran has been disgraced and punished and lost the privilege of holding public office. The public will not be outraged by the imposition of a sanction which is commensurate with his ethical obligations and

acknowledged character, rather than based solely on this aberration in his character. Disbarment is a severe sanction and, I believe, would be perceived by the public as excessive in these circumstances.

This dissent is not based on any disagreement with the basic premise that, as a lawyer and a member of this bar, Mr. Finneran was bound to adhere to its ethical principles, including the obligation of utmost candor in testifying before a court. It has to do with what is appropriate discipline for a lawyer in Mr. Finneran's position, given the conduct which admittedly occurred, not in the practice of law, but in his elected position as Speaker of the House of Representatives.

The hearing panel credited the testimony of prominent and well-respected character witnesses, Wayne Budd, Leonard Lewin, Mark Robinson and others to the effect that the respondent is an honest and straightforward person who was held in high regard, an honorable person and a great public servant, and that his conduct in these circumstances was aberrant. The Assistant U.S. Attorney's presentation to Judge Stearns was to the same effect. Based on its assessment of the credibility of these witnesses – testimony which was uncontroverted – the Hearing Panel concluded that the imposition of substantial discipline in addition to that already served pursuant to his temporary suspension was unwarranted and that the failure to impose greater discipline would not damage public perception of the Bar. As to the latter, the panel recommended that the respondent undergo a hearing prior to reinstatement.

The hearing panel, which heard Mr. Finneran testify, found that he has “accepted personal responsibility for the actions that led to his indictment and guilty plea and

expressed remorse and regret [which the panel accepted as genuine]”. (Panel decision. p.4) Similarly the federal court found the same (colloquy p.38).

These are important considerations in the context of the appropriate sanction to impose. I would adopt the recommendation of the Hearing Panel. Disbarment, I believe, would not only be unwarranted, but unprecedented where the obstruction of justice occurred in a civil proceeding and did not concern or relate to any crime or criminal investigation.

Erik Lund
Member
Board of Bar Overseers