IN RE: MATTER JOSEPH S. SAMRA, JR.
BBO No. 552211

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

BAR COUNSEL, Petitioner, v. JOSEPH S. SAMRA, JR., ESQ., Respondent.	)	B.B.O. File No. C4-19-260619

MEMORANDUM OF BOARD DECISION

For submitting false testimony in a court proceeding, a hearing committee has recommended that the respondent be suspended from the practice of law for two years. Finding no error, we adopt the committee's factual findings and (with one exception) its legal conclusions. We agree with its recommended sanction.

Findings of Fact[1]

The respondent and his former domestic partner (with whom he had an eighteen-year romantic relationship and two children) filed claims and counterclaims against each other in Worcester Superior Court, alleging a variety of civil wrongs, for example, fraud, unjust enrichment, breach of fiduciary duty, and conversion. As a defendant, the respondent was represented by insurance defense counsel, since some of the claims against him alleged legal malpractice. The respondent represented himself in the prosecution of the counterclaims. After some of the claims were settled, trial commenced on February 27, 2019.

[1] We adopt the hearing committee's findings of fact in their entirety. They find support in the evidence. B.B.O. Rules, § 3.53. Particularly when the findings rest on determinations of witness credibility, we are instructed to accept the committee's findings unless they are contradicted by the record evidence, which is not the case here.

On March 5, 2019, prior to the start of the day's proceedings, the respondent filed an application with the Superior Court seeking issuance of a harassment protection order under Mass. G.L. c. 258E, § 1 against Roger McCarthy, his former partner's brother.[2] In support of the application, the respondent submitted an affidavit signed under the pains and penalties of perjury.

In his affidavit, the respondent asserted that McCarthy assaulted and attempted to intimidate him. Specifically, the respondent claimed that on February 28, 2019 (six days prior to filing the affidavit), as he was walking to his car in a private parking lot after court had recessed, McCarthy "suddenly lurched [at the respondent] with his truck. [McCarthy] was driving his truck at the time. [McCarthy] had a license to carry a gun, so this threatening behavior with his vehicle is especially alarming." (Hearing Committee Report (HCR) ¶ 23). The respondent explained that he believed McCarthy had reason to harm him because the respondent's testimony at trial alleged that McCarthy had failed to report significant income to the IRS from his contracting business.

On the morning of March 5, 2019 (prior to resuming trial of the litigation between the respondent and his former partner), the Superior Court judge held a hearing on the chapter 258E complaint. The respondent testified in court under oath that after leaving the courthouse on February 28, 2019, he had crossed the street to a parking lot to retrieve his car. When he arrived at his car, he noticed "a big truck parked facing me, but with the back end up pretty high. And all of a sudden it started coming toward me. And the motor was running. It got within five feet, ten feet of me before it stopped, and then backed up again. I could see through the shaded glass

[2] The statute defines harassment as "[three] or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property."

someone who I believe was Roger McCarthy." (HCR ¶ 26). He testified that he noted the license plate number (R 19) and that the truck was a Ford F350. Testifying further, the respondent recounted that after thinking about the incident overnight, he called the Superior Court's liaison officer, who ran the license plate number and confirmed it belonged to McCarthy. On the advice of the liaison officer, the respondent filed a police report the following day with Officer Paul Keyes of the Worcester Police Department. In summary, the respondent testified to the Superior Court judge that, "[W]hen you see a two ton truck coming at you, for no apparent reason, you get – you get afraid. Had he kept going, Your Honor, he would have really just mashed me between the front of his truck and the front of my car." (HCR ¶ 31).

In his testimony, McCarthy denied all allegations. He said that after court on the day in question he went to lunch with his wife, his sister, and their attorneys. After lunch, he drove home in his wife's car, a Ford Explorer. He conceded that he owned a Ford F350 with the license plate R 19, but said that he had left the truck at home on the day in question. He denied the truck had tinted windows. The attorney who represented the respondent's domestic partner in the civil case corroborated McCarthy's testimony at the chapter 258E hearing. He testified that after court the group went to a nearby café for lunch and McCarthy never left the café until the meal was over, about ninety minutes later.

The Superior Court judge dismissed the respondent's petition for a harassment prevention order, finding "insufficient credible evidence" that the event occurred. After the trial was concluded, the judge referred the respondent to the Office of Bar Counsel based on her concerns that the respondent may have participated with McCarthy in a scheme to hide income from the IRS and that he may have tried to conceal money from his ex-wife. She also was concerned

about the respondent drafting trusts where he was the beneficiary. Her referral did not include any reference to the chapter 258E proceeding or the respondent's testimony.

Bar counsel's Petition for Discipline charged the respondent with violating the following Massachusetts Rules of Professional Conduct: Rule 3.3(a)(1) (knowing false statement of fact or law to a tribunal; Rule 4.4(a) (when representing a client, engaging in conduct with no substantial purpose other than to embarrass, harass, delay or burden a third person); Rule 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 8.4(d) (conduct prejudicial to the administration of justice; and Rule 8.4(h) (any other conduct reflecting adversely on fitness to practice law). All charges arose from the respondent's written and oral testimony about McCarthy's alleged assault.

The hearing committee found that the respondent lied about the incident with the truck. It based its findings on numerous subsidiary facts, including its finding that the respondent was not a credible witness and McCarthy's testimony was credible. (HCR ¶ 67). The committee specifically found that the incident had not occurred. Among the evidence indicating that McCarthy had not tried to run over the respondent and the respondent knowingly lied about it was the following:

- The committee found that McCarthy (corroborated by the lawyer for his sister, Attorney Warren Yanoff) testified credibly at the chapter 258E hearing and the disciplinary hearing that at the time of the alleged incident he was eating lunch in a restaurant.

- The committee found that McCarthy testified credibly at both the chapter 258E hearing and the disciplinary hearing that he did not drive his wife's truck to court on the day of the incident; he drove wife's car, a Ford Explorer.

- The respondent did not call 911 or immediately call the police.

- The respondent did not report the alleged incident to his sister until the following day, even though he regularly complained to her about McCarthy's conduct.

- The respondent knew the unique license plate number of McCarthy's truck and would not have needed to ask the court liaison officer to run the number.[3] His knowledge about the truck and the license plate number facilitated his concoction. His professed ignorance about the owner of the truck was part of the scheme to fabricate the incident. In addition, his professed ignorance undermined his credibility.

- The respondent did not report the incident until March 2, 2019, two days after it allegedly happened.

- The police report by Officer Keyes did not mention an incident about a truck, indicating that the respondent did not report to the officer anything about the alleged incident. Instead, Keyes' report recited general complaints that the respondent was "being harassed by Mr. McCarthy based on a previous incident." (HCR ¶ 49). The committee found that, if the incident had occurred as the respondent alleged in his affidavit and at the chapter 258E hearing, the respondent would have mentioned it to Keyes and it would have appeared in Keyes's report. The committee found Keyes credible that, if the respondent had told him he had been the victim of a motor vehicle assault, he would have written the fact into his report.

- An email the respondent sent to his lawyer in the civil case contained key false statements. The respondent wrote his lawyer that Officer Keyes had told him that Keyes' supervisor had described the incident in the police report as "two felony crimes … assult [sic] with a dangerous weapon (truck) and witness tampering/intimidation, both of which carry a year or more in jail for first offense." (HCR ¶ 57). Both Officer Keyes and his supervisor denied this conversation. The hearing committee credited their testimony. It found that the respondent's mischaracterization to his lawyer about what Keyes told him was in furtherance of his lies in the chapter 258E proceeding.

In sum, the hearing committee determined that, "[t]he respondent made knowing false statements in his Affidavit [sic] signed under penalty of perjury during his testimony and under oath. Armed with the knowledge of McCarthy's license plate number, which he had seen numerous times at his house and which was easy to remember, he fabricated from whole cloth an absurd and incredible story. In a deeply cynical and dishonest move to harm [his former partner]

[3] At the disciplinary hearing, the committee heard evidence of the respondent's long and acrimonious relationship with McCarthy, the brother of his former domestic partner. During the relationship, McCarthy had done extensive landscape work at the home shared by the respondent and his partner and often drove his truck to the job site. After the relationship ended on poor terms, McCarthy – according to the respondent – engaged in harassing behavior, which involved driving by the respondent in his truck. (HCR ¶ 11).

and her family, he lied intentionally when he drafted his Affidavit [sic] and when he testified in court." (HCR ¶ 75). "We find that the respondent's allegations, in court and under oath, that he was threatened with a truck by someone he believed to be McCarthy were false, and the respondent knew them to be false at the time he signed his Affidavit and gave his testimony.." (HCR, ¶ 66).

Legal Conclusions

Because it found that the respondent lied under oath, the hearing committee concluded that he violated Rules 3.3(a)(1) (knowingly false statement of fact or law to a tribunal; 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation); 8.4(d) (conduct prejudicial to the administration of justice; and 8.4(h) (any other conduct reflecting adversely on fitness to practice law) of the Massachusetts Rules of Professional Conduct. We agree with and adopt these conclusions.

The hearing committee correctly rejected the respondent's principal argument (made at the disciplinary hearing and on appeal to us) that he did not violate the rules because he had a sincere belief in the truth of what he said. As a factual matter, the argument is fanciful. The hearing committee specifically found that the respondent knowingly lied. It rejected his testimony about a supposedly honest mistake. This was not simply a conflict between the testimony of the respondent and McCarthy. The hearing committee's findings are amply supported by the record evidence, as we outlined above. Lastly, the hearing committee grounded its findings on its assessments of the credibility of the witnesses, as supported by the documentary evidence. (HCR ¶ 67). We have been provided no reason (other than argumentative speculation) to question the findings. B.B.O. Rules, § 3.53.

Even if we credited that the respondent sincerely believed McCarthy was behind the wheel of the truck, we still would find a violation of the rules. Subjective good faith is not a defense to allegations under Rules 3.3 and 8.4. Statements "purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." Matter of Diviacchi, 475 Mass. 1013, 1020, 32 Mass. Att'y Disc. R. 268, 280 (2016) (emphasis in original); Matter of Cobb, 445 Mass. 452, 468, 471-472, 21 Mass. Att'y Disc. R. 93, 112, 115-116 (2005) (standard is "objectively reasonable basis" for attorney's statement criticizing judge). In other words, the respondent owed a duty to McCarthy and the court to conduct a reasonable inquiry before accusing McCarthy of trying to run him over with a truck. The committee found that he failed to do so.[4] Again, we will not disturb this finding, which finds ample support in the evidence, including the committee's assessment of witness credibility. But we don't even need to get to this point, since the evidence was overwhelming that the incident never occurred. (HCR, ¶ 66: "We find that McCarthy did not threaten the respondent with his truck on February 28, 2019, nor did someone else threaten the respondent with McCarthy's truck in or around the parking lot"). Since it never happened, the argument about the respondent's subjective state of mind is a red herring. Once the evidence confirmed the absence of the truck, there was no factual basis that the respondent was simply mistaken about the identity of the driver. It's impossible to have an objectively good faith belief in an event that never took place.

[4] The respondent testified in Superior Court that, "I could see through the shaded glass someone who I believe to be Roger McCarthy." (HCR ¶ 26). His "belief" even if true would not exonerate his false statements. More fundamentally, the hearing committee rejected as not credible the respondent's testimony that he had to ask the court officer to run the plate number on the truck. Assessing credibility, the committee found that the respondent knew the plate number. Thus, whatever "inquiry" he conducted was a ruse.

The hearing committee rejected bar counsel's allegation that the respondent's conduct violated Mass. R. Prof. C. 4.4(a) (in representing a client, a lawyer shall not use means that have no substantial purpose other than to delay, harass, embarrass or burden a third person). One member of the committee would have concluded that bar counsel met the elements of the rule. The dispute centers on the phrase "in representing a client." The two members who rejected the charge concluded that the rule only applies when a lawyer is representing a client, not when (as here) the lawyer is *pro se*.

This is an issue of first impression in Massachusetts. Construing Rule 4.4 or Rule 4.2 (which prohibits lawyers from contacting directly a person who is represented by counsel and is similarly phrased in terms of "when representing a client"), courts in other states have held that the rule applies to self-represented attorneys.[5] *See* Matter of Yosha, 2017 WL 9480270 (Ariz., 2017) (Rule 4.4(a) applies to lawyer who represented herself); In re Rozbicki, 2013 WL 1277298 (Connecticut Superior Court, March 8, 2013) (lawyer who served as executor of former client's estate violated Rule 4.4(a)when he filed own suit against beneficiaries to harass them for objecting to his fee claim); In re Richardson, 792 N.E.2d 871 (Ind. 2003) (lawyer violated Rule 4.4(a) in course of his own suit against his estranged girlfriend).

The reasoning is persuasive. The rule is intended to protect third parties from embarrassment, harassment, delay or burden. With that as the goal, there is no reason it should not apply to *pro se* lawyers. It makes no difference to the third party if the offending lawyer is

[5] The Massachusetts rule is identical in all material respects to the Model Rule of the American Bar Association except that the Model Rule does not include "harass" in its list of prohibited conduct. The comments to the ABA Model Rule note that Rule 4.4(a) has been applied to lawyers representing themselves: "The rule's 'intent and purpose' require that a lawyer who represents himself be deemed to be representing a client, …" Annotated Model Rules of Professional Conduct, 9th ed., Center for Professional Responsibility, American Bar Association (2019), at p. 489.

representing a client or representing themselves. The harms to the third party or courts are the same.

The American Bar Association has opined that Model Rule 4.2 applies to *pro se* lawyers. *See* American Bar Association Formal Opinion 502 (September 28, 2022).[6] Similarly, a Massachusetts Superior Court judge has held that the rule applies to self-represented lawyers. Fishelson v. Skorupa, 13 Mass. L. Rptr. 458 (2001). As with Rule 4.4, the purpose of the rule would be impeded if it did not apply to *pro se* lawyers. There is no logical basis to distinguish between lawyers representing a client and lawyers representing themselves when they are communicating with a person who has counsel.

The ethical rules are rules of reason. We are called to use our common sense. *See* Massachusetts Rules of Professional Conduct: Scope [1]. "Self-representation is still representation, and an attorney who proceeds *pro se* in a matter functionally occupies the role of both attorney and client." Matter of Steele, 181 N.E.3rd 976, 979 (Ind. 2022). Whether phrased in terms of lawyers representing themselves or the rule applying to *pro se* attorneys, there is no reason to limit the scope of Rule 4.4(a).

Having established the rule applies, we conclude that the respondent's conduct violated it. His false and frivolous complaint was designed solely to harass or embarrass McCarthy, with whom the respondent had a long and adverse history. His conduct had no legitimate purpose.

[6] Two members of the ABA Committee on Professional Responsibility dissented to the majority opinion, asserting that the plain language of the rule was to the contrary and urging a revision of the rule to accord with its apparent intent.

Other Arguments Made by the Respondent

Before the hearing committee and on appeal, the respondent has advanced a few legal arguments, which we reject as meritless. For the sake of a full record, we briefly will address them.

First, the respondent argues that his testimony did not violate Rules 3.3 and 8.4 because the Superior Court judge did not refer him to the Office of Bar Counsel for the conduct, although she did ask bar counsel to investigate suspicious financial transactions involving the respondent. The fact that the judge did not include the potential Rule 3.3 and 8.4 violations in her referral is immaterial. Neither bar counsel nor the board is bound by the views of a judge whether to bring charges or not bring charges. Matter of Weiss, 460 Mass. 1012, 27 Mass. Att'y Disc. R. 895 (2011) (irrelevant that court and guardian *ad litem* may have had basis to report respondent's misconduct to bar counsel but did not do so). "It was bar counsel's prerogative to initiate a disciplinary case against the respondent, and the board's prerogative to adjudicate the same, regardless whether the matter was report to the by the guardian ad litem or by the court." Id.

Second, the respondent argues that the hearing committee improperly placed the burden on him to disprove bar counsel's case-in-chief. The argument mischaracterizes the evidence and our rules. Bar counsel must prove by a preponderance the factual allegations on which its charges are based. B.B.O. Rules, § 3.28. Conversely, respondent must prove his affirmative defenses. Id. As discussed above, the respondent defended the case on the basis that he made a sincere, genuine mistake about the driver of the truck. The committee rejected the testimony because the overwhelming weight of the evidence showed that the event did not occur, regardless of who supposedly was behind the wheel. In addition, it made credibility findings

against the respondent. Not believing the respondent's testimony is not the same thing as requiring that he disprove bar counsel's case.

Third, the respondent relies on the anti-SLAPP statute, Mass. G.L. c. 231, § 59H, which precludes civil claims brought against a party based on the party's exercise of its constitutional right of petition. The statute does not apply here, since it is limited to civil claims, not bar discipline matters. In addition, the statute does not apply to government agencies in furtherance of their enforcement responsibilities. *Cf* Commonwealth v. Exxon Mobil Corp., 489 Mass. 724 (2022). Lastly, bar counsel's proceeding was not brought solely because of the respondent's filing the chapter 258E case against McCarthy. *See* Duracraft Corp. v. Holmes Prod. Corp., 427 Mass. 156, 167-168 (1998) (movant must show that actions against it are based on petitioning activities alone). Rather, it was brought based on evidence that the respondent lied under oath. The respondent's argument, if accepted, would all but eviscerate bar counsel's ability to investigate and prosecute lawyers for their conduct in litigation.[7]

Matters in Mitigation and Aggravation

We agree with the hearing committee that the respondent presented no facts that we should consider in mitigation.

As for aggravating factors, we adopt the committee's findings concerning the respondent's prior discipline, experience as a lawyer, lack of candor[8] and insight into his

[7] Although bar counsel did not charge the respondent with violating Mass. R. Prof. C. 3.1(a) (claim or defense must have basis in law or fact that is not frivolous), he could have done so based on what we know of the chapter 158E matter. Factually, the entire case was based on a lie. Chapter 258E requires at least three acts of willful or malicious conduct aimed at a specific person. The respondent's claim against McCarthy alleged only one. We cannot imagine that the anti-SLAPP law would preclude attorney discipline for filing frivolous lawsuits or positing frivolous defenses, just as it does not bar discipline for lying under oath.

[8] We stress, as did the committee, that lack of candor does not follow automatically in every case where a fact finder does not believe a respondent's testimony. (HCR, ¶ 111, *citing*, Matter of Zankowski, 487 Mass. 140, 253, 37 Mass. Att'y Disc. R. 554, 571 (2021)). Attorneys are entitled to defend themselves. In some cases, however, the respondent's testimony so contradicts the facts that a reasonable hearing committee may find that the respondent displayed a deep-seated incapacity to testify candidly.

wrongdoing, and multiplicity of violations. We also agree that the misconduct caused substantial harm to McCarthy and others, including the court.

We part with the hearing committee (as we have with other committees in other cases) over its consideration of uncharged misconduct in aggravation. The committee found that the respondent had a history of apparent litigation abuse, including contempt findings in his own divorce case, as well as contempt complaints filed against him by his domestic partner for child support. A legal malpractice case he filed against his divorce lawyer was dismissed at summary judgment for failure to identify an expert, and a contempt finding entered against him in that case. A federal lawsuit he filed resulted in $60,000 in legal fees being awarded against him for violations of Fed. R. Civ. P. 11 along with a contempt finding.

Exhibiting a pattern of frivolous litigation, the allegations are troubling, but they should not have been considered in aggravation. As we have instructed, bar counsel must disclose in advance any evidence it intends to introduce at a hearing, including evidence to be considered in aggravation. We require this out of concern for due process and fairness, and to prevent the sand-bagging of respondents. Respondents are entitled to adequate notice so they may defend against the allegations. In a similar vein, S.J.C. Rule 4:01, § 8(3)(a) requires a Petition for Discipline to '[s]et[] forth specific charges of alleged misconduct." While we do not require bar counsel to plead facts in aggravation (in contrast to the requirement that respondents plead facts in mitigation, *see* B.B.O. Rules, § 3.15(f)), section 8(3)(a) supports the concept of fair notice of charges. There is no prejudice to bar counsel in requiring pre-hearing disclosure. Since all of the conduct recited in the prior paragraph was known to bar counsel prior to the hearing, there was no excuse to not reveal it.[9]

[9] Bar counsel has argued that he introduced the documents to impeach the respondent. Such evidence need not be disclosed in advance, for obvious reasons. The same holds true for rebuttal material. But bar counsel must choose:

Recommended Disposition

The presumptive sanction for lawyer misrepresentations under oath is a two-year suspension. Matter of Diviacchi, 457 Mass. 1013, 32 Mass. Att'y Disc. R. 268 (2016 (27 months); Matter of Finneran, 455 Mass. 722, 26 Mass. Att'y Disc. R. 178 (2010) (two years). It goes without saying that lying under oath is a serious offense, which strikes at "matters at the very heart of the legal profession." Matter of Balliro, 453 Mass. 75, 89, 25 Mass. Att'y Disc. R. 35, 50 (2009). In this case, the respondent's misconduct was not in furtherance of zealous representation of a client. Rather, he did so apparently for his own self-centered reasons.

Accordingly, we recommend a two-year suspension. We note that this hearing committee recommended the same disposition, even though the committee also found an aggravating factor (uncharged misconduct), which we have declined to adopt. There are no mitigating factors that would reduce the presumed sanction.

Conclusion

An Information shall be filed in the Supreme Judicial Court recommending a two-year suspension.

Frank E. Hill, III
Secretary

Dated: April 10, 2023

he may use the evidence to impeach, or he may use the evidence for aggravation. He may not withhold disclosure under the first rationale and then argue for its consideration under the second.