

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. BD-2024-043

IN RE: IN THE MATTER OF AN ATTORNEY

MEMORANDUM OF DECISION AND ORDER

This matter came before me on bar counsel's petition for discipline, a hearing committee report, and a memorandum of the Board of Bar Overseers (board) decision recommending that the petition for discipline be dismissed. The disciplinary proceedings stem from an alleged false statement that the respondent made to the trial judge in the course of his representation of Phillip Baram in a slip and fall accident. Bar counsel charged the respondent with bringing frivolous non-good faith arguments in violation of Mass. R. Prof C. 3.1; or in the alternative, failing to conduct a sufficient factual or legal investigation, in violation of Mass. R. Prof. C. 1.1 and 1.3. In addition, bar counsel charged the respondent with making a false statement of fact or law to a tribunal, in violation of Mass. R. Prof. C. 3.3(a)(1); conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of Mass. R. Prof. C. 8.4(c); and conduct that adversely reflects on

respondent's fitness to practice law, in violation of Mass. R. Prof. C. 8.4(h).

The hearing committee found that the respondent did not violate Mass. R. Prof. C. 1.1, 1.3, or 3.1. The hearing committee did, however, find that the respondent made a false statement of material fact that required correction under Mass. R. Prof. C. 3.3 and that his failure to correct his misstatement violated Mass R. Prof. C. 8.4(c). The hearing committee further found that this conduct adversely reflected on the respondent's fitness to practice law, in violation of Mass. R. Prof. C. 8.4(h). After noting the presence of several aggravating factors and no mitigating factors, the hearing committee recommended that the respondent be suspended for a term of six months and one day.

A majority of the board reversed the hearing committee, stating it "d[id] not adopt the finding that the respondent knowingly made a false statement of fact at the hearing on assessment of damages." This majority concluded that the respondent did not violate any rule of professional conduct and that the petition for discipline should be dismissed.

A three-person minority of the board dissented. In their view, the respondent had a motive to lie and made a knowingly false statement in violation of Mass. R. Prof. C. 3.3(a)(1) and 8.4(c). The dissenting members noted this single misstatement

was not sufficiently serious to implicate Mass. R. Prof. C. 8.4(h). They consequently recommended a public reprimand.

For the reasons explained below, I agree with the majority of the board that the respondent did not violate any rule of professional conduct and find that the petition for discipline should be dismissed.

1. Background. I summarize the facts adopted by the board supplemented with findings from the hearing committee. The respondent was admitted to the Massachusetts bar on December 16, 1983. He has been a sole practitioner since 2002.

a. Underlying lawsuit. In 2016, Baram was injured after he fell on an interior stairway at the restaurant where he worked. The respondent began representing Baram in a third-party tort action arising from these injuries.¹ The respondent's theory was that a defect in the construction of the staircase caused Baram's injury.

At the time of Baram's injury, the restaurant was owned and operated by Baruch and Rada Roda. However, the Rodas did not own the property. Chestnut Hill Realty Corp. (CHR) owned the property, and Gladys, LLC (Gladys) was the former owner. The Rodas had originally leased a portion of the property for their restaurant from Gladys. On January 31, 2013, Gladys sold the

¹ Baram also filed a workers compensation claim against his employer, which a different lawyer handled.

property to CHR and assigned its lease with the Rodas to CHR. Gladys retained a continuing security interest in the property as mortgagor as well as the right to inspect the property upon reasonable notice.

In his filings, the respondent alleged that CHR owned the property and Gladys controlled or retained the right to control the premises and both entities failed to maintain the property in a safe condition. Gladys was served with a complaint alleging a single count of negligence against it. Gladys did not file any answer or response and was defaulted in December 2017.

In April 2019, after settlement was reached between Baram and CHR, the respondent moved for an assessment of damages and entry for default judgment against Gladys. In his motion, the respondent wrote that CHR "is/ was the owner" of the property where Baram's accident occurred. While the motion did not specifically identify Gladys as the former owner, attached exhibits established this fact.

On May 23, 2019, the judge held an assessment of damages hearing. During this hearing, the judge stated that he had reviewed the underlying papers several times. The judge asked the respondent what Gladys' role was in the case. The hearing committee found that the respondent answered in the present tense stating: "They own the property, and they leased it to

the restaurant." Six days after the hearing, the court entered judgment against Gladys and later issued an execution.

Following this hearing, Gladys filed a motion to vacate the judgment and set aside the execution. This motion was denied. Gladys indicated an intent to appeal the decision but missed the deadline. Gladys' motion to file a late notice appeal was denied.

The respondent filed a motion for the trustee process to attach funds held by a third party on behalf of Gladys to satisfy the judgment ordered against Gladys. Gladys opposed the motion, raising for the first time that the respondent had misrepresented Gladys as the current owner of the property at the assessment of damages hearing. Gladys also filed a motion for a preliminary injunction. The motion for preliminary injunction was denied, and the judge granted the motion for the trustee process. In his decision granting the motion for trustee process, the judge did not address the misrepresentation issue. Ultimately, Gladys did not file a motion for vacate, instead settling with Baram.

b. Hearing committee's report. Bar counsel filed a petition for discipline against the respondent, alleging that he intentionally misrepresented to the judge that the former owner, Gladys, was the current owner of the property. Bar counsel

charged the respondent with violating Mass. R. Prof. C. 1.1, 1.3, 3.1, 3.3(a), 8.4(c), and 8.4(h).

Bar counsel charged the respondent with violating Mass. R. Prof. C. 3.1 on the basis that he had no non-frivolous basis in law or fact for his continued assertions that Gladys was in control of the premises and liable for Baram's injuries. The hearing committee found that bar counsel did not meet its burden to prove this charge. In doing so, the hearing committee noted that respondent's conduct did not fall in the typical range of conduct sanctioned under Mass. R. Prof. C. 3.1 -- the respondent did not pursue a claim that had already been decided, his sole purpose was not to harass an opponent, and he did not fabricate facts to create a claim. Given that identifying a non-frivolous basis in fact and law is not a high bar and the respondent had evidence that Gladys controlled or had a right to control the property, the hearing committee concluded that the respondent had not violated Mass. R. Prof. C. 3.1. Further, because the respondent's claims were neither unreasonable nor frivolous, the hearing committee found that the respondent did not violate Mass. R. Prof. C. 1.1 or 1.3.

The hearing committee did, however, find that the respondent had violated Mass. R. Prof. C. 3.3(a)(1), 8.4(c), and 8.4(h). Before reaching this conclusion, the hearing committee made certain factual findings. It found that respondent used

the present tense in the damages hearing when he told the judge, "[Gladys] own the property and they leased it to the restaurant."

The hearing committee then addressed the respondent's various explanations for his statement to the judge during the damages hearing. In his petition for discipline, the respondent claimed the judge "cut him off." The hearing committee did not credit this assertion. After listening to the audio recording as part of the disciplinary proceeding, the respondent then suggested he had in fact used the past tense. The hearing committee also did not credit this explanation, noting it was "far-fetched" and contradicted its unanimous findings that the respondent had used the present tense. The respondent then provided a third explanation in his post hearing brief, claiming if he did use the present tense, it was an unintentional misstatement. The hearing committee did not credit this explanation, noting this was the first time the respondent claimed he misspoke, and this explanation was in direct contradiction to his earlier two stories. The hearing committee concluded that the respondent's changing story supported its conclusion the respondent's misrepresentation at the hearing was intentional.

The hearing committee next observed that a judge is required, in a damages hearing, to ensure damages are legitimate

and make sense in the context of the case. See Jones v. Boykan, 464 Mass. 285, 294 (2013). The hearing committee found that the respondent's deliberate misstatement about ownership was therefore a false statement of material fact in violation of Mass. R. Prof. C. 3.3.

The hearing committee also concluded that the respondent had a motive to lie, as his misstatement implied to the judge this was a simple clear-cut case. The hearing committee found that because the respondent made an intentional misrepresentation and failed to correct that statement, he violated Mass. R. Prof. C. 8.4(c). The hearing committee noted that this conduct adversely reflected on his fitness to practice law and concluded that the respondent had violated Mass. R. Prof. C. 8.4(h). The hearing committee subsequently recommended a suspension of six months and one day, noting several factors in aggravation, including the respondent's substantial experience in the practice of law, his lack of acknowledgment of misconduct, his lack of candor, and his prior discipline record.

c. The board's report. As a primary matter, the board noted that bar counsel had not challenged the hearing committee's conclusion that he had failed to prove a violation of Mass. R. Prof. C. 3.1. Therefore, the board noted it was left to assess only the charges under Mass. R. Prof. C. 3.3(a)(1), 8.4(c), and 8.4(h). The majority of the board

declined to adopt the hearing committee's factual findings and legal conclusions to the extent they asserted that the respondent made a knowing misstatement of fact.

The board deferred to the hearing committee's factual finding that the respondent made an untrue statement. However, because the respondent's state of mind was not a question of credibility, the board found it was not bound by the hearing committee's findings on this point. The board concluded there was no evidence to support the hearing committee's finding that the respondent had a motivation to lie or that the respondent's changing story was evidence of a guilty conscience. The board found that because the respondent's statement was "aberrant" and counter to documents the respondent filed, it was not made knowingly or with an intent to deceive. Instead, it noted the respondent "misspoke, likely the result of carelessness." The board further found that the statement was not material because Gladys' liability was established by default. Based on these findings, the board concluded that the respondent had not violated Mass. R. Prof. C 3.3(a)(1), 8.4(c), or 8.4(h). The board dismissed the petition for discipline.

Three members of the board dissented. These members noted that the respondent admitted that he knew Gladys was not the owner on the day of the accident. They further noted that the respondent had a motive to lie to "pave[] the way for a simple

hearing focused only on damages." On this basis, the dissenting members found that the respondent's conduct violated the first prong of Mass. R. Prof. C. 3.3(a)(1). However, because they concluded the respondent's statement was not material, the dissenting members did not find his actions violated the second prong of Mass. R. Prof. C. 3.3(a)(1). The dissenting members also concluded that the respondent violated Mass. R. Prof. C. 8.4(c) but noted his actions were not sufficiently serious to indicate he was unfit to practice law in violation of Mass. R. Prof. C. 8.4(h). Based on these findings, the dissent concluded that the proper sanction was to impose a public reprimand.

2. Discussion. Bar counsel bears the burden to prove by a preponderance of evidence that the respondent violated the rules of professional misconduct. See In re Driscoll, 447 Mass. 678, 685 (2006). A reviewing court will uphold the board's subsidiary findings of fact if supported by substantial evidence. See Matter of Zankowski, 487 Mass. 140, 144 (2021); S.J.C. Rule 4:01 § 8(4). "'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion." Matter of Slavitt, 449 Mass. 25, 30 (2007), quoting G. L. c. 30A, § 1(6). However, the court is not bound by the board's findings and may reach its own conclusions. See Matter of Fordham, 423 Mass. 481, 487 (1996).

Pursuant to Mass R. Prof. C. 3.3(a)(1), "[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." The rule contains two prongs: (a) knowingly making a false statement of fact or law or (b) failing to correct a statement of material fact or law previously made. An attorney may violate this rule if his action's run counter to either prong.

Under the first prong of Mass. R. Prof. C. 3.3(a)(1), bar counsel must prove the defendant made a knowingly false statement. There is no debate that the respondent made a false statement -- Gladys was not the current owner of the property. However, to prove a violation of this prong, bar counsel must prove that the respondent made this statement knowingly. Under the rules of professional conduct, knowledge requires "actual knowledge of the fact in question" and can be "inferred from the circumstances." Mass. R. Prof. C. 1.0(h). I do not find the respondent's misstatement was made knowingly where Gladys' liability was established by its default and the pleadings correctly identified Gladys' status as a former owner. I agree with the board that, given the underlying documents the respondent filed, he had no motive to lie. Moreover, I do not find that the respondent's inconsistent explanations are grounds to infer that he knew he was making a false statement. Instead,

I hold the respondent made a careless error in using the present tense to answer the judge's question. Based on this evidence, I hold that the respondent did not violate the first prong of Mass. R. Prof. C. 3.3(a)(1).

Under the second prong of Mass R. Prof. C. 3.3(a)(1), an attorney's failure to correct the record will be sanctioned if the incorrect fact is material. "[A] fact is material if, viewed objectively, it directly or circumstantially had a reasonable and natural tendency to influence a judge's determination." Matter of Angwafo, 453 Mass. 28, 35 (2009). Although the judge may have chosen to probe further into the facts under Mass. R. Civ. P. 55(b)(2), if he had been aware Gladys was the prior owner, Gladys' liability had been established by its default. It was therefore not material to the damages hearing, and the respondent did not violate the second prong of Mass. R. Prof. C. 3.3(a)(1).

The respondent is also charged with "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation" in violation of Mass R. Prof. C. 8.4(c). Under this rule, "bar counsel must establish either (1) an intent to deceive or (2) at least knowledge of the falsity and an understanding that someone will likely rely on it." Matter of Foster, 492 Mass. 724, 757 (2023). Because I hold that the respondent did not make a knowingly false statement of fact, I hold that he did not

violate this rule of professional conduct. For the same reasoning, I hold the respondent did not "engage in any other conduct that adversely reflects on his or her fitness to practice law" in violation of Mass. R. Prof. C. 8.4(h).

4. Conclusion. Because I hold that the respondent's actions did not violate any rule of professional conduct, it is **ORDERED** that the petition for discipline be, and the same hereby is, **DISMISSED**.

By the Court,

/Frank M. Gaziano/

Frank M. Gaziano
Associate Justice

Dated: August 2, 2024