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. GARRETT J. BRADLEY, ESQ., Respondent.	B.B.O. File No. C1-20-263667

MEMORANDUM OF BOARD DECISION

When class actions settle, courts face a fraught situation. In most such cases, the attorneys for the plaintiff class are entitled to a percentage of the settlement as a contingent fee, and the fee requires court approval. Fed. R. Civ. P. 23. Having compensated the plaintiffs in exchange for a release and dismissal, the defendants disappear, leaving no viable challenger to litigate the amount of the fee that will be taken from the class settlement. At that point, the proceeding becomes, effectively, *ex parte*. The plaintiffs' lawyers file a petition for their fees, which class members rarely question.

This bar discipline case exposes the pitfalls of class action settlements. Following resolution of a complex securities litigation, the respondent, Garret J. Bradley, the former managing partner of the Thornton Law Firm LLP ("Thornton"), signed a fee application, which contained several misrepresentations. After a series of newspaper articles, the federal judge overseeing the case questioned the veracity of Bradley's application as well as similar applications filed by other lawyers. Years of litigation ensued, ending in a report by a Special Master (adopted by the judge), finding Bradley and his co-counsel had misrepresented material

facts to the court. Bar counsel opened an investigation and ultimately filed a Petition for Discipline. After a hearing at which only the respondent testified, the majority of a divided hearing committee recommended a suspension of Bradley's law license for six months. A dissenting member (the public member) would recommend a suspension of two years. Both parties have appealed. Having reviewed the briefs and the record, we adopt the hearing committee's findings of fact and conclusions of law. Rather than its recommended sanction of a six-month license suspension, we recommend that the Supreme Judicial Court suspend the respondent's law license for six months and one day.

The Hearing Committee's Findings of Fact

On appeal, we must accept the hearing committee's findings of fact if they are supported by the evidence, paying particular deference to the committee's assessment of witness credibility. S.J.C. Rule 4:01, Section 8(5); B.B.O. Rules, Section 3.53. As we will discuss in the course of this opinion, we adopt the facts found by the committee majority.

In 2011, the Arkansas Teacher Retirement System (ATRS) sued State Street Bank (State Street), alleging that State Street had defrauded investors in a complex scheme involving alleged overcharges in foreign exchange transactions. Thornton was one of the firms representing ATRS, and a firm out of New York City, Labaton Sucharow LLP (Labaton) was lead counsel. The details of the dispute need not concern us. Years later, in 2016, the case settled. On September 15, 2016, Labaton filed a motion seeking final approval of a settlement agreement, a plan to allocate settlement funds, and a final certification of the class. The case settled for $300 million. In addition, Labaton filed on behalf of all plaintiffs' counsel a motion for an award of legal fees and expenses in the amount of approximately $75 million to be divided among the plaintiffs' attorneys. As is typical in such cases, the federal judge utilized a lodestar cross-check method of

evaluating the reasonableness of the fee request. This method requires each law firm to file an hourly fee application setting forth the numbers of hours of work performed by attorneys in their respective firms multiplied by the attorneys' hourly rates. With this information, the judge then decides if the requested contingent fee ($75 million here) would be reasonable based on the lodestar multiplier. Arkansas Teacher Retirement System v. State Street Bank & Trust Company, 2020 WL 949885 (2/27/2020), at *2 (Wolf, J). Bradley was familiar with the lodestar method of determining a reasonable contingent fee in class action settlements, although he had limited experience in class action securities litigation.

On August 31, 2016 (prior to the filing of the settlement agreement in September but after the case had been settled, which occurred in July), a lawyer at Labaton circulated to the other law firms a form declaration for use in the fee requests. At some point between August 31 and September 14, two of Bradley's partners inserted Thornton-specific information on the form declaration. The insertions described the services Thornton lawyers had performed as well as representations concerning an attachment (Exhibit A). Exhibit A listed the names of the Thornton lawyers and paralegals who worked on the case, the number of hours each worked, and the hourly rate for each attorney or paralegal. The declaration itself was four pages, the first page comprised entirely of the case caption and the fourth page containing only a signature line. In other words, the text of the declaration occupied two pages. Exhibit A was a two-page table of names, employment status with the firm, hourly rate, total hours, and total lodestar calculation.

On September 14, 2016, Bradley signed his declaration, which was then sent to Labaton.[1] He had no involvement in the drafting of the documents and saw them for the first time when

[1] Although not specifically highlighted by the hearing committee, Bradley signed the document solely because he was managing partner of the firm. The evidence gives the impression that Bradley was not deeply involved in litigating the case. When presented with the document, he asked his partner, "'Why me'? He said, 'You just became managing partner,' and it made sense I guess that I would be the affiant." (Hearing Transcript, page 72,

they were given to him for signing. (Hearing Transcript, page 79, lines 12-17; page 87, lines 10-15). The page he signed was blank except for the following: "I declare under the pains and penalties of perjury that the foregoing is true and correct. Executed on September 14, 2016." Paragraph 3 of the declaration stated the following: "The schedule attached here as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions [sic], and the lodestar calculation based on my firm's current billing rates. … 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. …" Paragraph 4 said, "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." Based on the foregoing, the Thornton firm sought a total lodestar of $7,460,139 based on 15,302 hours of work.

On November 2, 2016, the federal court judge approved the joint fee application of all the plaintiffs' attorneys in the amount of $75 million.

The hearing committee majority credited Bradley's testimony that he did not carefully read his declaration in its entirety before he signed it. (Hearing Committee Report (HCR) ¶ 14). He read page two and "flipped through" page three "with sufficient comprehension to discern that it consisted of 'boilerplate'." (HCR ¶ 28, *quoting* Respondent's testimony). He admitted doing nothing to confirm the accuracy of the information, relying on those who prepared the documents and his partners, who presented the documents to him for signing. Specifically, the

lines 3-5). In addition, Bradley testified that he had little experience in filing fee petitions in class actions. (Hearing Transcript, page 85, line 18 – page 86, line 4). In the firm, he focused on client development, not litigation. (Hearing Transcript, page 61, line 22 – page 62, line 8).

majority wrote that they credited Bradley's recollection 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 the contrary." (HCR ¶ 24).[2]

Unanimously, the hearing committee agreed that the declaration and Exhibit A misrepresented material facts, upon which the federal judge relied when he approved the settlement as well as the fee petition. Paragraph 4 of the declaration stated that the hourly rates were "the same as my firm's regular rates charged for their services, which have been accepted in other complex class action." While the latter part of the sentence was true (the rates had been accepted in other cases), Thornton handled only contingent fee litigation and had never charged a client an hourly rate. As the hearing committee observed, "A reasonable reviewer of the body of the declaration would have understood there was some basis for identifying an hourly rate, and that the basis was work for which some client paid on an hour basis. There were no such clients." (HCR fn. 18).

Exhibit A listed 23 staff attorneys ("SA" on the list) as Thornton employees with regular billing rates of $425 per hour. Thornton did not employ these 23 lawyers; they were employed by (or contracted with) the Labaton firm or another plaintiffs' law firm, Lieff Cabraser ("Lieff").[3] Through a cost-sharing arrangement, Thornton reimbursed Labaton and Lieff a portion of the staff attorneys' salaries, but Exhibit A listed all hours for these lawyers, not just the hours that Thornton reimbursed, giving the impression that all staff attorneys were employed by the firm

[2] This finding (paragraph 24) is a little obscure. We infer that the hearing committee majority rejected a suggestion from bar counsel that the respondent read the two documents in their entirety, noticed the false statements, knew they were false, but signed the declaration despite his knowledge. In other words, the finding supports the majority's subsequent conclusion that the respondent's misrepresentation was negligent, not intentional.

[3] Labaton listed 17 of the same lawyers on its own submission, while Lieff listed the other six, leading to these attorneys being double-counted. At the hearing in this case, Bradley admitted that attributing a $425 hourly rate to the 23 staff attorneys was deceitful, since they had never charged that amount. He admitted that he had communicated with Labaton and Lieff about supporting the hourly rate, knowing that it would be filed in court. (HCR ¶ 26).

and had been paid by the firm. But under the cost-sharing arrangement, Thornton paid only a percentage of the staff attorneys' salaries. In addition to being listed on the Thornton application, 17 of the lawyers were listed by Labaton and six by Lieff on their own, separate fee petitions. Moreover, those lawyers had never worked for Thornton, which had never charged any client $425 per hour. The hearing committee majority interpreted these mistakes as "inadvertent and not intentional." (HCR ¶ 36). However, Bradley admitted that during the course of the case, he had discussed with Lieff and Labaton a rate for the staff attorneys, and they agreed to use $425 per hour. (Hearing Transcript, page 89, line 13 – page 90, line 13).

On a contract basis, Thornton also utilized the legal services of Michael Bradley (the respondent's brother). Exhibit A listed his hourly rate as $500. Michael Bradley had never charged a client $500 per hour.[4]

The inaccuracies came to light in a series of articles in the Boston Globe starting in November 2016. The article focused on the double-counting of the staff attorneys. As a result, Labaton wrote a letter to the court on its own behalf and on behalf of Thornton and Lieff. The letter admitted to an "inadvertent" error in listing the same attorneys on duplicate petitions, which caused the firms' collective lodestar to be incorrectly inflated by more than 9,300 hours and more than $4 million. At the hearing in this case, Bradley admitted he noticed the error about the staff attorneys as soon as he reviewed the documents after the Globe article appeared. After reading the article, Bradley compared the Exhibit A attached to his declaration with those from the other plaintiffs' firms and noticed the duplication. The hearing committee noted that,

[4] Michael Bradley's $500 hourly rate did not appear out of thin air. In 2013, when Bradley asked his brother to work on the case, they agreed that, if they eventually earned a contingent fee, they would use that figure. They both knew that Michael Bradley had never charged a client that amount; on a single matter, he had charged a client $450 per hour, but much of Michael Bradley's practice focused on court-appointed criminal defense work, for which the maximum hourly rate was $53.

"[h]e also must have observed his declaration's exhibit identifies these individuals (plus Michael Bradley) with the designation for their 'Status' as 'S' [staff attorney]" for the Thornton firm. … Respondent failed to correct these misrepresentations in November 2016." (HCR ¶ 34). He justified his inaction on the theory that the other firms should have corrected their documents, testimony which the majority accepted. (HCR ¶ 35).[5] However, the full committee agreed that Bradley should have clarified that Thornton had never charged a client $425 for the work of the 23 staff attorneys. (HCR ¶¶ 35 and 41-42). The full committee also agreed that the declaration untruthfully identified these lawyers, including Bradley's brother, as "employees" of the Thornton firm. (HCR ¶¶ 38 and 41). While the committee majority did not interpret the list of staff attorneys as fraudulent (since Thornton was responsible for paying a part of their salary; the problem arose from listing them on multiple declarations without clarification), it did find deception in characterizing the staff as Thornton employees with "established hourly billing rates" of $425 and allocating all of their work to Thornton. (HCR ¶¶ 23 and 85).

As with the original filing, the hearing committee majority found that bar counsel did not carry his burden to show that Bradley read his declaration in its entirety when he reviewed it after the Globe article appeared in November 2016. He "did not in November 2016 review his declaration for other potential errors … and accordingly was not at the time aware there were other potential errors." (HCR ¶ 41).

[5] In its letter to the judge, Labaton fell on its sword and admitted it should not have included in its exhibit the 17 lawyers who were duplicated on the Thornton exhibit. Labaton also allowed that, of the remaining six lawyers, two were appropriately allocated to Thornton, while most of the work of the remaining four should have been assigned to the Lieff firm. (HCR ¶ 36). Based on this, the majority of the hearing committee found that 19 of the 23 staff attorneys were correctly listed on Exhibit "A" to Bradley's declaration and that, of the remaining four attorneys, two were also properly listed with Thornton. (HCR para. 56).

Another Globe article appeared in December 2016, raising the issue of Michael Bradley's listing as a Thornton staff attorney and his hourly rate of $500. Bradley did not explain his brother's role to the court at that time.

On February 6, 2017 the judge scheduled a hearing for March 7, 2017. At that time, Bradley reviewed his declaration in full. At no time prior to the hearing did Bradley provide additional information, other than the disclosures in the November Labaton letter. At the March hearing, a lawyer representing Thornton acknowledged that Michael Bradley was not a Thornton employee and that neither the firm nor Michael Bradley had ever billed his time at $500 per hour.

The judge appointed a Special Master to look into the billing issues. The process took about two years, at the conclusion of which the Special Master reported to the judge on his findings. Ultimately, the court reduced the total fee for the plaintiffs' lawyers from $75 million to $60 million and reallocated the specific amount owed to each firm.

The Bar Discipline Case

On November 30, 2021, bar counsel filed a single-count Petition for Discipline, which was subsequently amended. Bar counsel alleged that Bradley had violated the following Massachusetts Rules of Professional Conduct: Rule 1.3 (diligence); Rule 3.3(a)(1) and (d) (candor toward the tribunal); Rule 3.4(c) (fairness to opposing party and counsel); Rule 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); 8.4(d) (conduct prejudicial to the administration of justice); and 8.4(h) (conduct adversely reflecting on lawyer's fitness to practice law). The only witness to testify at the hearing was the respondent, who was called by bar counsel in his case in chief. His lawyer asked no questions.

A majority of the hearing committee concluded that bar counsel proved violations of Rules 1.3 and 8.4(d). The committee concluded that Bradley should have read, but failed to read,

the declaration in its entirety before he signed it. Based on the same theory, the majority concluded that the misconduct was prejudicial to the administration of justice and therefore violated Rule 8.4(d). The committee majority ruled that bar counsel had failed to carry his burden to show that Bradley's false statements were knowingly false (HCR ¶ 52), but it held that his failure to read the document violated Rule 8.4(d). (HCR ¶ 53). Although holding that Rule 8.4(d) may be violated based on reckless indifference, the committee majority ultimately landed on a finding that, "the respondent was negligent in not reading the declaration in its entire before signing it, in relying on his partners' work product … and in not independently verifying the information provided in Exhibit A would be understood by the District Court especially considering how that exhibit was described in the declaration itself." (HCR ¶ 54) (emphasis supplied). Under the same reasoning, the committee concluded that the respondent had engaged in other misconduct reflecting adversely on his fitness to practice both at the time of the filing and when the errors were brought to his attention. Mass. R. Prof. C. 8.4(h).

Rule 3.4(c) (knowingly disobeying one's obligations under the rules of a tribunal) prompted a discussion of Rule 11(b) of the Federal Rules of Civil Procedure, which provides that when a lawyer signs a document filed in court, he thereby certifies that he has made a reasonable inquiry as to the facts contained therein and that those facts have evidentiary support. By admittedly not reading his declaration, Bradley failed to verify its contents before signing and filing it, a violation of Rule 11 according to the committee. Based on the violation of Rule 11 of the Rules of Civil Procedure, the committee held that Bradley violated Rule 3.4(c) of the Rules of Professional Conduct.

Relying on its credibility-based factual finding that Bradley had not read his declaration in its entirety, the committee majority concluded that bar counsel had not carried his burden to

prove a violation of Rule 3.3(a)(1) (knowingly false statement of fact to tribunal or failure to correct false statement of material fact). For the same reason, the majority rejected bar counsel's allegation that Bradley violated Rule 3.3(a)(3) (offering evidence lawyer knows to be false). Nor did bar counsel, according to the majority, establish a violation of the second clause of Rule 3.3(a)(3), which requires attorneys to correct (including in certain situations by disclosure to the court) materially false evidence that was previously submitted. On this point, the majority of the committee reasoned that Bradley could safely rely on Labaton's disclosure letter to the judge concerning the double-counting of the staff attorneys. Further, the majority figured, there was no duty to clarify other discrepancies before the hearing in March 2017.[6]

The committee did not reach a firm conclusion whether Bradley violated Rule 3.3(d), which applies in situations where a lawyer appears in court *ex parte* and which requires lawyers to advise the court of all known material facts to allow the court to make an informed decision.[7] Based on its finding that Bradley's misadventures were negligent, not intentional, the committee majority held that it would find a violation of Rule 3.3(d) only if the rule could be violated based on negligence or inadvertence. Presumably, the majority looks to us for guidance.

Similarly provisional was the majority's "conclusion" whether Bradley violated Mass. R. Prof. C. 8.4(c). The majority considered precedent in which lawyers were held to have engaged in "dishonesty, fraud, deceit or misrepresentation" where their misstatements resulted from negligence. Despite the negligence finding, the majority has recommended that we find a

[6] This conclusion is somewhat inconsistent with the majority's other conclusion that Bradley violated Mass. R. Prof. C. 8.4(h) when he "failed to make a seasonable and self-initiated correction to the District Court" in November 2016. (HCR para. 69).

[7] Comment [14A] to Rule 3.3 anticipates this precise circumstance. It provides that the filing of a joint fee application for approval of a class fee award is, in all respects, an *ex parte* proceeding, since it is not adversarial.

violation of the rule only if, "a negligent misrepresentation would, under the cases cited, result in either a public reprimand or a short suspension." (HCR ¶ 68).

All but one of Bradley's proffered factors in mitigation landed on deaf ears. The committee rejected his argument of selective prosecution, which was based on a theory that filing boilerplate declarations is a matter of routine and never-before-disciplined practice in Massachusetts and elsewhere. The committee also did not consider the adverse publicity of the case as mitigating, noting that publicity may be considered an aggravating factor. Other arguments -- such as lack of disciplinary history, the outstanding result achieved for the clients, and the large payment the Thornton firm (along with Labaton and Lieff) had to pay for the Special Master – were considered typical mitigating factors and given no weight. On the other hand, the majority took into consideration as "mitigation" the respondent's reliance on the form declaration prepared by Labaton and which was used "by essentially every plaintiff's firm involved in this case." (HCR, fn. 19).[8]

In aggravation (in addition to the publicity of the case discussed in the prior paragraph), the committee agreed with bar counsel to take into account Bradley's extensive experience as a lawyer. It rejected the argument that he had engaged in multiple violations of the rules, observing that the misconduct stemmed from a single incident. The committee did not consider uncharged misconduct such as a violation of Rule 1.1 (competence), since the same misconduct violated other rules.

In recommending a penalty, the committee majority recognized that Bradley knew the federal judge would rely on his declaration and the attachment as part of a well-established

[8] Later in its opinion, the majority declined to find mitigating the respondent's reliance on others who prepared his declaration, holding that the ethical obligation of diligence is non-delegable. (HCR ¶ 76). Regardless of this inconsistency, we will address this point later in our opinion.

process for approving attorneys' fees in class actions. It recognized that he knew or should have known the declaration was misleading, even if he failed to read the entire document or ask questions about it. Despite all that, the majority leaned heavily on its finding that the crux of the misconduct was negligent, not intentional. It therefore recommended a license suspension of six months.

In dissent, the public member disagreed with his colleagues' view that Bradley acted negligently and not with an intent to deceive, interpreting the facts as showing that Bradley had read the entire declaration. He noted an inconsistency between the declaration signed under the pains and penalties of perjury that the document was "true and correct" with Bradley's testimony denying that he read the document in its entirety. In other words, the dissenter did not believe Bradley's denial. In the alternative, even if Bradley did not read the entire document and therefore did not know its falsity, the dissent viewed his conduct as willfully blind, the equivalent to actual knowledge. Even this theory was implausible to the public member, who opined that Bradley had reason to know the declaration contained false information even if he had not read it (for example, the attachment listed his brother as a firm employee with a customary hourly rate of $500). Under the latter two theories, the dissent viewed the dispute about credibility as irrelevant, holding Bradley to reckless misconduct regardless of whether he read the documents in full. In aggravation, the dissenting member would have increased the sanction based on his view that Bradley testified falsely at the hearing and did not understand the wrongfulness of his conduct. The dissent would have us recommend a license suspension of two years.

Both sides have appealed. Bradley seeks an undefined sanction "less severe" than the six-month license suspension recommended by the hearing committee majority, while bar

counsel urges us to adopt the recommendation of the dissenting member of the hearing committee … a two-year suspension.

Discussion

Legal Analysis

We start with credibility. The hearing committee majority found credible Bradley's testimony that he did not thoroughly read the entire declaration. (HCR ¶ 14); B.B.O. Rules, Section 3.53 (hearing committee is "sole judge of the credibility of the testimony presented at the hearing"). Instead, he flipped through it and signed his name. We must defer to this finding unless it is contradicted by others. There are none. Bar counsel points to no record evidence that Bradley carefully read the entire document before he signed it.[9] Accordingly, we accept as fact that the respondent did not read in full his declaration or Exhibit A. Similarly, bar counsel did not prove that, even without reading the documents, Bradley had actual knowledge of their contents and that, with respect to the double-counting of staff attorneys, he knew other firms had included the same people on their declarations. In sum, bar counsel did not carry his burden to demonstrate a knowingly false statement of fact to a tribunal.

Nor do we conclude that the conduct was "willfully blind" to the truth, which is tantamount to a knowingly false statement in our jurisprudence. Matter of Zimmerman, 17 Mass. Att'y Disc. R. 633, 646 (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"). On the one hand, the conclusion has some logic to it. If Bradley had read the documents in their entirety, it is unlikely he would have acted

[9] Bar counsel argues that Bradley's testimony was contradicted by the fact that he signed the declaration under the pains and penalties of perjury as being "true and correct." This is not evidence; it's argument. Nothing in the record suggests that Bradley actually read the entire document. The signature creates other issues for the respondent as we will discuss, but it does not contradict his testimony.

differently. Thus, one could infer that he did not care to know what was in them. For example, he must have known that his brother was listed as a firm employee with an hourly rate of $500. With respect to the staff attorneys, there was evidence in the record that Bradley and other attorneys discussed how to support a rate of $450, presumably knowing that none of the lawyers had ever charged a client hourly at that rate.

The flaw in the theory is that it is only that, a theory. It's speculative. We do not know what Bradley would have done if he had read the entire declaration. We would have to infer an intention for which there is no evidence. Moreover, the theory relies on a premise for which there is no proof … actual knowledge of deceit. As described in the declaration, the hourly rates for all attorneys were "my firm's regular rates charged for their services, which have been accepted in other complex class actions." (emphasis added). Bradley could reasonably have interpreted that sentence, particularly the highlighted clause, as accurate insofar as it was confined to complex class actions. Similarly, the lawyers listed as "staff attorneys" were paid in part by Thornton, the problem being that other firms listed them as well. Bradley would not have known that fact based solely on reading his declaration and Exhibit A. Michael Bradley had worked on the case, although he was not an employee of the law firm. The brothers had discussed attributing to him an hourly rate of $500, the identical rate in the declaration. For us to conclude that Bradley acted with willful blindness, there would have to be evidence that he knew or had reason to know the statements were false and chose not to look.[10] But on their face, the statements would not necessarily have appeared to be untrue. In other words, even if he had read Exhibit A line-by-line, nothing would have alerted him to any problems.

[10] Perhaps bar counsel could have resolved the doubt by calling additional witnesses, such as the partners who presented the document to Bradley for signing or the lawyers from Labaton and Lieff who worked with him on the fee application. Bar counsel could have called Michael Bradley to the stand. He chose not to, electing to present his case with the respondent as his only witness.

Context is critical. The hearing committee found that the offending declaration was commonly used. Indeed, Bradley was aware that the Lieff firm had used an identical application in another class action. (Hearing Transcript, page 89, line 13 – page 90, line 13). Other firms in the case employed identical forms. We should not reach for a conclusion against one lawyer where others engaged in the same conduct.[11]

On appeal, bar counsel argues that Bradley knowingly misrepresented facts to the court because he signed under the pains and penalties of perjury that the declaration was "true and correct." He argues that Bradley "implicitly misrepresented that he had *read* the document and was familiar with its contents." (Bar Counsel's Brief on Appeal, p. 11) (emphasis in original). As discussed in footnote 9, bar counsel's reliance on the signature misconstrues its significance. That Bradley falsely certified the document was "true and correct" or that (implicitly) he had carefully read it in full does not divulge his state of mind. One can make a false statement intentionally (including with reckless indifference to the truth) or one can make a false statement carelessly, for example by not confirming the facts.[12]

Similarly, the conclusion that Bradley violated Rule 11 of the Federal Rules of Civil Procedure does not prove a knowingly false statement. Rule 11 holds lawyers to the facts in documents they file in court. Signing a pleading (such as a declaration) certifies that the lawyer has made a reasonable inquiry about the facts and that those facts have evidentiary support. To repeat, Bradley did not make a reasonable inquiry and some of the facts did not have evidentiary

[11] Our finding does not support the respondent's mitigation argument of selective prosecution. (HCR ¶ 70). We do not find that bar counsel improperly singled out Bradley. On the other hand, our analysis of the facts, including Bradley's state of mind, is informed by the prevalence of the practice.

[12] We're not persuaded by bar counsel's analogy to cases where lawyers sign affidavits for another person. (Bar Counsel's Brief on Appeal, p. 13). Those cases present a very different situation, where the act of signing is indisputably and intentionally false.

support.[13] The conduct violated Rule 11 and Rule 3.4(c). But a violation of those provisions does not automatically violate Rule 3.3(a)(1). If it did, every pleading signed by a lawyer with incorrect facts would violate the rule. The consequences would be even more dire for inaccurate affidavits, which carry a presumptive sanction of a two-year license suspension for lying under oath. Matter of Diviacchi, 475 Mass. 1013, 32 Mass. Att'y Disc. R. 268 (2016).

Accordingly, we agree with and adopt the committee majority's legal conclusion that the respondent did not act in breach of his duties of candor toward the tribunal under Mass. R. Prof. C. 3.3(a)(1) ("A lawyer shall not knowingly … make a false statement of fact or law to a tribunal …") (emphasis added). For the same reason, we adopt the majority's conclusion that he did not violate Rule 8.4(c) by engaging in "dishonesty, fraud, deceit, or misrepresentation."

In a very few cases, lawyers have been charged under Rule 8.4(c) for negligent misrepresentations and have admitted to the charge. These cases resulted in stipulated dispositions. *See, e.g.*, Matter of Faro, 35 Mass. Att'y Disc. R. 122 (2019); Matter of Ged, 20 Mass. Att'y Disc. R. 159 (2004); Matter of Tiberii, 12 Mass. Att'y Disc. R. 546 (1996). Neither we nor the court has opined whether a negligent misstatement may run afoul of the rule. A plain reading of the rule suggests otherwise. "Dishonesty," "fraud" and "deceit" all denote deliberate acts. While the common law recognizes the tort of negligent misrepresentation, it would be anomalous and confusing to include a negligence standard in a rule where three of the four terms unequivocally require a showing of deliberate misconduct. It would be prejudicial to lawyers, who reasonably would expect the rule to exclude negligence. Accordingly, we hold that Rule 8.4(c) requires bar counsel to prove a deliberate falsehood or willful blindness to the truth of the

[13] For this reason, we agree with and adopt the hearing committee's conclusion that Bradley violated Rule 3.4(c) by disobeying his obligations under a court rule.

matter. Since bar counsel did not do so here, there was no violation. A "negligent misrepresentation" does not cut it.

Our colleagues in dissent express concern that our decision will encourage lawyers to turn a blind eye to their duty to review documents before filing them. If a careless failure to read a document would result in a lighter sanction, it would behoove attorneys to not read what they sign. We do not share this concern. Each case will be judged on its own merits and based on its own facts. Like all cases, the facts of this matter are unique. We would not accept an unsupported defense that a respondent did not read a document before signing. Moreover, the failure to read a pleading, even if proved, would not be exculpatory, as we discuss below; it goes only to state of mind.

The inquiry does not end there. Taking Bradley at his word, we adopt the committee majority's conclusion that he failed to act with diligence and therefore violated Mass. R. Prof. C. 1.3. The committee had a sufficient basis for the finding. Bradley admitted that he failed to do anything to verify the accuracy of the information in his declaration. He inappropriately relied on others who prepared the documents. We have held other lawyers in breach of Rule 1.3 for carelessness when reviewing documents filed in court. *See, e.g.*, Matter of Fitzgerald, 35 Mass. Att'y Disc. R. 137 (2019).

For the same reasons, Bradley's actions prejudiced the administration of justice. Mass. R. Prof. C. 8.4(d). In Matter of Serpa, 20 Mass. Att'y Disc. R. 358 (2014), an attorney's contract with the Committee for Public Counsel Services entitled him to be paid for representing indigent criminal defense clients but precluded him from receiving payment from the same clients. In one case, the lawyer was paid by both CPCS and the client. Years later, without reviewing his records, the lawyer filed an affidavit that incorrectly denied the client had paid him. The

misrepresentation was "intemperate and negligent to the point of being reckless" and contravened Rule 8.4(d).

Next we address whether Bradley should have done more after he read the two articles in the Boston Globe about the fee petition. As discussed, counsel for Labaton wrote to the judge to explain the duplicate billing of staff attorneys. We agree with the hearing committee (the dissenting committee member does not appear to disagree) that Bradley could reasonably and appropriately rely on the Labaton letter to explain the issue to the judge; there was no need for his own, separate explanation. The conduct did not violate the second clause of Rule 3.3(a)(3), which requires reasonable measures to correct prior material misstatements. We also agree with and adopt the hearing committee's finding and conclusion that it was reasonable for Bradley to wait until the hearing on March 7, 2017 to more fully discuss the other issues with the declaration such as the billing rates and the inclusion of Michael Bradley as a Thornton employee. Indeed, there was no evidence that Bradley reviewed his declaration (as opposed to the Exhibit A) prior to the order from the judge on February 6, 2017 scheduling the March hearing. Accordingly, we conclude that bar counsel failed to prove a violation of the second clause of Rule 3.3(a)(3).

We agree with and adopt the committee's conclusion that Bradley violated Rule 3.3(d). The rule imposes a heightened duty of disclosure in *ex parte* matters. Bradley was under a duty to "inform the tribunal of all material facts known to [him] that will enable the tribunal to make an informed decision, whether or not the facts are adverse." Because State Street had no interest in the fee award, it was incumbent on Bradley and his co-counsel to fully disclose the facts to the judge. Indeed, comment [14A] to the rules uses class action fee litigation as an example of an *ex parte* matter requiring fulsome disclosure.

Lastly, we address Mass. R. Prof. C. 8.4(h) (other misconduct reflecting adversely on a lawyer's fitness to practice). The hearing committee concluded that bar counsel proved a violation of the rule, because filing a declaration without reading it is a clear dereliction of one's ethical duties. We agree. On the other hand, we do not agree that the failure to correct the material prior to the March 2017 hearing violated the rule, since we have concluded that Bradley had no such duty.

We adopt the majority's conclusions as to aggravation and mitigation, although we do not see Bradley's defense of reliance on others as mitigating; rather, it pertains to his state of mind and general culpability. Lack of prior discipline, achieving a good result for a client, and adverse publicity are not considered special mitigating factors under our case law and deserve no formal recognition. That the lawyers paid the Special Master substantial fees pursuant to a court order is not mitigating; if they had not done so, we would have considered the failure in aggravation.

We agree with the committee that adverse publicity should be an aggravating factor. We disagree with Bradley that he has been "punished enough." When a case receives widespread publicity in the general public, it brings disrepute to our profession, requiring us to consider it in imposing a sanction. Such are the pitfalls of a prominent case or a prominent lawyer. Matter of Nissenbaum, 34 Mass. Att'y Disc. R. 410, 444-445 (2018) (cited in Matter of Foster, 2022 WL 20438225 at *16 (Board Decision, June 30, 2022)); Matter of O'Donnell, 5 Mass. Att'y Disc. R. 279 (1987) (publicity surrounding attorney's criminal conviction); Matter of Killam, 388 Mass. 619 (1983) (judge). We will not elevate a lawyer's private interests over the public welfare. Matter of Nickerson, 422 Mass. 333, 337, 12 Mass. Att'y Disc. R. 367, 375 (1996); *see also*, Matter of D'Amato, 29 Mass. Att'y Disc. R. 159-160 (2013) (rejecting argument that passage of

time since misconduct was "punishment enough"). We also consider in aggravation, as did the committee, Bradley's extensive experience as an attorney.

Sanction Recommendation

We have concluded that Bradley violated Rules 1.3, 3.3(d), 3.4(c), 8.4(d) and 8.4(h) of the Massachusetts Rules of Professional Conduct. We have found two aggravating factors and none in mitigation.

As we do in every matter, we endeavor to recommend a sanction that is not markedly disparate from similar situations, giving due deference to the individual circumstances of each case and respondent. Matter of Foley, 439 Mass. 324, 333, 19 Mass. Att'y Disc. R. 141 (2003); Matter of the Discipline of an Attorney, 392 Mass. 827 (1984); *see also* Matter of Foster, et al., *supra*, 492 at 746 ("To ensure that a recommended disciplinary sanction achieves its desired ends, we focus our review on whether it is 'markedly disparate from judgments in comparable cases'"), *quoting* Matter of McBride, 449 Mass. 154, 163, 23 Mass. Att'y Disc. R. 443 (2007). Our primary focus is "the effect upon, and perception of, the public and the bar." Matter of Finnerty, 418 Mass. 821 829, 10 Mass. Att'y Disc. R. 86, 95 (1994) *citing* Matter of the Discipline of an Attorney, *supra*. "The primary purpose of the disciplinary rules and accompanying proceedings is to protect the public and maintain its confidence in the integrity of the bar and the fairness and impartiality of our legal system." Matter of Foster et al., 492 Mass. at 746. "The appropriate level of discipline is that which is necessary to deter other attorneys and to protect the public." Matter of Curry, 450 Mass. 503, 520-521, 24 Mass. Att'y Disc. R. 188, 223 (2008).

We agree with the hearing committee majority that a six-month license suspension generally comports with our precedent. Both parties have referred us to Matter of Serpa, *supra*,

albeit for different reasons. Attorney Serpa's license was suspended for sixty days after he lied to the court about a private payment from a supposedly indigent client, whom he was also paid by the state to represent. Bar counsel characterizes that case as less serious than this one, because Attorney Serpa "mistakenly believed that what he was stating in his affidavit was true; and his recklessness was in failing to check his records before making the mistaken misrepresentation." (Bar Counsel's Brief on Appeal, fn. 10). Bar counsel views Bradley's misconduct as more serious because, "he did not even read his declaration to know what it was he was representing to the court." (Id). For his part, Bradley excoriates Serpa as "far more serious." (Respondent's Brief on Appeal, p. 15). Both in his affidavit and in court, the respondent in that case repeated his falsehood that his former client had not paid him, potentially having an impact on the client's motion for a new criminal trial.

We find Serpa instructive, insofar as it involves a negligent misrepresentation to a court in an affidavit. However, we view the present matter as more serious for several reasons. First, Bradley's misrepresentation took place during an *ex parte* hearing, where he had a greater duty of care and candor to the court. Mass. R. Prof. C. 3.3(d). In addition, he violated Rule 11 of the Federal Rules of Civil Procedure and therefore Rule 3.4(c) of the Massachusetts Rules of Professional Conduct. In addition, his carelessness significantly impaired the administration of justice. Mass. R. Prof. C. 8.4(d). Because of his carelessness, the federal judge expended significant time and resources on a matter ancillary to the litigation. He appointed a retired judge as a Special Master. There was discovery, depositions, expert witnesses, and evidentiary hearings. All because Bradley and his co-counsel did not take care to file correct, truthful information.

On the other hand, because Bradley did not intentionally lie to the court, the two-year presumptive sanction urged by bar counsel is inappropriate. Imposing it would be disproportionate and unfair. It would be unnecessarily punitive. Thus, we do not accept bar counsel's argument for a suspension of that length. Given other particulars described above – such as Bradley's reliance on others who prepared the documents and the use by other firms of the same forms[14] – we do not view his misconduct as culpable as other matters where lawyers submitted false pleadings. We note that Bradley had little experience in class action litigation and relied on his partners and the more experienced firms.

We do not agree with the respondent that cases resulting in private admonitions are analogous. Bradley signed documents seeking a joint legal fee of $75 million. The amount on its own should have caused him to exercise more care and discretion. The document deserved – indeed required – more than the cursory glance he gave it. He was not signing a routine transmittal letter. This case is more serious than Serpa, which resulted in a sixty-day suspension.

In addition, we must increase the sanction for the aggravating factors, including the respondent's experience as an attorney, the use of court resources, and the publicity his misconduct received.

Thus, we determine that a license suspension in the range of six months is reasonable and fair in light of our precedent. We add one more factor. Given Bradley's cavalier attitude toward signing the documents, he would benefit from an ethics refresher. He should satisfy the bar that he understands his responsibilities. Accordingly, we recommend to the Supreme Judicial Court that it require him to take and pass the Multistate Professional Responsibility Examination

[14] Bradley testified that he was comforted about the facts in the declaration because he knew that the Lieff firm had used a similar application with identical rates ($425) in an analogous case against Mellon Bank. (Hearing Transcript, page 89, line 13 – page 90, line 13).

(MPRE). Such a requirement is automatic for any suspension longer than six months. Thus, we recommend that the court suspend the respondent's law license for six months and one day. If the court imposes a shorter suspension, we still would recommend the MPRE, which may be required in any case involving a suspension.

We stress that a license suspension of six months and one day (with the requirement of passing the MPRE) is a significant sanction. We respectfully disagree with our colleagues in dissent that our recommendation could encourage lawyers to turn a blind eye and simply ignore documents in the belief that not reading a document will allow them to escape the consequences of their false statements. As we discussed above, each case will be evaluated on its own circumstances. Our recommended discipline reminds the Bar that there are consequences not only for intentional misrepresentations, but even for those made negligently.

Conclusion

This case has raised serious questions about practices in the class action bar. We have no evidence that fee petitions of this nature are common and their use widespread and accepted. We suspect they may be, but we will leave those issues for the courts. Our responsibility is to evaluate the conduct of the attorney before us. We conclude that the respondent acted carelessly. For that, his license should be suspended for six months and one day, and he should be required to take and pass the Multistate Professional Responsibility Examination for reinstatement.

For all of the foregoing reasons, an Information shall be filed in the County Court, recommending that the respondent's license to practice law be suspended for six months and one day.

Dated: December 9, 2024 BOARD OF BAR OVERSEERS

By: Lynne C. Soutter
Lynne C. Soutter, Esq.
Secretary Pro Tem

DISSENT

We disagree with our colleagues in the majority on a fundamental point. Bradley's misconduct was not merely negligent; it was reckless. He was willfully blind to the facts stated in his declaration and the attached Exhibit A.

We accept the hearing committee majority's finding that Bradley did not read the documents in their entirety. The finding rested at least partly on its assessment of the respondent's credibility, and we will not disturb it. As our colleagues noted, bar counsel has pointed to no evidence that he read the entire filing, word for word, front to back.

Unlike our colleagues, we view the failure to read the documents (or ask questions about the basis for the assertions) as willfully blind. The declaration consisted of two pages of text. The same is true for the attachment. Moreover, we are persuaded that, if Bradley had actually read the documents, he would not have changed a word. He intended to mislead the judge to believe that his brother worked for his law firm, his brother's "regular hourly rate" was $500, 23 lawyers listed as staff attorneys were Thornton employees, and they too had "regular hourly rates," of $425. None of this was true, and the respondent knew it. Indeed, he did not need to read his declaration to know what it said. He knew it already. Bradley admitted that he discussed using a rate of $425 for the staff attorneys with lawyers at Lieff and Labaton. He knew that his brother would be listed as an employee of the firm with a rate of $500. Accordingly, whether he actually read the documents is irrelevant; he knew they were false.

The majority opinion suffers from a logical inconsistency. On the one hand, the majority accepts that Bradley did not carefully read the entire document. But on the other hand, it is clear that if he had read it, nothing would have changed. In other words, he chose not to inform himself of the contents because the contents did not matter to him. This is not a simple lack of diligence. It's an attempt to perpetrate a fraud on the federal court. The "mens rea," or mental state, required for a violation of Rule 3.3(a) is "knowledge," not intent. A tribunal may infer knowledge from willful blindness toward the existence of a fact. Zimmerman, *supra*; see also Model Penal § 2.02(7). The willful blindness doctrine essentially equates gross recklessness toward the falsity of a statement as the equivalent of knowledge of that statement's falsity, in order to avoid rewarding respondents and criminal defendants who put their heads in the sand in order to avoid actual knowledge. That is exactly what occurred here. Accordingly, we would have adopted the conclusions of the hearing committee dissent and concluded that Bradley violated Rule 3.3(a)(1) and 8.4(c).

When a lawyer signs an affidavit under the pains and penalties of perjury, he or she must comply with a higher duty of care. For this reason, our case law imposes a presumptive two-year license suspension for lying under oath. This is even more so in *ex parte* matters. In a case where he was to share in a $75 million legal fee, Bradley had a duty to not file a misleading declaration and attachment. His duty was not simply to read it, but to correct it.

We do not agree that Bradley could reasonably rely on the reassurances of others, either his partners who presented the document to him, or the lawyers at the other firms. Again, he knew what the document said without having to read it. He had participated in discussions about sharing the salaries of the staff attorneys and their hourly rates. This appears like a conspiracy to mislead the court. One conspirator cannot avoid punishment by relying on his co-conspirators.

We also are concerned that the majority's holding will perversely encourage lawyers to ignore documents, in effect to turn a blind eye. Under our colleagues' reasoning, lawyers will conveniently assert that they simply failed to pay attention to detail. By claiming they did not read a document, respondents in bar discipline cases may escape the serious consequences of their lies. The decision sets a dangerous precedent.

Accordingly, we would adopt the reasoning and sanction recommendation of the dissenting member of the hearing committee and recommend a license suspension of two years.

Dated: December 9, 2024

Frank E. Hill, III

Frank E. Hill, III

Rita B. Allen

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