IN RE: DOREEN ZANKOWSKI

NO. BD-2019-006

S.J.C. Order of Term Suspension entered by Justice Gaziano on November 18, 2019.[1]

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[1] The complete order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. BD-2019-006

IN RE: DOREEN M. ZANKOWSKI

MEMORANDUM OF DECISION

This matter came before me on bar counsel's petition for discipline, an information and record of proceedings, and a vote by a majority of the Board of Bar Overseers (board) recommending that the respondent be suspended from the practice of law in the Commonwealth for a period of two years. The vote was based on a one-count petition for discipline alleging that the respondent falsely inflated the number of hours included on final bills sent to several clients, improperly entered her time as work by her associates, and knowingly billed clients for taking depositions that she did not attend. On this basis, the petition asserted that the respondent had charged and collected a clearly excessive fee, in violation of Mass. R. Prof. C. 1.5(a). Because bar counsel believed that the billed amounts were entered intentionally for hours the respondent knew she had

not worked, the petition also alleged that the respondent had violated Mass. R. Prof. C. 8.4(c) (dishonesty, fraud, deceit or misrepresentation) and Mass. R. Prof. C. 8.4(h) (conduct adversely reflecting on the fitness to practice law).

Two members of the hearing committee agreed that the respondent had violated the rules of professional conduct, as stated in the petition, and one would have found that the petitioner's conduct was reckless, but not knowing and intentional, and thus not in violation of Mass. R. Prof. C. 8.4(c),(h). The majority recommended that the petitioner be suspended from the practice of law for one year and one day.[1]

Both parties appealed; bar counsel accepted the committee's findings and rulings, but sought a more severe sanction of two years' suspension. The respondent challenged the committee's findings as not based on substantial evidence and derived from an incorrect understanding of the need for the respondent to pay restitution; she sought, at most, a public reprimand. While stating that it adopted the hearing committee's findings and rulings, the board in fact made several of its own contrary findings, and rejected some of the hearing committee's reasoning, but nonetheless concluded that the respondent should be suspended for a period of two years.

[1] The dissent would have recommended a sanction of a public reprimand on the ground that the respondent's conduct was reckless but not intentionally false.

Before this court, the respondent raises several challenges to the board's findings and rulings, and renews some of the challenges that she made to the board concerning the hearing committee's findings. Among other arguments, she contends that the board's finding that she intentionally fabricated the hours she entered in the firm's billing system is not supported by substantial evidence, and that the board's equation of recklessness with intentional conduct for the purpose of determining a sanction was erroneous. The respondent argues that the errors in billing were as a result of her inadequate and error-prone billing practices and negligence in accurately inputting time entries, rather than intentionally overcharging three of her best clients. She also contests the recommended sanction. The respondent maintains that, even if she had charged those few clients excessive fees, the appropriate sanction would be a public reprimand.

For the reasons to be discussed, I agree with the board's rulings on the questions of restitution that differ from the hearing committee's rulings. I do not agree, however, with the board that a two-year suspension is the appropriate sanction for the respondent's conduct, nor with the hearing committee's conclusion that a sanction of one year and one-day would be most appropriate. Rather, I conclude that the appropriate sanction

for the conduct at issue in this case is a suspension of six months.

1. Background. The respondent was admitted to the bar of the Commonwealth on June 20, 1991. After graduation from law school, she worked in the legal department of an engineering, construction, and technology company and ultimately became general counsel for a group of its subsidiaries. In 1999, the respondent joined the construction practice of a large Boston law firm as an income partner. A few years later, she became an equity partner there.

In 2011, the respondent joined Saul Ewing Arnstein & Lehr LLP (the firm) as an income partner. In that position, the respondent received a set annual salary; her annual salary in 2014 was approximately $700,000, not including end-of-year bonuses.

At the beginning of 2015, the respondent became an equity partner at the firm; this position also was referred to as a "percentage partner." The firm paid equity partners and income partners differently. Equity partners were placed in a compensation "band" that was set in accordance with the firm's projected budget; because the firm set its budget conservatively, the firm commonly exceeded its annual anticipated revenue by approximately fifteen to twenty percent. Accordingly, in January of each year, equity partners expected

to receive additional income in the form of a percentage of the firm's end-of-year profits, in addition to any discretionary bonuses.

Upon becoming an equity partner, the respondent was placed in a salary "tier" of $575,000. Beyond this base salary, she expected to earn a bonus and a percentage of the firm's annual profits, if the firm met or exceeded its anticipated income. Therefore, as an equity partner, a greater proportion of the respondent's take-home pay depended upon generating income for the firm.

In December of 2015, the respondent called the firm's chief financial officer (CFO) to ask various questions related to her billing rates and statistics for the year. During the course of this conversation, it became apparent that the amount of time reflected as billed by the respondent in the firm's time management system was less than the actual amount brought in by the respondent; the respondent came to understand that this was because she was adding time to her bills that was not being captured elsewhere in the system.

The firm's litigation department monitored the production and performance of attorneys in order to make recommendations to the executive committee regarding partner compensation, including bonuses. On January 5, 2016, the respondent sent an electronic mail message to the chair of the litigation

department, summarizing her performance for the prior year with respect to the compensation process. The respondent explained that she had billed 3,173 billable hours and had worked more than 720 non-billable hours in 2015. The message also explained that $218,720 actually billed to clients over the past year had not been reflected in the respondent's original value billed; the message referred to this amount as "gravy." The litigation department chair was struck by what he described as the respondent's "extraordinary billable numbers," as well as a "premium" in earnings resulting from the fact that the respondent's overall actual amount billed was more than the original value entered.[2] On January 11, 2016, shortly before the executive committee was to meet to determine bonuses for the prior year and compensation bands for the forthcoming year, the firm's CFO brought what he perceived as an irregularity in billing to the attention of the firm's litigation department chair, general counsel, and chief operating officer (COO). Their review of the respondent's bills indicated that the respondent had added time to her draft bills after the draft bills had been produced. The litigation department chair and

[2] The CFO explained that there were a number of reasons why there might be a difference between the number of hours originally entered and the actual amount billed; these included a fixed fee arrangement or an alternative fee, as well as an overlooked time entry. In this case, however, the difference reflected what the CFO perceived to be an irregularity in the respondent's bills.

general counsel became concerned that the respondent might have added time beyond work that she actually had performed.

On January 12, 2016, the litigation department chair and general counsel met with the respondent and her attorney to discuss the reasons for the added amounts. At this meeting, the respondent explained that the difference between the hours actually billed and the original value billed was the result of her adding time to already-produced draft bills to reflect hours that she had worked but which had not been captured in the draft bills.

The respondent also was questioned during this meeting about edits she had made to some of her associates' bills. The respondent explained that she sometimes increased the time charged to an associate for work that she herself actually had performed, but which she attributed to an associate in order to benefit the client, because the associate's hourly rate was lower than hers, or because the work, such as document review, was of a type that ordinarily would be assigned to associates. The respondent indicated that she had been understaffed on major matters that had "exploded" in time required and difficulty during the year, and, in some cases, had done work that needed to be done which ordinarily a partner would not do. The respondent explained that she had followed this practice

throughout her time at the firm, as well as at her prior firm, and had not understood there to be any issue with this practice.

At the conclusion of their meeting with the respondent, the litigation department chair and general counsel were not satisfied with the respondent's explanations. They were not convinced that the firm had billed clients consistently for work that actually had been performed; the general counsel testified that he had determined prior to the meeting that most likely the respondent would have to separate from the firm, unless some satisfactory explanation was forthcoming. He decided to hire outside counsel to help investigate the matter further.

On January 21, 2016, with the representation by the general counsel that if she did so she would be able to keep her bonus for 2015, the respondent signed a negotiated withdrawal agreement with the firm. The respondent continued to work at the firm until March 31, 2016, when her withdrawal became effective. She began working for another law firm on April 1, 2016.

After the respondent left the firm, the general counsel continued his investigation into her billing practices. On May 5, 2016, the firm filed a complaint against the respondent with the board. In June, 2016, after further internal investigation, the firm decided to return funds to or to issue credits to several of the respondents' clients, in an amount

totaling approximately $260,000.[3] This overall amount reflected time the firm believed the respondent had over-billed. The firm returned or credited these funds along with accompanying letters informing clients that the firm had conducted an internal audit, and had concluded that certain bills submitted by the respondent were higher than they should have been. The letters did not explain why the firm believed that the clients had been over-billed.

After receiving these letters, all but one of the respondent's clients (who was in the midst of settlement negotiations spearheaded by one of the associates assigned to the respondent's matters) followed her to her new firm. One client offered to use the refunded money to take the respondent and her partner on a trip with him. When the respondent declined, the client used the funds to throw a party for his staff and invited the respondent to attend.

2. Prior proceedings. In February, 2017, bar counsel filed a petition for discipline against the respondent. Bar counsel alleged violations of Mass. R. Prof. C. 1.5(a). 8.4(c), and 8.4(h), in connection with allegations that the respondent

[3] It was undisputed that, in 2015, the respondent brought in $3.8 million in billing to the firm, double her previous highest-earning year, and that she was considered one of the firm's top producers. Thus, multiple millions of dollars' worth of the respondent's billing entries were not deemed problematic by any entity or individual who investigated her billing practices.

billed clients for work she had not actually performed as an equity partner at the firm.

A hearing committee conducted an adjudicatory hearing on the petition over the course of four days in September and October, 2017. At the hearing, bar counsel called the general counsel of the firm; an attorney of counsel to the firm who had been the respondent's chief associate; the firm's litigation department chair; and the general counsel at the firm where the respondent previously had been employed. The respondent testified on her own behalf. She also called her legal assistant, who had gone with her to her new firm; a senior vice president of one of the respondent's client organizations; an executive at another of the respondent's client organizations; and her life partner. The vast majority of the bills at issue in this case related to work for entities represented by the two testifying clients.

In May, 2018, the hearing committee issued a report outlining its findings of fact, conclusions of law, and recommended disciplinary sanction. Both parties appealed to the board from the hearing committee's report and recommendation for discipline. The board denied the respondent's motion for a new evidentiary hearing. In December, 2018, the board issued a memorandum containing its findings of fact, conclusions of law, and recommended sanction.

The case was entered in this court in January, 2019. Bar counsel supported the board's recommendation that the respondent be suspended from the practice of law in the Commonwealth for two years. I held a hearing on the matter in February, 2019, and then requested supplemental briefing from the parties on the issue of the appropriate sanction.

3. Discussion. Bar counsel bears the burden of proof in an attorney disciplinary proceeding. See In re Driscoll, 447 Mass. 678, 685 (2006). In challenging the board's decision, the respondent contends that findings made by the hearing committee and adopted by the board are not supported by substantial evidence, and that the board's suggested sanction is disproportionate to the discipline received by other attorneys for similar misconduct.

I conclude that there is substantial evidence to support at least some subsidiary findings underpinning the board's decision that the respondent intentionally billed clients for time she did not work. In particular, the hearing committee and the board focused on seven of the eighty-four depositions taken in the respondent's matters in 2015, which the respondent agreed she did not attend, but for which she modified billing entries of her associates to include what she asserted was her own time to prepare for and to review the depositions. I agree with the

respondent, however, that the board's recommended sanction is too severe.

a. Hearing committee report. Much of the testimony presented to the hearing committee centered on the respondent's billing practices; the respondent conceded that her billing practices were inadequate, careless, rushed, and error-prone, and that her time records were almost always entered into the firm's billing system days or weeks after the work had been performed. She maintained, however, that her method of modifying time entries at a subsequent stage in the billing process was known to the firm's billing staff in its Philadelphia office where the entries were made, and not contrary to any firm policy at that time.

Although the respondent tended to make manual notes contemporaneously with some of her work, she did not enter her time contemporaneously into the firm's electronic billing system, and required her assistant to do so at some point thereafter, before the firm's internal weekly cutoff for entering time. The fact of non-contemporaneous entry itself was not unusual. While younger members of the firm tended to enter their time into the computer system contemporaneously with the work being done, older partners often followed a practice of keeping manual records and having an assistant later enter their time into the billing system. Unlike other partners, however,

the respondent's manual entries captured only a small fraction of the work that she performed.

The respondent carried notepads around with her throughout her work day, in which she would keep notes that she took during meetings and telephone calls. The notebook entries often did not indicate the amount of time that she spent on a given task, or might not contain any entry at all for many tasks. Accordingly , the notepads did not create a reliable record of the respondent's hours worked. Thus, rather than having her assistant simply make computer entries for each task listed in a notepad for the day, the respondent delegated the task of determining tasks to enter, and creating billing reports, to her assistant. The respondent's assistant would gather up as many of the respondent's notebooks as she could find, initially monthly, and then weekly as the firm's requirements changed. The assistant also would review the respondent's calendar, correspondence files, pleading binders, and electronic mail messages. She then would create a "weekly time report" for the tasks the assistant believed the respondent had performed, as reflected in those documents. Often, when the assistant could not ascertain the amount of time that the respondent had spent on a given project, she would enter a placeholder value of "0.2" in the billing system. The assistant would print out the weekly time report for the respondent to review and edit.

The respondent would make handwritten notes on paper copies of these weekly time reports, to adjust the times entered and, less frequently, the descriptions of the tasks. Based on these marked-up time reports, the respondent's assistant would enter edits into the billing system. Then, on a monthly basis, the firm would produce draft bills for each client, detailing all time entries from all employees who had worked on a particular matter.

The respondent testified that she often edited the reports based on her own memory about the work she had completed, and not on any written source of information to which her assistant would have had access. When the respondent edited the weekly time reports that her assistant produced, the respondent testified that she "was only looking at the information on the time entry report[, rather than] looking for what was missing[,] because [she] didn't have the time to do it." As a result, when the respondent reviewed the draft bills that were produced at the beginning of the following month, the respondent "looked at what was there in the context of what [she] missed for [her] own time." She explained, "I would see entries that would then jog my memory that, yeah, absolutely, let me think back on that day, reconstruct it in my head," and that often what she remembered "was stuff that was not either in my inbox, on my calendar or on my notepads." The hearing committee did "not credit the

respondent's testimony that she remembered six weeks later those things she could not remember within one week, despite her testimony concerning her 'very good memory.'"[4]

The respondent testified that, while reviewing draft bills, if she remembered a meeting with an associate, she would request additions to the associate's time record in order to account for her own time. As well, the respondent testified that there were certain activities, such as document review, that she completed but for which she felt more comfortable billing the client at the lower rate of an associate. In addition, the respondent explained that she sometimes consolidated time entries of herself or her associates because some clients complained about entries in the amount of "0.1" and that at times she consolidated her time and that of the associate who took a deposition because some clients would not allow more than one attorney to bill for a single deposition, or would not allow billing of more than "8.0" hours in a day per attorney, as well as to give the client the benefit of a lower rate.[5]

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[4] The draft bills contained entries reflecting both billable and non-billable time; the respondent made edits largely, but not exclusively, to billable time entries.

[5] The respondent's primary associate testified that he also adjusted his own billing entries (contemporaneously) because some clients did not like to see entries of "0.1," would not pay for more than "8.0" hours per day for a single attorney, and would not pay for meals, but he attempted to indicate this in the narrative line.

The respondent testified as well that she edited her associates' time entries,[6] in part, because she believed that "creating [her] own new entry would have been an administrative burden" that would then have required all of the draft bills to be re-run and that she "was always being pressured to get [her] bills done."[7] The respondent's assistant testified that she frequently had to "chase" the respondent to edit the weekly pre-bills, that the edits generally were made at the last minute, that the respondent sometimes asked the Philadelphia office for extra time to make edits, and that, not infrequently, the respondent did not have time to make the edits at the pre-bill stage, and only was able to request edits after the draft bills had been produced.

The hearing committee credited the general counsel's testimony that making new entries at the pre-bill stage would not have been an administrative burden, and rejected the respondent's stated reasons for editing the time her associates

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[6] Although the respondent both added to and subtracted time from her associates' entries, her additions were much more frequent than her subtractions.

[7] The firm's general counsel testified that it would not have been an administrative burden to add time to weekly pre-bills, before the draft bills were produced. After the draft bills had been produced, however, witnesses for both parties testified that any change of time entries for description or amount required sending the change to the Philadelphia office for an employee in charge of billing to enter and then reprint the bill.

had entered as their own. A majority of the hearing committee did not agree with the dissent's view that a "'burden' can be subjective, and that revising pre-bills may be 'burdensome' to one lawyer but not to another." In so concluding, the majority pointed to the fact that, on several occasions, the respondent asked her assistant to create new time entries.

Overall, the hearing committee concluded that the respondent added approximately 450 hours of time to her and her associates' hours from March, 2015, through November, 2015, adding approximately eight to ten hours per week to previously entered time. The fees collected beyond the amount initially billed on the draft bills totaled approximately $218,000 for 2015. The hearing committee found that the hours added to draft bills increased throughout the year, and were added in round, large numbers such as one hour.

When the respondent edited time on the draft bills, the edits changed her attorney-billed statistics but not her attorney-worked statistics. As a result of these edits, the respondent's realization rate exceeded 100% in 2015.[8]

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[8] Later review indicated that the respondent's realization rate had exceeded 100% for all but one of the years that she worked for the firm, but at a much lower rate; the general counsel and the litigation chair both testified that a realization rate over 100%, alone, was usual and would not be a cause for concern, but their concerns arose because the respondent's rate was notably large.

On seven occasions, the respondent billed clients for work related to depositions that she did not attend. She clarified in testimony before the hearing committee that her narrative references to a "deposition" did not necessarily mean that she had attended the deposition; in some instances, she testified that she billed for calling into a deposition or doing work related to a deposition remotely, such as reviewing an associate's deposition outline, discussing the outline and planned strategy with the associate, or speaking with experts for technical depositions. The respondent's senior associate testified that he could not recall any times when he received draft motions, deposition summaries, or a deposition outline from the respondent, but that the respondent did edit his outlines and met with him about work related to the depositions he took, both before and after the deposition itself. The respondent testified that her generic use of the term "deposition" for any activity related to the taking of a deposition would not have confused her clients; she said that she talked to some of them specifically about out-of-State depositions taken by her senior associate, and that the bills contained costs only for his travel, hotel, and meals.

The hearing committee determined that the respondent intentionally overbilled for time she did not spend in relation to seven depositions. With respect to one of those depositions,

the respondent conceded that she had made a mistake in the billing. "While the dissent accept[ed] this explanation and consider[ed] this to have been an honest mistake, the majority [did] not." The majority also did "not credit the respondent's explanations, where billing entries reflected she attended or took these depositions, that she was working on something else related to the client." "As to those time entries where the respondent billed for time with the use of a generic description of the work performed, the dissent credit[ed] the respondent's testimony that although it was inaccurate or imprecise, it was not intended to deceive; the majority [did] not so credit the respondent's testimony."

The circumstances of this case are highly unusual. It was undisputed at the hearing that the respondent was an extremely hard worker and that she was one of the firm's highest producers, in 2015 more than doubling her previous high to produce $3.8 million in revenue for the firm.

Several of the firm's senior executives, including the litigation chair, testified that they believed the respondent had worked exceptionally hard and put in extremely long hours in 2015, while achieving excellent results for her clients. The firm's litigation chair testified that the respondent's billing numbers for 2015 were high, but not so high as, alone, to cause concern that the respondent was padding her bills. He and her

department chair sent her several electronic mail messages at the end of some billing periods, praising her hard work and thanking her for her efforts, as the litigation chair stated, to encourage her because he remembered how hard it had been when he himself had worked that number of hours in the past. The respondent's assistant testified that she fully believed the respondent was always working, even when she was on vacation, and keeping the assistant very busy, and that the respondent actually worked all of the time that was reflected in her billing. The respondent's senior associate, who testified for bar counsel, said that he had billed approximately 2,000 hours in 2015, that it had been his highest-billing and busiest year to that point, and that, subsequently, he had not billed more than approximately 1,700 hours in a year.

Clients who testified at the hearing expressed satisfaction with the respondent's work product and her availability to them. One client noted that the respondent "was always there to get the work done and provide the guidance that [the client] needed"; the client "never questioned or doubted [the respondent's] performance." Another client highly endorsed the respondent, explaining that he considered the respondent "far superior [to] other firms that we have used." He explained that the respondent would always get back to him within a twelve-hour period, in relation to whatever he needed. This client

considered the work he asked the respondent to do "pretty intense" and "demanding," and, even in light of the disciplinary proceedings, was satisfied that the bills he received from the respondent were fair and reasonable. A large client hired the respondent to manage its dual, complex cases after it had terminated another firm's services on one of its cases for having achieved no results and taken no depositions, while having billed more than $400,000 per month. By December of 2015, the respondent, by contrast, had reached a settlement agreement on both matters, while billing significantly less than the discharged firm.

The majority of the hearing committee did not credit the testimony of client witnesses who said they were satisfied with the services they received and the respondent's bills for those services. The majority pointed to the fact that one client's legal fees were paid by an insurer, and determined that the client "never questioned the respondent's bills, since they were so much lower than prior counsel's." The majority also pointed to the large annual amount of money handled by another of the respondent's clients, and therefore inferred that the client must have "paid scant attention to the bills" and "had no way of knowing whether they were overbilled or double-billed." The majority made this finding notwithstanding that the client testified that he reviewed all of the bills, it was his job to

do so, he sent some back for issues such as address changes, and he would have stopped using the respondent's services had he believed he was being billed for work that was not done.

The majority drew "an adverse inference from the respondent's failure to offer documents that might reasonably be expected under the circumstances to support her testimony in the face of bar counsel's evidence to the contrary." Without stating that the clients were not credible, the majority did not accept the clients' testimony that all of the work had been performed and that they were pleased with the results.

A majority of the hearing committee found that the respondent collected a "clearly excessive" fee, in violation of Mass. R. Prof. C. 1.5(a), by billing for more time than the respondent actually worked. The majority concluded that the respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Mass. R. Prof. C. 8.4(c), by billing and collecting fees to which she and the firm were not entitled, and that the respondent's conduct reflected adversely on her fitness to practice law, see Mass. R. Prof. C. 8.4(h). Overall, the majority found "that the respondent marked up her bills during 2015 to try to recoup the salary cut she faced as a result of becoming an equity partner at the Firm."

The majority recommended a sanction of a suspension from the practice of law for one year and one day. The majority

identified several factors in aggravation, and none in mitigation. Designating this finding as a factor in aggravation, the majority expressed its belief that the respondent remained under an obligation to repay the firm for what the firm repaid to its clients as a result of the respondent's misconduct.

The dissenting member of the hearing committee "would [have found] that respondent lacked the intent to deceive or to defraud her clients, and in so finding, would [have] credit[ed] the testimony of respondent's client-witnesses to the effect that they, in fact, received the legal services for which they were billed." The dissent thus would have imposed a lesser sanction of a public reprimand because, in his view, the respondent lacked the intent to deceive or defraud.

b. Appeal to the board. The board declined the respondent's request for an evidentiary hearing on the ground of insufficient evidence to support the hearing committee's findings. In a written decision issued in December, 2018, the board stated that it adopted the hearing committee's findings of fact and conclusions of law, albeit that the board then rejected a number of the hearing committee's specific findings and factors in aggravation. The board concluded that the respondent's conduct was intentionally dishonest, rather than careless. The board observed that, "[b]y the respondent's own

admission, the data initially entered by her assistant into [the firm's] billing system was inaccurate and incomplete." The board labelled this practice itself as "troublesome," and noted that while it would not "censure the occasional, innocent mistake in timekeeping, the hearing committee found that the respondent's practice occurred recurrently over ten months. At a minimum, it shows reckless indifference to whether the clients were honestly charged for her services." The board concluded that "we see no significant difference between a lawyer who intentionally overbills and a lawyer whose timekeeping and billing practices exhibit a cavalier indifference to truth and accuracy."

The board departed from the hearing committee's recommended sanction of a suspension for one year and one day, and instead recommended a suspension of two years. At the same time, the board concluded that the hearing committee incorrectly had found that the respondent was under an obligation to make restitution to the firm or her clients, as she did not directly profit from the misconduct and thus there was nothing for her to pay back, and because the firm had not been entitled to the fees it had returned. The board also explicitly declined to address the hearing committee's finding in aggravation that the respondent had acted out of greed, to increase the amount of her anticipated bonus. The board noted that, even if it had done

so, and had so concluded, that would not have increased its recommended sanction.

c. Challenges to board's findings and recommendation. The respondent advances several arguments in her appeal of the board's findings of fact, conclusions of law, and recommended sanction. She argues that there was insufficient evidence to support the board's finding that she intentionally overbilled clients by "padding" her bills. She also appeals from the board's recommended two-year sanction, as inappropriate on these facts and inconsistent with previous sanctions for similar misconduct. The respondent contends as well that the board's decision to increase the recommended sanction is inexplicable in light of its correction of the hearing committee's reasoning with respect to restitution.

i. Sufficiency of the evidence. "[T]he findings and recommendations of the board are entitled to great weight." Matter of Fordham, 423 Mass. 481, 487 (1996). I am "empowered, however, to review the board's findings and reach [my] own conclusion." Id. "The subsidiary findings of the hearing committee, as adopted by the board, 'shall be upheld if supported by substantial evidence,' see S.J.C. Rule 4:01, § 18(5), as appearing in 453 Mass. 1315 (2009)." In re Weiss, 474 Mass. 1001, 1001 n.1 (2016). "Substantial evidence is that which a reasonable mind might accept as adequate to support a

conclusion." Matter of Angwafo, 453 Mass. 28, 34 (2009), quoting from G. L. c. 30A, § 1(6).

Here, as discussed the board adopted, in part, the hearing committee's finding that the respondent intentionally inflated hours billed to her clients. Particularly because the respondent did not keep a full, contemporaneous accounting of the hours she worked, the hearing committee's assessment of the respondent's intent in editing her draft bills necessarily hinged to some extent on testimony presented to the hearing committee. "The hearing committee's determination of intent is treated as a determination of credibility." In re Murray, 455 Mass. 872, 882 (2010). "The hearing committee is the sole judge of credibility, and arguments hinging on such determinations generally fall outside the proper scope of our review." In re Diviacchi, 475 Mass. 1013, 1018-1019 (2016), quoting Matter of McBride, 449 Mass. 154, 161-162 (2007). As the board noted in its review of the hearing committee's report, a reviewing entity will not upset a credibility finding unless it is "satisfied with certainty that [the] credibility finding was wholly inconsistent with another implicit finding" (citations omitted). Matter of Curry, 450 Mass. 503, 519 (2008). "While we review the entire record and consider whatever detracts from the weight of the board's conclusion, as long as there is substantial evidence, we do not disturb the board's finding, even if we

would have come to a different conclusion if considering the matter de novo." Id., quoting Matter of Segal, 430 Mass. 359, 364 (1999).

The board concluded that, even if it accepted the respondent's explanation that her billing practices were "reckless" and "cavalier," but not intentionally false, she nonetheless had violated Mass. R. Prof. C. 1.5(a), because, on her own statements, she had modified her associates' time to reflect hours that she said she, and not they, actually had worked. In this view, with which I agree, entry of time for hours that the associates had not worked was false and misleading, because, even if worked, it was not completed by the attorney identified on the bill.

The respondent argues that there is insufficient evidence to support the board's conclusion that all 450 hours of time added to her draft bills in 2015 did not reflect work that was actually performed. She argues that in reaching its determination, the board relied too heavily on the hearing committee majority's credibility determinations, which the respondent contends were insufficient to meet bar counsel's burden of proof to establish significant overbilling. She contends that "mere disbelief of a witness's testimony is not affirmative evidence of the contrary."

As the respondent argues, "[d]isbelief of testimony is not the equivalent of proof of facts contrary to that testimony." Commonwealth v. Nattoo, 452 Mass. 826, 828 n.1 (2009), quoting Commonwealth v. Haggerty, 400 Mass. 437, 442 (1987). This case nonetheless is distinguishable from Nattoo, on which the respondent relies. In Nattoo, "[t]here was no evidence introduced" to contradict a testifying witness whom the judge disbelieved, and the "defendant [in that case] did not testify at the evidentiary hearing held on his motion." Nattoo, 452 Mass. at 828 n.1. Here, in contrast, the respondent testified before the hearing committee and was at times contradicted by other witnesses. In any event, the respondent's argument is unavailing as, based on her own testimony alone, the bills entered were false because they did not reflect work performed by the attorney named.

I do not agree with the respondent's suggestion that the hearing committee's misunderstanding of restitution entirely undermines the credibility assessments it made with respect to the respondent. To be sure, the committee's misapprehension of restitution here well might have had an impact on its recommended sanction. Indeed, in its report, the hearing committee's discussion of restitution occurred in the context of surveying factors in aggravation regarding an appropriate sanction.

At the same time, I recognize that no evidence presented to the hearing committee was dispositive of the respondent's intent in this case. Much of the evidence indeed could be read as demonstrating careless rather than fraudulent billing practices, as evidenced by the existence of a written dissent from a hearing committee member who would have found the billing inaccuracies unintentional, and who would have recommended imposition of a public reprimand. As the board determined, however, whether the respondent's actions were intentional padding or "cavalier indifference to truth and accuracy," both equated to an intentional act.

I agree with the respondent that the large number of hours she reported in 2015 is not substantial evidence that all or even most of the 450 hours at issue in this case were fraudulently billed, and the vast majority of the hearing committee's decision relied on the sheer number of hours; it had details of only a limited number of other instances, particularly including seven of the eighty-four depositions the respondent billed during that period.

Testimony by several witnesses supports the respondent's contention that 2015 was an extremely demanding year. Such testimony, by bar counsel's witnesses as well as by the respondent's, was buttressed by documentary evidence, such as a high number of discovery requests and requests for admissions

directed at the respondent's client in a particular highly complex and "aggressively" litigated matter involving more than twenty defendants. In addition, before allegations of misconduct arose, other firm employees in positions of institutional oversight reacted positively to the respondent's high billing numbers. I also note that the hearing committee did not provide an accounting of more than a small subset of the 450 hours that it concluded the respondent billed fraudulently. Moreover, evidence from the respondent's notepads, testimony by her assistant, and the particular bills issued showed that, in a number of instances, time the respondent recorded in the notepads was "missed" by both the respondent and her assistant, and never entered on the client's bills.

For all of these reasons, I do not conclude that substantial evidence supports a finding that the respondent necessarily over-billed clients intentionally for all or substantially all of the hours for which the firm refunded fees or credited to clients; it, too, apparently relied heavily on the sheer volume of modifications to the draft bills in reaching its determination that all modifications must have been false.

I conclude, in addition, that there is insufficient evidence to support the hearing committee's determination that "regardless of irregularities in the bills rendered, [clients who testified at the hearing] were [not] satisfied with the

legal services they received and the respondent's bills for them." Based on the clients' testimony, it would be unreasonable to conclude that they were dissatisfied with the respondent's legal services and the bills they received from her. The clients clearly testified that she had succeeded where others had failed, that they continued to employ her in their complex matters, and that they relied upon her advice to guide them in preference to other attorneys. See Matter of Angwafo, 453 Mass. at 34. This is distinct from concluding that the clients would have been satisfied with each questionable billing entry discussed at the hearing, had the clients been presented with evidence to support specific allegations of deceit in relation to specific billing entries.

Overall, the respondent's intent in modifying the draft bills, which she admits to having done improperly in at least some of the charged instances, need not be resolved in order to determine that the respondent violated the rules of professional conduct as charged. The multiple instances where the respondent testified that she had entered her own time as the time of one of four or five different associates plainly establishes violations of Mass. R. Prof. C. 1.5(a); Mass. R. Prof. C. 8.4(c); and Mass. R. Prof. C. 8.4(h). The respondent's admittedly cavalier attitude toward client billing, and her statement that nonbillable hours need not been entered correctly

because no client or firm member seriously considers them, fully support a finding that her conduct involved misrepresentation and reflected poorly on her fitness to practice law. Indeed, the narrative descriptions for some of her nonbillable hours include statements to the effect that a description was unnecessary because no one was going to read the narrative, a stark example of the respondent's attitude toward a critical part of the work of a law firm. As the board noted, even if it "accepted the respondent's argument that the overbilling resulted from her haphazard practices, her misconduct would require a suspension. The [full court] has equated 'willful blindness' with intentional misconduct." See Matter of Goldstone, 21 Mass. Att'y Disc. R. 288, 294 (2005) ("an inference of wilful blindness will support a finding that one has the requisite 'knowledge' where that state of mind is needed to establish violation of an ethical rule").

The respondent argues that I cannot conclude she charged excessive fees "where the clients or their representative did not complain about the amount of the fee, or at least express concern or dismay about it or the work itself, and, to the contrary, testified under oath that the fees charged were fair and reasonable based on their review of the bills and their intimate knowledge of the case and the work performed." As discussed, I do not agree.

Client satisfaction does not preclude finding fees "excessive" within the meaning of Mass. R. Prof. C. 1.5. The test for judging whether an attorney's fee is excessive "is whether the fee 'charged' is clearly excessive, not whether the fee is accepted as valid or acquiesced in by the client." Matter of Fordham, 423 Mass. 481, 493 (1996). I conclude that a fee reflecting charges for work not actually performed by the named attorney is by definition "clearly excessive," and an exhaustive review of the factors set forth in cases involving Mass. R. Prof. C. 1.5 is unnecessary to reach that determination. See, e.g., Matter of Pamela Harris-Daley, BD-2018-101, 2018 WL 7349033 (2018) ("By billing and collecting from the client funds for work she has not performed and expenses she has not paid, the respondent collected a clearly excessive fee, in violation of Mass. R. Prof. C. 1.5(a), and engaged in conduct involving dishonesty, deceit, fraud and misrepresentation, in violation of Mass. R. Prof. C. 8.4(c)").

The respondent argues that Fordam, 423 Mass at 481, is distinguishable from this case because the client in Fordam offered consent to a fee in advance of receiving a bill, and withdrew that consent once the bill was received. While I agree that the two cases are clearly distinguishable, I do not agree with the respondent's suggestion that a client's consent to a bill as received is dispositive as to whether a fee should be

deemed "clearly excessive." A fee for work not performed logically constitutes a fee outside the scope of what an attorney reasonably may charge a client. That said, I again note that this case is unique in featuring clients who have been happy with the respondent's work and with the fees charged in highly complex matters, which are, in some instances, far lower than their prior counsel, and that they remain satisfied with her work and the results received, as well as with the amounts of the fees charged.

c. Appropriate sanction. In light of the above, I conclude that the board's recommended sanction is too severe. I further conclude that the board accounted inappropriately for aggravating factors, while failing to account for relevant mitigating factors. Based on my analysis, a sanction of six months' suspension is the most appropriate here.

A suitable sanction in a bar discipline case is one which is "necessary to protect the public and deter other attorneys from the same behavior." In re Foley, 439 Mass. 324, 333 (2003), quoting Matter of Concemi, 422 Mass. 326, 329 (1996). "Although the effect upon the respondent lawyer in any discipline case is an important consideration, the primary factor [in determining a bar discipline sanction] is the effect upon, and perception of, the public and the bar." Matter of

Finnerty, 418 Mass. 821, 829 (1994), citing Matter of Alter, 389 Mass. 153, 156 (1983).

Generally, in considering what sanction is appropriate in a given case, "the board's recommendation is entitled to substantial deference," Matter of Tobin, 417 Mass. 81, 88 (1994). At the same time, however, "[e]ach case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances." Matter of Murray, 455 Mass. 872, 883 (2010), quoting Matter of Discipline of an Attorney, 392 Mass. 827, 837 (1984). See Matter of Saab, 406 Mass. 315 (1998), quoting Matter of McInerney, 389 Mass. 528, 531 (1983) ("All bar discipline proceedings take into account the 'totality of the circumstances'"). It is generally understood that "this court is not bound by the recommendation of either the [b]oard or [b]ar counsel." Matter of Alter, 389 Mass. 153, 157 (1983). Thus, I review the board's recommended sanction to determine if it is comparable to sanctions issued in similar cases. An appropriate sanction is made appropriate in part because it is not "markedly disparate judgments in comparable cases." In re Foley, 439 Mass. 324, 333 (2003), quoting Matter of Finn, 433 Mass. 418, 422-423 (2001). This comparative exercise must account, however, for "factual nuances that distinguish cases from each other." Matter of Shay, 427 Mass. 764, 768 (1998).

Without citation to any authority, the board, and bar counsel, assert that typical sanctions for intentionally charging an excessive fee range from one to two years. The respondent states that a typical fee in such circumstances is a public reprimand. Most of the cases cited by the respondent, however, involve charging an excessive fee in violation of Mass. R. Prof. C. 15, without violations of Mass. R. Prof. C. 8.4(h). At the same time, while I "certainly do not minimize the nature of the respondent's misconduct," I conclude that "the cases cited by bar counsel dealt with far more egregious conduct than that in which the respondent engaged and, as such, do not constitute comparable or similar circumstances that would warrant" a two-year suspension. In re Driscoll, 447 Mass. 678, 689 (2006).

For instance, in Matter of Barach, 22 Mass. Att'y Disc. R. 36, 48 (2006), upon which bar counsel relies heavily, the attorney received a two-year suspension after having been found to have charged $40,000 in a representation for which fees customarily ranged from $4,000 to $10,000, in relation to which a client testified that the work completed was inadequate. In that case, the hearing committee found that the respondent billed for work greatly in excess of the hours actually required by the representation. In addition, there were no mitigating factors. In Matter of Broderick, 20 Mass. Att'y Disc. R. 53, 56

(2004), the second case bar counsel maintains is comparable, the attorney received a suspension for two years after being been found to have charged an excessive fee; failed to return the unearned portion of the fee; failed to respond to the complainant's requests for information about the basis of his fee; and failed to comply with S.J.C. Rule 4:01, § 17, after his suspension from the practice of law. In Matter of Goldstone, 21 Mass. Att'y Disc. R. 288 (2005), cited by the board as involving far more egregious conduct than at issue here, the attorney was disbarred after he intentionally overbilled and collected hundreds of thousands of dollars in fees and costs to which he was not entitled, intentionally and secretly withheld money from a client, used appropriated funds for costs to pay costs he was responsible for paying, threatened to retain more funds when questioned, and made no restitution. The board correctly noted that differences in the factual circumstances underpinning this case and Matter of Goldstone, supra, make disbarment far too severe a sanction here.

As indicated, the circumstances here are unique, and finding a comparable case is difficult. After an exhaustive review of cases involving excessive fees, I conclude that a disposition in line with the hearing committee's original recommended sanction of one year's suspension would be closer to an appropriate sanction for the facts of this case, but not

entirely appropriate. See Matter of Robin, 32 Mass. Att'y Disc. R. 471 (2016) (three month suspension, stayed on conditions, for violations of Mass. R. Prof. C. 1.15, 1.5(a), 1.2(c), 3.1, 3.3(a), 3.4(c), and 8.4(a),(d) by entering into limited assistance agreement that was unreasonable in circumstances, making frivolous claims that had no basis in fact, charging and collecting a clearly excessive fee, and improper filings); Matter of Serpa, 30 Mass. Att'y Disc. R. 358 (2014) (suspension of sixty days for violations of Mass. R. Prof. C. 1.5(a), 3.3(a), 8.4(c)(d)(h), for charging clearly excessive fee, collecting payment from CPCS and client, in violations of prohibition, while certifying that he had not, and making false statements to tribunal); Matter of Moore, 29 Mass. Att'y Disc. R. 461 (2013) (suspension of three months, stayed for one year, for violations of Mass. R. Prof. C. 1.1, 1.15, 1.2, 1.3, 1.5(a), 3.3(a), 8.4(c)(d)(h) for charging clearly excessive fee over multiple years, failing to seek lawful objectives of clients, failing to distribute estate, failing to provide diligent and competent representation, refusing requests of clients for their funds and refusing to respond, and numerous violations of rules for attorney trust accounts).

After identifying an appropriate sanction, I then evaluate whether the sanction should be made more or less punitive by weighing mitigating or aggravating factors. See Matter of

Balliro, 453 Mass. 75, 86 (2009). This case features several mitigating factors, and no aggravating factors that I deem sufficient to increase the severity of a sanction beyond one year.

"Typical" mitigating factors are not "given substantial weight" in determining whether mitigating circumstances warrant a decreased sanction. Matter of Budnitz, 425 Mass. 1018, 1019 (1997). The fact that the respondent has not committed prior acts of misconduct does not itself justify a reduced sentence. See In re Finn, 433 Mass. 418, 425 (2001).

Generally, having an excellent reputation in the community is considered a "typical" mitigating factor, warranting no reduction in recommended sanction. See In re Finn, 433 Mass. 418, 425 (2001), citing Matter of Anderson, 416 Mass. 521, 527 (1993). Here, however, her clients' approval of the respondent extends beyond merely according to the respondent an excellent reputation in the community. Instead, the very clients who were billed in relation to the conduct at issue testified before the hearing committee that they had no concerns about the respondent's work on their behalf, and indeed actively chose to remain the respondent's clients. Because the testifying clients bore the brunt of the respondent's misconduct, as assessed by the hearing committee and the board, the clients' high regard

for the respondent's work on their behalves is relevant, and constitutes a mitigating factor.[9]

The hearing committee and board improperly determined that the respondent's failure to recognize the impropriety of her conduct and express remorse constituted an aggravating factor in this case. This was error. A respondent must be permitted to defend herself against the allegations made against her, and to present an alternate explanation for her conduct. Here, the respondent pointed to her exceptionally high workload, her long-standing (inadequate) billing practices, at several different firms, and an illness in the family as several factors helping to explain why she employed careless billing for these clients. The respondent did not admit to deceiving a client, and instead presented compelling arguments as to why her conduct should not

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[9] Neither the board nor the hearing committee considered as mitigating that, at the beginning of the period in question, when the billing discrepancies at issue appeared on the respondent's bills, the respondent's sister, who was the caretaker for the respondent's autistic brother, was diagnosed with chronic leukemia. The respondent's sister passed away two weeks before the evidentiary hearing; in addition to confronting this loss, her sister's death left the respondent undertaking steps to become her brother's guardian and trying to find a daily caretaker for him. The board determined that there was no mitigation because there was no causal connection between the appearance of the respondent's billing discrepancies and her sister's terminal illness.

However, at a minimum, certainly the respondent's demeanor and presentation at the hearing, where her credibility was being assessed, understandably would have been impacted by her then recent loss.

be seen as intentionally deceptive. It would be unjust to penalize the respondent for mounting a strong defense.

Accordingly, a judgment shall enter suspending the respondent for a period of six months.

By the Court,

Frank M. Gaziano
Associate Justice

Entered: November 18, 2019