COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL, Petitioner, v. MATTER OF AN ATTORNEY Respondent.	)	B.B.O. File No. C2-20-265176

MEMORANDUM OF BOARD DECISION

Bar counsel charged, and a hearing committee concluded, that the respondent misrepresented a fact to a court in the course of representing a personal injury plaintiff. The committee recommended that the respondent's law license be suspended for six months and one day. Both parties have appealed. Bar counsel asserts that we should recommend a suspension of one year and one day. The respondent urges us to dismiss the case. Because we disagree with the factual premise of the case, we do not adopt the committee's legal conclusions. We deny bar counsel's appeal. We order that the matter be dismissed.

Factual and Procedural Background

On July 14, 2016, Phillip Baram slipped and fell down interior stairs at his place of employment, Jerusalem Pita, which was located at 10 Pleasant Street in Brookline. On September 21, 2016, Baram retained the respondent, to represent him.[1] In April 2017, the

[1] In addition to the tort claim handled by the respondent, Baram filed a workers compensation claim against his employer. A different lawyer handled that matter.

respondent filed a third-party tort action in the Middlesex Superior Court, naming three defendants: Chestnut Hill Realty Corp. ("CHR"), Gladys, LLC ("Gladys"), and Citizens Insurance Company of America ("Citizens").

For purposes of the bar discipline case, the ownership and control of the premises is the central issue. On the day in question, Jerusalem Pita was owned and operated by Baruch and Rada Roda. The Rodas did not own the real property where Jerusalem Pita was located; they leased it. When they opened the restaurant on April 1, 2008, their landlord was Gladys. Gladys sold the property to CHR on January 31, 2013. On the same day, Gladys assigned to CHR its lease with the Rodas. The lease renewed automatically on an annual basis. Thus, at the time of Baram's incident, CHR owned the property.[2]

In connection with the sale, Gladys and CHR entered into a Purchase and Sale Agreement and a Mortgage Agreement, by which CHR agreed to pay Gladys a total of $11 million in annual installments of $500,000 and a balloon payment of $7.7 million on December 31, 2020. Gladys retained a continuing security interest in the property as the mortgagor. It also retained the right, upon reasonable notice, to inspect the property.

In the complaint he filed on behalf of Baram, the respondent alleged that CHR was the owner of the property and that Gladys controlled the premises or retained the right to control, and that both entities failed to maintain the property in a safe condition.[3] After being properly served with process, Gladys failed to respond to the complaint and was defaulted in December 2017. In April 2019, after settling with CHR, the respondent moved for entry of default, default

[2] Citizens was CHR's general liability insurance carrier.

[3] Specifically, paragraph 3 of the complaint alleged that Gladys "at all times material hereto controlled the premises … and retained the right to control … [under] the subject lease." Paragraph 4 of the complaint alleged that defendant CHR "at all material times hereto "owned and controlled the premises …"

judgment, and assessment of damages against Gladys. In his motion, the respondent recited that CHR "is/was the owner" of the property. He attached as exhibits the Purchase & Sales Agreement and the Assignment of Lease.

On May 23, 2019, the court conducted an assessment of damages hearing. Along with his client, the respondent appeared, but no one appeared on behalf of Gladys. The Superior Court judge asked the following question about Gladys' role: "They own the property or the restaurant of …" (Hearing Committee Report ("HCR") ¶ 16, quoting Hearing Exhibit 14). The hearing committee found that the respondent answered, "They own the property, and they leased it to the restaurant." (HCR ¶ 17; *see also* Hearing Exhibit 31 (audio of hearing)). The hearing committee rejected as not credible the respondent's testimony that he answered the question in the past tense (saying that Gladys "owned" the property) or that his answer was cut off by the judge. The judge entered judgment in favor of Baram against Gladys in the amount of $103,529.00.

Gladys filed a motion to vacate and set aside the judgment and execution, arguing that it had not been properly served, the statute of limitations had run, and that it did not control the property on the day of the accident. The judge denied the motion. Gladys filed an appeal, but it did so after the deadline. Its motion to file a late notice of appeal also was denied. After this contretemps, the respondent filed a motion for trustee process attachment, which Gladys opposed. It argued – for the first time – that the respondent had misrepresented its ownership of the property at the assessment of damages hearing. Gladys argued that the execution had been procured by a misrepresentation. It sought a preliminary injunction against the attachment. The same trial judge who entered judgment and allowed the execution heard Gladys' motion. He denied the motion and allowed the execution to proceed. Although counsel for Gladys indicated

that he intended to file a motion to challenge the underlying judgment under Mass. R. Civ. P. 60(b), he never did so. Ultimately, Gladys settled with Baram for $100,000.

Bar counsel charged that naming Gladys as a defendant and continuing to assert liability against it violated Mass. R. Prof. C. 3.1 (do not bring or continue a proceeding unless there is a non-frivolous basis to do so). The hearing committee concluded that bar counsel had not carried his burden to prove that the respondent violated the rule, reasoning that he had a good faith basis to name Gladys at the time he filed the complaint. Comment [2] to Rule 3.1 recognizes the utility of discovery for developing facts to support a claim. Indeed, the committee opined that it may have been malpractice for the respondent to omit Gladys from the complaint. Further, the committee credited the respondent's testimony that his retained liability expert opined that the defect that caused Baram's injury may have existed at the time Gladys owned the building. It noted the question whether Gladys could remain on the hook after it sold the property for a defect that arose at the time it was still the owner. With approval, it relied on the respondent's testimony that Gladys had continuing obligations under the assignment of lease and the installment sale character of the transaction with CHR. For similar reasons, the committee concluded that the respondent did not violate Mass. R. Prof. C. 1.1 (competence) or 1.3 (diligence) when he named Gladys in the complaint.

On the other hand, the committee agreed with bar counsel that the respondent violated Mass. R. Prof. C. 3.3(a)(1), 8.4(c), and 8.4(h) when he misrepresented at the hearing to assess damages that Gladys still owned the building and failed subsequently to correct the statement. From the audio of the hearing, the committee determined that the respondent answered the judge's question about ownership in the present tense. It found that the respondent knew this statement was untrue at the time he made it, and he had a motive to misrepresent the fact. Based

on the respondent's evolving explanations for what transpired, the committee found that the misstatement was intentional. (HCR ¶ 48).

The hearing committee found no facts in mitigation and several in aggravation: the respondent's experience at the bar; a lack of insight into or appreciation of his basic ethical obligations; lack of candor at the disciplinary hearing; and the respondent's prior discipline. The committee did not agree with bar counsel that the respondent caused harm to Gladys, noting that the harm was caused originally by the company's failure to answer the complaint.

The hearing committee recommended that the Supreme Judicial Court suspend the respondent's law license for six months and one day. Both parties have appealed. Bar counsel asserts that we should recommend a suspension of one year and one day. The respondent urges us to dismiss the case.

Discussion

Bar counsel has not challenged the hearing committee's conclusion that he failed to prove a violation of Mass. R. Prof. C. 3.1, which requires a lawyer to assert only those claims that have a basis in fact and law that are not frivolous. The basis of this charge was the allegation in the tort complaint that Gladys was in control of the premises where Baram's accident occurred. Independently, we have reviewed the hearing committee's conclusion under Rule 3.1 and adopt it. At the time the respondent filed the complaint against Gladys, he had a non-frivolous legal and factual basis for doing so. Thus, we are left only with the charges under Rules 3.3(a)(1), 8.4(c), and 8.4(h).

Mass. R. Prof. C. 3.3(a)(1) provides as follows: "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." 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.[4] Rule 8.4(c) prohibits engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." The third rule implicated in this case, Rule 8.4(h), provides that it is professional misconduct for a lawyer to "engage in any other conduct that adversely reflects on his or her fitness to practice law."

As an initial matter, we disagree factually with the respondent about his statement at the May 23, 2019 hearing to assess damages. We defer to the hearing committee's factual finding that the respondent told the judge that the defendant, Gladys, continued to own the property. He used the present tense. The statement was untrue, since Gladys had sold the property in 2013. Under the first prong of Rule 3.3(a)(1), bar counsel did not have to prove that the statement was material.

By contrast, the charge that the respondent failed to correct his prior in-court misstatement required bar counsel to prove that ownership of the property was material. The second prong of Rule 3.3(a)(1) requires a lawyer to correct only prior misstatements that are material. Indeed, bar counsel specifically charged that the description of ownership was material. (Petition for Discipline, ¶ 16). Here, bar counsel failed to prove a violation of the second prong of Rule 3.3(a)(1). "A fact is material if, viewed objectively, it directly or circumstantially had a reasonable and material tendency to influence a judge's determination." Matter of Angwafo, 453 Mass. 28, 35 (2009). At the time of the misrepresentation, ownership of the property was immaterial. Gladys' liability had been established by its default; the only live

[4] Rule 3.3(a)(1) was amended in 2015 to remove materiality from its first clause.

issue was the amount of damages. In concluding that the statement was material, the hearing committee reasoned that the respondent had to establish Gladys' ownership as a predicate to an award of damages. (HCR ¶ 54). The reasoning is incorrect. The discussion about Gladys' role was background information, because the default had established its liability.[5] The fateful exchange was initiated by the judge, presumably for him to understand the context of the proceedings. But merely mentioning a fact in court does not make that fact "material." The committee's interpretation would stretch the word "material" beyond its ordinary meaning. Under its reasoning, virtually every statement a lawyer makes in court would be material.

Because we have concluded that bar counsel did not prove that the statement about ownership was material, we need not discuss whether the respondent violated the second prong of Rule 3.3(a)(1) by failing to correct his earlier misstatement.[6] We focus solely on the events at the May 23, 2019 hearing. For the following reasons, we find that the respondent did not knowingly make a false statement of fact.

Our Rules of Professional Conduct define "knowledge" as denoting "actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances." Mass. R. Prof. C. Rule 1.0(h). The definition focuses on the speaker's state of mind. Rule 3.3(a)(1) refers specifically to knowingly false statements of fact. Untruthful statements arising from negligence or carelessness do not run afoul of the rules.

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[5] Despite its threat to file a motion to vacate the judgment under Mass. R. Civ. P. 60(b), Gladys instead settled with Baram for $100,000. Presumably, Gladys would have relied on the part of Rule 60(b) that allows for setting aside a judgment procured by fraud.

[6] In addition, as we will discuss later in this opinion, the respondent clarified the ownership status at a subsequent hearing. He did not "fail to correct" a prior material misstatement.

In this case, bar counsel presented no direct or indirect evidence of knowledge or intent … other than the bare fact of the inaccuracy. Indeed, the evidence undermines the theory. The original complaint asserted that CHR "at all times material hereto owned and controlled the premises." By contrast, his allegation against Gladys was that Gladys "controlled the premises" and "retained the right to control." Obviously, there is a non-trivial distinction between "owning" and "controlling."

Prior to the May 23, 2019 hearing, the respondent filed several pleadings that disclosed Gladys' role as the former owner, not the current owner. In his motion for damages, the respondent wrote that CHR "is/was the owner" of the property. He explained the lease between Gladys and the Rodas and that Gladys had assigned it to CHR on January 31, 2013. The motion did not conceal that CHR owned the property on the day of the accident. Nowhere does the respondent state or even imply that Gladys was the owner on the day of the accident. In addition, he attached to the motion the sales contract and the assignment of lease. If he had intended to mislead the court, he would not have submitted documents that accurately stated the facts.

During the hearing, the judge stated several times that he had read the papers filed by the respondent. The respondent could safely assume that the judge knew that Gladys was the former owner, not the prior owner. Similarly, when Gladys filed a motion to vacate the judgment, the respondent argued the same theory of the case: that Gladys was liable, not based on ownership, but pursuant to its continuing obligations under the Purchase & Sales Agreement and Lease Assignment. At the subsequent hearing on the respondent's motion for trustee process (where Gladys' counsel specifically claimed that the respondent had misrepresented its ownership), the

respondent clarified the record. He explained that Gladys had owned the property at the time of the original lease with the Rodas and that the sale to CHR did not preclude Gladys' liability.

Given the above, we are hard-pressed to find a knowingly false statement or an intent to deceive. The respondent's use of the present tense at the hearing was aberrant. Not every incorrect statement carries with it a sinister motive. People, even lawyers, misspeak at times. In the heat of the moment in court, the respondent apparently misspoke when he answered the judge that Gladys continued to own the building.

While we defer to hearing committees on questions of credibility, the respondent's state of mind is not a question of credibility in this case. Credibility determinations arise when a fact finder must assess whether a person under oath is telling the truth. Section 3.53 of the B.B.O. Rules requires us to defer to the hearing committee, because its members have the opportunity to observe first-hand the testimony, demeanor, and manner of the person testifying. On the other hand, when a hearing committee relies on other facts to support its finding, our deference is more restrained. The committee is in no better position than we are to draw inferences. We have the authority to review the record and draw reasonable inferences so long as the inferences do not depend directly on credibility findings. Matter of Dodd, 21 Mass. Att'y Disc. R. 196, 206 (2005).[7] In this case, the committee relied on two inferences to support its finding that the respondent made a knowingly false statement. We address each in turn.

First, the hearing committee focused on the respondent's motivation to lie. (HCR ¶ 55). The committee inferred from the context of the case that the respondent wanted to ease his path

[7] Matter of Murray, 455 Mass. 872, 882, 26 Mass. Att'y Disc. R. 406, 417 (2010), is not to the contrary. In that case, the Supreme Judicial Court observed that "the hearing committee's determination of intent is a determination of credibility." Id. In that matter, the hearing committee based its finding on the testimony of the respondent and another witness. Here, by contrast, there was no direct evidence.

to assessing damages against Gladys. So motivated, the committee assumed, the respondent did not want to unduly complicate matters by correcting the judge's use of the present tense in his question. The reasoning does not survive scrutiny. There is no evidence in the record to support it. It is speculative. It also contradicts other findings, specifically that the respondent had a good faith basis to assert claims against Gladys in the complaint. The theory is also undermined by the facts we recited above: the numerous documents filed by the respondent that showed Gladys formerly owned the property. As we discussed above, the complaint alleged only that Gladys controlled the premises; it separately alleged that CHR "owned and controlled the premises." Gladys' default established its liability under a theory of control. There would have been no reason for the respondent to misrepresent that Gladys owned the property. Accordingly, we do not adopt the committee's finding that the respondent had a motive to lie to the court at the May 23, 2019 hearing.

The committee also relied on the respondent's varied and inconsistent explanation for events at the hearing. (HCR ¶. 48).[8] It inferred from the equivocations a guilty conscience and a knowingly false statement. We do not agree. Bar counsel has pointed to no contemporaneous, actual evidence that the respondent knew he was making a false statement at the hearing. The change in explanations occurred in connection with the bar discipline case, starting with the answer and continuing through the post-trial briefs. We are unable to make the leap between the positions taken in this case to a finding that the respondent knew on May 23, 2019 that he was making a false statement to a judge.

[8] Initially, the respondent argued (in answering the Petition for Discipline) that the judge cut him off when he was trying to answer the question about ownership. He later averred that he in fact used the past tense. In his post-hearing brief, he argued that using the present tense was a "simple misstatement." (HCR para. 49).

In addition to the inferences discussed above, the committee (and bar counsel on appeal) relied on the fact that, in his Answer to the Petition for Discipline, the respondent admitted he knew the statement was false. (HCR ¶ 47; Bar Counsel's Brief on Appeal, p. 8). In making this finding, the hearing committee relied on the respondent's admission to paragraph 7 of the Petition for Discipline, which alleged that, "At the time he filed the tort action, the respondent knew Gladys, LL was not the owner …" (Petition for Discipline, ¶ 7). Paragraph 7 did not allege a knowing misstatement at the hearing on damages; it was focused on the respondent's state of mind at the time he filed the complaint. While the respondent knew at the time he filed the complaint that Gladys did not own the building, it does not necessarily follow that several years later he knowingly or intentionally misled the court about this fact.

In sum, we do not adopt the finding that the respondent knowingly made a false statement of fact at the hearing on assessment of damages.[9] We find that the respondent misspoke, likely as the result of carelessness. He also may have not understood the court's question. We hesitate to impose a form of strict liability every time a lawyer says something inaccurate in court. While lawyers must be careful in their use of language, not every misstatement warrants discipline. "An isolated lapse in judgment does not necessarily constitute sanctionable conduct." Matter of an Attorney, BBO No. C6-2007-21 (2009) (Board Decision). Furthermore, under the second prong of Rule 3.3(a)(1), we do not agree that the respondent failed to correct a material misstatement subsequent to the hearing. As to the latter, we find that the statement was not material, as that term is defined in our case law. In addition, the respondent did, in fact, correct

[9] If the respondent had made a false statement at the hearing, the fact would have been immaterial (*see* above). In that hypothetical scenario, the presumptive sanction would not have been a license suspension of one year, as bar counsel has suggested. While our case law indicates that the presumptive sanction for a false statement (not under oath) to a tribunal should be one year, the presumption should not apply to false statements that are immaterial. In other words, we view materiality as relevant to the sanction. We agree with our colleagues in dissent that materiality should be a factor when considering a sanction for making a false statement in violation of Rule 3.3(a)(1); on this issue, we are unanimous.

the statement when he clarified at a subsequent hearing that Gladys did not presently own the property where the accident took place.

For the same reasons, we decline to adopt the hearing committee's legal conclusion that the respondent violated Mass. R. Prof. C. 8.4(c). The prohibition on dishonesty, fraud, deceit, or misrepresentation necessarily requires a finding of a knowing falsehood. Matter of Zimmerman, 17 Mass. Att'y Disc. R. 633, 646-647 (2001). Such evidence was absent in this case.

Bar counsel also asserted that the respondent violated Mass. R. Prof. C. 8.4(h). The hearing committee concluded that his misrepresentations involved behavior that reflects adversely on his fitness to practice law. There were no misrepresentations. There is no basis for a Rule 8.4(h) violation.

Because we find that the respondent did not violate any rule of professional conduct, we need not address the matters in aggravation determined or rejected by the hearing committee. To the extent it would become relevant, we do not agree with the committee that the respondent's lack of candor should be considered in aggravation. A respondent is entitled to defend himself at a disciplinary hearing. The fact that the committee did not find his testimony persuasive is not sufficient, on its own, to sustain a finding as to lack of candor.

Conclusion

For the foregoing reasons, we deny bar counsel's appeal. We decline to adopt the hearing committee's factual findings and legal conclusions to the extent they assert that the respondent made a knowing misstatement of fact in violation of Mass. R. Prof. C. 3.3(a)(1), 8.4(c), and 8.4(h). We adopt the committee's conclusions that the respondent did not violate Mass. R. Prof. C. 3.1. The petition for discipline is dismissed.

Dated: March 11, 2024

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Ashley E. Hayes
Secretary *pro tem*

DISSENT

Because we disagree with the majority on the fundamental question of the respondent's state of mind, we dissent from the decision to dismiss the Petition for Discipline. For the reasons that follow, we would conclude that the respondent violated Mass. R. Prof. C. 3.3(a)(1) and 8.4(c) (but not Rule 8.4(h)). We would impose a public reprimand.

There is no question the respondent incorrectly told the Superior Court judge that defendant Gladys continued to own the property where the accident occurred. We agree with the hearing committee that the audio recording of the hearing reflects his use of the present tense "own" rather than the past tense "owned." Unlike the majority, we find that the statement was knowingly false. At the time of the hearing, the respondent knew that Gladys was not the owner on the day of the accident. He admitted as such in his Answer to the Petition for Discipline. The exhibits he attached to his motion for assessment of damages likewise made clear that Gladys did not own the property at the relevant time. We agree with the hearing committee and bar counsel that the respondent had a motive to lie to the judge when asked about the ownership on the day in question. Obviously, the judge had questions about Gladys' role: presumably that is why he asked for clarification that Gladys "owns" the property. Asserting that Gladys continued to own the property paved the way for a simple hearing focused only on damages. If the respondent had answered truthfully, the judge likely would have probed more deeply into the facts of the case and the basis of the defendant's liability. Indeed, Mass. R. Civ. P. 55(b)(2) provides a mechanism for doing so. The rule provides, in pertinent part: "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems

necessary and proper …" In other words, the May 23, 2019 hearing was not limited to issues of damages, and the respondent had a motive to assuage the judge's (mistaken) belief that Gladys bore responsibility under the applicable law.

We agree with the majority that the statement was not material. While this question is irrelevant to the May 23, 2019 hearing, it pertains to the allegation that the respondent failed to correct the record. Thus, we would not find a violation of the second prong of Rule 3.3(a)(1). Our disagreement is limited to the first prong and the events on May 23, 2019.

While we agree with the hearing committee that the respondent violated Rule 3.3(a)(1) and 8.4(c), we do not agree that he violated Rule 8.4(h). The latter rule prohibits "any other conduct that adversely reflects on [a lawyer's] fitness to practice law." We do not agree that the respondent's misstatement was sufficiently serious to implicate the rule. He is not unfit to practice law.

We disagree with the hearing committee's recommendation to impose a license suspension of six months and one day. Not all misrepresentations are created equal. On a continuum of violations of "candor toward the tribunal," the respondent's falsehoods are minor. As we discussed previously, the fact of ownership was not material. While materiality is irrelevant under Rule 3.3(a)(1) (at least as to the part of the rule relevant here), we should consider materiality in recommending an appropriate sanction. Moreover, the misconduct took place during a single hearing. Throughout the underlying litigation, the respondent accurately described Gladys' role. We also recognize that the misrepresentations were made in the "heat of litigation" and without a preconceived plan. Matter of McCarthy, 416 Mass. 423, 429, fn. 3, 9 Mass. Att'y Disc. R. 225, 232, fn. 3 (1993) (fact that misrepresentations apparently were made without planning is entitled to limited weight in mitigation, "but not much"). Under these

circumstances, a public reprimand would not be markedly disparate from similar situations, taking into account the individual circumstances of each case. Matter of Foley, 439 Mass. 324, 333, 19 Mass. Att'y Disc. R. 141 (2003).

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R. Michael Cassidy

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Ernest L. Sarason, Jr.

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Rita B. Allen