

**IN RE: MATTER OF DAVID GLENN BAKER
BBO NO. 634889**

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

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|--------------------|---|-------------------------|-----------------------|
| BAR COUNSEL, |) | | |
| |) | | |
| Petitioner |) | | |
| v. |) | B.B.O. File Nos. | C1-20-00264659 |
| |) | | C1-21-00269180 |
| DAVID GLENN BAKER, |) | | C1-22-00272396 |
| Respondent. |) | | |
| |) | | |

HEARING REPORT

On April 14, 2022, bar counsel filed a three-count petition for discipline against the respondent, David Glenn Baker, Esquire. In the main, Counts One and Two charged misconduct in two Bankruptcy Court proceedings, both cases involving intentional false statements and other misconduct, and in Count Three, assorted misconduct in connection with the representation of a mother and her daughter evicted from their home. Simultaneously with the filing of the petition, bar counsel filed a Motion for Issue Preclusion as to Count One, arguing that those allegations had been fully and finally litigated in the United States Bankruptcy Court for the District of Massachusetts, the United States District Court, and the United States Court of Appeals for the First Circuit. The respondent objected to the Motion for Issue Preclusion. By Order dated June 27, 2022, the Board Chair allowed the motion in part, precluding the respondent from contesting the facts asserted in paragraphs five to twenty-five of the petition.

Bar counsel moved to amend the petition on July 6, 2022, to add new charges only to Count Three, based on actions the respondent had taken after the original petition had been filed. Amendment was allowed on August 4, 2022. At that point represented by counsel, the respondent filed an amended answer on September 27, 2022.

A Prehearing Conference was held remotely on June 28, 2023. The respondent participated, along with his counsel. Prehearing orders, establishing the timing for exchanging of exhibits and witnesses, were entered and served. The respondent's counsel withdrew on September 27, 2023; thereafter, the respondent proceeded pro se.

Bar counsel filed a motion in limine on October 5, 2023, arguing that although the respondent had made reference to illness in his amended answer, and had cited "health problems" in mitigation, he had failed to produce any documents in support of these claims. Bar counsel argued further that the respondent had not complied with the prehearing deadlines to provide bar counsel any lists of expected witnesses, preliminary exhibits, or copies of proposed documents. Bar counsel sought an order precluding the respondent from calling witnesses and introducing into evidence any document not previously disclosed, and from objecting to any of bar counsel's proposed exhibits. The respondent filed a limited opposition, blaming his attorney (discharged by then) for the inadequate discovery response, and citing recent medical issues to justify his non-compliance.

By Order dated October 17, 2023, we allowed bar counsel's motion in limine, noting that the respondent would be allowed to testify, but could not present the testimony of any previously undisclosed witnesses, any previously unidentified exhibits, or other previously unidentified documentary evidence.¹

The hearing was held on December 4 and 5, 2023. Sixty-five exhibits were admitted. The respondent was the only witness to testify. On March 1, 2024, the parties filed their proposed findings and conclusions.

¹ We did allow the respondent to introduce exhibits at the hearing, marked as Exs. 56-64.

Findings and Conclusions²

Findings of Fact

1. The respondent, David Glenn Baker, is an attorney duly admitted to the Bar of the Commonwealth on December 18, 1996. Ans. ¶ 2.
2. The respondent is an experienced bankruptcy practitioner. He has worked in the field since his admission to the bar, first in an “of counsel” position to the Chapter 13 trustee in Boston, then for the trustee’s successor, and finally as a solo practitioner in the field of consumer bankruptcy. Tr. 1:33, 1:121-122 (Respondent).
3. The respondent called to our attention that he was twice selected by Boston Magazine as one of Boston’s top bankruptcy lawyers, in 2021 (Ex. 56 (543)) and 2022 (Ex. 57 (545)). He has represented a client before the United States Supreme Court. Tr. 1:122 (Respondent). He claims to have had “ a number of cases in the [F]irst [C]ircuit and in the trial courts . . . that have had favorable results and made a substantial change in bankruptcy practice.” Id. He described his “underlying approach” as “to ask why are things the way they are,” and told us that he believes that “sometimes we have to . . . go out on a limb representing our clients to effect a necessary change in the law” Tr. 1:122-123 (Respondent).

² The transcript is referred to as “Tr. __: __”; the matters admitted in the amended answer are referred to as “Ans. ¶__”; the matters resolved by the Order of Issue Preclusion are referred to as “OIP,” and the hearing exhibits are referred to as “Ex. __.” We have considered all of 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.

COUNT ONE
(Client John Hoover)

4. In or around March 2014, the respondent was retained to represent John Hoover III in a Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the District of Massachusetts (the “Court”). Ans. ¶ 3; OIP; Ex. 1 (001).

5. On March 15, 2014, the respondent filed a Chapter 11 Voluntary Petition with the Bankruptcy Court commencing the bankruptcy case for John E. Hoover, III d/b/a Halloween Costume World (the “debtor”), Docket Number 14-40478 (the “Hoover Bankruptcy Case”). Ans. ¶ 4 ; OIP; Ex. 1 (002).

6. On April 8, 2014, the Office of the United States Trustee filed a motion to have the case converted to one under Chapter 7 of the Bankruptcy Code or to have the case dismissed (the “Motion to Convert or Dismiss”). Ans. ¶ 5; OIP; Ex. 2. As grounds, the Trustee claimed that the debtor “has apparently used cash collateral without Court authorization.” Ex. 2 (063).

7. The Motion to Convert or Dismiss recited that the Trustee had learned, and had informed the respondent, that the Massachusetts Department of Revenue (MDOR) had placed liens upon all property and rights to property belonging to the debtor; that the Trustee had emphasized to the debtor the need “to move quickly to seek Court authority for use of cash collateral”; and that the debtor had not yet sought Court approval. Ex. 2, ¶ 7 (064). The Trustee argued that the unauthorized use of cash collateral— i.e., the debtor’s failure to seek Court approval to use cash collateral—constituted cause to convert or dismiss the proceeding. Ex. 2, ¶¶ 8, 9 (064).

8. On April 8, 2014, the respondent filed Hoover’s Objection to Motion to Convert or Dismiss Case (the “Objection”). Ans. ¶ 6; OIP; Ex. 3.

9. The respondent wrote, among other things, that, under 11 U.S.C. § 363(a) of the Bankruptcy Code, “‘cash collateral’ means cash or other property ‘subject to a security interest as provided in section 552(b),’” and that § 552(b), in turn, “defines the relevant security interest as being based on a ‘security agreement’ that the debtor and the allegedly secured party ‘entered into . . . before the commencement of a case.’” He asserted that “the lien at issue must be a consensual lien” and that the MDOR lien was a statutory, not consensual, lien, and that accordingly the Trustee’s motion “was not substantially justified.” (Emphasis respondent’s). Ex. 3, ¶¶12, 14 (070).

10. Further motion practice ensued. On April 14, 2014, the respondent filed on behalf of his client a Motion for Sanctions Against Bank of America for Violations of the Automatic Stay (the “Motion for Sanctions”). Ans. ¶ 7; OIP; Ex. 4.

11. In the Motion for Sanctions, the respondent claimed that although the Bank had been aware of the March 15, 2014 filing of the debtor’s bankruptcy case, at some point after that date it had sent the debtor a letter postponing, to June 18, 2014, a foreclosure sale of the debtor’s property it had scheduled before the bankruptcy petition was filed. Ex. 4, ¶ 5 (072).

12. This postponement was alleged to have violated the automatic stay provision of the bankruptcy code. The respondent wrote that “[w]here a creditor has notice, continuation of a mortgage foreclosure sale post-petition, without obtaining relief from the automatic stay, is a willful violation [of the automatic stay].” Ex. 4, ¶ 8 (073). He cited three cases allegedly in support of this proposition: In re Lynn-Weaver, 385 B.R. 7 (Bkrcty.D.Mass. 2008); In re Heron Pond, LLC, 258 B.R. 529 (Bkrcty.D.Mass. 2001); and Hart v. GMAC Mortgage Corp., 246 B.R. 709 (Bkrcty.D.Mass. 2000). Id.

13. The respondent “suggested” that the Bank should have filed its motion for relief from stay *before* it sent the debtor the letter postponing the sale. Ex. 4, ¶ 10 (074). He claimed that the purpose of the postponement letter the Bank sent had been to harass the debtor, and that the Bank’s action was “an improper continuance of foreclosure activity, and a violation of the automatic stay.” Ex. 4, ¶ 11 (074).

14. The Bank filed its Motion for Relief from Stay a few days later, on April 18, 2014. Ex. 1, # 46 (006).

15. On June 2, 2014, the Court (Hoffman, J.) denied the respondent’s Motion for Sanctions.³ Ans. ¶ 10; OIP; Ex. 1, # 82 (010). On the same date, the Court entered an Order to Show Cause (the “First Show Cause Order”), ordering the respondent to show cause at a hearing scheduled for July 8, 2014 why he should not be sanctioned for violating Federal Rule of Bankruptcy Procedure 9011(b)(2)⁴ (“Rule 9011”) for:

- (1) Claiming in the Debtor’s Motion for Sanctions Against Bank of America for Violation of the Automatic Stay [#41] that “where a creditor has notice, continuation of a mortgage foreclosure sale post-petition, without obtaining relief from the automatic stay, is a willful violation,” which is not a correct statement of the prevailing legal standard, and citing as authority cases which do not support such a claim.
- (2) In paragraph 12 of the Objection to Motion to Convert or Dismiss Case [#30] filed by the United States trustee, misquoting the definition of cash collateral contained in Bankruptcy Code § 363(a) and misstating the law by claiming that the obligation of a debtor to obtain authority to use cash collateral applies only when the lien on cash is a consensual lien.

Ans. ¶ 11; OIP; Ex. 5.

³ The respondent fared no better as to his objection to the Motion to Convert. After an evidentiary hearing, the Court allowed the Trustee’s Motion to Convert the case to Ch. 7. Ex. 1, #126 (015). The respondent appealed. Ex. 1, #131 (015). The District Court affirmed. Ex. 1, #306 (033). The First Circuit affirmed the conversion, although it did not discuss the cash collateral issue in its opinion. Ex. 10.

⁴ Fed. R. Bankr. P. 9011(b)(2) provides, in pertinent part: “By presenting to the court . . . a petition, pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.”

16. On July 2, 2014, the respondent filed a response to the First Show Cause Order. Ex. 1, # 103 (012).

Evidentiary Hearing and the Court's Sanction Order

17. Judge Hoffman held an evidentiary hearing on the First Show Cause Order on July 8, 2014. Ex. 6. The respondent stated that as to his claim that the Bank violated the automatic stay, "I think that I properly and correctly quoted and cited the cases involved." Ex. 6 (089). As to the cash collateral issue, he described the statute as "very, very awkward" and "quite ambiguous," concluding that his argument, even if wrong, was "certainly a reasonable one." *Id.*

18. After the U. S. Trustee and counsel for the Bank had been permitted to argue their respective positions, the respondent was allowed to respond. The respondent reiterated his position, insisting as to the cash collateral issue that he was "permitted to be wrong," and that the issue was really one about "semantics." Ex. 6 (097-098, 099).

19. Judge Hoffman disagreed, and imposed sanctions by Order dated August 6, 2014 (the Hoover Sanction Order). As to the **violation of the automatic stay** issue, he found that the cases the respondent had cited "stand for the exact opposite of what he claims they stand for." Ex. 7 (105). The judge rejected the respondent's argument that he had, in fact been "making a non-frivolous argument for the modification of the law established by those cases," observing that the respondent's motion "says nothing of the kind." Ex. 7 (106).

20. On the **cash collateral question**, the judge found that the respondent had misquoted the statutory definition of cash collateral by "omitting most of the words in the definition." Ex. 7 (105). He rejected the respondent's argument that he had been "paraphrasing," saying that the respondent "purported to quote a statutory definition rather than convey its

meaning in his own words. It is precisely that distinction that makes his conduct so dismaying.” Ex. 7 (107).

21. After categorizing the respondent’s argument as “absurd” – because the statute “unambiguously states the opposite” of what the respondent argued that it said—the Court wrote that the respondent had “crossed the line separating good faith legal argument from the flagrantly improper and hence Rule 9011-violating kind by quoting out of context part of a statute because quoting the statute in its entirety would have disproven his premise.” Ex. 7 (107).

22. Relevant to Judge Hoffman’s analysis was the fact that the respondent had been sanctioned three times before, by Bankruptcy Court Judges Hillman and Feeney, for violating Rule 9011 by advancing baseless legal and factual arguments. See Ex. 7 (107-109). The similarity between the misconduct in the earlier cases and the misconduct before Judge Hoffman was, in his words, “startling.” Ex. 7 (109).⁵

23. Judge Hoffman noted that the monetary sanctions imposed on the respondent in the earlier cases had not achieved their goal, and instead of a monetary sanction ordered him to “enroll in and attend in person (not on-line) a one-semester, minimum three credit-hour class on legal ethics or professional responsibility in an ABA accredited law school to be completed within 13 months of the order.” Ex. 7 (109). The respondent was warned that “[i]f a certificate of compliance is not filed by September 30, 2015, further proceedings will be initiated.” Id.

⁵ See, e.g., Hermosilla v. Hermosilla (In re Hermosilla), 450 B.R. 276 (Bankr. D. Mass. 2011), *aff’d*, 2011 WL 6034487 (B.A.P. 1st Cir. Nov. 14, 2011) (respondent fined \$9,000 for pursuing an appeal completely unsupported by fact or law).

The Respondent's Unsuccessful Appeals

24. The respondent appealed the Hoover Sanction Order to the United States District Court for the District of Massachusetts (the "District Court"). Ans. ¶ 18; OIP.

25. On August 27, 2015, the District Court issued a Memorandum and Order on Appeal (the "District Court Order"), affirming the Hoover Sanction Order. Ans. ¶ 19; OIP; Ex. 8. The District Court found no abuse of discretion in Judge Hoffman's sanction order and rejected, as had Judge Hoffman, the respondent's tortured argument regarding the automatic stay, namely, that his description of *existing* law in fact was an argument for a *change* in the law. Ex. 8 (114).

26. It squarely rejected the respondent's companion argument that he had paraphrased the statutory definition of cash collateral, supposedly by omitting only needless words, noting that his selective quotation narrowed the definition of cash collateral so as to benefit his client. Ex. 8 (115-116).

27. The respondent appealed the District Court Order to the First Circuit. Ans. ¶ 20; OIP.

28. On June 29, 2016, the First Circuit issued a judgment affirming the Hoover Sanction Order. Ans. ¶ 21; OIP; Exs. 9, 65. It described as "a flat out misstatement" the respondent's argument that the case law he had cited supported a claim that the Bank had violated the automatic stay. Ex. 65 (585). Citing the bankruptcy court's familiarity with the respondent and his writings, it specifically upheld as reasonable the Court's inference that the respondent's misstatement "was the product not of reasonable mistake, but of something worse," referencing case law to the effect that "[i]f the reasonably foreseeable effect of [the]

representations to the bankruptcy court was to mislead the court, they cannot be said to have complied with Rule 9011.” (citation omitted). Ex. 65 (586-587).

29. The First Circuit rejected the respondent’s cash collateral arguments, describing his actions as “fashion[ing] support for an otherwise unsupported position by materially mischaracterizing what the statute says, and by leaving out the most relevant, and to his argument, the most discrediting, portion of it.” Ex. 65 (587).

30. It concluded that on balance, the respondent’s assertions as a whole “were not merely erroneous detours made in pursuit of otherwise well-grounded filings. Rather, [the respondent], in each instance, marshalled artifice to provide illusory support for positions that were otherwise without an apparent basis.” Ex. 65 (588). It concluded that “[a]s the bankruptcy court observed, [the respondent] has a record of using his knowledge and skills for improper purposes.” Id.

The Respondent’s Failure to Comply with the Court’s Order

31. Although the respondent initially enrolled in a legal ethics course at New England Law, he failed to complete the course over the next two years. Ans. ¶ 22; OIP.

32. After the respondent filed a Status Report with the Court on January 18, 2018, reflecting that he had not yet completed the ethics class, on January 22, 2018, the Court issued a second Order to Show Cause (the “Second Show Cause Order”) “why additional sanctions should not be imposed . . . for failing to comply with my [Hoover Sanction Order] of August 6, 2014. Ans. ¶ 23, OIP, Exs. 13, 14.

33. After an evidentiary hearing on the Second Show Cause Order, on January 31, 2018, the Court found that “Mr. Baker has without any reasonable justification failed to comply with my order dated August [6], 2014 . . . to complete a course in legal ethics within 13 months,

and that he unilaterally and without leave, self-limited my prior order to legal ethics courses taught only at night.” Ex. 15 (136).

34. The Court ordered the Hoover Sanction Order enforced, and imposed a further sanction on the respondent of \$10,000, releasing the respondent from payment should he complete an ethics course in accordance with the Court’s August 6, 2014 Order, and certify by August 31, 2018 that he had done so. Id.

35. The respondent never completed the ethics course. We find that this was a violation of the Court’s Second Show Cause Order. While he paid to the Court the \$10,000 fine on August 30, 2018, the Order did not say he could pay in lieu of attendance. Rather, it said that once he timely submitted proof of completion of the course, he did not have to pay the fine. See Ans. ¶ 25; OIP; Ex. 15.

Conclusions of Law – Count One

36. Bar counsel charged that by asserting a frivolous claim in the Motion for Sanctions, the respondent violated Mass. R. Prof. C. 3.1 (do not bring, continue, defend a proceeding or assert or controvert an issue therein, unless there is a non-frivolous basis in law and fact for doing so, which includes a good faith argument for an extension, modification or reversal of existing law).

37. We agree that the claim in the Motion for Sanctions was frivolous. As detailed at length above, the respondent’s argument as to the Bank’s alleged misconduct was not supported by authority and, as phrased, cannot be construed to be a request for a change in existing law. It was a stark misrepresentation to elide the fact that there was no authority for the respondent’s position, and it was, therefore, frivolous.⁶

⁶ Bar counsel did not charge the respondent under Rule 3.1 for his misrepresentations in the opposition to the Trustee’s motion to convert or dismiss his client’s bankruptcy action.

38. Bar counsel charged that by knowingly making a false statement of law to a tribunal in both the Motion for Sanctions and the Objection to the Motion to Convert, the respondent violated Mass. R. Prof. C. 3.3(a)(1) (do not make a knowing false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made).

39. The respondent denied “knowing” falsity, and argued to us that he “believed in good faith . . . that I was making a reasonable and rational argument for the modification or change of an existing law within the meaning of Rule 11.” Tr. 1:125 (Respondent).

40. Under Mass. R. Prof. C. 1.0(h), “[k]nowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

41. We find that the respondent did not make either misrepresentation in good faith. We find that the misstatements in both pleadings were knowing. See generally Matter of London, 427 Mass. 477, 483, 13 Mass. Att’y Disc. R. 431, 438-439 (1998) (upholding committee’s inference of intent to deceive, where lawyer gave false explanations).

42. In addition to finding the respondent’s explanation not credible, we rely on the following. First is the misleading nature of the respondent’s pleadings – citing, respectively, a statute and case law allegedly in support of his position when, in fact, neither supported his point.

43. As noted, the cases cited in support of the Motion for Sanctions did not support the respondent’s argument, and in fact undermined it. In his cash collateral argument, we find that he eviscerated the statute, deliberately removing from it the section that did not help him.

44. We note additionally the absence, in the respondent’s motion papers or argument before Judge Hoffman, of language recognizing the force of authority, but advocating for a change to existing law. This was not an example of the respondent “go[ing] out on a limb representing [a client] to effect a necessary change in the law” See Tr. 1:123 (Respondent). Instead, the respondent simply and intentionally mischaracterized the law and argued, disingenuously, that his claims were supported.

45. Our conclusion that this was an intentional strategy and not an innocent mistake is underscored by our reference above, ¶ 22 and n. 5, to the respondent’s earlier conduct in the bankruptcy court for strikingly similar behavior. Manifestly, as described by the First Circuit, the respondent “marshalled artifice” in apparent support of unsound and unsupported arguments.

46. To the extent that the respondent is arguing that Judge Hoffman did not rely on his misrepresentations, we reject that claim as irrelevant. See generally Matter of Bailey, 439 Mass. 134, 151, n.21, 19 Mass. Att’y Disc. R. 12, 33, n.21 (2003) (intent of the person misrepresenting, not actions of the recipient, controls). We find that the respondent clearly intended Judge Hoffman to rely on his misrepresentation.

47. Bar counsel charged that by failing to obey the Hoover Sanction Order, the respondent violated Mass. R. Prof. C. 3.4(c) (do not knowingly disobey an obligation under the rules of a tribunal).

48. We agree that the respondent did not obey the Hoover Sanction Order. To the extent that he claimed before us that he was ill and could not do so, we note his failure to produce evidence to this effect, and his choice simply to ignore the Order rather than petition

Judge Hoffman for relief from it.⁷ We therefore conclude that the respondent violated Rule 3.4(c).

49. Bar counsel charged that by asserting frivolous claims and objections, making false statements of law to a tribunal and failing to obey a lawful order of the court, the respondent engaged in conduct that was prejudicial to the administration of justice in violation of Mass. R. Prof. C. 8.4(d) (do not engage in conduct prejudicial to the administration of justice).

50. The respondent admitted in his Answer that his conduct violated Rule 8.4(d), and we so find. Ans. ¶ 29. Failing to comply with Court Orders and wasting the Court's limited resources with meritless pleadings and baseless defenses prejudices the administration of justice.

51. Bar counsel charged that by asserting frivolous claims and objections, making false statements of law to a tribunal and failing to obey a lawful order of the court, the respondent engaged in conduct that adversely reflects on his fitness to practice law, in violation of Mass. R. Prof. C. 8.4(h) (do not engage in any other conduct that adversely reflects on fitness to practice law).

52. We agree that the conduct described in detail above adversely reflects on the respondent's fitness to practice. We conclude that bar counsel has proved a violation of Rule 8.4(h).

COUNT TWO
(Client Mary Buscone)

Preliminary Matters in the Bankruptcy Court

53. After Mary Buscone filed a Ch. 7 petition in the bankruptcy court, she filed a motion to avoid a judicial lien of a creditor, Ann Botelho. Botelho objected. Ex. 16, # 12, 14

⁷ As noted above, he also failed to comply with the Second Show Cause Order, but bar counsel did not charge this.

(139). Botelho then filed a complaint in the Bankruptcy Court, docketed as an “Adversary Proceeding,” seeking a determination that Buscone’s debt to her was not dischargeable under the Bankruptcy Code. Ex. 17, # 1 (147); Tr. 1:36 (Respondent).⁸

54. On or before May 4, 2019, Buscone retained the respondent to represent her in defending the Adversary Proceeding. Ex. 17, #14 (148); Tr. 1:38 (Respondent).

55. On May 4, 2019, the respondent filed a motion to dismiss the Adversary Proceeding. Ex. 17, #15 (148). Botelho filed an opposition and affidavit in response. Ex. 17, # 24 (149).

56. On October 9, 2019, the Court converted the motion to dismiss to a motion for summary judgment, denied the motion (the “Summary Judgment Motion”), and ordered Buscone to file an answer to Botelho’s complaint. The respondent filed the answer on November 2, 2019. Ex. 17, # 35, 39 (150, 151).

Discovery Disputes, Motions to Compel, and Sanctions Orders Against the Respondent

57. On or about March 13, 2020, Botelho served discovery on the respondent’s client, including interrogatories, requests for production of documents and requests for admissions. Ans. ¶ 36. On or about June 19, 2020, Botelho served a Second Request for Inspection or Production of Documents Propounded by the Plaintiff to be Answered by defendant Mary E. Buscone. Ex. 55.

58. On June 26, 2020, Botelho filed a motion to compel discovery, claiming that the respondent had failed to provide all discovery requested. Ans. ¶ 37.

⁸ The First Circuit has described an Adversary Proceeding as “a subsidiary lawsuit within the larger framework of a bankruptcy case.” *In re Mary Buscone*, 61 F.4th 10, 16, n.1 (1st Cir. 2023); Ex. 29, n.1 (367) (internal quotation marks and citation omitted).

59. The Court denied the motion to compel discovery. On July 2, 2020, the Court held a telephonic, off-the-record conference, ordering afterwards that Botelho had leave to file certain discovery motions. Ex. 17, #72 (154); Tr. 1:44 (Respondent); Ans. ¶ 38.

60. On September 9, 2020, Botelho again filed a motion to compel discovery and for an award of fees and sanctions, alleging that numerous discovery requests, among them Interrogatories 8-10 and Document Requests 11-14, had not been answered (the “First Botelho Sanctions Motion”). Ex. 17, #81, 82 (155); Ex. 18; Ans. ¶ 39.⁹

61. After a telephonic hearing held October 13, 2020, the Court entered a Proceeding Memorandum and Order (the “Discovery Order”), granting Botelho’s motion to compel discovery, fees and sanctions, and ordering the respondent “to serve a written response to Botelho’s document requests # 10-14, and to produce any and all responsive documents on or before October 20, 2020.” Ex. 19 (172); see Ex. 55 (Botelho’s Second Request for Inspection or Production of Documents Propounded by the Plaintiff to be Answered by Defendant Mary E. Buscone).

62. The Court ruled further that any objections Buscone had to these requests were deemed waived, “by virtue of her failure to timely respond to the request even after a motion to compel was on file.” Ex. 19 (172). Buscone was ordered to appear for deposition “at a time and place to be determined by the parties.” Id.

63. In the Discovery Order, the Court also ordered the respondent to pay personally the \$500 cost for the stenographer “hired for the unattended deposition,” and to file on or before

⁹ Bar counsel charged, and the respondent admitted, that in addition to the allegations listed above, Botelho’s motion alleged that the respondent’s client had failed to appear for her continued deposition. APD, ¶ 39; Ans. ¶ 39. The motion itself does not allege this, although it may be in the affidavit of Botelho’s counsel, which is mentioned in his motion and which we do not have. See Ex. 18. We note that the Court’s Discovery Order, Ex. 19, *does* order relief for the failure of the respondent’s client to attend her continued deposition, so we assume this was brought to the Court’s attention in some manner.

October 20, 2020 any response to Botelho's request for \$13,500 in sanctions against him. Ex. 19 (173).¹⁰

64. On November 4, 2020, Botelho filed a second motion seeking additional sanctions against Buscone and/or the respondent for failure to provide written responses and documents as required by the Discovery Order (the "Second Botelho Sanctions Motion"). Ex. 20. She alleged in the motion that she had "received NO RESPONSES, nor any DOCUMENTS to the outstanding Rule 34 Requests," and that the interrogatory answers she had received were "both non-responsive and inappropriate," reminding the Court that the respondent had been instructed that all objections were waived. Ex. 20 (175) (emphasis in original). In addition to fees and expenses of \$10,920, Botelho sought entry of a default judgment against Buscone for "willful non-compliance, lack of good faith and Contempt of Court." Ex. 20 (178).

65. On November 17, 2020, the Court held a telephonic hearing on the Second Botelho Sanctions Motion. Ex. 21. Botelho's counsel told the Court that he still had not received responses to Document Requests #10-14, and had received no documents. Ex. 21 (194, 197). Asked by the Court why it should not enter a default judgment against his client for failure to abide by a clear Court order, the respondent stated, "Well, because we believe she did comply with the order of the court." Ex. 21 (197). The respondent then intentionally attempted to divert and confuse the Court by referencing interrogatory answers, which were not the subject of the Court's questions. Ex. 21 (198-199).

66. The following colloquy between the Court and the respondent, which warrants quoting in full, then ensued:

¹⁰ The respondent admitted at the disciplinary hearing that he was responsible for his client's failure to appear at the deposition. Tr. 1:49 (Respondent).

THE COURT: Mr. Baker, did you file a Rule 34 response by October 20th to RF, Requests for Production 10 through 14? And I, I warn you, Mr. Baker, to be very, very careful now with your response.

MR. BAKER: My response is that I believe that we did. I believe that -- and our responses are, are set forth in the motion and I -- as I said before, I have --

THE COURT: Forget about the motion. Forget about the motion. I don't want to hear about the motion. So I, if I order you right now to produce to me a copy of your Rule 34 written response, you're going to be able to do that? If I order you right now to e-mail that to my FJB e-mail address, you're going to be able to accomplish that, is that correct?

MR. BAKER: Yes. It will have the wrong numbers, but yes.

THE COURT: What do you mean "the wrong numbers"?

MR. BAKER: It - because -- because it had -- hold on. Hold on just one second. (Pause) Okay. In the answers, in the answers that we provided -- they are No. 8 --

THE COURT: The answers to what? The response, the written response to the RFP, right? That's what we're talking about, not answers to interrogatories. And I know you understand what I'm saying.

MR. BAKER: Yes, I do. Yes, yes, yes. And I'm looking in my file. (Pause) I apparently -- not document productions.

THE COURT: Mr. Baker?

MR. BAKER: Yes.

THE COURT: I believe that you, I believe you have made misrepresentations to me today, all right? I have a record of this. All right. I'm going to -- I don't need to hear any more. This is not appropriate behavior. I asked you very clearly about whether you filed a written response under Rule 34. You know what that is. You told me that you did. Now you tell me you didn't. This is very concerning to me.

MR. BAKER: And to me as well.

THE COURT: This is inappropriate behavior. All right. I'm going to give you one last chance. Did you or did you not -- and tell me the truth -- file a, serve a Rule 34 compliant written response

pursuant to my order with respect to Requests for Production 10 through 14? Yes or no.

MR. BAKER: No. My mistake. No, your Honor.

Ex. 21 (201-203).

67. On December 7, 2020, the Court entered an Order awarding \$6,807.60 to Botelho for her attorney's fees in connection with the Discovery Order. The Court found that the respondent was "responsible for the failures to respond which gave rise to this motion Attorney Baker shall make all such payments on or before January 5, 2021." Ex. 22.

68. On December 7, 2020, the Court entered its Proceeding Memorandum and Order regarding the Second Botelho Sanctions Motion. Ex. 17, # 120 (160-162); Ex. 23. The Court found that the respondent had failed to obey its October 13, 2020 Discovery Order; had provided no creditable argument for the failure to comply; and that Botelho had been and continued to be prejudiced by the failure of the respondent and his client "to follow even the most basic requirements of the discovery rules." Ex. 23 (220, 221).

69. The Court found further that the respondent and his client had "failed to respond to discovery for many months and then obfuscated the issues when called upon to answer for this avoidance." The Court noted as well that the respondent had not "argued the adequacy of lesser sanctions," writing that the Court had already shifted fees to Buscone and the respondent for discovery abuses, but that they were "unmoved by those sanctions." Ex. 23 (221). The Court found the respondent responsible for the failures to respond, and directed him to pay Botelho's "reasonable expenses incurred in making this motion" of \$2,356 before January 5, 2021. Ex. 23 (222).

70. Lastly, on December 7, 2020, the Court entered a default judgment against Buscone as a sanction for noncompliance, exempting from discharge her debt to Botelho of \$91,673.45, plus interest and costs. Ex. 24 (223).

The Respondent's Motion for Relief and Appeals

71. On December 21, 2020, the respondent filed a Motion for Relief from Order, challenging the two sanction orders entered against him, the default judgment, and the order denying summary judgment. Ex. 25.¹¹ In support of the Motion for Relief, the respondent filed a three-part memorandum of law over the course of nine days, fully arguing the merits of his position. Ex. 17, # 126, 127, 128 (163); Exs. 60, 61, 62; Ans. ¶ 49.

72. On February 19, 2021, the Court denied the Motion for Relief, noting the respondent's failure to cite any grounds to warrant reconsideration of any of the Court's Orders. Ex. 17, # 140 (165); Ex. 26; Ans. ¶ 50.

73. On February 27, 2021, the respondent appealed the Court's denial of the Reconsideration Motion to the United States Bankruptcy Appellate Panel for the First Circuit (the "BAP"). Ex. 17, # 144 (165).

74. On December 21, 2021, the BAP issued its opinion affirming the Order Denying Summary Judgment, affirming the Default Judgment, and affirming the Order denying the Motion for Reconsideration. Ex. 17, #160 (167); Ex. 28.

75. In a comprehensive decision, the BAP reviewed the facts, the motions and oppositions filed by each party, the Bankruptcy Court's various orders, and the parties' respective positions on appeal. Ex. 28.

¹¹ The Motion for Relief is sometimes referred to as a Motion for Reconsideration.

76. The BAP dismissed, on standing grounds, Buscone’s appeal of the two orders imposing liability for fees on the respondent because Buscone had no standing to appeal the sanctions against the respondent and the respondent had failed to appeal the sanctions against him individually. Ex. 28 (347-349). The BAP noted that the respondent had waived the issue, having failed to address the propriety of the sanctions in Buscone’s appellate brief. Ex. 28 (349).

77. In the course of upholding the default judgment against Buscone, the BAP cited the respondent’s conduct, writing that his “evasiveness” during the November 20 hearing, “despite the court’s explicit warnings, supports the court’s conclusion that the misconduct was deliberate and lacking a legitimate excuse.” Ex. 28 (358-359). The weight of this misconduct was heavy enough to overcome “the ‘admittedly strong interest in deciding cases on the merits.’” Ex. 28 (359) (citation omitted).

78. The BAP upheld the denial of the Motion for Reconsideration, noting that the three memoranda the respondent had filed in the Bankruptcy Court amounted to “either a regurgitation of arguments previously made or arguments that should have been made but were not,” and concluded that the memoranda as a whole were “little more than attempts to remedy Buscone’s repeated discovery failures.” Ex. 28 (362).

79. On or about January 10, 2022, the respondent filed a notice of appeal to the First Circuit. Ex. 17, #161 (167).

80. In a judgment entered February 22, 2023, the First Circuit noted that “[w]hat began as a missed deposition quickly snowballed into a pattern of discovery abuses. . . and an overall unwillingness to . . . follow the rules of discovery”; this “continued even after the bankruptcy court had ordered [the respondent] to comply with

certain requests and had already imposed the lesser sanction of fees for earlier abuse.”
Ex. 29 (397-398).

81. It affirmed the Bankruptcy Court’s orders denying Buscone’s motion for summary judgment, granting Botelho’s motion for a default judgment, and denying Buscone’s motion for reconsideration. Ex. 29.

Conclusions of Law – Count Two

82. Bar counsel charged that by knowingly making a false statement of fact to a tribunal during the telephonic hearing, the respondent violated Mass. R. Prof. C. 3.3(a)(1).

83. The respondent argues that his statement was not knowing, and claims that in any event, the transcript of the hearing shows that he corrected any false statement he may have made. Respondent’s Post-Trial Brief (PTB), p. 9.

84. We disagree. We do not credit the respondent’s claim that he had simply made a mistake. The exchange quoted above in full, at ¶ 66, shows the respondent actively misrepresenting his activities to the Court, and intentionally sowing confusion about interrogatories that were not at issue. This approach is uncomfortably similar to the shenanigans we described above in Count One, although we find that this lie was sharper and more explicit.

85. Before us, the respondent claimed that he in fact answered the document request and produced documents. Tr. 1:50-51, 137-138 (Respondent). We do not credit this. He did not offer this material to us, further underscoring our conclusions that he never prepared or produced it, and that he lied to Judge Bailey. See Matter of Zankowski, 487 Mass. 140, 149, 37 Mass. Att’y Disc. R. 554, 565 (2021) (adverse inference warranted “from the respondent’s failure to offer materials, readily available to her, that would presumably support her version of the facts if true”).

86. We are particularly troubled by the respondent’s breathtakingly audacious claim that if he did make a misrepresentation, he corrected it and therefore was not in violation of Rule 3.3(a)(1). See Respondent’s PTB, p. 9. We conclude that the respondent corrected nothing. Rather, when cornered, he finally stopped lying and admitted defeat, as he had to do. The First Circuit described this well: “After some prying by the court, and obfuscation by Baker, he ultimately conceded that he had failed to serve a response compliant with the order.” Ex. 29, n.14 (373).¹² The First Circuit’s finding underscores the words of the BAP, which had found that the respondent’s misconduct “was deliberate and lack[ed] a legitimate excuse.” Ex. 28 (359). We agree and, in light of this and our own analysis, conclude that the respondent violated Rule 3.3(a)(1).

87. Bar counsel charged that by failing to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party, the respondent violated Mass. R. Prof. C. 3.4(d) (do not fail to comply with legally proper discovery request).

88. We have detailed above the respondent’s activities when confronted with legally proper discovery requests. We are not sympathetic to his argument that the requests were “abusive or excessive.” Respondent’s PHB, p. 10. Nor are we the tribunal to resolve that issue; the proper place to have made that argument would have been before Judge Bailey, presumably via a Motion to Quash or other request for relief. The discovery requests were the source of many motions and a hearing, and yet the respondent did not ever move to quash on grounds of oppression or abusiveness, demonstrating yet another refusal to follow the rules. See Tr. 1:45, 134 (Respondent). Absent a ruling to that effect, and despite the respondent’s scattershot and

¹² We note that Rule 3.3(a)(1) prohibits both knowingly making a false statement of fact or law to a tribunal **or** failing to correct a false statement of material fact or law previously made. (Emphasis added). The respondent’s knowingly false statement violated the rule, even if he later corrected it which, as noted, he did not.

inappropriate attempts to get *us* to decide this issue, see Respondent's PTB, pp. 10-11, we presume that the discovery requests were proper.

89. We conclude that bar counsel has proved a violation of Rule 3.4(d).

90. Bar counsel charged that by failing to obey the Discovery Order, the respondent violated Mass. R. Prof. C. 3.4(c).

91. In light of our discussion above, we conclude that bar counsel has proved this rule violation.

92. Bar counsel charged that by making false statements of law to a tribunal, failing to comply with a legally proper discovery request by an opposing party, and by failing to obey the Discovery Order, the respondent engaged in conduct that is prejudicial to the administration of justice in violation of Mass. R. Prof. C. 8.4(d).

93. We have detailed above the impact of the respondent's misconduct on the Bankruptcy Court, the BAP and the First Circuit, as well as the effects on Botelho. We conclude that bar counsel has proved this rule violation.

94. Bar counsel charged that by making false statements of law to a tribunal, failing to comply with a legally proper discovery request by an opposing party, and by failing to obey the Discovery Order, the respondent engaged in conduct that adversely reflects on his fitness to practice law in violation of Mass. R. Prof. C. 8.4(h).

95. We find that the respondent's activities, detailed above, reflect poorly on his fitness to practice law. We conclude that bar counsel has proved this rule violation.

COUNT THREE
(Clients Sonya and Zaina Leak)

96. In 2011, Sonya Leak's mother, Priscilla Graham, died intestate, resulting in an intestate estate (the "Graham Estate"). Ans. ¶ 59. Graham's heirs at law are her daughters, Sonya Leak ("Sonya") and Jewel Swift ("Jewel"). Ex. 31 (416).

97. In 2011, Sonya and Jewel were appointed as personal representatives of the Graham Estate. Ex. 32.

98. The sole asset of the Graham Estate was a condominium unit located at 152 Callender Street, Dorchester, MA (the "Condo Unit"). Ans. ¶ 60.

99. After Graham's death, Sonya lived in the Condo Unit with her daughter, Zaina Leak ("Zaina"). Sonya made the monthly mortgage payments to the mortgagee, Massachusetts Housing Finance Agency (the "MHFA"). Title remained in Graham's name. Ex. 35 (427); Ans. ¶ 61.

100. In or around January 2015, Sonya became unable to make the monthly mortgage payments and MHFA began foreclosure proceedings. Tr. 1:63 (Respondent); Ans. ¶ 62.

101. On or around July 11, 2018, MHFA sold the Condo Unit at public auction to a third party (the "New Owner"). Ex. 35 (430). The sale generated proceeds above the amount of the mortgage; these proceeds are discussed below.

102. In early October 2018, the New Owner filed a summary process action in the Housing Court, seeking to evict Sonya from the Condo Unit. Ex. 33. Sonya proceeded pro se. An execution on behalf of the New Owner issued on December 21, 2018. Ex. 33 (421). The Constable's 48 Hour Notice of Eviction was filed on January 7, 2019. Id.

Bankruptcy Proceedings and the Respondent's Involvement

103. On January 8, 2019, in an effort to stop the eviction, Zaina filed a voluntary petition under Chapter 7 of the Bankruptcy Code (the "First Bankruptcy Case"). Ex. 34 (423); Tr. 1:77 (Respondent). Despite the pendency of the bankruptcy, and the attendant automatic stay, preventing any party from enforcing a prepetition judgment, the sheriff proceeded with the eviction. Zaina and Sonya were removed from the Condo Unit, and their possessions were sent to a storage facility. Ans. ¶ 65; Ex. 39, ¶ 31 (484).

104. On January 10, 2019, Zaina's First Bankruptcy Case was dismissed due to her failure to comply with a court order to file particular documents. Ex. 34, #10 (423).

105. On January 15, 2019, Zaina filed a motion to vacate the dismissal of the First Bankruptcy Case. The Court ordered Zaina to serve the motion on all creditors and to file all of the missing documents. Ex. 34, # 15 (424).

106. Shortly thereafter, Zaina hired the respondent to assist her with her bankruptcy matter. Ans. ¶ 67. He entered his notice of appearance in the bankruptcy case on January 28, 2019. Ex. 34, #18 (424).

107. The respondent and/or Zaina failed to file the required documents and the First Bankruptcy Case was not reinstated and remained dismissed. Ex. 34, #24 (424).

108. On February 2, 2019, the respondent filed, on Zaina's behalf, a voluntary petition under Chapter 13 of the Bankruptcy Code (the "Second Bankruptcy Case"). Ex. 37 (436).

109. The respondent and Zaina executed a document entitled Disclosure of Compensation of Attorney for Debtor and filed it in the Second Bankruptcy Case. Ex. 37, #4 (437); Ex. 64. The respondent agreed to accept \$3,500 for his services, plus "such additional amounts as the court may allow." Ex. 64 (573). Among the services covered by the \$3,500 fee

were “[r]epresentation of the debtor in adversary proceedings and other contested bankruptcy matters.” Ex. 64 (574).

110. Between February 1, 2019 and October 2, 2019, Sonya paid at least \$1,150 on Zaina’s behalf for the Second Bankruptcy Case, including \$600 to the bankruptcy trustee and at least \$550 to the respondent. Ex. 36.

111. The respondent never disclosed to the Bankruptcy Court that Sonya had paid some of his compensation on Zaina’s behalf. He had checked “N/A” in response to the question on the Disclosure form, which asked about the source of attorney compensation, and he never amended this. Ex. 64 (573).

112. The respondent failed to obtain a waiver in writing from Zaina with respect to the fact that her legal fees were being paid by a third party. Tr. 1:66 (Respondent).

113. Although the respondent testified that he believed both Sonya and Zaina had initialed and signed Zaina’s fee agreement, this was not in fact the case; only Zaina had signed. Tr. 1:69-71 (Respondent); Ex. 64 (574). The respondent and Sonya never had a written fee agreement. Tr. 1:69, 97-99 (Respondent).

114. On March 20, 2019, the respondent filed an adversary proceeding (the “Leak Adversary Proceeding”) in the Bankruptcy Court, naming Zaina as the plaintiff. See Ex. 38. He named the MHFA, the New Owner and the sheriff among the defendants. In the Verified Complaint he filed, he added Sonya as a co-plaintiff. Ex. 39 (482). The Verified Complaint asserted violations of the automatic stay on behalf of Zaina; violation of the “eviction statute,” G.L. c. 239, § 4, on behalf of both Sonya and Zaina; and wrongful foreclosure on behalf of both. Ex. 39.

115. The Leak Adversary Proceeding claims brought by the respondent on behalf of Sonya were dismissed by Order of the Court for lack of subject matter jurisdiction on or about August 20, 2019. Tr. 1:73-74 (Respondent); see Ex. 38, #91, 93, 94 (462-463).

116. Zaina's Adversary Proceeding claims were not dismissed. After mediation, on June 22, 2021, the respondent agreed on Zaina's behalf to settle Zaina's Adversary Proceeding claims for a payment to her from the defendants of \$40,000. Ex. 47 (521).

117. The respondent received \$10,000 of the settlement amount. Tr. 1:88 (Respondent). He testified that this was agreed to at a mediation, and that "all" agreed, even Zaina, "that \$10,000 would be appropriate." Id.¹³ This fee was not calculated off of an hourly rate, or the number of hours the respondent spent on the adversary matter. Tr. 1:91 (Respondent). There was no writing stating that the respondent was entitled to \$10,000 of the \$40,000 settlement payment. Id. No modification of the fee agreement was ever filed with the Bankruptcy Court. See Ex. 64.

118. The respondent did not remember if he ever disclosed the \$10,000 fee to the Bankruptcy Court judge, stating that by that point the bankruptcy case "was long dismissed." Tr. 1:103 (Respondent).¹⁴ He agreed, however, that the Leak Adversary Proceeding, which had been filed in the Bankruptcy Court, had not been dismissed by June 2021, and in fact the docket reflects that on June 26, 2021, a status conference was scheduled for August 3, 2021 concerning the "report of mediation and notice of settlement." Ex. 38, #219 (479); Tr. 1:103 (Respondent).

¹³ We allowed this testimony at the hearing, but conclude upon reflection that it should not have been admitted. See G.L. c. 233, § 23C (communication made during mediation by any participant, mediator or other person "shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding"); Mass. Guide to Evid., § 514 (2023 ed.). Accordingly, we will not rely on this statement in our deliberations.

¹⁴ This is not consistent with the Docket Sheet of the Ch. 13 case, which appears to indicate that the bankruptcy case was not closed until September 10, 2021. Ex. 37 (451).

The parties stipulated to dismissal on or around August 12, 2021, and a Judgment followed on August 18, 2021. Ex. 38, # 223, 225 (479-480).

MHFA's Superior Court Interpleader Case and Recovery of Excess Proceeds

119. At around the same time the respondent filed the Leak Adversary Proceeding in bankruptcy court, MHFA filed an interpleader action in the Suffolk County Superior Court, Docket No. 1984CV00821 (the "MHFA Interpleader Action"). The suit, filed March 13, 2019, named many parties as defendants, among them Sonya Leak and Jewel Swift. Ex. 41. The complaint recited that the foreclosure sale of the Graham condominium unit had resulted in excess proceeds of \$69,809.27. Ex. 41 (494). The MHFA sought Court authority to deposit this sum with the Court, and to have the parties work out how the proceeds should be divided. Ex. 41 (496).

120. On June 25, 2019, the respondent filed a notice of appearance on Sonya's behalf in the MHFA Interpleader Action. Ans. ¶ 77; Ex. 40, #19 (489). He never provided Sonya with a written fee agreement. See Tr. 1:99 (Respondent). He later gave his rationale for this, writing: "Given that Sonya was homeless and unemployed, I did not insist on a retainer or agreement." Ex. 46, ¶17 (518).

121. On June 28, 2019, the respondent filed an answer and counterclaims on Sonya's behalf in the MHFA Interpleader Action. Ex. 40, #22, 23 (489-490).

122. On May 13, 2020, the Superior Court entered an order in the MHFA Interpleader Action setting forth how the foreclosure proceeds should be distributed to junior lienholders and the Graham Estate. Pursuant to the Court's Order, the Graham Estate was entitled to \$34,735.40. Ex. 40, #30 (491).

123. On September 15, 2020, the Superior Court judge dismissed the counterclaims the respondent had filed on Sonya's behalf in the MHFA Interpleader case.¹⁵ Ex. 40, #33 (491).

124. On or about October 8, 2020, a check from the MHFA's counsel in the amount of \$34,735.40 payable to the "Estate of Priscilla V. Graham" was sent to the respondent. Ex. 45. The respondent did not give the excess proceeds check to Sonya and Jewel as personal representatives of the Graham Estate. He put the check in his file until he could "get instructions" from Sonya and Jewel as to how to disburse it. Tr. 1:83, 109 (Respondent). He allowed the check to become stale. Tr. 1:85 (Respondent).

125. We find that the respondent made only minimal efforts to contact the probate attorney representing Sonya and Jewel in the probate/Graham Estate matter. He "called the phone number on the docket," and may have sent a fax. He offered no copy of a fax transmission to substantiate this testimony. Tr. 1:84, 85, 112 (Respondent).

The Respondent's Probate Court Interpleader Complaint

126. On May 12, 2021, the respondent filed a Complaint in Interpleader in the Graham Probate Estate case. Ex. 30, #8 (414); Ex. 46.¹⁶ He does not appear to have served the probate attorney representing Sonya and Jewel. Ex. 46 (518). At that point, he was no longer representing Sonya in any matter. Tr. 1:86 (Respondent).¹⁷

¹⁵ While we have not been given specific information about these counterclaims, we infer from the Respondent's PHB that they challenged the effectiveness of the assignment from the original mortgagee to MHFA. See Respondent's PHB, p. 5 and n. 9.

¹⁶ The Complaint is dated January 12, 2021, but the Probate Court docket sheet lists the docketing date as May 12, 2021. Ex. 30, # 8 (414). Another record document, the respondent's Notice of Withdrawal of Pleadings, identified the "Complaint in interpleading" [sic] as having been filed May 12, 2021. Ex. 54 (537).

¹⁷ In addition to the matters described above, the respondent had briefly represented Sonya in a contempt case brought in the Housing Court. The complaint against her was filed October 5, 2020, and alleged that after the eviction, she had moved back into the Condo Unit. Ex. 42, #1 (498), Ex. 43. The respondent entered his appearance October 29, 2020. Ex. 42, #8 (499). He moved to withdraw December 21, 2020. Ex. 42, #16 (499). After a hearing, he was allowed to withdraw on January 6, 2021. Ex. 42 (499-500).

127. The respondent's Complaint sought attorney's fees: payment of \$4,060 from Sonya's share of the excess proceeds, for his work on her behalf in the Superior Court and the Housing Court. It recites the chronology of events, from the death of Priscilla Graham through the receipt of the \$34,735.40 check for excess proceeds. Ex. 46. He noted that he and Sonya had no written fee agreement, and went on to demand payment in quantum meruit for his services. He concluded that "[a]bsent other order of the court, I will negotiate the check and pay Jewel \$17,367.70, my aforementioned fee [of \$4,060], and the balance of \$13,307.70 to Sonya. Id., ¶ 20. He served Sonya and Jewel by email, but there is no indication on his Certificate of Service that he served their probate court attorney. Ex. 46 (518).

128. The respondent admitted that he could have filed a motion to request authority to deposit the proceeds with the Court, as part of the interpleader. Tr. 1:135-136 (Respondent). He chose not to do this, claiming instead that he had relied on someone at the Probate Court as to what to do, and that is why he proceeded as he did.

129. The respondent attached a copy of the check, and an unsworn "Time Sheet." Ex. 46 (519-520). The time sheet purports to show that on October 15, 2020 he received the excess proceeds check, discussed with his client dividing it with Jewel, and reviewed the Probate Court docket; sent a letter to Jewel 11/27/20 about the surplus; sent a letter to Jewel and Sonya 12/16/20 about the surplus; and filed the interpleader complaint on January 12, 2021, an incorrect date, as noted above in n.16. Ex. 46 (520).

130. The probate court attorney representing Sonya and Jewel filed a Notice of Withdrawal on May 10, 2022. Ex. 49, #11 (525).

131. Shortly thereafter, the respondent filed a series of documents in the Probate Court beginning May 11, 2022, either identifying himself as Sonya's attorney or identifying himself as

the estate fiduciary (the “Unauthorized Pleadings”). E.g., “General Probate Petition,” filed May 11, 2022, identifying himself as “attorney for co-executrix Sonya R. Swift-Leak,” seeking fees from her share of the surplus “for services rendered in other matters,” and signing under the penalties of perjury (Ex. 50); an “Account,” filed May 26, 2022, purporting to list total assets of the estate and signing as estate “fiduciary” under penalty of perjury (Ex. 52); a “Petition for Order of Complete Settlement,” filed May 26, 2022, identifying himself as “Attorney for co-P.R. Sonya Leak” and proposing distribution of \$17,367.50 to Jewel, \$13,267.50 to Sonya, and \$4,060 to himself, signing under the penalties of perjury. Ex. 53.

132. The respondent did not represent and had never represented Sonya in the Probate Court. Indeed, when he filed his materials in Probate Court, he had not represented Sonya in any matter for well over a year, since January 2021. Tr. 1:86 (Petitioner).

133. At the disciplinary hearing, the respondent insisted that even though he identified himself as Sonya’s attorney in papers filed with and sworn to in the Probate Court, he *was* her attorney in Housing and Superior Court. Tr. 1:114-115 (Respondent). We do not agree that the respondent was Sonya’s attorney as to matters that had long concluded. More to the point, he was never her attorney in Probate Court, and identifying himself as such without explanation, making representations about the estate’s assets, and signing inaccurate and misleading documents as an alleged fiduciary in addition to alleged counsel under the penalties of perjury, was clearly fraudulent.

134. Sonya and Jewel eventually settled their matters. Tr. 1:116 (Respondent). The respondent filed, in the Probate Court, a Notice of Withdrawal of Pleadings on December 13, 2022. Ex. 54.

Conclusions of Law – Count Three

135. Bar counsel charged that by failing to take any action to transmit to Sonya and Jewel, as personal representatives of the Graham Estate, the approximately \$35,000 in excess foreclosure proceeds that was due to the estate, the respondent violated Mass. R. Prof. C. 1.3 (act with reasonable diligence and promptness in representing a client) and Rule 1.15(c) (promptly notify and deliver trust funds in which a client or third person has an interest).

136. The respondent argues that he *did* take action; he contacted the sisters, then requested instructions from the Probate Court. Respondent's PHB, p. 12. However, many months elapsed between these actions. The respondent received the excess proceeds check on or about October 15, 2020. He did not file the Probate Court action until May 12, 2021, almost seven months later. He knew that Sonya was unemployed and homeless (Tr. 1:68, 78 (Respondent)), so it is unclear to us why he waited so long to begin the process to get her some money.

137. Bar counsel does not argue in her Proposed Findings of Fact, Conclusions of Law, and Recommendation for Discipline (PFCs) that she has proved a Rule 1.3 violation. Nonetheless, we conclude that the respondent's failure, from October 8, 2020 to May 12, 2021 to take meaningful steps to disburse the excess proceeds, such as making contact with the probate estate attorney or promptly depositing the excess proceeds in the Probate Court, violated both Rules 1.3 and 1.15(c).

138. Bar counsel charged that by failing to reasonably consult with Sonya about the means by which her objectives were to be accomplished and to keep Sonya reasonably informed about the status of the matter, the respondent violated Mass. R. Prof. C. 1.4(a).

139. Bar counsel makes no argument about this charge in her PFCs. We do not find that it was proved. Sonya did not testify, and none of the agreed or admitted exhibits addressed this issue. We conclude that bar counsel did not prove this rule violation.

140. Bar counsel charged that by failing to provide Zaina with a writing describing the scope of the representation and the basis or rate of the fee and expenses for which the client would be responsible in connection with the Leak Adversary Proceeding, the respondent violated Mass. R. Prof. C. 1.5(b)(1).

141. We received no evidence that the respondent updated or amended his barebones Disclosure of Compensation form (Ex. 64) to cover the Leak Adversary Proceeding. As noted, a Settlement Agreement Term Sheet reflects that Zaina was awarded \$40,000 after mediation of her wrongful foreclosure claim. Ex. 47, ¶ 3 (521). The respondent took a \$10,000 fee. Tr. 1:88 (Respondent).

142. We find that the respondent never provided Zaina with a writing describing the scope and basis of any fee to which he was entitled for his work in the Leak Adversary Proceeding, and conclude that bar counsel has proved a violation of Rule 1.5(b)(1).¹⁸

143. Had bar counsel charged the respondent with collecting a clearly excessive fee from Zaina, in violation of Mass. R. Prof. C. 1.5(a), we would have so found. Having agreed with Zaina in the Disclosure of Compensation to accept \$3,500 for activities including his representation of her “in adversary proceedings and other contested bankruptcy matters,” the respondent should not, without more, have been able to demand a higher fee for his adversary

¹⁸ Bar counsel also challenges the respondent’s failure to provide *Sonya* with a written fee agreement. In her PFCs, bar counsel seeks a finding that “[i]n violation of Mass. R. Prof. C. 1.5(b)(1), the respondent failed to provide Sonya with any writing communicating the fee for which she would be responsible.” Bar Counsel’s PFCs, ¶ 118. It is undisputed that the respondent did not provide Sonya with any written fee agreement. Tr. 1:69, 97-99 (Respondent). However, bar counsel did not make this charge in the Amended Petition for Discipline and, accordingly, we will not find that the respondent violated this rule.

proceeding representation. See Ex. 64 (574). However, bar counsel did not charge that this conduct violated the rule against excessive fees, and in fairness to the respondent, we will not find misconduct that could have been but was not charged. See generally Matter of Foster, 492 Mass. 724, 762, n.18, 39 Mass. Att’y Disc. R. __ (2023); Matter of Parker, 39 Mass. Att’y Disc. R. __, __ (2023) (Board Memorandum).

144. Bar counsel charged that by unilaterally charging Sonya fees during representation that he had agreed to provide on a pro bono basis, the respondent charged a clearly excessive fee, in violation of Mass. R. Prof. C. 1.5(a).

145. Bar counsel made no argument about this charge in her PFCs. We heard no evidence that the respondent had agreed to represent Sonya on a pro bono basis. We conclude that this charge has not been proved.

146. Bar counsel charged that by failing to obtain Zaina’s informed written consent to the respondent’s receiving fees from Sonya, a third party, to represent her, the respondent violated Mass. R. Prof. C. 1.7(b) (lawyer may represent a client even with a concurrent conflict of interest if each affected client gives written informed consent).

147. Sonya paid the respondent \$600 on Zaina’s behalf, between February 1, 2019 and October 2, 2019, for the Second Bankruptcy Matter. There was no written consent. While we do not subscribe to the “no harm, no foul” theory, and while we recognize that harm is not an element of a Rule 1.7(b) violation, in the circumstances we find that the interests of Sonya and Zaina were more or less congruent and largely tracked one another.

148. We conclude that bar counsel has proved a technical violation of Rule 1.7(b). However, we will not increase our recommended sanction as the result of this particular

misconduct. (In our Recommended Disposition discussion, we note the sanction range for this misconduct should our decision not to include it be rejected).

149. In her PFCs, at ¶ 119, bar counsel argues that she had proved a Rule 1.8(f) violation against the respondent (do not accept compensation from someone other than the client without the client's consent) for his failure to obtain Zaina's consent to having her fees paid by her mother.

150. Bar counsel did not charge a Rule 1.8(f) violation in the Amended Petition for Discipline, and for that reason, we decline to find one.

151. Bar counsel charged that by filing the Unauthorized Pleadings in order to obtain an unauthorized fee, when he never represented Sonya in connection with the Graham Estate and when his representation of Sonya in all other matters had been terminated, the respondent violated Mass. R. Prof. C. 1.5(a) (do not make agreement for, charge or collect an illegal or clearly excessive fee), 3.3(a)(1), and 1.16(a)(3) (withdraw from representation after discharge).

152. We received no evidence on what, if any, fee the respondent was entitled to for his representation of Sonya. We are not in a position to say that the \$4,060 he sought was clearly excessive. Bar counsel has not proved this Rule 1.5(a) violation.

153. Bar counsel devoted no argument in her PFCs to the 1.16(a)(3) charge, and we find that it has not been proved.

154. We discuss below our findings and conclusions as to the Rule 3.3(a)(1) charge.

155. Bar counsel charged that by knowingly making, in the Unauthorized Pleadings, false statements of fact to a tribunal, the respondent violated Mass. R. Prof. C. 3.3(a)(1) and 8.4(d) and (h).

156. We find that the respondent intentionally misrepresented himself to the Probate Court as both the attorney for Sonya and the estate's fiduciary. He did this knowingly and with a single purpose in mind: to get paid from the excess proceeds.

157. As indicated, we make no finding as to what if anything the respondent's services to Sonya were worth. In this regard, we note that there were other avenues available to him to seek compensation that would not have involved lying and misrepresenting his status.

158. We find deeply troubling the respondent's brazen misrepresentations to the tribunal in the service of his own financial interests. He was not Sonya's attorney in any matter when he filed the Unauthorized Pleadings, and had never represented her in the Probate Court. He was never the estate fiduciary. We are especially struck by the fact of the respondent's timing: he seems to have timed his filings to follow the withdrawal of the probate estate's attorney, who could have explained to Sonya and Jewel what he was doing.

159. Even if the timing was coincidental, we conclude that bar counsel has proved violations of Rules 3.3(a)(1), 8.4(d) and 8.4(h).

Matters in Mitigation and Aggravation

Mitigation

160. The respondent has claimed in mitigation that he is well-regarded by the bankruptcy bar, and has made "a definite difference in bankruptcy practice, generally, in Massachusetts and nation-wide." Respondent's PHB, p. 14; Ans., p. 28.

161. A favorable reputation, as indicated by the Boston Magazine recognition, is not a mitigating factor. "Our standards of ethical practice apply to all attorneys, whether they are well known for their victories in high-profile cases or whether they practice law in quiet obscurity. Matter of Bailey, supra, 439 Mass. at 152, 19 Mass. Att'y Disc. R. at 34. "If anything, the fact that [an attorney] committed such grave misconduct despite his vast experience as a seasoned

litigator only serves to heighten the seriousness of his offenses.” Id.; see also Matter of Kennedy, 428 Mass. 156, 159, 14 Mass. Att’y Disc. R. 383, 388 (1998).

162. The respondent cites health problems, including ADHD, and the fact that he was hospitalized twice during the Hoover matter. Respondent’s PHB, p. 3; Ans., p. 28.

163. The respondent has introduced no medical records in support of ADHD or any other medical condition. He has not proved that any medical condition was “a substantial, contributing cause of the misconduct.” Without this proof, his claim fails. Matter of Zankowski, supra, 487 Mass. at 152, 37 Mass. Att’y Disc. R. at 569.

164. The respondent argues repeatedly that he has already been “punished” sufficiently for any transgression he may have committed. See generally Respondent’s PHB, p. 4: “A suspension is not likely to result in me learning anything new, which I believe to be the purpose of discipline, aside from punishment, and I have been punished in spades, I believe.”

165. This argument misconceives the purpose of discipline for ethical misconduct. It is not punitive, and it is not about a respondent’s private interests. “The question is not whether the respondent has been ‘punished’ enough. To make that the test would be to give undue weight to [a respondent’s] private interests, whereas the true test must always be the public welfare.” Matter of Nickerson, 422 Mass. 333, 337 (1996).

166. The respondent claims that “there is an issue as to whether Bar Counsel should be barred from bringing [Count One] on the grounds of laches,” where the misconduct occurred in 2014 and the petition for discipline was not filed until 2022. Respondent’s PHB, p. 2. The case he cites, Matter of Gross, 435 Mass. 445, 450, 17 Mass. Att’y Disc. R. 271, 277 (2001), states that while delay in bringing disciplinary proceedings does not result in their dismissal, “delay may be considered in mitigation.”

167. We do not agree that the delay was mitigating. The respondent has shown no prejudice as a result of the delay such as, for instance, necessary witnesses dying in the interim. See Gross, *supra* at 451, 278-279. His defense to Count One was based purely on his state of mind, and he made no claim that the passage of time had impacted his ability to remember what he was thinking when he made the misrepresentations.

168. Further, the respondent's last appeal in the Hoover matter was concluded in 2016. He did not pay the Court-ordered sanctions until 2018. As noted above, he never took the ethics course. We do not consider a petition filed in 2022, especially in light of the fact that some of the matters detailed in the petition did not resolve until 2021, to be grounds for mitigating delay.

Aggravation

169. The respondent is an experienced attorney. Our case law treats experience as an aggravating factor. Matter of Moran, 479 Mass. 1016, 1022, 34 Mass. Att'y Disc. R. 376, 387 (2018); Matter of Luongo, 416 Mass. 308, 312, 9 Mass. Att'y Disc. R. 199, 203 (1993). We agree that this is a factor in aggravation.

170. To the extent that the respondent claims he was not an experienced Probate Court litigant, Tr. 1:129 (Respondent), we reject his argument. Even a brand-new lawyer should recognize the perils and inappropriateness of misleading a court, and falsely signing papers as an attorney or fiduciary when no such relationship exists. This was not a signature on specialized papers or some detail about third parties or other facts. It was the signature on the very complaint that commenced the action, and asserting what he, himself, personally was not.

171. The respondent committed multiple rule violations. This is an aggravating factor. See generally Matter of Saab, 406 Mass. 315, 326, 6 Mass. Att'y Disc. R. 278, 289-290 (1989).

172. The respondent has been disciplined before. Matter of Baker, 23 Mass. Att’y Disc. R. 25 (2007) (public reprimand for lack of diligence and competence in real estate transaction, plus failure to disclose to settlement agent that HUD-1 did not reflect the actual terms of the sale, with no intent to defraud). Prior discipline, even if unrelated, is always a “substantial factor” in choosing a sanction. Matter of Dawkins, 412 Mass. 90, 96, 8 Mass. Att’y Disc. R. 64, 71 (1992).

173. The respondent lacked insight into or appreciation of his basic ethical obligations, and has not acknowledged the nature, effects, or implications of his misconduct. This is an aggravating factor. See Matter of Rosenberg, 491 Mass. 1027, 1029, 39 Mass. Att’y Disc. R. ___, ___ (2023) (lawyer's misconduct is further aggravated “by his abject refusal to appreciate the wrongful nature of his behavior”); Matter of Bailey, *supra*, 439 Mass. at 152, 19 Mass. Att’y Disc. R. at 34 (failure to recognize or appreciate wrongful nature of misconduct as factor in aggravation); Matter of Clooney, 403 Mass. 654, 657, 5 Mass. Att’y Disc. R. 59, 63 (1988) (finding aggravating conduct showing lawyer was “unmindful of certain basic ethical precepts of the legal profession”).

174. Underscoring the respondent’s lack of insight or appreciation for rules are our own observations of his conduct. A few examples illustrate this point.

175. He was dismissive and vague about his prior discipline, claiming in response to bar counsel’s question about it that he did not remember any details. Tr. 1:116 (Respondent). During the hearing, the respondent protested repeatedly that he did not understand Count Three where, as noted, in order to get paid, he intentionally misrepresented himself to a tribunal as a party’s lawyer and estate fiduciary. Tr. 1:28 (Respondent’s Opening Statement); Respondent’s PHB, p. 5. He challenged a question about his Count Two misconduct, concerning the document

requests at the heart of those charges, by stating that he “wasn’t expecting any of these questions.” Tr. 1:148 (Respondent). And finally, in addition to the prehearing failure to produce medical records, described above at p. 2, we note that despite being told that BBO Rules, § 3.44 was to guide him in his preparation of post-hearing materials (brief to contain statement of the evidence relied on, with “specific reference to the pages of the record or exhibits where such evidence appears”), he did not include a single record citation in his PHB, and he added much extra-record material.

176. Related to the respondent’s lack of insight and failure to acknowledge the wrongfulness of his action is his tendency to blame others. He blamed Botelho’s attorney for misnumbering the interrogatories as justification for his own “confusion” about his response to document requests. Tr. 1:147-148 (Respondent). He disclaimed responsibility for misleading the Probate Court by stating, repeatedly, that he was told to do what he did by someone in the clerk’s office. E.g., Tr. 1:128, 129, 135 (Respondent). And while we credit that he may have received general guidance, we find it wholly implausible that anyone at the Court told the respondent to sign documents as an attorney for a party he did not represent. See generally Commercial Wharf East Condominium Association v. Boston Boat Basin, LLC, 93 Mass. App. 523, 531 (2018) (actions of public officials ““are presumed to be regular and lawful””) (citation omitted). Blaming others is an aggravating factor. Matter of Cobb, 445 Mass. 452, 480, 21 Mass. Att’y Disc. R. 93, 126 (2005).

177. The respondent’s Count Three misconduct was largely motivated by his own financial interests and personal gain. This is a factor in aggravation. Matter of Hilson, 448 Mass. 603, 619, 23 Mass. Att’y Disc. R. 269, 289 (2007).

178. An attorney charged with misconduct is entitled to defend himself, but must do so while being candid with the hearing committee, not evasive or dishonest. It is up to us to “determine whether to credit the testimony and evidence, and [we] may consider in aggravation any lack of candor [we] find[.]” Matter of Zankowski, *supra*, 487 Mass. at 153, 37 Mass. Att’y Disc. R. at 571; Matter of Hoicka, 442 Mass. 1004, 1006, 20 Mass. Att’y Disc. R. 239, 243 (2004).

179. We find that the respondent was not candid with us. We have described many examples of this. One particularly glaring example was his argument that he had “never said in [the Probate Court] papers that I was representing Sonya in the probate court matter – I did represent her in housing and superior court” Respondent’s PHB, p. 6. This statement is preposterous. The respondent signed a pleading in Probate Court on the line marked “attorney.” Manifestly, he indicated to the Court that he was representing her; the Court, in turn, listed his name on the docket as her attorney. Ex. 30 (414). Further, by the time he filed these pleadings, he was no longer representing Sonya anywhere; that he had once done so is no defense and wholly irrelevant.

180. The respondent’s misconduct caused harm. He caused the Count Two client, Buscone, to have a default judgment enter against her, the result of which was that her considerable debt was not discharged. Even if she might not have prevailed on the merits, the loss of even a weak claim constitutes harm. Matter of Long, 24 Mass. Att’y Disc. R. 435, 444-445 (2008). The fact that Buscone has continued to use the respondent as her attorney, assuming this is in fact the case – there is no evidence on this point – could be for many reasons, and certainly does not mean he did not cause her harm. See Respondent’s PHB, p. 5.

181. Sonya Leak suffered harm in having to wait months for her share of the excess proceeds check. By the respondent's own admission, she was homeless and unemployed. Getting her paid should have been a matter of great urgency, and we cannot fathom how the respondent could have done so little to this end between October 15, 2020 and May 12, 2021.

Recommended Disposition

Bar counsel recommends a two-year suspension. The respondent recommends that the petition be "denied," or that we impose only "de minimus" discipline. We recommend a three-year suspension.

In recommending a sanction, we are guided by the mandate that "[e]ach bar discipline case is decided on its own merits. . . ." Matter of Zankowski, supra, 487 Mass. at 149, 37 Mass. Att'y Disc. R. at 566. "[E]ach attorney receives the discipline that is 'most appropriate in the circumstances,' taking into account 'what measure of discipline is necessary to protect the public and deter other attorneys from the same behavior.'" Id. (citations omitted). It goes without saying that we will not find a case precisely like this one, but certain themes are reflected in the case law, and we are attuned to the rule that our recommendation should not be "'markedly disparate' from judgments in comparable cases." Matter of Foster, 492 Mass. 724, 746, 39 Mass. Att'y Disc. R. ___, ___ (2023) (citation omitted).

We found, above, that in violation of Rule 3.3(a)(1), the respondent made an intentional misrepresentation of law to the Bankruptcy Court, an intentional misrepresentation of fact to a second judge of the Bankruptcy Court, and repeated intentional misrepresentations of fact under oath to the Probate Court. The presumptive sanction for intentional, factual misrepresentations to a tribunal not under oath is a one-year suspension. See Matter of Neitlich, 413 Mass. 416, 8 Mass. Att'y Disc. R. 167 (1992) (attorney perpetuated a fraud on court and opposing counsel by

misrepresenting the terms of a sale of real property); Matter of McCarthy, 416 Mass. 423, 9 Mass. Att’y Disc. R. 225 (1993) (attorney elicited false testimony and offered false documents in proceeding before rent control board). See also Matter of Harris-Daley, 31 Mass. Att’y Disc. R. 244, 250 (2015) (six-month suspension for two intentional misrepresentations that were “tangential to the merits of the proceedings,” one to the superintendent of schools, and one to the Court, in violation of Mass. R. Prof. C. 3.3(a)(1), 4.1, 8.4(c) and 8.4(h)); Matter of Macero, 27 Mass. Att’y Disc. R. 554 (2011) (one-year suspension for making misrepresentations and submitting false evidence material to a procedural ruling to Appeals Court in connection with untimely appellate filing fee, in violation of Mass. Rule Prof. C. 3.3(a)(1), 3.3(a)(4), 8.4(c), (d) and (h)).

Bar counsel notes that the Court Three misrepresentations were under oath, and cites Matter of Diviacchi, 475 Mass. 1013, 1020-1021, 32 Mass. Att’y Disc. R. 268, 280-281 (2016), for the proposition that for false testimony under oath, the presumptive sanction is a two-year suspension. Bar counsel’s PFCs, ¶ 125. This is correct. See generally Matter of Shaw, 427 Mass. 764, 770, 14 Mass. Att’y Disc. R. 699 (1998). We find, however, that the two-year rule has not always been followed. E.g., Matter of Maroun, 38 Mass. Att’y Disc. R. 309 (2022) (two-year suspension for lying in affidavit, in violation of Rule 3.3(a)(1), plus numerous other rule violations and significant aggravation); Matter of Merrill, 34 Mass. Att’y Disc. R. 347 (2018) (eighteen-month suspension, by stipulation, for misconduct including lying in affidavit filed with SJC for purposes of seeking reinstatement, in violation of Rules 3.3(a), 8.4(c), 8.4(d) and 8.4(h)); Matter of Freyleue, 29 Mass. Att’y Disc. R. 270 (2013) (eighteen-month suspension for varied misconduct in four counts, including declaring under penalties of perjury that schedules

submitted to bankruptcy court were accurate when lawyer knew they were not, in violation of Rules 3.3(a)(1), 8.4(c), 8.4(d) and 8.4(h)).¹⁹

We have not found many cases where a lawyer intentionally misrepresented the law to a tribunal; most of the Rule 3.3(a)(1) cases involve factual misrepresentations. Nevertheless, we have no hesitation in recommending a heavy sanction for the respondent's deliberate misrepresentations about the law. See Rule 3.3(a)(1), comment [4] ("legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. . . The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to a case").

In summary of our Rule 3.3(a) (1) discussion, we observe that "[t]he court system depends on the integrity of attorneys who appear before it." Matter of Moran, *supra*, 479 Mass. at 1023, 34 Mass. Att'y Disc. R. at 388. "As an officer of the court, an attorney is a 'key component of a system of justice,' . . . and is bound to uphold the integrity of that system by being truthful to the court and opposing counsel." Matter of Neitlich, *supra*, 413 Mass. at 423, 8 Mass. Att'y Disc. R. at 175 (citation omitted). The respondent's Rule 3.3 violations deeply undermined his duties to the Court, and to the system of justice.

We also found a Rule 3.1 violation. Standing alone, this would likely warrant no more than an admonition. E.g., Admonition 02-11, 18 Mass. Att'y Disc. R. 629 (admonition and CLE course for serving groundless c. 93A letter, causing recipient to incur time and expense, as well

¹⁹ See also Matter of Pezza, 29 Mass. Att'y Disc. R. 535 (2013) (year-and-a-day suspension, by stipulation, plus legal ethics course, for making statements in affidavit which were either knowingly false or made with reckless disregard for their truth or falsity, and signing under pains and penalties of perjury, in violation of Rules 8.4(c) and 8.4(d)); Matter of Livingstone, 27 Mass. Att'y Disc. R. 548 (2011) (stipulation to one-year suspension for lying in filed, notarized affidavit, under penalties of perjury, in violation of Rules 3.3(a)(1), 8.4(c), 8.4(d) and 8.4(h), with mitigation). Cf. Matter of Beaulieu, 29 Mass. Att'y Disc. R. 33 (2013) (stipulation to four-year suspension for repeated submission of inaccurate, inflated or false bills to CPCS, submitted under pains and penalties of perjury, with mitigation (promise of repayment), in violation of Rules 1.5(a) (excessive fees), 8.4(c) and 8.4(h)).

as for violations of Rules 1.3, 1.15(b) and 8.4(h), with mitigation); Admonition 00-53, 16 Mass. Att’y Disc. R. 530 (admonition for violation of Rules 1.3 and 3.1).

As is true in much of the case law we have reviewed, however, the respondent’s Rule 3.1 violation occurred in conjunction with many other rule violations. See generally Matter of Kaplan, BBO File No. C3-19-262446 (December 11, 2023) (Board Memo; Information pending before SJC) (eighteen-month suspension for extensive misconduct in the course of lawyer’s own divorce, including violations of Rules 3.1, 3.3(a)(1), 8.4(c), 8.4(d) and 8.4(h) for repeated misrepresentations to Probate Court, and 3.4(c) for repeated and willful failures to follow court orders, with aggravation); Matter of Collins, 39 Mass. Att’y Disc. R. __ (2023) (eighteen-month suspension for serial neglect, frivolous litigation, even after termination, knowing violation of Court orders, with aggravation (prior discipline for similar misconduct)); Matter of Belanger, 37 Mass. Att’y Disc. R. 25 (2021) (two-year suspension for repeatedly litigating matters that had been resolved, ignoring court orders and making intemperate comments about judges, in violation of Mass. R. Prof. C. 3.1, 3.4(c), 8.4(c)(d) and (h), and 8.2); Matter of Corona-Perez, 34 Mass. Att’y Disc. R. 63 (2018) (year-and-a-day suspension, after default, for numerous misrepresentations made to Court, and the filing of multiple frivolous appeals, relating to the ownership and possession of home owned by attorney’s former spouse, in violation of Mass. R. Prof. C. 3.1, 8.4(c) (d) and (h)).

We also found two violations of Rule 3.4(c), knowing disobedience of a court order. We recognize that the sanction for this can vary greatly. E.g., Matter of Grayer, 483 Mass. 1013, 35 Mass. Att’y Disc. R. 231, 236 (2019) (year-and-a-day suspension for varied misconduct, including violation of Court order, aggravated by prior discipline); Matter of Collins, supra,

(eighteen-month suspension for misconduct including disobeying court orders, among them an order to pay sanctions, resulting in contempt judgment).

We are aware that Rule 3.4(c) violations do not always result in a suspension. E.g., Matter of Manoff, 29 Mass. Att’y Disc. R. 421 (2013) (public reprimand, conditioned on a two-year period of accounting probation, for varied misconduct, including IOLTA accounting violations, negligent misuse of client funds, and intentional failure to appear at numerous payment review hearings in small claims court, resulting in the issuance of capiases for arrest, default judgments and late payments to court reporters); Matter of Campbell, 24 Mass. Att’y Disc. R. 86 (2008) (public reprimand for knowing violation of Probate Court orders and engaging in contempt of court, in violation of Rules 3.4(c), 8.4(d) and 8.4(h), with mitigation). Cf. Admonition 19-18, 35 Mass. Att’y Disc. R. 715, 722 (admonition appropriate where single Rule 3.4(c) violation, though intentional, was “the result of a split-second decision in the heat of trial”; admonition more appropriate than public reprimand for fleeting and limited misconduct).

In our view, violation of a Court Order is serious misconduct, undermining the respect due a tribunal and the solemn obligations imposed on lawyers. We would strongly urge that in the future, intentional Rule 3.4(c) violations be sanctioned more heavily.

Sanctions for the other rule violations we have found would likely range between a public reprimand and an admonition. See Matter of Carnahan, 449 Mass. 1003, 1005, 23 Mass. Att’y Disc. R. 56, 60 (2007) (absent “self-dealing . . . or egregious conflicts causing substantial injury,” public reprimand for conflict of interest); Admonition 22-24, 38 Mass. Att’y Disc. R. 660 (admonition for violation of Rules 1.7(a) and (b)); Admonition No. 22-18, 38 Mass. Att’y Disc. R. 641 (admonition for failure to promptly disburse funds, in violation of Mass. R. Prof. C.1.15(c), plus record-keeping violation); Admonition 20-02, 36 Mass. Att’y Disc. R. 487

(admonition and CLE for failure to have a written fee agreement and improper acceptance of compensation from non-client).

On balance, considering the serious, intentional misconduct and the numerous aggravating factors we have found, we recommend a three-year suspension. We are mindful of the fact that this is indeed a heavy sanction, but it is justified in our view by the gravity of the respondent's misconduct, including without limitation, serial violations over several years; multiple attempts to mislead several Courts; flouting of the Bankruptcy Court's order to take an in-person ethics class; disservice to clients; lack of self-awareness of the consequences of his actions; and an arrogant, steadfast refusal to admit the wrongdoing which resulted in the pending matter. We take seriously our duty to protect the public from dishonest lawyers, and conclude that a three-year suspension is the appropriate sanction here. In the event that the respondent's suspension is reduced to a suspension of less than a year-and-a-day, we strongly recommend that he be ordered to undergo a reinstatement hearing before he is readmitted to practice.

In addition, we respectfully suggest that a copy of the final decision in this matter be sent to the Chief Judge of the Suffolk County Probate and Family Court, the site of the respondent's sworn, intentional misrepresentations under oath to the Probate Court.

Dated: May 20, 2024

Respectfully submitted,

By the Hearing Committee,

/s/ Joshua M. Alper
Joshua M. Alper, Esq., Chair

/s/ D.R. Martin
D. R. Martin, Esq., Member

/s/ Barbara Neel
Barbara Neel, Member