

SUPREME JUDICIAL COURT OF MASSACHUSETTS

In re Foley

439 Mass. 324 (2003) · Decided May 6, 2003

SUMMARY

The Massachusetts Supreme Judicial Court reviewed the discipline imposed on Steven M. Foley for fabricating a criminal defense and encouraging his client to provide false testimony. The court rejected proposed mitigating circumstances, concluded that the misconduct was deliberate and seriously threatened public confidence in the legal profession, and increased the sanction from an eighteen-month suspension to a three-year suspension.

CASE DETAILS

COURT	Supreme Judicial Court of Massachusetts
WRITING FOR THE COURT	Cordy, J.
JURISDICTION	Massachusetts
DECIDED	May 6, 2003
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The respondent attorney appealed to the full Supreme Judicial Court from a single justice's order imposing an eighteen-month suspension from the practice of law. The disciplinary proceeding arose from findings by the Board of Bar Overseers that the respondent fabricated a criminal defense and encouraged his client to testify falsely.
STANDARD OF REVIEW	When a disciplinary sanction imposed by a single justice is challenged, the court generally asks whether the sanction is markedly disparate from judgments in comparable cases. If the case is unique or one of first impression and lacks comparable precedent, the court reviews whether the decision is supported by sufficient evidence, constitutes an abuse of discretion, and is free from legal error. Review is de novo but tempered by substantial deference to the Board of Bar Overseers' recommendation.
PRECEDENTIAL VALUE	Published Massachusetts Supreme Judicial Court opinion; precedential.
PARTIES	Steven M. Foley v. Bar Counsel

TOPICS

appellate procedure criminal procedure prosecutorial misconduct

PRACTICE AREAS

legal ethics and attorney discipline professional responsibility appellate procedure criminal procedure

QUESTIONS PRESENTED

1. Whether the eighteen-month suspension imposed by the single justice was markedly disparate from sanctions in comparable disciplinary cases or otherwise legally unsupported.
2. Whether the circumstances that the client initiated the idea of fabricated testimony, the testimony was never presented in court, the proceeding ended in a nolle prosequi, and the respondent's cross-examination of the undercover agent was limited constituted mitigating circumstances.
3. Whether limiting the respondent's cross-examination of the undercover agent violated due process.
4. Whether describing the fabricated defense to the prosecutor was equivalent to presenting it to a judge for purposes of sanction.

HOLDINGS

1. A three-year suspension from the practice of law is warranted for an attorney who deliberately fabricates a criminal defense, presents the fabricated story to the prosecutor, and prepares and encourages the client to give false testimony, even though the testimony is never presented at trial.
2. The court reviews a challenged single-justice disciplinary sanction de novo, ordinarily asking whether it is markedly disparate from sanctions in comparable cases, while giving substantial deference to the Board of Bar Overseers' recommendation.
3. The fact that false testimony was never presented in court is relevant to the severity of the sanction but does not mitigate the misconduct of fabricating the defense and preparing the client to testify falsely.
4. Limiting the respondent's cross-examination of the undercover agent did not violate due process because the respondent failed to make a plausible showing that additional questioning would have produced relevant or materially helpful evidence.
5. A prosecutor is not the equivalent of a judge, and presenting a fabricated defense to a prosecutor is not legally equivalent to presenting that defense to a judge in a judicial proceeding, although the distinction does not lessen the seriousness of the misconduct.

KEY QUOTATIONS

“Fundamentally, however, “[e]ach case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances.”” (439 Mass. at 333)

“Hardly a brief flirtation, this was a prolonged and close embrace with false testimony.” (439 Mass. at 335)

“There is no room in the profession of the law for those who commit deliberate falsehood in court.” (439 Mass. at 336)

“In our view, that sanction is a three-year suspension.” (439 Mass. at 339)

FACTUAL BACKGROUND

Steven M. Foley represented an undercover FBI agent who had been arrested for operating under the influence of alcohol and unlawful handgun possession. After the agent suggested fabricating an explanation for the gun, Foley developed a detailed false story, presented portions of it to the prosecutor, coached the agent to testify falsely, and encouraged him to learn details about locations and invent a description of a supposed gun owner. Foley also falsely told the prosecutor that the client was out of town to obtain a continuance. The criminal charges were ultimately nolle prossed before trial, and the fabricated testimony was never presented in court.

PROCEDURAL HISTORY

Bar counsel petitioned for discipline before a hearing committee of the Board of Bar Overseers. The committee found ethical violations and recommended a public reprimand; the Board adopted the findings, found an additional violation, and recommended a six-month suspension. On appeal, a single justice imposed an eighteen-month suspension. The respondent appealed, and the Supreme Judicial Court vacated that order and remanded for entry of a three-year suspension.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Vacate the single justice's order imposing an eighteen-month suspension and enter a judgment suspending the respondent from the practice of law for three years.

CASES CITED

- Matter of Finn, 433 Mass. 418, 422-423 (2001)
- Matter of Kerlinsky, 428 Mass. 656, 664 (1999)
- Matter of Tobin, 417 Mass. 81, 88 (1994)
- Matter of Alter, 389 Mass. 153, 156 (1983)
- Matter of McInerney, 389 Mass. 528, 530 (1983)
- Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984)
- Matter of Finnerty, 418 Mass. 821, 829 (1994)
- Matter of Concemi, 422 Mass. 326, 329 (1996)
- Matter of Orfanello, 411 Mass. 551, 556-557 (1992)
- In re Storment, 873 S.W.2d 227 (Mo. 1994)
- Matter of Edson, 108 N.J. 464 (1987)
- Board of Overseers of the Bar v. Dineen, 481 A.2d 499 (Me. 1984)
- Matter of Sleeper, 251 Mass. 6, 20 (1925)

- Matter of Gross, 435 Mass. 445, 452 (2001)
- Matter of McCarthy, 416 Mass. 423 (1993)
- Matter of Neitlich, 413 Mass. 416 (1992)
- Matter of Eisenhower, 426 Mass. 448, 453 (1998)
- Matter of Tobin, 417 Mass. 92, 101-102 (1994)
- Commonwealth v. Johnson, 431 Mass. 535, 538 (2000)
- Commonwealth v. Fordham, 417 Mass. 10, 19-20 (1994)

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