

**IN RE: MATTER RONALD B. KAPLAN**  
**BBO No. 650577**

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

BAR COUNSEL,

Petitioner,

vs.

RONALD BRUCE KAPLAN, ESQ.,

Respondent

B.B.O. File No. C3-19-262446

**MEMORANDUM OF BOARD DECISION**

In a case arising out of the respondent's divorce, bar counsel charged, and the hearing committee agreed, that the respondent asserted frivolous defenses and discovery requests, lied to judges of the probate court, obstructed his ex-wife's access to documents, and violated pretrial orders to pay alimony, all in violation of Rules 3.1, 3.3 and 3.4 of the Massachusetts Rules of Professional Conduct. The same conduct was found to violate Rules 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 8.4(d) (conduct prejudicial to the administration of justice), but not Rule 8.4(h) (other conduct reflecting adversely on fitness to practice law). Based on these conclusions and several aggravating factors, the hearing committee has recommended a license suspension of eighteen months.

On appeal, the respondent challenges the hearing committee's conclusion that he violated Rule 3.1, arguing that bar counsel failed to meet his burden to prove a violation of the rule. He also takes issue with the committee's use of B.B.O. Rule § 4.5(d) to call its own witness in support of bar counsel's case in chief. As to Rule 3.3, the respondent argues that the rule does not apply to lawyers who are parties in their own cases, rather than when they represent clients.

He challenges the conclusions under Rule 3.4 (c) based on the facts of the case, specifically his failure to pay alimony and legal fees to his ex-spouse.

For the reasons that follow, we adopt the hearing committee's findings of fact and with one exception (Rule 8.4(h)) its conclusions of law. We agree with the recommended sanction.

### **Factual and Procedural Background**

We adopt the facts from the Hearing Report. They are supported by the evidence in the record. B.B.O. Rules, § 3.53.

The respondent and his ex-wife Lucretia A. Kaplan were married for 26 years, raising two sons together. Lucretia was the family's primary wage earner, while the respondent focused on the children. At age 41, the respondent became a member of the Massachusetts bar, having attended both college and law school as an adult, education which was funded by his wife. Since 2000, Lucretia has been unable to work due to a work-related injury and has been collecting disability benefits. On November 10, 2008, the respondent filed for divorce. A judgment of divorce entered on November 3, 2009. There was no provision for alimony in the original judgment.

In addition to practicing law, the respondent invested in real estate with a partner, Kevin Kane, who was a contractor and builder. They bought approximately ten houses over a four-year period between 2010-2014. Each property was purchased by a trust. The evidence at trial indicated that Kane and the respondent had a verbal agreement pursuant to which the respondent purchased land, Kane constructed a house, and the respondent helped with paperwork. When a house was sold, the partners equally split the proceeds. (Hearing Committee Report ("HCR") ¶¶ 32-33). The committee found that Kane and the respondent were equal partners in a profitable

real estate business. (HCR ¶ 40 and 47).<sup>1</sup> The hearing committee's findings on these points were based in part on its assessment of the credibility of the respondent and Kane as well as evidence in the record.

The respondent deposited his real estate income into the Tralfaz Revocable Trust. The sole beneficiary of the Tralfaz Revocable Trust was yet another trust, the Apsinwall Trust, a nominee trust. In addition to the Tralfaz Trust, the respondent was the trustee of three other trusts: The Oak Street Trust, the Surehold Trust, and the Johnson Trust. Aspinwall was the beneficiary of the Surehold Trust, while Tralfaz was the beneficiary of the Johnson Trust. The respondent had no involvement in Aspinwall, which was controlled solely by Kane. Likewise, Kane had no interest in the four trusts controlled by the respondent. The hearing committee rejected the respondent's testimony (both in the probate court and in the disciplinary case) that his four trusts benefitted Kane. The testimony could have been supported (or refuted) by tax returns or other financial statements of the Tralfaz Trust (into which the respondent deposited his profits (HCR ¶ 33), but the respondent testified that Kane (who controlled the beneficiary of Tralfaz (the Aspinwall Trust)) refused to permit their production. (HCR ¶ 45). Kane testified to the contrary. (HCR ¶ 45).

Seeking alimony (which was not included in the original divorce judgment), in June 2013, Lucretia hired Attorney John McGlone to file a Complaint for Modification. The respondent engaged Attorney Teresa Lord, who represented him at two hearings. A dispute arose over the respondent's response to his ex-wife's request for discovery. Attorney McGlone

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<sup>1</sup> The hearing committee rejected as not credible the respondent's testimony that he did not make money from his real estate investments. (HCR ¶¶ 107-110). As one example, his partner Kane testified that the respondent earned a profit of \$80,000 from one investment, on Oak Street in Holbrook. (Hearing Transcript, Vol. VI, p. 77-78). In addition to earning revenue from sales, the respondent has lived rent-free in one of the properties (130 Weymouth Street in Holbrook) for a number of years. (HCR ¶ 38). On appeal, we have been directed to no contrary evidence.

argued that the respondent had failed to respond in good faith, for example, by refusing to produce any documents because counsel had mistakenly referred to him by his wrong first name in the definition section of the Rule 34 request. The respondent also took the position that the documents sought by Lucretia were not discoverable because they related to a trust, not the respondent individually. At a second hearing, McGlone again informed the court that the respondent had failed to comply with discovery (for example, he had produced a single page of one tax return, even though he had been ordered to produce all returns in their entirety) and that McGlone had been forced to seek documents from the respondent's banks through subpoenas *duces tecum*.

A probate court order dated March 27, 2015 required the respondent to produce "any and all bank records that Ronald B. Kaplan has signature authorization on including, but not limited to," four specific accounts at the Crescent Credit Union. The court also ordered him to produce "copies of any and all Trust [sic] instruments ... for which Ronald B. Kaplan is the Donor, Trustee, and/or beneficiary." (HCR ¶ 24). After the second hearing, Attorney Lord withdrew as the respondent's attorney, and he represented himself for the duration of the proceeding.

Eventually, McGlone obtained some trust documents from Registries of Deeds. The respondent did not produce any trust tax returns. On July 28, 2015, the respondent filed a financial statement in the probate court as part of Lucretia's complaint for modification. On September 4, 2015, he filed another financial statement.

After a two-day trial, on December 31, 2015, the probate court judge found, among other things, that the respondent had testified falsely, intentionally tried to conceal his income; failed to produce documents to support his claim that he had borrowed funds from the trusts to pay personal expenses; failed to list on his financial statement the funds in the Tralfaz Trust; failed to

list on his financial statement property he owned at 109R Woodlawn Avenue in Holbrook, Massachusetts; failed to cooperate in discovery; and was generally untruthful. (HCR ¶ 51). The judge ordered the respondent to pay alimony in the amount of \$1,800 per week in addition to back alimony of \$48,150.

There ensued a cascading series of complaints for contempt filed by Lucretia and notices of appeal and post-trial motions by the respondent. There were at least five of the former and ten of the latter, the first complaint arriving only a few weeks after the modification judgment. On March 31, 2016, the judge ordered the respondent to pay \$4,500 on the threat of a thirty-day jail sentence, which was suspended for three weeks.<sup>2</sup> Defending against the contempt complaints, the respondent argued to the probate court judge that he did not have the financial means to pay alimony and his ex-wife's attorney's fees. The judge rejected the defense on multiple occasions. (HCR ¶¶ 57, 59, 64). After serving a short jail sentence in 2018, the respondent satisfied the contempt judgment ... only to face another contempt motion and judgment a few months later.<sup>3</sup> On June 26, 2019, the respondent filed a Complaint for Modification in the probate court.

On October 26, 2021, bar counsel filed a single-count Petition for Discipline, asserting violations of Rules 3.1, 3.3, 3.4 and 8.4. Bar counsel filed a motion for issue preclusion regarding the underlying probate court orders. The motion was denied.

After an evidentiary hearing, the committee found that the respondent had impeded his ex-wife's discovery in the underlying case, most prominently by refusing to produce financial documents concerning the Tralfaz Trust. (HCR ¶ 78). It found the respondent not credible in his

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<sup>2</sup> The series of contempt judgments are set forth in detail in the hearing committee report, and will not be repeated here. (See HCR ¶¶ 55-72).

<sup>3</sup> Apparently, a friend of the respondent gave him money to pay the judgments. The respondent listed these payments as loans on his financial statements, but the hearing committee found no evidence of any intent to repay. (HCR ¶ 89 and fn. 17).

explanation that he could not produce the documents because the trust beneficiary (Kane) refused to allow it. (HCR ¶ 79). The committee found that the respondent refused to produce to his ex-wife’s lawyer documents concerning the other trusts. (HCR ¶ 80). It found that the respondent’s testimony in the disciplinary hearing was “in bad faith,” specifically his denial that he obstructed discovery in the probate case. It adopted the probate judge’s finding that the respondent, “failed to cooperate in the discovery phase of the case and caused unnecessary delay, compelling [Lucretia] to file several motions to compel.” (HCR ¶ 83).

The hearing committee agreed with the probate court judge that the respondent’s financial statements (July 28, 2015 and September 4, 2015) omitted material facts, namely his ownership of real estate and his income derived therefrom. (HCR ¶ 84). He did not disclose all of his bank accounts. Although he claimed that funds in the Tralfaz Trust were not his, he spent the money in the trust for his own purposes. (HCR ¶¶ 86-88). The respondent’s financial statements between July-September 2015 indicated that his debts had decreased at the same time his law practice allegedly was losing money; a phenomenon the respondent could not explain. (HCR ¶ 92). He falsely denied to the probate judge that he was “buying and flipping houses.” (HCR ¶ 93). His tax returns contained significant “irregularities” such as unsubstantiated deductions for rental payments and excessive amounts of alimony.<sup>4</sup> (HCR ¶¶ 115-118 and fn. 18). In sum, the committee found that:

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<sup>4</sup> On appeal, the respondent argues that the hearing committee mistakenly found he inflated the amount of alimony on his income tax returns. (Respondent’s Brief, p. 4). The committee found that the respondent claimed he paid \$29,900 in 2017, \$33,850 in 2018, \$76,525 in 2019 and \$41,475 in 2020 for a total of \$191,750. (*See also* Hearing Exhibit 73). However, his annual payments were only \$23,400 per year (\$450 per week) for a total of \$93,600. Even including \$30,000 in arrears and \$31,000 in attorney’s fees, the amount paid would be far less than \$191,750. (HCR ¶ 117 and fn. 18). Moreover, there is no evidence that he paid more than \$23,400 in any single year. In opposition, the respondent argues that he actually paid \$194,800, which includes the amounts above as well as \$48,600 in arrears and \$31,000 in attorney’s fees. We disagree with the respondent’s arithmetic. His argument is based on five years of alimony payments, but the committee’s findings were based on only four years. In addition, there was no evidence that the respondent actually paid the amount claimed on appeal. The dispute is relatively minor in the overall context of the hearing committee’s findings, but we mention it to dispel any question about the

The respondent has used the various trusts he has set up, and the Tralfaz bank accounts, to hide or obscure the true nature of his real estate holdings and dealings. He has hidden behind Kane to deepen and further this deception. He created an elaborate shell game of trusts and related, undisclosed bank accounts with a single goal in mind: to hide his assets and to defeat any claim against them by his ex-wife.

(HCR ¶ 120).

On five occasions the respondent knowingly refused to comply with court orders that he pay alimony and attorney's fees despite his ability to pay. (HCR ¶ 100 and 102). The respondent testified in multiple probate hearings. The judge rejected his arguments, such as an inability to work due to disability or that he did not have sufficient assets, since he owned several pieces of real estate. (HCR ¶¶ 102 and 105).<sup>5</sup> Thus, the committee found that the respondent's disobedience of the court orders that he pay alimony was knowing. (HCR ¶ 105). The committee found that even at the time of the bar discipline hearing, the respondent still had failed to fully comply with the probate court orders. (HCR ¶ 106).

With no factors in mitigation and several in aggravation (discussed below), the hearing committee recommended a license suspension of eighteen months. The respondent has appealed. He takes issue with some of the factual findings and legal conclusions. As for the sanction, he maintains that even if we were to agree with the hearing committee on the facts and the law, the appropriate suspension length would be three or four months.

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committee's fact-finding. Even if the respondent were correct, the committee's legal conclusions are amply supported by other findings. Indeed, it does not appear that the respondent faced discipline due to the representations he made on his income tax returns.

<sup>5</sup> The judge observed that, "Common sense and basic concepts of fairness support the notion that ownership of a valuable asset demonstrates ability to pay without further inquiry as to whether payment can be enforced directly against the asset." (HCR ¶ 102, *citing Krokyn v. Krokyn*, 378 Mass. 206, 213-214 (1979)).

## Conclusions of Law

### Rule 3.1

The hearing committee concluded that the respondent violated Rule 3.1(a) of the Rules of Professional Conduct (meritorious claims or defenses based on facts that are not frivolous) when he failed to produce discovery to his ex-wife based on arguments the committee deemed frivolous. (HCR ¶ 79 and 124). Specifically, the committee found that the respondent had no “basis in ... fact ... that was not frivolous” when he informed the probate court that Kevin Kane refused to permit him to produce trust documents. We adopt the conclusion.<sup>6</sup>

Whether the respondent’s discovery arguments had a “basis in ... fact ... that was not frivolous” requires an analysis of the relationship between the respondent and his former real estate partner, Kevin Kane. As discussed above, the respondent established the Tralfaz Revocable Trust to hold the profits he earned from real estate investments with Kane. (HCR ¶ 33). The ultimate beneficiary of this trust was another trust, the Aspinwall Trust, which was a “Kane family trust.” (HCR ¶ 44). When his ex-wife’s lawyer requested documents concerning the trusts, the respondent argued that he could not produce them, because Kane had refused to permit production. (HCR ¶ 29).<sup>7</sup> With regard to the Tralfaz Revocable Trust, the committee found that Kane “had nothing to do with the respondent’s trusts and, by necessary implication, Tralfaz or its tax returns.” (HCR ¶ 79). The hearing committee found credible Kane’s testimony

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<sup>6</sup> We also adopt the committee’s conclusion that bar counsel failed to prove a Rule 3.1 violation based on the respondent’s filing an action to terminate child support and the complaint for contempt. As the committee noted, there was “scant” evidence in support of the allegation. (HCR ¶ 123).

<sup>7</sup> At the disciplinary hearing, the respondent testified that he asked his “clients” (by which we infer he meant Kane) for permission to produce the trust documents, and was refused. (Hearing Transcript, Volume II, p. 170, lines 14-17 and p. 174, lines 1-11). He further testified that he called the Office of Bar Counsel’s ethics hotline and was advised that he could not produce documents of the trust beneficiary without his consent or a court order. (*Id.*, p. 178, line 22-p. 179, p. 4). The probate court did not order Kane to produce the documents.

that the respondent never asked him for documents concerning the Aspinwall Trust (HCR ¶ 79); the respondent's statement to the contrary was a lie. Accordingly, it was frivolous for the respondent to argue to the probate judge that Kane was the impediment to producing documents. (HCR ¶ 124).

The respondent had listed Kevin Kane as a potential witness; bar counsel did not. Bar counsel rested his case in chief without calling Kane. When respondent's counsel informed the committee on the fourth day of trial that he did not intend to call Kane as a witness, the committee exercised its authority under B.B.O. Rules, § 4.5(d) to call Kane as its own witness, observing that Kane appeared central to the case. (HCR, fn. 7).<sup>8</sup> Kane testified on the last day of trial that the respondent never asked him for documents concerning Apsinwall and that he (Kane) had no relationship with the Tralfaz Trust; production of those documents rested within the respondent's exclusive control. Thus, Kane contradicted the respondent's version of events.

On appeal, the respondent does not directly take issue with the facts that brace the committee's conclusions, nor could he, since there is no question that the respondent did not ask Kane for permission to produce trust documents. Instead, he points to the unusual process that led the committee to rely on Kane's testimony as the basis for its findings and conclusion. He makes two related arguments: first, that bar counsel failed to sustain his burden of proof when he rested without Kane's testimony;<sup>9</sup> second, that the hearing committee acted outside its authority when it called Kane as a witness to, in essence, fill the holes in bar counsel's case. We will address both arguments together.

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<sup>8</sup> Pursuant to Rule 4.5(d), the hearing committee "may, on its own motion, subpoena any witness to appear and give testimony."

<sup>9</sup> At the close of bar counsel's evidence, the lawyer for the respondent orally moved for a "required finding" that the charges under Rule 3.1 should be dismissed. The committee chair denied the motion.

Bar counsel bears the burden of proving all facts by a preponderance of the evidence. B.B.O. Rules, § 3.28. Although bar counsel presents its case before presentation of evidence by the respondent, our process is not as formal or rigid as a criminal or civil proceeding. Our rules do not contemplate motions for directed verdict or a required finding of not guilty. *Compare* Mass. R. Civ. P. 50(a) (“A party may move for a directed verdict at the close of the evidence offered by the opponent, ...”); Mass. R. Crim. P. 25(a) (“The judge on motion of a defendant or on his [sic] own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint of any part there after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge”).<sup>10</sup> Put another way, there is no requirement that bar counsel establish a case in chief at a specific point in litigation. There is no rule that would prohibit a hearing committee from relying on facts presented in the respondent’s case to support a legal conclusion. While a respondent may argue that bar counsel has failed to prove his case, such an argument would be premature prior to the close of all the evidence.

Our rules allow hearing committees (as well as hearing panels, hearing officers, and even the board itself) to issue subpoenas for witness testimony. B.B.O. Rules, § 4.5(d). We also permit the committee to ask questions of witnesses called by either party.<sup>11</sup> We do this so that the committee, as the finder of fact, may gather all information relevant to a bar discipline case.

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<sup>10</sup> Although not always the case, civil and criminal matters often are tried to juries, and the directed verdict/required finding procedure is utilized to weed out cases that should not go to a jury. Such is not the case in our practice, where hearing committees sit as “both judge and jury.”

<sup>11</sup> Similarly, subject to a trial judge’s review, juries in Superior Court are allowed to submit written questions to witnesses at the conclusion of their examination by the lawyers. A salutary trend in trial practice is to free juries from their passive status.

This aim serves the interests of justice and due process, insuring a fair hearing and a result based on all of the facts.<sup>12</sup>

Rule 4.5(d) has no specific limits on calling witnesses. The rule does not limit who may be called, when the witness may be called, or the course of examination by the hearing committee. With relevance to the points made in the prior paragraph, the committee may call a witness before or after either party rests.

Of course, the hearing must conform to the Constitution and accepted notions of fairness. A respondent in a bar disciplinary case is entitled to due process. Matter of Ruffalo, 390 U.S. 544 (1968); Matter of Stephen M. Foley, 439 Mass. 324, 336, n. 13, 19 Mass. Att’y Disc. R. 141 (2003). In bar discipline matters, the right is more limited than in a criminal case, since only a professional license (a property interest) is on the line, not a respondent’s liberty. Thus, a respondent is entitled to notice of the charges, a right to call witnesses, and a right to cross examination. All of these were provided to the respondent in this case. Calling Kane as a witness was neither unfair nor a due process violation. There was no surprise. The committee did not act secretly. The respondent himself had listed Kane as a potential witness. Presumably, the respondent’s attorney had interviewed Kane and decided to not call him. Called to the stand, Kane was subject to cross examination by both parties.

We infer that the hearing committee sought to clarify the facts about the respondent’s real estate investments, which on their face made little sense. Kane testified to his relationship with the respondent, including their profit-sharing. Kane confirmed that he had no interest in the trusts (Tralfaz, Oak Street, Surehold and Johnson) controlled by the respondent, a key fact showing that the respondent earned money from their joint venture. (HCR ¶¶ 32-47). He

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<sup>12</sup> In this case, the witness – Kane – filled in information relevant to bar counsel’s allegations. We can imagine the opposite situation ... where a hearing committee calls a witness whose testimony assists the respondent’s defense.

described at least one transaction where the respondent earned a profit of about \$80,000. The alleged conversation about the trust documents was not the focus of the committee's examination. Indeed, it was bar counsel, not the hearing committee, who asked Kane about his conversation with the respondent concerning the trust documents.<sup>13</sup> While we could imagine a scenario where a hearing committee acted beyond the scope of its job, this case is not it.<sup>14</sup>

Based on Kane's testimony, the hearing committee's legal conclusion rested on a sound factual footing. The respondent's argument to the probate court judge that Kane's "opposition" precluded production of the Aspinwall and Tralfaz documents had no basis in fact. It was frivolous. By making the argument, the respondent violated Rule 3.1. The same conduct violated Rule 3.3(a)(1) and 3.4(a), which we will discuss in the following sections.

### **Rule 3.3(a)(1)**

Rule 3.3(a)(1) prohibits lawyers from making false statements of fact or law to a tribunal (or to correct a false statement previously made). Rule 8.4(c) prohibits lawyers from engaging in conduct involving fraud, deceit, dishonesty or misrepresentation. Rule 8.4(d) prohibits conduct that interferes with the administration of justice. The hearing committee concluded that the respondent violated the rules when he filed financial statements with false information and

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<sup>13</sup> The key testimony was a single question and answer by the assistant bar counsel after the hearing committee concluded its own questions: "Q: Mr. Kane, at any point did Mr. Kaplan request a copy of the declaration of trust and beneficiary schedule for Aspinwall Trust? A: Not that I am aware of." (Hearing Transcript, Vol. VI, p. 93, lines 5-10). Called in rebuttal, the respondent repeated his earlier testimony about their conversation and suggested that Kane had forgotten it. (*Id.*, Vol. VI, p. 208, line 12 – p. 209, line 9). The hearing committee believed Kane, and we will not disturb its finding. More significantly, the respondent admitted that the key trust (Tralfaz) was not Kane's to control. (Vol. VI, p. 209, lines 2-9: "And so I had gone to Kevin and asked him, and he said, oh, don't produce the tax returns. I mean, I know he doesn't remember this, but he didn't want that because – and I don't know why because they weren't really his tax returns, but he kept telling me don't do that, so I objected").

<sup>14</sup> As the respondent points out, he is entitled to an impartial tribunal. However, other than a general disquietude about the unusual process that brought Kane to the hearing, he has directed us to nothing that would indicate any bias or partiality. While the respondent suggests that the committee improperly assumed the role of advocate/prosecutor, our review of the record indicates no such abdication of its neutral, fact-finding duties.

testified falsely to the probate court judge about his finances. We agree with and adopt this legal conclusion. His misrepresentation concerning his conversation with Kane also violated the rule.

The respondent's financial statements purported to show that he earned little or no money from his real estate business with Kevin Kane. The probate court judge rejected the evidence. (Hearing Exhibit 7; HCR ¶ 51). The hearing committee found similar facts (HCR ¶ 84-95) and reached the same conclusion. (HCR ¶ 126).

Similarly, we agree that the respondent lied to the court when he asserted that Kevin Kane had prohibited him from producing trust documents in discovery. As we discussed above in connection with the Rule 3.1 violation, these assertions were false.

On appeal, the respondent argues that Rule 3.3(a)(1) does not apply to lawyers whose false statements occur outside of representing a client, for example, a lawyer acting *pro se* in litigation. (Respondent's Brief on Appeal, p. 18-20). The assertion rests on comment [1] to the rule, which provides that, "This Rule governs the conduct of a lawyer who is representing a client in the proceedings before a tribunal." The argument is incorrect. The phrase "representing a client" includes lawyers who represent themselves. The cases cited by bar counsel at page 9 of his appeal brief illustrate circumstances where the rule has been applied to *pro se* lawyers. In an analogous situation, we have held that Rule 4.4 (prohibiting lawyers in "representing a client" from using methods that have no substantial purpose other than to delay, harass, embarrass, or burden a third party) applies to *pro se* attorneys. Matter of Samra, 39 Mass. Att'y Disc. R. \_\_\_\_ (2023), *aff'd*, 2023 Westlaw 8170026 (August 17, 2023, Kafker, J). We have recognized that the purpose behind the rule (as well as Rule 4.4 and Rule 4.2 (which prohibits conduct with a represented person and has similar language)), would be frustrated if its reach were as limited as the respondent suggests.

Bar counsel charged that the same conduct behind the violation of Rule 3.3(a)(1) violated Rules 8.4(c) and 8.4(d) (conduct prejudicial to the administration of justice). The hearing committee concluded that the conduct violated the two additional rules. We agree.

**Rule 3.4(a) and 3.4(d)**

The hearing committee concluded that the respondent's persistent efforts to withhold discovery from his ex-wife violated Rule 3.4(a) (lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully conceal a document having potential evidentiary value). We agree for the reasons set forth above, namely his false statement that the purported trust beneficiary of the trusts (Kane) refused to permit disclosure. The same transgressions violated Rule 8.4(d). The committee declined to find a violation of Rule 3.4(d), observing that it was in the nature of a "lesser included offense" of the Rule 3.4(a) charge. We will not disturb the conclusion.

**Rule 3.4(c)**

The hearing committee concluded that the respondent violated Rule 3.4(c) of the Rules of Professional Conduct (obey obligations under the rules of a tribunal) when he failed to comply with numerous orders to pay alimony as well as the consequent contempt judgments and awards of attorney's fees. The conclusion rests on a solid factual foundation.

There is no dispute that the respondent failed to pay his ex-wife pursuant to the orders issued by the probate court. He was found in contempt on several occasions. He was jailed for a short time. The respondent's defense (both in the probate court and before the hearing committee) was that he did not have the ability to pay, which excused his failure as a matter of law. The argument, in turn, depends on the respondent's testimony that he earned no money

from his real estate venture with Kevin Kane. Two probate court judges rejected his testimony. (HCR ¶¶ 57, 59 and 64).

The hearing committee found that the respondent had the ability to pay and his failure to do so was knowing. In reaching its conclusion, the committee relied on the testimony of the witnesses, the documents, and the decisions of the probate court judges. (HCR ¶ 47: “We find far more credible the testimony we have set out above: Kane and the respondent were partners in a generally profitable real estate venture where they bought, renovated and sold house[s] and divided the profits evenly”). We agree with the conclusion and adopt it. In addition to its credibility finding (which we will not disturb in the absence of contrary evidence), the committee received ample evidence that the respondent earned sufficient money from his real estate business to pay his alimony commitments to his ex-wife and to pay her legal fees (for example the profits from at least one investment, discussed above in footnote 1). He had sufficient sources of income.

On appeal, the respondent urges us to take at face value his financial statements showing lack of income and assets. (Respondent’s Appeal Brief, p. 7-11). The argument ignores the evidence outside the financial statements demonstrating his ability to pay, including his 50% share in a revenue-generating real estate business.<sup>15</sup> As evidence that he was hiding assets, the committee noted that the respondent failed to identify bank accounts on his financial statements. (HCR ¶ 86). He failed to mention an ownership interest in any trust. (Id.). He repeatedly used money in the bank account of the Tralfaz Trust to pay personal expenses. (HCR ¶ 87). The

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<sup>15</sup> The hearing committee called out one example: the probate court judge noted that the respondent failed to list on his financial statement property that he owned (109R Woodlawn Avenue). (HCR ¶ 84-85). Also, despite reporting “negative income” on his financial statements, the respondent was able to meet his living expenses. (HCR ¶ 89). Contrary to the respondent’s argument to us, the financial statements were not a reliable indicator of his ability to pay.

hearing committee did not simply rely on the decisions of the probate court judges; it came to an independent conclusion based on six days of testimony and dozens of exhibits.<sup>16</sup>

In addition, we find substantial support for the hearing committee’s conclusion that the respondent knowingly disobeyed his obligation to pay court-ordered alimony and therefore violated Rule 3.4(c). “Inability to pay” provides a narrow defense, which the respondent failed to meet. “Ability to pay alimony includes all forms of income and capital assets a spouse possesses.” Cooper v. Cooper, 43 Mass. App. Ct. 51, 56 (1997), *citing* Krokyn v. Krokyn, 378 Mass. 296, 214 (1979). In addition to present status, a judge may consider earning potential and future income. Schuler v. Schuler, 382 Mass. 366, 373-374 (1981). This is particularly true where a spouse is earning less than they could with reasonable effort. Rediger v. White, 91 Mass. App. Ct. 1111 (2017) (Rule 1:28 opinion), *citing* Schuler, *supra*. Considering the respondent’s legal practice and his real estate investments, there was sufficient evidence to support the hearing committee’s conclusion that the he knowingly disobeyed the probate court orders and engaged in repeated contumacious conduct.

#### **Rule 8.4(h)**

The committee concluded that bar counsel did not prove a violation of Rule 8.4(h) (other conduct reflecting adversely on respondent’s fitness to practice law). Holding that the rule’s reference to “other misconduct” requires that bar counsel prove a dereliction in addition to the misconduct punished by the other charged rules, the committee concluded that bar counsel had failed to prove additional violations. We disagree.

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<sup>16</sup> Prior to trial, the board chair denied bar counsel’s motion for issue preclusion. Accordingly, the respondent had the opportunity to re-try the facts from the numerous probate court contempt complaints. The hearing committee reached the same conclusion as two judges of the probate court.

Frequently, lawyers are sanctioned under Rule 8.4(h) for the identical misconduct underlying other rules violations. *See, e.g., Matter of Foster*, 492 Mass. 724, 39 Mass. Att’y Disc. R. \_\_\_ (2023) (identical conduct violated numerous rules, including 8.4(h)); *Matter of Gannett*, 489 Mass. 1007, 38 Mass. Att’y Disc. R. 146 (2022) (trust account violations of Mass. R. Prof. C. 1.15(b)(2)(ii) and 1.15(c) also violated Rules 8.4(c) and 8.4(h)); *Matter of Lupo*, 447 Mass. 345, 22 Mass. Att’y Disc. R. 517 (2006) (“[t]he respondent's conduct in filing a lawsuit against a third party because she filed a grievance against him was ‘prejudicial to the administration of justice’, Mass. R. Prof. C. 8.4(d), and ‘adversely reflect[ed] on his ... fitness to practice law’, Mass. R. Prof. C. 8.4(h)”). The reference in the rule to “any other conduct” does not mean that there must be separate or additional behavior. The key differentiator is the qualification that the misconduct must reflect “adversely” on the lawyer’s fitness to practice law, a separate conclusion that must find support in the record, even if the evidence is identical to the facts relating to other violations.

### **Factors in Mitigation and Aggravation**

The hearing committee rejected all of the respondent’s arguments for mitigation, including: the contentious nature of his divorce; his asserted reputation for honesty and competence (about which the committee heard no evidence); his *pro bono* work; his cooperation in the disciplinary process (which, if there were evidence in support, the committee noted would be offset by his untruthful testimony); his lack of disciplinary history; and his “longtime and significant health problems, which pre-dated the events alleged in the petition for discipline.” (HCR ¶ 140). As to the latter, the committee noted the lack of a causal connection between the health conditions and the misconduct. Further undermining the argument was the respondent’s ability to maintain his law practice as well as extracurricular pursuits such as serving as town

meeting representative. We agree with the hearing committee's analysis and adopt its findings. The respondent has presented no evidence to support any mitigation.

In aggravation, we agree with the hearing committee on the following factors: the lack of candor; the multiplicity of violations; the respondent's greed and self-interest; and the harm he caused to his ex-wife Lucretia and the administration of justice. We further agree that the respondent's failure to comply with probate court orders should not be considered in aggravation, as that misconduct rests on the same foundation as the violations of Rule 3.4(c).

### **Conclusion and Recommendation**

We agree with the hearing committee's recommendation of an eighteen-month license suspension.

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). 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. 724, 746; 39 Mass. Att'y Disc. R. \_\_\_\_ (2023). "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).

The respondent's multiple rules violations are all connected. They form a web of misconduct. The respondent concealed his net worth, refused to produce information, filed false or incomplete financial statements, lied to the court and opposing counsel, invented conversations that never occurred, and willfully flouted his legal obligations to pay alimony and attorney's fees. His apparent intent was to swindle his ex-wife with no regard for the delays and waste he caused. His words and conduct displayed contempt for the probate court, his ex-wife and the administration of justice. The underlying record reveals the costs in both time and money for the court and the parties. Lucretia and her lawyer had to file multiple complaints for contempt. They had to issue subpoenas directly to banks to obtain documents that the respondent should have produced. With limited resources, the judges struggled in multiple hearings to reconcile the obviously deceitful financial statements and testimony with reality. None of this should have been necessary. An experienced probate court practitioner, the respondent knew or should have known about the critical role that financial statements play in divorce litigation. Indeed, the statements are signed under the pains and penalties of perjury. By concealing his actual income and assets, the respondent undermined the foundation of the probate court system.

In terms of an appropriate sanction, the hearing committee and bar counsel direct us to Matter of Laroche-St. Fleur, 490 Mass. 2020, 38 Mass. Att'y Disc. R. 292 (2022), where the court imposed a license suspension of eighteen months for a lawyer who in her divorce engaged in a pattern of misconduct similar to this case. While the respondent characterizes the misconduct in Laroche-St. Fleur as more egregious, the differences are immaterial for purposes

of the level of discipline.<sup>17</sup> In both cases, respondents attempted to conceal their assets from their ex-spouses and used a series of frivolous tactics to avoid their legal obligations.

Cases featuring shorter suspensions do not feature anywhere near the constellation of misconduct we found here, or the numerous aggravating factors. In Matter of Ring, 427 Mass. 186, 14 Mass. Att’y Disc. R. 651 (1998), a self-represented lawyer was found in contempt at least seven times. However, he did not lie to the court, did not hide evidence, and stipulated to the misconduct, which was mitigated by depression. In imposing a short suspension, the court noted that bar counsel had not proposed a suspension, and the board did not press for more than three months. The Supreme Judicial Court wrote: “Although we would have proposed a longer suspension if the issue had come to us without the background recited in this opinion, we are content to direct that the single justice enter a judgment suspending the lawyer for a period of three months.” Ring, 427 Mass. at 193, 14 Mass. Att’y Disc. R. 663. In Matter of Finnerty, 418 Mass. 821, 10 Mass. Att’y Disc. R. 86 (1994), the respondent deliberately misrepresented his assets in his financial statement “to obtain an unwarranted judgment, favorable to him, with respect to the division of marital assets.” Finnerty, 418 Mass. at 828, 10 Mass. Att’y Disc. R. 93-94. His misconduct was found to have violated the predecessor rules to Rules 8.4(c), (d) and (h). There was no other misconduct, and no aggravating factors. Finnerty was suspended for six months. The conduct at issue in Matter of Leahy, 28 Mass. Att’y Disc. R. 529 (2012) (two-month suspension for knowing violation of court orders regarding custody; misrepresentation to court and guardian ad litem, including about wife’s mental state; no personal financial motive; with aggravation) is significantly less serious than the respondent’s in this case.

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<sup>17</sup> The respondent in Laroche-St. Fleur submitted false financial statements on five occasions. She failed to disclose bank accounts. She was held in contempt on six occasions, including for discovery violations and failure to pay a discovery master. She filed a frivolous motion for a new trial and frivolous appeals. All of these actions were taken to hamper and delay her ex-husband in receipt of his divorce benefits.

Based on the above, we agree with the hearing committee and recommend a license suspension of eighteen months.

An information shall be filed in the County Court, recommending the respondent's suspension from the practice of law for eighteen months.

December 11, 2023

*Frank E. Hill, III*

Frank E. Hill, III  
Secretary