IN RE: MATTER OF GARRETT J. BRADLEY
BBO NO. 629240

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

BAR COUNSEL,	)	
Petitioner	)	
v.	)	**B.B.O. File No. C1-20-00263667**
	)	
GARRETT J. BRADLEY,	)	
Respondent	)	
	)	

HEARING REPORT (MAJORITY)

This matter arises out of the fee petition submitted by the class action counsel in the State Street Bank litigation (the "Class Action"), captioned as Arkansas Teacher Retirement System v. State Street Bank and Trust Co., civil action 11-cv-10230-MLW, in the U.S. District Court for the District of Massachusetts. The Class Action case arose from alleged overcharges of clients by State Street Bank and Trust Co. ("State Street" or the "Bank") through hidden mark-ups and the use of foreign exchange transactions. The law firm in which the respondent, Garrett J. Bradley, was then a partner represented the plaintiff class as co-counsel with other firms.

On November 30, 2021, bar counsel filed a petition for discipline against Bradley. An amended petition for discipline was filed on December 27, 2021. The amended petition for discipline charged that the respondent's declaration in support of his law firm's motion for the award of attorneys' fees and expenses (Ex. 8) in the Class Action, which he signed under oath, contained knowingly false statements of fact and therefore was a violation of Fed. R. Civ. P. 11. If, instead, the respondent had failed to read his declaration, bar counsel charged that the respondent violated Mass. R. Prof. C. 1.3 (lack of diligence). To the extent that he knowingly made the false statements and failed to correct them or take other remedial measures in a timely

manner, the amended petition charged that he violated rules 3.3(a)(1), 3.3(a)(3), 3.4(c), 8.4(c), 8.4(d) and 8.4(h). To the extent that he failed to inform the District Court in an *ex parte* hearing of all material facts known to him that would enable the court to make an informed decision with respect to the lodestar cross-check method of the fee-approval process, the amended petition charged that the respondent violated Mass. R. Prof. C. 3.3(d).

Represented by counsel, the respondent filed an answer to the amended petition for discipline on March 1, 2022. We held a prehearing conference on May 17, 2022, but at the request of the parties, the disciplinary hearing was not held until November 1, 2022. Prior to the disciplinary hearing, bar counsel filed a motion for issue preclusion based on proceedings that occurred in the District of Massachusetts following the respondent's submission of the declaration at issue. The board chair denied the motion on April 21, 2022.

The sole witness at the hearing was the respondent, who was called by bar counsel. The respondent's counsel elected not to ask any questions of him. Forty-two exhibits were admitted into evidence.[1] Bar counsel attempted to introduce the entirety of a 377-page report filed by a special master appointed by the District Court judge to investigate the circumstances surrounding the submission of the respondent's fee petition and several other fee petitions submitted by other counsel in the class action case. Bar counsel also sought to introduce the final order of the District Court judge. We excluded both documents. However, post-hearing, we admitted thirteen excerpts proffered by bar counsel, which are exhibits 42A through 42M.

The respondent sought to offer about seventy-four fee petitions and related documents, which were previously exhibits at the special master's hearing. We excluded those as well. They

[1] The respondent filed several motions in limine to exclude certain proposed exhibits by bar counsel. We denied all these motions and, later, admitted some of bar counsel's proposed exhibits.

are, however, referenced in exhibit 32, which is the respondent's reply to bar counsel's letter of April 8, 2020, advising the respondent that an investigation had been commenced.

The parties submitted their proposed findings of fact, conclusions of law, and recommended dispositions ("PFCs") on December 30, 2022. The following constitutes the findings of fact and conclusions of law of the majority of the hearing committee. One member of the committee disagrees with material parts of these findings and conclusions and submits a separate dissent.

FINDINGS OF FACT[2]

1. The respondent, Garrett J. Bradley, was admitted to the Massachusetts Bar on December 27, 1995. He is also admitted to the bars of the United States District Court for the District of Massachusetts, the First Circuit Court of Appeals, the State of New York, the United States District Court for the Eastern District of New York, and the United States District Court for the Southern District of New York. The respondent became the managing partner of the Thornton Law Firm LLP ("Thornton") in July or August 2016. (Ans. ¶ 1).[3]

2. The Arkansas Teacher Retirement System ("ATRS") is an institutional investor with experience, prior to this class action litigation, as lead plaintiff in class actions. ATRS selected the New York law firm Labaton Sucharow LLP ("Labaton" or "Lead Counsel") as its

[2] The transcript is referred to as "Tr. __"; the matters admitted in the answer are referred to as "Ans. ¶_"; and the hearing exhibits are referred to as "Ex. _." The matters admitted by the answer include those deemed admitted because of the respondents' failure to deny them in accordance with B.B.O. Rules, § 3.15(d). See Matter of Moran, 479 Mass. 1016, 1018, 34 Mass. Att'y Disc. R. 376, 379 (2018).

We have considered all the evidence, but we have not attempted to identify all evidence supporting our findings where the evidence is cumulative. We credit the testimony cited in support of our findings to the extent of the findings, and we do not credit contradictory testimony. In some instances, we have specifically indicated testimony that we do not credit.

[3] The Thornton firm announced Bradley's election as managing partner on September 2, 2016. (Tr. 64-65; Ex. 1, "Timeline").

counsel to pursue certain class action claims against State Street for alleged fraud relating to its billing on foreign exchange transactions. (Ex. 42A). In turn, Labaton, as Lead Counsel, involved other class action firms, including Thornton, to participate as plaintiffs' counsel in the anticipated litigation. (Ex. 42A; Ans. ¶ 3). Thornton's role was liaison (local) counsel in the Class Action against State Street. (Ans. ¶ 3). All the firms were to be compensated on a contingent fee basis, subject to court approval of counsel fees. (Ans. ¶ 3; Tr. 66).

3. On or about February 10, 2011, the respondent signed and filed the Class Action complaint in the United States District Court for the District of Massachusetts (the "District Court"). (Ans. ¶ 4; Ex. 2 at 14, dkt. 1).

4. On July 26, 2016, the parties executed a Stipulation and Agreement of Settlement (the "Settlement Agreement"). The Settlement Agreement required the Bank to pay $300,000,000 in cash into an interest-bearing escrow account for the benefit of the settlement class. On September 15, 2016, Lead Counsel filed a motion seeking final approval of the Settlement Agreement, a plan to allocate the settlement funds, and final certification of the subject class. (Ans. ¶ 5; Ex. 42B).

5. Along with the motion to approve the Settlement Agreement, Lead Counsel also filed on behalf of all plaintiffs' counsel, a motion for an award of approximately $75,000,000 in attorneys' fees and expenses to be divided among the various counsel. (Ans. ¶ 6; Ex. 42B).[4]

6. To evaluate the reasonableness of the fee requests, the District Court employed the "lodestar cross-check" method. Each plaintiff's law firm would file an hourly fee application, also called a lodestar report, setting forth the number of hours of work performed by attorneys in

[4] The exact amount of legal fees, as originally awarded by the District Court, was $74,541,250, with an additional $1,257,697.94 in approved expenses. (Ex. 24 at 647). The District Court used the rounded figure $75,000,000 for the sake of convenience, and we likewise use that figure.

each firm multiplied by the attorneys' hourly rates. The District Court would then determine if the requested contingent fee resulted in a reasonable "multiplier" (i.e., the percentage of fee award divided by the sum of all lodestar report calculations). (Ans. ¶ 7).[5]

7. As of September 2016, the respondent was familiar with the lodestar cross-check method that the court would use to verify the reasonableness of a class action fee award and what that method specifically entailed. (Tr. 66-69).

8. As Thornton's managing partner, the respondent understood that he would be responsible for submitting the firm's lodestar data to the District Court. (Tr. 71-72).

9. On August 31, 2016, a partner with the Lead Counsel circulated to the eight other law firms that represented the class and six firms that represented the class for purposes of ERISA issues a form declaration that could be used in connection with their respective fee requests. (Ex. 1 at p. 1; Ex. 3.) The Thornton firm received the form document. At some point between August 31 and September 14, 2016, two of the respondent's partners inserted Thornton-specific information into the form declaration. (Ex. 1 at p. 1.) This included language in the body of the declaration describing what services Thornton performed as well as representations concerning the information contained in the attached Exhibit A. One of these lawyers also filled in the information in Exhibit A. This exhibit included specific information necessary for the lodestar calculation; i.e., the names of lawyers (and one paralegal) who performed work on the case, the number of hours each worked, and the nominal hourly rate for each such attorney (and

[5] The Bank had no financial interest in the amount of attorneys' fees the law firms would individually or collectively recover out of the $300,000,000 settlement. The members of the plaintiff class, by contrast, had a direct financial interest as each dollar allocated to the contingent fee payment reduced the amount that would be shared among the class members. However, the parties have stipulated that a petition for the award of attorneys' fees in a class action is appropriately treated as an *ex parte* submission. (Ex. 40; *see also* Ans. ¶8 (not denying that in connection with this disciplinary action, the Class Action fee approval proceeding should be considered to be *ex parte*)).

the paralegal). (Id.) Included among these individuals was the respondent's brother, Michael. (Ex. 8 at p. A-000160.)[6]

10. Most if not all of the other plaintiff's firms received, utilized, and filed with the District Court (with edits typically involving descriptions of the specific firm's services) the same form declaration in connection with their lodestar fee requests. (E.g., Exs. 7, 9, 10, 11, 12, 13 & 15.) At least one firm provided additional information about the reasonableness of its hourly rates, for example. (Ex. 14.)

11. The Thornton partners who prepared the declaration presented it to the respondent on September 14, 2016, for his review and signature. The respondent signed the document that day, and his partners promptly emailed it to the partner at the Lead Counsel collecting the various declarations to be submitted in support of the omnibus fee petition. (Ex. 1, p.1.) The respondent signed the document on a page that was blank except for the following: "I declare under penalty of perjury that the foregoing is true and correct. Executed on September 14, 2016." (Ex. 8.) The date was handwritten. Whether or not the respondent added the handwritten date, there is no question he signed the declaration under those words.

12. As mentioned above, the respondent's declaration included an attachment, prepared by his partners, that purported to list the Thornton attorneys and support staff who worked on the Class Action, the number of hours each of them worked, an hourly rate for each attorney, and the resulting total lodestar for the firm. (Ex. 8, at 160 to 161; Ex. 1, Timeline, 001 to 002).

13. In his declaration, the respondent stated under penalty of perjury that:

> The schedule attached hereto as Exhibit A is a summary indicating the amount

[6] We discuss below how the Thornton firm established hourly rates for the attorneys and the paralegal, none of whom in fact had established or usual and customary hourly rates for cases for clients that paid on an hourly basis.

> of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. . . . The hourly rates for the attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions.

(Ex. 8, ¶ 3 at A-000157 to A-000158; Ans. ¶ 9, admitted or not otherwise denied).[7]

14. The respondent testified (and, in his answer, also asserted) he did not read the sworn declaration in its entirety before signing it. (Ans. ¶ 10; Tr. 74-75, 80, 181, respondent; Tr. 40-41, respondent's counsel). The majority of the committee credits the respondent's testimony on this point.

15. Pursuant to Rule 11(b) of the Federal Rules of Civil Procedure, the respondent's signature on the declaration constituted a certification to the court that he had made a reasonable inquiry as to the facts contained therein and that those asserted facts had evidentiary support. The respondent admits he failed to read the declaration before signing it. (Ans. ¶ 10, admits he did not read before signing). The respondent failed to make any independent inquiry as to whether the representations contained in his declaration were accurate. Instead, he relied on his partners' analyses incorporated into the declaration they presented to him. (Tr. 79, respondent ("Yeah. I read it quickly. I trusted that Mike Lesser [a Thornton partner] would put it together correctly. He had worked on the case for many years."), 81-82 ("That was Evan's responsibility …. he was responsible for putting the Exhibit A together."), 84). We take administrative notice

[7] This language was copied essentially verbatim from the form declaration Lead Counsel sent to the various plaintiffs' law firms. We note that essentially all the other plaintiffs' law firms, including Lead Counsel, copied and included the same language. (E.g., Exs. 7, 9, 10, 11, 12, 13, 14 & 15).

of the wording of Fed R. Civ. P. 11(b).

16. The respondent's four-page declaration consists of only two pages of text. (Ex. 7). (The first page, 156, is only the case caption and the fourth page, 158, is only the signature page). The respondent testified that he saw his name and the description of the firm. He was told that part of it was "boilerplate," and he did not read anything on that page. (Tr. 80-81). He turned the page and saw the rest of the declaration was not "boilerplate." Nevertheless, he testified that he flipped to the signature page and signed it without reading the entire declaration. (Tr. 74).

17. The respondent's declaration, including the "Exhibit A" referenced therein (Ex. 7, at 160 and 161), contained several false and misleading statements. First, the respondent declared that certain attorneys were employed by Thornton and that the hourly rates attributed to them for the purpose of calculating Thornton's lodestar were "the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." However, Thornton worked solely on a contingent fee basis. Accordingly, the firm had no clients who paid for legal services on an hourly basis and therefore no "regular rates charged" for its attorneys. At the time he signed the declaration, the respondent knew that Thornton did not charge the hourly rates that were presented to the court as part of the basis for calculating the firm's lodestar attorney's fees amount of $7,460,139. (Ans. ¶ 11, admitted or not otherwise denied; Tr. 65, firm did no hourly fee work).

18. Second, the respondent represented to the District Court that attorney Michael Bradley was a Thornton employee with a regular hourly billing rate of $500. Michael Bradley is the respondent's brother and was never an employee of Thornton. Neither Thornton nor Michael Bradley ever charged a client $500 per hour for Michael Bradley's services. At the time he

signed the declaration in support of the motion for attorneys' fees, the respondent knew that his brother Michael was neither a partner of nor employed as an associate by Thornton and that neither the firm nor Michael billed his time to clients at a rate of $500 per hour. (Ans. ¶ 12, admitted in part except as to Michael's hourly rate; Tr. 100-101 & 120, Michael told the respondent he had charged a client $450 an hour; Tr. 101, Michael was not an employee of Thornton; Ex. 31, transcript of Michael Bradley's deposition, at pp. 17-20, he had one case, in 2012-2013, where he charged and was paid $450 per hour; see also, id. at pp. 12-13, "For the vast majority of the work I do is criminal defense work. I do private work, obviously. I'm also a member of the Norfolk County Bar Advocate Program. [The rate for the bar advocate] work is capped at $53 an hour").

19. The testimony concerning how the $500 per hour rate for Michael Bradley's time was set was the following. The respondent testified he and his brother discussed Michael's hourly rate in 2013 when Michael began work on the case. (Tr. 99-100). They agreed his compensation would be contingent on the success of the case. (Tr. 99-100, 120). The respondent testified Michael "said he had just billed four fifty to a client," and they agreed he would be paid $500 per hour for his work on the case if the Thornton firm received a contingent fee for its work on the case. (Tr. 99-101). The respondent also testified at the hearing "he and I had discussed that his most recent rate was prior to starting the work in 2013, and he said four fifty. And I said, Well, we'll probably be able to do 500 because you're taking it on a contingency. And then at some point we revisited that and confirmed on 500." (Tr. 120.)

20. Michael Bradley's deposition testimony, taken on July 27, 2017, during the Special Master's investigation into the fee petitions, corroborated the respondent's testimony on

these points.[8] Michael testified the respondent asked in mid or late February 2013 if he would be willing to work on the Class Action litigation. (Ex. 31 at pp. 26–27). Michael testified that he, not the respondent, proposed that he be paid $500 per hour on a contingent basis for his work on the case. (Id. pp. 28–30). Michael testified that a year or two before he became involved in the Class Action litigation a private client hired him at a rate of $450 per hour and paid him $87,000 at that rate. (Id. pp. 17–19). In December 2016, Thornton paid Michael Bradley $204,000 at the rate of $500 per hour for his work on the Class Action case. (Id. at pp. 70–71).[9] There was no contrary testimony about the discussions between the respondent and Michael in 2013.

21. Accordingly the majority finds that Michael Bradley's $500 per hour rate was set in a 2013 discussion he had with the respondent; that although Michael had never billed his time at a rate of $500 per hour, they discussed in 2013 a then-recent private pay case in which Michael had been paid $450 per hour; that the respondent made clear Michael's compensation would be entirely contingent and therefore at risk; and that the respondent and Michael discussed what an appropriate hourly rate would be under the circumstances and agreed on $500. The testimony was not consistent as to who first proposed $500 per hour in the 2013 discussion; accordingly, the majority of the committee makes no finding with respect to that specific issue.

22. Third, the respondent identified some twenty-three staff or contract attorneys (the "Staff Attorneys") as Thornton employees who had regular hourly billing rates of $425 per hour. (Ex. 8, at 157, ¶ 4; 160-161). This was also false and misleading. The Staff Attorneys were not employed by Thornton. Rather, they were employed or contracted by Lead Counsel or Lieff Cabraser. Through a cost-sharing arrangement, Thornton reimbursed Lead Counsel and Lieff

[8] Neither party called Michael Bradley as a witness at the hearing.

[9] This followed the court's approval of the original fee requests.

Cabraser a portion of what those firms paid the Staff Attorneys. (Tr. 92, 103, 106-08). To the respondent's knowledge, those attorneys had never performed work on any of Thornton's other cases. (Tr. 96). They had never been to Thornton's offices. (Tr. 94). As the respondent also was aware, Thornton never billed any clients $425 per hour for services performed by these (or any other) attorneys. (Ans. ¶ 14; Tr. 93-94, the staff attorneys did not work for Thornton; Tr. 97-98, Thornton never billed any attorney at $425 an hour).[10]

23. Including the Staff Attorneys as Thornton employees and incorporating the full number of hours they worked (rather than just claiming the hours for which Thornton, under the cost-sharing agreement, reimbursed Lead Counsel or Lieff Cabraser for what they paid with respect to the Staff Attorneys), obviously had the effect of increasing significantly Thornton's lodestar share of the requested attorneys' fees. Thus, this aspect of the respondent's declaration supported a claim for a percentage of the fees of the overall contingent fee that likely was higher than warranted. (Ex. 27, respondent's federal court testimony, at A-000800 to A-000803; Ex. 30, respondent's deposition, at A-000927 and A-000934). See Arizona Teacher Retirement System v. State Street Bank and Trust Company, 512 F.Supp.3d 196, 243 (D. Mass. 2020) (quoting these sources in the Court's findings of fact).

24. The majority of the committee finds that had the respondent read the declaration carefully, he would have been aware that some or all the above statements were not accurate or, in the context of the proceeding, at least misleading. However, the majority of the committee credits his testimony that he did not read the declaration carefully enough to understand what he was signing was not accurate or was misleading. Bar counsel failed to introduce any evidence to

[10] The only people on the list incorporated in the respondent's declaration who actually worked at Thornton were the first five attorneys (four of whom were partners) and one paralegal. (Tr. 92-93; Ex. 8 at 160).

the contrary.

25. Lead Counsel included seventeen of the twenty-three Staff Attorneys discussed above in its declaration in support of the fee petition generally and its specific lodestar calculations. Lieff Cabraser included the other six Staff Attorneys in its declaration. (Ex. 16 at p. 2.) Accordingly, the arrangement whereby Thornton paid for lawyers who were employed by other firms led to a double-counting error (where Thornton and the actual employing law firms both listed the lawyer and the lawyer's alleged time charges); this inflated the firms' total lodestar by over $4,000,000. (Ans. ¶ 14; Ex. 42C; Ex. 16; Ex. 33 at BC-3022).[11]

26. At the hearing before us, the respondent admitted that identifying the Staff Attorneys as lawyers that Thornton had previously billed out to clients at the rate of $425 per hour constituted a misrepresentation to the court. (Tr. 94-95). He also admitted that he had been involved in email communications with Lieff Cabraser and Lead Counsel concerning Lieff Cabraser's view of how to support a $425 hourly rate for those lawyers, knowing that this information would then be included in Thornton's fee declaration. (Tr. 89-91, 96-97).

27. The respondent's misrepresentations to the District Court were material to the fee-approval process. In analyzing the reasonableness of the fee award that was being sought by Thornton and the other plaintiffs' firms, the District Court relied on the truthfulness of the law firms' statements concerning the rates they customarily charged paying clients for the services of

[11] The double-counting of the Staff Attorneys that produced the inflated lodestar related to a "cost-sharing" arrangement between Thornton and the other plaintiffs' firms involved in the class action. (Ex. 16 at p. 2; Tr. 106-08, 111.) This arrangement was not "documented." (Tr. 108, 111). The respondent's fee declaration omits any mention of such a fee-sharing arrangement. (See Ex. 8). As explained below, once this issue surfaced, Lead Counsel referenced the cost sharing arrangement in a letter to the District Court. (Ex. 16). The majority of the committee has no reason to believe this explanation was fabricated by any of the attorneys involved. The majority therefore credits the respondent's testimony in this regard. To the extent bar counsel disputes the arrangement existed, the majority of the committee finds bar counsel has failed to present any contrary evidence.

the attorneys who worked on the Class Action. The District Court relied on this information in calculating the lodestar, establishing the multiplier, and determining the appropriate share of the $300,000,000 settlement the law firms would be permitted to recover as their compensation. (Ex. 42B.) Lead Counsel had agreed with the plaintiff class representative that the total contingent fee would not exceed 25% of the recovery. (Tr. 44, Ex. 30 at p. A-000922.) Any duplicated hours or inappropriately high hourly rates would not therefore have increased the total contingent fee above 25% of $300,000,000, or the $75,000,000 (approximately) the District Court initially approved based on the original declarations it received.

28. Although the respondent claimed he did not read his declaration in its entirety before signing it, he admitted he read material portions of it before signing it. (Tr. 74-75). Excluding the document's caption, the signature page, and the three exhibits that were attached to it, the declaration consisted of just two pages of text. (Ex. 8). The respondent admitted to having read the first page of text (page two of the declaration) before signing the declaration. (Tr. 74-75, 83). He further testified that while he only flipped through it, he looked at the second page of text (page three of the declaration) with sufficient comprehension to discern that it consisted of "boilerplate." (Tr. 75). The respondent acknowledged that to read the second page in its entirety would have taken only a few (perhaps thirty) seconds of his time, and that it was a mistake for him not to have done so. (Tr. 83-84).

29. The respondent admitted that he failed to do anything to verify the accuracy of the information contained in his declaration. (Tr. 84-85). Although the respondent testified that he relied on those who prepared the declaration to ensure that it was accurate, he agreed that, as the signer of the document and Thornton's managing partner, "the buck stops with me. It's my mistake." (Tr. 86). We find that the respondent was therefore responsible for any errors in the

declaration he signed and submitted to the District Court.

30. On November 2, 2016, the District Court conducted a hearing on the motion to approve the settlement and the related $75,000,000 fee request. At that time, it was the District Court's understanding that, "in calculating the lodestar, plaintiffs' law firms had used the rates they each customarily actually charged paying clients for the services of each attorney and were representing that those rates were comparable to the rates actually charged to clients for similar services by other attorneys in their community." (Ex. 42M, emphasis added). The District Court relied upon the respondent and other class counsel to provide truthful information concerning the rates they customarily charged paying clients for the services of the attorneys who worked on the case. (Ex. 42B). In submitting his fee declaration, the respondent intended for the court to place such reliance upon it. (Tr. 72: "Q: And fair to say you wanted the judge to treat that fee declaration as reliable and trustworthy? A: Of course").

31. Relying on the truthfulness of the sworn declarations provided by the respondent and other counsel, the District Court approved the $75,000,000 fee request. (Ex. 24 (transcript of November 2, 2016, hearing), at 647).

32. The respondent testified that, as a result of a Boston Globe investigation, he became aware, sometime between November 2 and November 10, 2016, that the firms of Labaton and Lieff Cabraser had also included, in aggregate, all the Staff Attorneys on their firms' fee declarations. He therefore compared the three Exhibit As of the three firms side-by-side and saw the duplication. (Tr. 101-105; Ex. 16).[12] The respondent said that he "saw right away that there [were] the same names with different rates at different firms, and [he] knew that

[12] The Boston Globe had uncovered this discrepancy and had asked a firm representing Thornton on another matter about it. Outside counsel in turn reported the information to the respondent's firm. (Tr. 101-102).

something wasn't right." (Tr. 103).

33. On November 10, 2016 (about a week after the District Court issued an order approving the $75,000,000 fee award), a Labaton attorney informed the District Court by a letter ("the Labaton Letter") that inquiries from the media had caused class counsel to realize that they had inadvertently double-counted the hours of the Staff Attorneys. (Ex. 16 at p.1 ¶1). Labaton submitted this letter on behalf of itself, the Thornton firm, and Lieff Cabraser to explain this particular error. (Id.) This error inflated what had been represented to be their collective lodestar by more than 9,300 hours and more than $4,000,000. (Ex. 16; Ex. 1, Timeline at 002; Ex. 42C).

34. When the respondent compared the Thornton "Exhibit A" to his declaration against the others in November 2016, he must also have observed his declaration's exhibit identifies these individuals (plus Michael Bradley) with the designation for their "Status" as "SA". That stands for "Staff Attorney." Neither Exhibit A nor the body of the declaration states any of these individuals actually were employed by or contracted to one of the other lead class counsel and that the Thornton firm at most reimbursed one or the other firm for some or all of the expenses associated with these lawyers. To the contrary, the body of the declaration states the persons on Exhibit A either were or had been employed by (or contracted to) Thornton such that it was responsible for their compensation and accordingly could "claim" the value of their time in its lodestar calculation. Respondent failed to correct these misrepresentations in November 2016.

35. Before us, the respondent testified that, in early November 2016, he believed pursuant to the cost-sharing agreement among the law firms, the mistakes in the submissions to the District Court concerning the twenty-three overlapping Staff Attorneys were those of the other law firms and not Thornton's. (Tr. 110-111). The respondent testified "our [Thornton's]

Exhibit A [to his declaration, Ex. 8] was accurate" and the "mistake" was "on the other firms" for counting their own employees. (Tr. 110-111). This testimony was not extensive or clear. The majority of the committee finds that the respondent continued in November 2016 to believe the Staff Attorneys properly could be included in his declaration. However, the respondent did not at that point correct the misrepresentation that the $425 per hour rate identified with the Staff Attorneys was based on hourly rates that the Thornton firm customarily charged for them or any other attorneys.

36. The respondent's testimony about his belief the Staff Attorneys could be included in his declaration is corroborated by the letter that Lead Counsel submitted to the District Court on November 10, 2016. In it, Lead Counsel identified certain of the Staff Attorneys who were "mistakenly" included either in its or Lieff Cabraser's declaration as well as, correctly, in the respondent's declaration. (Ex. 16 at p. 2.) The majority of the hearing committee finds that letter confirms that the hours for seventeen of the twenty-three identified Staff Attorneys quite properly were included exclusively in Exhibit A to the respondent's declaration and should not have been included at all in Lead Counsel's declaration. The letter also identifies that the hours for two of the remaining six Staff Attorneys were properly included entirely in the respondent's declaration and should not have been included in Lieff Cabraser's declaration. Some unspecified portion of the hours for two of the remaining four Staff Attorneys were properly included in the respondent's declaration and should not also have been included in Lieff Cabraser's declaration.[13] Finally, the majority of the committee finds that the double counting, at least with regard to the respondent and Thornton, was inadvertent and not intentional.

37. Based on the analysis the three lead counsel law firms conducted in November

[13] Bar Counsel did not provide a contrary analysis of Exhibit 16.

2016, the majority of the committee finds that the hours for nineteen of the twenty-three Staff Attorneys properly were included entirely in the respondent's declaration. The hours for two of the twenty-three Staff Attorneys were also properly included in his Exhibit A, at least in material part. Two of the Staff Attorneys' hours should not have been included in the respondent's declaration. The majority of the committee therefore finds that almost all the "double counting" were contained in the other firms' declarations. Nonetheless, other than as set forth in Lead Counsel's letter, the respondent did not in November 2016 inform the District Court that the hours for two of the Staff Attorneys should not have been included in his declaration and that the hours for two other Staff Attorneys should have been split with one of the other firms.

38. Given the respondent's testimony and the contemporaneous Labaton Letter submitted to the District Court on behalf of Labaton, the Thornton firm, and Lieff Cabraser, the majority of the committee credits the respondent's testimony concerning how the cost-sharing arrangement worked in connection with the Staff Attorneys. Bar counsel introduced no evidence, at least that was made clear to the majority of the committee, demonstrating the representation in the letter from Lead Counsel to that effect was not accurate. That does not, however, excuse the respondent's declaration represented to (or was understood by) the District Court as affirming the identified attorneys were "employees" of the Thornton firm. Whatever were the details of the cost-sharing arrangement, none of these people were employees of the Thornton firm.

39. Exhibit A to the respondent's declaration also contains "hourly rates" that were multiplied by the hours that the Thornton firm recorded with respect to each of the identified individuals. Exhibit A also assigns hourly rates for the lawyers (and one paralegal) identified, including the Staff Attorneys; Michael Bradley; an associate at the Thornton firm; and four of its partners including the respondent. The hourly rate identified for the Staff Attorneys was $425 per

hour, Michael Bradley's rate was identified as $500 per hour, and the actual Thornton lawyers were identified at rates ranging from $450 (for the associate) to $850 for the name partner of the firm.

40. Nothing in Exhibit A states the basis for assigning the specific rate to the specific individual or expressly represents these were hourly rates charged to firm clients paying on an hourly basis. However, the body of the declaration represents the hourly rates identified in Exhibit A are in fact hourly rates that the Thornton firm charged to one or more hourly-pay clients.[14] The respondent admitted the Thornton firm had no hourly pay clients and, accordingly, the statement in his declaration suggesting otherwise was false.[15]

41. If the respondent had reviewed in November 2016 the body of his declaration at the same time he reviewed Exhibit A in an effort to identify any and all potential misstatements rather than just the double-counting of the Staff Attorneys identified by the Boston Globe, he should have recognized the declaration at least implicitly states these individuals and his brother were employees of or contracted to the Thornton firm, which was not the case; the hourly rates assigned to everyone, including Michael Bradley, had never been charged to any hourly pay

[14] The declaration does not expressly state that the hourly rates identified on Exhibit A are what the firm "customarily charged" to "hourly pay" clients. The declaration instead uses the expressions "my firm's current billing rates," "billing rates for such personnel in his or her final year of employment by my firm" (Ex. 8 ¶ 3), and "The hourly rates for the attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." (Ex. 8 ¶ 4). The respondent testified Lieff Cabraser suggested, in an email copied to the respondent, the $425 rate would be appropriate because it had been accepted in a recent, similarly complicated contingent fee case. (Tr. 89-91, 96-97). Had the respondent stated that expressly in his declaration as the basis for the hourly rates assigned to the Staff Attorneys, he would not have misrepresented the basis for those rates. However, a reasonable reviewer of the body of the declaration would have understood there was some basis for identifying an hourly rate, and that basis was work for which some clients paid on an hourly basis. There were no such clients.

[15] The hourly rates may or may not have been appropriate based on what would have been a reasonable rate for attorneys of the individual's experience, the complexity of the case, the contingent nature of any recovery by the Thornton firm, and other factors. However, that is not the way in which the Thornton firm, or the other firms, justified the rates in their lodestar calculations.

client; and therefore the Thornton firm's lodestar calculation was based on inaccurate assumptions. The majority of the committee therefore considered whether there is evidence from which they can conclude the respondent (1) reviewed all parts of his declaration in November 2016 for anything other than, as he testified, the overlap in the named individuals among the three relevant class counsel declarations, and (2) therefore knew at that time these other aspects of his declaration were false. The majority of the hearing committee finds that bar counsel has failed to satisfy his burden to show the respondent reviewed all parts of the declaration in November 2016 and knew then any other aspect of his declaration was false. The majority of the committee finds the respondent simply did not in November 2016 review his declaration for other potential errors (Tr. 121-22) and accordingly was not at the time aware there were other misrepresentations.

42. The Labaton letter did not directly address whether any of the Staff Attorneys were employed by Thornton or by one or both of the other firms. The letter does state though they were "located" at the offices of the other two firms and that "financial responsibility for certain SAs … was borne by Thornton." (Ex. 16 at p. 2.) The respondent did not provide anything to the District Court at the time to make clear any statement to the effect his firm "employed" any of the Staff Attorneys was not correct. Nor did he or the Labaton Letter correct misstatements to the effect that the identified rates were based on hourly billing rates for non-contingent fee cases. (Ex. 16).

43. There was no evidence other than the testimony from the respondent (and the letter itself) why other misstatements were not corrected at the time. The majority of the hearing committee credits the respondent's testimony he simply did not review the rest of his declaration for any additional potential errors or understand at the time there might be other aspects of the

declaration that were misstated. While not an excuse for the respondent, we also note neither Labaton nor Lief Cabraser corrected any misstatements regarding the hourly rates or whether the Staff Attorneys were employees of their firms. None of the several other firms that used the same form declaration containing the same representations submitted any corrections at that time.

44. Around December 17, 2016, the respondent read another article in the Boston Globe concerning the case. (Ex. 17; Tr. 116). The article focused on the $500 rate assigned to the respondent's brother, Michael. The respondent did not consider there was anything regarding his brother's rate that needed to be clarified to the court. (Tr. 120-22.) The respondent did not at that time inform the District Court of any additional factual inaccuracies in his declaration or make any attempt to correct them. (Ex. 121-122).

45. The District Court entered an order on February 6, 2017 (Ex. 33), for a hearing on March 7, 2017, at which the respondent and others were to be present. (Ex. 1, Timeline, at 002; Tr. 122). The respondent did not come forward and inform the District Court that any parts of his declaration was incorrect (other than to the extent presented in the Labaton Letter); his disclosures came when the Court questioned him at the hearing on March 7, 2017. (Ex. 25 at A-000655, respondent's testimony).

46. In view of the questions raised by the inflated lodestar and the Boston Globe articles, the District Court proposed appointing retired United States District Judge Gerald Rosen as a Master to investigate the reliability of the representations made to the court in the request for attorneys' fees and related issues. (Ex. 42E).

47. On March 7, 2017, the District Court conducted a hearing on its proposal to appoint retired Judge Rosen as a master. (Ex. 42F). The March 7, 2017, hearing also included discussion of some of the issues that prompted the appointment of the master. (Id.). At the

hearing, counsel for Thornton stated that the District Court's concerns about the representations that had been made in the requests for attorneys' fees were "justifiable." (Id.). Thornton's counsel and Michael Bradley each informed the District Court that Michael Bradley was not an employee of Thornton, and that neither the firm nor Michael Bradley had ever billed for his time at the rate of $500 per hour, as had been represented under oath in the respondent's declaration. (Id.). The respondent identified only one case in which his brother was billed by Thornton at a rate of as much as $300 per hour. (Id.).

48. Thornton and the other class counsel agreed to the appointment of Judge Rosen as master. (Ex. 42G). After an extensive investigation, Judge Rosen filed, on May 14, 2018, a 377-page "Report and Recommendations." (Ex. 42K). After receiving the master's report and recommendations, the court vacated the original $75,000,000 fee award. (Ex. 42I).

49. In June 2019, the District Court conducted a three-day evidentiary hearing on objections to the report that had been filed by Thornton and other Class Counsel. (Ex. 42K). Following this hearing, the District Court reduced the original fee award from approximately $75,000,000 to $60,000,000 and reallocated the amount each of the participating law firms would receive of that reduced total. (Ex. 42L).

CONCLUSIONS OF LAW

50. Bar counsel charged that, by failing to read the declaration prior to signing it to ensure that his representations to the District Court were truthful and accurate, the respondent violated Mass. R. Prof. C. 1.3 (lack of diligence) and 8.4(d) (conduct prejudicial to the administration of justice).

51. We first consider Mass. R. Prof. C. 1.3. It is possible to file a petition with a tribunal that, because of a lack of due diligence (e.g., failure to supervise the filer), contained

false assertions of fact. Even when the lawyer did not personally do so, if a petition with erroneous information is filed due to the lawyer's lack of adequate supervision over his staff, it will still result in a lengthy suspension. E.g., Matter of Dvorak, 28 Mass. Att'y Disc. R. 269 (2012) (reciprocal discipline; thirty-six month suspension with the last eighteen months stayed). Thus, even though we credit that the respondent relied solely on others and signed a declaration based on such reliance, he admitted he did nothing independently to verify the information was accurate. Accordingly, his conduct still demonstrated a lack of diligence in violation of rule 1.3. See Matter of Fitzgerald, 35 Mass. Att'y Disc. R. 137 (2019) (deliberately certifying that the lawyer had followed applicable appellate rules, when he had not done so, violated Mass. R. Prof. C. 1.1, 1.3, 3.4(c), and 8.4(d)). We therefore conclude that the respondent violated Mass. R. Prof. C. 1.3.

52. Regardless of whether the respondent read the declaration before signing it, we conclude that bar counsel has proved a violation rule 8.4(d).[16] Obviously, if the respondent had read the declaration and signed it, knowing it contained false statements and would be submitted to and relied upon by the court regarding the fees his firm was seeking, his conduct would have been prejudicial to the administration of justice. E.g., Matter of Moran, 479 Mass. 1016, 34 Mass. Att'y Disc. R. 376 (2018) (among other misconduct, filing an accounting with the probate court that was false with regard to his fees); Matter of Munroe, 26 Mass. Att'y Disc. R. 385 (2010) (same); Matter of Zadworny, 26 Mass. Att'y Disc. R. 772 (2010) (same). However, the majority of the committee does not find that he knew -- at the time he signed the declaration and allowed it to be filed on behalf of his firm – that anything in his declaration was not accurate. Indeed, bar counsel failed to present any evidence to support the conclusion that the respondent

[16] The majority of the committee understands that intent is not an element of rule 8.4(d).

knew at the time he signed and submitted the declaration that his statements were false. Put differently, the majority of the committee finds bar counsel failed to carry its burden in this regard.

53. A failure to read a declaration, or at least to read relevant portions carefully enough, can be considered reckless and, accordingly, a violation of rule 8.4(d). E.g., in Matter of Serpa, 30 Mass. Att'y Disc. R. 358 (2014) (term suspension), a lawyer had contracted with CPCS to receive payment for representation of indigent defendants exclusively from CPCS, but then requested and received additional payment directly from a client. Years later, when the client informed the court of the payment in a motion for a new trial, the lawyer filed an unsolicited affidavit, incorrectly denying he had received the payment. The Court said the lawyer had made a "reckless misrepresentation," and the lawyer conceded his affidavit was "foolish [] . . . without reflection . . . without looking at the CPCS billing . . . kind of in the heat of the moment." The lawyer's conduct of filing an unknowingly false affidavit violated rules 8.4(d) and 8.4(h).

54. The majority finds that the respondent was negligent in not reading the declaration in its entirety before signing it, in relying entirely on his partners' work product concerning material facts to be presented to the District Court, and in not independently verifying how the information provided in Exhibit A would be understood by the District Court especially considering how that exhibit was described in the body of the declaration itself. The investigation and related matters that followed the submission to the District Court of the many declarations containing misrepresentations concerning employment status and purported hourly rates charged to hourly clients consumed a great deal of judicial and nonjudicial resources. That could have been avoided had the respondent and the other class counsel had read their declarations more carefully, had properly identified who employed the Staff Attorneys and

explained the cost sharing arrangement, and had included the explanation that the rates assigned to the Staff Attorneys (and, in the case of the respondent, Michael Bradley) were not established rates for hourly clients but instead represented the declarant's belief as to an appropriate rate given the lawyer's experience.

55. Bar counsel charged that, by failing promptly to correct and/or take other remedial measures with respect to the false and misleading statements that he learned in or around November 2016 had been included in his declaration, the respondent intentionally violated Fed. R. Civ. P. 11 and therefore Mass. R. Prof. C. 3.3(a)(1), 3.3(a)(3), 3.4(c), and 8.4(c) and (h). We unpack these.

56. Rule 3.3(a)(1) prohibits a lawyer from knowingly making a false statement of fact or law to a tribunal or failing to correct a false statement of material fact. Rule 3.3(a)(3) prohibits a lawyer from knowingly offering false evidence,[17] but adds that if the lawyer has offered material evidence that the lawyer later learns was false, the lawyer shall take reasonable remedial measures, including, if necessary, a disclosure to the tribunal. Because the majority of the committee credits the respondent's testimony that he did not read his declaration in its entirety, we find no violation of Mass. R. Prof. C. 3.3(a)(1) nor of the first sentence of Mass. R. Prof. C. 3.3(a)(3).

57. The other component of Rule 3.3(a)(3) requires us to decide whether the respondent took reasonable measures to correct his false statements to the District Court, assuming he did not know they were false at the time but learned later of their falsity. The respondent testified that, in the fall of 2016, when the Boston Globe noted that the firms of Labaton and Lieff Cabraser had double-counted lawyers also claimed by the respondent to be

[17] Rule 3.3(a)(3) contains certain exceptions pertaining to a criminal case, including false testimony by the criminal defendant client. We paraphrase this rule to eliminate inapposite provisions.

Thornton employees on its fee declaration, he compared the "Exhibit A" of each of the three firms and saw the duplication. (Tr. 103). While the negative publicity clearly triggered inquiry by all the class counsel, the majority of the committee finds that the respondent did not violate this rule by relying on Lead Counsel to explain to the District Court these issues and the appropriate reduction from the aggregate fee request. The Labaton Letter (Ex. 16) expressly discusses the submission by the Thornton firm. The majority of the committee sees no reason why the respondent or his firm should have submitted a duplicate letter. And as discussed above, the majority concludes the Labaton Letter identifies that the source of the errors, at least those specifically addressed in that letter, almost entirely was the two other firms, not the Thornton firm.

58. However, a further issue is whether this inquiry should have caused the respondent, and other class counsel, to look more deeply into the declarations they filed to see what else might have been presented inaccurately. Had the respondent done so at the time, he would have realized the combination of the form language in the body of the declaration and the statements in Exhibit A falsely representing that quite a few lawyers were employees of the Thornton firm when they clearly were not. Further thought should have made clear that even though $425 per hour might have been accepted for similar work by similarly qualified lawyers in other complex class action cases, to state, as the body of the declaration does (in somewhat imprecise language), that these individuals had been billed on an hourly basis to any client was simply untrue. The respondent contends he did not review the declaration at that time for anything other than to clarify the double counting of Staff Attorneys and did not understand then the other misstatements implied between the language of the declaration and the way in which the information was presented in Exhibit A. (Tr. 112-13). The majority of the committee finds

that bar counsel has not met his burden to show otherwise.

59. The respondent testified he took no action at that time (e.g., November 2016). Nor did he take any action when a later Boston Globe article uncovered other misstatements beyond the double counting of Staff Attorneys, leading to the District Court conducting a hearing, at which the respondent testified on March 7, 2017. The respondent testified before us that on the advice of outside counsel, he took no action to correct his materially false statements between February 6, 2017, when Judge Wolf scheduled a hearing for March 7, 2017, and that hearing. "Advice of counsel" is not a defense.[18] The respondent could certainly have submitted something to the District Court between when the Boston Globe raised other issues and February 6, 2017. However, the District Court had scheduled a hearing to discuss precisely all these issues. Logically, it would be in connection with that hearing, which occurred on March 7, 2017, the respondent would and did provide testimony about all these issues. Accordingly, a majority of the committee does not find there is a violation of this rule.

60. Mass. R. Prof. C. 3.4(c) prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal (except for an open refusal, based on an assertion that no valid obligation exists). Pursuant to Fed. R. Civ. P. Rule 11(b), the respondent's signature on the declaration constituted a certification to the court that he had made a reasonable inquiry as to the facts contained therein and that those asserted facts had evidentiary support. The respondent contends that he did not read the declaration in its entirety and therefore did not have a clear understanding of what information he was presenting to the court. Moreover, he admittedly

[18] E.g., Matter of Murray, 455 Mass. 872, 26 Mass. Att'y Disc. R. 402 (2010) (advice of counsel is no defense to the delay of doing what a lawyer is required to do); Matter of Hilson, 448 Mass. 603, 616, 23 Mass. Att'y Disc. R. 265, 285 (2007) (reliance on advice of counsel not mitigating); Matter of Lupo, 447 Mass 345, 357, 22 Mass Att'y Disc. R. 513, 531(2006) (reliance on advice of counsel no defense to a charge of unethical conduct).

failed to verify the contents of the declaration before signing it and causing it to be filed with the District Court. These failures constituted a violation of his Rule 11 obligations. We conclude that, by violating Federal Rule 11, the respondent in turn violated Mass. R. Prof. C. 3.4(c). Once a lawyer makes a false statement under oath, purportedly of his own knowledge and without a reasonably diligent inquiry, he has violated Mass. R. Prof. C. 3.3. Matter of Diviacchi, 475 Mass. 1013, 1020, 32 Mass. Att'y Disc. R. 268, 280 (2016) (construing comment [3] to rule 3.3); Matter of Johnson, 27 Mass. Att'y Disc. R. 490 (2011) (false statement violated Mass. R. Prof. C. 3.4(c)). We therefore conclude that the respondent violated Mass. R. Prof. C. 3.4(c).

61. Bar counsel charged that, by failing to inform the District Court in an *ex parte* hearing of all material facts known to him that would enable the court to make an informed decision with respect to the lodestar cross-check aspect of the fee-approval process, the respondent violated Mass. R. Prof. C. 3.3(d) (in ex parte proceeding, lawyer must advise the court of all known material facts to enable the court to make an informed decision). For reasons stated throughout these findings, the majority finds that bar counsel has not proved that at the time he submitted the declaration, the respondent violated any such rule knowingly or that he acted in a willfully blind manner. To the extent a violation of this rule can be established in the absence of knowledge or of willful blindness; in short, solely based on negligence or inadvertence, the majority concludes that bar counsel has proved his charge.

62. State Street Bank had no interest in the outcome of the fee petitions of class action counsel because their compensation was to be paid from the $300,000,000 that State Street had agreed to pay as part of the settlement. The class members, by contrast, clearly had an incentive to challenge the fee petition if they thought it was excessive as any excess amount would come straight from their recovery. However, the parties have stipulated that this matter is appropriately

treated as an *ex parte* proceeding, governed by Mass. R. Prof. C. 3.3(d). (Ex. 40). See Mass. R. Prof. C. 3.3, Comment [14A] (citing the filing of a joint petition for approval of a class action fee award as a specific example of when a proceeding "loses its adversarial character" and becomes *ex parte*).

63. Specifically, the respondent was under a duty "to inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." Mass. R. Prof. C. 3.3(d). Although we find he did so negligently, not willfully or recklessly, the respondent failed to provide the District Court information it would have needed to establish a correct, realistic lodestar for Thornton or the plaintiffs' law firms generally. At a minimum, the respondent's declaration did not make clear the manner in which the respondent and his brother Michael agreed on a $500 per hour rate and the reasons for it; that while Michael had been paid $425 on an hourly basis he did not have an established hourly rate of $500 per hour; that Michael's stated hourly rate was based in part on the fact that his compensation was contingent on a successful outcome of the case; that the Staff Attorneys were not, in fact Thornton associates or employees and the nature of the cost sharing arrangement; that the respondent's firm had never worked with them before; and that the $425-per-hour hourly rates assigned to these lawyers was not based on actual hourly work for hourly clients but instead was based on information provided by Lieff Cabraser relating to another complex, contingent fee, class action case.

64. In an *ex parte* proceeding, with no adversary to present a conflicting position, it is particularly important for the lawyer to be scrupulously honest in a presentation to the Court since it is not tested or balanced by an opposing counsel. Lawyers who have failed to disclose pertinent information at *ex parte* proceedings have been found to have violated Mass. R. Prof. C.

3.3(d). E.g., Matter of Haskell, 36 Mass. Att'y Disc. R. 243 (2020) (*ex parte* proceeding for temporary guardianship); Matter of Nissenbaum, 34 Mass. Att'y Disc. R. 410 (2018) (same); Matter of Munroe, 26 Mass. Att'y Disc. R. 385 (2010) (*ex parte* request to operate a business on behalf of an estate); Matter of Lipton, 20 Mass. Att'y Disc. R. 336 (2004) (*ex parte* application for trustee process). We therefore conclude that the respondent violated Mass. R. Prof. C. 3.3(d).

65. Regarding the charge of violating rule 8.4(c), the respondent argues that his misconduct is a negligent misrepresentation to a tribunal and cites numerous cases in support of a public reprimand or an admonition. However, unlike the cases cited by bar counsel, virtually all the cases cited by the respondent are stipulations, and a stipulated case is not considered to have precedential value when a matter is litigated. E.g., Matter of Marion, 23 Mass. Att'y Disc. R. 435 (2007). In any event, they are distinguishable from the present case. In Matter of Ged, 20 Mass. Att'y Disc. R. 159 (2004), the respondent was found to have violated rules 8.4(c) (noting a "negligent misrepresentation") and 8.4(d); Matter of Faro, 35 Mass. Att'y Disc. R. 122 (2019) (negligent misrepresentation to bankruptcy court; stipulation to public reprimand). There, the lawyer recycled boilerplate forms that he had created and then failed to use the case-specific information before submitting them as part of his fee request. Here, the respondent similarly used a boilerplate form that his partners had filled out. However, the information about this case was available to him (and was not simply recycled from an earlier case in which he or his firm had been involved), and he should have more carefully read what he signed to understand in material ways it was false.

66. Similarly, in Matter of Tiberii, 12 Mass. Att'y Disc. R. 546 (1996), the lawyer negligently misnamed a party in a superior court complaint (naming the client's son instead of the client) and did not appreciate or foresee the consequences of not correcting the record, which

he failed to do for some time. The respondent stipulated to a public reprimand with conditions under the predecessor Code of Professional Responsibility.

67. Notwithstanding these cases, the respondent argues that there is no such thing as a "negligent misrepresentation" under rule 8.4(c) (respondent's PFCs at pp. 23-24, citing cases).

68. The majority credit the respondent's testimony that he did not read his declaration in its entirety; he therefore did not make intentional misrepresentations to the District Court and thus did not violate rule 8.4(c). The majority would find a violation of this rule if a negligent misrepresentation would, under the cases cited, result in either a public reprimand or a short suspension and not a longer suspension that would result from an intentional misrepresentation.

69. Finally, bar counsel charged that the respondent violated Mass. R. Prof. C. 8.4(h) (conduct reflecting adversely on the lawyer's fitness to practice law). We conclude that the respondent violated this rule. His admitted failure to read his declaration in its entirety is something no lawyer should do. That, combined with failure to review his declaration in detail in November 2016, when it was first questioned, and make a seasonable and self-initiated correction to the District Court is more than sufficient to warrant a conclusion that the respondent violated rule 8.4(h).

Matters in Mitigation and Aggravation

Mitigation

70. The respondent argues in mitigation that other plaintiffs' law firms in other class action cases, both in Massachusetts and elsewhere, made similar false statements under oath in fee petitions and no disciplinary charges were brought against them. As a threshold matter, we note that the Court has recently refused to recognize a claim of "selective prosecution" in bar discipline cases when it is not based on a protected class. E.g., Matter of Fitzgerald, 35 Mass.

Att'y Disc. R. 137, 153-154 (2019).

71. Moreover, the respondent bears the burden of proof in factors in mitigation (see Rules of the Board of Bar Overseers, § 3.28) and he introduced no evidence to support these claims. However, even if such evidence had been introduced, a claim of "selective prosecution" is not mitigating. E.g., Matter of Tobin, 417 Mass. 92, 10 Mass. Att'y Disc. R. 256 (1994).[19]

72. The respondent also argues that he received widespread negative publicity because of this matter, and that it has been "hanging over him" for six years. However, adverse publicity is not mitigating. Rather, because it calls the legal profession into disrepute, it is aggravating and not mitigating. E.g., Matter of Killam, 388 Mass. 619 (1983) (public sanction, not private reprimand, appropriate for drunk driving arrest of judge due to publicity surrounding event); Matter of O'Donnell, 5 Mass. Att'y Disc. R. 279 (1987) (publicity adversely reflecting on legal community is factor in indefinite suspension for criminal violation); Matter of Ryan, 6 Mass. Att'y Disc. R. 275 (1990) (public reprimand, rather than private discipline, due to the publicity). Cf. Matter of Bille, 21 Mass. Att'y Disc. R. 54, 60 (2005) (rejecting "general proposition that negative publicity accorded to an attorney's conduct is mitigating"; citation omitted).

73. In Matter of D'Amato, 29 Mass. Att'y Disc. R. 159-160 (2013), the Court rejected a lawyer's argument that, since his misconduct had occurred years earlier, he had already been "punished enough." The board memorandum also noted that "this argument has never been very compelling in the bar discipline context," citing Matter of Nickerson, 422 Mass. 333, 337, 12 Mass. Att'y Disc. R. 367, 375 (1996) ("'[t]he question is not whether the respondent has been

[19] The majority finds significant, however, as a factor in mitigation that the Thornton firm and therefore the respondent relied on and utilized a form fee declaration submitted by Lead Counsel and which was submitted, in very similar terms, by essentially every plaintiff's firm involved in this case. That does not excuse intentional misrepresentations, which we do not find any firm engaged in.

'punished' enough. To make that the test would be to give undue weight to his private interests, whereas the true test must always be the public welfare.'")

74. The respondent also argues that he has no prior discipline. However, it is well-settled that this is also not a factor in mitigation. E.g., Matter of Pike, 408 Mass. 740, 745, 6 Mass. Att'y Disc. R. 256 (1990); Matter of Neitlich, 413 Mass. 416, 425, 8 Mass. Att'y Disc. R. 167 (1992) (the absence of prior discipline is a typical mitigating factor that carries little or no weight); Matter of Dawkins, 412 Mass. 90, 95-96, 8 Mass. Att'y Disc. R. 64 (1992) (same).

75. As previously mentioned, the respondent argues in his defense or mitigation that his delay in advising the federal court of the false statements in his declaration were on the advice of counsel. (Respondent's PFCs at p. 18). However, it is well-settled that advice of counsel is not a defense to a disciplinary charge. E.g., Matter of Hilson, 23 Mass. Att'y Disc. R. 269, 285 (2007) (reliance on advice of counsel not a defense to a charge of unethical conduct); Matter of Lupo, 447 Mass 345, 357, 22 Mass Att'y Disc. R. 513, 531(2006) (same; "[the respondent's] claim that, in [filing a lawsuit against a person who had filed a grievance against him], he relied on the advice of counsel does not excuse his conduct"). The respondent cites no law in support of argument.[20]

76. Although not specifically offered as a factor in mitigation, the respondent testified that he signed his declaration because it was prepared by two other attorneys at the firm and he relied on their work. Even though we credit the respondent's claim that he only reviewed the declaration in part, the ethical obligation of diligence is a non-delegable duty. E.g., Matter of Abelson, 24 Mass. Att'y Disc. R. 1 (2008) (indefinite suspension; an attorney remains responsible when he delegates duties to ensure that the resulting conduct complies with

[20] The majority find, however, that the issues he might have brought to the attention of the District Court in early 2017 already had been flagged as issues to be addressed at the March 2017 hearing.

professional standards, citing rule 5.3); Matter of Gordon, 20 Mass. Att'y Disc. R. 166 (2004) (lawyer suspended for two years for negligent supervision of a secretary to whom he had delegated handling of his IOLTA account); Matter of Fulwood, 22 Mass. Att'y Disc. R. 329 (2006) (lawyer publicly reprimanded for IOLTA accounting violations by an associate to whom she had delegated that responsibility). Moreover, the parties stipulated this was an *ex parte* proceeding in which the duty of candor to the court is heightened.

77. The respondent argues in mitigation that the plaintiff firms achieved an extraordinary recovery for the clients, who were pension funds (and therefore the real clients were pensioners), and that no one objected to their fees. However, neither of these is mitigating. Matter of Zankowski, 487 Mass. 140, 151-152, 37 Mass. Att'y Disc. R. 555, 569-570 (2021).

78. The law firms had to pay for the cost of the special master appointed by the District Court. (Ex. 33, BC-3010-3011, court order that the fees for special master will be paid from the $74,541,250 awarded to plaintiffs' counsel). These fees were sizable. It appears the Thornton firm itself paid well over $1,000,000 for these fees plus suffered a significant reduction in its share of the contingent fee. However, these are not proper factors in mitigation, as we understand it.

Aggravation

79. In aggravation, bar counsel argues the respondent engaged in multiple disciplinary violations, the cumulative effect of which must be assessed in determining the appropriate sanction. Matter of Zak, 476 Mass. 1034, 33 Mass. Att'y Disc. R. 521 (2017); Matter of Kerlinsky, 428 Mass. 656, 666, 15 Mass. Att'y Disc. R. 304 (1999); Matter of Saab, 406 Mass. 315, 325-326, 6 Mass. Att'y Disc. R. 278 (1989) (in deciding sanction, the consideration of the cumulative effect of several violations is proper, and even minor violations,

when aggregated, can result in a substantial sanction exceeding what each alone would warrant); See AMERICAN BAR ASSOCIATION, ANNOTATED STANDARDS FOR IMPOSING LAWYER SANCTIONS (1992) (ABA STANDARDS), § 9.22(d). All the violations, however, stem from the same declaration. There were not multiple instances of misrepresentations to the District Court. There was one declaration containing misrepresentations, a clarification in November 2016 that addressed one issue that had just surfaced, a failure at that time to consider whether other clarifications were needed, and subsequent clarifications that could have been made before the hearing before Judge Wolf.

80. The respondent's substantial experience in the practice of law is a factor in aggravation. Matter of Zankowski, 487 Mass. 140, 153, 37 Mass. Att'y Disc. R. 555, 571 (2021); Matter of Grayer, 483 Mass. 1013, 35 Mass. Att'y Disc. R. 31 (2019); Matter of Moran, 479 Mass. 1016, 1022 (2018); Matter of Luongo, 416 Mass. 308, 311-312, 9 Mass. Att'y Disc. R. 199 (1993). The respondent's substantial experience in the practice of law and, to a lesser degree as of 2016, the field of practice in which the misconduct occurred (Tr. 58-64) is a factor in aggravation. Matter of Kasilowski, 31 Mass. Att'y Disc. R. 357, 364 (2015) (noting the lawyer's substantial experience specifically in the field where his misconduct occurred).

81. In aggravation, the respondent's misconduct received extensive publicity through the publication of a series of articles that appeared in the Boston Globe. (See Exs. 34-39). The fact of such public notoriety is a factor in aggravation. See Matter of Nissenbaum, 34 Mass. Att'y Disc. R. 410, 444-45 (2018) ("relying on decisions in a number of other disciplinary matters, the committee 'recommend[ed] that the notoriety of this case should result in greater—not lesser—bar discipline'"; citing Matter of Ryan, 6 Mass. Att'y Disc. R. 275, 277 (1990); Matter of O'Donnell, 5 Mass. Att'y Disc. R. 279, 281 (1987); Matter of Killam, 388 Mass. 619

(1983); Matter of Holzberg, 12 Mass. Att'y Disc. R. 200, 204-05 (1996)).

82. Uncharged misconduct can be considered as a factor in aggravation. E.g., Matter of Strauss, 479 Mass. 294, 299 and n.9, 34 Mass. Att'y Disc. R 517, 528 and n.9 (2018). Clearly the respondent failed to act competently, in violation of Mass. R. Prof. C. 1.1, by signing a declaration that included a schedule of attorneys and hourly billing rates that when read with the declaration did not accurately state relevant facts, by not reading the declaration before signing it, and by not seasonably attempting, on his own, to correct any of the errors before being questioned by Judge Wolf, months later.

83. However, in this case, we need not consider the respondent's lack of competence as a factor in aggravation because the same misconduct violated other rules with which he is charged, including rules 1.3 (lack of diligence and failure to represent a client zealously), 3.3 and 8.4(h) (conduct reflecting adversely on the lawyer's fitness to practice law). Therefore, our consideration of the uncharged misconduct of violating rule 1.1 would not affect the sanction recommendation.

DISCUSSION

84. Bar counsel recommends that the respondent be suspended for two years if we conclude that his misrepresentations under oath to the federal court were intentional, or a shorter suspension if we conclude they were not intentional. The respondent seeks a dismissal, or at most a public reprimand. For the reasons discussed below, a majority of the committee recommend that the respondent be suspended for six months.

85. The respondent's fee declaration contained misrepresentations concerning Thornton's lodestar that were made under oath. The respondent understood the District Court would rely upon his declaration as part of a well-established process for approving counsel fees

in class action cases. At the hearing, the respondent focused his defense on the issue of whether, or to what extent, he read the fee declaration before signing it. However, the respondent did not need to read every word of the declaration to understand it states things that were not true. To repeat, the Thornton firm did not have established hourly rates; even though almost all the Staff Attorneys properly could have been included in Exhibit A, none of them (nor Michael Bradley) had ever been employees of the firm; the $425/hour rate for the Staff Attorneys was, as the declaration does not explain, based on a prior case in which a similar rate had been approved and not on hourly rates charged to any client paying on that basis; and Michael Bradley's rate was agreed to with the respondent; while Michael had been paid $450 per hour once for a significant case, the stated rate did not reflect an hourly rate Michael charged to hourly clients.

86. However, the majority of the hearing committee credits the respondent's testimony that he did not knowingly make a misrepresentation of fact to the Federal Court because he did not read his declaration in its entirety before signing it. Accordingly, while he violated rules 3.3(a)(3), 3.3(d) and 8.4(d) and (h), he did not violate rules 3.3(a)(1) and 8.4(c), the latter to the extent that it was not intentional misrepresentation, but negligent misrepresentation, thus warranting a lesser sanction.

SANCTION RECOMMENDATION

For the foregoing reasons, a majority of the hearing committee recommends that the respondent be suspended for six months.

Respectfully submitted,

By /s/ Dustin F. Hecker
Dustin F. Hecker, Esq., Chair

/s/ Christine Kingston
Christine Kingston, Esq., committee member

Date: May 20, 2024

Bradley dissent

Most of the facts are established either by admission or by documents. I therefore agree with many of the facts also found by the majority and stated in their decision, viz., the introductory three pages and the following paragraphs of their report: ¶¶ 1-13, 15-20, 22, 23, 25 (except for the last three sentences of footnote 11, which is the majority's view, with which I disagree), 26-35, 39, 40, 42, and 44-49. There are some exceptions: I also agree with ¶ 14 to the extent it states the respondent's testimony. For ¶ 18, I stress that the respondent's statements to the federal court were under oath. For ¶ 26, the stated usual hourly rate for the staff attorneys was $425/hour; for Michael, it was alleged to be $500/hour. However, I disagree with the majority's view on the last three sentences of footnote 11, as I believe they misinterpret the evidence presented.

As to the conclusions of law, I agree with the majority as to the following: ¶¶ 50-53, 55, 60, 61 (although I find there was actual knowledge or willful blindness), 62-64, and 69. Accordingly, I agree with the majority as they find serious violations of the following rules: Mass. R. Prof. C. 1.3 (see ¶ 51); 8.4 (d) (see ¶¶ 52 and 53); 8.4 (h) (see ¶¶ 53 and 69); 3.4 (c) (see ¶ 60); and 3.3 (d) (see ¶¶ 61-64). I am afraid I have to disagree with the majority's decision not to find violations of the following rules: Mass. R. Prof. C. 3.3(a)(1) (see ¶ 56); 3.3(a) (3) (see ¶¶ 56-59); and 8.4(c) (see ¶¶ 65-68), all of which I conclude that the respondent has violated.

Regarding mitigation and aggravation factors, I agree with the majority on the following paragraphs: ¶¶ 70-75, 77-83. However, as to ¶ 76, I agree, except for the majority's crediting the respondent's testimony that he only reviewed the sworn declaration in part before signing it.

Since most of the facts are established, either by admission or documents, there are three things to be decided, as they are implicated by rules 3.3(a)(1), 3.3(a)(3), and 8.4(c): first, did the

respondent read the entirety of his "Declaration" (Ex. 8) sworn to under the penalties of perjury, before it was filed in federal court? Second, if he did not, was he willfully blind to its contents, such that, as a matter of law, he is deemed to have read and known its contents? Third, what, if any, additional Rules of Professional Conduct did the respondent violate?

The Respondent Should Be Held to His Statement Under Oath

A majority of my colleagues on this hearing committee credit the respondent's testimony that he did not read his sworn "declaration" in its entirety before signing it. However, I find this credibility determination to be inconsistent with the evidence in this case. Under our case law, a naked, unsupported credibility determination will not suffice, especially if it is inconsistent with other evidence. Therefore, I must respectfully disagree with the majority's decision in this matter.

In Herridge v. Board of Medicine, 420 Mass. 154 (1995) S.C., 424 Mass. 201 (1997), the Board of Medicine heard conflicting testimony from the doctor and the patient; it chose to credit some but not all of the patient's testimony over that of the physician (petitioner). The board did not explain its reasons for doing so, nor did it cite support in the record. The Court vacated and remanded the board's decision, noting that "Not only did the board fail adequately to explain its reasons for crediting the patient, but its stated reasons for disbelieving the petitioner also lack support in the record.'" Id. at 164 (citation omitted). In the bar discipline case of Matter of Strauss, 479 Mass. 294, 298, 34 Mass. Att'y Disc. R. 522, 527 (2018), the Court cited Herridge with approval. These cases are relevant to our current case as they establish the importance of supporting credibility determinations with evidence from the record.

Here, an inconsistency exists between the record (the declaration which the respondent swore to under the penalty of perjury as being "true and correct") and the respondent's unsupported testimony, denying what is stated in his "declaration" (Ex. 8). The respondent's

denial is at odds with his signed declaration under oath, and nothing in the record, besides the respondent's self-serving testimony, supports his claim that he did not read the sworn declaration before signing it. Since nothing supports the respondent's claim that he did not read the sworn declaration, as a matter of law, under Strauss and Herridge, the majority's decision to credit the respondent's testimony should fail. In Matter of Sementelli, 29 Mass. Att'y Disc. R. 584 (2013), the lawyer relied solely on her otherwise unsupported testimony that she had not read documents that she had signed under oath and which contained omissions and misrepresentations in order to obtain real estate loans on favorable terms. The lawyer's claims were rejected, inter alia, because of her training and experience, and her "efforts to distance herself from the loan application process to avoid responsibility for the representations made and to claim she did not know the content of the loan applications." Id. at 595-596. See Matter of Foley, 26 Mass. Att'y Disc. R. 199 (2010) (real estate lawyer had clients sign HUD-1's he had prepared that lawyer "knew, either in fact or by willful blindness . . . were false"; eighteen-month suspension); Matter of Barry Greene, 477 Mass. 1019, 1021, 33 Mass. Att'y Disc. R. 163 (2017) (noting that the sanction for false HUD-1 statements ranged from eighteen months to two years; citing cases); Matter of Evan Greene, 476 Mass. 1006, 1009, 32 Mass. Att'y Disc. R. 254 (2016) (two-year suspension is not markedly disparate when the only misconduct is HUD-1 violations).

In Matter of Diviacchi, 475 Mass. 1013, 32 Mass. Att'y Disc. R. 268 (2016), the lawyer attempted to escape the consequences of his false statements under oath by claiming they should be evaluated under a subjective, good faith basis standard, and the Court explicitly rejected that position. Once a lawyer makes a false statement under oath, purportedly of his own knowledge, and without a reasonably diligent inquiry, he has violated Mass. R. Prof. C. 3.3. Id., 475 Mass. at 1020, 32 Mass. Att'y Disc. R. at 280. See comment [3] ("[A]n assertion purporting to be on

the lawyer's own knowledge, as in an affidavit by the lawyer or a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true based on a reasonably diligent inquiry.").

Here, the respondent signed the declaration and "declare[d] under penalty of perjury that the foregoing is true and correct." (Ex. 8 at A-000157). Perforce, like Diviacchi, the respondent is held to have had actual knowledge and, therefore, knowingly made a false statement of fact to the federal court.

Further, I do not credit the respondent's testimony that he did not read all of his declaration supporting the motion to award attorneys' fees and expenses. (Ex. 8). The sworn declaration is two double-spaced pages of text (the other two pages are a caption and a signature line), so any reasonable attorney—particularly a managing partner—who was even mildly interested in the firm's support for a request for a multi-million-dollar fee that his firm was seeking to be awarded, would have read it. I also note that the respondent was announced in early September 2016 as Thornton's new managing partner. (Ex. 1, Timeline). Less than two weeks later, he signed the declaration. (Ex. 8). I do not believe that one of the respondent's first acts as managing partner of his firm would be to sign a short affidavit, where his firm sought a multi-million-dollar fee, without reading all of it. I, therefore, do not credit that the respondent did not read the entirety of the two pages of content.

The S.J.C. has said that the committee is "the sole judge of the credibility of the testimony presented at the hearing," it "may decline to credit a witness's testimony, provided it explains its reasoning and those reasons are supported by the record." Matter of Strauss, 479 Mass. 294, 298, 34 Mass. Att'y Disc. R. 522, 527 (2018), citing Herridge v. Board of Medicine, 420 Mass. 154 (1995) (emphasis added).

I also take issue with what the majority viewed as "negligence." There is no "negligence" in the respondent's holding a four-page document in his hands, reading the first page (which is just the caption), and then turning to the signature page, i.e., page four. There is no "negligence" in intentionally skipping the substantive pages. Notwithstanding any semantic contortions one engages in, this is nothing but an intentional choice not to read what the respondent held in his hands.

The respondent testified repeatedly that, at the time he signed it, he did not read the provisions of his sworn declaration that contained materially false statements of fact. Because of the law of "willful blindness," discussed below, the respondent's credibility on this matter is arguably irrelevant. He knew beforehand that the fee application was asserting that his brother, Michael, was employed by the Thornton firm and that his "hourly rate" was $500/hour. In fact, Michael was not employed by the Thornton firm, and the most Michael ever charged a client was $450/hour, in one case, many years earlier, and the vast majority of his work is as a bar advocate, where his hourly rate is capped at $53/hour. (See majority opinion, at ¶ 18, for citations.) Further, the respondent defended the grossly inflated hourly rate by saying it was increased to account for the fact that getting paid was contingent upon recovering for the plaintiffs in this case. Id. It was never Michael's regular rate, nor was it ever charged by the Thornton firm for Michael. Even if the respondent knew nothing else, he knew these statements were false. Finally, the respondent had been personally involved in creating the stated $425 hourly rate for the "staff attorneys," knowing that this information would then be included in Thornton's fee declaration, which he signed. (Tr. 89-91, 95).

The respondent argues that we cannot conclude that he had read the entire sworn declaration when the only testimony was his, and that he did not. That is not a correct statement

of the law. While mere disbelief of one thing does not automatically establish the truth of the opposite, a finder of fact can reject a respondent's testimony and based on other evidence or inference, conclude the opposite despite the absence of contradictory testimony. This is particularly true when there are only two alternatives; in this case, whether the respondent did or did not read the declaration in its entirety at the time. E.g., Matter of Williams, 491 Mass. 1021, 39 Mass. Att'y Disc. R. ___ (2023) (either the lawyer or her former associate inflated case expenses to misappropriate client funds; rejecting the lawyer's claim on appeal that the factfinder could not reject her testimony and reach the opposite conclusion when no one testified contrary to her); Matter of Macero, 17 Mass. Att'y Disc. R. 554, 561-562 (2011), citing Matter of London, 427 Mass. 477, 482-483, 14 Mass. Att'y Disc. R. 431, 438-439 (1998). In Macero, the lawyer denied backdating the docketing fee check she sent to the Appeals Court. Either she did or she did not. On appeal, the single justice affirmed the hearing committee and the Board, who had inferred and, therefore, concluded that she did backdate the check. See also Commonwealth v. Herbert, 421 Mass. 307, 311-313 (1995) (even in a criminal case where the defendant enjoys the presumption of innocence, the trier of fact can infer the contrary from its belief that the defendant's discredited testimony was a contrivance).

Even If the Respondent Did Not Read His Sworn Declaration, He is Deemed to Have Done So Under the Doctrine of Willful Blindness

Moreover, even if one were to believe that the respondent did not read the declaration, it would be necessary to conclude that such conduct–-choosing not to read something he was signing under oath and which he knew to be incredibly important to his firm being compensated for its work on the State Street Bank case—constituted willful blindness. As a matter of law, willful blindness is the equivalent of actual knowledge. E.g., Matter of Zimmerman, 17 Mass. Att'y Disc. R. 646, 633 (2001) ("[A] lawyer cannot avoid 'knowing' a fact by purposefully

refusing to look. . . . 'studied ignorance of a readily accessible fact by consciously avoiding it is the functional equivalent of knowledge of the fact.'") (citations omitted); Matter of Days, 30 Mass. Att'y Disc. R. 89 (2014); Matter of Sementelli, supra (quoting Zimmerman); Matter of Goldstone, 445 Mass. 551, 556, 21 Mass. Att'y Disc. R. 288 (2005) (even if lawyer did not have actual knowledge of the falsity of the bills he sent, he consciously avoided obtaining readily available information that would have put him on actual notice, and thus his actions constituted willful blindness and intentional misconduct). See Matter of Connell, 31 Mass. Att'y Disc. R. 85 (2015) (lawyer was willfully blind to the fact that her client was making illegal usurious loans); Matter of Daniels, 23 Mass. Att'y Disc. R. 102 (2007) (proper to infer knowledge from the circumstances).

To me, this case presents classic willful blindness. Among other things, the respondent knew the fee petition would include hourly rates when he knew his firm had never charged a client by the hour and when he assisted in the fabrication of a $500/hour rate for his brother, which he knew was not Michael's usual hourly rate. This is actual knowledge, even without reading the entirety of the sworn declaration. He could have read it but did not; it was not so lengthy or complicated that it would have been entirely unreasonable for him to do so. Therefore, assuming arguendo, the respondent did not read it, but he did so, knowing it contained false information that would be submitted to the Court.

In sum: (1) if the respondent did not read the declaration, that constituted willful blindness and a lack of diligence; (2) even if he did not read it, he had reason to know it contained false information because he knew it listed his brother as an employee and a "usual hourly rate" that he knew his brother had never charged; and (3) I do not believe he did not read it, because it is unreasonable not to have done so, given the brevity and importance of the

declaration and his having sworn to it under oath.

Since willful blindness is the equivalent of actual knowledge, it follows ineluctably that the respondent knowingly engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. He told the federal court that twenty-three people who did not work at his firm were employees, and he submitted an array of false "usual hourly rates," including that for his brother Michael, which the respondent himself helped to fabricate. As in Diviacchi, supra, and other cases, this conduct violated Mass. R. Prof. C. 8.4(c).

Accordingly, I conclude that, as a matter of law, the respondent violated rules 3.3(a)(1), 3.3(a)(3), 8.4(c), 8.4(d) and 8.4(h).

Factors in Mitigation

I also disagree with the majority that the respondent's reliance on a form provided by Lead Counsel is mitigating. Lawyers are required to exercise independent professional judgment. See Mass. R. Prof. C. 2.1 and 5.4. Even if one were to characterize Lead Counsel's having provided a form as "advice of counsel," it would still not rise to a factor in mitigation. E.g., Matter of Lupo, 447 Mass. 345, 357, 22 Mass. Att'y Disc. R. 513 (2006) (advice of counsel is no defense; a lawyer must be familiar with the court's rules). See also Arkansas Teacher Retirement System v. State Street Bank & Trust Co., 512 F.Supp.3d 196, 246-247 (2020), noting that Bradley violated Fed. R. Civ. P. 11(b) by making false statements, the "template language could have easily been revised to be true and not misleading." It is no excuse for a lawyer to make a knowingly false statement under oath and defend it by saying, "I was just using a form provided by lead counsel." As the federal court noted, the form could have been revised in some minor ways to contain the relevant information without being false and misleading. Using common-sense lay analogy; everyone knows that a driver pulled over for speeding cannot defend

the traffic citation by saying, "Everyone else was speeding at the same time." I conclude that the respondent's reliance on a form provided by Lead Counsel is not mitigating.

Factors in Aggravation

I have additional problems with the respondent's testimony at our hearing and conclude that these should be considered in aggravation.

The respondent tried to tell us that he had no role in preparing his sworn declaration. (Respondent's PFCs ¶ 17; Tr. 79, 87). However, that puts too fine a point on what transpired. The respondent directed his colleagues to include his brother Michael as having a regular hourly rate of $500/hour and other staff attorneys at $425/hour (Tr. 89-91, 95, 120; Arkansas Teacher, 512 F.Supp.3d at 243), all of which was knowingly false. Since the respondent knew the fee schedule was attached to the sworn declaration, and since he knew the fee schedule was in part created by him and known to be false when he made it, he cannot say he had no role in the preparation of the sworn declaration in its entirety (including the attached fee schedule.)

The respondent attempted to defend his knowing overstatement of Michael's hourly rate by saying he could have (and in retrospect, should have) said that his work could have justified a fee award of $500/hour for his work. (Tr. 120). However, I take administrative notice under Mass. General Laws c. 30A, § 11, and I credit the facts found by the federal court that "Michael Bradley worked from his own office, not Thornton's, in his spare time. His work involved only document review," the lowest level of work, typically done by contract attorneys. "He found a few possibly relevant documents. However, he produced no memoranda or made any other contribution to this case. It was untrue to claim that the regular rate for his services was $500 an hour or that the market would have valued his services at $500 an hour." Arkansas Teacher, 512 F.Supp.3d 196 at 243.

The respondent also repeatedly said he did not know the "body" of the declaration contained false or inaccurate information. (Respondent's PFCs ¶¶ 35, 50, 52 and p. 19, citing to testimony). The respondent attempts to minimize his misconduct. He knew at all times that the schedules attached to the body of the declaration—representing that certain attorneys worked at Thornton when they never did and that they had usual hourly billing rates when they did not—were false.

The respondent also tried to tell us that "I corrected [the double-counting of attorneys] once I became aware when Judge Wolf put his order out in February of 2017." (Tr. 121) and he also had to correct the statement about hourly rates that did not apply to Thornton's actual practice concerning hourly rates. (Tr. 133-134). He specifically told us that he was told to "go in and clarify this, and that's what I did at the March hearing." (Tr. 131). That overstates the respondent's corrective actions, as he took none on his own initiative. Rather, his corrections came only in response to Judge Wolf's questioning at the March 7, 2017 hearing. (Ex. 25 at A-000655, respondent's testimony). Cf. Matter of Lansky, 22 Mass. Att'y Disc. R. 443 (2006) (making restitution due to a court order is not mitigating); Matter of Concemi, 422 Mass. 326, 330, 12 Mass. Att'y Disc. R. 63, 69 (1996) (same).

Accordingly, I conclude that the respondent displayed a lack of candor before the hearing committee and that this should be considered in aggravation. Matter of Hoicka, 442 Mass. 1004, 1006, 20 Mass. Att'y Disc. R. 239 (2004); Matter of Eisenhauer, 426 Mass. 448, 457, 14 Mass. Att'y Disc. R. 251, 262 (1998); Matter of Friedman, 7 Mass. Att'y Disc. R. 100 (1991)

SANCTION RECOMMENDATION

The presumptive sanction for knowingly making a false statement of fact to a court under oath is a two-year suspension. See Matter of Diviacchi, 475 Mass. 1013, 32 Mass. Att'y Disc. R.

268 (2016) (intentional misrepresentation in a document attested to by an attorney cannot be distinguished from false testimony under oath; presumptive sanction is a two-year suspension)[1]; Matter of Bartley, 30 Mass. Att'y Disc. R. 16 (2014) (absent mitigating factors, a two-year suspension is a usual sanction for false testimony under oath). See Matter of Maroun, 38 Mass. Att'y Disc. R. 309, 343 (2022) (noting willful blindness in a false notarization and filing document allegedly without reading it; two-year presumptive suspension for making a false statement under oath, rejecting hearing committee's recommendation for a shorter suspension). Indeed, Maroun held:

> Submitting false evidence to a court is a grave offense. It goes without saying that courts and litigants must be able to rely on the statements presented to them. As officers of the court, attorneys have a singular obligation to maintain the integrity of the judicial system. *See* Mass. R. Prof. C. 3.3, comment [2]. This responsibility must not be taken lightly. Accordingly, violations of Rule 3.3(a) require a significant penalty.

Id. at 342-343 (citations omitted). I find that by signing, under oath, and submitting the declaration to the court, the respondent knowingly made a false statement of fact to the court.

There can be a downward departure from the two-year presumptive suspension in some circumstances, such as when the lawyer did not sign the false statement under oath. E.g., Matter of Macero, supra (one-year suspension when lawyer paid Appeals Court docketing fee late with backdated check in an effort to avoid dismissal of her appeal; no false statement about the facts in the case itself). There can also be a downward departure if the misstatements that the lawyer failed to correct were not "material." E.g., Matter of Francoeur, 38 Mass. Att'y Disc. R. 117, 128-129 (2022). Obviously, here, as in Francoeur, they WERE material (and were ultimately relied on by the judge in making his initial fee award), so a downward departure is not

[1] In Diviacchi, the lawyer was suspended for twenty-seven months, as his misconduct included more than a false statement under oath to a court.

appropriate or justifiable.

Given that willful blindness is the equivalent of actual knowledge, and in light of the other rules violations and the factors in aggravation, I see nothing to justify a downward departure from the presumptive sanction of a two-year suspension.

CONCLUSION

Accordingly, I recommend that the respondent be suspended for two years.

/s/ Richard Mackenzie
Richard Mackenzie, committee member

Date: May 20, 2024