

Massachusetts Legal Ethics: Substance and Practice

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The Board's goal in preparing this treatise is to make Massachusetts legal ethics and the disciplinary system readily accessible to members of the bar and to the public. To this end, it has assembled the law on these topics in a single-volume reference work.

This PDF document is a draft of the treatise. The Board is posting it on its web site at this time to make it available as it finalizes the volume. The Board anticipates that a final version of the treatise will be published during 2018 in hard copy and as an e-book. Annual updates will keep this volume current.

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Chapter 1

A Brief History of Bar Discipline in Massachusetts

Before 1972, bar discipline in Massachusetts was administered, as it was throughout most of the country, on a county-by-county basis. A petition for the removal of a lawyer from the office of attorney at law was brought, usually by a county bar association acting in a voluntary capacity,¹ in the superior court under G.L. c. 159, § 39. By statute, the attorney's appeal from any adverse judgment lay in the Supreme Judicial Court.

By at least the beginning of the twentieth century, the Supreme Judicial Court had made clear that bar discipline was a matter wholly committed to its "inherent jurisdiction,"² and that any permissible statutory incursions by the legislature were viewed as measures in aid of the Court's exercise of that jurisdiction and did not limit the Court's judicial power.³ The specific history and the details of those proceedings have less relevance to this treatise than the essential principles of bar discipline laid down in the Court's early jurisprudence.

The Court decided early on that an attorney's removal from the bar was not a punishment but action taken to preserve "the purity of the courts."⁴ Removal reflected an acknowledgment that a "due regard to the dignity and decency of the court does not permit such fellowship" with the ousted attorney.⁵ As a consequence, a disciplinary proceeding is neither civil nor criminal in nature,⁶ and the attorney is not entitled to criminal or other special process, but only, as the Court later put it, to reasonable notice and an opportunity to be heard.⁷

Subsequent decisions put further flesh on the skeletal notion of the kind of notice, opportunity, and procedural safeguards a respondent attorney facing discipline was entitled to receive. While acknowledging that ethical codes adopted by bar associations "have no statutory force," the Court nonetheless found that they were "commonly recognized by bench and bar alike as establishing wholesome standards of professional

¹ In one case, involving allegations of jury tampering, the petition was brought "on behalf of a committee of citizens of the commonwealth," who obtained the appointment of two "special commissioners" whose subsequent report led to a trial before a single justice. *See In re Keenan*, 287 Mass. 577, 192 N.E. 65 (1934).

² *See, e.g., Matter of Cohen*, 261 Mass. 484, 159 N.E. 495 (1928).

³ *See In re Carver*, 224 Mass. 169, 170, 112 N.E. 877 (1916).

⁴ *Matter of Greenwood*, 168 Mass. 169, 46 N.E. 568, 575 (1897).

⁵ *Id.*

⁶ *Matter of Randall*, 11 Allen 473, 93 Mass. 473, 476 (1865).

⁷ *See, e.g., Matter of Greenwood*, 168 Mass. at 168, 46 N.E. at 575 (1897). *See also* *Bar Ass'n of City of Boston v. Scoty*, 209 Mass. 200, 203, 95 N.E. 402, 403 (1911) ("mere forms not affecting [the] merits should not stand in the way of protecting the court and the public by appropriate action after a full hearing").

action,” and their breach would warrant discipline.⁸ In *Matter of Mayberry*,⁹ the Court determined that a preponderance of the evidence, not clear and convincing evidence, should be the standard of proof in disciplinary proceedings.¹⁰ In *Matter of Santasuosso*,¹¹ the Court permitted the introduction in a bar discipline proceeding of evidence taken, but not the findings made, in a prior court proceeding.¹² In *Matter of Centracchio*,¹³ the Court adumbrated much of what became the current standard by which petitions for reinstatement to the bar are assessed. In all important respects, bar discipline was conducted in such a framework until the mid-1970s.

In 1970 the American Bar Association published the report of its Special Committee on Evaluation of Disciplinary Enforcement, known as the Clark Committee after the former United States Supreme Court justice who headed it.¹⁴ After undertaking the first nationwide examination of lawyer disciplinary procedures in the United States, the Clark Commission warned of a “scandalous situation” in professional discipline that required “the immediate attention of the profession.”¹⁵ The Clark Committee deplored a nationwide situation in which “most states conducted lawyer discipline at the local level with no professional staff,” in a “secretive procedural labyrinth of multiple hearings and reviews,” and before local hearing officers with too little rotation and no assurance of objectivity.¹⁶ As a consequence, discipline was parochial, subject to cumbersome procedures, and woefully underfinanced. Disciplinary staff was usually unpaid and, in any event, given little access to training opportunities. While the ABA had adopted its Model Code of Professional Responsibility in 1969, there was little coordination, guidance, or research on the subject.

In the aftermath of the Clark Commission’s report, the ABA adopted its Model Rules of Disciplinary Enforcement. Model Rule 8, which was intended to address the problem of financing bar discipline activities, provided as follows:

⁸ In re Cohen, 261 Mass. at 487 (two-month suspension for engaging in lawyer advertising).

⁹ 295 Mass. 155, 3 N.E.2d 248 (1936).

¹⁰ In this regard, Massachusetts is in the distinct minority: most states require, as the American Bar Association recommends, that charges against a lawyer be established by clear and convincing evidence. In 2005, the Massachusetts Bar Association recommended to the SJC that the Court raise the standard of proof. See MASSACHUSETTS BAR ASSOCIATION, REPORT OF THE MBA TASK FORCE ON LAWYER DISCIPLINE—PROTECTING THE PUBLIC: REFORMING THE DISCIPLINARY PROCESS (2005). The SJC did not make the suggested change. In 2002, the First Circuit held that the preponderance of the evidence standard does not offend due process. *Matter of Barach*, 540 F.3d 82, 86–87 (1st Cir. 2008).

¹¹ 318 Mass. 489, 62 N.E.2d 105 (1945).

¹² In *Bar Counsel v. Board of Bar Overseers*, 420 Mass. 6, 11 Mass. Att’y Disc. R. 291 (1995), the Court determined that the usual rules of issue preclusion were applicable to bar discipline proceedings. Given that the standard of proof is a preponderance of the evidence, issue preclusion based on prior civil adjudications is more prevalent in Massachusetts than in states that require clear and convincing evidence to prove misconduct.

¹³ 345 Mass. 342 (1963).

¹⁴ LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1992).

¹⁵ *Id.* at xiv.

¹⁶ *Id.*

- A. *Requirement.* Every lawyer admitted to practice before this court shall pay to the clerk of this court [state bar] an annual fee for each fiscal year . . . to be set by the court [state bar] from time to time. The fee shall be used to defray the costs of disciplinary administration and enforcement under these rules, and for those other purposes the board shall from time to time designate with the approval of this court

The phrase “state bar” appeared in brackets because the drafters proposed the state bar as an alternative recipient of annual fees for those states in which the state supreme court delegated the disciplinary function to a mandatory state bar association. In fact, a majority of the supreme courts do so delegate that function.

On May 15, 1970, the Massachusetts Bar Association petitioned the Supreme Judicial Court to adopt just such a rule. The MBA asked the Court to establish the MBA as a “unified self-governing entity to which every Massachusetts lawyer must belong and pay dues.”¹⁷ The MBA also sought the establishment of the Clients’ Security Board, which would be supported by the same funding.

The petition was supported by most county bar associations, but it was strenuously opposed by the Boston Bar Association and the Civil Liberties Union of Massachusetts (CLUM). While the petition was still pending, the justices adopted the ABA’s Code of Professional Responsibility and Canons of Judicial Ethics, with some modifications to reflect local practice.¹⁸

The full Court heard oral argument on the unification petition on November 4, 1972. The BBA argued against concentration of so much authority in the hands of a single bar association, while CLUM feared that individual lawyers might be obliged to provide funding to a bar association whose political stances they did not support. The concerns expressed by CLUM proved prescient in view of the success of later constitutional challenges to the funding of the political activities of unified bars in other states.¹⁹

After argument, the Court appointed retired Justice B. Ammi Cutter to serve as special master and commissioner to hear additional arguments and to draft rules to achieve the objectives of the petition and, as a separate matter, to present draft rules “which this court should consider if it were to order the unification of the bar.”²⁰

On September 12, 1973, Cutter filed his comprehensive report. He took no position on the unification proposal, which remained squarely before the Court. Although, as Chief Justice Wilkins relates, the Court was initially inclined, by a vote of

¹⁷ Herbert Wilkins, *A Justice’s Perspective of the First Twenty Years of the Board of Bar Overseers*, 79 MASS. L. REV. 134, 134 (1994). Justice (later Chief Justice) Wilkins’ article offers a fascinating glimpse into the Court’s deliberations on the matter.

¹⁸ See S.J.C. Rule 3:22, 359 Mass. 796 (1971).

¹⁹ See, e.g., *Keller v. State Bar of California*, 496 U.S. 1 (1990); *Matter of the State Bar of Wisconsin*, 169 Wis.2d 21 (1992).

²⁰ Wilkins, *supra* note 17, at 135.

four to three, to adopt the unification proposal, the Court later determined not to do so.²¹ It is Justice Wilkins' recollection that the justices felt that unification was too controversial a change to visit on the bar by so divided a vote. Hence, on June 3, 1974, the Court entered an order that promulgated rules concerning bar discipline and clients security protection.²² The rules became effective on September 1, 1974. Unification was rejected. A nine-member Board of Bar Overseers ("Board") and a seven-member Clients' Security Board would be created, and their members would be appointed not by the MBA but by the Court after receiving nominations from the various bar associations. The justices indicated that the question of unification would remain on the Court's docket for two years, but by then the Board of Bar Overseers was fully operational, and no one suggested that the unification issue be revisited.²³

The procedural rules as originally recommended by Justice Cutter and promulgated by the Court constituted a rule-bound set of procedures that departed from the loose notions of procedural due process that the Court had invoked in the past. The originally promulgated rules also differ strikingly from those that apply today in two important respects. First, decisions on whether to institute formal charges against a lawyer were delegated to hearing committees sitting in the county where the lawyer lived or practiced. Second, the rules could be read to grant accused lawyers a trial de novo before the Supreme Judicial Court on the charges against them.

In 1978, Justice Wilkins, sitting as a single justice, noted the apparent confusion as to the nature and scope of Board's and the Court's review of hearing committee findings.²⁴ The Board responded by proposing, and the Court adopted, an amendment that squarely provided that the Court would uphold the subsidiary facts found by the Board "if supported by substantial evidence."²⁵ In addition, the 1978 amendment empowered the Board to adopt the hearing committee's findings of fact or to "revise such findings which it determines to be erroneous, paying due respect to the role of the hearing committee as the *sole judge of the credibility of the testimony* presented at the hearing."²⁶

Research has been unable to locate any documents or obtain any oral history that explains the reasons for granting such unusual authority to the hearing officers. The available record contains no clue whatsoever why the Court and the Board departed from the Administrative Procedure Act in rejecting the "substantial deference" standard used by administrative agencies in reviewing the credibility determinations of hearing officers. Instead, the rule grants almost total deference to a hearing committee's credibility determinations—deference the Court has since likened to that owed a jury's findings on

²¹ *Id.*

²² *See* Matter of McInerney, 389 Mass. 528, 530 n5, 451 N.E.2d 401, 403 n5 (1993) (describing the 1974 action).

²³ Wilkins, *supra* note 17, at 136. As it happened, the MBA's petition for unification of the bar was the high-water mark of the drive for unified bars: it appears that no other supreme court has adopted a unified bar proposal since Massachusetts rejected the MBA's petition in 1974.

²⁴ *See* Matter of Blais, 1 Mass. Att'y Disc. R. 30, 34–35 (1978).

²⁵ S.J.C. Rule 4:01, § 8(3).

²⁶ *Id.* (emphasis added).

credibility.²⁷ In any event, it is now clear beyond cavil that a hearing committee's credibility determinations are sacrosanct and will not be set aside unless wildly wrong or self-contradictory.²⁸

There have been three major sets of amendments to S.J.C. Rule 4:01 and the Board's own administrative rules since 1978. The first group of changes came hard on the heels of a 1992 federal district court decision striking down a rule in Florida that prohibited complainants from making public the allegations or even existence of grievances filed against lawyers.²⁹ Justice Wilkins, then chair of the Court's rules committee, asked the Board to make recommendations on what to do about the Court's almost identical rule. In addition, he asked whether it was not time for Massachusetts, whose disciplinary proceedings generally were conducted in secret until after hearing and review by the full Board, to join the thirty-two other states that opened the process to the public upon the filing of formal charges. The Board responded by recommending, and the Court subsequently adopted, fairly sweeping changes to the procedural rules, the more important of which include the following: (1) proceedings became public upon the filing of formal charges; (2) the Board was permitted to recruit and deploy laypersons to serve on hearing committees;³⁰ (3) the two available private sanctions – the informal admonition and private reprimand – were merged into a single form of private discipline called admonition; (4) the former public censure, which could be imposed only by the Court, was replaced by the public reprimand, which is imposed by the Board; (5) complainants and witnesses were granted absolute immunity for giving testimony and communicating with the Board and Bar Counsel; (6) the Board and Bar Counsel were given discretion to make public disclosures regarding the pendency, subject matter, and status of an investigation in certain circumstances; (7) respondents who fail to cooperate with Bar Counsel's investigation would be administratively suspended until they did; and (8) Bar Counsel was granted authority to close meritless grievances unilaterally so long as complainants could review the closing by appeal to a single Board member.

The second group of changes to Rule 4:01 was promulgated effective July 1, 1997. The major amendments included the imposition of administrative suspension for failure to respond to a subpoena and other defaults; the addition of the special hearing officer as a sole adjudicator at the discretion of the Board chair; the creation of the disability inactive status and new proceedings to determine incapacity; major changes to

²⁷ See, e.g., *Matter of Barrett*, 447 Mass. 453, 463–465, 22 Mass. Att'y Disc. R. 58, 70–72 (2006).

²⁸ See, e.g., *Matter of Wise*, 433 Mass. 80, 16 Mass. Att'y Disc. R. 416 (2000) (overruling a Board finding that conflicted with a hearing committee's credibility determination); *Matter of Hachey*, 11 Mass. Att'y Disc. R. 102, 103 (1995) (same). See also *Matter of Barrett*, 447 Mass. 453, 460, 22 Mass. Att'y Disc. R. 58, 67 (2006) (hearing officers act like a jury on issues of credibility, which may not be set aside “unless the finding was wholly inconsistent with another implicit finding”) (quoting *Matter of Hachey*, *supra*). In *Matter of Hession*, 29 Mass. Att'y Disc. R. 338 (2013), the single justice stated that the hearing committee's “decision to credit the respondent's testimony that what he said was true does not deserve deference as a credibility determination.” 29 Mass. Att'y Disc. R. at 350 n.8. That determination seemingly rested on the single justice's determination that the issue in question was not one of credibility, but of sufficiency of evidence.

²⁹ *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990).

³⁰ The Board itself has had laypersons among its twelve members since 1978, and it typically has four lay members.

the procedure to be followed after disbarment, suspension, resignation or transfer to disability inactive status; lawyers suspended from practice for less than a year could be reinstated without the need for a hearing; and lawyers suspended for more than a year were allowed to file a petition for reinstatement three months before the date on which they were eligible for reinstatement.

The third group of major rules changes occurred effective September 1, 2009, following recommendations by a Task Force of the Massachusetts Bar Association³¹ as well as an evaluation performed by representatives of the American Bar Association.³² The principal changes included:

(1) The replacement of the presumption that disciplinary hearings would be held in disciplinary districts based on the lawyer's home county. Instead, the venue would be the offices of the Board unless the Board chair found another venue convenient for the parties and witnesses.

(2) The use, in appropriate cases, of probation or diversion in place of traditional discipline was permitted.

(3) Bar counsel was given further authority not to entertain frivolous complaints.

(4) Lawyers were allowed to contest the imposition of an admonition at a private, expedited hearing before a single Board member, with any appeals limited to review by the Board, not the Court.

(5) The Board's own rules were amended to afford respondents additional discovery in formal proceedings.

In 1992 the Board encouraged its general counsel to endeavor to find pro bono counsel to represent indigent respondents, an undertaking now codified in the Board's rules in section 3.4(d).³³ That same year the Board voted unanimously to recommend that the Court fund the operations of Lawyers Concerned for Lawyers (LCL) out of the registration fees paid by lawyers. The Court accepted the recommendation. LCL later expanded its mission beyond providing mental health services to lawyers so as to include law office management services.

³¹ REPORT OF THE MBA TASK FORCE ON LAWYER DISCIPLINE, PROTECTING THE PUBLIC: REFORMING THE DISCIPLINARY PROCESS (2004).

³² AMERICAN BAR ASSOCIATION REPORT ON THE LAWYER REGULATION SYSTEM OF MASSACHUSETTS (2009).

³³ RULES OF THE BOARD OF BAR OVERSEERS § 3.4(d) (2011).

Chapter 2

The Actors in and the Structure of the Disciplinary System in Massachusetts

I. Introduction

The Massachusetts disciplinary processes includes several different participants and entities, each of which has a separate, defined role in the regulation of Massachusetts attorneys and the protection of consumers of legal services. This chapter introduces the participants and describes their respective roles and responsibilities. The chapter will introduce you to the following:

- The Board of Bar Overseers (BBO or Board))
- BBO Hearing Officers
- The Office of the General Counsel of the BBO
- The Office of Bar Counsel
- The Attorney and Consumer Assistance Program (ACAP)
- The Supreme Judicial Court

The Chapter also describes the following important ancillary actors:

- The Clients' Security Board
- The Board of Bar Examiners
- Lawyers Concerned for Lawyers (LCL)
- The Law Office Management Assistance Project (LOMAP)

The Board of Bar Overseers has primary responsibility to administer the discipline of lawyers in Massachusetts. The Office of Bar Counsel serves as the investigator and prosecutor of lawyers who have been accused of misconduct. The BBO appoints hearing panels or hearing officers consisting of volunteers (lawyers and laypersons) to hear and decide contested disputes about lawyer discipline. The Board also hears appeals and recommends (and sometimes imposes) discipline. The Office of the General Counsel provides legal advice and guidance to the Board and to the hearing officers. The Supreme Judicial Court, usually through single justices but sometimes as a full court, must approve recommendations for suspension or disbarment, and decides appeals involving lesser sanctions.

While not a part of the disciplinary administrative authority, three other agencies have important relevance to the process. The Clients' Security Board (CSB) manages and distributes monies in the Clients' Security Fund to victims of financial loss caused by the dishonest conduct of a member of the bar acting as an attorney or fiduciary. The Board of Bar Examiners oversees the admission of applicants to the Massachusetts bar, including deciding questions of moral fitness. Lawyers Concerned for Lawyers assists attorneys and others in the profession who are experiencing impairment in their ability to function as a result of personal, mental health, addiction or medical problems. And the

Law Office Management Assistance Project assists Massachusetts attorneys to establish responsible and effective office practices.

This chapter will also offer a schematic of how the disciplinary processes are structured in Massachusetts, in order to demonstrate how the actors' work fits together.

First, the participants.

II. The Participants

A. Participants in the Disciplinary Process

1. The Board of Bar Overseers

The Board of Bar Overseers (the BBO or the Board) is a volunteer body appointed by the Supreme Judicial Court (SJC) pursuant to authority established under SJC Rule 4:01. Traditionally, the Board has consisted of twelve members, four laypersons (including, usually, a doctor) and eight attorneys.¹ The Board includes a Chair and a Vice-Chair, who have special responsibilities, described below. The Board administers and oversees the entire disciplinary process, but it is separate from (if often confused with) the Office of Bar Counsel (OBC). In essence, the OBC prosecutes lawyers, while the BBO serves as the tribunal to decide disputed matters surrounding discipline. While the BBO does appoint the Bar Counsel with the approval of the SJC and approves the hiring of the lawyers who work in the OBC, Bar Counsel serves at the pleasure of the SJC.

The BBO serves several discrete functions. It assembles a group of volunteer lawyers and laypersons to serve as hearing officers, and assigns them to sit as hearing committees or individual hearing officers to preside over the hearings that arise in disputed matters. The Board then serves as the appellate body (either as a full board, or in panels of three members each) to hear and decide contested matters arising from the adjudicative tribunal proceedings. The Board makes decisions in those appellate-type proceedings. Some Board decisions are binding and final (for example public reprimands, if no further appeal occurs). Some Board decisions are not final, and must be reviewed by a single justice of the SJC. The distinction is this: The Board may issue public reprimands on its own and will approve or reject proposed admonitions, but more serious discipline—suspension and disbarment orders—must be entered by the SJC. The Board members also, again in panels of three, hold evidentiary hearings in selected matters, including petitions for reinstatement and hearings arising from a lawyer's conviction of a crime. On occasion, a Board member will sit as part of a hearing committee.

¹ The size of the Board is not fixed by the SJC rule, which states that “[t]he Board shall consist of such number of members as the court shall determine from time to time.” SJC Rule 4:01, § 5(1).

Board members have the authority to issue hearing subpoenas at the request of Bar Counsel or a respondent.² The Chair of the Board (or the Vice-Chair in the Chair's absence) has special duties beyond that of other members. For instance, the Chair hears certain motions during hearing proceedings. If a party files a pre-hearing motion for a protective order, for dismissal, for issue preclusion, or to stay or defer prosecution, those matters must be ruled on by the Board Chair or his or her designee.³ In addition, Board members periodically are assigned for "duty review" for a given week. Duty review involves, among other tasks, issuing subpoenas when requested by a party, approving a charging memorandum if Bar Counsel determines to proceed with discipline, approving admonitions, and reviewing objections by complainants after Bar Counsel has decided that a grievance should be closed without disciplinary proceedings.

Board members are appointed by the SJC, and serve staggered terms of four years each. Board members may be reappointed for one more four-year term;⁴ that term limit does not bar a reappointment after the member has left the Board for at least one year. The Court's consistent practice over the last quarter century, however, has been to decline requests for appointment to a second four-year term except for lay members of the Board.

Finally, the Board has established four standing committees through which to conduct its work. The Rules Committee, the Budget and Finance Committee, and the Personnel Committee have responsibilities apparent from their titles. (The Rules Committee traditionally includes at least one non-voting representative of the Office of Bar Counsel.) The Hearing Officer Committee is responsible for recruiting, selecting, and training hearing officers.

2. Volunteer Hearing Officers for the BBO

The Board itself does not typically conduct evidentiary hearings in disciplinary disputes.⁵ Those hearings are conducted by volunteer hearing officers, either in committees of three (usually two lawyers and a layperson) or as a special hearing officer (always a lawyer). The Board appoints such individuals to serve as hearing officers on three-year terms, once renewable. Later chapters describe the process of the hearings and the powers and responsibilities of hearing officers. In 2017, the Board had a roster of 141 hearing officers, of whom 40 were not attorneys.

3. The Office of the General Counsel of the BBO

The Office of the General Counsel (OGC) serves as the in-house counsel to the Board and gives legal advice to the volunteer hearing officers. In 2017 the OGC

² SJC Rule 4:01, § 22(1). The subpoenas may also be issued by the chair of a hearing panel or a special hearing officer.

³ See BBO Rules, §§ 3.18(b), (c), 3.22(d).

⁴ SJC Rule 4:01, § 5(2).

⁵ Disciplinary proceedings may be heard by a panel of Board members, see SJC Rule 4:01, § 5(3)(e); BBO Rules, § 3.19(a), but the Board's practice since 2008 has been to assign hearing committees or a special hearing officer.

consisted of five attorneys—a General Counsel, an Associate General Counsel, and three Assistant General Counsel, along with two administrative staff members. The responsibility of the OGC is to advise the Board and the hearing officers, who are the clients of the OGC. OGC lawyers attend hearings and Board meetings, assist in drafting hearing decisions and memoranda, research legal matters to assist the Board and the hearing officers to decide disputes, and otherwise ensure that the processes operate according to the SJC’s and BBO’s rules. The OGC also serves the Board’s administrative needs, by scheduling matters, distributing notices, and maintaining case records.

The OGC is entirely different and separate from the Office of Bar Counsel, and it does not offer legal advice to respondent lawyers. The General Counsel does, however, endeavor to find counsel to represent respondents who cannot afford to hire a lawyer and who do not have coverage for the defense of disciplinary grievances under a professional liability insurance policy. Depending on the circumstances, the attorneys located by the General Counsel may offer legal services to the respondent at a reduced fee, or on a pro bono basis.

4. The Office of Bar Counsel / The Bar Counsel

The Office of Bar Counsel (OBC) functions independently of the Board of Bar Overseers, despite much popular misconception. The OBC is established by SJC Rule 4:01(7). Its responsibility is “to investigate all matters involving alleged misconduct by a lawyer coming to [the Bar Counsel’s] attention from any source”⁶ Besides investigating such allegations, the OBC disposes of complaints that do not warrant disciplinary proceedings, proposes and obtains Board approval for (private) admonitions and diversions, files petitions for (public) discipline, and then prosecutes the matters that proceed toward possible discipline. The OBC consists of the Bar Counsel, and her staff of assistants to the Bar Counsel, who are the lawyers who carry out the responsibilities of the office. In 2017, the office included the Bar Counsel, 21 assistant bar counsel, and several investigators.

The chief Bar Counsel, known as “the Bar Counsel,” is appointed by the BBO, with the approval of the SJC.⁷ The Bar Counsel hires the assistant bar counsel with “the concurrence” of the BBO.⁸

In addition to its duties as investigator and prosecutor of discipline complaints, the OBC serves an educational role as well. It regularly issues, and posts on its website, articles and columns advising lawyers about ethical issues that might cause trouble for the unwary.⁹ Through its telephone “helpline,” the office also offers informal,

⁶ SJC Rule 4:01, § 7(1). The only exception to that authority is any allegation of misconduct against a member of the Board or its staff, which is investigated by the Board itself. See BBO Rules, § 5.6(c)(2)

⁷ SJC Rule 4:01, § 5(3)(b).

⁸ *Id.*

⁹ The collected articles may be found at <http://www.mass.gov/obcbbo/articles.htm>.

nonbinding advice to attorneys on ethical problems, and provides continuing legal education training for attorneys.

5. The Attorney and Consumer Assistance Program (ACAP)

The OBC receives complaints about lawyers and investigates them. Some of those complaints are relatively minor or do not involve professional misconduct. In order to resolve such complaints, to streamline the work of the OBC, and to offer prompt assistance to the complainants, in 1999 the OBC created the Attorney and Consumer Assistance Program (ACAP), which is an office within OBC. The overwhelming majority of complaints about a lawyer are initially addressed by the staff of ACAP. ACAP may contact both the complainant and the lawyer to determine whether the complaint may be resolved through some informal action. If so, no formal complaint file is opened, and presumably the complainant receives some measure of satisfaction. If the complaint alleges more serious, credible allegations of misconduct, the complainant may file a formal complaint with the OBC, or the OBC will initiate the disciplinary process itself.

The ACAP process is addressed in more detail in Chapter 5.

6. The Supreme Judicial Court (SJC) / single justices

The Massachusetts Supreme Judicial Court (SJC) has ultimate authority over lawyer discipline in the Commonwealth. It has well-defined duties in matters involving individual lawyers and their discipline. The SJC has administrative oversight of the BBO, appoints Board members and approves the appointment of Bar Counsel, who serves at the pleasure of the SJC. But more directly relevant, the SJC plays a central role in the imposition of discipline upon lawyers in the Commonwealth. It does so in two ways (or perhaps three, depending on how one looks at the arrangements).

First, the SJC must approve all sanctions beyond a public reprimand.¹⁰ Even if the respondent lawyer and the Office of Bar Counsel agree with the sanction proposed by the Board, that sanction must be approved by the SJC if it is more serious than a public reprimand. Typically, that approval process goes through a single justice assigned to hear the matter. The single justice may, or may not, accept the disposition agreed upon by the parties. Second, in all cases where the parties do not agree with the Board's proposed sanction, the case is heard by the SJC, initially by a single justice.¹¹ The single justice may, in his or her discretion, refer the matter to a full panel of the SJC in lieu of deciding the matter.¹² Any party aggrieved by the single justice's decision may appeal

¹⁰ SJC Rule 4:01, § 8(6).

¹¹ *Id.* The Rule does not state that the matters will be reviewed by a single justice, but such is the practice of the court.

¹² The referral to the full Court by a single justice is seen in a limited number of cases. *See, e.g.,* Matter of Balliro, 453 Mass. 75, 25 Mass. Att'y Disc. R. 30 (2009) ("the present bar discipline matter is before us on reservation and report, without decision, from a single justice of this court"); Matter of Finneran, 455 Mass. 722, 26 Mass. Att'y Disc. R. 177 (2010) ("This bar discipline matter comes before the court on a

that ruling to the full court. A pilot program instituted in 2009 and accepted as a permanent procedure in 2015 spells out procedures for such appeals to the full court.¹³ Chapter 9 of this Treatise reviews the specifics of each of these review procedures.

B. Participants Ancillary to the Disciplinary Process

1. The Clients' Security Board (CSB)

The Clients' Security Board (CSB) is a separate administrative agency that has indirect relevance to the disciplinary process in Massachusetts and hence to the subject matter of this Treatise. It uses funding from the registration fees paid by lawyers in the state to reimburse clients and other victims who have lost money as the result of lawyer misconduct involving defalcation, embezzlement, or conversion of money or property, but not for damages caused by legal malpractice. The CSB's website offers the best description of what it is and what it does:

The Clients' Security Board consists of seven members of the bar of the Commonwealth of Massachusetts who are appointed by the Supreme Judicial Court to serve as public trustees of the Clients' Security Fund. A portion of the annual fees paid by each member of the bar is allocated to the Fund. Board members manage and distribute the monies in the Fund to members of the public who have sustained a financial loss caused by the dishonest conduct of a member of the bar acting as an attorney or a fiduciary. Board members receive no financial compensation for their time and efforts in performing their duties as Board members.

The CSB works in the same offices as the BBO, but is not part of the BBO. It is an independent entity overseeing the Clients' Security Fund. Chapter 14 reviews the work of the CSB in more detail.

2. The Board of Bar Examiners (BBE)

The Board of Bar Examiners (BBE) is different and separate from its similarly-sounding agency, the Board of Bar Overseers (BBO). The BBE consists of five members appointed by the SJC to examine the character and fitness of all applicants to the bar of the Commonwealth. The BBE both oversees the administration of the bar examination and ensures that persons who apply to become lawyers in this state meet all of the qualifications necessary for that privilege, including investigating the moral character of all applicants. The BBE recommends applicants to the SJC for admission to the bar, and may recommend that an applicant be denied admission to the bar. The BBE's role intersects with the disciplinary process in two ways. Some respondents before the BBO end up there because they submitted false or improper materials to the BBE in their

reservation and report by a single justice, without decision"); *Matter of Wainwright*, 448 Mass. 378, 23 Mass. Att'y Disc. R. 749 (2007) ("a single justice reserved and reported the cases to the full court").

¹³ See Order Establishing a Modified Procedure for Appeals in Bar Discipline Cases (April 1, 2009); SJC Rule 2:23 (April 1, 2015).

application to the Massachusetts Bar.¹⁴ Other respondents receive sanctions from the BBO that include a requirement that they submit to the BBE for a review of their character and rehabilitation before they are permitted to resume the practice of law in the state.¹⁵ While the SJC appoints the members of the BBE and approves its rules, the BBE itself is a creation of the legislature, and not of the SJC.¹⁶

3. Lawyers Concerned for Lawyers

Lawyers Concerned for Lawyers, Inc. (LCL) is a private, nonprofit Massachusetts corporation and a recognized federal Section 501(c)(3) tax-exempt organization. Its operations are governed by SJC Rule 4:07. LCL assists lawyers, judges, law students, and their families who are experiencing any level of impairment in their ability to function as a result of personal, mental health, addiction or medical problems. LCL provides assistance with problems such as career and family difficulties, depression, and stress, as well as alcoholism, substance abuse, gambling and all other forms of addiction.¹⁷ The organization's funding comes primarily from a portion of the registration fees collected by the BBO each year from Massachusetts lawyers.¹⁸ LCL offers all of its services free of charge, and confidentially.¹⁹

LCL plays a critical role in the disciplinary process. When the Board or the SJC determines that a lawyer's misconduct has resulted from an impairment or similar difficulty that LCL might help address, the resulting sanction order may include a requirement that the respondent seek assistance from LCL. At least 40 disciplinary reports since 1999 include some reference to LCL.

4. The Massachusetts Law Office Management Assistance Program (LOMAP)

The Massachusetts Law Office Management Assistance Program (LOMAP) is a program within Lawyers Concerned for Lawyers, Inc. LOMAP's mission is to educate lawyers about law office management, and to assist individual lawyers to establish effective office practices. It provides training classes, individual consultations, and many resources on its website.²⁰ All of its services are free of charge.

¹⁴ See, e.g., Matter of Betts, 26 Mass. Att'y Disc. R. 44 (2010) (suspension for failure to disclose misdemeanor charges on petition for admission); Matter of Voykhansky, 24 Mass. Att'y Disc. R. 719 (2008) (suspension after false claim of having obtained an undergraduate degree before law school).

¹⁵ See, e.g., Matter of Resnick, 26 Mass. Att'y Disc. R. 544 (2010).

¹⁶ See G.L. c. 221 § 35.

¹⁷ The description in the text is from the LCL website. See <http://www.lclma.org/about/who-we-are/#sthash.JD8TNe7L.dpuf>.

¹⁸ In 2015 LCL received 7.5 percent of the annual registration fees collected by the BBO. In FY 2103, its operative revenue was approximately \$1.25 million.

¹⁹ LCL assures users of strict confidentiality on its website. See <http://www.lclma.org/about/confidentiality/>. In addition, Rule 1.6(d) of the Rules of Professional Conduct deems any participant in LCL (or any similar organization) to be a client for purposes of confidentiality protection.

²⁰ See <http://masslomap.org/about/>.

Like with LCL generally, LOMAP plays an important role in the disciplinary system. Many instances of misconduct, and especially those involving client neglect or mismanagement of client funds and trust accounts, can be attributable to the lawyers' failure to establish effective office management systems. Discipline reports often include a requirement that a lawyer work with LOMAP as a condition of reinstatement or of maintaining the right to practice. Since 2006, at least 47 disciplinary reports have referenced LOMAP.

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Chapter 3. The Structure of the Disciplinary Process

In simplified terms, the following is how the disciplinary process develops from initial intake to a final disposition. Each of the steps discussed below is treated more fully in later chapters.

Bar Counsel's Investigation Begins. Pursuant to the provisions of S.J.C. Rule 4:01, § 7, Bar Counsel is responsible for investigating complaints of attorney misconduct, as well as questions of attorney misconduct that come to her attention in the absence of a complaint, such as through news media or court decisions.

ACAP review/investigation. The Attorney and Consumer Assistance Program (ACAP) is the intake division of the Office of Bar Counsel (OBC). It attempts to identify and resolve minor complaints against attorneys without docketing them as formal OBC complaints. Traditionally, ACAP is able to resolve about 85 percent of the matters it receives without opening formal complaints in them. In those instances, the matters are simply closed. When a complaint involves allegations of serious misconduct, such as the mishandling of client funds, ACAP urges the complainant to file a formal written complaint (called a "request for investigation") with Bar Counsel to trigger an investigation for possible prosecution.

Initiation of a formal investigation. If the matter is not resolved by ACAP or if it involves allegations of serious misconduct, but the complainant takes no further action, ACAP may itself refer the matter to Bar Counsel for investigation. Upon determining that a matter should be investigated, Bar Counsel notifies the attorney in writing of the complaint.

Reply by respondent; OBC's further investigation. The attorney is required to respond to Bar Counsel's letter stating that an investigation has been commenced and to cooperate in Bar Counsel's investigation. Failure to do so may constitute a separate act of misconduct, and can result in immediate administrative suspension.¹ Upon receipt of the respondent's answer, Bar Counsel will determine whether further investigation is required and if so, what is involved. That can include, but is not limited to, the following: asking the respondent for additional documents, including pleadings, bank records, etc.; issuing subpoenas to third parties, such as banks and insurance companies; and having the respondent appear at Bar Counsel's office and give a recorded statement under oath.²

Disposition by Bar Counsel. What happens next depends on the outcome of Bar Counsel's investigation. Note that, generally, the complainant has no role or voice in this process.³ Moreover, Bar Counsel is not required to terminate an investigation because a complainant wishes to withdraw the complaint or because the parties have settled the

¹ S.J.C. Rule 4:01, § 3.

² S.J.C. Rule 4:01, § 22.

³ A complainant may request review by the Board of Bar Overseers (the Board) of a Bar Counsel decision not to prosecute a matter. The Board's decision, however, is final, with no right on the part of the complainant to seek court review of the decision. See Chapter 4.II.B.

underlying matter.⁴

After the investigation of a matter, Bar Counsel makes a recommendation for its disposition, which, in most instances, requires a Board member's review and approval or modification. Bar Counsel may recommend the following:

- (a) Closing: The complaint may be closed, either because no violation of the rules of professional conduct has occurred, because the violation does not warrant discipline, because it occurred more than six years earlier, or because no violation can be proven. Sometimes a file is closed with a warning about better practices that a respondent might employ, such as better communications with clients.⁵
- (b) Deferment: Bar Counsel can, with the approval of the Board or the Supreme Judicial Court, defer a matter where the material allegations are substantially similar to those in a pending civil, criminal, or administrative proceeding, or to a bar disciplinary proceeding pending in another jurisdiction.⁶ Alternatively, a file may be closed temporarily, subject to the outcome of pending litigation in which similar issues are being decided.
- (c) Diversion: Bar Counsel can also recommend diversion to an alternative educational, remedial, or rehabilitative program as an option for disposition of a complaint. This requires an agreement between Bar Counsel and the respondent, and is memorialized in a formal diversion agreement, which is approved or modified by the Board.⁷
- (d) Admonition. Upon approval by a Board member, an admonition may be imposed by Bar Counsel for relatively minor disciplinary violations.⁸ If so, the identity of the attorney receiving an admonition is not made public. Except when an admonition is imposed by agreement, the administration of an admonition is a unilateral act by Bar Counsel after Board review and approval.⁹ If an attorney seeks to contest the admonition, the attorney must file timely objections with the Board and request a hearing. The matter is assigned to a special hearing officer (SHO) and proceeds under a separate rule for expedited hearings.¹⁰ The proceedings are confidential.¹¹
- (e) Stipulations for public discipline accepted by the Board. If the attorney and Bar Counsel agree that there has been a violation warranting public discipline and also agree on a sanction, they can submit a stipulation to the Board for approval, before or after the filing of formal disciplinary charges. The submission will

⁴ S.J.C. Rule 4:01, § 10.

⁵ S.J.C. Rule 4:01, § 8(1)(a).

⁶ Rules of the Board of Bar Overseers (hereinafter "BBO Rules") § 2.13; S.J.C. Rule 4:01, § 11.

⁷ S.J.C. Rule 4:01, § 8(1).

⁸ BBO Rules § 2.11; S.J.C. Rule 4:01, §§ 8(1)(c)(i) and 8(2).

⁹ S.J.C. Rule 4:01, §§ 8(1)(c)(i) and 8(2)(c).

¹⁰ BBO Rules §§ 2.11 and 2.12; S.J.C. Rule 4:01, §§ 8(2)(c) and 8(4).

¹¹ BBO Rules § 2.12(2); S.J.C. Rule 4:01, § 8(4).

include a petition for discipline (either one drafted for submission along with the stipulation because the stipulation was reached before formal proceedings began, or the petition on file or as amended if the stipulation is reached after formal charges have been filed), and an answer and stipulation of the parties.¹² If the stipulation is approved, no hearing is required. If the agreement is for a public reprimand, the Board issues the public reprimand.¹³ Since only the Court can suspend or disbar a lawyer, if the agreement is for a suspension or disbarment, then an Information, consisting of the administrative record, is filed in the Supreme Judicial Court for Suffolk County, which is also referred to as the single justice session.¹⁴

- (f) Rejected stipulations: If the Board votes to reject a stipulation, this vote is a preliminary determination, and the Board states its reasons for its initial rejection.¹⁵ The parties are then given an opportunity to brief the issues and thereafter the Board issues a final vote in which, if rejecting the stipulation, it determines the appropriate recommended disposition and states the reasons for its rejection. Stipulations are either binding on the parties or collapsible.¹⁶ If a binding stipulation is rejected, the matter will be decided by the single justice, with the Board advocating its recommended disposition and the parties their stipulated disposition.¹⁷ If a collapsible stipulation is rejected by the Board, the parties can amend their pleadings and the matter is then scheduled for disciplinary hearing before a hearing committee of the Board.¹⁸
- (g) Commencement of formal proceedings: If the matter is not otherwise disposed of and, in Bar Counsel's judgment, warrants public discipline, Bar Counsel will request approval from a Board member to commence formal disciplinary proceedings by submitting a proposed draft petition for discipline.¹⁹ No Board approval is required for a petition arising from a conviction where the Court has remanded the matter to the Board under SJC Rule 4:01, § 12(4).

Petition for discipline. A petition for discipline arises in one of three contexts: (1) after Bar Counsel's investigation, pursuant to BBO Rules § 3.13(a)(2), including reciprocal discipline in another jurisdiction pursuant to S.J.C. Rule 4:01, § 8(16); (2) following the respondent's conviction of a serious crime, pursuant to BBO Rules § 3.13(a)(1); or (3) when the parties stipulate to a disposition and accompany their stipulation with a petition for discipline. Formal disciplinary proceedings are commenced by Bar Counsel's filing of an approved petition for discipline with the Board.²⁰ The petition must be sufficiently clear and specific to inform the respondent attorney of the charges of alleged misconduct,

¹² BBO Rules § 3.19(d); S.J.C. Rule 4:01, §§ 8(1)(c)(iii) and 8(3)(c).

¹³ S.J.C. Rule 4:01, § 8(1)(c).

¹⁴ S.J.C. Rule 4:01, § 8(1)(c).

¹⁵ BBO Rules § 3.19(e); S.J.C. Rule 4:01, § 8(3).

¹⁶ BBO Rules § 3.19(e).

¹⁷ *Id.*

¹⁸ BBO Rules §§ 3.19(d) and (e), S.J.C. Rule 4:01, § 8(3)(c).

¹⁹ SJC Rule 4:01, §§ 8(1)(c)(iii), 8(3)(a).

²⁰ BBO Rules § 3.13(a); SJC Rule 4:01, § 8(3)(a).

and must enumerate the specific rules of professional conduct alleged to have been violated by the respondent.²¹ The matter is later tried before a hearing committee, hearing panel, or SHO appointed for that purpose.²² They and the board cannot recommend or impose discipline for the violation of a rule that was not charged in the petition for discipline.²³ If there are several separate charges of unethical conduct pending against an attorney, those matters may be brought in a single proceeding. In such a case, a recommendation for discipline based upon all of the charges is appropriate.²⁴ Related charges against more than one attorney may also be consolidated into a single proceeding.²⁵

When the petition for discipline is served on the respondent, it is accompanied by a cover letter informing the respondent that an answer must be filed with the Board with a copy served upon Bar Counsel within twenty days,²⁶ that the allegations in the petition will be deemed admitted if no answer is filed, that failure to file an answer can result in an administrative suspension,²⁷ and that General Counsel of the Board will assist the respondent in obtaining counsel, on a *pro bono* basis, if necessary.

Respondent's Answer. The respondent has twenty days to file an answer to the petition for discipline.²⁸ The answer must be in writing, and must state fully and completely the nature of the defense. The answer must also specifically admit or deny, in detail, each material allegation of the petition and state clearly and concisely the facts and matters of law relied upon. General denials are not permitted. Averments in the petition are deemed admitted when not denied in the answer in accordance with this section.²⁹

In addition to responding specifically to the allegations in the petition for discipline, the respondent's answer must include any facts in mitigation and may request that a hearing be held on the issue of mitigation. The failure to include facts in mitigation constitutes a waiver of the right to present evidence of those claims.³⁰

If no answer is filed within the time limit established by the S.J.C. Rules, the Board will promptly notify the respondent that the allegations of the petition have been deemed admitted and that the opportunity to present evidence in mitigation has been waived.³¹ Unless Bar Counsel requests a hearing on matters in aggravation, the Board will then consider the matter of disposition on the basis of the admitted charges. The

²¹ BBO Rules § 3.14, S.J.C. Rule 4:01, § 8(3)(a).

²² S.J.C. Rule 4:01, § 8(3)(b).

²³ See Matter of Orfanello, 411 Mass. 511, 556, 7 Mass. Att'y Disc. R. 220, 226 (1992); Matter of Brower, 1 Mass. Att'y Disc. R. 45, 47 (1979).

²⁴ See Matter of Saab, 406 Mass. 315, 326–27, 6 Mass. Att'y Disc. R. 278, 289–90 (1989).

²⁵ See Matter of Pike, 408 Mass. 740, 6 Mass. Att'y Disc. R. 256 (1990).

²⁶ BBO Rules § 3.15 provides that failure to file an answer constitutes a default and the matter is then referred to the Board to determine the sanction.

²⁷ S.J.C. Rule 4:01, § 8(3)(a).

²⁸ BBO Rules § 3.15(a)(1); S.J.C. Rule 4:01, § 8(3)(a).

²⁹ BBO Rules § 3.15(d).

³⁰ BBO Rules § 3.15(f).

³¹ S.J.C. Rule 4:01, § 8(3)(a).

Board may order the parties to submit briefs on disposition.³² A respondent may, within twenty days after the notice of default, file a motion for relief from default. For good cause shown, the Board Chair may order the default removed and permit the respondent to file an answer to the petition for discipline.³³

Motions to dismiss. A respondent may file a motion to dismiss under BBO Rules § 3.18(b), but unlike such motions in civil litigation, it does not stay the proceedings. Given that each petition for discipline is reviewed by a Board member before it can be docketed and served on a respondent, motions to dismiss are rarely, if ever, granted. A respondent's motion to dismiss is decided by the Board chair or by another member of the Board designated by the chair.³⁴

Automatic Reciprocal Discovery and Other Discovery. Within twenty days following the filing of an answer, Bar Counsel and the respondent must exchange the names and addresses of all persons having knowledge of facts relevant to the proceedings. In addition, Bar Counsel and the respondent shall, within ten days, comply with reasonable requests made within thirty days following the filing of an answer for non-privileged information and evidence relevant to the charges or the respondent.³⁵ There are no express provisions for interrogatories, requests for production, or requests for admissions. Discovery of work product is not permitted.

Depositions. Discovery depositions must be approved in advance by the Board chair and are allowed only upon a showing of a very high standard of substantial need.³⁶ However, testimonial depositions of witnesses who will be unavailable to attend a hearing may be taken under less stringent standards.³⁷

Assignment to Hearing Committee. After a petition and answer have been filed with the Board, the Board assigns the case to a hearing committee or an SHO. Hearing committee members are volunteer lawyers and members of the public appointed by the Board to serve three-year terms (once renewable). A hearing committee usually consists of two lawyers and one public member, with a lawyer designated as the chair. An SHO is always a lawyer and sits alone. Most hearings are held in Boston; however, if the respondent's office is located near Springfield, Worcester, or southeastern Massachusetts, the case is usually assigned to a hearing committee from that area and held in a location in that area.³⁸

If a case arises from a conviction, it is assigned to a hearing panel consisting of three members of the Board.

Pre-hearing Conference. In discipline cases, a pre-hearing conference is scheduled to

³² BBO Rules § 3.15(a).

³³ BBO Rules § 3.15(h).

³⁴ BBO Rules § 3.18(b)(1).

³⁵ BBO Rules § 3.17(a).

³⁶ BBO Rules § 4.9.

³⁷ BBO Rules §§ 4.10 4.15.

³⁸ BBO Rules § 3.20.

expedite the orderly presentation of the evidence and testimony at hearing, and may address such issues as the exchange of exhibits, the limitation of the number of witnesses, discovery, scheduling of motions (including motions for protective orders, motions for issue preclusion, and motions in limine), and addressing potential evidentiary issues, such as witnesses testifying remotely by video conferencing. A prehearing conference is held in a conviction case only if a party requests such a conference within thirty days after the answer is filed. Except for good cause shown, a prehearing conference is not held prior to an expedited disciplinary hearing on appeal from an admonition.³⁹

The pre-hearing conference is usually conducted by the hearing committee chair; attendance by the other committee members is optional but welcome, and telephone participation is acceptable.

Bar Counsel, the respondent, and the respondent's counsel, if any, must attend the pre-hearing conference. At the conference, a schedule is set for all pre-hearing events, such as motions, and hearing dates are finalized. Dates are set for the parties to exchange their proposed witnesses (including expert witnesses and expert witness disclosures) and their proposed hearing exhibits. If a respondent intends to introduce medical or psychological evidence in mitigation, a schedule for the nature and timing of such disclosure and related matters is established. The parties are given a deadline by which to agree upon the admissibility of exhibits and to submit the agreed exhibits, along with any fact stipulations, to the committee. The hearing dates and various deadlines are the memorialized in a pre-hearing order, the template for which is provided to the parties before the pre-hearing conference.

Pro Se Respondents. Where a respondent appears *pro se* before the hearing committee, the committee encourages the respondent to obtain counsel. If the respondent cannot afford counsel, he is referred to the Board's General Counsel, who will, if requested, try to find counsel willing to undertake the representation on a *pro bono* or reduced-fee basis.

Pre-hearing Motions. Once a case has been assigned to a hearing committee, SHO, or hearing panel, all motions are decided by the hearing committee chair, except for motions for protective orders, motions by a respondent to dismiss some or all of the charges, motions for issue preclusion, motions for discovery depositions, and motions to stay or defer, which are referred directly to the Board.⁴⁰

Stipulations. Before the hearing, Bar Counsel and the respondent may agree to certain facts that may affect the need for a full evidentiary hearing. Under BBO Rules § 3.38, the parties are bound by their stipulations, but the stipulations are not binding upon the hearing committee, the Board, or the S.J.C. The hearing committee has the authority to conduct a hearing or an inquiry to satisfy itself as to the accuracy of the factual stipulation.

³⁹ BBO Rules § 3.23(a).

⁴⁰ BBO Rules §§ 3.19(a)(1), 3.18(b), 3.18(c), 3.22, 5.12.

Exhibits. As part of the prehearing order, the parties are required to exchange proposed exhibits and to attempt to agree upon them. They are required to submit a unified set of agreed exhibits and lists of contested exhibits; a party objecting to an exhibit is required to state the reasons therefor. Exhibits offered for limited purposes are to be so designated. The originals of the agreed exhibits are filed with the Board; copies of the agreed exhibits are provided to the hearing committee members several days in advance of the first hearing date so they may review them.⁴¹

Hearing subpoenas. Unlike in superior court or federal district court, the parties cannot issue their own subpoenas. Hearing subpoenas, including subpoenas duces tecum, must be requested in advance by the parties; they are prepared and issued by the Board.⁴²

Conduct of the Disciplinary Hearing. As noted above (see “Assignment to Hearing Committee”), a disciplinary hearing usually takes place before a three-person hearing committee or, in some circumstances, before an SHO sitting alone. If the case arises from a criminal conviction, it will be heard by a three-person hearing panel composed of Board members. Regardless, an assistant general counsel will be present at the hearing to provide legal advice on behalf of the Board to the committee, panel, or SHO and also handle the exhibits, of which the Board takes custody.

A hearing may proceed in the absence of one committee or panel member. The absent member may participate fully in all deliberations of the committee so long as the transcript of the hearing at which he or she was absent is available to him or her.⁴³ Hearings are generally conducted in accordance with the provisions of Massachusetts General Laws chapter 30A pertaining to adjudicatory hearings, except where otherwise inconsistent with the BBO Rules.⁴⁴

The respondent must attend the disciplinary hearing. If the respondent fails to appear, he or she may be administratively suspended from the practice of law.⁴⁵

The hearing committee, panel, or SHO can participate actively in the conduct of the hearing and usually does. They can limit the number of witnesses to avoid unduly repetitious testimony but can also subpoena witnesses and documents on their own.⁴⁶ They usually ask questions of the witnesses who testify.

Burden of Proof and Presentation of the Evidence. Bar Counsel bears the burden of proof except on affirmative defenses and matters in mitigation, where the respondent bears the burden of proof. The standard of proof is the preponderance of the evidence. Bar Counsel must “initiate the presentation of evidence”; Bar Counsel opens first and closes last.⁴⁷ Both parties have the right to present evidence, cross-examine, object, argue, and

⁴¹ BBO Rules §§ 3.25, 3.40.

⁴² BBO Rules §§ 4.5(a)–(c); S.J.C. Rule 4:01, § 22.

⁴³ BBO Rule § 3.7(c).

⁴⁴ BBO Rules § 3.2.

⁴⁵ S.J.C. Rule 4:01, § 3(2).

⁴⁶ BBO Rules §§ 3.30, 4.5(d).

⁴⁷ BBO Rules § 3.28.

make appropriate motions.⁴⁸ Except as otherwise provided by the BBO Rules, admissibility is generally governed by the Massachusetts Administrative Procedure Act (Chapter 30A).⁴⁹ The hearing committee, panel, or SHO rules on the admissibility of evidence.⁵⁰

Witnesses and Transcripts. All witnesses are sworn and give testimony under oath, which is transcribed by a court reporter. For hearings conducted at the Board's hearing room, it is possible for a witness to testify by Skype or other technology, but the notary public who swears in the witness must be with the witness to verify his or her identity. The transcripts are part of the record.⁵¹ A respondent may obtain a copy of the transcript at his or her expense from the court reporter.⁵²

Evidence Submitted After the Close of the Hearing. Before the close of a hearing, the hearing committee, panel, or SHO can in their discretion agree to accept additional evidence at a later date, which will occur more than ten days before the filing and service of the post-hearing briefs.⁵³ After the close of the formal hearing, the record may be reopened at the request of one of the parties pursuant to written petition, or sua sponte by the committee, panel, SHO, or Board.⁵⁴

Post-hearing Submissions. Within thirty days from the receipt of the last hearing transcript, the parties are to file their briefs and proposed findings of facts and requests for conclusions of law (together referred to as PFCs).⁵⁵ The preferred format of the PFCs is similar to the statement of facts in a support of a motion for summary judgment: a series of numbered paragraphs, with every proposed finding supported by a reference to a specific citation to evidence in the record. Proposed conclusions of law, factors in aggravation and mitigation, and sanctions should cite supporting case law. The specific requirements for the content and format of PFCs is set forth in BBO Rules § 3.44.

The Hearing Report. After the PFCs are filed, the hearing committee, panel, or SHO meets, typically with the assigned assistant general counsel, to discuss its findings, conclusions and, if appropriate, a sanction recommendation. The members of the committee, the panel, or the SHO exercise their authority as independent fact-finders; the assigned assistant general counsel provides support to them in that role, but is not a "fourth member" of the committee or panel. These deliberations are privileged and are not subject to discovery. However, after the hearing committee, panel, or SHO has reached its decisions, the assistant general counsel will prepare a draft report for consideration. Once the report is finalized, it is filed with the Board and served on the parties, and it becomes part of the record.⁵⁶ The contents of the report are specified by

⁴⁸ BBO Rules § 3.29.

⁴⁹ BBO Rules § 3.39.

⁵⁰ BBO Rules § 3.40.

⁵¹ BBO Rules §§ 3.33 and 3.36.

⁵² BBO Rules § 3.35.

⁵³ BBO Rules §§ 3.31.

⁵⁴ BBO Rules §§ 3.31, 3.59, 3.60 and 3.61.

⁵⁵ BBO Rules § 3.43.

⁵⁶ BBO Rules §§ 3.46, 3.48 and 3.49.

BBO Rules § 3.47.

The Board's Review of the Hearing Report Without an Appeal. While either party may appeal from the findings, conclusions, or sanction recommendation, the Board will automatically review the hearing report even without an appeal. If the Board makes a preliminary determination that some or all of the decisions of the hearing committee, hearing panel, or SHO should not be affirmed, it shall give the parties appropriate notice thereof and an opportunity to file briefs, and the Board may then proceed to take such action as it could have taken had an appeal been filed.⁵⁷

The Board's Review of the Hearing Report After an Appeal. If a party objects to any part of the hearing report (findings of fact, conclusions of law and/or sanction recommendation) it must file its brief within twenty days of the service of the report. Note that the brief must be filed within twenty days, not simply a "notice of appeal" as occurs in superior court. The opposing party must file its brief within twenty days after the service of the appellant's brief. The appellee may file a cross-appeal in its brief; if it does so, the original appellant has twenty days to file a brief in opposition to the cross-appeal. No further briefing is allowed without the Board's permission. A party who does not file a brief on appeal is deemed to have waived all objections. These deadlines may be extended by the Board.⁵⁸ The contents and form of the brief are specified by BBO Rules § 3.51. Oral argument will be granted only if requested, and a party who does not file a brief has waived its right to request oral argument.⁵⁹

On appeal, the Board must review and may adopt the findings of fact made by the hearing committee, hearing panel, or SHO or revise any findings that it determines to be erroneous. However, the Board must pay due respect to the role of the hearing committee, hearing panel, or SHO as the sole judge of the credibility of the testimony presented at the hearing. The Board may adopt or modify the recommendation of the hearing committee, hearing panel, or SHO. Whenever the Board modifies the findings or recommendations, it must state its reasons in its vote or in a separate memorandum.⁶⁰

The Board may decide that the proceedings should be concluded by an admonition (which is private), or by a public reprimand of the respondent. If so, the Board serves a copy of the vote and memorandum (if any) on the parties. The vote and memorandum constitute the admonition or public reprimand.⁶¹ If an admonition is imposed, the Board and Bar Counsel must keep the fact of the receipt of an admonition confidential; however, in response to specific inquiry as to the outcome of a public hearing which has been concluded by admonition, the Board or Bar Counsel may disclose that an admonition was imposed.⁶² The admonition is also subject to limited disclosure under Supreme Judicial Court Rule 4:01, § 20(2).

⁵⁷ BBO Rules § 3.52.

⁵⁸ BBO Rules § 3.50(a).

⁵⁹ BBO Rules §§ 3.50(a) and (b).

⁶⁰ BBO Rules § 3.53; S.J.C. Rule 4:01, § 8(5).

⁶¹ BBO Rules § 3.56(a).

⁶² BBO Rules § 3.56(c); S.J.C. Rule 4:01, § 8(5).

Further Proceedings: Appeal from a Dismissal, Admonition, or Public Reprimand. If either the respondent or Bar Counsel does not accept the Board's determination to conclude a matter by dismissal, admonition, or public reprimand, the party aggrieved can demand that the Board file an Information with the Court. The demand must be in writing and filed with the Board within twenty days after the date of service of the Board's vote and memorandum. This time limit cannot be extended.⁶³

Further Proceedings: the Board's Recommendation of a Suspension or Disbarment. Only the Court can suspend or disbar a lawyer. Therefore, if the Board determines that the matter should be concluded by suspension or disbarment (or if the Respondent or Bar Counsel files a written demand for the filing of an Information; see the preceding paragraph), the Board shall file an Information in the single justice session of the Court (called Supreme Judicial Court for Suffolk County), together with the entire record of its proceedings.⁶⁴

Proceedings Before the single justice. Once the Information is filed with the Court, it is assigned to a single justice to impose, modify, or reject the proposed discipline. Generally, the single justice will schedule a hearing where Bar Counsel and the respondent appear and argue before rendering a decision. Alternatively, the single justice may remand the matter to the Board or report it to the full bench. The subsidiary facts found by the Board and contained in its report filed with the Information must be upheld if supported by substantial evidence.⁶⁵

Appeal from the single justice Decision. An appeal from the decision of a single justice in a bar discipline case proceeds under S.J.C. Rule 2:23. The aggrieved party may appeal to the full court for review of the order or judgment. A notice of appeal must be filed with the clerk of the Supreme Judicial Court for Suffolk County within ten days of entry of the final order. An appeal does not stay any order or judgment of suspension or disbarment unless the single justice or the full bench so orders.⁶⁶

The matter goes to the full bench for consideration based on the record that was before the single justice, which includes the Information, the hearing report, the Board memorandum, and the single justice's decision or memorandum. The appellant can file a preliminary memorandum, not to exceed twenty pages, demonstrating why there has been an error of law or abuse of discretion by the single justice; that the decision is not supported by substantial evidence; that the sanction is markedly disparate from the sanctions imposed in other cases involving similar circumstances; or that for other reasons the decision will result in a substantial injustice.⁶⁷ Based on this record, the full court may affirm, reverse, or modify the order or judgment of the single justice without oral argument and without a reply memorandum from the appellee. Alternatively, the

⁶³ BBO Rules § 3.57(a).

⁶⁴ BBO Rules § 3.58, S.J.C. Rule 4:01, § 8(6).

⁶⁵ S.J.C. Rule 4:01, § 8(6).

⁶⁶ S.J.C. Rule 2:23(a).

⁶⁷ S.J.C. Rule 2:23(b).

full court may direct the appeal to proceed in the regular course, in which case the parties will be permitted to file full briefs in conformance with the Rules of Appellate Procedure and the case will be scheduled for oral argument.⁶⁸ In almost all instances the full Court decides the matter on the record and the Rule 2:23 preliminary memorandum of the appellant and renders its decision without full briefing and even without requesting a reply from the appellee to the Rule 2:23 preliminary memorandum.

Resignations. At any time during the disciplinary process after Bar Counsel has begun an investigation, a lawyer under investigation may resign from the bar by submitting an affidavit of resignation. The required contents of the affidavit are described in more detail in later chapters.⁶⁹ The Court may accept the affidavit of resignation as a disciplinary sanction or, more commonly, may also disbar the lawyer in connection with the resignation (called a “resignation and disbarment”). Either way, the lawyer cannot apply for reinstatement for eight years.⁷⁰

Temporary Suspension. If it comes to Bar Counsel’s attention that a lawyer poses a “threat of substantial harm” to clients or prospective clients (which usually means that the lawyer is currently misappropriating client funds) or if the lawyer’s whereabouts are unknown, Bar Counsel can file a petition with the Court for the lawyer’s “immediate suspension” under S.J.C. Rule 4:01, § 12A. The Court will give notice to the respondent lawyer and schedule a hearing on whether the lawyer should be suspended “as protection of the public.” A § 12A temporary suspension does not take the place of a disciplinary suspension and it is expected that Bar Counsel will file a petition for discipline, under S.J.C. Rule 4:01, § 8(3), within a reasonable time.⁷¹

Administrative Suspensions. If during the course of Bar Counsel’s investigation, a respondent does not (or ceases to) cooperate with Bar Counsel’s investigation, Bar Counsel may, after notice to the lawyer of the consequences of such non-cooperation, petition the Court for the respondent’s administrative suspension.⁷² If the respondent thereafter cooperates with Bar Counsel’s investigation, he or she can file an affidavit of compliance and request reinstatement.⁷³ In addition, the failure to cooperate with Bar Counsel’s investigation can separately be grounds for bar discipline.⁷⁴

Disability Inactive Status. At any time during the disciplinary process (although it can also occur apart from it), a lawyer may, by Court order, be placed on disability inactive status. This can occur in one of three contexts: (1) the lawyer has been judicially declared incompetent or committed to a mental hospital after a court hearing, placed in a mental hospital, or by court order placed under a guardianship or conservatorship; (2) a lawyer who is under investigation by Bar Counsel admits that he or she is incapacitated; or (3) a lawyer who is under investigation by Bar Counsel alleges that he or she is unable

⁶⁸ S.J.C. Rule 2:23(c).

⁶⁹ S.J.C. Rule 4:01, § 15, BBO Rules § 4.1.

⁷⁰ S.J.C. Rule 4:01, § 18(2).

⁷¹ See *Matter of Ellis*, 425 Mass. 332, 337 (1997).

⁷² S.J.C. Rules 4:01, §§ 3(1) and 3(2).

⁷³ S.J.C. Rules 4:01, § 3(3).

⁷⁴ Mass. R. Prof. C. 8.4(g).

to assist in the defense due to a mental or physical disability.⁷⁵ An application is then made to the Court to place the lawyer on disability inactive status; as discussed in more detail below, the mechanisms depend on whether or not the allegation of disability is disputed by either Bar Counsel or the lawyer.⁷⁶ Once a lawyer is placed on disability inactive status, he or she is not allowed to practice law and, moreover, cannot petition to be transferred back to active status for at least one year.⁷⁷ Disability status stays but does not terminate any pending investigation or bar disciplinary proceedings, which may be resumed once the lawyer is returned to active status.⁷⁸

Petitions for reinstatement. As discussed in more detail below, a lawyer can be suspended from the practice of law in Massachusetts from anywhere from a term of thirty days, to an indefinite suspension (which in Massachusetts means a minimum suspension of five years), to a disbarment (which in Massachusetts means a minimum suspension of eight years).⁷⁹ What a lawyer must do to be reinstated after a suspension depends on the type and length of the suspension.

Reinstatement from a Suspension for Six Months or Less. A lawyer suspended for six months or less can be reinstated without a hearing by filing with the Court and serving upon the Bar Counsel an affidavit, the required contents of which are described in more detail in later chapters.⁸⁰

Reinstatement from a Suspension for More than Six Months but Not More than One Year. A lawyer suspended for more than six months but not more than one year can be reinstated without a hearing by taking and passing the Multi-State Professional Responsibility Examination (MPRE) and complying with the terms for reinstatement from the shorter suspension.⁸¹

There are two caveats with these so-called “automatic reinstatements” under S.J.C. Rule 4:01, § 18(1): First, the suspended lawyer forfeits automatic reinstatement if he or she does not file the required affidavit within six months after the expiration of the suspension period.⁸² Second, the Court may impose an additional requirement of a reinstatement hearing for a suspension of one year or less, a condition that is automatic for a suspension of more than one year (including an indefinite suspension or disbarment).

Reinstatement from a Suspension for More than One Year. A lawyer who has been suspended for more than a year (including those suspensions referred to as “a year and a day”), as well as a lawyer who has been indefinitely suspended or disbarred, must petition the Court for reinstatement. (This also applies to a lawyer who has been

⁷⁵ S.J.C. Rule 4:01, § 13(1)–13(3).

⁷⁶ S.J.C. Rule 4:01, § 13(4).

⁷⁷ S.J.C. Rule 4:01, § 13(6).

⁷⁸ S.J.C. Rule 4:01, § 13(4)(f).

⁷⁹ S.J.C. Rule 4:01, § 18.

⁸⁰ S.J.C. Rule 4:01, § 18(1)(a).

⁸¹ S.J.C. Rule 4:01, § 18(1)(b).

⁸² S.J.C. Rule 4:01, § 18(1)(a)(d).

suspended for a shorter term but where the Court imposed the requirement of a reinstatement hearing.) The required contents of the petition for reinstatement are summarized in S.J.C. Rule 4:01, § 18(4) and discussed in more detail in later chapters of this treatise. The Court refers reinstatement petitions to the Board, which convenes a hearing panel of three Board members to hear the petition. The petitioner bears the burden of proof by a preponderance of evidence that he or she has (a) the moral qualifications and (b) competency and learning in law required for admission to practice law in this Commonwealth, and (c) that his or her resumption of the practice of law will not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest. After conducting a hearing, the panel submits a report to the Board, which then acts upon it and submits its report to the Court. The findings and subsidiary facts found by the Board shall be upheld if supported by substantial evidence.⁸³

⁸³ S.J.C. Rule 4:01, § 18(5).

Chapter 4

Discipline: Grounds and Types

I. Grounds for Discipline

This Chapter explains the distinctions among the several kinds of disciplinary sanctions, and describes how and when the respective sanctions should apply. While the American Bar Association has promulgated model Standards for Imposing Lawyer Sanctions,¹ the Supreme Judicial Court has traditionally not followed the ABA standards, but has developed its own sanctions standards. Later, in Chapter 7, the Treatise reviews various types of lawyer misconduct and the sanctions that a lawyer might expect for engaging in that misconduct.

II. Types of Dispositions, Including Formal Sanctions

This section describes the possible dispositions available within the disciplinary system, from the most lenient to the most severe.

A. ACAP Informal Resolution

The Office of Bar Counsel maintains a unit within its program known as the Attorney and Consumer Assistance Program, or ACAP.² ACAP's mission is to attempt to resolve the less-critical problems or complaints received by Bar Counsel, and to mediate a satisfactory resolution to many of the problems that otherwise would be dismissed under the standards described above.

Almost every communication about a lawyer received by Bar Counsel starts with ACAP, which serves as Bar Counsel's "central intake system."³ ACAP is staffed by assistant bar counsel and investigators, who upon receipt of a claim contact the complainant to determine the nature of the problem that led to the call, letter or filing. The matter is known within ACAP as an "inquiry," to be distinguished from a "complaint" docketed when Bar Counsel opens a formal case.

The ACAP staff frequently speaks with the lawyer whose conduct is at issue and obtains copies of relevant documents, including court docket sheets and pleadings, as part of its evaluation. If the ACAP staff determines that the allegation concerns serious misconduct that might lead to disciplinary action, the role of ACAP ends. If a serious complaint is received in writing, the matter will be opened as a formal complaint within the Office of Bar Counsel for further investigation. If a serious complaint is received by

¹ AMERICAN BAR ASSOCIATION, STANDARDS FOR IMPOSING LAWYER SANCTIONS § 2.7 (2012) [hereafter "ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS"].

² For a more in-depth discussion of the ACAP process, refer to Chapter 5.

³ Anne Kaufmann, *Five Years of ACAP* (2004), available at <http://www.mass.gov/obcbbo/acap5.htm>.

telephone call, ACAP will provide the complainant with a formal complaint form to complete and file.⁴ In fact, regardless of whether the complainant submits a written statement, if the claim is sufficiently troubling Bar Counsel will investigate the matter.

If the inquiry involves a matter that ACAP can help resolve, ACAP will assist to attempt to resolve the complainant's concerns. If a lawyer is not returning calls, ACAP may telephone the attorney and nudge him or her to be more responsive. Most of the time (although, remarkably, not all of the time), lawyers will respond promptly to a phone call from the Office of Bar Counsel, even if they have not been so responsive to clients. If a lawyer has failed to return a file, for example, ACAP will advise the lawyer that Rule 1.16 requires return of the appropriate papers to the client. Bar counsel has learned that many conflicts between lawyers and clients can be resolved by this intervention. If ACAP resolves a matter, the lawyer is relieved of any formal complaint related to the matter (but Bar Counsel maintains a record of the interaction for future reference). ACAP resolves the vast majority of inquiries it receive without a formal complaint being opened.⁵

B. Dismissal

If ACAP does not resolve an inquiry, Bar Counsel opens and docket a complaint. Many complaints opened and investigated by Bar Counsel result in a closing of the matter with no discipline, either public or private.

A complaint will be dismissed if Bar Counsel concludes that it has no merit. For instance, a dissatisfied client may complain that his lawyer acted too slowly, obtained a bad result, or charged too much money, and Bar Counsel may conclude on reviewing the facts alleged that, despite the client's sincere feelings, the lawyer did not violate any rule. At other times the Office of Bar Counsel will dismiss a complaint because the BBO lacks jurisdiction (for instance, some disputes about whether a fee is owed or not), or sometimes because the matter is stale.⁶

At other times, Bar Counsel will close or dismiss a complaint which alleges a violation of a rule of professional conduct, but which Bar Counsel concludes ought to be resolved in a different forum at least in the first instance. For example, if a party in the middle of protracted and contentious litigation accuses the lawyer for the adverse party of misconduct arising from that litigation, Bar Counsel may close the matter without any charges filed and without extensive investigation if it appears that the trial judge is better

⁴ See the ACAP page on Bar Counsel's website, at <http://www.mass.gov/obcbbo/acap.htm> ("A complaint form will be sent immediately [to the person who has complained about the lawyer] where serious unethical conduct may be involved.").

⁵ MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2015 (2015) [hereafter "BAR COUNSEL 2015 ANNUAL REPORT"] at 4 ("[The Attorney and Consumer Assistance Program] resolved more than 91% of inquiries without referral for investigation" in FY2015).

⁶ See BBO Rule 2.1(b)(1) ("Bar Counsel need not investigate any complaint arising out of acts or omissions occurring more than six years prior to the date of the complaint."); Jerry Cohen, *Appropriate Dispositions in Cases of Lawyer Misconduct*, 82 MASS. L. REV. 295, 296 (1997).

situated to monitor and address the alleged misconduct. Bar counsel may, however, advise the complainant to notify Bar Counsel if a court finds misconduct by an attorney.

A complainant has the right to seek review by a member of the Board of a decision by Bar Counsel to close a matter without any formal charge or resolution.⁷ If the Board receives such a request for review, Bar Counsel's entire file is made available to the Board member for his or her examination, and the attorney who conducted the investigation and made the recommendation to close the file is available in the event the Board member has further questions. Such reviews at the request of complainants are not uncommon, and while it is very rare for a Board member to reverse Bar Counsel's decision not to pursue a matter, it does happen on occasion.⁸ If the Board member upholds the decision to close the matter, the complainant has no further right to challenge the decision.⁹

In many instances, Bar Counsel will dismiss an inquiry that otherwise may have some merit after informal resolution of the concerns raised by the complainant. Cases may also be closed as a result of an agreement between Bar Counsel and the lawyer as to remedial measures. This process is known as diversion and is discussed below.

C. Diversion / Probation

For matters involving comparatively minor misconduct that might otherwise warrant discipline, Bar Counsel may determine that the attorney is best suited for its "Diversion Program." According to the Office of Bar Counsel's Diversion Policy, this remedy may apply

if Bar Counsel concludes that the professional misconduct was not the result of any willful or dishonest conduct, the basis of the misconduct or incapacity is subject to remediation or resolution through alternative mechanisms, and the public interest and the welfare of the respondent's clients and prospective clients will not be harmed if the respondent complies with the program.¹⁰

The Diversion Program contemplates referral of the attorney to a lawyer assistance program such as Lawyers Concerned for Lawyers (LCL),¹¹ the Massachusetts

⁷ See BBO Rule 2.8(a)(1).

⁸ See BAR COUNSEL 2015 ANNUAL REPORT, *supra* note 5, at 5 (Bar Counsel declined to open investigation in 210 complaints filed in FY15; 79 of those complainants sought review by the Board; the Reviewing Board Member confirmed Bar Counsel's decision in all of those reviews).

⁹ See *In the Matter of a Request for an Investigation of an Attorney*, 449 Mass. 1013, 1014 (2007) ("An individual who files a complaint with the board lacks standing to challenge in a court action the board's decision not to prosecute the complaint.").

¹⁰ Office of Bar Counsel, *Diversion Program Policy Statement*, available at <http://www.mass.gov/obcbbo/divpolicy.pdf>.

¹¹ See <http://www.lclma.org/>. As described on that website, LCL, a private, nonprofit Massachusetts corporation, "assists lawyers, judges, law students, and their families who are experiencing any level of impairment in their ability to function as a result of personal, mental health, addiction or medical problems." For a more in-depth description of LCL, see Chapter 3.

Law Office Management Program (LOMAP),¹² or the Office of Bar Counsel's monthly program on maintaining client trust accounts. Lawyers may also be referred for other forms of support, including monitoring of trust accounts or for psychological help. The attorney and Bar Counsel enter into a written agreement containing the stipulated facts and the terms of the diversion, and Bar Counsel monitors the lawyer's compliance. If the lawyer satisfies the terms of the agreement, the file is closed without discipline. If the lawyer fails to satisfy the terms of the agreement, Bar Counsel may reopen the disciplinary matter and pursue formal discipline. In such an instance, the alleged violations, but not the facts of what occurred, would be at issue.

Separate from the Diversion Program, the SJC and the BBO on occasion use probation terms, such as with a stayed suspension, in lieu of removing an attorney from practice.¹³

D. Admonition

If the complaint against a lawyer is not resolved through ACAP or the Diversion Program, or is not appropriate for either, Bar Counsel may pursue disciplinary charges. If discipline ensues, the first, or least severe, level of discipline is an admonition. An admonition is "a form of non-public discipline which declares the lawyer's conduct improper, but does not limit the lawyer's right to practice."¹⁴ It results when the lawyer has committed misconduct that violates the Rules of Professional Conduct, but causes little or no harm and otherwise does not evidence bad faith on the part of the respondent.

Summaries of admonitions are published in the Massachusetts Disciplinary Reports and on Bar Counsel's website, but admonitions do not identify the respondent by name. Admonitions remain on the lawyer's record at the BBO for eight years. After eight years, if the lawyer remains free of any further misconduct and no complaints are pending, the admonition is vacated and the complaint dismissed.¹⁵ While the admonition is in effect, its imposition serves as an aggravating factor should the lawyer face later disciplinary proceedings. A lawyer likely will have to report an admonition to her insurance company when applying for or renewing a professional liability policy. In addition, the lawyer may have to report the admonition to any other jurisdiction in which

¹² See <http://masslomap.org/>. LOMAP, which is part of LCL, "makes itself available to help attorneys licensed in Massachusetts (or soon to be) establish and institutionalize professional office practices and procedures to increase their ability to deliver high quality legal services, strengthen client relationships, and enhance their quality of life," according to its website. For a more in-depth description of LOMAP, see Chapter 3.

¹³ See, e.g., *Matter of Rosencranz*, 27 Mass. Att'y Disc. R. 754 (2011) (cooperation with LCL); *Matter of Betts*, 26 Mass. Att'y Disc. R. 44 (2010) (twelve-month suspension, six months stayed, with conditions including abstention from drugs and alcohol and reports from LCL). See also *Matter of O'Neill*, 30 Mass. Att'y Disc. R. 289 (2014) (rejecting a proposed stayed suspension). Stayed suspensions are addressed below in Subsection F(3).

¹⁴ ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra* note 1, at § 2.6.

¹⁵ BBO Rules, R. 4.3(a).

she is licensed to practice, and possibly to any court to which the lawyer seeks *pro hac vice* status.¹⁶

Practice Tips

While an admonition that has been dismissed after eight years may not be introduced as evidence in aggravation in an unrelated future proceeding, and may not be weighed by the Board as an aggravating factor in determining discipline for an unrelated later offense, Bar Counsel may still take it into account in making prosecutorial decisions in the future.

* * *

A lawyer must understand that any discipline, including a non-public admonition, likely must be disclosed to his insurance carrier. If not, the lawyer's policy may not cover any future incidents. All discipline likely must be disclosed as well to any jurisdiction where the attorney is licensed to practice.

Admonitions are a very common form of discipline. The BBO may approve admonitions when the lawyer has committed minor misconduct, often without harm resulting to a client or third person, and where the respondent did not act with malice or similar motive.

The BBO imposed admonitions on 26 lawyers in FY15,¹⁷ 22 lawyers in FY14,¹⁸ and 19 lawyers in FY13.

Examples of Admonition Sanctions Standards

For Neglect of a Client Matter: Admonition is generally appropriate when a lawyer has failed to act with reasonable diligence in representing a client or otherwise has neglected a legal matter, and the lawyer's misconduct causes little or no actual or potential injury to a client.¹⁹

For Mishandling Client Funds: A lawyer will receive an admonition if she intentionally commingles client funds with the lawyer's funds, provided that the lawyer commits no other misconduct and the client loses no money and otherwise suffers no harm.²⁰

¹⁶ Whether a lawyer must report on such an application a *vacated* admonition is a question whose answer likely turns on the language of the particular application.

¹⁷ BAR COUNSEL 2015 ANNUAL REPORT, *supra* note 5, at 15.

¹⁸ MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2014 (2014) at 15 [hereafter "BAR COUNSEL 2014 ANNUAL REPORT"].

¹⁹ Matter of Kane, 13 Mass. Att'y Disc. R. 321 (1997).

²⁰ "Intentional commingling of clients' funds with those of an attorney should be disciplined by private reprimand." Matter of Schoepfer, 426 Mass. 183, 186 n.2 (1997) (*quoting* Matter of the Discipline of an Attorney, 392 Mass. 827, 836 (1984)). Many admonition reports involve that kind of misconduct. *See*,

For Conflicts of Interest: A lawyer will receive an admonition if he engages in a conflict of interest not motivated by self-interest and causing little to no harm to the affected client or clients.²¹

E. Public Reprimand

The next more serious form of discipline is a public reprimand, which is “a form of public discipline that declares the lawyer’s conduct improper, but does not limit the lawyer’s right to practice.”²² The discipline is “public” because it identifies the attorney by name. The sanction is brought to public attention in three ways: First, and most widely noticed, the BBO publishes in the leading legal newspaper in the state, *Massachusetts Lawyers Weekly*, the name of the lawyer along with the full report from the BBO describing the misconduct the lawyer committed and the BBO’s reason for imposing the sanction. Many lawyers read that newspaper regularly, so the fact of discipline is very likely to become known within the attorney’s professional community. Second, the BBO report published in the *Massachusetts Lawyers Weekly* also becomes a formal Massachusetts disciplinary report, available in the online library at the Social Law Library, on the BBO’s website, and the hard copy Massachusetts Attorney Discipline Reports. It is also distributed to newspapers, including the lawyer’s hometown daily or weekly. Finally, the fact of that discipline becomes part of the BBO’s public record of the attorney. If one searches on the BBO website for a lawyer, the lawyer’s page on that site includes the fact of the reprimand.

Practice Tip

The BBO website includes reference to a lawyer’s history of public discipline, regardless of when the discipline was imposed. The website offers a link to each disciplinary report since 1999.

The difference to a lawyer’s practice between an admonition and a public reprimand can be significant. No one except the Office of Bar Counsel, the BBO, the client and the lawyer knows the identity of the lawyer who received the private admonition, so the lawyer’s practice may proceed relatively without disruption after an admonition.²³ The public reprimand, while probably not known to clients, will not be a secret in the lawyer’s working community, and may cause the lawyer considerable embarrassment or injury to his or her professional reputation. As with admonitions, the

e.g., AD 12-02, 28 Mass. Att’y Disc. R. 915 (2012); AD 10-01, 26 Mass. Att’y Disc. R. 761 (2010); AD 09-19, 25 Mass. Att’y Disc. R. 687 (2009); AD 08-05, 24 Mass. Att’y Disc. R. 849 (2008); AD 07-44, 23 Mass. Att’y Disc. R. 1036 (2007).

²¹ In re Discipline of an Attorney, 449 Mass. 1001, 1002 (2007). See also AD 11-04, 27 Mass. Att’y Disc. R. 930 (2011); AD 10-19, 26 Mass. Att’y Disc. R. 797 (2010); AD 10-18, 26 Mass. Att’y Disc. R. 794 (2010); AD 08-11, 24 Mass. Att’y Disc. R. 860 (2008).

²² ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra* note 1, at § 2.5.

²³ If Bar Counsel commences a public proceeding against a lawyer and that proceeding results in an admonition, Bar Counsel will “claw back” and eliminate any public references to the lawyer’s name and the proceedings beyond the admonition report.

fact that a lawyer has received a reprimand likely must be reported to other bars or to courts in which the lawyer is admitted or seeks admission, and to the lawyer's insurance carrier. It is, therefore, a very serious sanction for any lawyer.

The BBO may impose a public reprimand when the lawyer's misconduct risks important harm to a client or third party but not to an extent warranting suspension.

Unlike an admonition, the fact of a public reprimand remains on the lawyer's record permanently. Of course, it also serves as a significant aggravating factor in any later disciplinary proceedings involving the lawyer.

Public reprimands are common in Massachusetts.²⁴ The BBO imposed public reprimands on 16 lawyers in FY15,²⁵ 18 lawyers in FY14,²⁶ and 32 in FY13.²⁷

Examples of Public Reprimand Sanction Standards

For Neglect of a Client Matter: Public reprimand is generally appropriate where a lawyer has failed to act with reasonable diligence in representing a client or otherwise has neglected a legal matter and the lawyer's misconduct causes serious injury or potentially serious injury to a client.²⁸

For Mishandling Client Funds: A lawyer will receive a public reprimand if she carelessly uses client funds, provided that the client is not deprived of the funds even temporarily and otherwise suffers no harm, and there are no aggravating factors, such as prior discipline or a failure to cooperate with Bar Counsel.²⁹

For Conflict of Interest with Some Risk of Harm: A lawyer may receive a public reprimand if he engages in an obvious conflict of interest that risks some harm to a client or clients, but does not cause substantial harm.³⁰

²⁴ Since 1999, at least 294 lawyers have received public reprimands in Massachusetts, according to a 2013 Westlaw search.

²⁵ BAR COUNSEL 2015 ANNUAL REPORT, *supra* note 5, at 15.

²⁶ BAR COUNSEL 2014 ANNUAL REPORT, *supra* note 18, at 15.

²⁷ MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2015 (2015) at 15.

²⁸ *Kane*, 13 Mass. Att'y Disc. R. at 327–28.

²⁹ “Unintentional, careless use of clients' funds should be disciplined by public censure.” *Matter of Schoepfer*, 426 Mass. 183, 186 n.2 (1997) (*quoting* *Matter of the Discipline of an Attorney*, 392 Mass. 827, 836 (1984)). Some public reprimand reports show that kind of misconduct. *See, e.g.,* *Matter of LaPre*, 26 Mass. Att'y Disc. R. 302 (2010) (attorney negligently misused client funds in his IOLTA account, which resulted in a check he wrote to the client being dishonored due to insufficient funds, but restored the amount to his client from his personal funds as soon as he became aware of the deprivation); *Matter of McCabe*, 25 Mass. Att'y Disc. R. 367 (2009) (lawyer negligently maintained two separate IOLTA accounts, which resulted in the bank not honoring a check the respondent had issued to a client, but promptly issued a replacement check to the client to repair the problem).

³⁰ *See* *Matter of Carnahan*, 449 Mass. 1003, 1004–1005 (2007); *Matter of Morrow*, 23 Mass. Att'y Disc. R. 486, 489 (2007); *Matter of Abbene*, 23 Mass. Att'y Disc. R. 2, 2 (2007).

F. Suspension

1) Suspensions generally

When a lawyer has committed very serious misconduct, with significant actual or potential harm to others, the SJC may sanction the lawyer by suspending him from practice for a specified period of time, or even indefinitely (which equates to a five-year minimum loss of license), as the most serious sanction short of disbarment. While the BBO may recommend that a lawyer be suspended, only the SJC may impose that sanction. A suspension removes the lawyer from the practice of law, but permits the attorney to resume practice after the suspension has ended and after he has been reinstated by the SJC.³¹

Massachusetts departs from the ABA guidelines, which recommend suspensions between six months and three years in length. The SJC has frequently imposed suspensions shorter than six months, with some as short as 30 days.³² The SJC on occasion has imposed suspensions longer than three years; and, as noted earlier, the SJC has often suspended lawyers indefinitely, i.e., five years minimum.³³

Several discrete types of suspensions are described and compared below. All suspensions, though, regardless of type, share certain qualities and trigger certain responsibilities.³⁴ A suspension means that the lawyer must stop practicing law and inform all clients of the opportunity to locate replacement counsel, as of the effective date of the suspension. This aspect of this sanction demonstrates what a profoundly disruptive penalty it is, causing substantial harm to a lawyer's career, and not just for solo practitioners. After the order enters, the lawyer must, within the next 14 days, complete all of the steps necessary to cease practice, including closing IOLTA and other trust accounts and returning advanced fees. Seven days later, which means within 21 days after the order enters, the lawyer must file with Bar Counsel an affidavit certifying that he has accomplished all of these steps necessary to suspend his practice. Most suspensions take effect within 30 days after the SJC order imposing the sanction, so the lawyer will

³¹ The ABA has described the suspension sanction as follows:

Suspension is the removal of a lawyer from the practice of law for a specified minimum period of time. Generally, suspension should be for a period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years. Procedures should be established to allow a suspended lawyer to apply for reinstatement, but a lawyer who has been suspended should not be permitted to return to practice until he has completed a reinstatement process demonstrating rehabilitation, compliance with applicable discipline or disability orders, and fitness to practice law.

ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra* note 1, at § 2.3.

³² *See, e.g.*, Matter of Guinane, 20 Mass. Att'y Disc. R. 191 (2004).

³³ *See, e.g.*, Matter of Nagy, 29 Mass. Att'y Disc. R. 483 (2013) (indefinite suspension based on reciprocal discipline); Matter of Eleey, 28 Mass. Att'y Disc. R. 275 (2012) (indefinite suspension for misappropriation of client funds).

³⁴ The descriptions in this paragraph come from Rule 4:01 § 17.

have a short period during which to notify his clients, begin to arrange for replacement counsel, and to wrap up all active matters.³⁵

At the end of the suspension, the lawyer may seek reinstatement. As described in the next sections, sometimes the reinstatement is without a hearing unless Bar Counsel objects; in other instances it requires a petition and proceedings before the Board along with the approval of the SJC.

During the period of suspension, the lawyer may not earn a living through any connection to the practice of law in Massachusetts. While in theory a lawyer with a valid out-of-state law license could practice lawfully in that other jurisdiction, given the prevalence of reciprocal discipline the lawyer's license in the other state very well may be affected by the Massachusetts suspension.³⁶ The suspended lawyer may not work as a paralegal or a legal assistant during the period of suspension, and may not be hired *in any capacity* by, or volunteer for, a lawyer or a law firm, absent leave of the SJC.³⁷ Therefore, a suspended lawyer may not even seek to earn a living as a receptionist, secretary or custodian in a law office or for a lawyer.³⁸

2) Term suspensions

Most suspensions in Massachusetts are “term suspensions,” with a definite expiration date. The length of a term suspension has important consequences in Massachusetts. Most importantly, the length of a suspension affects the reinstatement process for the suspended lawyer. Here is how the Massachusetts reinstatement guidelines operate according to SJC Rule 4:01, Section 18:

Six months or less: “A lawyer who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension”³⁹ by filing with the SJC and Bar Counsel an affidavit affirming that the lawyer has (1) complied with all the terms of the order of suspension, (2) paid all costs imposed in connection with the disciplinary process, and (3) reimbursed the Clients' Security Board any funds it paid on the lawyer's behalf. Upon the filing of that affidavit, the lawyer will be reinstated automatically ten days after filing the affidavit, unless Bar Counsel files an objection with the SJC. If Bar Counsel files such an objection, the Court will hold a hearing, typically before a single justice, to determine whether a formal petition for reinstatement and an

³⁵ A lawyer subject to a temporary suspension, which is an interim suspension pending the completion of disciplinary proceedings, must accomplish the steps within 14 days. See the discussion below about that type of suspension.

³⁶ See Chapter 10 for a discussion of reciprocal discipline.

³⁷ Rule 4:01 § 17(7). Section 18(3) authorizes a lawyer whose suspension term has expired (but whose license to practice has not yet been reinstated), or who has been suspended for at least four years as part of an indefinite sanction, to file a motion with the SJC for leave to work as a paralegal.

³⁸ Depending on the circumstances, a lawyer might be permitted to perform the duties of a mediator during the period of suspension. See *Matter of Bott*, 462 Mass. 430, 439 (2012) (mediation sometimes will qualify as the practice of law, and sometimes not).

³⁹ Rule 4:01 § 18(1)(a).

accompanying hearing is necessary.⁴⁰ If the lawyer fails to submit the affidavit within six months of the end of the suspension, he must file a petition for reinstatement using the procedures described below.

Suspensions for less than six months demonstrate the SJC's conclusion that the misconduct in question, while serious, does not reflect so badly on the lawyer as to require a showing of fitness before the lawyer may resume practice.

More than six months but not more than one year: "Suspensions longer than six months in duration typically involve substantial violations of the ethical rules, such as fraud, deliberate financial malfeasance, or intentional misrepresentation."⁴¹ If the lawyer's suspension is for more than six months, but less than one year and one day, the lawyer will be reinstated only if she has successfully completed the Multistate Professional Responsibility Examination (MPRE), administered by the Law School Admission Council on behalf of the National Conference of Bar Examiners three times each year (April, August, and November).⁴² Successful completion of the MPRE is defined in the Commonwealth as obtaining a score of 85 or more.⁴³ The lawyer must file with the SJC and Bar Counsel the same affidavit as above, except that she must also affirm that she has successfully completed the MPRE.⁴⁴ The same procedures apply to the submission of the affidavit and the automatic reinstatement as described immediately above. Because of this added requirement, some disciplinary dispositions deliberately add one day to a six-month suspension to require that the respondent prepare for and pass the MPRE.⁴⁵

Practice Tip

Because the MPRE is offered only three times per year, a lawyer must plan to apply to sit for the test in time to have the results available when the lawyer expects to resume practice. Lawyers who have not taken the test in time may wish to negotiate with Bar Counsel for an extension of time in which to apply for automatic reinstatement.

⁴⁰ *Id.* at § 18(1)(c).

⁴¹ *Matter of Donaldson*, 27 Mass. Att'y Disc. R. 221, 227 (2011).

⁴² Rule 4:01 § 18(1)(b).

⁴³ *See* Board of Bar Examiners, <http://www.mass.gov/bbe/mbedoc.htm>.

⁴⁴ Rule 4:01 § 18(1)(b). It is worth noting that prior to January 2000, suspensions in excess of six months were subject to a requirement of a petition for reinstatement. Section 18 of Rule 4:01 was amended effective January 3, 2000. The SJC's Transitional Order in Aid of Construction explains that "a person who is suspended before January 3, 2000, for a term exceeding six months shall be required to petition for reinstatement under paragraph (4) of § 18."

⁴⁵ *See, e.g.*, *Matter of Firstenberger*, 450 Mass. 1018, 1019, 23 Mass. Att'y Disc. R. 136 (2007) (knowing and intentionally deceptive breach of arrangement with mortgagee; suspension for six months and one day imposed); *Matter of Dash*, 22 Mass. Att'y Disc. R. 179, 180 (2006) (failure to supervise non-lawyer employee, commingling of trust account, and false statements to insurance adjuster; suspension for six months and one day imposed).

More than one year: A lawyer suspended for more than one year must petition the SJC for reinstatement, and the BBO will conduct a hearing on the petition. The lawyer may not submit the petition before three months prior to the expiration of the suspension. The petition must include assertions similar to those described above for the affidavits required for automatic reinstatements, including that the respondent has completed the MPRE. A full description of the reinstatement process can be found in Chapter 16 of this treatise. Because of this significant additional requirement, many disciplinary decisions add one day to a one-year suspension, triggering the reinstatement petition process.⁴⁶

The year-and-a-day suspension has a very clear message. It indicates the Court's view that the lawyer needs to prove that he is sufficiently trustworthy and knowledgeable to resume the practice of law. Two suspension reports exemplify the Board's and the Court's use of this sanction. In *Matter of Hopwood*,⁴⁷ despite numerous violations, including a failure to cooperate with Bar Counsel, the single justice rejected a year-and-a-day suspension in favor of a one-year suspension, explaining that "[w]e do not impose the additional day recommended by the hearing officer because we do not believe that the respondent's misconduct is so grievous that he needs to demonstrate his fitness to resume the practice of law. The requirement that he take and pass the Multi-State Professional Responsibility Examination will help assure that he is cognizant of his ethical obligations in this respect." In *Matter of Pudlo*,⁴⁸ the single justice accepted the Board's recommended discipline of an attorney who intentionally misused client funds and attempted to conceal his conduct by making false statements. The single justice wrote that "the additional day of suspension has the effect of requiring the respondent to demonstrate his fitness to resume practice at a reinstatement hearing ..."⁴⁹

Recap of the Reinstatement Requirements

Suspensions of Six Months or Less: Reinstatement effectively automatic unless Bar Counsel objects to affidavit.

⁴⁶ See, e.g., *Matter of Cohen*, 26 Mass. Att'y Disc. R. 83 (2010) (year-and-a-day suspension for numerous "ethical lapses," including incompetence, failure to communicate, failure to refund money, and dishonesty with Bar Counsel; respondent's ultimate cooperation with Bar Counsel persuades single justice to allow respondent to petition for reinstatement three months prior to the expiration of his suspension); *Matter of Ellsworth*, 29 Mass. Att'y Disc. R. 232 (2013) (failure to report felony conviction, plus repeated defaults and failure to cooperate with Bar Counsel yields suspension for a year and a day with condition that "the respondent was not permitted to petition for reinstatement to the practice of law in the Commonwealth until one year and one day after she filed a full and truthful affidavit of compliance").

⁴⁷ 24 Mass. Att'y Disc. R. 354, 363 (2008).

⁴⁸ 28 Mass. Att'y Disc. R. 712 (2012).

⁴⁹ 28 Mass. Att'y Disc. R. at 721. The attorney was later reinstated, but not until 2015, close to four years after the effective date of his year-and-one-day suspension. *Matter of Pudlo*, 31 Mass. Att'y Disc. R. ___, 2015 WL 9308990 (2015).

Suspensions of Six Months to One Year: Reinstatement effectively automatic, if the attorney confirms that she has successfully completed the MPRE, unless Bar Counsel objects to affidavit.

Suspensions of More than One Year: Reinstatement requires MPRE, a petition to the SJC, and a BBO hearing.

Every term suspension longer than one year will include the reinstatement petition requirement. For even more serious misconduct, lawyers may receive lengthy term suspensions, including those of two or three years. The longest term suspension found within the disciplinary reports has been four years,⁵⁰ although that length is rare.

Practice Tip

A lawyer may, and typically will, file her petition for reinstatement three months before the effective date of the expiration of the suspension. Even with that advance filing, a term suspension for more than one year will ordinarily last at least six months longer than the identified term, because of the time needed to arrange and complete the reinstatement hearing.

In addition to reinstatement provisions in Rule 4:01, the SJC has sometimes required an attorney to petition for reinstatement even though the suspension was shorter than one year and one day. For instance, in *Matter of Kolofolias*,⁵¹ the respondent engaged in paralegal work while on disability inactive status without permission of the Court. The parties' stipulation provided for a suspension of six months and one day, but the single justice required that reinstatement be subject to a formal petition proceeding. In *Matter of Krabbenhoft*,⁵² for misconduct including neglect, intentional misrepresentation to a client, failure to cooperate with Bar Counsel, and failure to comply fully with an administrative suspension, all aggravated by a prior admonition, the lawyer received a "six-month suspension, together with the requirement that [he] petition for reinstatement in order to show that adequate steps have been taken to address [these] concerns." And in *Matter of Barrat*,⁵³ the respondent was suspended for six months for misconduct in two matters, including misrepresentations to the client, but with requirement that he be required to petition for reinstatement.

The SJC has also on occasion imposed other conditions that a lawyer must meet before she will be reinstated. For instance, in *Matter of Johnson*,⁵⁴ the respondent received a three-month suspension for lack of diligent and competent representation. Her reinstatement was conditioned on her attending an MCLE program called "How to Make

⁵⁰ See, e.g., *Matter of Balsler*, 32 Mass. Att'y Disc. R. ____, 2016 WL 6093188 (2016); *Matter of Beaulieu* 29 Mass. Att'y Disc. R. 33 (2013).

⁵¹ 25 Mass. Att'y Disc. R. 334, 335 (2009).

⁵² 23 Mass. Att'y Disc. R. 362, 383 (2007).

⁵³ 20 Mass. Att'y Disc. R. 27, 39 (2004).

⁵⁴ 26 Mass. Att'y Disc. R. 276 (2010).

Money and Stay Out of Trouble,” maintaining legal malpractice insurance for at least two years after reinstatement, and undergoing an evaluation at the Law Office Management Assistance Program (LOMAP).

The SJC imposed a term suspension on 45 lawyers in FY16,⁵⁵ 35 lawyers in FY15,⁵⁶ and 44 in FY14.⁵⁷ In each such year, the term suspension was the most common form of discipline imposed on Massachusetts lawyers.

Examples of Term Suspension Sanction Standards

For Neglect of a Client Matter: A “term suspension is appropriate for a pattern of neglect resulting in serious harm.”⁵⁸

For Mishandling Client Funds: “The intentional use of clients’ funds normally calls for ‘a term suspension of appropriate length.’”⁵⁹

For Presenting False Testimony: A term suspension of twenty-seven months was appropriate for misconduct including the attorney’s having made “false statements under oath to one or more courts.”⁶⁰

3) Stayed suspensions

In recent years, the disciplinary reports have shown an increase in an unusual form of discipline—a term suspension, but whose term is stayed, so that the lawyer does not lose the right to practice, or loses that right for a shorter period than the term of the suspension would have indicated. A stayed suspension is akin to a suspended sentence in criminal law. Two examples demonstrate how the “stayed suspensions” have worked. In *Matter of Kydd*,⁶¹ the lawyer received discipline for lack of competence and failure to cooperate with Bar Counsel. The single justice imposed a three-month suspension, with conditions, but stayed for one year that three-month ban on practice. The effect of that discipline is that the lawyer must comply with the imposed conditions for a period of a year. If he complies, his “suspension” would be over, with no interruption in his practice. If he does not comply with the conditions, the three-month suspension would activate. The single justice explained this sanction as follows: “While I agree with the board that the respondent’s conduct involved repeated failures to act with due diligence, albeit on a single matter, and that a suspension of three months on that basis might generally be appropriate, I find the conduct to be on the borderline to that which might be

⁵⁵ MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2016, at 14.

⁵⁶ BAR COUNSEL 2015 ANNUAL REPORT, *supra* note 5, at 15.

⁵⁷ BAR COUNSEL 2014 ANNUAL REPORT, *supra* note 18, at 15.

⁵⁸ *Matter of Espinosa*, 28 Mass. Att’y Disc. R. 307 (2012) (*citing* *Matter of Kane*, 13 Mass. Att’y Disc. R. 321 (1997)).

⁵⁹ *Matter of Schoepfer*, 426 Mass. 183, 187 (1997) (*quoting* *Matter of the Discipline of an Attorney*, 392 Mass. 827, 836 (1984)).

⁶⁰ *Matter of Diviacchi*, 475 Mass. 1013, 1020 (2016).

⁶¹ 25 Mass. Att’y Disc. R. 341 (2009).

appropriately sanctioned by a public reprimand.”⁶² In this respect the stayed suspension was effectively a public reprimand, but with more teeth and a greater opportunity for ongoing monitoring.

Compare that report to *Matter of Lee*.⁶³ There, the lawyer was convicted of engaging in domestic violence and violating abuse prevention orders. The Board recommended a suspension for six months, with execution stayed for two years, subject to terms of probation. The single justice described this discipline as “modest,” and expressed concern that the sanction “fails to give adequate force to the need to treat violence in the home as seriously as the Court has indicated [in past decisions].”⁶⁴ The Court settled on a six-month suspension with the last three months suspended for two years subject to certain probationary terms. The Court added a further condition: that any material breach of the terms of probation would result, in addition to the imposition of a full six-month suspension, in the surrender of the right to the automatic reinstatement under Rule 4:01 that accompanies a six-month suspension.

Most of the disciplinary reports involving a sanction of suspension where the SJC refers the lawyer to LOMAP have been stayed suspensions, with the LOMAP referral serving as a condition of probation.⁶⁵

You Should Know

The use of a stayed suspension appears most often when the probationary terms imposed upon the respondent are designed to remediate shortcomings in the lawyer’s practice, such as poor accounting, or relate to medical or psychological conditions that can be evaluated and monitored.⁶⁶

4) Indefinite suspensions

Not all suspensions include a term. On occasion, the SJC will suspend a lawyer indefinitely, which is the most serious discipline short of disbarment. An indefinite suspension will last a minimum of five years, as the discussion below will show. At least 100 lawyers in Massachusetts have received indefinite suspensions since 1999.⁶⁷

⁶² 25 Mass. Att’y Disc. R. at 345.

⁶³ 17 Mass. Att’y Disc. R. 357 (2001).

⁶⁴ *Id.* at 364.

⁶⁵ *See, e.g.*, *Matter of Brassard*, 29 Mass. Att’y Disc. R. 55 (2013); *Matter of Brunelle*, 29 Mass. Att’y Disc. R. 62 (2013); *Matter of Ellis*, 28 Mass. Att’y Disc. R. 301 (2012); *Matter of Lagana*, 26 Mass. Att’y Disc. R. 295 (2010).

⁶⁶ In *Matter of O’Neill*, 30 Mass. Att’y Disc. R. 289 (2014) (Board Memorandum), the Board articulated its intended use of a stayed suspension:

We believe staying all or part of a suspension that would otherwise be appropriate for the misconduct involved should be reserved for matters in which the stay itself functions as an incentive or a deterrent, as the case may be, to encourage or discourage certain conduct, whether for the sake of safeguarding the public or assisting the lawyer to take certain remedial steps, or both.

⁶⁷ Westlaw search, February 4, 2017.

Indefinite suspension is an apparent effort to impose very serious discipline but without disbarment. For example, while the SJC has not articulated a presumptive sanction of indefinite suspension for neglect (as it has for the sanctions discussed up to now), it has imposed that sanction in serious instances of neglect with harm suffered by clients.⁶⁸ Also, the presumptive sanction for the intentional misuse of client funds, with an intent to deprive and actual deprivation of the funds, is “an indefinite suspension or disbarment.”⁶⁹ Several reports applying that *Schoepfer* standard result in an indefinite suspension instead of a disbarment, as the SJC or single justice concluded that some facts warranted a sanction just below the most severe. For instance, in *Matter of Osagiede*,⁷⁰ and in *Matter of Ragan*,⁷¹ the respondent lawyer in each case misused client funds, and had prior discipline for that kind of misconduct, but made restitution. Each lawyer received an indefinite suspension.

Some of the reports involving an indefinite suspension result from reciprocal discipline, a topic covered by this Treatise in Chapter 10. A lawyer disbarred in another jurisdiction may receive an indefinite suspension in the Commonwealth if an indefinite suspension, rather than disbarment or a term suspension, is the appropriate sanction here.⁷²

Practice Tip

Because the Board wants to encourage lawyers who have misused client funds to make restitution to the affected clients, it often recommends an indefinite suspension instead of disbarment where the lawyer has repaid the amounts owed.

A lawyer who has received an indefinite suspension may not petition for reinstatement “until the expiration of at least three months prior to five years from the effective date of the order of suspension.”⁷³

Examples of Indefinite Suspension Sanction Standards

⁶⁸ See, e.g., *Matter of Gomez*, 19 Mass. Att’y Disc. R. 182 (2003) (lawyer abandoned his practice, leaving all clients to find other assistance); *Matter of Mickiewicz*, 21 Mass. Att’y Disc. R. 491 (2005) (serious neglect of two client matters, and of the BBO inquiries; aggravated by previous sanction for neglect).

⁶⁹ *Matter of Schoepfer*, 426 Mass. 183, 187 (1997) (citing *Matter of the Discipline of an Attorney*, 392 Mass. 827, 836 (1984)); see also *Matter of Bryan*, 411 Mass. 288, 292 (1998) (explaining the difference between the two sanctions).

⁷⁰ 453 Mass. 1001, 25 Mass. Att’y Disc. R. 478 (2009).

⁷¹ 23 Mass. Att’y Disc. R. 587 (2007).

⁷² See, e.g., *Matter of Amaral*, 26 Mass. Att’y Disc. R. 7 (2010) (intentional misuse use of funds with full restitution). Cf. *Matter of Ladas*, 17 Mass. Att’y Disc. R. 341 (2001) (indefinite suspension in Massachusetts on petition for reciprocal discipline based on conduct resulting in two-year suspension in New York; intentional misuse of funds with full restitution).

⁷³ SJC Rule 4:01 § 18(2)(b).

For Mishandling Client Funds: The presumptive sanction for the intentional misuse of client funds, with an intent to deprive and actual deprivation of the funds, is “an indefinite suspension or disbarment.”⁷⁴ Indefinite suspension typically occurs when restitution has been made, and disbarment when there has been no restitution. Mishandling client funds is the most common basis for an indefinite suspension.

After a Criminal Conviction: Lawyers convicted of crimes involving fraud or bribery have received indefinite suspensions.⁷⁵

The SJC imposed indefinite suspensions on 8 lawyers in FY16,⁷⁶ 7 lawyers in FY15,⁷⁷ and 4 in FY14.⁷⁸ In each such year, the indefinite suspension was the least frequent form of discipline imposed.

5) Temporary suspensions

Rule 4:01 refers several times to the concept of a “temporary suspension,”⁷⁹ even though that term is defined nowhere within the rule. Board reports and SJC opinions use this term to refer to an immediate suspension under Rule 4:01 § 12A, of a lawyer who “poses a threat of substantial harm to clients or potential clients, or [whose] whereabouts are unknown”⁸⁰ Under Section 12A, if Bar Counsel files a petition with the SJC alleging facts showing such a threat or that the lawyer cannot be found, the Court will enter an order to show cause why the lawyer should not be immediately suspended pending final disposition of the disciplinary proceeding that Bar Counsel has commenced against the lawyer or will commence within a reasonable time.⁸¹ The lawyer must have an opportunity to be heard on the matter, and after that hearing the single justice “may make such order of suspension or restriction as protection of the public may make appropriate.”

The SJC has concluded that, at the hearing on the order to show cause, the standard to be applied is essentially that applicable to issuance of a preliminary injunction, with protection of the public interest replacing the concept of irreparable harm.⁸² Unlike all other forms of suspension, which usually take effect 30 days after the order has been entered, the temporary suspension takes effect immediately.⁸³ However,

⁷⁴ *Matter of Schoepfer*, 426 Mass. 183, 187 (1997) (citing *Matter of the Discipline of an Attorney*, 392 Mass. 827, 836 (1984)).

⁷⁵ *See Matter of Curtis*, 17 Mass. Att’y Disc. R. 157 (2001) (commercial bribery); *Matter of Gibson*, 15 Mass. Att’y Disc. R. 220 (1999) (conviction for falsifying student loan records); *Matter of Greene*, 31 Mass. Att’y Disc. R. ___, 2015 WL 9309005 (2015) (real estate fraud).

⁷⁶ BAR COUNSEL 2016 ANNUAL REPORT, *supra* note 55, at 14.

⁷⁷ BAR COUNSEL 2015 ANNUAL REPORT, *supra* note 5, at 15.

⁷⁸ BAR COUNSEL 2014 ANNUAL REPORT, *supra* note 18, at 15.

⁷⁹ *See, e.g.*, §§ 17(1)–17(6).

⁸⁰ Rule 4:01 § 12A.

⁸¹ *Matter of Kenney*, 399 Mass. 431, 437 (1987).

⁸² *Matter of Ellis*, 425 Mass. 332 (1997) (referring to a § 12A suspension as a “temporary suspension”).

⁸³ Rule 4:01 § 17(3).

as with all other suspensions, once the order enters, the lawyer has 14 days to provide the requisite notices to clients and others as described above,⁸⁴ and to resign or withdraw from appointments.⁸⁵ The temporary suspension will typically remain in effect until the disciplinary process arrives at some other conclusion or produces a different order.⁸⁶

In addition to the above process, upon conviction of a “serious” crime, a lawyer must show cause why she should not be temporarily suspended. In that instance there is no need to show threat of substantial harm to clients or that the lawyer’s whereabouts are unknown.⁸⁷

Practice Tips

A lawyer’s indictment on felony charges may serve as a factor demonstrating that a lawyer “poses a threat of substantial harm to clients or potential clients.”⁸⁸

* * *

In some instances, accepting a temporary suspension will serve a respondent’s interests, especially if the lawyer is not practicing law at the time. If the lawyer will ultimately receive a term suspension for the misconduct being investigated by Bar Counsel, that term will begin to run at the time of the imposition of the temporary suspension assuming full compliance with the terms of suspension, including filing the affidavit of compliance with the court and Bar Counsel. Therefore, all of the time spent by Bar Counsel to achieve the term suspension will “count” in the running of that term.

6) Administrative suspensions

Separate from a disciplinary suspension issued after a full BBO and SJC review, and separate from a temporary suspension described above, is an “administrative suspension.” This sanction is indeed a real suspension—it prohibits the lawyer from practicing law during its term. However, it results from different kinds of misconduct, and takes effect without any hearing. It can arise in two kinds of contexts.

First, and most commonly, the BBO will seek administrative suspension of a lawyer who fails to pay her bar registration fees and complete her registration duties in any given year. The Board sends every registered lawyer an annual registration statement

⁸⁴ See Section II.F.2 *supra*.

⁸⁵ Rule 4:01 § 17(1).

⁸⁶ In *Matter of Eberle*, 25 Mass. Att’y Disc. R. 181 (2009), the single justice imposed a four-month temporary suspension, that term having a relationship to the expected term suspension the respondent was likely to receive after the disciplinary process had completed.

⁸⁷ Rule 4:01 § 12.

⁸⁸ *Matter of Ellis*, 425 Mass. 332 (1997).

that must be completed, signed and returned with the required fee within 30 days. Failure to remit the payment results in a notice that a late fee will be assessed absent compliance within 15 days, and lawyers who still do not pay are notified that nonpayment will lead to the filing of a petition for their suspension.⁸⁹ The Board then files with the SJC a petition for administrative suspension based on the lawyer's failure to register or to pay the registration fee. The petition is granted without hearing and as a matter of routine. Upon entry of such an order, the lawyer is suspended from the practice of law.

Practice Tip

Many administrative suspensions for failure to register occur because the lawyer fails to notify the board's registration department of address changes and thus fails to receive notice to register. The board notifies Bar Counsel of the administratively suspended lawyer's request for reinstatement, in case Bar Counsel wishes to oppose reinstatement or to investigate the circumstances of the suspension and the extent to which the lawyer practiced while suspended. If the failure to register is not egregious or prolonged, and if a lawyer so suspended continues to practice because she is not aware of the suspension, reinstatement is more easily obtained.

Second, Bar Counsel will seek an administrative suspension when a lawyer fails to cooperate with an investigation by Bar Counsel. Under Rule 4:01, § 3, the failure (1) to comply with a validly issued subpoena; (2) to respond to requests for information by Bar Counsel or the Board made in the course of the processing of a complaint for discipline; or (3) to file an answer in such a proceeding or to appear at a hearing before a hearing committee will result in Bar Counsel's seeking an administrative suspension in the same fashion as described above.

Both forms of administrative suspension require the lawyer to cease the practice of law, but an administrative suspension does not *immediately* require a lawyer to close down shop. A Bar Counsel article on this topic explains:

If an administratively suspended lawyer is not reinstated within 30 days after the entry of the order, she becomes subject to the same requirements imposed by S.J.C. Rule 4:01, § 17, on lawyers under disciplinary suspension. These include withdrawing all appearances as counsel, resigning all fiduciary appointments, and giving notice of the suspension to all clients, opposing counsel, wards, heirs and beneficiaries. In addition, administratively suspended lawyers must refund all unearned fees, close all IOLTA or other trust accounts, and properly disburse all client, fiduciary and other trust funds in their control. They are also required to file an affidavit and documentation of compliance with the court and Bar Counsel.⁹⁰

⁸⁹ Rule 4:03(2).

⁹⁰ Roger Geller & Susan Strauss Weisberg, *Dues and Don'ts* (2002), available at <http://www.mass.gov/obcbbo/dues.htm> (citing Rule 4:03(3)).

A lawyer who has been administratively suspended must therefore cease practice immediately, but need not formally withdraw her appearances or terminate any client relationships unless the administrative suspension lasts at least 30 days. Obviously, the lawyer must scramble to find coverage for any active matters that require attention by a lawyer during the time of the suspension. As with any other suspended lawyer, the administratively suspended lawyer may not practice as a legal assistant or paralegal without leave of Court.⁹¹

How the administrative suspension ends will depend on how it arose. If the administrative suspension occurred because the lawyer failed to register, the lawyer may be reinstated by registering, paying the past-due annual fees including a late assessment, and paying a fine. The lawyer must also file an affidavit with the BBO explaining how she has complied with whatever obligations she had failed to meet leading up to the suspension.⁹² The rule implies, in cases where the administrative suspension resulted from a default on bar registration and nonpayment of fees, that reinstatement rests with the discretion of the Board and the Court. In practice, however, reinstatement is automatic upon the lawyer's registering and paying all fees and the late assessment., although the matter may be referred to Bar Counsel for investigation of unauthorized practice while suspended or other issues raised by the suspension and reinstatement. If the administrative suspension resulted instead from a failure to cooperate with Bar Counsel's investigation of a disciplinary complaint, a similar process applies, but the Court's discretion about reinstatement may be exercised with more deliberation depending upon the quality of the lawyer's cooperation efforts.

As discussed in Chapter 7, many lawyers find themselves in even more serious trouble because they continued to practice after the administrative suspension.

G. Disbarment

The most serious discipline is disbarment, imposed when the lawyer's misconduct is so grave that he or she forfeits the privilege to practice law in Massachusetts for a minimum period of eight years. As with suspensions, disbarment is imposed by the SJC, not the BBO. Unlike some other states,⁹³ Massachusetts's disciplinary process does not provide for permanent disbarment.⁹⁴ In Massachusetts, Rule 4:01 permits a disbarred attorney to apply for reinstatement after eight years have elapsed since the disbarment order.⁹⁵ (The disbarred lawyer may submit his application for reinstatement three months before the eight year limit.⁹⁶ The procedures described above for implementing a

⁹¹ Rule 4:01 §§ 17(7), 18(3). Because an attorney may not even request leave of court to work with a lawyer until after four years of an indefinite suspension (*id.* at § 18(3)), it would be remarkable for an administratively suspended lawyer to obtain such permission.

⁹² Rule 4:03(3). In 2013, the late fee was \$50 and the fine is \$100. Those figures are likely to change in the future.

⁹³ *See, e.g.*, In re Amendments to Rules Regulating the Florida Bar, 718 So. 2d 1179, 1181 (Fla. 1998) (amending R. Regulating Fla. Bar 3-5.1(f) "to authorize permanent disbarment as a disciplinary sanction").

⁹⁴ *Matter of Hiss*, 368 Mass. 447, 454 (1975).

⁹⁵ Rule 4:01 § 18(2)(a).

⁹⁶ *Id.*

suspension, including ceasing all practice, withdrawing from all appearances, closing IOLTA and trust accounts, returning fees, etc., apply to disbarment. As with any non-temporary suspension, a disbarment order takes effect 30 days from the date of the SJC's ruling, and, within 14 days after the date of the order, the lawyer must complete all of those requirements. Within seven days thereafter the disbarred lawyer must file with the BBO an affidavit describing the steps he has taken to wrap up his practice.⁹⁷

Disbarment is reserved for the most serious instances of misconduct, and most reports of disbarment include multiple examples of wrongdoing with aggravating factors. For example, in neglect matters, even the most severe neglect of client matters will not lead to disbarment, but significant neglect combined with other misconduct will result in the lawyer being disbarred.⁹⁸ In matters involving misuse of client funds, “[w]hen an attorney ‘intended to deprive the client of funds, permanently or temporarily, or if the client was deprived of funds (no matter what the attorney intended), the standard discipline is disbarment or indefinite suspension.’”⁹⁹ The SJC imposes disbarment when the facts of the lawyer’s misappropriation of client funds is most serious, and where other aggravating factors are present, including failure to make restitution.¹⁰⁰ Disbarment is the presumptive sanction for conviction of a serious crime implicating the practice of law.¹⁰¹

Chapter 13 of this treatise reviews the standards and the procedures governing how a lawyer who has been disbarred may seek reinstatement.

At least 175 Massachusetts lawyers have been disbarred since 1999, not counting the many lawyers who have resigned in the face of a possible disbarment order. The SJC disbarred 23 lawyers in FY16,¹⁰² 15 lawyers in FY15,¹⁰³ and 19 in FY14,¹⁰⁴ including those lawyers who were disbarred after submitting disciplinary resignations.

Examples of Disbarment Sanction Standards

⁹⁷ Rule 4:01 § 17.

⁹⁸ *See, e.g.*, Matter of Espinosa, 28 Mass. Att’y Disc. R. 307 (2012) (repeated neglect would warrant a lengthy term suspension, but lawyer’s misrepresentations to clients and to Bar Counsel, and his misuse of client funds, warranted disbarment).

⁹⁹ Matter of McBride, 449 Mass. 154, 163 (2007) (*quoting* Matter of Schoepfer, 426 Mass. 183, 187 (1997)).

¹⁰⁰ *See, e.g.*, Matter of Dasent, 446 Mass. 1010, 1012–1013, 22 Mass. Att’y Disc. R. 173 (2006) (imposing sanction of disbarment where attorney intentionally misused client funds, failed to repay full amount owed, committed multiple ethical violations, and showed no special mitigating factors).

¹⁰¹ Matter of Otis, 438 Mass. 1016, 1017 (2003); Matter of Concemi, 433 Mass. 326, 330 (1996).

¹⁰² BAR COUNSEL 2016 ANNUAL REPORT, *supra* note 55, at 14.

¹⁰³ BAR COUNSEL 2015 ANNUAL REPORT, *supra* note 5, at 15.

¹⁰⁴ BAR COUNSEL 2014 ANNUAL REPORT, *supra* note 18, at 15.

For Neglect of a Client Matter: Even the most severe neglect of client matters will not result in a disbarment order. Significant neglect combined with other misconduct may result in the lawyer being disbarred.¹⁰⁵

For Mishandling Client Funds: “When an attorney ‘intended to deprive the client of funds, permanently or temporarily, or if the client was deprived of funds (no matter what the attorney intended), the standard discipline is disbarment or indefinite suspension.’”¹⁰⁶ The SJC imposes disbarment when restitution has not been made or where other violations or aggravating factors are present.¹⁰⁷

For Conviction of a “Serious Crime”: “Disbarment is the ‘usual and presumptive sanction’ for conviction of a serious crime.”¹⁰⁸ A “serious crime” is defined in S.J.C. Rule 4:01 § 12(3).

H. Disciplinary Resignation

The final disciplinary avenue is a voluntary resignation while subject to a BBO investigation or proceeding. This Section distinguishes truly voluntary resignations and those pursued while the lawyer faces discipline.

1) Voluntary Resignations

A lawyer may resign from the practice of law. A lawyer who is in good standing and not the subject of any disciplinary investigation may resign by submitting a request to the BBO. After determining that the resignation is not in anticipation of a forthcoming Bar Counsel investigation, the Board will forward the resignation request to the SJC, which will allow it. By resigning, the now-former lawyer may have to re-take the bar examination and satisfy all other admissions requirements if she wishes to become an attorney again.¹⁰⁹ This kind of “normal, voluntary” resignation has no disciplinary implications whatsoever. It almost never occurs, since most lawyers who no longer wish

¹⁰⁵ See, e.g., *Matter of Espinosa*, 28 Mass. Att’y Disc. R. 307 (2012) (repeated neglect would warrant a lengthy term suspension, but lawyer’s misrepresentations to clients and to Bar Counsel, and his misuse of client funds, warranted disbarment).

¹⁰⁶ *Matter of McBride*, 449 Mass. 154, 163 (2007) (quoting *Matter of Schoepfer*, 426 Mass. 183, 187 (1997)).

¹⁰⁷ See, e.g., *Matter of Dasent*, 446 Mass. 1010, 1012–1013, 22 Mass. Att’y Disc. R. 173 (2006) (imposing sanction of disbarment where attorney intentionally misused client funds, failed to repay full amount owed, committed multiple ethical violations, and showed no special mitigating factors).

¹⁰⁸ *Matter of Otis*, 438 Mass. 1016, 1017 (2003) (quoting *Matter of Concemi*, 422 Mass. 326, 330 (1996)).

¹⁰⁹ The BBO website explains the process for a good-standing resignation, as follows:

[I]f you are in good standing and you wish to resign voluntarily from the bar, the General Counsel will place your request before the Board, which will make a recommendation to the Court. It is the Board’s practice to hold such requests for six months in case disciplinary charges surface. This kind of resignation will also have the effect of removing your name from the rolls and would likely require you to take and pass the bar examination and fulfill other requirements for readmission should you decide to return to the practice of law in Massachusetts.

<http://massbbo.org/>.

to practice simply retire. Retirement permits the lawyer to avoid re-taking the bar exam if she opts to resume practice. To become active again she must pay the fees for all years she was retired.¹¹⁰

2) Disciplinary Resignations

An entirely different process applies if a lawyer is the subject of a Bar Counsel investigation, or is in the middle of disciplinary proceedings, and wishes to resign. Rule 4:01 establishes a process for those resignations.¹¹¹ In order to resign, such a lawyer must submit an affidavit to the Board with several components, including a concession that the resignation is voluntary and not the subject of coercion or duress, as well as a statement that the allegations against him are warranted, or at least that they can be proven:

The lawyer acknowledges that the material facts, or specified material portions of them, upon which the complaint is predicated are true or can be proven by a preponderance of the evidence.¹¹²

A template affidavit of resignation is attached as Appendix A.

The Board acts on the affidavit of resignation, after which the matter goes to the SJC. Upon the Court's acceptance of the resignation, the lawyer may still be disbarred, as an order accepting the resignation and disbarring the lawyer sometimes (but not always) enters as a result.¹¹³ In either event, the lawyer is prohibited from practice in the same manner as any disbarred attorney, and may not seek reinstatement any sooner than if he had been disbarred, that is, for eight years. Still, some lawyers prefer a resignation leading to a disbarment order to an involuntary disbarment order. Resignation has other advantages for the disciplinary process as a whole. As one single justice has written, "the purpose of the resignation provision is to permit respondent attorneys who wish to acknowledge their wrongdoing and exit the profession with dignity to do so forthwith, while saving Bar Counsel, the Board and the Court the time and expense of lengthy

¹¹⁰ As the BBO website reports:

Alternatively [to a voluntary resignation], you may elect Retirement Status, for which you do not pay an annual fee, in the event you deem it unlikely you would be practicing law in the Commonwealth of Massachusetts in the future. You obtain the same result without all the negative effects of an actual resignation from the bar. If you wish to resume active status from retirement, however, you are required to pay the active fee for all the years while on retirement status.

Id.

¹¹¹ Rule 4:01 § 15.

¹¹² *Id.*

¹¹³ In most reported instances of a lawyer submitting an affidavit of resignation in lieu of facing possible disbarment, the SJC orders disbarment. *See, e.g.,* Matter of Lamond, 26 Mass. Att'y Disc. R. 299 (2010); Matter of Gregson, 24 Mass. Att'y Disc. R. 312 (2008). Occasionally, though, the resignation itself serves as the sanction, and no order of disbarment appears. *See, e.g.,* Matter of Sohmer, 25 Mass. Att'y Disc. R. 553 (2009) ("the Court entered a judgment accepting the affidavit of resignation as a disciplinary sanction effective immediately"; no order of disbarment issued); Matter of Lallier, 23 Mass. Att'y Disc. R. 388 (2007) (same).

disciplinary proceedings.”¹¹⁴ The fact that a resignation offers a lawyer some advantages is demonstrated by the fact that on at least two occasions Bar Counsel has attempted to prevent a lawyer from resigning at the last minute to avoid a disbarment, efforts that did not succeed.¹¹⁵

Practice Tip

Most lawyers who resign during disciplinary proceedings or investigation will get disbarred by the SJC. The SJC will not enter a disbarment order if the underlying misconduct would not warrant disbarment. In either instance, a disciplinary resignation will have the same effect on the attorney’s future practice as a formal disbarment.

The SJC accepted disciplinary resignations without using the word “disbarment” from three lawyers in FY16,¹¹⁶ ten lawyers in FY15,¹¹⁷ and three in FY14.¹¹⁸

III. Mitigating and Aggravating Factors

The sanctions described above must be applied fairly. As the SJC has written, “When considering a disciplinary sanction, we examine whether the sanction is markedly disparate from judgments in comparable cases.”¹¹⁹ The BBO and the SJC “need not endeavor to find perfectly analogous cases, nor must [they] concern [themselves] with anything less than marked disparity in the sanctions imposed.”¹²⁰ In assessing the appropriate level of discipline, the BBO and the SJC must also consider factors that mitigate, and those that aggravate, the misconduct committed by the lawyer. A lawyer may receive a lesser sanction compared to another lawyer who engaged in the same misconduct if she shows significant mitigating factors, and, correspondingly, she may receive a more severe sanction if aggravating factors are present.

Chapter 8 of this Treatise explores mitigating and aggravating factors in depth.

IV. Disability Inactive Status

While not a disciplinary sanction based upon misconduct, the SJC may impose upon a lawyer disability inactive status if the lawyer does not have the mental or physical capacity to maintain the practice of law. If a lawyer has been declared incompetent or in need of a guardian by a court, the SJC will enter an order transferring the lawyer to

¹¹⁴ Matter of Oates, 5 Mass. Att’y Disc. R. 274, 277 (1986).

¹¹⁵ Matter of Lee, 3 Mass. Att’y Disc. R. 129 (1983); Matter of Orme, 27 Mass. Att’y Disc. R. 677 (2011). In Matter of Toscano, 5 Mass. Att’y Disc. R. 364 (1987), Bar Counsel supported an attorney’s request to resign, but the SJC refused the lawyer’s request.

¹¹⁶ BAR COUNSEL 2016 ANNUAL REPORT, *supra* note 55, at 14.

¹¹⁷ BAR COUNSEL 2015 ANNUAL REPORT, *supra* note 5, at 15.

¹¹⁸ BAR COUNSEL 2014 ANNUAL REPORT, *supra* note 18, at 15.

¹¹⁹ Matter of Balliro, 453 Mass. 75, 85 (2009), quoting Matter of Finn, 433 Mass. 418, 423 (2001).

¹²⁰ Matter of Hurley, 418 Mass. 649, 655 (1994).

disability inactive status.¹²¹ If no such adjudication has occurred, but Bar Counsel learns of facts showing such incapacity (including, at times from the lawyer himself), Bar Counsel may initiate formal proceedings to transfer the lawyer to disability inactive status.¹²² The lawyer assigned such status may later petition to be reinstated.¹²³

This disability inactive status is discussed in more detail in Chapter 11.

¹²¹ SJC Rule 4:01 §13(1).

¹²² *Id.* at §13(4).

¹²³ *Id.* at §13(6).

Chapter 5

Complaints, ACAP, Investigation, Stipulations

This chapter outlines and describes the travel of a disciplinary matter from initial contact by a complainant, the investigation by Bar Counsel, and any resolution through informal measures or by stipulation of the parties. Chapter 6 will cover the procedures for those matters that do not resolve either by informal resolution or by stipulation, including the rules, standards and practice for evidentiary hearings.

I. The Complaint

The disciplinary process starts by someone or something triggering the attention of the disciplinary actors. This section explains how those triggers operate. The process starts with the Office of Bar Counsel, not with the Board of Bar Overseers or the Supreme Judicial Court. There are several ways in which a potential matter may come to the attention of Bar Counsel:

- 1) A telephone call or a letter to Bar Counsel;
- 2) A formal written complaint to Bar Counsel;
- 3) A lawyer's mistake in connection with the BBO's registration department, such as failure to register and pay fees or paying bar fees from an IOLTA account;
- 4) Bar counsel's becoming aware of misconduct through a newspaper article or a court decision;
- 5) Receipt of a notice of a bounced check on an IOLTA account (based upon the required reporting by an IOLTA account bank¹); or
- 6) Self-reporting by the attorney.

Any one of these, or information from any source about possible misconduct, will cause the Office of Bar Counsel to take some steps, which are described below.

Most complaints come to Bar Counsel from some person—often a client, sometimes an opposing party or lawyer, or even a judge who has observed the lawyer—calling Bar Counsel to register a grievance, or writing a letter to Bar Counsel. The complainant may also use an official complaint form, entitled “request for investigation.”² (Bar counsel does not have a publicly available email address through which the complainant could communicate his grievance electronically. Bar counsel currently will not accept email complaints.) Bar counsel does not accept anonymous complaints unless the complaint contains clear evidence of serious misconduct on which an investigation can be based. However, if a judge makes a report, Bar Counsel will protect the identity of the complaining judge where possible, unless the judge has already so advised the lawyer or has given permission to disclose the judge's identity.

¹ For a discussion of the dishonored check notification policy, see Chapter 14.

² A copy of the form appears at the end of this chapter.

When Bar Counsel receives a telephone call, a letter or a complaint form, it will refer the matter to the Attorney and Consumer Assistance Program (ACAP) within the Office of the Bar Counsel unless the matter is of such gravity as to warrant the attention of Bar Counsel from the start. If, after a telephone complaint has been reviewed by ACAP, no resolution is possible or if it is determined that a formal investigation is appropriate, ACAP will provide the complainant with a complaint form to complete. If a written complaint (including a letter) is already on hand and ACAP's involvement fails to resolve the matter or reveals a serious issue, the complaint will be referred for formal investigation and logged in as a formal case on Bar Counsel's docket. Even if the complainant does not submit a complaint form after having been provided it by ACAP, Bar Counsel may, on its own, initiate a formal disciplinary investigation against the lawyer if warranted.

All complaints submitted to the Board or to Bar Counsel "shall be confidential and absolutely privileged,"³ although no authority prevents the complainant from disclosing the fact that a complaint has been submitted or the contents of the complaint. The person making the complaint will be immune from any civil liability for the statements made in the complaint (but not for other statements made outside of that process, including sharing the complaint with others⁴). The "confidential" part of that commitment means, according to the Bar Counsel website, that "[u]ntil the lawyer has been served with a petition for discipline instituting formal charges or has agreed to be formally disciplined, the Board and Bar Counsel may not publicly disclose that the complaint has been filed."⁵ Bar Counsel will ordinarily disclose to the respondent lawyer the name of the complainant and the content of the complaint, and after that the lawyer may have permission to disclose otherwise confidential facts if necessary to defend himself.⁶

The SJC rules describe some narrow exceptions to the confidentiality duty imposed upon Bar Counsel. Bar counsel may disclose the pendency and the status of its investigation (which presumably includes the identity of the respondent lawyer) if the lawyer consents, if the investigation has been triggered by the lawyer's conviction for a "serious crime" (a term of art described elsewhere⁷), if the underlying allegations have become generally known, or if there is a need to notify a person or organization in order to protect the public, the administration of justice, or the legal profession.⁸ After a petition for public discipline has been filed, the allegations within that petition become public.

³ SJC Rule 4:01, § 9(1).

⁴ *Id.* See also *Bar Counsel v. Farber*, 464 Mass. 784 (2013) (complainant's immunity remains even though the disciplinary proceedings become public).

⁵ Office of Bar Counsel, "How to File a Complaint," available at <http://www.mass.gov/obcbbo/complaint.htm#confidentiality>.

⁶ See MASS. R. PROF'L C. R. 1.6(b)(5) (permitting disclosure of protected client information where necessary "to respond to allegations in any proceeding concerning the lawyer's representation of the client").

⁷ See SJC Rule 4:01 § 12(3), discussed in Chapter 4.

⁸ SJC Rule 4:01 § 20(2)(a)–(d).

Finally, some administrative and disciplinary actions will commence without a complaint from an outsider. If a lawyer fails to comply with the registration and renewal procedures at the end of a year, then, after reminders to the lawyer and the expiration of applicable grace periods, the Board will institute the process to administratively suspend the lawyer. If a lawyer overdraws his IOLTA account (and a check is dishonored for insufficient funds), a bank approved by the IOLTA committee is required to notify Bar Counsel.⁹ Since overdrawing a client trust account indicates some trust account record-keeping issues, Bar Counsel will automatically open an investigation. Bar counsel will also act proactively if a lawyer pays his bar dues from his IOLTA account.

Bar counsel reports annually to the public the nature of the complaints it receives. The annual report appears on Bar Counsel's website.¹⁰ An earlier article from Bar Counsel reported that "[w]ithout fail, domestic relations cases generate the most complaints,"¹¹ and that pattern has remained consistent.¹² After family matters, the next most common subject matters leading to complaints tend to be civil litigation (non-motor vehicle injuries), real estate, motor vehicle personal injury, criminal matters, and trust and estate matters.¹³ Of the reasons why people contact Bar Counsel, the most common complaint, by far, is neglect and competence concerns, followed by fee issues.

II. The Attorney and Consumer Assistance Program (ACAP)

Almost all complaints to Bar Counsel, whether written or telephonic, are assigned initially to the ACAP. The Office of Bar Counsel created ACAP in 1999, after years of concern that the office was overwhelmed with its caseload.¹⁴ ACAP has been successful in resolving most of the complaints filed against lawyers, and in separating out those that need serious disciplinary attention. A report from 2014 stated that ACAP resolved 86% of the matters it received without any formal disciplinary proceedings needing to be instituted.¹⁵

The ACAP system works as follows: The ACAP staff (consisting of attorneys and investigators experienced in bar discipline) responds to all telephone complaints and is assigned the written complaints deemed appropriate for ACAP resolution. The

⁹ MASS. R. PROF'L C. 1.15(h)(1).

¹⁰ See <http://www.mass.gov/obcbbo/annual.htm>.

¹¹ Anne Kaufman, "Five Years of ACAP" (2004), available at <http://www.mass.gov/obcbbo/acap5.htm> ("Five years in a row, family law concerns constituted more than 15% of all matters screened by ACAP.").

¹² The annual reports of the Office of Bar Counsel for the years 2012 through 2016 list domestic relations as the most common practice area generating complaints about lawyer misconduct.

¹³ See Kaufman, *supra* note 11. The recent annual reports of the Office of Bar Counsel confirm that list of practice areas.

¹⁴ See, e.g., MASSACHUSETTS BAR ASSOCIATION, REPORT OF THE MBA TASK FORCE ON LAWYER DISCIPLINE, PROTECTING THE PUBLIC: REFORMING THE DISCIPLINE PROCESS 13–14 (2005) [hereinafter MBA TASK FORCE] (describing the history).

¹⁵ See MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2016, at 3. Compare Daniel C. Crane, *The Future for Lawyer Discipline* (2005), available at <http://www.mass.gov/obcbbo/future.htm> (in 2005, ACAP resolved 75% of its matters without formal discipline).

assigned ACAP staff person first hears from the complainant, usually a client of the lawyer but sometimes a different actor, such as a parent or companion of a criminal defendant, or a relative who has agreed to pay for an individual's legal fees. The ACAP staff first explores the underlying story and the reasons for the complaint. ACAP will always (assuming that the complainant cooperates) learn the identity of the lawyer complained about. ACAP maintains a record of such complaints for future reference, regardless of how the complaint is concluded or resolved. This record may protect the lawyer, as some complainants contact Bar Counsel on more than one occasion with the same complaint.

The complaint can lead to one of three different dispositions. If the complaint does not constitute misconduct or is not something that is appropriate for ACAP's intervention, the ACAP staff will inform the complainant of the reasons why the complaint does not constitute a breach of duty or otherwise is not something fitting within Bar Counsel's purview. The complainant does not have to accept this determination, however, and has the right to submit a written complaint for review by Bar Counsel. If Bar Counsel believes the complaint should be opened, the complaint will be docketed for further investigation. If Bar Counsel agrees that the matter should not be further investigated, the complainant will be informed in writing of this decision and provided with an explanation for the determination. The complainant will also receive notice of his right to request review of the decision to take no action, as described below in Section V. In these instances, the lawyer who is the subject of the complaint will receive no notice from ACAP or from Bar Counsel.

At the other extreme are those complaints that ACAP determines, from the facts alleged, to warrant formal investigation by Bar Counsel. If the allegations show, without the need for further inquiry, sufficient cause to believe that the lawyer in question has engaged in serious misconduct, the complainant will be asked to submit the complaint in writing (either by letter or on the Bar Counsel complaint form),¹⁶ and the matter will be referred directly to the Bar Counsel staff who investigate and prosecute lawyers. ACAP's role is completed once it makes that referral.

The vast majority of calls fall into the middle ground, where ACAP's intervention might resolve the dispute without the need for a petition for discipline, or where there is a plausible chance of that happening. In those matters, ACAP learns of the complainant's allegations, and then contacts the lawyer to engage her in a mediation-type process in an attempt to resolve the complaint. That contact to the lawyer is typically by telephone. ACAP has access to any publicly-available court dockets and pleadings, so its staff may review court or agency records to help understand what had happened leading up to the complaint. ACAP may also request that the lawyer or the complainant provide documents to establish the facts in question.

Once ACAP understands the facts underlying the complaint and the lawyer's version of the events, it may seek to broker a resolution to satisfy the interests of both

¹⁶ For an example of the official complaint form, called a "request for investigation," visit the BBO website at <https://www.massbbo.org/Complaints>.

parties. Some categories of disputes readily lend themselves to this kind of mediated resolution. For instance, if a client calls ACAP because his lawyer has not provided his file to successor counsel, a telephone call to the lawyer often will result in the delivery of the file. Or, if the client is displeased because a personal injury matter settled a few months ago and the client has not yet received the proceeds, ACAP might be able to show the complainant that a lien has not yet been resolved, explaining the delay in payment. Sometimes it can be as simple as getting the lawyer to contact the client with a status update on the client's matter.

While ACAP does not resolve fee disputes,¹⁷ sometimes a complainant's protest about the amount of a fee will also include some underlying allegations about less-than-competent lawyering or an error in calculating the fees charged. In such settings, a call from ACAP might lead to an agreement between the lawyer and the client resulting in correction of the mistake, a forgiveness of the fee, or return of attorney's fees, without any further action taken against the lawyer.

As noted above, the vast majority of the complaints received by Bar Counsel end up with a resolution overseen by ACAP. While ACAP will keep an electronic record of the complaint and its resolution for internal use, no formal complaint exists on the attorney's record at the BBO when the matters resolve through ACAP in this way.

III. The Investigation by the Office of Bar Counsel

In a small proportion of the matters received by Bar Counsel, where ACAP determines that a formal complaint is warranted, ACAP staff either invites the complainant to file a formal "request for investigation," which is essentially a complaint form, or transfers the written complaint letter already received to be docketed and assigned to an assistant bar counsel. When Bar Counsel receives that complaint, it investigates the underlying facts and claims. *The commencement of an investigation is not the same thing as the filing of charges against the lawyer.* The "filing of charges" refers to a "petition for discipline" whereby Bar Counsel, with the approval of the Board, institutes formal proceedings to impose public discipline.¹⁸ Bar counsel must, through its investigation, satisfy itself that charges are warranted before filing charges. That investigation process can take some time.¹⁹ In most cases, the investigation by Bar Counsel will not lead to any charges being filed.

¹⁷ If a dispute about fees does not rest on a claim of a "clearly excessive fee" in violation of Rule 1.5(a), or a claim of dishonesty in billing in violation of Rules 1.4 and 4.1, the matter is not properly before the Office of Bar Counsel. Instead, ACAP urges the parties to seek the aid of the Massachusetts Bar Association's Fee Arbitration Panel, or go to small claims court.

¹⁸ SJC Rule 4:01, § 7(2)(c).

¹⁹ In its 2005 report on the state of the disciplinary process in Massachusetts at that time, the MBA Task Force criticized the excessively long time between the commencement of an investigation and the decision to file charges, noting that "[a]pproximately half of the cases decided by the BBO in the last two fiscal years had investigatory periods (i.e., the period between the initial complaint against the lawyer and the filing of formal charges) of four years or longer." The report also described one matter where the investigatory period was ten years. MBA TASK FORCE, *supra* note 14, at 23. That process seems to be much more efficient now. According to a recent Bar Counsel report (for fiscal year 2014), "For the first time Bar Counsel ended the fiscal year with no files over 2 years old that are not in petition or deferred.

Here is how the process develops from the beginning of an investigation:

The filing by the complainant of the written “request for investigation” causes Bar Counsel to docket the matter and initiate an investigation. The BBO rules require Bar Counsel to “forward to the Respondent a request for a statement of the Respondent’s position”²⁰ That notification will include the nature of the complaint and the name and address of the complainant (unless Bar Counsel has good cause not to disclose that information). The BBO Rules do not state that Bar Counsel must share the actual complaint form with the respondent, but the practice of Bar Counsel is to forward the written complaint to the respondent, unless it comes from a judge who prefers that the respondent not know that she is the one who notified Bar Counsel. When a judge is the complainant, the file typically will be opened as a “Bar Counsel” file; the same is true when Bar Counsel opens the matter as a result of her own initiative. Otherwise, the file is opened in the name of the complainant.

The respondent has 20 days to reply to that notice from Bar Counsel. As every practitioner manual or article written about this topic has emphasized, a lawyer who receives such a notice from Bar Counsel must take it seriously and respond within the time permitted (which may include an extension upon request).²¹ Not only is it good strategic judgment to treat such a development with the respect it deserves, but a failure to respond to a request for information from Bar Counsel may itself be a basis for discipline, above and beyond the grounds for which the underlying complaint was filed.²² The response at this stage is different from the answer the respondent will have to file to a petition for discipline if formal disciplinary proceedings are commenced. The response at this stage of the investigation should include the lawyer’s version of the facts surrounding the dispute and the lawyer’s position about the merits of the complaint, with supporting documents. The respondent is asked to provide an original and a copy of his response, with the copy intended for the complainant. The complaining party will have the opportunity to read what the lawyer submits in response to the notice from Bar Counsel, and to comment upon it.

The respondent may answer by email, attaching scanned copies of his response and any attachments. While not a requirement, it is good practice for a respondent or respondent’s counsel to number the pages of his response and “Bates number”²³ the response and the supporting documents.

Only 4 lawyers had files over 18 months old that were not in petition and that had not been deferred.” MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2014.

²⁰ BBO Rules, § 2.6.

²¹ See, e.g., James S. Bolan, *The Disciplinary Process*, in ETHICAL LAWYERING IN MASSACHUSETTS, Chapter 1 (Mass .Cont. Leg. Ed. 2009); Ronald F. Kehoe, *How to Settle Cases with the Office of Bar Counsel*, in PRACTICING BEFORE THE BBO 269, 270 (Mass .Cont. Leg. Ed. 1994).

²² Rule 4:01, § 3(1)(b).

²³ “Bates numbering” is the process used by most law firms to assign successive numbers to every page of a collection of documents.

Whether a respondent should retain counsel at this stage of the proceedings is a matter left to his or her professional judgment, influenced by the seriousness of the misconduct alleged in the request for investigation. Most observers remind respondents that there is considerable benefit to having objective, independent advice about the risks the lawyer might face. Every person is subject to pervasive and powerful self-serving biases,²⁴ and those biases may distort a lawyer’s judgment about how to respond to claims of misconduct. Also, the response by the lawyer to Bar Counsel waives any right the respondent may have under the privilege against self-incrimination relating to any admissions made in that response.²⁵ If a respondent would like to be represented by counsel but cannot afford to retain counsel for that purpose, the Office of the General Counsel of the BBO will attempt to assist the respondent in obtaining reduced-fee or pro bono representation.²⁶ Many professional liability insurance policies provide coverage for the cost of counsel to respond to bar discipline proceedings, and respondents would be well-served to review their insurance policy, if they have one, both to obtain defense counsel and to provide the requisite notice of the claim to insure there is coverage.

After receipt of the respondent’s position and his response to the allegations, Bar Counsel may need to investigate further, especially if it has reason to believe that it may recommend to the Board to institute proceedings for public discipline. Bar counsel may use investigatory subpoenas in its exploration of the facts underlying the dispute. The BBO Rules permit Bar Counsel to request that the Board (through any one Board member) issue a subpoena “requiring the attendance and testimony of a witness, *including the Respondent*, and the production of any evidence, including books, records, correspondence or documents, relating to any matter in question in the investigation.”²⁷ The practice of the Board has been to issue such subpoenas regularly when Bar Counsel requests them.

The subpoena will require that the witness appear before Bar Counsel at a specified time and place, with the requested papers or items. While Massachusetts and federal civil procedure practice permits a “documents only” subpoena,²⁸ that option is not available in Bar Counsel investigations. However, if a Bar Counsel subpoena requests only documents, Bar Counsel may advise the subpoenaed witness that she does not need to appear as long as she provides the subpoenaed documents in a timely manner and with an affidavit authenticating the documents. If a meeting does occur, the respondent has no

²⁴ See, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); Robert A. Prentice, *The SEC and MDP: Implications of the Self-Serving Bias for Independent Auditing*, 61 OHIO ST. L.J. 1597 (2000).

²⁵ The Fifth Amendment privilege against self-incrimination can apply in disciplinary proceedings if some likelihood exists of criminal charges, but its assertion may trigger adverse inferences. See *Matter of Boxer*, 14 Mass. Att’y Disc. R. 74, 78–79 (1998) (proper to draw an adverse inference from respondent’s refusal to testify) (*citing* *Spevack v. Klein*, 385 U.S. 511, 514 (1967) (lawyer may not be disciplined solely for asserting the privilege against self-incrimination in bar disciplinary proceedings)); *Matter of Kenney*, 399 Mass. 431, 437 (1987) (same).

²⁶ BBO Rules, § 3.4(d).

²⁷ BBO Rules, § 4.4(a) (emphasis added).

²⁸ See, e.g., Mass. R. Civ. P. 45(b), Reporter’s Note (2015) (“the most significant change in Rule 45 as result of this [2015 amendment] was the adoption for Massachusetts practice of a ‘documents only’ subpoena directed to a non-party, a practice that has existed under Federal Rules of Civil Procedure since 1991.”

right to be present, and has no right to know when and where the meeting will take place. This investigatory process is quite different from a deposition in a civil court action, where the other party has the right not only to attend but to participate in asking questions.²⁹ If Bar Counsel records the meeting resulting from the subpoena, it must supply a copy of the recording to the respondent prior to a hearing on a petition for discipline. Otherwise, Bar Counsel has no obligation to share the product of this meeting with the respondent. The BBO Rules require that Bar Counsel shall “maintain the absolute confidentiality of the investigation,” including the information obtained pursuant to its subpoena.³⁰

If financial misconduct is a potential issue, Bar Counsel can and will demand that the respondent provide records he is required to maintain by Rule 1.15³¹ and subpoena all relevant financial records directly from the appropriate banks or other financial institutions. Bar counsel will, depending on the needs of the investigation, also obtain pertinent court pleadings, transcripts and/or audio recordings of hearings or trials, insurance company files, mortgage lenders’ files, and any other relevant third party’s files. In addition, Bar Counsel may speak to opposing counsel, clients, or any other persons having relevant information. The confidentiality requirements of Bar Counsel’s investigation do not preclude such investigations; however, persons and institutions that Bar Counsel contacts are all advised that Bar Counsel’s investigation is confidential. Bar counsel requests that the contacted person or organization honor that confidentiality.

During Bar Counsel’s investigation, a respondent has no right to subpoena witnesses to any corresponding meeting, or to seek leave of the Board to do so. As described in Chapter 6, the respondent will have some limited discovery opportunities after charges have been filed and a hearing is expected.

IV. Resolution by Agreement After Completion of the Investigation

After Bar Counsel has completed its investigation, the office will make a determination about how to proceed. If the investigation does not provide Bar Counsel with good cause to seek to impose some form of discipline, Bar Counsel will close the matter and so inform both the respondent and the complainant. The complainant will have the review rights described in the next section. Bar counsel may also “close the matter after adjustment, informal conference, or reference to and completion of diversion to an educational, remedial, or rehabilitation program.”³² That closing will always come through an agreement with the respondent. The parties may agree to any satisfactory diversionary or remedial arrangement, but quite often the lawyer will agree to participate in a program offered by Lawyers Concerned for Lawyers (LCL),³³ the Massachusetts organization aimed to assist lawyers “who are experiencing any level of impairment in their ability to function as a result of personal, mental health, addiction or medical

²⁹ See MASS. R. CIV. R. 30(b), (c).

³⁰ BBO Rules, § 4.7(a)

³¹ MASS. R. PROF’L C. 1.15(f)(1) (itemizing documentation required of all trust accounts).

³² BBO Rules, § 2.7(2).

³³ See <http://www.lclma.org/>.

problems,”³⁴ or the Law Office Management Assistance Program (LOMAP),³⁵ a program within LCL established “to help attorneys licensed in Massachusetts (or soon to be) establish and institutionalize professional office practices and procedures to increase their ability to deliver high quality legal services, strengthen client relationships, and enhance their quality of life.”³⁶

A stipulation may also (or alternatively) include an agreement to “accounting probation,” whereby the respondent’s accounts are audited by a financial professional at the respondent’s expense for some specified period of time. For accounting violations, Bar Counsel may also require the respondent to attend one or more courses addressing law office fiscal management.

If Bar Counsel determines that some formal discipline is warranted, it will inform the respondent and invite the respondent to agree to the discipline recommended by Bar Counsel. If the respondent disagrees with the proposed sanction, and if further negotiations about that topic are fruitless, then Bar Counsel will proceed with formal discipline proceedings as described in the next chapter. If the respondent and Bar Counsel agree about the facts and the appropriate discipline, then Bar Counsel will prepare a petition for discipline and serve it on the respondent. If the proposed sanction is an admonition, Bar Counsel will recommend to the Board that an admonition be imposed and, with the agreement of the respondent, will send the lawyer a notification of the admonition, including a summary of the basis of the charges. The procedures if the respondent does not consent to the admonition are described in the next chapter.

If the proposed sanction on which the parties agree is for some form of public discipline, the matter proceeds as follows:³⁷ Bar counsel will prepare a petition for discipline, and the respondent will file an answer admitting the charges and waiving any right to be heard on the question of mitigation. If either party wishes to reserve the right to a hearing should the agreement be rejected by the Board, such reservation must be made at this time. After the respondent has filed her answer, the matter will be referred directly to the Board, along with a description of the joint recommendation for discipline.³⁸ Where the agreement is for a public reprimand, and if the Board agrees with the joint recommendation, the Board will order the public reprimand.³⁹ If the agreement is for a suspension or disbarment, and the Board agrees with the joint recommendation, the Board will file a pleading with the Supreme Judicial Court known as an “Information,” the vehicle which moves the proceedings from the Board to the SJC. The Board must also transmit to the SJC a full record of the matter. Because only the SJC may suspend or disbar an attorney, the Court must approve the joint recommendation.

³⁴ *Id.*

³⁵ See <http://masslomap.org/>.

³⁶ *Id.*

³⁷ See BBO Rules, §§ 3.19(d) and (e) for the description of this process.

³⁸ BBO Rules, § 2.8(c).

³⁹ *Id.* § 3.19(d).

If the Board rejects the parties' joint recommendation, it must articulate its reasons for doing so, giving such notice to the parties. The parties then have 14 days from that notice to file briefs arguing for acceptance of the joint proposal.⁴⁰ If the Board remains unpersuaded, then one of two avenues will exist. If either of the parties has reserved the right to a hearing, then the parties may amend their pleadings and proceed to a hearing, in the manner described in Chapter 6. This form of stipulation is typically referred to as a "collapsing stipulation," because by its own terms it "collapses," or becomes void, if the Board does not accept the parties' recommended sanction.⁴¹ If neither party has reserved that right, the matter proceeds to the SJC for its decision about the appropriate disposition. This type of stipulation is typically referred to as a "binding stipulation," because the parties remain bound by their agreements about the facts, rules violations, matters in aggravation or mitigation cited in the stipulation even if the Board does not accept their recommended sanction, and the Board will then decide the matter as if there had been a hearing and final action on the report by the Board.⁴² A template for stipulations, with alternative paragraphs for binding and collapsing stipulations is attached as Appendix B.

As a practical matter, the respondent's best opportunity to negotiate an agreed-upon disposition with Bar Counsel is before the petition for discipline is filed. Unlike a civil case where the plaintiff conducts discovery to find out more about the strengths and weaknesses of her case, Bar Counsel already knows her case before the petition for discipline is filed. If the respondent has a defense or a factor in mitigation, he should present that evidence to Bar Counsel in the course of her investigation to try to negotiate the best possible proposed disposition at that time. A respondent should not expect Bar Counsel to agree to a disposition that is below the sanctions range for that misconduct. (For a description of the typical sanctions for different types of misconduct, see Chapter 7.)

If the respondent is willing to agree to a sanction recommendation that is appropriate for the agreed misconduct, Bar Counsel may, in some circumstances, be willing to omit disputed issues. The lesser charge might be to a respondent's benefit at a later reinstatement hearing.

If a lawyer expects to agree to a suspension recommendation, or expects to go to a hearing when the real question is the appropriate length of the suspension, and if the lawyer has ceased or is willing to cease the practice of law, he should consider agreeing to a temporary suspension under SJC Rule 4:01, §12A,⁴³ with the understanding that, at such time as the disciplinary sanction takes effect, it will be retroactive to the effective date of the temporary suspension. The Board and the SJC have approved such

⁴⁰ *Id.* § 3.19(e).

⁴¹ *Id.* § 3.19(e), last sentence.

⁴² *Id.* § 3.19(e), second sentence.

⁴³ For a discussion of temporary suspensions under this rule, see Chapter 4.

agreements in the past, assuming timely compliance by the respondent with the terms of the suspension or disbarment.⁴⁴

As an alternative to filing an Answer and Stipulation along with Bar Counsel's petition for discipline, a respondent who has committed serious misconduct may choose to submit an affidavit of resignation. As described in Chapter 4, a respondent who resigns will not be able to apply for reinstatement for at least eight years. As just noted above, the resignation may be retroactive to the date of a temporary suspension, or arranged prospectively if the respondent needs time to wind down his practice.

V. Complainants' Right to Review

As noted above, if Bar Counsel decides to dismiss a request for investigation and to close a case without any discipline, the complaining party is entitled to a review of that decision by the Board. In every case where Bar Counsel decides not to prepare a petition for discipline, it will send the complainant a notice required by Rule 4:01 "informing the complainant in writing of the reasons for not investigating a complaint or for closing the file and of the complainant's right to request review by a member of the Board[.]"⁴⁵ The BBO rules require that the complainant apply for such review within 14 days of receipt of the notice from Bar Counsel.⁴⁶

According to the experience of Bar Counsel in recent years, in the vast majority of cases in which Bar Counsel has decided to close the file, the complainant will not seek review by the Board. When the complainant requests a review, Bar Counsel will submit to a Reviewing Board Member the contents of the file, and the Reviewing Board Member may adopt, reject, or modify Bar Counsel's decision.⁴⁷ The experience of Bar Counsel in recent years has been that the Reviewing Board Member rarely overrules or modifies Bar Counsel's decision not to pursue discipline.

A complainant who is not satisfied with Bar Counsel's decision not to pursue discipline may have other remedies against the respondent, including a malpractice action or resort to a fee arbitration board. Bar counsel will advise the complainant of such alternative avenues when appropriate. However, a complainant has no standing to seek to compel Bar Counsel to investigate or prosecute a case.⁴⁸

⁴⁴ See, e.g., *Matter of Pomeroy*, 26 Mass. Att'y Disc. R. 515 (2010) (affidavit of resignation, with disbarment retroactive to the date of the § 12A temporary suspension); *Matter of Khoury*, 24 Mass. Att'y Disc. 395, 397 (2008) (respondent defaulted; disbarment retroactive to date of compliance with § 12A suspension); *Matter of Golden*, 23 Mass. Att'y Disc. 196, 202 (2007) (stipulation to indefinite suspension accepted by the Court; retroactive to date of § 12A temporary suspension).

⁴⁵ Rule 4:01, § 8(1)(a).

⁴⁶ BBO Rules, § 2.10(1)(A).

⁴⁷ Section 2.10 of the BBO Rules states that, should a complainant seek review of a decision not to pursue discipline, the procedures outlined in section 2.8 will apply. Section 2.8 outlines the procedures by which a board member reviews Bar Counsel's recommendations generally.

⁴⁸ *Binns v. Board of Bar Overseers*, 369 Mass. 975 (1976); *Matter of a Request for an Investigation of an Attorney*, 449 Mass. 1013 (2007).

DRAFT

Chapter 6

Adjudicative Proceedings Before the Board of Bar Overseers

I. Introduction

This Chapter explains the adjudication process before the Board of Bar Overseers. It describes the steps leading up to a disciplinary hearing, the hearing itself, and the resulting written report to the Board by the hearing committee or officer. It discusses separately at the end of the chapter the somewhat different procedures in disciplinary hearings based upon a criminal conviction, in expedited hearings to review the imposition of an admonition, and in reinstatements.

II. The Petition for Discipline

A. Filing

Once the Office of Bar Counsel has decided to institute disciplinary proceedings against an attorney (including a referral by the SJC to the Board after a lawyer has been convicted of a crime¹) and, where required, the Board has approved the matter for prosecution,² it will file with the Board a petition for discipline. The petition must set forth the charges of the attorney's alleged misconduct with specificity,³ and will include a caption listing Bar Counsel as the Petitioner and the attorney as the Respondent,⁴ with a filing number determined by the geographic area in which the respondent practices and the year of filing. The petition will be signed by an Assistant Bar Counsel.

The petition typically includes one or more counts, each of which alleges in numbered paragraphs detailed facts concerning the transactions or activities through which the alleged misconduct has occurred, identifying relevant dates and names of individuals or organizations, including, where appropriate, the client or clients affected by the alleged misconduct. The petition must identify the grounds for discipline,

¹ See SJC Rule 4:01 § 12(4), (5). Section 12(4) states that the SJC shall refer to the Board any conviction involving a "serious crime" for which an order to show cause why the lawyer should not be immediately suspended has issued. Section 12(5) permits the SJC to refer to the Board any other conviction. For a discussion of the immediate suspension process after a conviction for a serious crime, see Chapter 4, Part II.F.5.

² When, after investigation, Bar Counsel determines that there is a basis for public discipline and Bar Counsel and the Respondent have not agreed on a disposition the matter is presented to a board member for approval for prosecution. S.J.C. Rule 4:01, §§ 8(1)(c), (3); Rules of the Board of Bar Overseers [hereafter "BBO Rules"] §2.7(3). No such approval is needed when the discipline results from the lawyer's conviction of a "serious crime" as provided for in SJC Rule 4:01 § 12(4). For a discussion of that process, see Chapter 4, Part II.F.5.

³ BBO Rules § 3.14(b).

⁴ BBO Rules § 4.14(a).

including the Rules of Professional Conduct or other rules⁵ that Bar Counsel claims the respondent has violated. The petition also typically includes, after the counts, the full text of the cited rules, omitting the comments. The petition must be signed by an assistant bar counsel.

A sample, fictitious petition for discipline is appended to this Treatise as Appendix C.

You Should Know

Once a petition for discipline has been filed, all of the proceedings are open to the public, and all filed documents, including the petition and the respondent's answer, will be available for public inspection, absent the SJC's or the Board's issuance, in rare circumstances, of a protective order.⁶

B. Service and Filing of the Petition and Accompanying Notice from the Board

Before filing the petition with the Board, Bar Counsel must serve the petition upon the respondent by certified mail, return receipt requested, and by first class mail. Service is made at the address of record at the Board.⁷ The petition when filed with the Board includes a certificate of service signed by the assistant bar counsel of record, attesting to the date and means of service.

The petition when served must include a notice from the Board informing the respondent of his responsibilities upon receipt of the petition.⁸ That document shall include the following items:

- (1) A notice that the respondent must file an answer within twenty days from receipt of the notice, along with information about the acceptable method of filing and serving the answer.
- (2) Advice to the respondent that failure to file a timely answer will be deemed an admission of the charges, and averments of the petition that are not denied in the answer will be deemed admitted.

⁵ As indicated elsewhere in this treatise, S.J.C. Rule 4:01, Section 3, identifies the grounds for professional discipline, and these include both violations of the Rules of Professional Conduct set forth in S.J.C. Rule 3:07 and violations of the rules governing the legal profession set forth in Chapter Four of the Rules of the Supreme Judicial Court.

⁶ SJC Rule 4:01 § 20(1)(c); BBO Rules § 3.22.

⁷ BBO Rules § 3.4(c).

⁸ *Id.* at § 3.15(a)(1)–(3).

(3) Advice to the respondent that failure without good cause to file a timely answer will itself be deemed both an act of professional misconduct, and also grounds for administrative suspension pursuant to SJC Rule 4:01 § 3(2).⁹

A fictitious sample of such notice is appended to this Treatise as Appendix D.

III. Answer of the Respondent; Filing and Service

A. When to File the Answer

After service by Bar Counsel, the respondent has twenty days from the date of service to file an answer with the Board and to serve the answer on Bar Counsel.¹⁰ Filing of the answer is complete when the document has been received by the Board.¹¹ Failure to file the answer on time will result, according to the Board Rules, in each allegation of the complaint being deemed admitted, as described immediately above. If the respondent has good cause for filing the answer later than twenty days after receipt, she may file a motion with the Chair of the Board requesting an extension of time. The procedure for filing and serving motions is described below in Section IV.

Practice Tips

In calculating the time when the respondent's answer is due, the period begins to run from the date that the petition is mailed. The Board rules do not incorporate the principles of Rule 6(d) of the Massachusetts Rules of Civil Procedure, which adds three days to the relevant time period when a document is served by mail.¹² In practice, that time period is not strictly construed as it might be in some contentious civil litigation contexts. In fact, when an answer has not been filed by the expected deadline, the Board will inform the respondent of the opportunity to file a motion to remove a default.

* * *

If a respondent needs more time to answer, the best practice is to contact the assistant bar counsel and request an extension of time. Such requests are routinely granted if made in good faith. If granted, the parties will prepare a joint motion, or Bar Counsel will not oppose respondent's motion, to the Board for the extension.

⁹ For a discussion of administrative suspensions, see Chapter 4, Part II.F.6.

¹⁰ SJC Rule 4:01 § 21.

¹¹ BBO Rules § 3.3.

¹² MASS. R. CIV. P. 6(d), which reads as follows:

(d) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other papers upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

If the respondent files neither an answer nor a motion for an extension of time, the Board “promptly” notifies the respondent that the allegations of the petition have been deemed admitted and that the opportunity to present evidence in mitigation has been waived.¹³ Within twenty days of the date of that notice, the respondent may seek relief from that default by a motion showing good cause for having missed the filing deadline.¹⁴ In practice, such motions will be allowed if the respondent has a reasonable explanation for having failed to meet the filing deadline.

If the respondent defaults and does not successfully move for relief from the default, the Board will notify the respondent that the allegations of the petition have been deemed admitted and that the opportunity to present evidence in mitigation has been waived. Unless Bar Counsel requests a hearing on matters in aggravation, in which the respondent may participate and offer evidence, the Board will consider the matter on the basis of the admitted allegations. If the Board orders the parties to submit briefs, the respondent may submit a brief on any contested issue even after having defaulted.¹⁵

B. The Contents of the Answer

The answer must “state fully and completely the nature of the defense,” and must admit or deny each allegation included in the petition, “specifically, and in reasonable detail.”¹⁶ The respondent may also deny an allegation on the basis that she has insufficient information on which to admit or deny the assertion.¹⁷ The answer must also state in concise fashion any facts and law on which the respondent relies for her defense. In addition, if the respondent intends to assert any facts in mitigation, she must allege them in her answer. Failure to allege such facts will effect a waiver of the right to present evidence of those facts.

Practice Tip

A denial in an answer of a factual averment on the ground that the respondent has insufficient information on which to admit or deny the allegation is risky. It invites a motion from Bar Counsel to deem the matter admitted, unless the lack of information is plausible under the circumstances.

* * *

A respondent might choose in her answer to admit the facts and claim mitigation in defense. That strategy limits the proceeding to matters in mitigation and aggravation. This strategy can be effective if there is no defense on the facts, little in aggravation, but powerful mitigation.

¹³ BBO Rules § 3.15(g).

¹⁴ *Id.* at § 3.15(h).

¹⁵ *Id.* at § 3.15(g).

¹⁶ *Id.* at § 3.15(d).

¹⁷ While the BBO Rules do not specifically allow such a response, it is an accepted practice when used appropriately.

In her answer the respondent “may request that a hearing be held on the issue of mitigation.”¹⁸ The Board’s practice is to treat the pleading of matters in mitigation as a request that the disciplinary hearing include evidence in mitigation, even if the respondent has not expressly requested a hearing on mitigation.

The answer must be signed by the respondent *pro se*, or by her counsel of record. (The answer need not be, and in practice is never, signed under the penalties of perjury.)

A lawyer appearing on behalf of a respondent in a disciplinary proceeding must be licensed in Massachusetts, as practice before the BBO constitutes the practice of law. A lawyer licensed in another jurisdiction but not licensed in Massachusetts may request permission to appear on behalf of a respondent, and such requests have been granted in the past.¹⁹

A fictitious, sample answer is appended to this Treatise as Appendix E.

Practice Tip

Having the advice of counsel at the pleading stage can be critical to a respondent in the disciplinary process. If a respondent cannot afford counsel, the Office of the General Counsel of the Board will assist the respondent to locate *pro bono* or reduced fee representation, although there is no right to counsel in disciplinary proceedings. Every participant in the disciplinary process in Massachusetts emphasizes the critical role counsel can play for a respondent.²⁰ Many liability insurance policies will provide coverage for representation to defend against disciplinary charges.

IV. Motions Before the Filing of an Answer

Before filing an answer, a respondent may choose to file a motion for an extension of time to answer, if he has good cause for such a request. Unlike proceedings governed by the Rules of Civil Procedure, a respondent has no right, under the Board rules, to file a motion to dismiss or for a more definite statement in lieu of filing an answer, although a respondent may file a motion to dismiss *after* having answered the

¹⁸ BBO Rules § 3.15(d).

¹⁹ Such requests typically involve counsel from another jurisdiction who already represents the respondent in that jurisdiction. That circumstance would qualify the lawyer to practice under Rule 5.5(c)(4), which permits temporary practice in Massachusetts by an out-of-state lawyer in matters that “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.” MASS. RULES OF PROF’L CONDUCT 5.5(c)(4).

²⁰ There is no right to counsel in discipline matters. BBO Rules, § 3.4(d); Matter of Jones, 425 Mass. 1005, 1006, 13 Mass. Att’y Disc. R. 290, 295 (1997) (rescript).

petition.²¹ A respondent who opts to file a pre-hearing motion to dismiss should accompany that motion with a motion to stay the proceedings.²²

The Board rules include general provisions for filings motions.²³ Those rules do not describe the procedure for a motion for an extension of time to answer, but the practice of the Board is as follows: The respondent must file the motion with the Board, with a copy to Bar Counsel. The motion must allege facts with specificity supporting the request for an extension of time, which facts must be included in an affidavit signed under the penalties of perjury. The chair of the Board will rule on the motion without a hearing. In practice, most such motions will have the assent of Bar Counsel, after the parties have discussed respondent's need for more time.

The same process applies when a respondent files a motion for relief from default, although for such a motion the rules are explicit. That motion must be filed within twenty days of the respondent's receipt of a notice from the Board informing the respondent that the allegations of the petition have been deemed admitted and that the opportunity to present evidence in mitigation has been waived.²⁴ That motion must be accompanied by an affidavit demonstrating good cause for such relief, and the chair of the Board will decide the matter without a hearing.

V. Selection of the Hearing Committee or the Special Hearing Officer

Once the respondent has filed an answer, the Board will assign the matter to a hearing committee or, on occasion, a special hearing officer.²⁵ The process for selecting the committee or the officer is as follows:²⁶

The Board, through its Office of General Counsel, will elicit from Bar Counsel and the respondent or respondent's counsel their estimates of the likely length of the hearing and the complexity of the issues. With that knowledge, the general counsel's staff will ordinarily appoint a hearing committee, consisting of three volunteer hearing committee members, one of whom will typically be a layperson. The timing of the likely hearings and the scheduling needs will influence which volunteers will be assigned to a committee, as well as the location of the hearing. A lawyer member of the committee will be chosen to chair the committee.

²¹ See BBO Rules § 3.18(a). Section 3.18, entitled "Motions," refers almost exclusively to motions directed to the hearing committee, hearing panel, or special hearing officer, and similarly refers to the effect of such motions on the hearing. That rule does not address motions to extend time for filing of an answer, and no other rule addresses that topic.

²² BBO Rules §§ 3.18(b)(1), (2).

²³ *Id.* at § 3.18

²⁴ *Id.* at § 3.15(g), (h).

²⁵ For matters involving reinstatement of a suspended or disbarred attorney, or involving discipline based on a criminal conviction, the Board will assign a *hearing panel*, which consists of members of the Board, and is distinguished from the *hearing committee* described in the text.

²⁶ Board of Bar Overseers, Policies and Practices ¶ 9 (2011), available at <http://www.mass.gov/obcbbbo/bbopolicy.pdf> (describing this process).

In unusual circumstances, typically because a matter is expected to be extremely complex and lengthy, or sometimes because of the expected brevity of the proceeding, the general counsel's staff will assign the matter to a special hearing officer, a single attorney volunteer who will conduct the proceedings alone.

For the purposes of the ensuing discussion of the processes leading up to and throughout the hearing, this chapter will refer to a hearing committee rather than repeatedly referring to a hearing committee or a special hearing officer. Everything that the committee can accomplish may be accomplished by the special hearing officer when so appointed.²⁷

VI. Discovery

Discovery in BBO disciplinary proceedings is limited, and is governed by Section 3.17 of the BBO Rules. The following avenues exist for the parties to conduct discovery and to obtain information from one another.

A. Required Document and Information Production

Within 20 days of the respondent's filing of an answer, each party must disclose to the other the names and addresses of "all persons having knowledge of facts relevant to the proceedings."²⁸ Within 30 days of the filing of an answer, each party may make a reasonable request to the other party for non-privileged information and evidence relevant to the charges or to the respondent, and upon that request the other party must comply within 10 days. The rule also provides that, with the approval of the chair of the hearing committee, a party may obtain information other than that just described.²⁹

Practice Tip

BBO disciplinary proceedings are intended to be fair and expeditious. Both parties fare much better when the participants demonstrate cooperation and good faith compliance with the rules. Prompt and accommodating compliance with the required sharing of information helps set a tone that will be very useful as the matter continues to its resolution. Disputes or uncertainties about the information required to be shared are best resolved by conversations between the parties or their counsel.

²⁷ BBO Rules § 3.19(a).

²⁸ *Id.* at § 3.17(a). The rule does not require disclosure of email addresses of the persons identified.

²⁹ *Id.* The rule permits "other material" beyond "non-privileged information and evidence relevant to the charges or the Respondent." That "other material" would include relevant information that might have work-product protection, or information that, while not strictly "relevant" to the charges, ~~are~~ is likely to lead to the discovery of evidence admissible at the hearing. "The Massachusetts work product doctrine ... may be invoked to protect from discovery certain types of documents prepared by a party's attorney, or nonlawyer representative, in anticipation of litigation. [Certain types of] work product may be subject to disclosure upon a showing of a substantial need for the material and that its equivalent cannot be obtained by other means." *Cahaly v. Benistar Property Exchange Trust Co., Inc.*, 85 Mass. App. Ct. 418 (2014). *See also* Mass. R. Civ. P. 26(b)(3).

B. Medical Records

In cases where a respondent has placed his or her physical or mental status in issue (typically as an argument in mitigation), the rules require the respondent to provide to Bar Counsel detailed disclosures about any such condition and any medical or similar records related to it.³⁰ The deadline for those disclosures will be set at the mandatory prehearing conference described below in Section VIII below. A respondent who has placed in issue a medical condition must do the following:

- (1) Identify and disclose to Bar Counsel in writing the nature of every condition that the respondent claims may have affected his professional conduct or is otherwise in issue, and for which the respondent has “received consultation, evaluation, treatment, counseling or other services,” including “the dates” of each such condition;³¹
- (2) For each such condition, identify the name and address of each hospital, doctor, therapist, counselor or other provider from whom the respondent received any services;
- (3) For each such condition, produce all hospital, medical, psychiatric psychological, counseling, and other records and reports in the respondent’s possession and control; and
- (4) Sign a release that will permit Bar Counsel or its agents to obtain all medical records from the identified providers relating to the conditions in issue.³²

Practice Tip

A respondent who proffers a mental or physical condition in any way during a disciplinary proceeding, most often as a factor in mitigation, must be completely forthcoming with Bar Counsel about all treatment records and information *regarding that condition*. The respondent need not disclose any medical information or records, nor execute releases to providers authorizing disclosure of

³⁰ BBO Rules § 3.23(b)(6)(b). The disclosure requirements for medical records are found in the part of the BBO rules governing the mandatory prehearing conference.

³¹ *Id.* Presumably, the rule’s reference to the “dates” of such conditions is intended to elicit the time periods when the respondent suffered from such conditions, as well as the specific dates of each consultation, evaluation, treatment, counseling or other service. The “dates” of conditions claimed in mitigation are relevant to the required determination whether the condition had a causal relationship to the charged misconduct. *See, e.g.,* Matter of Johnson, 452 Mass. 1010, 1011, 24 Mass. Att’y Disc. R. 380, 383 (2008) (rescript).

³² Section 3.23(b)(6)(b)’s use of the phrase “for each such condition” in tandem with the requirement that the respondent “identify” the claimed mitigating physical or mental condition indicates that the respondent has a burden of identifying which doctors, treatments, records, etc., are pertinent to which claim of mitigating physical or mental status.

those records, for any other medical or psychological condition not placed at issue by the respondent.

C. Depositions

A party may take a deposition in a BBO disciplinary proceeding under two circumstances, one relatively easy to satisfy and the other quite difficult.

A party may take the deposition upon oral examination of an “unavailable witness,” defined in the rules as a witness “not subject to service of a subpoena or unable to attend a hearing due to age, illness or other infirmity[.]”³³ A respondent or Bar Counsel may seek permission from the Board for such a testimony-preserving purpose either before formal proceedings have commenced,³⁴ or after they have commenced.³⁵ A request made after the petition is filed must be granted for a witness at the hearing—. A request made before a petition is filed will be granted only if “in the interest of justice.”

A party may also take a deposition upon oral examination “upon showing of a substantial need for the deposition in the preparation of the applicant’s case[.]”³⁶ Permission for the taking of such a discovery deposition is much more rare, and the burden on the applicant is significantly higher.

Practice Tip

A party needing to take a deposition to preserve the relevant testimony of a witness who genuinely will not be available for a hearing will be able to do so. A party desiring to take a deposition to prepare its case more effectively will typically not obtain permission to do so. In the BBO disciplinary hearing process, discovery depositions are discouraged and rarely occur.

The Board will allow a witness unable to appear in person to testify by videoconference, thereby reducing some concerns about a witness’s unavailability. When a witness at a hearing is not present in the hearing room, the witness must be sworn in by a notary public who is at the same location as the witness.

³³ BBO Rules § 4.10(b). This procedure is available to the parties before the commencement of formal proceedings as well, if the same test is met. BBO Rules § 4.10(a).

³⁴ *Id.* For a deposition of an unavailable witness before proceedings have commenced, the Board chair or her designee may grant permission if deemed “to be in the interest of justice.” *Id.*

³⁵ *Id.* at § 4.10(b). The “interest of justice” factor is not explicitly identified in this rule, which states that such requests “shall be approved” by the Board chair, her designee, or the hearing committee or officer. *Id.*

³⁶ BBO Rules § 4.9(a)(2). That rule lists the factors that determine whether substantial need exists. *See* BBO Rules § 4.9(a)(2)(a)–(c).

To obtain permission to conduct a deposition, the party must file a written notice and application to the Board chair or the chair's designee, seeking leave to take the deposition and (if applicable) to request the deponent to produce documents at the time of the deposition.³⁷ The rules identify no time limit for such a request (unlike the process for requesting documents and information from the other party, which is subject to defined time limits), except that all depositions must be completed within 21 days prior to the date set for the hearing.³⁸ The application to conduct a deposition must identify the name and address of the deponent, the subject matter on which the person will be deposed, the date, time, and place of the proposed deposition, and the name of the notary before whom the deposition will take place, along with the reasons for taking the deposition.³⁹ The rules permit a deposition to be taken before the Board Chair or her designee, a member of the hearing committee, any notary public, or any other disinterested person authorized to administer oaths.⁴⁰ Most parties choose to have depositions taken before a notary public and not before a member of the hearing committee.

The other party may object or otherwise respond to the request within seven days after service of the application.⁴¹ After the time for objection has passed, the hearing committee or the Board chair will either allow or deny the application.⁴² If the deposition is authorized, the order will identify the time and place of the deposition and the name of the notary who will preside over the deposition. The order allowing a deposition may also include protective provisions limiting the scope of the deposition.⁴³ If necessary (which essentially means that if the witness will not come to the deposition voluntarily), the Board chair will issue a subpoena to be served upon the deponent requiring his or her attendance, and the production of any documents covered by the order. Once the subpoena has been issued, the party requesting it must arrange for service of the subpoena upon the witness, and (unless the subpoenaed witness is a lawyer) must follow the procedures for service of a *summons* (which is different from the procedure for service of a subpoena) in Massachusetts courts.⁴⁴

If a party needs to subpoena a witness from another jurisdiction to appear at a deposition, that party shall first seek permission from the hearing committee or officer.⁴⁵ If permission has been granted, the Board Chair shall request that the disciplinary board

³⁷ *Id.* at § 4.11.

³⁸ *Id.* at §§ 4.9(b), 4.10(b).

³⁹ *Id.* at § 4.11(a).

⁴⁰ BBO Rules § 4.12(a) describes those persons entitled to oversee depositions under SJC Rule 1:02 § 2(a), which covers notaries public in the Commonwealth and other similar agents outside the Commonwealth.

⁴¹ BBO Rules § 4.11(a).

⁴² *Id.* at § 4.11(b).

⁴³ *Id.* at § 4.11(c). This rule departs from the general provision authorizing the Board, but not the hearing committee, to issue protective orders. *See* SJC Rule 4:01, § 20(4); BBO Rules § 3.22(d).

⁴⁴ BBO Rules § 4.6 (“Each subpoena issued in accordance with this subchapter shall be served in the manner provided for service of summonses in the Courts of the Commonwealth.”). In Massachusetts courts, service of a summons requires an authorized process server, while service of a subpoena may occur by any person who is not a party and is at least 18 years of age. *Compare* MASS. R. CIV. P. 4(c) *with* MASS. R. CIV. P. 45.

⁴⁵ BBO Rules § 4.5B(a).

or entity in the jurisdiction in which the deposition is to be taken issue an appropriate subpoena.⁴⁶ If that entity cannot or declines to issue the requested subpoena, the party must petition the SJC pursuant to G.L. c. 223A, §10 to issue “Letters Rogatory.”⁴⁷

Practice Tip

In disciplinary hearing settings, the parties seldom resort to formal use of subpoenas served in the manner required by the rules. Deponents typically agree to appear, and accept service of subpoenas in an informal matter, if a party uses a subpoena at all.

The deposition will proceed as in civil litigation settings, with the deponent’s testimony taken under oath, and with the opportunity for deponent’s counsel to examine the witness after the direct testimony has taken place.⁴⁸ The rules imply that the principle expressed in Rule 32(d)(3)(B) of the Rules of Civil Procedure, that objections regarding the form of the question are waived if not made during the deposition,⁴⁹ will apply regardless of who oversees the deposition. In depositions conducted without the hearing officer presiding, objections “to the competency of the witness or to the competency, relevancy or materiality of the testimony are not waived by failure to make them before or during the taking of the deposition.”⁵⁰ If a party elects to take the deposition before a member of the hearing committee, the person presiding will rule on objections when they are made.⁵¹

When the deposition is complete, the deponent has the opportunity to read and to sign the transcript, and may make changes “in form or substance” to the transcript,⁵² which changes shall be entered upon the deposition by the notarial officer along with the reasons given by the deponent for the changes.⁵³ If the deponent fails or refuses to sign the transcript, the deposition may be used as though it had been signed. After the transcript has been signed or the time for signing has passed, the notarial officer will distribute the deposition. For depositions taken after the commencement of formal proceedings and to secure the testimony of an unavailable witness, the notarial officer

⁴⁶ BBO Rules § 4.5B(b).

⁴⁷ BBO Rules § 4.5B(c). *See also* SJC Rule 4:01 § 22(2) (when a party seeks a subpoena pursuant to the law of some other jurisdiction for use in a disciplinary proceeding there, a member of the Board “may issue a subpoena” to compel the attendance of witnesses and production of documents, but only after and the issuance of the subpoena “has been duly approved under the law of the other jurisdiction”).

⁴⁸ BBO Rules §§ 4.11, 4.13.

⁴⁹ Mass. R. Civ. P 32(d)(3)(B), which reads as follows:

Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

⁵⁰ BBO Rules § 4.14(a).

⁵¹ *Id.* at § 4.14(b).

⁵² *Id.* at § 4.13(a).

⁵³ *Id.* The rules do not establish a time limit during which the deponent must sign the deposition. That schedule must be agreed upon between the parties.

must certify the deposition and deliver it to the Board, which will file the original and provide a copy to each party and member of the hearing committee.⁵⁴ For all other depositions, the officer must give notice to the parties of the availability of the transcript. Any party or the deponent may then obtain a copy from the officer by payment of the cost of that copy.⁵⁵

A deposition is not evidence in a disciplinary proceeding (and therefore not available for public inspection) unless and until a party offers the transcript or a part of the transcript into evidence at the hearing. (This is true even when the deposition transcript has been delivered to members of the hearing committee prior to the hearing.) When offered, the recorded testimony will be treated as though the deponent were present at the hearing and testifying.⁵⁶

VII. Motions After the Filing of an Answer

A party may file a motion, including a motion to dismiss the petition for discipline, prior to the commencement of the hearing.⁵⁷ Any such motion must be filed with the Board at least 10 days before the hearing, absent good cause for a later filing. As with the petition, service may be made by mail, and is complete upon mailing or in-hand service.⁵⁸ A party wishing to respond to the motion must file a response within 7 days of the date of *service* of the motion, not *receipt* of the motion.⁵⁹ If the motion is based on assertions of fact, the moving party must support the motion with an affidavit, unless the facts are established by the pleadings or an agreement between the parties.⁶⁰ Except for motions to dismiss or for issue preclusion, the chair of the hearing committee will decide all motions, without a hearing or oral argument.⁶¹

Motions to dismiss the petition or the charges must be heard by the chair of the Board or another Board member designated by the Chair.; motions for issue preclusion must be heard by the chair or the chair's designee, which could be another Board member or could be the hearing committee chair⁶²

A party may not appeal immediately an unfavorable ruling on a motion, except for an allowance of a motion to dismiss or a ruling that the moving party alleges exceeds

⁵⁴ *Id.* at § 4.13(b)(1).

⁵⁵ *Id.* at § 4.13(b)(2). The Board rules offer no opportunity for a party or deponent to obtain a copy of the transcript without payment.

⁵⁶ *Id.* at § 4.15.

⁵⁷ The procedure for motions filed after an answer are identified in BBO Rules § 3.18.

⁵⁸ Rules 3.9, 3.10.

⁵⁹ This procedure differs from the typical civil litigation arrangement. *Compare* MASS. R. CIV. P. 6(d), which reads as follows:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other papers upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

⁶⁰ BBO Rules § 3.18(a)(3).

⁶¹ *Id.* at § 3.18(a)(4), (5).

⁶² *Id.* at § 3.18(b)1 and (c)

the jurisdiction or authority of the hearing committee. For all other motion rulings, the dissatisfied party must reserve any review until after the issuance of the hearing report.⁶³

VIII. The Mandatory Prehearing Conference

A pre-hearing conference is required before a disciplinary hearing. The conference is typically scheduled at the time the Board notifies the parties of the appointment of the hearing committee and the hearing dates. The date chosen for the conference contemplates that the parties will have engaged in discovery and that the matter will be ready for a hearing to commence. The purpose of the prehearing conference is for the chair to issue orders designed to refine the issues in dispute, to resolve any remaining discovery matters, to identify evidence to be submitted in the parties' cases-in-chief and eliminate unnecessary witnesses, to obtain stipulations regarding documents and undisputed facts, and to address any other matters that will result in "the prompt and orderly conduct and disposition of the proceeding."⁶⁴ The parties and their counsel must attend the prehearing conference, and must have authority to make commitments about the matters to be addressed.⁶⁵ The conference will establish timelines and deadlines for completing any discovery, and for exchanging witness lists and exhibits. The parties will assist in arranging the hearing date or dates.

You Should Know

The hearing committee is prohibited by Board policy from engaging in or encouraging settlement discussions.⁶⁶ Notwithstanding that policy, mandatory prehearing conference is an opportunity for the parties, before or after the conference but without the participation of the hearing officer, to explore settlement or stipulation possibilities. If the parties agree on the charges to remain in place and a recommended sanction, that agreement will be reduced to writing and presented to the Board for its approval, and the committee will be discharged.⁶⁷ While the conference is not intended for settlement discussion about the charges, it is intended to achieve stipulations about facts and documents.

An important purpose of the prehearing conference is the identification and resolution of any disputes about the documentary evidence to be offered during the hearing. Prior to the commencement of the disciplinary hearing, each party must identify all documents to be offered through the party's case in chief or on expected rebuttal. Any objection to those documents must be raised during the course of the exchange of exhibits set up by the prehearing order issued as a result of the conference. The prehearing

⁶³ *Id.* at § 3.18(a)(6).

⁶⁴ *Id.* at § 3.23(b).

⁶⁵ The requirements of the mandatory prehearing conference are outlined in BBO Rules § 3.23.

⁶⁶ BBO Policies and Practices, ¶ 10 ("The [B]oard prohibits [hearing] panel members from encouraging Bar Counsel and the respondent to settle matters assigned to a hearing.").

⁶⁷ *See* Chapter 5 for a discussion of stipulations and the process by which the Board and, if necessary, the SJC will review the agreement.

conference order will require “prefiling” of all proposed exhibits within an identified period of time, with objections due at a time after the prefiling of the exhibits. Absent good cause, failure to object to a proposed exhibit precludes the party from objecting to the admission of the exhibit at the hearing.

The prehearing conference will also address the disclosure of medical records and releases to medical providers for the same by a respondent who has placed a medical condition in issue in the proceeding, as discussed above in Section VI.B.

The rulings of the hearing committee chair presiding at the prehearing conference will control the remainder of the proceeding, unless the Board chair modifies any such rulings.⁶⁸ If a party wishes to seek review by the Board chair of a ruling made at the prehearing conference, that party must file a motion with the Board chair, with copies to the other party and the members of the hearing committee, explaining the basis for the party’s disagreement with the ruling. The Board chair will decide the motion typically without a hearing.⁶⁹

After completion of the prehearing conference, the chair of the hearing committee will serve on the parties a prehearing conference order, describing all of the matters covered during the conference. A fictitious, sample prehearing conference order is appended to this Treatise as Appendix F.

IX. The Hearing

A. An Overview of the Disciplinary Hearing

After the prehearing conference, if the matter has not resolved, the parties will proceed to a hearing before the hearing committee. The presumptive location for all hearings is the office of the Board in Boston, but hearings may also take place at other locations, usually in Dartmouth, Springfield, or Worcester, based upon the convenience of the parties, the committee members, and witnesses.⁷⁰ The Board’s letter to the parties notifying them of the appointment of the hearing committee includes the prehearing conference date and the hearing dates. The hearing will be open to the public (including news media and television cameras), subject to any protective orders issued by the Board or the SJC.⁷¹ The committee chair will attempt to accommodate the schedules of the parties and their counsel, but at the same time will be rigorous in ensuring that the hearing takes place in a time-sensitive manner.

The Board must give the parties at least 15 days notice of the hearing.⁷² That notice must advise the respondent that failure to appear at the hearing will be deemed an

⁶⁸ Rules 3.25, 3.26. In practice, the other hearing committee members may review and revise rulings made at the prehearing conference, although the BBO rules do not expressly allow for that practice.

⁶⁹ The BBO rules do not describe the process of this review of prehearing conference rulings, but in practice the process in the text is followed.

⁷⁰ *Id.* at § 3.20.

⁷¹ *Id.* at § 3.22(c).

⁷² SJC Rule 4:01, § 8(3)(b).

act of professional misconduct, and may be grounds for administrative suspension.⁷³ In practice, because the notice of the hearing is in the letter from the Board advising the parties of the appointment of the hearing committee and the date of the prehearing conference, the parties receive notice of the hearing months, rather than days, in advance. The prehearing conference is typically held six weeks or more before the hearing, and that conference permits the parties an opportunity to review the hearing dates.

No continuance of a hearing will be granted for the reason that one of the members of the hearing committee is absent, as long as a quorum of the hearing committee is present. The absent member may participate fully in all deliberations of the committee so long as that person has the transcript of the missed proceedings.⁷⁴

Generally, Bar Counsel has the burden of proving the elements of professional misconduct by a preponderance of the evidence; the respondent has the burden of proof on affirmative defenses and mitigation.⁷⁵

As the hearing commences, before the party with the burden of proof calls his or her first witness, the hearing committee chair will accept in evidence all of the exhibits that the parties have agreed are admissible. Some exhibits may be admitted for a limited purpose. Each exhibit received during the hearing will receive an identifying number or letter.

B. Opening Statements

At the discretion of the hearing committee chair, the parties may make brief opening statements at the commencement of the hearing.⁷⁶ Those statements must refer to facts and must not include argument. In her opening statement, Bar Counsel typically does not request a particular sanction; rather, she reserves that assertion for her closing argument or her post-hearing brief. The respondent may defer making an opening statement until after Bar Counsel has completed her case in chief.

C. Subpoenas to Witnesses

The procedure in discipline proceedings for using subpoenas to compel a witness to attend the hearing differs markedly from state civil practice, where the parties' attorneys may cause a notary to issue a subpoena without prior court approval. In a bar

⁷³ BBO Rules § 3.21. For a discussion of administrative suspensions, see Chapter 4, Part II.F.6..

⁷⁴ *Id.* at § 3.7(c).

⁷⁵ *Id.* at § 3.28. See *Matter of Balliro*, 453 Mass. 75, 84, 25 Mass. Att'y Disc. R.31 (2009) (Bar Counsel has burden to prove misconduct); *Matter of Hoicka*, 442 Mass. 1004, 1006, 20 Mass. Att'y Disc. R. 239, 242 (2004) (respondent bears burden to prove informed consent to a conflict); *Matter of Eisenhauer*, 426 Mass. 448, 452, 14 Mass. Att'y Disc. R. 251, 256 (1998) (same); *Matter of Murray*, 455 Mass. 872, 26 Mass. Att'y Disc. R. 406 (2010) (burden of proof on certain elements of intentional misuse with deprivation prospectively shifted to attorneys who receive cash, fail to deposit it in an account, then are unable to account for it).

⁷⁶ The Board rules do not expressly allow for opening statements, but this paragraph describes the typical practice.

discipline case, a party wishing to compel a witness to testify or to produce documents must submit a written request for a subpoena to the Board or the hearing committee.⁷⁷ The committee chair and any Board member have authority in Massachusetts to issue a subpoena.⁷⁸ As noted above in the discussion of depositions, once the subpoena has been issued, the party requesting it must arrange for service of the subpoena upon the witness and, unless the witness is a lawyer licensed in Massachusetts, must follow the procedures for service of a *summons* (which is different from the procedure for service of a subpoena) in Massachusetts courts.⁷⁹

The hearing committee members may issue a subpoena on their own motion for attendance of a witness and for production of evidence at the hearing.⁸⁰

Practice Tip

The subpoena provisions in the BBO rules authorize requiring a witness to come to a hearing with as-yet-unexamined documentary evidence, which could then be admitted into evidence subject to any objections by the parties. In practice, it is very unusual for a party to obtain and introduce evidence in that fashion without that evidence having been reviewed by the parties in advance.

D. Examination of Witnesses

Each witness testifies under oath or affirmation. A party calls its witness, examines that witness, and the other party is permitted cross-examination. Re-direct and re-cross examinations may be permitted in the discretion of the hearing committee chair. On occasion, witnesses testify by Skype or similar videoconferencing arrangement. More rarely, and typically only by the assent of the parties and hearing committee, a witness testifies via telephone. Usually the witnesses are sworn by the court reporter transcribing the testimony, but where a witness is testifying by telephone or videoconference, the proponent of the testimony will have to arrange for the administration of the oath at the witness's location.

E. Bar Counsel's Case in Chief

⁷⁷ BBO Rules § 4.5(a). Typically, the prehearing order sets a deadline two weeks before the start of hearings for submission of subpoena requests. In the ordinary course, these will be acted on by a board member. Parties may, however, ask the hearing committee chair to issue a subpoena, which might be necessary in exigent circumstances. Bar counsel may use a subpoena to compel the respondent to attend the hearing, but also has available the threat of administrative suspension for that purpose. *See* S.J.C. Rule 4:01, §3(2). A hearing subpoena is more likely when Bar Counsel seeks to compel production or authentication of documents.

⁷⁸ S.J.C. Rule 4:01, § 22; BBO Rules § 4.5.

⁷⁹ BBO Rules § 4.6 (“Each subpoena issued in accordance with this subchapter shall be served in the manner provided for service of summonses in the Courts of the Commonwealth.”). *See* note 44 *supra*.

⁸⁰ *Id.* at § 4.5(d).

As noted above, Bar Counsel generally bears the burden of proof on all charged violations, and on matters in aggravation of the charged violations. “[B]ar discipline charges need only be proven by a preponderance of the evidence.”⁸¹ Bar counsel’s case in chief will consist of witnesses, documentary evidence, stipulations, and admissions in the pleadings. As discussed below, Bar Counsel may also rely on issue preclusion to establish one or more elements of her case in chief.

F. Respondent’s Presentation

After Bar Counsel has presented her case in chief, the respondent presents his evidence relevant to his defense. During respondent’s presentation, he will also present evidence supporting any claim of mitigation that he raised in his answer. If the respondent did not include a claim of mitigation in his answer, he may not offer evidence related to mitigation at the hearing. A request to amend an answer at the hearing to permit evidence of mitigation will be left to the discretion of the hearing committee.⁸² As noted above, the respondent bears the burden of proof on all claims of mitigation. For a full discussion of mitigation factors, see Chapter 8.

G. Expert Witnesses

The parties may, and on rare occasions must, rely upon expert witnesses in disciplinary hearings. The BBO’s internal policy manual states the following:

In any disciplinary hearing in which the hearing committee determines that the attorney’s compliance with the degree of learning and skill required to be possessed by attorneys’ practicing in a particular area or areas of the law is relevant to the decision of the committee, expert testimony concerning the standard of care applicable to the attorney’s conduct may, in the discretion of the committee, be admitted into evidence, subject to the caveat that an expert’s opinion to the effect either (1) that there has or has not been a violation of law or (2) that there has or has not been an ethical violation, is not admissible and must be rejected. As in the case of other evidence, the committee is not required to credit such expert testimony if it is admitted or because it is uncontradicted, *Matter of Minkel*, 13 Mass. Att’y Disc. R. 548 (1997), and, if credited, may determine what weight is to be given to it.⁸³

Just as in Massachusetts trial courts, expert testimony regarding the meaning of the Rules of Professional Conduct, or on the ultimate conclusion whether an ethical rule has been violated, is not permitted in disciplinary hearings, as that issue is a matter of law for the parties to argue and for the hearing committee, the Board, and ultimately the

⁸¹ *Matter of Budnitz*, 425 Mass. 1018, 1018 n. 1 (1997), *citing* *Matter of Mayberry*, 295 Mass. 155, 167 (1936).

⁸² *See* *Matter of Patch*, 466 Mass. 1016, 1018 (2013) (respondent did not plead mitigation, and did not offer any evidence to support mitigation; Court implies that the respondent may have been permitted to offer such evidence).

⁸³ BBO Policies and Practices ¶ 12.

Court to determine.⁸⁴ Where, by contrast, a matter in dispute concerns the standard of care, expert testimony is often essential, and will be permitted. For example, in a disciplinary hearing involving a charge that a lawyer charged or collected an excessive fee, the hearing committee must make findings about “the fee customarily charged in the locality for similar legal services,”⁸⁵ among several other factors. On occasion, expert testimony will be necessary to establish the customary charge for the services provided by the lawyer.

When a party discloses its intention to rely on expert testimony the hearing committee will require that the party disclose to the other party information about the expert’s qualifications and opinions similar to that required by Rule 26(b)(4)(A)(i) of the Massachusetts Rules of Civil Procedure.⁸⁶ The timing and content of expert disclosures are governed by the rules concerning the prehearing conference and the prehearing order that results from it.⁸⁷

You Should Know

Most hearing committee members are practicing lawyers, and may have their own well-founded understanding of what constitutes the appropriate standard of care in a given practice setting. Parties in a disciplinary hearing must be aware of the possibility that the hearing committee members will rely on their own experience when deciding whether a duty of care has been breached. No rule or court opinion prohibits hearing committee members from relying upon their own experience in this way, and the state Administrative Procedures Act permits such reliance.⁸⁸

⁸⁴ *Fishman v. Brooks*, 396 Mass. 643, 650 (1986) (“Expert testimony concerning the fact of an ethical violation is not appropriate, any more than expert testimony is appropriate concerning the violation of, for example, a municipal building code. . . . A judge can instruct the jury (or himself) concerning the requirements of ethical rules. The jurors need no expert on legal ethics to assess whether a disciplinary rule was violated.”) (citation omitted). This reasoning carries additional force where the “jury” includes lawyers who are being asked to interpret “ethical rules of the profession ‘written by and for lawyers,’” In re Discipline of Attorney, 442 Mass. 660, 669 (2004), and who are permitted to bring some of their expertise to bear in reaching their conclusions. *See* G.L. c. 30A, § 11(3) (“Agencies . . . may take notice of general, technical or scientific facts within their specialized knowledge”); BBO Rules § 3.2 (except where inconsistent with the BBO rules, disciplinary proceedings “shall conform generally to the practice in adjudicatory proceedings under Chapter 30A of the General Laws”).

⁸⁵ MASS. RULES OF PROF’L CONDUCT 1.5; *Matter of Fordham*, 423 Mass. 481, 12 Mass. Att’y Disc. R. 161 (1996). *See also* Chapter 7, Part V.

⁸⁶ *See* MASS. R. CIV. P. 26(b)(4)(A)(i), which reads as follows:

A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

⁸⁷ *See* BBO Rules § 3.23(b)(6)(a), and the standard form prehearing order, published at http://www.mass.gov/obcbbbo/BBO_PHO.pdf, a sample of which is found at Appendix D.

⁸⁸ *See* note 84 *supra*.

H. Objections

A party may object to evidence on the ground that the proffered testimony or document should not be admitted. In ruling on such objections, the hearing committee chair will not apply the common law of evidence. Instead, “[i]n any proceeding the admissibility of evidence shall be governed by the Rules of Evidence observed in adjudicatory proceedings under Chapter 30A of the General Laws (State Administrative Procedure).”⁸⁹ According to Chapter 30A,

Unless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.⁹⁰

The following objections might arise in the course of a disciplinary hearing:

Hearsay: Hearsay evidence may be accepted as evidence in disciplinary hearings (as in other state administrative proceedings) as long as the evidence has “indicia of reliability.”⁹¹ In Massachusetts, even second-level hearsay that would not be admissible in court may constitute substantial evidence in an administrative proceeding if it is sufficiently reliable.⁹² Any hearsay, such as that contained in documents, must satisfy foundation requirements—that is, the factfinder must be satisfied that the evidence is what it purports to be.⁹³

Practice Tip

A hearing committee will ordinarily accept reliable hearsay as substantial evidence, but a charge based primarily on questionable hearsay evidence will likely not survive. Any such hearsay must have sufficient “indicia of reliability.”⁹⁴

⁸⁹ BBO Rules § 3.39.

⁹⁰ M.G.L. c. 30A, 11(2).

⁹¹ *Matter of Segal*, 15 Mass. Att’y Disc. R. 544 (1999) (a criminal trial transcript contains sufficient indicia of reliability). *See also* 38 ALEXANDER J. CELLA ET AL., MASSACHUSETTS PRACTICE, ADMINISTRATIVE LAW & PRACTICE § 248 (2013); 17C RICHARD W. BISHOP, MASSACHUSETTS PRACTICE, PRIMA FACIE CASE § 66.1 (5th ed. 2013); James P. Rooney, *Evidentiary Issues in Administrative Hearings: Hearsay, Expert Testimony and Prior Proceedings*, BOSTON B. J., Mar./Apr. 1998, at 4.

⁹² *See, e.g.,* *Murphy v. Superintendent, Mass. Correctional*, 396 Mass. 830, 834 (1986); *Town of Shrewsbury v. Commissioner of the Dept. of Environmental Protection*, 38 Mass. App. Ct. 946 (1995)(rescript).

⁹³ Rooney, *supra* note 91, at 4.

⁹⁴ *Embers of Salisbury v. Alcoholic Beverages Control Commission*, 402 Mass. 526 (1988) (“substantial evidence” to support an administrative finding may be hearsay if it bears indicia of reliability); *Matter of Levy*, 32 Mass. Att’y Disc. R. ___, 2016 WL 6696063 (2016) (“hearsay evidence is admissible in disciplinary proceedings when it bears sufficient indicia of reliability”); S.J.C. Rule 4:01, § 8(6) (subsidiary facts found by the board will be upheld if supported by substantial evidence).

Privilege: As noted above, the law governing privileges applies in disciplinary proceedings just as in court. A well-founded objection to a question on the ground that it would invade a privilege will be sustained, and the proffered testimony excluded.

The privileges that apply include the Fifth Amendment privilege against self-incrimination and the attorney-client privilege. As to the former, according to the SJC, “There is no doubt that a lawyer may not be sanctioned as a penalty for asserting the privilege against self-incrimination.”⁹⁵ Compelling a lawyer to produce documents required by law or by the SJC rules to be maintained as part of her practice responsibilities will not qualify as an invasion of that privilege, according to the “required records” exception to the privilege.⁹⁶ Because disciplinary hearings are equivalent to civil proceedings, “a reasonable inference adverse to a party may be drawn from the refusal of that party to testify on the grounds of self-incrimination.”⁹⁷ This principle applies to proceedings before the BBO.⁹⁸

Leading: Counsel examining its own witness may not use leading questions, and an objection will be sustained. (The exception, as in court, is for foundational matters.) Of course, leading questions are not terribly persuasive, so good lawyers will not use them, except on noncontroversial foundational matters, even if the other party does not object. Leading questions are allowed on cross-examination and on direct examination with a hostile witness.⁹⁹

One issue that arises in disciplinary hearings concerns the use of leading questions by respondent’s counsel when examining the respondent after he has been called by Bar Counsel as part of its case in chief. The typical practice is for the hearing committee chair to allow leading questions on matters covered on direct examination, but the hearing committee has discretion to prohibit such questions. Whether respondent’s testimony is sufficiently persuasive when elicited through leading questions is a strategic matter for respondent’s counsel to evaluate.

Documents not authenticated: This objection is rare in disciplinary proceeding hearings. Exhibits are required to be identified and shared through the prehearing conference process, and a party questioning a document’s authenticity must raise the objection at that time. The hearing officer will rule on the objection when the exhibit is offered into evidence at the hearing. Should a party need to offer during the evidentiary hearing a document that has not been part of the prehearing exchange and reviewed in

⁹⁵ Matter of Kenney, 399 Mass. 431, 437 (1987) (citing Spevack v. Klein, 385 U.S. 511, 514 (1967) (plurality opinion)).

⁹⁶ *Id.* (relying on the “required records” exception announced in Stornanti v. Commonwealth, 389 Mass. 518 (1983)).

⁹⁷ Labor Relations Commission v. Fall River Educators’ Ass’n, 382 Mass. 465, 471 (1981).

⁹⁸ See Matter of Boxer, 14 Mass. Att’y Disc. R. 74, 79 (1998) (Board Memorandum).

⁹⁹ No report or decision arising from a BBO proceeding has stated the “hostile witness” principle, but it is a practice supported by the SJC in court matters. See, e.g., Commonwealth v. Jones, 319 Mass. 228 (1946).

advance by the other party, the other party may object on any ground, including the authenticity of proffered papers.¹⁰⁰

I. Issue Preclusion

When appropriate, Bar Counsel may introduce factual findings from other civil or criminal adjudications in order to prove facts necessary for its case in chief. This use of collateral estoppel is also known as “issue preclusion” when the previously-established findings satisfy Bar Counsel’s burden on a particular issue. The SJC has held that there is no basis for “withholding preclusive effect of civil findings in a subsequent disciplinary action against an attorney.”¹⁰¹ As the Court noted, “The offensive use of collateral estoppel is a generally accepted practice in American courts.”¹⁰² “For the [offensive collateral estoppel] doctrine to apply, there must be ‘an identity of issues, a finding adverse to the party against whom it is being asserted, and a judgment by a court or tribunal of competent jurisdiction.’”¹⁰³ The Board has wide discretion whether to permit the use of collateral estoppel in this manner. Bar counsel may use such prior findings to establish both its misconduct charges as well as any claims of aggravation.

To take advantage of issue preclusion/collateral estoppel, Bar Counsel must present a motion to the Board, which must be decided by the Board chair or another Board member designated by the Board chair.¹⁰⁴

J. Closing Argument

After each party has rested, the hearing committee will hear closing arguments, first from the respondent, and then from Bar Counsel.¹⁰⁵ (On rare occasions, the committee chair will request written argument in lieu of an oral closing argument.) The BBO rules state that such closing argument shall occur “directly following the taking of testimony except for good cause shown.”¹⁰⁶ In practice, the hearing committee occasionally schedules a different date for hearing closing argument. Unlike the opening statement, the closing argument will include reasoned argument based upon the evidence adduced at the hearing, but may not rely on a party’s or counsel’s personal opinion or on evidence not admitted during the hearing. For example, a deposition transcript filed with the Board and provided to the hearing committee before the hearing, but not admitted in any part during the hearing, may not be referred to during closing argument, even if the hearing committee chair presided over the deposition.

¹⁰⁰ Cf. *Matter of Moore*, 442 Mass. 285, 20 Mass. Att’y Disc. R. 400 (2004) (respondent’s objection to admission of documents properly overruled where the authenticity of the documents is not in dispute).

¹⁰¹ *Bar Counsel v. Bd. of Bar Overseers*, 420 Mass. 6, 10 (1995).

¹⁰² *Id.*, 420 Mass. at 9.

¹⁰³ *Matter of Cohen*, 435 Mass. 7, 15 (2001) (quoting *Miles v. Aetna Cas. & Sur. Co.*, 412 Mass. 424, 427 (1992)).

¹⁰⁴ BBO Rules § 3.18.

¹⁰⁵ If the only matter at issue is one of mitigation, then the respondent has the burden of proof and the order of closing arguments will be reversed.

¹⁰⁶ BBO Rules § 3.42.

The closing argument is different from, and precedes, the parties' filing of post-hearing briefs, discussed in Section XI below. At closing argument, the hearing committee members will often ask questions of counsel or the party making the argument. The question of an appropriate sanction will often be a topic during closing argument.

Practice Tips for Counsel in Disciplinary Hearings

Experienced hearing committee members report that some practices by lawyers during disciplinary hearings are not effective and do not serve the lawyers' clients well. Other practices and habits serve clients well. Here are some suggestions from those who regularly hear these matters:

- Aggressive, scorched-earth tactics are particularly ineffective in these hearings. Treat witnesses, parties, counsel and the hearing committee with respect.
- Attacks on complaining witnesses (such as former clients) can be particularly counterproductive if not focused, respectful, and directed to disputed assertions of identifiable facts.
- Understand the rules of the BBO, and the differences between those rules and the Rules of Civil Procedure. It is not persuasive to argue to the committee, "This is how we do things in District Court."
- Resolve as many disputed legal or evidentiary issues as possible during the mandatory prehearing conference and the procedures following it, to permit the formal hearing to proceed as smoothly and efficiently as possible.
- Stand when questioning witnesses or addressing the hearing committee.
- Keep opening statements and closing arguments brief and to the point.
- Use post-trial briefs to address those issues and questions raised by the hearing committee members during closing arguments.
- Exercise good judgment in conceding what is obvious. Counsel do their clients a disservice by refusing to acknowledge a plainly proven rule violation or facts established by the evidence and by delaying attention to the proper sanction.
- Be prepared. Know your case and everything in it.

K. The Role of BBO General Counsel in the Hearing

At each disciplinary hearing, an assistant general counsel (AGC) from the BBO Office of General Counsel (OGC) will attend the proceeding. The OGC is counsel to the

Board, and has no responsibility for the outcome of a hearing or for any factual or credibility findings. The role of the AGC is to advise the hearing committee regarding the BBO rules and procedures, the elements of the offenses charged, and legal precedents relevant to rulings and appropriate discipline. Hearing committee members may confer with the AGC during the hearing for guidance, and the AGC “may suggest lines of inquiry for questioning by hearing officers.”¹⁰⁷ The AGC will not question witnesses nor engage in colloquy with parties or their counsel. At the conclusion of the hearing and after all post-hearing briefs have been filed, the AGC will draft the report of the hearing committee, which report must be approved in all respects by the committee.

X. Transcript of the Proceeding

All hearings will be transcribed, including argument by counsel and other discussion, by an official reporter, unless the parties agree otherwise with the approval of the hearing committee. After the hearing closes, the official reporter will prepare a transcript of the proceedings and supply that transcript to the Board. The parties may obtain a copy of the transcript at their own expense. Any corrections to the transcript must be made no later than 10 days in advance of the time when the post-hearing briefs are due.¹⁰⁸

Practice Tip

The BBO rules state that purchase of a transcript by respondent or his counsel is discretionary, not mandatory. In practice, a respondent must arrange to purchase the transcript, because the post-hearing briefs normally cite to the pages of the transcript. No fee waiver procedure exists for counsel who cannot afford to purchase the transcript.¹⁰⁹

XI. Post-hearing Briefs

Within 30 days after the Board’s receipt of the final transcript of the hearing, each party may file (1) proposed findings of fact; (2) proposed rulings of law; and (3) a post-hearing brief.¹¹⁰ It is not unusual for the parties to agree to request an extension of that 30-day deadline. Parties typically file a pleading containing proposed findings of fact and conclusions of law, as well as argument addressing questions of law and the appropriate sanction. The argument should normally include:

- (1) A concise statement of the case;

¹⁰⁷ BBO Policies and Practices ¶ 11.

¹⁰⁸ BBO Rules § 3.34.

¹⁰⁹ In 2017, a transcript of one full-day hearing would cost approximately \$5007600.

¹¹⁰ BBO Rules § 3.43.

(2) A discussion or statement of the evidence relied upon by the party filing, with specific reference to the pages of the record or exhibits where such evidence appears; and

(3) Proposed findings and conclusions, together with the reasons and authorities supporting them.¹¹¹

Hearing committee members report that the most useful briefs are concise, treat the evidence fairly and honestly, cite to the record for all evidentiary references and assertions, and address directly the contested factual and legal issues that the hearing committee will have to decide.

The brief and the proposed findings and rulings must be filed with the Board and copies of each served upon the other party and upon each member of the hearing committee by mail or by in-person delivery at the party's election. Service is complete upon in-person delivery or upon deposit in the United States mail.¹¹² Each pleading must include a certificate of service identifying the method and date of service.

Practice Tip

The post-trial brief is a very important document. A well written brief can have a significant effect on the hearing committee's decision. Parties are well advised to take the opportunity to argue the key issues in the case and reasons for the desired outcome.

XII. The Committee Report

After the filing of the briefs, an AGC will typically draft the report of the hearing committee, after the committee's deliberation. The AGC will prepare a draft report and elicit comments from the committee. The hearing committee exercises full responsibility for the substance of the final report. The committee must "promptly" submit its report to the Board.¹¹³ The committee report must include the following:¹¹⁴

- (1) A concise statement of the case;
- (2) A citation of each Disciplinary Rule found to have been violated by the Respondent;
- (3) The committee's rulings on admission of evidence and other procedural matters, referring to the pages of the transcript if the committee ruled on the matters during the hearing;

¹¹¹ *Id.* at § 3.44(a)(1), (2).

¹¹² *Id.* at § 3.10.

¹¹³ *Id.* at § 3.46.

¹¹⁴ *Id.* at § 3.47.

- (3) The committee’s findings of fact;
- (4) Its conclusions of law; and
- (5) Its recommended disposition of the petition.

Together with a transcript and record of the proceedings, the report is sent by the committee to the Board, with copies of the report to the parties. The Board has ultimate responsibility to decide the matter, including a decision to file an information transferring the matter to the SJC. Chapter 9 reviews the processes occurring after the hearing committee submits its report to the Board.

XIII. Special Hearing Procedures

A. Disciplinary Hearings Before a Special Hearing Officer

As noted in Section V, on occasion a disciplinary hearing will be presided over by a special hearing officer instead of a hearing committee. All of the procedures described above apply with equal force to hearings conducted before a special hearing officer.

B. Disciplinary Hearings Following a Criminal Conviction

A lawyer convicted of a crime must report that conviction to Bar Counsel within ten days.¹¹⁵ If the crime for which the lawyer was convicted constitutes a “serious crime,” defined in the SJC Rules,¹¹⁶ the lawyer will be suspended immediately.

A disciplinary hearing on a petition based on a lawyer’s criminal conviction will follow the procedures described above, with one exception: The hearing will be conducted by a hearing *panel*, not a hearing committee. A hearing panel is comprised of members of the Board. Typically a hearing panel will include one Board member who is not a lawyer.¹¹⁷ The panel’s deliberation will be subject to the SJC’s presumptive sanctions following a conviction. For conviction of a felony, the typical sanction is disbarment¹¹⁸ or, when there are special mitigating circumstances, indefinite suspension.¹¹⁹ A misdemeanor that qualifies as a “serious crime” warrants a suspension.¹²⁰ Other misdemeanor convictions warrant at least a public reprimand.¹²¹

¹¹⁵ S.J.C. Rule 4:01, § 12(8). The clerk of the court in which the lawyer was convicted has an accompanying duty to report the matter to the Board and to the SJC. *Id.* at § 12(7).

¹¹⁶ *Id.* at § 12(3).

¹¹⁷ BBO Policies and Practices ¶ 9.

¹¹⁸ *Matter of Otis*, 438 Mass. 1016, 1017 (2003).

¹¹⁹ *Matter of Concemi*, 422 Mass. 326, 330 n.4 (1996).

¹²⁰ *Matter of Eberle*, 26 Mass. Att’y Disc. R. 150 (2010); *Matter of Fraser*, 25 Mass. Att’y Disc. R. 217 (2009).

¹²¹ *Matter of Coyle*, 30 Mass. Att’y Disc. R. 79 (2014).

The principle of issue preclusion described above applies in cases arising from a conviction: “A conviction of a lawyer for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against that lawyer based upon the conviction.”¹²² A committee and the board may not make findings that are inconsistent with the conviction.¹²³ “Conviction” is defined to include a plea of guilty or *nolo contendere* and an admission to sufficient facts for a guilty finding, even in the absence of a sentence.¹²⁴

C. Reinstatement Hearings

As with hearings based upon a criminal conviction, hearings on a petition for reinstatement will also be heard by a hearing panel, and not a hearing committee.¹²⁵ Reinstatement hearings proceed differently from disciplinary hearings in other ways. For a full description of the reinstatement process, including the hearing process, see Chapter 13.

D. Expedited Disciplinary Hearings

A respondent who has been admonished may demand in writing that the admonition be vacated and an expedited hearing convened to review that sanction.¹²⁶ The expedited hearing must be assigned to a special hearing officer, and must be held within 30 days after the respondent makes his demand for the review. There are three possible outcomes of an expedited hearing: the admonition may be vacated; the admonition may be upheld; or the hearing officer may determine that a more substantial sanction is appropriate and will recommend that the matter be remanded for formal disciplinary proceedings.

The procedures for an expedited hearing will differ from those described above in the following ways:

- (1) No prehearing conference is held in an expedited hearing.¹²⁷ In lieu of such a conference, the notice of hearing prepared by the Office of General Counsel must include the following three deadlines:
 - a) a date for the parties’ exchange of witness lists and exhibits the party intends to use during his or her case in chief, and a date for objections;
 - b) a date for the parties’ objections to any exhibit or witness as well as for any supplemental designation of witnesses or objections; and

¹²² S.J.C. Rule 4:01, § 12(2).

¹²³ *Matter of Concemi*, 422 Mass. 326, 328–329, 12 Mass. Att’y Disc. R. 63, 67 (1996).

¹²⁴ S.J.C. Rule 4:01, § 12(1).

¹²⁵ BBO Policies and Practices ¶ 9.

¹²⁶ SJC Rule 4:01 § 20; BBO Rule 2.12.

¹²⁷ BBO Rules § 2.12(e).

c) a date for filing with the Board a final witness and exhibit list, final objections, and any stipulations and stipulations.¹²⁸

(2) The hearing is closed to the public, because the identity of respondents who receive admonitions is not made public. If, after the hearing, the special hearing officer recommends that the matter be remanded for formal proceedings, the matter will become public when a petition for discipline is filed.¹²⁹

(3) The parties will not file post-hearing briefs or findings and fact and conclusions of law, except for good cause shown.¹³⁰

In all other respects, an expedited hearing will proceed in the same way as any other disciplinary hearing.

¹²⁸ BBO Rules § 2.12(d).

¹²⁹ BBO Rules § 3.22(b).

¹³⁰ BBO Rules § 2.12(g).

Chapter 7 Misconduct and Typical Sanctions

Part I

Problems of Competence: Poor Work, Neglect, and Failure to Communicate with a Client (Rules 1.1, 1.2(a) and (c), 1.3, and 1.4)

I. Introduction

A lawyer in Massachusetts must be competent, diligent, and responsive to her clients. Failure to provide competent and diligent representation is a violation of the Massachusetts Rules of Professional Conduct and may lead to discipline. Those duties emerge from the lawyer's essential fiduciary relationship with clients, but they also exist as affirmative duties established by several rules of professional conduct. Rule 1.1 of the Massachusetts Rules of Professional Conduct requires a lawyer to provide competent representation; Rule 1.2(a) requires a lawyer to "seek the lawful objectives of his or her client through reasonably available means . . ."; Rule 1.2(c) permits a lawyer to limit the scope of representation with informed client consent so long as the limitation is reasonable; Rule 1.3 imposes a duty of reasonable diligence and promptness regarding client matters; and Rule 1.4 requires a lawyer to maintain reasonable and timely contact with the lawyer's clients and to keep the client sufficiently informed to make needed decisions. While Rule 1.2 includes separate duties discussed elsewhere in this treatise,¹ these four rules together establish a collection of related responsibilities which warrant treatment together. This Part describes the nature of the respective obligations and the level of discipline a lawyer who violates the duties might expect to face.

A lawyer who performs less than competent service for a client (and which may involve negligence or a failure to keep a client informed) and causes harm to the client may encounter a civil claim for damages, through a malpractice action or other civil claim. This Treatise does not address those civil claims and their substantive or procedural requirements, but other helpful resources exist that do so.² This chapter instead addresses the disciplinary consequences of a lawyer's breach of her duties of competence and diligence.

II. The Nature of the Lawyer's Responsibilities Regarding Competence

¹ See Parts III and VII of this chapter.

² See, e.g., RONALD E. MALLIN, JEFFREY M. SMITH & ALLISON D. RHODES, *LEGAL MALPRACTICE* (2013 ed.); David A. Barry & William L. Boesch, *Massachusetts Legal Malpractice Cases 2000–2009*, 93 MASS. L. REV. 321 (2011); see also David A. Barry & William L. Boesch, *Legal Malpractice Law in Massachusetts, Developments 1993–2000*, 85 MASS. L. REV. 2 (2000).

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) A lawyer shall seek the lawful objectives of his or her client through reasonably available means permitted by law and these Rules. A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

* * *

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

A. The Lessons of Rules 1.1, 1.2(a), and 1.2(c)

Rule 1.1 states that a lawyer “shall provide competent representation to a client,” and that “[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” A lawyer who fails to provide competent representation therefore violates this Rule, and may be subject to discipline for that failure. The level of skill needed to qualify as “competent” will be measured by the standard of a “reasonably prudent and competent lawyer.” That phrase comes from the definitions section of the Massachusetts Rules of Professional Conduct, in Rule 1.10(k), defining “reasonable” and “reasonably.” While no reported Massachusetts opinion has employed that phrase, there is no question that a lawyer’s performance will be governed by that standard.³

³ That same phrase appears in the Terminology section of the Model Rules of Professional Conduct. *See* MODEL RULES OF PROF. CONDUCT R. 1.0(h) (2013).

The Comments to Rule 1.1 confirm that the competence duty is usually that of “a general practitioner.”⁴ No overarching definition of competence exists within Massachusetts jurisprudence. An American Bar Association (ABA) task force, though, sought to catalogue the lawyering skills with which “a well-trained generalist should be familiar before assuming ultimate responsibility for a client.”⁵ The task force’s “MacCrate Report” offered to lawyers a catalogue of necessary skills for effective law practice.⁶

The Comments to Rule 1.1 offer some further understanding about what constitutes competence. The Comments stress the importance of adequate preparation and thoroughness, both of which “are determined in part by what is at stake.”⁷ The timing of the client’s need for services is another factor that a lawyer may take into account in determining whether her services meet the competence standard.⁸ A lawyer need not be familiar with the area of law at the outset of the attorney-client relationship if she trains herself in the relevant field.⁹ That training, however, cannot be at the expense of the client. While a lawyer may learn the substantive law as part of her paid representation of the client, the overall fee she charges the client must be reasonable.¹⁰ If the lawyer does not have the competence to provide the legal services a client needs despite her study, she may still accept a matter if she associates with a lawyer who has the experience and expertise.¹¹ The lawyer must reasonably believe that the association will aid in her representation, and must obtain the consent of the client.¹²

The question of the standard or definition of competence arises more often in malpractice cases than in disciplinary cases (even though failure to provide competent service is a frequent cause of discipline). The Supreme Judicial Court has stated that a lawyer owes her client “a reasonable degree of care and skill in the performance of legal

⁴ MASS. RULES OF PROF. CONDUCT R. 1.1 cmt. 1 (1998). A lawyer who holds himself out as a specialist will be held to a higher standard of care. *Fishman v. Brooks*, 396 Mass. 643, 646 (1986).

⁵ ABA SEC. LEGAL EDUC. & ADMISSIONS, *Legal Education & Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 125 (Robert MacCrate ed., 1992).

⁶ *Id.* at 138–40. The Report identified the following skills as those that a competent lawyer must master:

1. Problem-solving;
2. Legal analysis and reasoning;
3. Legal research;
4. Factual investigation;
5. Oral and written communication;
6. Counseling;
7. Negotiation;
8. Litigation and alternative dispute resolution procedures;
9. Organization and management of legal work; and
10. Recognizing and resolving ethical dilemmas.

⁷ Rule 1.1 cmt. 5.

⁸ Rule 1.1 cmt. 3.

⁹ Rule 1.1 cmts. 2, 4.

¹⁰ *Matter of Fordham*, 423 Mass. 481, 12 Mass. Att’y Disc. R. 161 (1996), *cert. denied* 519 U.S. 1149 (1997).

¹¹ Rule 1.1 cmt. 2.

¹² Rule 1.1 cmt. 6.

duties.”¹³ The Appeals Court has qualified the standard as follows: ““But it must not be understood that an attorney is liable for every mistake that may occur in practice, and held responsible for the damages that may result. If the attorney acts with a proper degree of attention, with reasonable care, and to the best of his skill and knowledge, he will not be held responsible. Some allowance must always be made for the imperfection of human judgment.””¹⁴ Breach of the standard of care for competent lawyering may serve both as a basis for discipline under Rule 1.1 and grounds for civil liability under the common law of malpractice.

By contrast, the constitutional standard for ineffective assistance of counsel in criminal cases, arising from the Sixth Amendment to the United States Constitution and Article XII of the Massachusetts Constitution, is a narrower and more constrained competence standard than that imposed by Rule 1.1. A court’s determination that a lawyer’s performance does not constitute ineffective assistance of counsel does not preclude a finding that the lawyer has failed to provide competent representation under Rule 1.1.¹⁵

A lawyer may not provide less-than-competent service to a client in return for a lower fee. A lawyer may be tempted to offer meager or incomplete services to a client who cannot afford to pay for fully adequate representation, believing that some legal assistance to the financially-strapped client is better than nothing. Rule 1.1 does not permit that bargain (even if the logic of that supposition were true).¹⁶ But a lawyer may, pursuant to Rule 1.2(c), offer to the client limited representation as long as the client provides informed consent to the limited services, the limitation is reasonable, and the services the lawyer delivers are fully competent.¹⁷

¹³ Pongonis v. Saab, 396 Mass. 1005, 1006 (1985).

¹⁴ Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C., 25 Mass.App.Ct. 107, 111 (1987) (quoting Stevens v. Walker & Dexter, 55 Ill. 151, 153 (1870)). A similar principle applies in disciplinary cases. Bar Counsel v. Attorneys A & B, 26 Mass. Att’y Disc. R. 744, 755 (2010) (in the circumstances, failure to attend status conferences was “not the stuff of bar discipline”); Matter of an Attorney, 18 Mass. Att’y Disc. R. 586, 598 (2002).

¹⁵ See Matter of Abelow, 18 Mass. Att’y Disc. R. 17 (2002) (attorney’s failure to obtain necessary records and information for client’s alibi defense was not found to be ineffective assistance of counsel, but constituted failure to act competently under DR 6-101 (the precursor to Rule 1.1); three-month suspension imposed).

¹⁶ See MASS. RULES OF PROF. CONDUCT R. 1.2 cmt. 7 (“Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. ... See Rule 1.1.”); see also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-379 (advising that a fee too low to permit adequate preparation and services will violate Rule 1.1).

¹⁷ The legal profession has accepted the evolving concept of “unbundled” legal services, where a lawyer agrees to provide some discrete legal service instead of handling a client’s matter in full. For discussion of that practice, see Brenda Star Adams, *Unbundled Legal Services: A Solution to the Problems Caused by Pro Se Litigation in Massachusetts’s Civil Courts*, 40 NEW ENG. L. REV. 303 (2005); Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295 (1997). Several courts in the Commonwealth permit lawyers to appear in a limited fashion, known as Limited Assistance Representation (LAR), introduced in 2009 by the SJC as a pilot program. See <http://www.mass.gov/courts/programs/legal-assistance/lar-gen.html>.

Massachusetts is one of the few jurisdictions in the country¹⁸ that does not require members of its bar to attend annual continuing legal education programs as a condition of bar membership renewal, or otherwise to engage systematically in ongoing education and to report those efforts to the proper authorities. While not required, it is advisable for Massachusetts lawyers to participate in continuing legal education as a matter of professional responsibility, in order to maintain competence in the changing legal profession. A Comment to Rule 1.1 states that a lawyer “should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”¹⁹

Many reported disciplinary decisions show the imposition of sanctions for failure to provide competent service.²⁰ Other reported decisions have imposed discipline for the different but related problem of lack of diligence, as described in Section III.

Practice Tip

As suggested by Comment [2] to Rule 1.1, a lawyer who lacks the competence to handle a matter should either refer the matter to a more experienced lawyer or, with the consent of the client, associate with a more experienced lawyer in the continued handling of the client matter.

B. Sanctions for Violation of Rules 1.1, 1.2(a), and 1.2(c)

Hundreds of Massachusetts lawyers have been disciplined for failure to provide competent legal services to clients. Few such reports, however, appear without some other accompanying misconduct, usually neglect or a conflict of interest. An assiduous attorney who tries hard and attends to her affairs but makes a mistake will likely not receive discipline (although she may be sued for malpractice, and may not collect or have to forfeit her fees). Perhaps because of the scarcity of discipline based solely on Rule 1.1, neither the Board nor the SJC has articulated a presumptive sanction for misconduct related to lack of competence. As described below, the Board has articulated guidelines for misconduct involving the closely-related problem of neglect.

¹⁸ The other jurisdictions are Connecticut, District of Columbia, Maryland, Michigan and South Dakota. See http://www.americanbar.org/publications_cle/mandatory_cle/mcle_states.html. Massachusetts does require newly admitted lawyers to complete a “Practicing with Professionalism” course within eighteen months of their admission. See SJC Rule 3:16.

¹⁹ Rule 1.1, cmt 8. The ABA, relying on the same language to its comment to Rule 1.1, advised in a 2017 ethics opinion of the increasing importance of this component of the lawyer’s necessary skill set. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 17-477-R (revised May 22, 2017).

²⁰ For a sampling of those decisions, see, e.g., Matter of Dowell, 28 Mass. Att’y Disc. R. 244 (2012) (year and a day suspension for failure to provide competent representation); Matter of Feeney, 24 Mass. Att’y Disc. R. 271 (2008) (attorney misread date of accident on police report, filed suit seven days after the statute of limitations had expired; public reprimand); AD 01-74, 17 Mass. Att’y Disc. R. 804 (2001) (attorney advised client, then eight months pregnant, to enter into a separation agreement that did not provide for child support so that the client could get her divorce “that day,” where the client wanted to pursue child support after the child was born); AD 87-14, 5 Mass. Att’y Disc. R. 501 (1988) (failure to associate with a lawyer who had the experience the respondent lawyer lacked).

You Should Know

Bar Counsel has investigated a client's claim that his lawyer provided less than competent service even if that client has civil remedies available, such as a legal malpractice action, or even if that client has successfully availed himself of those remedies.²¹

Bar Counsel may defer investigation of a complaint until after the civil matter has been resolved. If Bar Counsel has not done so on her own, a lawyer who has been sued for legal malpractice and who is the subject of disciplinary investigation by Bar Counsel for that same alleged misconduct may file a motion with the Board requesting that the disciplinary investigation be stayed pending the outcome of the civil proceedings.²²

No reported disciplinary matter involving Rule 1.1 did not also include other misconduct. However, there are reported cases where the Rule 1.1 violation was predominant. In *Matter of Bongiovi*,²³ a lawyer received a public reprimand for "inadequate preparation and incompetent representation" in handling a probate estate matter. His prior discipline likely led to the public reprimand. Many instances of discipline for lack of competence also involve neglect of the client's matter, which, while a separate type of misconduct, affects a lawyer's competent representation. For instance, in *Matter of Lovett*,²⁴ the respondent received a public reprimand for neglecting to file suit after his settlement efforts were unavailing. His prior admonition contributed to the sanction being public rather than private discipline. In *Matter of Thompson*,²⁵ the respondent abandoned her law practice and neglected numerous pending client matters; she also failed to communicate with her clients and failed to protect their interests. She also committed numerous IOLTA accounting violations and failed to cooperate with Bar Counsel's investigation. Thompson was suspended for a year and a day.²⁶

Most other matters primarily involving Rule 1.1 resulted in admonitions. In AD 05-01,²⁷ a lawyer received an admonition for his having made serious mistakes in handling his client's immigration matter. In AD 00-21,²⁸ the lawyer made what he

²¹ See, e.g., *Matter of Pilavis*, 17 Mass. Att'y Disc. R. 459 (2001) (facts established in malpractice matter admissible against lawyer in disciplinary hearing; lawyer disbarred for that and other serious misconduct).

²² SJC Rule 4:01 § 11 (authorizing the Board or the Court to defer on motion by a respondent; ordinarily, no deferral occurs).

²³ 20 Mass. Att'y Disc. R. 50 (2004).

²⁴ 27 Mass. Att'y Disc. R. 551 (2011).

²⁵ 16 Mass. Att'y Disc. R. 390 (2000).

²⁶ See also *Matter of Johnson*, 26 Mass. Att'y Disc. R. 272 (2010) (respondent suspended for three months for multiple instances of misconduct stemming largely from a lack of competence); *Matter of Wysocki*, 16 Mass. Att'y Disc. R. 434 (2000) (respondent neglected numerous client matters but also engaged in financial misconduct; suspended for two years).

²⁷ 21 Mass. Att'y Disc. R. 664 (2005).

²⁸ 16 Mass. Att'y Disc. R. 480 (2000).

admitted was “a serious error of judgment” involving a real estate closing, and received an admonition. And in AD 00-04,²⁹ a lawyer advised a client who believed that she was a victim of race discrimination that she had a longer period of time to file her claim with the state agency than she in fact had. That attorney also received an admonition. Several other admonitions involved the same kind of mistakes as just described, but also included an additional item of misconduct, such as signing a document dishonestly to cover up for a mistake³⁰ or misuse of an impounded court document when the lawyer did not know the rules of court.³¹

The most serious discipline involving Rule 1.1 involves not only lack of competence but also neglect of client matters, and is discussed below.

III. The Nature of the Lawyer’s Responsibilities Regarding Diligence

RULE 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client. The lawyer should represent a client zealously within the bounds of the law.

A. The Lessons of Rule 1.3

Neglect of a client’s matter commonly results in discipline. While no rule expressly requires that a lawyer not “neglect” a client’s matter, Rule 1.3 states that “a lawyer shall act with reasonable diligence and promptness in representing a client.” Comment 2 to Rule 1.3 states, “Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed.” Neglect, therefore, may constitute a violation of Rule 1.3.³² That lack of diligence almost always constitutes less than competent representation, and therefore usually violates Rule 1.1 as well. A review of the disciplinary reports in Massachusetts shows that lack of diligence is, in fact, a very serious problem for many Massachusetts lawyers.³³ Because the

²⁹ 16 Mass. Att’y Disc. R. 451 (2000). *See also* AD 00-07, 16 Mass. Att’y Disc. R. 457 (2000) (lawyers failed to attend to details when submitting a financial statement to the Probate & Family Court; admonition).

³⁰ AD 04-37, 20 Mass. Att’y Disc. R. 728 (2004) (signing a person’s affidavit after failing to have it signed properly).

³¹ AD 00-38, 16 Mass. Att’y Disc. R. 506 (2000).

³² The predecessor to the Massachusetts Rules, the Code of Professional Responsibility, did expressly refer to neglect. Former Disciplinary Rule 6-101(A)(3) stated, “A lawyer shall not . . . (3) Neglect a legal matter entrusted to him.”

³³ A Westlaw search shows that since 1999 more than 700 disciplinary reports have cited Rule 1.3 as a basis for the attorney’s discipline. More than half of those reports also cited Rule 1.1.

disciplinary reports and court opinions tend to employ the term “neglect” to refer to lack of diligence, this chapter will use that term as well.

No reported Massachusetts disciplinary decision offers a discrete definition of disciplinable neglect, even though hundreds of decisions offer examples of neglect sufficiently problematic to lead to sanctions. However, not all “neglect” would violate Rule 1.1 or 1.3. If a lawyer promises to write a demand letter by Friday but neglects to do so—he simply forgets—and writes the letter by the following Tuesday, with no harm to the client and no effect on the success of the legal strategy, that lapse does not constitute neglect under any of the standards reviewed here. By contrast, if a lawyer ignores a client’s matter and the statute of limitations expires, and the client therefore loses his rights, that neglect obviously does qualify as a violation of both Rules 1.1 and 1.3. Between those two extreme examples exist many kinds of neglect that may warrant discipline.

The following statement would seem to capture the “neglect” principle as discerned from the disciplinary reports:

An inattention to or ignoring of a client matter in such a fashion that the lapse causes or risks significant harm to the client, was avoidable, and represents less diligence than that typically provided by the reasonably prudent and competent lawyer in Massachusetts.

No court or authority has articulated that specific definition,³⁴ but every instance of reported and disciplined neglect fits that description. Neglect is a very serious matter. Clients entrust their affairs to lawyers, and very often pay handsomely for the lawyer’s promise to pursue the clients’ interests. A lawyer who makes that promise and fails to attend to his client’s matter violates a central commitment of the legal profession. Most often neglect causes direct harm to the client and to her legal interests, even if the neglect is not intentional.³⁵

While a single instance of neglect may lead to discipline,³⁶ an isolated neglect of

³⁴ The ABA’s ethics committee did offer the following description of the term:

Neglect involves indifference and a consistent failure to carry out the obligations that the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgment made in good faith.

ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 1273 (1973).

³⁵ In *Matter of Horgan*, 5 Mass. Att’y Disc. R. 156, 158–59 (1987), a single justice stated that the discipline in that case “provides a strong warning to all attorneys that neglect, even if unintentional, is not to be excused.”

³⁶ See AD 12-04, 28 Mass. Att’y Disc. R. 919 (2012); *Matter of Un*, 26 Mass. Att’y Disc. R. 698 (2010) (public reprimand for single instance of neglect of client’s immigration matter); AD 05-20, 21 Mass. Att’y Disc. R. 712 (2005) (admonition for single instance of neglect involving failure to research the effect of divorce on client’s will, causing will not to be probated).

a matter, with minimal or no risk of harm to a client, has not resulted in discipline.³⁷ Most reported disciplinary cases involve a pattern of neglect.³⁸

You Should Know

The fact that a client has discharged a lawyer in a matter pending in court does not relieve the lawyer of her duties if the court does not allow the lawyer to withdraw from the pending action.³⁹ In transactional matters, where no court action exists, a lawyer who withdraws from the representation must take special care to determine when the lawyer's duties to the client terminate.

The seminal disciplinary decision involving neglect, *Matter of Kane*,⁴⁰ emphasized the seriousness of this problem. The specific neglect in *Kane* was the lawyer's failure to file available post-trial motions on behalf of an incarcerated client. *Kane* is noteworthy because in that opinion the Board enunciated important new "guidelines for discipline in cases involving neglect or failure of zealous representation," after finding that "existing sanctions for neglect are inadequate."⁴¹ The *Kane* guidelines are discussed below. *Kane* did not attempt to define neglect or to limit its scope.⁴²

B. Discipline for Violations of Rule 1.3

In *Matter of Kane*,⁴³ the BBO announced new presumptive sanction guidelines that increased the sanctions for incompetence and neglect. As described by the then-Bar

³⁷ Authorities from other jurisdictions, which, like Massachusetts, claim that harm to the client is not a condition for discipline in neglect matters inevitably refer to a risk of harm, even if no actual harm occurred. See, e.g., *In re Lewis*, 689 A.2d 561, 564 (D.C. 1997) ("failure to take action for a significant time"); *In re Beardsley*, 658 N.E. 2d 591, 592 (Ind. 1995) ("potential for serious harm").

³⁸ See, e.g., *Matter of Watson*, 28 Mass. Att'y Disc. R. 885 (2012) (eighteen-month suspension for neglecting the interests of three clients); *Matter of Caggiano* 24 Mass. Att'y Disc. R. 74 (2008) (a year and a day suspension for pattern of neglect involving three unrelated client matters); *Matter of Sterritt*, 17 Mass. Att'y Disc. R. 542 (2001) (a year and a day suspension for multiple instances of neglecting to pursue clients' claims, causing suits to be dismissed); *Matter of Johnson*, 24 Mass. Att'y Disc. R. 37 (2008); 26 Mass. Att'y Disc. R. 276 (2010) (three-month suspension for lack of diligent and competent representation in two matters following public reprimand for lack of diligence and pursuit of client's objective in another matter; respondent also failed to communicate adequately with clients).

³⁹ See, e.g., *Matter of Harsch*, 20 Mass. Att'y Disc. R. 227 (2004) (public reprimand). See also *Matter of Kiley*, 459 Mass. 645 (2001) (lawyer in pending case, who decided to leave private practice, filed motion to withdraw; court required remaining lawyer in firm to continue representation of client, as client was retained in the firm's name).

⁴⁰ 13 Mass. Att'y Disc. R. 321 (1997).

⁴¹ 13 Mass. Att'y Disc. R. at 6.

⁴² Other examples of neglect leading to sanctions include AD 00-39, 16 Mass. Att'y Disc. R. 508 (2000) (where insurer put claim on hold during criminal prosecution, attorney neglected legal matter by failing to bring civil action within the two-year limit under the relevant insurance policy); *Matter of Thompson*, 16 Mass. Att'y Disc. R. 390 (2000) (abandoning law practice and ignoring 60 open client files); *Matter of Chambers*, 421 Mass. 256 (1995) (failing to pursue client's appeal such that appeal was not docketed until after client had served his entire sentence); *Matter of Garabedian*, 415 Mass. 77 (1993) (failure to file personal injury action within the statute of limitations).

⁴³ 13 Mass. Att'y Disc. R. 321 (1997).

Counsel, the new standards established the following standards for sanctions in neglect cases:

The recommendation in each case will be made on an individual basis. However, absent aggravating or mitigating circumstances, the basic standards are as follows:

1. Admonition is generally appropriate when a lawyer has failed to act with reasonable diligence in representing a client or otherwise has neglected a legal matter, and the lawyer's misconduct causes little or no actual or potential injury to a client.
2. Public reprimand is generally appropriate where a lawyer has failed to act with reasonable diligence in representing a client or otherwise has neglected a legal matter and the lawyer's misconduct causes serious injury or potentially serious injury to a client.
3. Suspension is generally appropriate for misconduct involving repeated failures to act with reasonable diligence, or when a lawyer has engaged in a pattern of neglect, and the lawyer's misconduct causes serious injury or potentially serious injury to a client.

It is important to note that if there are aggravating factors present in the case, the discipline is likely to be increased.⁴⁴

Since 1998, the BBO and the SJC have followed the guidelines established by *Kane*.⁴⁵ The following sections describe selected, but typical, examples of discipline imposed in matters involving neglect.

1) **Disbarment**

While *Kane* does not address disbarment as a sanction, lawyers have been disbarred for serious, repeated neglect when they also engaged in misconduct to cover up or escape the consequences of their negligence, and where the misconduct was aggravated by other factors, such as the vulnerability of the affected clients or prior discipline. One such example is *Matter of Espinosa*,⁴⁶ where the respondent "had neglected two immigration matters and a divorce; misrepresented the status of the cases to his clients and, in one of the matters, to an immigration judge both orally and in writing; misused an unearned retainer and later misrepresented to Bar Counsel the amount of work expended in an effort to justify retaining the unearned fee." "[A] number

⁴⁴ Arnold R. Rosenfeld, *New Standards Clamp Down on Incompetence and Neglect*, BAR OVERSEER ARTICLES (Jan. 1998), at <https://bbopublic.blob.core.windows.net/web/f/neglect.pdf>.

⁴⁵ See *Matter of Shaughnessy*, 442 Mass. 1012, 1014, 20 Mass. Att'y Disc. R. 482, 486 (2004) (six-month suspension for multiple instances of neglect; "We are satisfied that the disposition we order today is consistent with our pre-*Kane* jurisprudence, and note that similar conduct today would merit a substantially more serious sanction.").

⁴⁶ 28 Mass. Att'y Disc. R. 307 (2012).

of substantial factors in aggravation” were also present. The Board report approved by the single justice concluded that “[a]lthough no single act committed by the [respondent] would, by itself, normally warrant this severe a penalty, [we] must consider the cumulative effect of the respondent’s many infractions. . . . Given the respondent’s demonstrated unwillingness (or inability) to conform to the basic standards of his profession, [we] conclude that disbarment is necessary both to protect the public and to maintain its confidence in the integrity of the bar.”⁴⁷ Applying the *Kane* presumptions and the aggravation factors, the single justice ordered the lawyer disbarred.

Another example of lawyer neglect resulting in disbarment is *Matter of Marshall*.⁴⁸ In *Marshall*, the attorney failed to return client files, failed to represent several clients zealously, failed to return unearned retainers, made misrepresentations to clients, failed to respond to Bar Counsel’s subpoenas, failed to comply with an order of administrative suspension, and failed to file an answer to the petition for discipline. In *Matter of Ulin*,⁴⁹ a lawyer was disbarred after he “engaged in a pattern of negligent conduct spanning several years, has caused pecuniary damage to clients, made repeated misrepresentations with the intention of concealing his neglect, and violated more than twenty separate ethical and disciplinary rules.”

While neglect—even neglect aggravated by misrepresentation to hide it or its consequences—does not typically result in disbarment, when it is joined with other intentional misconduct, disbarment can be warranted.

You Should Know

While disbarment often results after a progression of discipline, it may be a sanction in the first instance, as the single justice noted in *Matter of Ulin*. “Step punishment is a policy, not a rule, and the board may impose severe sanctions when the circumstances warrant. This is particularly appropriate where, as here, an attorney frustrates the normal disciplinary process (and hence the normal escalation of disciplinary sanctions) by repeatedly refusing to cooperate with board investigations.”⁵⁰

2) Suspension

Term suspensions are common in cases of neglect, particularly when the neglect is serious, repeated, and causes some harm. The *Kane* decision signaled an across-the-board increase in sanctions for neglect, including imposition of a suspension where previously an admonition or public reprimand would have resulted, as well as a ramping-up of the length of suspensions.⁵¹

⁴⁷ *Id.* (quoting *Matter of Ulin*, 18 Mass. Att’y Disc. R. 549, 555 (2002)).

⁴⁸ 16 Mass. Att’y Disc. R. 299 (2000).

⁴⁹ 18 Mass. Att’y Disc. R. 549 (2002).

⁵⁰ *Matter of Ulin*, 18 Mass. Att’y Disc. R. 549 (2002).

⁵¹ *See Matter of Shaughnessy*, 442 Mass. 1012, 1014, 20 Mass. Att’y Disc. R. 482 (2004).

You Should Know

A review of decisions of single justices based on neglect since *Kane* shows term suspensions ranging in length from two months (with the suspension suspended)⁵² to two years,⁵³ with most of the suspensions being for a term of four to six months.⁵⁴

An apt example of a suspension for serious neglect is *Matter of Barrat*.⁵⁵ In *Barrat*, the attorney neglected two separate client matters and misrepresented the facts to one of the clients in an effort to hide his negligence. On one matter there was harm to the client (although redressed by the respondent's malpractice coverage). The single justice imposed a suspension of six months as recommended by the Board. The Board had rejected the respondent's plea for a public reprimand, given the seriousness of the neglect, but it also rejected Bar Counsel's proposed suspension of one year and a day, in part because the lawyer's diagnosis of depression was a factor in mitigation. Similarly, in *Matter of MacDonald*,⁵⁶ the lawyer was suspended for six months for his neglect of several matters but also for his proffering forged or backdated documents to a court to cover his mistakes. This lawyer also suffered from serious depression, and that mitigating factor influenced the single justice in his decision to limit the suspension to six months, with conditions.⁵⁷

A closer case was *Matter of Kydd*.⁵⁸ In *Kydd*, the lawyer neglected one probate estate matter, and misrepresented the status of his activity to a beneficiary of the estate. The hearing committee recommended a three-month suspension. The single justice concluded that such a suspension was too long under the *Kane* standards for a single instance of neglect with accompanying harm, as well as deceit. The justice opted to maintain that three-month suspension but stayed the suspension for one year with conditions. In *Matter of O'Reilly*,⁵⁹ the respondent neglected a client matter and repeatedly lied to his client about his neglect. While the *Kane* analysis would suggest a public reprimand for the single instance of neglect with harm to the client, the accompanying misrepresentations justified a suspension of a year and a day.

⁵² See, e.g., *Matter of Long*, 24 Mass. Att'y Disc. R. 435 (2008).

⁵³ See, e.g., *Matter of Ozulumba*, 23 Mass. Att'y Disc. R. 515 (2007).

⁵⁴ In *Matter of Matter of Cammarano*, 29 Mass. Att'y Disc. R. 82, 104–106 (2013), the lawyer was suspended indefinitely after he neglected multiple immigration matters over a period of years, made misrepresentations to clients, and charged nonrefundable fees, and where there were multiple factors in aggravation, including that the clients were vulnerable.

⁵⁵ 20 Mass. Att'y Disc. R. 27 (2004).

⁵⁶ 23 Mass. Att'y Disc. R. 411 (2007).

⁵⁷ See also *Matter of Krabbenhoft*, 23 Mass. Att'y Disc. R. 362 (2007) (analogized to *Matter of Barrat*, *supra*; six-month suspension for two instances of neglect with misrepresentation to a client, mitigated by depression); *Matter of Brunelle*, 29 Mass. Att'y Disc. R. 62 (2013) (six-month suspension for single instance of neglect, stayed for two years, with prior discipline as aggravation).

⁵⁸ 25 Mass. Att'y Disc. R. 341 (2009).

⁵⁹ 26 Mass. Att'y Disc. R. 466 (2010).

In *Matter of Lansky*,⁶⁰ a lawyer neglected two probate estate matters and engaged in a conflict of interest, causing substantial injury to the beneficiaries of the estates. The respondent argued that his neglect, which he conceded, should receive a lesser sanction under the pre-*Kane* standards. The single justice disagreed, as much of the neglect had occurred post-*Kane*. Applying the *Kane* standard, the single justice imposed a six-month suspension.

3) Public Reprimand

According to the *Kane* standards, a lawyer who neglects a single matter and causes harm ought to receive a public reprimand. The Board has applied that standard often, even when the misconduct includes misrepresentation to a client or beneficiary to conceal the lawyer's missteps. In *Matter of Berkland*,⁶¹ the lawyer neglected a litigation matter, which resulted in his client's claims being dismissed. His insurer made the client whole. In *Matter of Kirby*,⁶² the respondent neglected a matter, causing "limited harm," and actively fabricated evidence to cover up the neglect. Scores of similar examples appear in the disciplinary reports.⁶³

You Should Know

As seen in *Berkland* and numerous other cases,⁶⁴ violations of Rules 1.1, 1.2(a), 1.3, and 1.4 are often seen occurring together. It should not be surprising that a lawyer who lacks competence to handle a matter (Rule 1.1) often lacks diligence (Rule 1.3) and fails to pursue the client's lawful objectives (Rule 1.2(a)). The lawyer is then either too uninformed or embarrassed to keep the client apprised of relevant information (Rule 1.4(a)) or to know when to ask for the client's input (Rule 1.4(b)).

Sometimes attorneys receive public reprimands in circumstances where the facts suggest a more serious sanction. For instance, in *Matter of Gleason*,⁶⁵ a lawyer neglected a client matter causing significant harm (redressed by his liability insurer), and also engaged in an improper fee agreement, requested that his client settle the malpractice claim without the protections of Rule 1.8(h), and failed to supervise his staff on the matter. The Board adopted a proposed stipulation of the parties to a public reprimand.

⁶⁰ 22 Mass. Att'y Disc. R. 446 (2006).

⁶¹ 26 Mass. Att'y Disc. R. 40 (2010).

⁶² 29 Mass. Att'y Disc. R. 366 (2013).

⁶³ See, e.g., *Matter of McManus*, 26 Mass. Att'y Disc. R. 361 (2010); *Matter of Un*, 26 Mass. Att'y Disc. R. 698 (2010); *Matter of Griffin*, 25 Mass. Att'y Disc. R. 235 (2009); *Matter of Fitzgerald*, 23 Mass. Att'y Disc. R. 153 (2007); *Matter of Bagmari*, 22 Mass. Att'y Disc. R. 31 (2006); *Matter of Williams*, 19 Mass. Att'y Disc. R. 492 (2003); *Matter of Dougherty*, 14 Mass. Att'y Disc. R. 220 (1998); *Matter of Van Dusen*, 13 Mass. Att'y Disc. R. 813 (1997).

⁶⁴ See, e.g., *Matter of Sousa*, 30 Mass. Att'y Disc. R. 383 (2014); *Matter of Fleming*, 29 Mass. Att'y Disc. R. 257 (2013); *Matter of Watson*, 28 Mass. Att'y Disc. R. 885 (2012); *Matter of Lynch*, 23 Mass. Att'y Disc. R. 405 (2007).

⁶⁵ 28 Mass. Att'y Disc. R. 352 (2012).

Practice Tip

Misconduct that would warrant a public reprimand under the *Kane* standard may lead to a lawyer's suspension if she misrepresents facts or circumstances to cover up her neglect, or fails to cooperate with Bar Counsel.⁶⁶

4) Admonition

Under the *Kane* standards, a violation of Rule 1.3 will result in an admonition if “the lawyer’s misconduct causes little or no actual or potential injury to a client.”⁶⁷ Many such examples exist in the disciplinary reports.⁶⁸ For instance, in AD 12-04,⁶⁹ the lawyer neglected a probate estate matter for nearly two years. He received an admonition for that misconduct despite having had a previous admonition for similar misconduct nine years earlier. In AD 13-02,⁷⁰ the lawyer received an admonition after he twice permitted a civil action to be dismissed because of his failure to take some action in the case. He had no prior discipline, and he fully cooperated both with Bar Counsel and with the resulting malpractice claim.

Similar admonitions appeared under the predecessor to Rule 1.3. In AD 99-67,⁷¹ the attorney represented an incarcerated convicted criminal defendant, and failed to visit his client in jail, in violation of DR 6-101(A)(2) and (A)(3); he received an admonition with conditions. In AD 99-71,⁷² the lawyer’s actions and his inadequate supervision of an associate created a very long delay in resolving title questions on a real estate closing; the violation of DR 6-101(A)(2) and (A)(3) led to his admonition.

5) Diversion

In some instances where an admonition would otherwise be the appropriate sanction for a respondent’s neglect or lack of diligence, Bar Counsel instead may enter into a diversion agreement with the respondent. Diversion “to an alternative educational, remedial, or rehabilitative program” as an alternative to formal discipline is authorized under SJC Rule 4:01.⁷³ These appear to be instances where Bar Counsel believes it is better for the lawyer to receive supervision or guidance (e.g., how to maintain a tickler

⁶⁶ See, e.g., Matter of Beery, 28 Mass. Att’y Disc. R. 46 (2012) (three-month suspension for one instance of neglect with failure to cooperate); Matter of Hodgdon, 23 Mass. Att’y Disc. R. 295 (2007) (three-month suspension for two instances of neglect, with reimbursement to the clients, plus failure to cooperate; substantial factors in mitigation and conditions on reinstatement).

⁶⁷ *Kane*, 13 Mass. Att’y Disc. R. at 7.

⁶⁸ A Westlaw search generates at least 190 admonition reports since 1999 where the primary misconduct involves neglect of a client matter.

⁶⁹ 28 Mass. Att’y Disc. R. 919 (2012).

⁷⁰ 29 Mass. Att’y Disc. R. 697 (2013).

⁷¹ 15 Mass. Att’y Disc. R. 775 (1999).

⁷² 15 Mass. Att’y Disc. R. 783 (1999).

⁷³ SJC Rule 4:01, § 8(1)(b). For a discussion of diversion, see Chapter 4, Part II.C.

system for court appearances and statutes of limitations; how to supervise support staff) than to be disciplined only to risk making the same mistakes again.

IV. The Nature of the Lawyer’s Responsibilities Regarding Communication and Keeping a Client Informed

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(f), is required by these Rules;**
- (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;**
- (3) keep the client reasonably informed about the status of the matter;**
- (4) promptly comply with reasonable requests for information;**
and
- (5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.**

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

A. The Lessons of Discipline under Rule 1.4

Related to the problems of providing less-than-competent representation and neglecting a client’s matter are a lawyer’s failure to maintain adequate contact with a client, and failure to communicate relevant information to the client. Bar counsel reports that a lawyer’s failure to stay in contact with a client is the most common complaint received by that office. While few discipline decisions involve solely this breach of duty, a lawyer’s ignoring her client often contributes to a result where discipline is warranted on the basis of neglect or lack of competence. A lawyer has a duty, both as a fiduciary and under the Massachusetts Rules, to maintain adequate communication with a client. Rule 1.4 must be understood as a complement to Rule 1.2(a), which requires a lawyer to “seek the lawful objectives of his or her client through reasonably available means permitted by law and these Rules.”⁷⁴

As with neglect, no clear standard has emerged from the disciplinary decisions concerning this obligation, other than that the communication to a client must be of such quality and quantity to meet the standards of a reasonably prudent and competent lawyer. A failure to communicate combined with a risk of, or actual, significant harm to the client

⁷⁴ MASS. RULES OF PROF. CONDUCT R. 1.2(a).

may lead to discipline.⁷⁵ Often, the failure to maintain contact with a client while neglecting the client's matter has served as the basis for discipline in Massachusetts.⁷⁶

Practice Tips

It is especially important to communicate bad news to clients, and to do so promptly. This includes informing the client about mistakes the lawyer has made.

* * *

A lawyer must inform his client that he suffers from a mental condition that impairs his ability to represent the client adequately.⁷⁷

While most serious violations of Rule 1.4's duty to communicate responsibly with a client will also qualify as neglect of a client matter in violation of Rule 1.3, the two rules are not coextensive. A lawyer may pursue a client's matter assiduously and therefore not neglect it, but still fail to disclose important facts or developments to the client, or fail to provide the client with sufficient information for the client to participate meaningfully in decisions concerning the case.⁷⁸ By contrast, it is hard to imagine, and no Massachusetts cases exist, where the lawyer who seriously neglected a matter did not also fail to maintain adequate communication with a client.

B. Discipline for Violations of Rule 1.4

⁷⁵ Many of the reported disciplinary decisions involving Rule 1.4 include more deceptive conduct, where the lawyer conceals from, or misrepresents to, the client his or her failures. *See, e.g.*, Matter of Gillis, 28 Mass. Att'y Disc. R. 349 (2012) (failure to inform client of attorney's failure to prosecute); Matter of O'Reilly, 26 Mass. Att'y Disc. R. 466 (2010) (neglect concealed by misrepresentations); Matter of Waisbren, 24 Mass. Att'y Disc. R. 725 (2008) (misrepresentation and concealment). However, simple neglect and failure to communicate with the client can be the basis of public discipline. *See, e.g.*, Matter of Brandt, 26 Mass. Att'y Disc. R. 59 (2010).

⁷⁶ A Westlaw search shows more than 550 reported disciplinary matters since 1999 where Rule 1.4 is a source of the lawyer's misconduct. Of those reports, close to 500 also involved a violation of Rule 1.3. *See, e.g.*, AD 10-17, 26 Mass. Att'y Disc. R. 792 (2010) (attorney violated Rule 1.4 by failing to tell the client she did not plan to pursue her ex-husband's signature on the Qualified Domestic Relations Order (QDRO) required by a divorce judgment); AD 09-11, 25 Mass. Att'y Disc. R. 671 (2009) (attorney's failure to explain to the client the difficulties of proof she faced, to disclose his lack of knowledge concerning the qualifications of an investigator he had hired, and to disclose that he had not corroborated certain claims by the investigator); AD 09-07, 25 Mass. Att'y Disc. R. 666 (2009) (failure to disclose to the client pending discovery and related motions for sanctions that later resulted in dismissal of the client's claims, where the attorney had hoped to avoid those issues by a motion for summary judgment); AD 03-42, 19 Mass. Att'y Disc. R. 598 (2003) (general duty to meet with an incarcerated client to discuss the client's case, even when the attorney believes that there was little to discuss); AD 01-58, 17 Mass. Att'y Disc. R. 769 (2001) (duty to stay in communication with an incarcerated client about the case and about requests for continuances).

⁷⁷ Matter of Gallagher, 29 Mass. Att'y Disc. R. 275 (2013).

⁷⁸ *See, e.g.*, AD 10-17, 26 Mass. Att'y Disc. R. 792 (2010) (attorney who represented a client in a family law matter did not advise client that she considered Qualified Domestic Relations Order (QDRO) preparation to be outside the scope of her engagement).

Discipline based primarily upon a violation of Rule 1.4 without other accompanying misconduct is unusual. The reported sanctions in cases that focus on a failure to communicate or to keep a client adequately informed are almost all admonitions. More serious discipline arises when something else goes wrong in the representation, and the lawyer fails to communicate with the client because of those problems.

In *Matter of Kennedy*,⁷⁹ the respondent received a public reprimand for his violation of this duty. The lawyer advised a client about a possible claim he may have against a lender. The client understood that the lawyer was representing him on that matter and believed the lawyer would file suit. The lawyer understood his role as merely to advise the client, but did not make the limited nature of the relationship sufficiently clear to the client. After the statute of limitations had expired without the lawyer having filed suit, the lawyer received this public reprimand. In *Matter of Brandt*,⁸⁰ the respondent had decided not to handle the client's potential medical malpractice case but "never notified the client of his decision, did not return the client's medical records and did not advise the client of his right to consult with other attorneys, of the statute of limitations, or of the consequences of failing to file suit by the end of the limitations period. The respondent did not take any steps to toll the statute of limitations for the client or otherwise protect his rights while he sought to consult with other attorneys."⁸¹ The lawyer received a public reprimand.

At least twenty-five admonitions since 1999 have primarily involved Rule 1.4. Examples of the kind of mistake that has led to such an admonition include the following. In AD 12-10,⁸² a lawyer failed repeatedly to respond to inquiries from a client. She also did not respond promptly to the inquiries from Bar Counsel. In AD 10-17,⁸³ a lawyer did not follow up adequately with her divorce client about whether or not the lawyer would prepare a Qualified Domestic Relations Order (QDRO), and by the time the parties resolved that issue the ex-husband had dissipated most of the assets. The Board report concluded that the lawyer had not acted less than competently, but her failure to keep her client apprised of the limit of the lawyer's responsibilities was a breach of her duties. In AD 09-07,⁸⁴ a lawyer representing a tenant failed to apprise his client of a deposition notice and subsequent court orders to attend the deposition; as a result of the client's subsequent failure to attend the deposition, the court dismissed the tenant's Chapter 93A counterclaim. The Board concluded that the counterclaim was not meritorious, but the lawyer had failed in his duty to keep his client informed. In AD 03-42,⁸⁵ the lawyer, a criminal defense practitioner, did not have a driver's license and could only meet clients who were accessible by public transportation. He failed to visit two clients who were

⁷⁹ 26 Mass. Att'y Disc. R. 284 (2010).

⁸⁰ 26 Mass. Att'y Disc. R. 59 (2010).

⁸¹ 26 Mass. Att'y Disc. R. at 59.

⁸² AD 12-10, 28 Mass. Att'y Disc. R. 928 (2012).

⁸³ AD 10-17, 26 Mass. Att'y Disc. R. 792 (2010).

⁸⁴ AD 09-07, 25 Mass. Att'y Disc. R. 666 (2009).

⁸⁵ AD 03-42, 19 Mass. Att'y Disc. R. 598 (2003).

incarcerated, and by not visiting them in person he failed to maintain adequate communication with them.

Generally, lying to clients to cover up a failure to keep them informed about their matters results in public discipline.⁸⁶ Where the lawyer's false report has not caused harm to the client, the resulting discipline has usually been an admonition.⁸⁷

Practice Tips

A lawyer's duty to communicate with a client continues even if the client has failed to pay the lawyer the fees owed for the lawyer's work.⁸⁸ The proper remedy is to seek to withdraw, not to refuse to communicate.

* * *

Appellate criminal defenders are required by CPCS policy to "confer" with clients after receiving the trial transcripts to discuss the merits and strategies of the appeal. Failure to do so violates Rule 1.4(a) and (b), and may lead to discipline.⁸⁹

V. Additional Considerations for Matters Involving Allegations of Lack of Competence, Neglect of Client Matters, and Failure to Communicate

An important relationship exists between the common law of malpractice and breach of fiduciary duty as developed in private civil litigation and the disciplinary process governed by the Rules of Professional Conduct. When Bar Counsel asserts that the conduct of a lawyer demonstrates lack of competence or diligence, that claim necessarily refers to some benchmark for competent lawyering. For malpractice purposes, that benchmark is the *standard of care* of an average, prudent, careful lawyer in Massachusetts.⁹⁰ For BBO disciplinary purposes, one can reasonably read Rules 1.1, 1.2, 1.3 and 1.4 as collectively imposing an equivalent standard.

Violation of the Rules of Professional Conduct neither establishes nor constitutes the standard of care for a practicing lawyer. The Rules themselves say that, as do several

⁸⁶ See, e.g., Matter of Bixby, 17 Mass. Att'y Disc. R. 81 (2001) (lawyer publicly reprimanding for intentionally misrepresenting to his client that her case was still pending when the lawyer had dismissed the case; in mitigation, the case may not have been viable).

⁸⁷ See, e.g., AD 09-14, 25 Mass. Att'y Disc. R. 678 (2009); AD 06-36, 22 Mass. Att'y Disc. R. 926 (2006) (mitigating factors present).

⁸⁸ AD 06-45, 22 Mass. Att'y Disc. R. 950 (2006).

⁸⁹ See, e.g., AD 99-74, 15 Mass. Att'y Disc. R. 789 (1999).

⁹⁰ See Fishman v. Brooks, 396 Mass. 643, 646 (1986) ("An attorney who has not held himself out as a specialist owes his client a duty to exercise the degree of care and skill of the average qualified practitioner.").

cases.⁹¹ That assertion might lead one to conclude that a lawyer may violate the Rules and be disciplined even if the lawyer's actions comply with the standard of care of the average qualified practitioner working in Massachusetts in that area of practice. As a practical matter, that conclusion is incorrect, especially in the context of issues regarding competence and neglect. The definitions of competence, diligence, and maintaining reasonable communication with one's clients are not apparent from the Rules, and can be understood only in the context of the standard of a reasonable practicing attorney with familiarity with the practice area in question.⁹²

In any given dispute about whether a lawyer's conduct breached the applicable Massachusetts duty of care, one or both parties may seek to offer *expert testimony* to establish the standard of care to prove the party's assertion that the conduct constituted a violation of the duty. The BBO disciplinary process does not permit expert testimony on the meaning of the rules themselves, whose interpretation calls for the type of legal analysis that the hearing panel or officer has the capacity to make independently.⁹³ Also, the SJC has stated that expert testimony is ordinarily not required in disciplinary matters to establish a standard of care.⁹⁴ But in those disputes where the parties disagree about the nature of the standard of care, the BBO process permits expert testimony, in the discretion of the hearing panel or officer.⁹⁵ If the lawyer's actions evidence a clear failure to meet the ordinary standards of good practice, the hearing panel or officer will typically deny a proffer of expert testimony.⁹⁶

Few if any reported Massachusetts disciplinary cases involving claims of incompetence or neglect of a client matter, whether leading to admonitions or more serious discipline, evidence a legitimate, good faith dispute about the nature of the standard of care or about whether the standard was in fact violated. While the parties may, and often do, disagree about the facts (what the respondent lawyer actually *did*), they seldom if ever disagree about the question of whether the facts as alleged by Bar

⁹¹ See MASS. RULES OF PROF. CONDUCT Scope, at [6]; see, e.g., *Fishman*, 396 Mass. at 649; *Sullivan v. Birmingham*, 11 Mass. App. Ct. 359, 369 (the ethics rules "provide standards of professional conduct of attorneys and not grounds for civil liability").

⁹² See GILDA TUONI RUSSELL, MASSACHUSETTS PROFESSIONAL RESPONSIBILITY § 1.08, 1–20 (2003) (on questions of adequate preparation to satisfy Rule 1.1, "a Massachusetts lawyer must ask . . . what would a reasonable lawyer do[?]").

⁹³ See *Matter of Crossen*, 450 Mass. 533, 570, 24 Mass. Att'y Disc. R. 122 (2008).

⁹⁴ *Crossen*, 450 Mass. at 570, 24 Mass. Att'y Disc. R. at 168; *Matter of Tobin*, 417 Mass. 81, 86, 10 Mass. Att'y Disc. R. 269, 274 (1994) (dictum).

⁹⁵ BOARD OF BAR OVERSEERS, POLICIES AND PRACTICES § 12 (2011), available at <https://bbopublic.blob.core.windows.net/web/f/bbopolicy.pdf>:

In any disciplinary hearing in which the hearing committee determines that the attorney's compliance with the degree of learning and skill required to be possessed by attorneys practicing in a particular area or areas of the law is relevant to the decision of the committee, expert testimony concerning the standard of care applicable to the attorney's conduct may, in the discretion of the committee, be admitted into evidence, subject to the caveat that an expert's opinion to the effect either (1) that there has or has not been a violation of law or (2) that there has or has not been an ethical violation, is not admissible and must be rejected.

⁹⁶ See *Crossen*, 450 Mass. at 570; *Matter of Buckley*, 2 Mass. Att'y Disc. R. 24, 25 (1980) For further discussion of the role of an expert witness in a disciplinary hearing, see Chapter 6, Part IX.G.

Counsel violate the standards of competence, diligence, or keeping a client fully informed.

DRAFT

Part II
Problems of Confidentiality
(Rules 1.6 and 1.9(c))

I. Introduction

A lawyer must protect the information she receives during the representation of her clients. The instructions of Rule 1.6 to a lawyer are simple and clear: “A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent,”⁹⁷ or unless one of seven exceptions applies.⁹⁸ That obligation continues after the representation ends. According to Rule 1.9(c), a lawyer shall not use confidential information to the disadvantage of a former client, or reveal such information unless otherwise permitted or required by other rules.⁹⁹ A lawyer who reveals or uses information in violation of these rules is subject to discipline. At times, the sanctions against a lawyer who breaches this central fiduciary duty of confidentiality will be severe, as the later discussion will show.

II. The Nature of the Confidentiality Duty, and Sanctions for Violations of the Duty

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary, and to the extent required by Rules 3.3, 4.1(b), 8.1 or 8.3 must reveal, such information:

(1) to prevent reasonably certain death or substantial bodily harm that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or to prevent the wrongful execution or incarceration of another;

⁹⁷ MASS. RULES OF PROF. CONDUCT R. 1.6(a).

⁹⁸ MASS. RULES OF PROF. CONDUCT R. 1.6(a), (b), discussed below.

⁹⁹ The Massachusetts version of Rule 1.9(c)(1), barring the use of former client information, omits a qualifying phrase from the Model Rule counterpart. The latter declare an exception for information “generally known.” The absence of that phrase in the Massachusetts rule probably results from the this state’s limitation of the restriction to “confidential” information. Information that is generally known is unlikely to qualify as confidential. However, as comment [5B] to Rule 1.6 says, publicly available information, including information that is a matter of public record, but that is not generally known, is protected as a client confidence.

(2) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to property, financial, or other significant interests of another;

(3) to prevent, mitigate, or rectify substantial injury to property, financial, or other significant interests of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to the extent permitted or required under these Rules or to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's potential change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, confidential information relating to the representation of a client.

(d) A lawyer participating in a lawyer assistance program, as hereinafter defined, shall treat the person so assisted as a client for the purposes of this Rule. Lawyer assistance means assistance provided to a lawyer, judge, other legal professional, or law student by a lawyer participating in an organized nonprofit effort to provide assistance in the form of (a) counseling as to practice matters (which shall not include counseling a law student in a law school clinical program) or (b) education as to personal health matters, such as the treatment and rehabilitation from a mental, emotional, or psychological disorder, alcoholism, substance abuse, or other addiction, or both. A lawyer named in an order of the Supreme Judicial Court or the Board of Bar Overseers concerning the monitoring or terms of probation of another attorney shall treat that other attorney as a client for the purposes of this Rule. Any lawyer participating in a lawyer assistance program may require a person acting under the lawyer's supervision or control to sign a nondisclosure form approved by the Supreme Judicial Court. Nothing in this paragraph (c) shall require a bar association-sponsored ethics advisory

committee, the Office of Bar Counsel, or any other governmental agency advising on questions of professional responsibility to treat persons so assisted as clients for the purpose of this Rule.

A. The Scope of Coverage of Rule 1.6

While the scope of the Massachusetts version of Rule 1.6 is narrower than it is in most other jurisdictions, and less strict than that described in the ABA’s Model Rule 1.6, the duty remains a powerful and extensive one. Massachusetts’s Rule 1.6 protects “confidential information related to the representation.” (The ABA’s Model Rule omits the qualifier “confidential,” and so literally covers more information than the Massachusetts rule.¹⁰⁰)

According to Rule 1.6, “‘Confidential information’ consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the lawyer has agreed to keep confidential,”¹⁰¹ but “does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.”¹⁰² The fact that information is available in a public record or was disclosed in a public proceeding does not deprive that information of its confidential character if it fits the above definition.

Not only must a lawyer avoid revealing protected information related to the representation, but she must also take precautions to avoid inadvertent disclosure of information. Any lawyer who employs email communication or cloud computing to perform legal services for clients—in other words, just about every working lawyer—must ensure that the communication devices are safe and secure.¹⁰³ Comment [18] to Rule 1.6 emphasizes that a lawyer must take into account the sensitivity of a client’s information, the cost and complexity of extra security, and the client’s preferences in choosing how to communicate technologically about a client’s matter (including sharing

¹⁰⁰ MODEL RULES OF PROF. CONDUCT R. 1.6(a). Most jurisdictions have adopted the language of the Model Rule without the Massachusetts qualifier. In practice, however, the ABA rule is very likely treated the same as the Massachusetts rule. As the American Law Institute states in its Restatement volume on the law governing lawyers,

[U]se or disclosure of confidential client information is generally prohibited if there is a reasonable prospect that doing so will adversely affect a material interest of the client or prospective client. Although the lawyer codes do not express this limitation, such is the accepted interpretation. For example, under a literal reading of ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983), a lawyer would commit a disciplinary violation by telling an unassociated lawyer in casual conversation the identity of a firm client, even if mention of the client’s identity creates no possible risk of harm. Such a strict interpretation goes beyond the proper interpretation of the rule.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 60, Cmt. c(i) (2000).

¹⁰¹ Rule 1.6, cmt [3A].

¹⁰² *Id.*

¹⁰³ See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 17-477-R (revised May 22, 2017).

sensitive documents).¹⁰⁴ Under ordinary circumstances, the use of unencrypted email and cloud computing, each commonly used by lawyers in their daily practices, is adequate,¹⁰⁵ but a lawyer must offer more secure avenues when appropriate and necessary.¹⁰⁶

For the purposes of a lawyer's duties under Rule 1.6, the Massachusetts rule makes clear that "[a] lawyer participating in a lawyer assistance program . . . shall treat the person so assisted as a client for the purposes of this Rule."¹⁰⁷ Participants must keep the confidences of assisted persons, even if those persons are not technically their "clients."

The exceptions to this ethical duty are reviewed later in this chapter.

B. Confidentiality and the Attorney-Client Privilege Distinguished

Practice Tip

Lawyers sometimes confuse the ethical duty of confidentiality with the attorney-client privilege. The two concepts are very different. The ethical duty applies in all settings of a lawyer's practice; the evidentiary privilege applies only in court-related settings such as a hearing or a deposition. The scope of the ethical duty is much broader than that of the evidentiary privilege. Information that is received from a prospective client remains privileged and confidential, even if the prospective client does not ultimately retain the lawyer.

The ethical duty of confidentiality is much broader in scope than the attorney-client privilege, and the two are sometimes confused. Rule 1.6 describes a lawyer's ethical responsibilities; it does not describe nor address *privileged* matters. The attorney-client privilege bars any compelled use of client communications, in court and elsewhere, if those communications fit the narrow definition developed by Massachusetts common law. The Supreme Judicial Court has described the attorney-client privilege as follows:

A party asserting the privilege must show that (1) the communications were received from the client in furtherance of the rendition of legal services; (2) the

¹⁰⁴ Rule 1.6, cmt. [18]. Note that the Massachusetts version of Comment 18 is more developed than the ABA's version, interpreting the identical language of Rule 1.6(c).

¹⁰⁵ See, e.g., Massachusetts Bar Association Committee on Professional Ethics, Opinion 12-03 (2012): A lawyer generally may store and synchronize electronic work files containing confidential client information across different platforms and devices using an Internet based storage solution, such as "Google docs," so long as the lawyer undertakes reasonable efforts to ensure that the provider's terms of use and data privacy policies, practices and procedures are compatible with the lawyer's professional obligations, including the obligation to protect confidential client information reflected in Rule 1.6(a).

¹⁰⁶ ABA Op. 17-477-R, *supra*.

¹⁰⁷ Rule 1.6(d). The Model Rule does not include such a provision.

communications were made in confidence; and (3) the privilege has not been waived.¹⁰⁸

A communication between a lawyer and a client concerning the legal matter for which the lawyer has been retained will not be privileged if that conversation takes place in the presence of an unnecessary third party.¹⁰⁹ The privilege may be waived if proper precautions are not taken to protect against inadvertent disclosure.¹¹⁰ Information that an attorney obtains during the course of representation other than through a confidential client communication will not be privileged, although it may be covered by Rule 1.6.

The doctrine surrounding the attorney-client privilege is extensive and intricate, and will not be a central component of this treatise, especially since the evidentiary doctrine has little direct relevance to disciplinary matters.¹¹¹ One notable SJC decision does deserve mention, however, because it demonstrates the relationship between the two separate bodies of confidentiality law. In *Purcell v. District Attorney for Suffolk Dist.*,¹¹² a lawyer revealed otherwise confidential client information to the police in order to prevent his client from committing a criminal act (arson). That disclosure was permissible according to DR 4-101(C)(3), in place at the time.¹¹³ His disclosure worked; it prevented the crime. However, it also led to the arrest of his client on a charge of attempted arson, for which the client was indicted. When the District Attorney subpoenaed the lawyer to testify at the trial about the matters that the lawyer had reported to the police, the lawyer claimed that his testimony was inadmissible because of the privilege. While recognizing the crime-fraud exception to the attorney-client privilege, the SJC concluded that the exception did not apply to this case.

The SJC wrote, “A statement of an intention to commit a crime made in the course of seeking legal advice is protected by the privilege, unless the crime-fraud exception applies. That exception applies only if the client or prospective client seeks advice or assistance in furtherance of criminal conduct.”¹¹⁴ In this case, the lawyer’s client did express his intention to commit a crime, but did not seek his lawyer’s assistance in that crime or advice about it. Therefore, the lawyer was permitted to reveal the threat to the authorities, but could decline to testify about the content of the conversation when subpoenaed to testify.¹¹⁵

C. Discipline for Revealing Confidences Under Rule 1.6

¹⁰⁸ In re Grand Jury Investigation, 453 Mass. 453, 456 (2009).

¹⁰⁹ Comm’r of Revenue v. Comcast Corp., 453 Mass. 293, 306 (2009).

¹¹⁰ Hoy v. Morris, 79 Mass. (13 Gray) 519 (1859).

¹¹¹ For a more in-depth discussion of the privilege, see PAUL J. LIACOS, MARK S. BRODIN & MICHAEL AVERY, HANDBOOK OF MASSACHUSETTS EVIDENCE § 13.4 (8th ed. 2006).

¹¹² 424 Mass. 109 (1997).

¹¹³ That exception continues to exist under the Rules of Professional Conduct, in a greatly expanded form. See the discussion below about the exceptions to the basic duties established by Rule 1.6.

¹¹⁴ 424 Mass. at 115.

¹¹⁵ In *Purcell*, the Court implied that the client’s threats qualified as “communications . . . in furtherance of the rendition of legal services.” In *re Grand Jury Investigation, supra*. In the latter matter, involving a client’s threats against a judge which the lawyer disclosed, the Court made that finding explicit. 453 Mass. at 458–59.

Practice Tip

A lawyer may not rely upon the duty of confidentiality under Rule 1.6 to refuse to share information with Bar Counsel during an investigation, and such a refusal may lead to further discipline. It is misconduct to fail to cooperate with Bar Counsel's investigation.¹¹⁶ A lawyer may refuse to disclose or produce information protected by the attorney-client privilege. "[A] lawyer may be compelled by subpoena to produce material protected by Rule 1.6 but not falling within the scope of the attorney/client privilege."¹¹⁷

1) Disbarment

While no lawyer in Massachusetts has been disbarred solely for revealing client confidences, lawyers have been disbarred for misconduct involving Rule 1.6 or its predecessor, DR 4-101 in a significant way. In *Matter of Pool*,¹¹⁸ a young lawyer disclosed confidential information of his criminal defendant client—the location of a safety deposit box—to prosecutors in order to reach funds in the box needed to pay for investigative expenses and counsel fees. The lawyer also misrepresented his actions to the client, but the primary misdeed was his revelation of his client's secrets in order to obtain money. He was disbarred.

In *Matter of Johnson*,¹¹⁹ an experienced lawyer was disbarred after she posted confidential client information on her website, in an effort to publicize what she believed were false claims of sexual abuse. Much of the material she posted had been impounded by a court order, which the respondent ignored. With one client whose material she posted, the respondent refused to remove the website material until the client withdrew a complaint made to Bar Counsel. This combination of misconduct led to her disbarment.

Another lawyer, in what the single justice described as "an unfortunate case," was disbarred after he misused client funds, neglected his IOLTA client trust account, mismanaged client affairs, and, as he sued his client for fees he alleged were due, disclosed more confidential facts than necessary to establish his claim or defense under

¹¹⁶ SJC Rule 4:01, § 3(1); Rule 8.4(g).

¹¹⁷ *Matter of Hollingsworth*, 16 Mass. Att'y Disc. R. 227 (2000)

¹¹⁸ 4 Mass. Att'y Disc. R. 112 (1984). For a discussion of the facts leading to disbarment, and the respondent's subsequent reinstatement, see *Matter of Pool*, 401 Mass. 460, 5 Mass. Att'y Disc. R. 290 (1988). Pool was disbarred under an earlier version of SJC Rule 4:01 and the Court noted the importance of his being disbarred, rather than being suspended. 4 Mass. Att'y Disc. R., at 115. Despite being disbarred, Pool was allowed to apply for reinstatement after one year, in part because the misconduct had occurred eleven years before he was disbarred, perhaps in part because the disciplinary hearing "did not commence until 1981, due to the unwillingness of the United States government to permit interviews of the Federal agents and attorney involved in the case." 401 Mass. at 463 n.1

¹¹⁹ 450 Mass. 165, 22 Mass. Att'y Disc. R. 403 (2006)

Rule 1.6(b)(5).¹²⁰ That unwarranted disclosure of confidential client information contributed to his disbarment, but apparently played a relatively minor role.

2) Suspension

No lawyer in Massachusetts has been suspended solely for violating Rule 1.6, but several lawyers have been suspended from practice for a combination of misconduct, some of which included serious disregard for client confidentiality. In one vivid example of misconduct, a lawyer abandoned his law practice and, in the words of the single justice,

When the respondent abandoned his law office, he left a large number of open and closed files and documents in file drawers and cabinets and on desks and tables. The respondent did not make any of these files available to the clients and former clients, did not inform them that he was abandoning his office and his practice and did not maintain the confidentiality of information in these files and documents from his landlord or others who might take possession of the premises. The respondent also abandoned a check book, check register and statements on an IOLTA account in his name.¹²¹

The lawyer also diverted escrow funds for his personal use, and neglected many client matters when he abandoned his law practice. The SJC imposed an indefinite suspension.

In *Matter of Lagana*,¹²² a lawyer was suspended for three months for multiple instances of misconduct, including a violation of Rule 1.6 under circumstances that may interest many lawyers who find themselves in a similar situation. In his immigration practice, the respondent represented a client who proved to be nonresponsive. The respondent filed a motion to withdraw his appearance, and in that motion disclosed more client information than was necessary to support the motion.¹²³ That breach of client confidentiality, along with considerable additional misconduct,¹²⁴ led to the suspension. Similarly, in *Matter of Hilson*,¹²⁵ a lawyer was suspended indefinitely for multiple instances of misconduct involving his handling of a real estate escrow account. One count against the respondent accused him of violating DR 4–101(B), the predecessor to Rule 1.6, by disclosing more client facts than necessary during his deposition after the dispute led to litigation. The lawyer claimed that his disclosures were “appropriate”

¹²⁰ *Matter of O’Malley*, 26 Mass. Att’y Disc. R. 462 (2010).

¹²¹ *Matter of Delaney*, 21 Mass. Att’y Disc. R. 166 (2005).

¹²² 26 Mass. Att’y Disc. R. 295 (2010).

¹²³ *Id.*

¹²⁴ The respondent asked an inexperienced associate to prepare the motion to withdraw with its excessive disclosures, and did not review the motion before its filing, and therefore violated Rule 5.1. More troubling still, the lawyer failed to notify an immigration court about a change of his office address, and as a result missed critical notices in the client’s case, leading the client to lose Temporary Protected Status and, eventually, to be arrested by the immigration authorities.

¹²⁵ 448 Mass. 603, 23 Mass. Att’y Disc. R. 265 (2007).

given his need to defend himself, but the SJC agreed with the Board that “the standard is more than ‘appropriate’; disclosures must be ‘necessary.’”¹²⁶

Practice Tip

Lawyers must tread a fine line when communicating with a court about problems with a client relationship, such as when seeking leave of the court to withdraw from representation. Lawyers may properly disclose some limited client information to support the request, but revealing more than necessary could lead to discipline. As discussed below, most such errors result in an admonition. One suggested strategy is for counsel to file a motion disclosing minimal facts, and prepare a separate supporting *in camera* affidavit for the court to review but not disclose it to opposing counsel or make it part of the record.¹²⁷

A lawyer was suspended for his *failure* to reveal client confidences pursuant to Rule 1.6(b)(3). As noted above, Rule 1.6(b)(3) gives lawyers discretion to reveal client information when necessary to prevent or rectify client fraud. Such a disclosure becomes mandatory under Rule 4.1(b) when necessary to avoid assisting in a client’s fraud. In *Matter of Harlow*,¹²⁸ the lawyer represented a client in an administrative proceeding, and the single justice concluded that the client’s course of action constituted health care fraud. By seeking to serve as a zealous advocate and therefore not disclosing the client’s fraud (and misleading the administrative body at the same time by his evidence and arguments), the respondent violated both Rule 1.6 and Rule 4.1, and he was suspended for six months and a day.

3) Public Reprimand

Lawyers have received a public reprimand for revealing clients’ confidential information. In *Matter of Bulger*,¹²⁹ the attorney was employed as counsel to the Office of the Commissioner of Probation. When the administrator who appointed him was placed on administrative leave pending an investigation into politically-motivated hiring at the department, Bulger continued to communicate with the administrator without permission, giving him updates on the investigation. The Board adopted the hearing committee’s recommendation of a public reprimand. The Board noted that a Rule 1.6 violation alone typically warrants an admonition, but in this instance a reprimand was warranted. “[T]he respondent was improperly motivated by concern for the person responsible for his own rise in the probation department; the impropriety of his disclosures was fairly obvious; the disclosures occurred repeatedly over an extended course of conversations with [the administrator]; and the respondent seemed to the

¹²⁶ 448 Mass. at 610, n.5 (citing Canon 4, DR 4–101(C)(4)).

¹²⁷ See MBA Ethics Op. 96-3. The ethics committee cautioned that disclosure should be limited to the bare minimum necessary and that, if the court wants to delve more deeply, the lawyer might request that the motion to withdraw be heard *in camera* by a judge other than the one expected to try the client’s case.

¹²⁸ 20 Mass. Att’y Disc. R. 212 (2004).

¹²⁹ *Matter of Bulger*, 29 Mass. Att’y Disc. R. 65 (2013).

committee still to be wholly unaware of the impropriety of his misconduct.” The Board dismissed the respondent’s argument that he was unsure who his client was during this time as “willful blindness.”¹³⁰

Several lawyers have received public reprimands for misusing client information belonging to a *former* client. Those cases are summarized in the discussion of sanctions reported under Rule 1.9(c), the rule governing safekeeping of former client confidences.

4) Admonition

The typical sanction for violation of Rule 1.6 without other misconduct or aggravating circumstances is an admonition.¹³¹ The disciplinary reports show how a lawyer with a disagreement with a client might reveal confidential client information improperly. The lawyers who have done so, and whose complaints did not include other separate misconduct, have typically received admonitions. (Lawyers who reveal information about a *former* client under such circumstances also receive admonitions, as described below in the discussion of Rule 1.9(c).) Lawyers seeking to withdraw from representation in a court matter often struggle with the question of how much information to reveal in support of the motion. At least two admonitions show lawyers who made the wrong judgments. In AD 11-21,¹³² the lawyer, in his motion to withdraw from representation in a family court matter, attached emails between the lawyer and the client to establish the breakdown of the relationship. The lawyer also disclosed the specific amount of fees owed by the client, which the Board deemed not necessary and a breach of the lawyer’s confidentiality duty. In an earlier decision, PR 92-34,¹³³ Bar Counsel recommended a public reprimand for a lawyer who made a similarly poor judgment, but the Board imposed what was then called a private reprimand, the equivalent to an admonition today. In that case, the client sent a letter to the Geraldo Rivera television show, and one to the respondent, each complaining about the lawyer’s representation of the client in a criminal matter. In his motion to withdraw as defense counsel, the lawyer attached both letters to bolster his claim. Because both letters revealed confidential and sensitive information, including the client’s allegations that the judge was corrupt, the Board concluded that the lawyer had violated his duties under the disciplinary rule in place at the time.¹³⁴

Other examples exist where the lawyer and the client had some disagreement, and the lawyer revealed more than he should in response to claims made by the client. For

¹³⁰ *Id.* See also Matter of DuPont, 29 Mass. Att’y Disc. R. 213 (2013) (in a motion to withdraw, “the respondent filed an affidavit that was critical of his client and revealed confidential information that went beyond what was necessary to support his withdrawal”; public reprimand imposed).

¹³¹ *Id.*

¹³² 27 Mass. Att’y Disc. R. 972 (2011).

¹³³ 8 Mass. Att’y Disc. R. 328 (1992).

¹³⁴ *Id.*, referring to DR 4-101(B)(1). Note that while the letter sent to the television show was not *privileged*, given that it was hardly confidential, for purposes of the ethics rules it remained protected, and disclosing it breached the lawyer’s ethical duties. Under the current Massachusetts rule, the lawyer’s disclosure of the letters might contravene Rule 1.6 because they were embarrassing to the client.

instance, in AD 09-18,¹³⁵ a client posted comments on an internet bulletin board that were critical of the tax assistance the lawyer had provided and the fee the lawyer charged. The lawyer responded with a posting of his own, denying the client's claims and disclosing the client's substance abuse issues, as well as other confidential information. And, in AD 07-35,¹³⁶ a client authorized the lawyer to charge the lawyer's fee to his credit card, but later disputed the claim with his credit card provider. The lawyer sent letters to the bank in an attempt to explain the charge and request that it be reinstated. The lawyer revealed highly confidential information about the client that was not necessary to establish the claim for legal fees. The Board concluded that such disclosure violated Rule 1.6(a).

In another admonition matter, AD 06-24,¹³⁷ the lawyer was disciplined after she disclosed information from a prospective client to her estranged husband. The facts learned from the prospective client were relevant to a dispute the lawyer had with her husband, and so she confronted him with the information. Because information from a prospective client has the same protection as that received from a current client, the lawyer's actions violated Rule 1.6.¹³⁸

A disciplinary matter arising under the predecessor to Rule 1.6 involved lawyers using information from one client's case to assist substantially another client's affairs, at little (but some) harm to the client whose information the lawyers exploited. In *Matter of Discipline of Two Attorneys*,¹³⁹ the lawyers represented the buyers of a parcel of real estate, and learned by happenstance that a different client of the lawyers was a judgment creditor of the sellers. The lawyers arranged to intercept the proceeds of the sale after the closing but before the funds reached the seller, to pay off their judgment-creditor client. In addition to the conflict of interest, the SJC agreed with the Board that the potential risk of harm to the buyer clients (that the scheme would unravel and the sale would be canceled once the sellers learned of it) was sufficient to warrant an informal admonition, given the language of DR 4-101(B) barring disclosure of information that "would be likely to be detrimental to the client."¹⁴⁰

In one reported matter, a single justice concluded that a lawyer had violated the predecessor to Rule 1.6, but declined to impose discipline. In *Matter of An Attorney*,¹⁴¹ the attorney represented a client in a personal injury matter. The attorney and client disagreed about the relevance of the client's attendance at a police academy to his claim of disability, and the client discharged the attorney. After the client returned with his father, a police officer, in order to use police resources to photocopy parts of the file, the attorney wrote to the police chief detailing the encounter and revealing the client's plans

¹³⁵ 25 Mass. Att'y Disc. R. 685 (2009).

¹³⁶ 23 Mass. Att'y Disc. R. 1015 (2007).

¹³⁷ 22 Mass. Att'y Disc. R. 901 (2006).

¹³⁸ That same misconduct would violate Rule 1.18 of the Model Rules, which Massachusetts had not adopted at the time. Rule 1.18 protects information from prospective clients in a fashion different from that of existing clients.

¹³⁹ 421 Mass. 619, 12 Mass. Att'y Disc. R. 580 (1996).

¹⁴⁰ 421 Mass. at 622-23, 12 Mass. Att'y Disc. R. at 586.

¹⁴¹ *Matter of an Attorney*, 18 Mass. Att'y Disc. R. 588 (2002).

to use the police lab for his personal business. Bar Counsel sought an admonition for this disclosure. The single justice concluded that the lawyer's actions violated DR 4-101 (the predecessor to Rule 1.6), but exercised his discretion and imposed no discipline. Noting the client's "outrageous conduct," the single justice wrote that "an isolated lapse in judgment does not necessarily constitute sanctionable conduct."

Practice Tip

Lawyers who engage in disputes with clients publicly through social media not only risk sanctions for violation of Rule 1.6. They also risk damage to their reputations, as such social media interactions often have high search engine value. Prospective clients or others searching for the lawyer on the internet may find that dispute appearing prominently on the search engine results.

III. The Nature of the Confidentiality Duty to Former Clients, and Sanctions for Violations of the Duty

RULE 1.9: DUTIES TO FORMER CLIENTS

* * *

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter,

(1) use confidential information relating to the representation to the disadvantage of the former client, or for the lawyer's advantage, or the advantage of a third person, except as Rule 1.6, Rule 3.3, or Rule 4.1 would permit or require with respect to a client; or

(2) reveal confidential information relating to the representation except as Rule 1.6, Rule 3.3, or Rule 4.1 would permit or require with respect to a client.

A. Discipline for Revealing or Using Former Client Confidences Under Rule 1.9(c)

Lawyers on occasion have been disciplined for their use, or their disclosure, of client information after the representation has ended. Some of these disciplinary matters appear later in this Chapter in the discussion of former client conflicts of interest.¹⁴²

¹⁴² See Part IV, Section III.A.

No lawyer has been disbarred or suspended solely for misuse of former client confidences in violation of Rule 1.9(c). Several lawyers have received admonitions or public reprimands.

Practice Tip

A lawyer properly may oppose her former client in a later matter, so long as the later matter is not substantially related to the earlier representation. But even if permitted to oppose a former client, the lawyer may not reveal or use information learned from the client in the first matter, unless that information is generally known.¹⁴³

1) Public Reprimand

Lawyers have been publicly reprimanded on occasion for disclosing the information of former clients. In *Matter of Hochberg*,¹⁴⁴ a lawyer represented new clients in a dispute against a former client, in a matter unrelated to the former representation. (Therefore, under Rule 1.9(a) the new representation seems to have been proper.) In response to a consumer protection demand letter sent by the former client's new lawyer, the respondent sought to attack the credibility of the former client by disclosing that the former client had not paid the respondent's legal bill, and that the former client had attempted to fabricate evidence in the previous matter. The BBO imposed a public reprimand for this misuse of the former client's confidences against him.

In *Matter of Horrigan*,¹⁴⁵ a case discussed in the conflicts Part of this chapter, the lawyer violated Rule 1.9(a), and then more seriously violated Rule 1.9(c), and received a public reprimand for that misconduct. After having represented a man in a personal injury and worker's compensation matter, the lawyer agreed to represent the man's wife in a divorce action. The lawyer then realized the conflict of interest and withdrew the same day. The respondent later gave to the wife the husband's medical records that had been obtained during the previous representation. Although neither the wife nor her lawyer reviewed the records (they returned them to the husband's divorce lawyer), and despite the absence of prior discipline or any other misconduct in the present proceeding, the lawyer's actions warranted a public reprimand.

¹⁴³ The ABA Model Rule includes the exception noted in the Tip for "generally known" matters. That same exception appears in comment [8] to in the Massachusetts version of Rule 1.9(c), presumably because if a fact is "generally known," it is not "confidential."

¹⁴⁴ 17 Mass. Att'y Disc. R. 304 (2001).

¹⁴⁵ 26 Mass. Att'y Disc. R. 250 (2010).

In *Matter of Acharya*,¹⁴⁶ a lawyer whose former client sought relief from an order by claiming that the respondent provided ineffective assistance of counsel defended herself from that charge by revealing more confidential information about her former client than was necessary. That misconduct, along with the less-than-competent legal services offered originally, led to the lawyer receiving a public reprimand.

2) Admonition

A few lawyers have been admonished for disclosure of confidential information belonging to a former client. The distinction between public reprimands and admonitions appears to be based on the harm, or risk of harm, caused to the former client. In AD 09-08,¹⁴⁷ the lawyer's misconduct was purely based on Rule 1.9(c). The respondent worked as a lawyer for a company and learned valuable information while there. She then left that employer and established her own business competing with her former client, and used information of the former client to its disadvantage. Similarly, in AD 09-13,¹⁴⁸ a lawyer assisted the wife of a former client in her divorce action against the former client by submitting an affidavit listing some faults of the former client, revealing confidential information in doing so. And in AD 08-09,¹⁴⁹ the lawyer offered to his client, as examples for their use in their own cases, copies of previous clients' divorce pleadings, thereby revealing those former clients' confidential information.¹⁵⁰

IV. Exceptions to the Duty of Confidentiality

A lawyer who reveals his client's confidential information is subject to discipline (and many examples exist of lawyers doing so), unless the lawyer has permission to make the disclosure, either from the client or from one of the exceptions identified in Rule 1.6 or 1.9. Almost all, but not all, of the exceptions to confidentiality are *discretionary*, not mandatory—that is, the lawyer may, but need not, disclose if the exception applies. In three kinds of settings, described below, a lawyer will be required to reveal some information that otherwise qualifies as confidential under Rule 1.6. A lawyer will have permission, or a duty, to disclose otherwise confidential information in the following instances:

1. *With client permission:* Of course, if a client agrees to disclosure, Rule 1.6(a) permits the lawyer to reveal information related to the representation. The rule requires that the lawyer obtain “informed consent” from the client, which the rules define as “the agreement by a person to a proposed course of conduct after the lawyer has

¹⁴⁶ 26 Mass. Att’y Disc. R. 4 (2010).

¹⁴⁷ 25 Mass. Att’y Disc. R. 667 (2009).

¹⁴⁸ 25 Mass. Att’y Disc. R. 676 (2009).

¹⁴⁹ 24 Mass. Att’y Disc. R. 856 (2008).

¹⁵⁰ The discipline in AD 08-09 demonstrates that the fact that client information is available in a court file open to the public does not deny that material protection as “confidential” under Rules 1.6(a) and 1.9(c).

communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”¹⁵¹

2. *In some instances, to prevent death, substantial bodily harm, or substantial financial injury to another:* Rule 1.6(b)(1) allows a lawyer the discretion (but not the obligation) to reveal client confidences, even over the express objection of his client, if necessary “to prevent reasonably certain death or substantial bodily harm, or to prevent the wrongful execution or incarceration of another.” Rule 1.6(b)(2) provides the same discretion “to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to property, financial, or other significant interests of another.” And, Rule 1.6(b)(3) allows a lawyer to disclose information when necessary “to prevent, mitigate or rectify substantial injury to property, the financial, or other significant interests of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.”

The ABA’s Model Rule is different from the above provisions in some minor ways. The Model Rule contracts the discretion under Rule 1.6(b)(2) for fraudulent acts leading to substantial financial injury by requiring that the fraud be related to the lawyer’s services.¹⁵² The Massachusetts rule adds “other significant interests” to the property and financial interests covered by the Model Rule’s exceptions. And the ABA rule also does not mention “wrongful execution or incarceration.” A wrongful execution would surely be covered by the “death”-prevention authority in the Model Rule, but a wrongful incarceration would require a factual determination that the confinement in question amounts to “substantial bodily harm.” In Massachusetts, no such factual determination would be necessary.

The discretion of a lawyer to disclose information to prevent a fraudulent act that will result in substantial financial harm, as just described, becomes a *mandatory* obligation if disclosure is necessary for the lawyer to avoid assisting in a crime or fraud. This requirement is addressed in the discussion of Rule 4.1 later in this chapter.

3. *To establish a claim or defense in a dispute with a client:* In what is known colloquially as the “self-defense” exception, Rule 1.6(b)(5) allows a lawyer to disclose enough, but only enough, confidential client information needed to defend against a claim, or to establish a claim, in a dispute with a client or former client. It also permits the lawyer to disclose confidential information in order “to respond to allegations in any proceeding concerning the lawyer’s representation of the client.” A lawyer who relies upon this exception to reveal unnecessary information in a dispute with a client will face discipline, so this discretionary exception must be employed with prudence and good judgment.

Questions of protecting client confidences and complying with Rule 1.6 also arise when a lawyer receives notice from the Office of the Bar Counsel that it has received a

¹⁵¹ Rule 1.0(f).

¹⁵² Compare Model Rule 1.6(b)(1), (2).

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¹⁵¹ Rule 1.0(f).

¹⁵² Compare Model Rule 1.6(b)(1), (2).

“request for investigation” (a “complaint”) about the lawyer’s conduct. As described in Chapter 5, Bar Counsel, upon receipt of a complaint about a lawyer, in most instances assigns the matter for investigation. The lawyer is typically asked to produce documents and otherwise communicate with Bar Counsel about the facts alleged in the complaint. In her response to Bar Counsel, the lawyer must consider the ramifications of her communicating confidential or privileged information to the agency. Similarly, if the disciplinary matter proceeds to a formal charge being filed, the lawyer will consider the scope of permissible disclosures in the course of her response to the complaint and during the resulting hearing and settlement processes.

The general rule in Massachusetts (and elsewhere) is that an attorney may disclose otherwise privileged communications in order to respond to allegations of misconduct. The client’s complaint effects a waiver of the client’s privilege.¹⁵³ If a person other than the attorney’s client makes the complaint, the common law doctrine across the country also permits the lawyer to reveal otherwise privileged information in order to establish a defense.¹⁵⁴ The same exception appears explicitly in the Massachusetts version of Rule 1.6(b)(5). The lawyer may reveal only such otherwise-privileged or otherwise-confidential information as is reasonably necessary to address the accusation. Revealing more than what is necessary may itself lead to discipline.¹⁵⁵

4. *To comply with other law*: Rule 1.6(b)(6) states a principle that should be obvious: If some outstanding legal obligation or court order requires that a lawyer disclose some matters otherwise qualifying as confidential client information, the lawyer has permission to comply with that other law. Note that this provision is discretionary. It implies that a lawyer may choose not to comply with other law, but the lawyer would then have violated that other law, which itself may create problems for lawyers under the Rules of Professional Conduct.

Practice Tip

If the lawyer has a good-faith question about her duty to comply with a subpoena or other court order which would involve the disclosure of confidential client

¹⁵³ See, e.g., SEC v. Forma, 117 F.R.D. 516, 524 (S.D.N.Y. 1987) (“The self-defense doctrine permits an attorney to disclose attorney-client communication in order to defend himself against accusations of wrongful conduct.”); Com. v. Silva, 455 Mass. 503, 529 (2009).

¹⁵⁴ See, e.g., Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974) (lawyer may reveal confidences or secrets necessary to defend himself against accusation of wrongful conduct alleged by non-client shareholder); Apex Mun. Fund v. N-Group Secs., 841 F.Supp. 1423, 1430 (S.D.Tex. 1993) (lawyer can use privileged information in defending against nonclient’s accusations even though client does not agree to waiver); Stirum v. Whalen, 811 F.Supp. 78 (N.D.N.Y. 1993) (protective order permitting disclosure by codefendant lawyer to defend against charge of assisting defendants in perpetrating fraud).

¹⁵⁵ See, e.g., A.D. 99-52, 15 Mass. Att’y Disc. R. 746 (1999); A.D. 99-42, 15 Mass. Att’y Disc. R. 726 (1999); A.D. 04-47, 20 Mass. Att’y Disc. R. 671 (2004); Matter of Harris, 20 Mass. Att’y Disc. R. 220 (2004); Matter of Markley, 20 Mass. Att’y Disc. R. 372 (2004); A.D. 06-16, 22 Mass. Att’y Disc. R. 884 (2006); A.D. 07-06, 23 Mass. Att’y Disc. R. 909 (2007); A.D. 07-35, 23 Mass. Att’y Disc. R. 1013 (2007); Matter of Acharya, 26 Mass. Att’y Disc. R. 4 (2010).

information, she should consider seeking a protective order to test the validity of the demand for disclosure.

5. *To perform certain conflict checks:* Rule 1.6(b)(7) allows a lawyer to disclose limited information about a client’s representation in order “to detect and resolve conflicts of interest arising from the lawyer’s potential change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.”

The next three exceptions—each mandatory—require that a lawyer reveal some client information, and face discipline if the lawyer fails to do so.

6. *To prevent or rectify fraud on a tribunal:* Under Rule 3.3(a)(3) and 3.3(b), a Massachusetts lawyer is required to take affirmative steps, including possibly informing others, if her client intends to engage, or has engaged, in perjury or similar fraud on a tribunal, even if those steps involve revelation of confidential information otherwise protected by Rule 1.6.¹⁵⁶ This treatise addresses the perjury questions in its consideration of Rule 3.3, later in this chapter at Part IV, Section II.

7. *To avoid assisting in a fraud:* As noted above, Rule 4.1 imposes upon lawyers in Massachusetts an affirmative duty to disclose material facts when necessary to avoid assisting a criminal or fraudulent act by a client, but only if that disclosure is not barred by Rule 1.6. Because Rule 1.6 *permits* disclosure of information necessary to prevent a criminal or fraudulent act by a client in certain circumstances, Rule 4.1 therefore *mandates* such disclosure when those conditions are met.

8. *To avoid obstruction of justice:* Rule 3.4(a) states that a Massachusetts lawyer must not “*unlawfully* obstruct another party’s access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value.”¹⁵⁷ Much common law from other states,¹⁵⁸ as well as the Restatement of the Law Governing Lawyers,¹⁵⁹ interprets the lawyer’s duty when having obtained evidence of a crime where a proceeding is pending to be to deliver such evidence to a public official, even if doing so reveals information related to the representation. A lawyer who fails to do so has violated Rule 3.4, by violating her duties under applicable obstruction of justice statutes.

¹⁵⁶ See, e.g., *Comm. v. Mitchell*, 438 Mass. 535 (2003). Rule 3.3 does offer special procedures for responding to intended perjury of a criminal defendant. See Rule 3.3(e).

¹⁵⁷ Rule 3.4(a) (emphasis added).

¹⁵⁸ See *State v. Olwell*, 394 P.2d 681 (Wash. 1964) (a knife); *In re Ryder*, 263 F. Supp. 360 (E.D. Va. 1967) (gun and stolen money); *Morrell v. State*, 575 P.2d 1200 (Alaska 1978) (handwritten kidnapping plan); *People v. Meredith*, 631 P.2d 46 (Cal. 1981) (murder victim’s wallet). The SJC has indicated its acceptance of that line of authority. See *Matter of a Grand Jury Investigation*, 470 Mass. 399, 400, 403–407 (2015).

¹⁵⁹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §119 (2000).

Part III

Allocation of Roles and Authority in the Attorney-Client Relationship (Rules 1.2, 1.4, 1.13, 1.14)

I. Introduction

In the course of representing a client, a lawyer will be confronted with countless decisions, from what aspect of the case to work on at any given hour, to choosing the most effective legal strategy, to recommending to a client whether to accept a settlement offer or instead proceed to trial. Some of those decisions remain within the discretion of the lawyer and her good judgment; others are the client's responsibility; and some ought to be made jointly by the lawyer and client. Typically, the allocation of responsibility question does not lead to the kind of misconduct that results in discipline, or even a disciplinary complaint. Sometimes, however, a lawyer will misread or misunderstand the substantive law governing the proper allocation of authority, and as a result may engage in misconduct. This Part reviews the substantive law and describes the types of sanctions that a lawyer may face if she fails to appreciate her proper role.

This Part describes four separate rules addressing the allocation of responsibility between a lawyer and her client—Rules 1.2, 1.4, 1.13, and 1.14. The Part identifies the basic thrust of each rule and describes respectively the kinds of sanctions lawyers have faced for misconduct involving those rules.

II. The Rules Governing a Lawyer's Responsibilities in Decisionmaking for a Client, and Sanctions for Related Misconduct

Rules 1.2 and 1.4 serve in tandem to establish a lawyer's duties about sharing responsibility with clients for the legal work a lawyer performs, and decisions about that legal work.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) A lawyer shall seek the lawful objectives of his or her client through reasonably available means permitted by law and these Rules. A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the

lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

RULE 1.4: COMMUNICATION

(a) A lawyer shall;

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

A. The Lessons of Rules 1.2 and 1.4

Lawyers are agents of and fiduciaries to their clients, and possess authority to act only from the client. But "there is much more involved [in this relationship] than mere agency. The relationship of attorney and client is paramount, and is subject to established

professional standards.”¹⁶⁰ The “established professional standards” allocate some decisions to clients and some to lawyers, with the client possessing the ultimate authority about the objectives and goals of the representation.¹⁶¹ At the same time, a lawyer may not assist a client in activity that is criminal or fraudulent, even if the client chooses to proceed in that fashion.¹⁶²

Locating the primary authority in the client does not, and as a practical matter cannot, mean that lawyers must look to clients to make every decision that arises in the course of representation. The Massachusetts Rules of Professional Conduct offer some guidance about the proper sharing of responsibility. Rule 1.2(a) confirms that the lawyer must seek the *lawful objectives* of the client, through “reasonably available means permitted by law”¹⁶³ The rule specifies certain decisions that must be made by the client, and may not be made unilaterally by the lawyer: whether to accept an offer of settlement of a matter, and, in criminal proceedings, whether to enter a plea, whether to waive a jury trial, and whether the client will testify.¹⁶⁴ By listing those discrete decisions as belonging to the client, Rule 1.2(a) implies that a lawyer may exercise discretion as to most other decisions in the course of the representation, although some that are not mentioned (such as the decision whether or not to appeal an adverse judgment) remain with the client.¹⁶⁵ The comments to Rule 1.2 emphasize that “lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.”¹⁶⁶ Rule 1.4, however, establishes that a lawyer must keep a client informed about the developments in a matter, implying that a lawyer may not make critical choices for a client without ensuring that the client understands the implications of those choices and accepts them.¹⁶⁷

The lesson of Rules 1.2 and 1.4 therefore is that lawyers must involve clients collaboratively in all substantial decisionmaking as a case progresses, even if the decisions are not those itemized by Rule 1.2. While some common law malpractice authority provides substance to that lesson,¹⁶⁸ no disciplinary authority from within the BBO jurisprudence exists showing that a lawyer has received discipline for making the

¹⁶⁰ *Burt v. Gahan*, 351 Mass. 340, 342 (1966).

¹⁶¹ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §§ 20–22 (2000).

¹⁶² MASS. RULES OF PROF’L CONDUCT R. 1.2(d) (1998); MASS. CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(6), (7) (1969); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 23(1) (2000). The limitations on assisting in criminal or fraudulent conduct are discussed elsewhere in this chapter. *See* Part VII.

¹⁶³ Rule 1.2(a).

¹⁶⁴ *Id.*

¹⁶⁵ RESTATEMENT, *supra*, § 22(1).

¹⁶⁶ Rule 1.2, Cmt. [2].

¹⁶⁷ *See* Rule 1.4(a), (b); *see also*, RESTATEMENT, *supra*, § 20.

¹⁶⁸ *See Williams v. Ely*, 423 Mass. 467 (1996) (law firm was negligent for failing to advise clients of the unsettled state of law and adverse consequences); *Moore v. Greenberg*, 834 F.2d 1105, 1107-08 (1st Cir. 1987) (finding of legal malpractice when attorney failed to advise client of opportunities of settlement); *Fishman v. Brooks*, 396 Mass. 643 (1985) (enunciating standard of care).

wrong judgment call on these allocation decisions. By contrast, a lawyer's failure to keep a client informed has frequently led to formal discipline.¹⁶⁹

A lawyer must refuse, however, to seek to achieve his client's chosen objectives if they constitute a crime or a fraud. Rule 1.2(d) states the following:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Lawyers are forbidden by Rule 1.2(d) from counseling clients in a way that assists, or encourages, the clients to engage in criminal or fraudulent action. Lawyers are not forbidden, though, from advising clients about the limits of the law, and explaining to them the consequences of violations of the law. Understandably, the dividing line between counseling a client to commit a crime, and explaining to that client the implications of engaging in that criminal action (which may include the likelihood of detection and the level of punishment expected should detection occur), is a slippery one. But the line exists.¹⁷⁰ Lawyers have permission to perform the latter kind of counseling; they do not have permission to perform the former kind of counseling, and will risk discipline if they do so.

The Rule 1.2(d) prohibition does not apply to conduct that is not criminal or fraudulent. A lawyer may properly advise her client about the legal consequences of breaching a valid contract, and in doing so may encourage the client to commit such a breach. The lawyer may counsel a client about other non-criminal and non-fraudulent actions that may be inconsistent with some law or some legal obligation, including violation of regulatory mandates (for example, copyright infringement) or tortious conduct, even if doing so encourages that activity.¹⁷¹ Of course, a lawyer may (and most often should) properly engage the client in moral conversation about the wisdom of such activity.¹⁷²

A lawyer may also limit his representation of a client in some circumstances with informed consent of the client. According to Rule 1.2(c), "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Rule 1.2(c), properly invoked, permits a lawyer not to perform certain tasks that a lawyer ordinarily would accomplish in the course of typical representation. A lawyer and a client may agree, subject to the lawyer's duties of competence as expressed in Rule 1.1 and to a vigorous informed consent process, to limit

¹⁶⁹ See *Matter of Galica*, 26 Mass. Att'y Disc. R. 213 (2010); *Matter of Gately*, 23 Mass. Att'y Disc. R. 179 (2007); *Matter of Lipton*, 20 Mass. Att'y Disc. R. 336 (2004).

¹⁷⁰ See Geoffrey C. Hazard, *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669, 672, 678, 682 (1981); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1554-58 (1995).

¹⁷¹ See Rule 1.2(d) cmt. [9].

¹⁷² See Rule 2.1.

the scope of the representation to selected discrete activities, usually to save the client money (or, in public interest settings, to allocate a lawyer's limited time and resources in the most efficient fashion).¹⁷³ The most common example of this kind of limited representation is "unbundled" legal services, discussed elsewhere in this chapter in the section on competence.¹⁷⁴

B. Discipline for Violation of Rule 1.2(a) and (c)

1) Disbarment

The SJC has disbarred lawyers for misconduct involving making significant legal decisions without client authority, and then misrepresenting the status of matters to the clients or to others. In each case, however, the lawyer committed multiple instances of misconduct. No lawyer has been disbarred in Massachusetts solely for a violation of Rule 1.2. For instance, in *Matter of Cobb*,¹⁷⁵ a lawyer was disbarred for serious misconduct involving three separate clients, one instance of which involved accepting a settlement offer after his client had repeatedly refused to authorize settlement at that figure. The lawyer later claimed, falsely, to have proof of his authority to settle the case. And in *Matter of McBride*,¹⁷⁶ a lawyer was disbarred for multiple instances of misconduct, including settling a lawsuit without any client permission and then mishandling the resulting proceeds.¹⁷⁷

*Matter of Marani*¹⁷⁸ offers an instructive basis to understand the appropriate level of discipline in cases where a lawyer settles a client's matter without authority. In *Marani*, the attorney represented the client in recovering damages for injuries that were sustained in a motor vehicle accident. The attorney settled the claim without informing the client by filling in an amount of money in a release previously signed by the client and sending the release to the insurer. Once the attorney received the settlement check, he failed to notify the client that he had settled or had received the check and instead deposited the check into a commingled client funds account. The attorney continued to misrepresent to the client that he needed to sign a new release form to settle and that the funds could not be disbursed due to additional paperwork. Those actions led the Board to recommend a two-year suspension. The Board then discovered that the lawyer had

¹⁷³ The SJC allows attorneys to provide limited assistance representation in the trial courts under certain conditions. See Mass. Sup. Jud. Ct., Order In Re: Limited Assistance Representation (Apr. 10, 2009), available at <http://www.mass.gov/courts/case-legal-res/rules-of-court/sjc/lar.html>.

¹⁷⁴ "Unbundled" legal services refers to an arrangement by which a lawyer agrees to perform certain discrete tasks for a client but not to represent the client fully on a matter. See Part I of this chapter for a discussion of that kind of arrangement.

¹⁷⁵ 445 Mass. 452, 21 Mass. Att'y Disc. R. 93 (2005).

¹⁷⁶ 449 Mass. 154, 23 Mass. Att'y Disc. R. 443 (2007).

¹⁷⁷ See also *Matter of Siciliano*, 23 Mass. Att'y Disc. R. 654 (2007) (lawyer resigned, and Court imposed order of disbarment, after lawyer settled civil matter without client permission, including forging client signatures, and, in a separate matters, misappropriated more than \$200,000 in real estate funds he held in escrow).

¹⁷⁸ 14 Mass. Att'y Disc. R. 464 (1998).

misappropriated close to \$190,000 in client funds in other matters, and with that new information the Board recommended, and the SJC entered, a judgment of disbarment.¹⁷⁹

Other lawyers have been disbarred for misconduct involving an ostensible violation of Rule 1.2, when the lawyers mishandled or misappropriated client funds and the SJC cited that rule as one basis for discipline (given that the lawyers, by taking client funds without permission, had violated Rule 1.2(a)).¹⁸⁰ Other lawyers have been disbarred for misconduct involving Rule 1.2 when they egregiously neglected client matters and caused the clients significant harm.¹⁸¹ Those types of misconduct are discussed elsewhere in this chapter.

2) Suspension

You Should Know

Lawyers who settle litigation matters without client permission—particularly when done to ensure the lawyer’s contingent fee—will likely receive term suspensions, with longer terms imposed when the lawyer has misrepresented the nature of his misconduct.

Settlement of a client’s case without authority frequently results in the lawyer’s suspension. An apt example is *Matter of Traficonte*.¹⁸² There, the respondent settled a class action without client consent, and proceeded to mislead the named plaintiffs about the status of the settlement, including the lawyer’s substantial attorney fee award. The hearing report, adopted by the single justice in affirming a one-year suspension for the respondent, noted that “[d]uring the negotiations with [the defendant], the Respondent was motivated by the best of intentions on behalf of his clients, and sincerely and reasonably believed that he was obtaining the best result possible for his clients. He believed that his chances for successfully prosecuting the class action were dim.” Nevertheless, he had no authority to settle, and dissembled after doing so. The single justice rejected a public reprimand because the clients were harmed by the lawyer’s actions, and because the misconduct involved a conflict of interest (due to the fees available) and misrepresentation.¹⁸³

¹⁷⁹ See also *Matter of Corben*, 11 Mass. Att’y Disc. R. 47 (1995) (lawyers settled client matters without consent and forged client signatures, but also on several occasions misappropriated client funds; affidavit of resignation accepted and order of disbarment entered).

¹⁸⁰ See, e.g., *Matter of LiBassi*, 449 Mass. 1014, 23 Mass. Att’y Disc. R. 396 (2007); *Matter of Dahl*, 14 Mass. Att’y Disc. R. 187 (1998); *Matter of Okai*, 13 Mass. Att’y Disc. R. 595 (1997).

¹⁸¹ See, e.g., *Matter of O’Desky*, 24 Mass. Att’y Disc. R. 512 (2008); *Matter of Cohen*, 27 Mass. Att’y Disc. R. 143 (2011); *Matter of Espinosa*, 28 Mass. Att’y Disc. R. 307 (2012).

¹⁸² 22 Mass. Att’y Disc. R. 747 (2006).

¹⁸³ While *Traficonte* clearly violated DR 5-106(A) by settling a matter without client consent, it is important to note that in the context of class actions, the authority of the named plaintiffs to control the litigation is considerably less than in ordinary civil or criminal litigation. The lawyer’s duty is to the class, not to the named plaintiff individually. For examples of disputes about this principle, see *Bartle v. Berry*, 80 Mass.App.Ct. 372 (2011); *Ehrlich v. Stern*, 74 Mass.App.Ct. 531 (2009) (both concerning class action disputes involving claims against the distributor of Poland Springs bottled water).

Other lawyers have been suspended for settling matters without client authority. In *Matter of Buck*,¹⁸⁴ a lawyer was suspended for one year for conduct similar to that in *Traficante*. In *Buck*, the lawyer settled a personal injury case without any client authority, and without sufficient medical evidence to warrant a settlement. He then instructed his secretary to forge his clients' signatures to the settlement check. The single justice rejected the parties' stipulated agreement for a three-month suspension, and imposed the one-year suspension.¹⁸⁵

In *Matter of Chancellor*,¹⁸⁶ where the lawyer settled a client's matter without client permission in order to receive a contingent fee, the lawyer was suspended indefinitely. The attorney settled his client's claim without consulting the client about the settlement amount or obtaining the client's consent. The attorney used the client's share of the settlement and continually misrepresented matters to the client. The lawyer also mishandled his IOLTA account and responded untruthfully to the Bar Counsel investigation, factors that account for his more serious discipline.

In *Matter of King*,¹⁸⁷ an attorney was suspended for two months, by stipulation, for violating Rule 1.2(a) in two matters. In the first matter, after a dissatisfied client sought successor counsel, the successor counsel repeatedly informed the attorney that he was now discharged and to transfer the client's files. Instead of sending the client's file to the successor counsel, the attorney filed suit on behalf of the client, without informing the client or obtaining her consent. In the second matter, the attorney was discharged after his client retained new counsel but failed to withdraw. He settled the client's claim without the client's knowledge and consent, and took his fee from the settlement.

Another example of a lawyer settling a case without authority, but this time on the defense side, was *Matter of Leone*.¹⁸⁸ The respondent was suspended for one year for misrepresenting to the court and to opposing counsel that she had authority to settle a case, in violation of DR 7-102(A)(5). The respondent shared office space with a lawyer (the "referring lawyer") who asked the respondent for assistance representing a defendant in a civil action, granting her the authority to settle for not more than \$1,500. Contrary to this instruction, the respondent settled the case for \$3,000 after misrepresenting to the opposing counsel that she had the authority to do so. The attorney then signed the referring lawyer's name to court documents and misrepresented facts to Bar Counsel during its investigation. Those latter elements likely accounted for the serious suspension.

¹⁸⁴ *Matter of Buck*, 22 Mass. Att'y Disc. R. 121 (2006).

¹⁸⁵ The lawyer offered evidence of several mitigating factors, which may account for the three-month suspension stipulation.

¹⁸⁶ 28 Mass. Att'y Disc. R. 150 (2012); *see also* *Matter of Thalheimer*, 24 Mass. Att'y Disc. R. 684 (2008) (indefinite suspension); *Matter of Barrese*, 21 Mass. Att'y Disc. R. 30 (2005) (indefinite suspension).

¹⁸⁷ 23 Mass. Att'y Disc. R. 352 (2007).

¹⁸⁸ 19 Mass. Att'y Disc. R. 236 (2003).

A lawyer can also be suspended for violations of Rule 1.2 that do not involve the failure to obtain client authorization of a settlement. In *Matter of Bozzotto*,¹⁸⁹ the respondent engaged in multiple violations of Rule 1.2(a) (along with Rules 1.1, 1.3, and 1.4) by not telling an institutional client what he was—or was not—doing on three different matters he was handling for that client. He engaged in similar misconduct on a fourth matter for an individual client. The respondent was suspended indefinitely after he failed to cooperate with Bar Counsel’s investigation (leading to an administrative suspension) and then engaged in the unauthorized practice of law while on suspension and failed to participate in the disciplinary proceedings.

3) Public Reprimand

You Should Know

Lawyers who act without proper client authority but do so without selfish or evil intentions, and whose clients do not suffer substantial harm, may receive a public reprimand rather than a suspension.

Whether one receives a public reprimand or a term suspension seems to turn on whether the lawyer was acting in her own selfish interest when proceeding without client permission and the extent of the resulting harm. For instance, in *Matter of Malaguti*,¹⁹⁰ an attorney handled real estate closings for a company that itself served as an agent for lenders. The lawyer did not attend two closings and had not advised the clients that he would not attend. The Board treated that limitation of representation as one requiring client consent, which the lawyer did not obtain. The lawyer also paid insufficient attention to the documents and caused some harm to at least one client by that inattention.

In *Matter of Blake*,¹⁹¹ an attorney violated Rule 1.2 by continuing to prosecute an action over his client’s objection. The client was the administratrix of the estate of her sister and brother; the attorney and client disagreed whether three bank accounts left in the siblings’ names were joint accounts. The client opposed the filing of an action in probate court to determine how the court would treat the accounts; instead, she instructed her lawyer to file tax returns, which the attorney did not do. This violation of Rule 1.2 also led to a violation of Rule 1.5, as the lawyer charged substantial, and unnecessary, fees for the resulting years of litigation.

In *Matter of Weiss*,¹⁹² an attorney received a public reprimand for violating Rule 1.2(a) by settling a case for \$500 without his client’s permission. The small claims court complaint had sought \$750 in damages in addition to multiple damages and attorneys’ fees. The attorney did not discuss the possibility of settlement or did he obtain the client’s consent to settle the claim. The client ultimately was not harmed, as he

¹⁸⁹ 27 Mass Att’y Disc. R. 58 (2011).

¹⁹⁰ 27 Mass. Att’y Disc. R. 566 (2011).

¹⁹¹ 26 Mass. Att’y Disc. R. 52 (2010).

¹⁹² 22 Mass. Att’y Disc. R. 787 (2006).

challenged the settlement agreement and received \$750. But in aggravation, the lawyer had been previously disciplined. The order imposing a public reprimand included a condition that the lawyer pass the MPRE within a year; if not, the sanction would instead be a one-month suspension.

In *Matter of Mason*¹⁹³ an attorney received a public reprimand for withdrawing an objection in bankruptcy court without consulting his client, in violation of DR 7-101(A)(1), (2), and (3).¹⁹⁴ The bankruptcy trustee had submitted a final report that excluded a negotiated homestead exemption. In response, the attorney filed an objection but decided to withdraw the objection without discussing that strategy with his client. The attorney also failed to advise the client that the objection had been withdrawn. As a result, the case closed with the trustee's inaccurate final report.¹⁹⁵

4) Admonition

You Should Know

If a lawyer acts without client authority, and no serious harm occurs, the lawyer will likely receive an admonition, unless the lawyer makes misrepresentations to a court.

Lawyers who acted without client consent with little or no harm to the client frequently have received admonitions. For example, in AD 99-22,¹⁹⁶ an attorney added unauthorized language to a mortgage in violation of Rule 1.2(a). In an effort to protect some property after the client lost a lawsuit, the lawyer inserted into a mortgage certain language that he believed would be useful, but about which he did not counsel his client. When circumstances later changed, the added language came to light, and the client complained. The attorney acknowledged that he was not authorized to insert the language, although the Board concluded that his assumptions about the client's intentions were logical. The attorney took steps to rectify the mistake. Similarly, in PR 92-30,¹⁹⁷ an attorney printed his client's name on the back of two checks payable to the client and negotiated them. Although the attorney believed that his client intended him to use the funds as payment toward legal fees, the attorney violated DR 1-102(A)(4) because he never had the client's express authority to do so.

¹⁹³ 17 Mass. Att'y Disc. R. 408 (2001).

¹⁹⁴ Under the previous Massachusetts Code, DR 7-101(A)(1), (2), and (3) served as the equivalent of Rule 1.2. The provisions addressed the following duties: "(A) A lawyer shall not intentionally: (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law . . . ; (2) Fail to carry out a contract of employment entered into with a client for professional services . . . ; (3) Prejudice or damage his client during the course of the professional relationship . . ." each subject to some exceptions not included here.

¹⁹⁵ See also *Matter of Bixby*, 17 Mass. Att'y Disc. R. 81 (2001) (dismissal of case without client's authorization resulted in a public reprimand).

¹⁹⁶ 15 Mass. Att'y Disc. R. 687 (1999).

¹⁹⁷ 8 Mass. Att'y Disc. R. 321 (1992).

In one case where the facts were seemingly even more egregious, the Board also imposed an admonition. In AD 06-37,¹⁹⁸ an attorney violated Rule 1.2 while representing an incarcerated client. The attorney filed a tort complaint on behalf of his client, but the lawyer expected the client to pursue the matter himself, even though the client was in jail. The lawyer did not discuss the limits of his representation with the client; as a result the client did not respond to discovery requests in that lawsuit and the court ultimately dismissed the matter. The respondent was a relatively new lawyer and he made adequate restitution to the client, factors which may have influenced the Board to admonish the lawyer rather than to reprimand him publicly.

In each of these admonitions, the lawyer did not misrepresent his authority to others, and that factor seemed relevant to the sanction imposed.

C. Discipline for Violation of Rule 1.4

1) Disbarment

The SJC has disbarred lawyers for misconduct involving Rule 1.4, but typically in connection with other, related, serious rule violations. Because lawyers who misappropriate client funds or engage in conflicts of interest usually do not keep their clients sufficiently apprised of developments in the matters, virtually every such disciplinary opinion includes a reference to Rule 1.4.¹⁹⁹ Also, several Rule 1.4 disbarments related to the respondents' serious neglect of client matters, as neglect almost inevitably includes a failure to keep the client apprised of developments.²⁰⁰ Part I of this chapter addresses Rule 1.4 violations in that context. But some lawyers have been disbarred for serious misconduct that centrally included failing to keep a client informed about the status of a matter, or failing to explain a matter adequately to the client.

*Matter of Espinosa*²⁰¹ is one such matter. In *Espinosa*, the attorney represented a mother and her two minor sons who retained the lawyer to adjust their immigration status. The attorney failed to pursue adjustment of all three clients without adequately explaining to his clients the reason for his actions, in violation of Rule 1.4(a) and (b); violated Rule 1.4 by failing to advise the mother about the status of the sons' petitions,

¹⁹⁸ 22 Mass. Att'y Disc. R. 897 (2006).

¹⁹⁹ See, e.g., *Matter of Arnowitz*, 27 Mass. Att'y Disc. R. 10 (2011) (failure to inform client of settlement, approval of release without client consent, and signing stipulation of dismissal without notifying the client); *Matter of Campanella*, 22 Mass. Att'y Disc. R. 122 (2006) (settled matter without client consent, misappropriated the proceeds); *Matter of Pinson*, 25 Mass. Att'y Disc. R. 496 (2009) (settlement of several personal injury matters without informed consent); *Matter of Reynolds*, 28 Mass. Att'y Disc. R. 723 (2012) (misappropriating client funds); *Matter of Steele*, 24 Mass. Att'y Disc. R. 662 (2008) (mismanagement of liens on personal injury award).

²⁰⁰ See, e.g., *Matter of Michael Berry Cohen*, 27 Mass. Att'y Disc. R. 143 (2011) (neglect of divorce and trademark matters); *Matter of Daniels*, 27 Mass. Att'y Disc. R. 159 (2011) (misrepresentation to clients about neglected matters); *Matter of O'Desky*, 24 Mass. Att'y Disc. R. 512 (2008) (neglect of divorce client matters; misappropriating funds).

²⁰¹ 28 Mass. Att'y Disc. R. 307 (2012). The respondent had previously resigned and been disbarred, 7 Mass. Att'y Disc. R. 95 (1991) and reinstated, 13 Mass. Att'y Disc. R. 197 (1997). This was therefore his second disbarment.

which had been denied; and failed to inform a different client about a hearing in immigration court and explain adequately that the lawyer's strategy to gain legal residency would present significant risks. The attorney advised the latter client not to appear at the hearing, and the court ordered that the client be deported in absentia. This misconduct combined with the significant harm to the clients warranted disbarment.

In *Matter of Mangano*,²⁰² an attorney violated Rule 1.4(a) and (b) by failing to inform several bankruptcy clients that he was not authorized to practice law in the Bankruptcy Court. He later abandoned his solo practice without notice to his clients and without taking adequate steps to protect his clients' interests, leaving his clients' confidential records and files unsecured at his law office. The attorney then withdrew from representation without notice to his clients, who had relied on him to file bankruptcy petitions. The SJC ordered that he be disbarred.²⁰³

2) Suspension

Practice Tip

Lawyers sometimes act on their own without keeping their clients informed about their actions, or obtaining client consent to the lawyer's strategy. That mistake can lead to a term suspension if a client is harmed as a result. Lawyers who repeatedly keep clients in the dark will receive lengthy suspensions.

The Disciplinary Reports since 1999 contain more than 150 suspension decisions in which the lawyer violated Rule 1.4, usually along with other rules. As noted above in the disbarment discussion, most of those suspensions resulted from serious misconduct accompanied by the lawyer's failure to inform the client of matters (which most often were going terribly wrong). On occasion, however, a suspension will result from misconduct in which Rule 1.4 played a more significant role. For instance, in *Matter of Grayer*,²⁰⁴ the SJC imposed a one-year suspension on a lawyer who in three separate instances used the services of a lawyer who was not a member of his law firm, without notifying the client of that referral and collaboration. The new lawyer's fees were significantly higher than those of the respondent, leading to higher bills than the client expected. While other misconduct occurred as well, the primary failure of the lawyer was not keeping his clients apprised of how he was managing their cases.

In *Matter of Donovan*,²⁰⁵ while representing a husband in a divorce proceeding, the attorney was unreachable and failed to respond to the client's calls. In another divorce matter, she failed to advise her client of a pretrial hearing and abandoned the matter without notice. In a personal injury case, she did not inform her client that her

²⁰² 28 Mass. Att'y Disc. R. 600 (2012).

²⁰³ See also *Matter of Sachar*, 25 Mass. Att'y Disc. R. 539 (2009); *Matter of Conley*, 25 Mass. Att'y Disc. R. 138 (2009); *Matter of Osagiede*, 24 Mass. Att'y Disc. R. 523 (2008).

²⁰⁴ 23 Mass. Att'y Disc. R. 215 (2007).

²⁰⁵ 27 Mass. Att'y Disc. R. 229 (2011).

telephone service had been disconnected and that she was no longer working on the case. Lastly, in another personal injury matter in which she represented a juvenile, the attorney failed to advise the child's mother that a guardian ad litem needed to be appointed. The attorney further violated Rule 1.4 by failing to respond to the client's requests for information and by abandoning the case without notice. She was suspended for eighteen months.

In *Matter of Nealon*,²⁰⁶ an attorney failed to communicate the basis or rate of his fee to his clients, a husband and wife who had a dispute with a builder. When the attorney received settlement funds from the builder, he failed to notify his clients within a reasonable time (but did remove funds to pay himself, also without notice to the client). In another case, the attorney represented an elderly couple who were involved in an automobile accident and wanted him to help them with estate-planning matters. The husband died shortly after the clients hired the attorney, leaving the wife as the sole beneficiary of her husband's estate. The attorney decided that neither of the two automobile accident claims was worth litigating and thus did not file suit within the statute of limitations, without informing the wife. He was suspended for six months, with four months stayed.

3) Public Reprimand

You Should Know

Most public reprimands involving a failure to maintain adequate communication with a client as required by Rule 1.4 also include other misconduct.

The Disciplinary Reports since 1999 contain more than 100 public reprimand decisions where the lawyer violated Rule 1.4, and most of those decisions involve other wrongdoing. One public reprimand where Rule 1.4 played a more significant role was *Matter of Atwood*.²⁰⁷ In *Atwood*, several different clients filed complaints with the Bar Counsel against the attorney after he charged fees that he never adequately explained to the clients. While his conduct violated Rule 1.5, it also violated his duties under Rule 1.4. *Matter of Mancuso*²⁰⁸ is another matter where a public reprimand resulted from essentially a breach of communication duties. In *Mancuso*, the attorney knowingly gave his client an unreliable phone number (a cell phone whose services was frequently cut off because of billing problems) and failed to reply to several letters from a client who was in prison.²⁰⁹

²⁰⁶ 26 Mass. Att'y Disc. R. 427 (2010).

²⁰⁷ 26 Mass. Att'y Disc. R. 12 (2010).

²⁰⁸ 24 Mass. Att'y Disc. R. 465 (2008).

²⁰⁹ For a similar set of facts, where a lawyer received a public reprimand for his persistent failure to respond to client inquiries, see *Matter of Kwait*, 22 Mass. Att'y Disc. R. 434 (2006).

Several other public reprimand matters also involved a significant breach of the duties required by Rule 1.4. In *Matter of McGuirk*,²¹⁰ a lawyer received a public reprimand after a pattern of failing to respond to repeated inquiries by two separate clients, as well as by failing to advise a client about the effects of a guardianship proceeding. In *Matter of Pepe*,²¹¹ an attorney received a public reprimand for misconduct that included serious violations of Rule 1.4(a) and (b). The lawyer represented a tenant in a summary process proceeding, and after failing to respond to discovery, he did not inform his client about the court hearings resulting from his non-response. Even after the client discharged the attorney he did not tell her about the next court hearing scheduled in her case. In *Matter Doyle*,²¹² an attorney received a public reprimand for violating Rule 1.4, among other instances of misconduct. The attorney failed to back up his data and lost all of it when his computer crashed; as a result he stopped working on the case. The attorney neither disclosed to the client the loss of information nor informed her that he was no longer working on her case, in violation of 1.4. While the client suffered no harm (and therefore the respondent might have received an admonition (see below)), the lawyer's mishandling of the retainer paid by the client contributed to his public discipline.

4) Admonition

You Should Know

The disciplinary reports show that a lawyer's failure to keep a client informed, without other misconduct and without any serious prejudice to the client, will most likely result in an admonition.

Lawyers have received admonitions for failing to maintain adequate communication with a client, absent serious harm to the clients. For instance, in AD 07-18,²¹³ an attorney violated Rule 1.4(a) and Rule 8.4(c). He was not able to file his client's complaint immediately but falsely reported to the client that he had done so. He made additional false statements concerning the progress of the case. The client discharged the respondent and suffered no harm in the end. In AD 06-39,²¹⁴ an attorney failed to notify his client promptly of the dismissal of her wrongful termination lawsuit, to respond in a timely fashion to his client's inquiries, and to refile the suit. And in AD 99-74,²¹⁵ an attorney violated Rule 1.4(a) and (b). The attorney was appointed to represent a client in an appeal of his convictions. The attorney neither met the client nor spoke with him at all before filing the appellate brief. Even after filing the brief, the attorney made no attempt to meet the client.

²¹⁰ 26 Mass. Att'y Disc. R. 355 (2010).

²¹¹ 26 Mass. Att'y Disc. R. 497 (2010); *see also* *Matter of Berkland*, 26 Mass. Att'y Disc. R. 40 (2010) (attorney received public reprimand for repeatedly failing to respond to interrogatories and failing to inform his client).

²¹² 26 Mass. Att'y Disc. R. 143 (2010).

²¹³ 23 Mass. Att'y Disc. R. 968 (2007).

²¹⁴ 22 Mass. Att'y Disc. R. 935 (2006).

²¹⁵ 15 Mass. Att'y Disc. R. 789 (1999).

III. Allocation of Decisionmaking Authority with Organizational Clients

Rules 1.2 and 1.4 apply to all lawyers, whether representing individual clients or organizations. Lawyers representing organizations have distinct duties, however, as described in Rule 1.13.

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

A. The Allocation of Decisionmaking Principles Applied to Organizational Clients

1. Rule 1.13's Guidance on Representing Organizations

Rule 1.13 offers some guidance on how properly to counsel organizational clients, such as corporations or LLCs. Some lawyers have been disciplined for failing to conform to the dictates of Rule 1.13.²¹⁶

Rule 1.13(a) provides that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” The individual person with whom a lawyer interacts for an organization is *not* the lawyer’s client, even if she acts like the client and the lawyer treats her as the client. The client is the organization. In allocating decisionmaking authority in the organizational setting, the lawyer must rely for guidance on the “duly authorized constituents” of the organization. Ordinarily, the constituent authorized to provide guidance to the lawyer will be crystal clear (for instance, a CEO, vice-president, or general counsel of an established corporation). In some less-common instances, though, it will not be clear at all who lawfully speaks for the client, especially, for instance, when an organization encounters internal disputes. Rule 1.13 does not resolve those questions for the lawyer, except to require the lawyer to follow the direction of the “duly authorized” constituents. The lawyer must instead rely on substantive corporate law and agency principles to discern whose directions the lawyer ought to honor.²¹⁷

The other significant implication of Rule 1.13(a) is that a lawyer sometimes may not rely on a purportedly authorized constituent if the lawyer has reason to believe that a superior constituent would disapprove of the proposed course of action, or if the lawyer concludes that the proposed course of action is not in the best interests of the organizational client. Lawyers have the right to approach a higher authority within the organization to confirm or determine that a proposed course of action is in fact what the

²¹⁶ See, e.g., *Matter of Wise*, 16 Mass. Att’y Disc. R. 416 (2000).

²¹⁷ For one widely-cited discussion of this tension, see William H. Simon, *Whom (Or What) Does the Organization’s Lawyer Represent: An Anatomy of Intraclient Conflict?*, 91 CAL. L. REV. 57 (2003).

organization wishes to take. In settings where the client's constituent is breaching an obligation to the organization and creating a likelihood of substantial harm to the client, the lawyer must approach the higher authority.²¹⁸ A lawyer who fails to determine what the organization itself chooses to do, in circumstances where a reasonable lawyer would understand the need to seek some further confirmation, has violated her responsibility to her organizational client, and therefore has violated Rules 1.2, 1.4, and 1.13. No reported disciplinary decision has sanctioned a lawyer for having made the wrong call in such a setting.²¹⁹

Nothing in Rule 1.13 relieves a lawyer from the responsibility to honor the obligation established by Rule 1.2(d) not to assist in conduct that is criminal or fraudulent. Rule 1.13(b) adds a further obligation to a lawyer representing an organization. It states:

If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Under this standard, a Massachusetts lawyer must *do something* when she discovers that the organizational constituents are engaging in conduct that is either a violation of a legal obligation to the organization (e.g., embezzlement) or a violation of law to be imputed to the organization (e.g., pollution), if either of those actions is likely to cause substantial harm to the organization and is a matter related to the representation. What the lawyer typically must do is to counsel the constituent about ceasing or rectifying the improper action, and (if that does not solve the problem) then to report the improper action to a higher authority within the organization. In some instances, a lawyer may report the misconduct outside the organization, even if such reporting would not otherwise be permitted under Rule 1.6.²²⁰

²¹⁸ Rule 1.13(b). Sometimes substantive law apart from the rules of professional conduct impose additional duties to report potential wrongdoing. *See, e.g.*, SEC Rule 205, 17 C.F.R. § 205 (implementing the Sarbanes-Oxley Act of 2002, P.L. 107-204, 116 Stat. 745).

²¹⁹ In other jurisdictions lawyers have on occasion received discipline for mishandling their duties under Rule 1.13. *See, e.g.*, *Ky. B. Ass'n v. Hines*, 399 S.W.3d 750 (Ky. 2013) (120-day suspension after lawyer acted in the best interests of the organization and challenged majority shareholders and board members).

²²⁰ Rule 1.13(c). That provision permits the lawyer to reveal information outside of the client, even if not permitted by Rule 1.6, if the highest authority in the organization fails or refuses to address misconduct related to the representation, "but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization."

2. The Constituent/Client Distinction

The most common ethical challenge for the lawyer representing an organization (and especially a close corporation) is to maintain the distinction between the constituents of the organization—the managers, employees, and others with whom the lawyer works every day—and the client itself, which is the entity. Constituents frequently believe that the company lawyer serves as *their* lawyer. That is a common mistake.²²¹ While the lawyer may look to the constituents to act as “the client,” they are not the lawyer’s client in any person or individual capacity (absent a separate agreement). Rule 1.13(f) addresses this concern as follows:

In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

A lawyer representing an organization therefore must be vigilant in assessing whether the employee or agent with whom she is speaking understands that the lawyer is not that person’s individual lawyer, she must advise the constituent about the lawyer’s role if there appears to be any uncertainty. Some refer to this kind of Rule 1.13(f) advice (which is also consistent with Rule 4.3 obligations) as a “corporate Miranda warning,” given its importance in protecting against the inadvertent establishment of an attorney-client relationship.²²²

Practice Tip

Lawyers who represent organizations, including public agencies, frequently come to consider their supervisors in the organization as their “client.” That reaction is understandable, but it is wrong and can be risky to the lawyer and the organization, as the *Bulger* matter below shows.

B. Discipline for Violation of Rule 1.13

While Rule 1.13 presents subtle and complicated issues for lawyers representing organizations, few lawyers have been disciplined for a violation of that rule. In one reported disciplinary case, *Matter of Wise*,²²³ the attorney was suspended for six months for misconduct arising from his representation of a nonprofit organization engaged in an internal struggle for control. The lawyer took actions at the direction of former members of the corporation’s board of directors, who claimed that their removal from the board was not lawful and therefore they still spoke for the nonprofit. Because the lawyer’s

²²¹ See, e.g., *Robertson v. Snow*, 404 Mass. 515, 521 (1989) (“An attorney for a corporation does not simply by virtue of that capacity become the attorney for . . . its officers, directors or shareholders.”).

²²² See Peter A. Joy & Kevin C. McMunigal, *Corporate Miranda Warnings*, 25 ABA CRIMINAL JUSTICE 47 (Summer 2010); *United States v. Ruehle*, 583 F.3d 600, 604 n.3 (9th Cir. 2009).

²²³ 433 Mass. 80, 16 Mass. Att’y Disc. R. 416 (2000).

action occurred before the adoption of the Massachusetts Rules of Professional Conduct, the SJC concluded that Rule 1.13 did not apply, but implied that the lawyer's actions may have breached duties under that rule if it had been in effect.²²⁴ By favoring and cooperating with the dissident faction within an internal organizational dispute, and at a time when the opposing faction was questioning his bill for attorney's fees, the lawyer violated the rules governing conflicts of interest, revelation of client confidences, and contact with a party represented by counsel.²²⁵ *Wise* serves as an important warning to lawyers who represent organizations about the need for care in determining who speaks for the client.

In *Matter of Bulger*,²²⁶ the respondent received a public reprimand after he continued to communicate confidential client information to a former constituent of the government agency for which he worked. The former constituent was the head of the agency who had been placed on administrative leave after allegations of wrongdoing. The respondent sought to lessen his sanction by claiming that the circumstances created confusion about the identity of his client, but the Board rejected that claim as "willful blindness."

IV. Allocation of Decision-making Authority for Clients with Diminished Capacity

Rules 1.2 and 1.4 assume a client who is capable of shared decisionmaking about the client's matters. Sometimes, however, clients suffer from impairments that hamper their ability to participate meaningfully in the progress of their legal matters. Rule 1.14 addresses the lawyer's responsibilities in such settings. Few lawyers have been disciplined in Massachusetts for misconduct involving a violation of Rule 1.14.

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's ability to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation, is at risk of substantial physical, financial or other harm unless action is taken, and

²²⁴ *Id.*, 433 Mass. at 85–86.

²²⁵ The Court said that the duty of a lawyer facing such a dispute about control of an organization is to "remain neutral." *Matter of Wise*, 433 Mass. at 88. It rejected the claims that the lawyer acted in the best interests of the organization, and that he had permission to reveal information to prevent the commission of a crime, as permitted under the applicable Code of Professional Responsibility at the time. *Id.*

²²⁶ 29 Mass. Att'y Disc. R. 65 (2013).

cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action in connection with the representation, including consulting individuals or entities that have ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(c) Confidential information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal confidential information about the client, but only to the extent reasonably necessary to protect the client's interests.

A. Allocation of Authority for Clients with Diminished Capacity

The standard rules regarding the allocation of decisionmaking authority between a lawyer and her client, as discussed thus far, presume that the client has the capacity to make reasoned choices within the attorney-client relationship. When the client suffers from some diminished capacity, this rule requires the attorney to maintain the normal attorney-client relationship “as far as reasonably possible.” The client autonomy commitment established by Rules 1.2 and 1.4 remain operative. But if the client is unable to participate meaningfully in his or her legal matter because of some disability or limitation, or if that ability is substantially compromised, the responsibilities of the lawyer will change. The lawyer must maintain the commitment to respect the client’s autonomy while at the same time compensating for the client’s decisionmaking limitations and protecting the interests of the client from substantial harm.²²⁷ Therefore, Rules 1.2 and 1.4 apply differently in the setting where the client has some form of diminished capacity.

Rule 1.14 offers lawyers some guidance about how to proceed with a client of diminished capacity. That limited capacity may be the result of a developmental disability, a mental illness, or a very young age, as when a lawyer has been appointed to represent a child client. Rule 1.14(b) articulates the trigger for a lawyer’s extra responsibility and describes how the lawyer might exercise the discretion granted to the lawyer by the rule. That rule sets the stage as follows:

When the lawyer reasonably believes that the client has diminished capacity that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action in connection with the representation²²⁸

²²⁷ Rule 1.14, Comment 1.

²²⁸ Rule 1.14(b).

Before a lawyer may lawfully take “reasonably necessary protective action” on behalf of a client, she must reasonably believe that (1) the client has diminished capacity; (2) the diminished capacity is sufficiently severe to prevent the client from deciding capably about some specified representational issue; (3) the client, as a result, cannot adequately act in his own interest; and (4) the client faces a palpable risk of some substantial harm, whether financial, physical, or emotional. Only if the lawyer concludes that all four factors are present may she treat the client with diminished capacity any differently than she would deal with another client.

The text of Rule 1.14 does not aid a lawyer to determine when it is appropriate to take some protective action, but its Comments refer to the following factors:

[T]he client’s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.²²⁹

Lawyers must rely upon their own discretionary judgments, usually without the aid of any professional, to conclude that a client’s actions are not merely idiosyncratic, but instead manifest some impaired reasoning capacity.²³⁰ Once a lawyer concludes, or reasonably believes, that the above factors have been met, the lawyer may consult with others who may be helpful in confirming or correcting the lawyer’s assessment, notwithstanding the usual prohibition on speaking with others about a client’s affairs. The rule does not require an attorney to consult with an expert before taking action under the rule. Indeed, the decision to take such action, including consulting an expert, is one of the things that would otherwise violate the lawyer’s duties with unimpaired clients, but that the rule permits after the attorney has formed a reasonable belief about the need for it.

If the lawyer, either through the consultation with others or relying on her own judgments, determines that the client does indeed have diminished capacity and faces the risks of harm described in the rule, she may seek or recommend the appointment of a surrogate decision maker, such as a guardian or conservator, or take other measures aimed at protecting the client’s interests. For representation involving a litigation setting, the Comment to Rule 1.14 offers the following choices, each available in the discretion of the lawyer:

[T]he attorney may:

- (i) advocate the client’s expressed preferences regarding the issue;

²²⁹ *Id.*, cmt [6].

²³⁰ The criteria upon which a lawyer may act pursuant to Rule 1.14 resembles that applicable to appointment of a conservator for an impaired person. *See* G. L. c. 190B, § 5-101(9) (“an individual who[,] for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance”).

- (ii) advocate the client’s expressed preferences and request the appointment of a guardian ad litem or investigator to make an independent recommendation to the court;
- (iii) request the appointment of a guardian ad litem or next friend to direct counsel in the representation; or
- (iv) determine what the client’s preferences would be if he or she were able to make an adequately considered decision regarding the issue and represent the client in accordance with that determination.²³¹

The role of a lawyer acting in a protective capacity for a client with diminished capacity who does not have an appointed surrogate is clear: the lawyer must exercise her discretion using the “substituted judgment” standard, and not a “best interests” standard.²³² In other words, the lawyer must act in such a way as to fulfill the desires and respect the values of the client, to the extent those may be discerned, instead of acting in some objective, best interests fashion. Any actions taken by the lawyer ought to represent the least restrictive alternative available.²³³

Many lawyers have been disciplined for mistreating clients with diminished capacity,²³⁴ but few decisions, described below, have sanctioned a lawyer for misapplying or misunderstanding the duties under Rule 1.14. The scarcity of such discipline might be explained by the fact that Rule 1.14 operates primarily in a defensive manner. It serves to justify actions by a lawyer that ordinarily would be improper, such as discussing private matters with third parties, or making decisions contrary to the client’s instructions.²³⁵

B. Discipline for Violation of Rule 1.14

²³¹ *Id.*, cmt. [7].

²³² *See, e.g.*, *Care & Protection of Georgette*, 439 Mass. 28, 36 (2003); *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417 (1986); *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728, 729–732, 746–747, 752–754 (1977).

²³³ While Rule 1.14 does not reference the “least restrictive alternative” principle expressly, that sentiment is well-accepted in other protective services contexts. *See, e.g.*, G. L. c. 190B, § 5-407(b)(8) (conservator statute).

²³⁴ *See, e.g.*, *Matter of Clooney*, 403 Mass. 654, 531 N.E.2d 1271 (1988) (disbarment after misuse of funds belonging to “elderly, impaired” clients); *Matter of Muse*, 12 Mass. Att’y Disc. R. 335 (1996) (three-year suspension for misconduct involving an elderly, impaired client); *Matter of Hurley*, 8 Mass. Att’y Disc. 102 (1992) (disbarment for scheming to become guardian for an elderly disabled woman and misappropriating funds).

²³⁵ Discipline under Rule 1.14 is rare nationwide as well, no doubt for that same reason. For one such example, see *In re Flack*, 33 P.3d 1281 (Kan. 2001) (lawyer’s failure to abide by client’s estate planning objectives, as far as reasonably possible, after being informed of client’s medical and mental disability violated Rule 1.14; two-year probation).

As noted, few lawyers have been disciplined for misconduct in which Rule 1.14 played an important role. In *Matter of Eskenas*,²³⁶ the respondent represented a frail nursing home resident in a divorce against her husband. While the lawyer properly recognized his need for a substitute decisionmaker when his client's capacity to make informed decisions failed, he misjudged his responsibilities when he sought and obtained a general guardianship, rather than a limited guardianship, for his client. He then neglected his responsibilities after having filed for the guardianship by failing to keep either his client or the proposed guardian apprised of developments. He received a public reprimand. In *Matter of Weiss*,²³⁷ the respondent was suspended for a year and a day for misconduct involving his failure to respect the wishes of his disabled elderly client. The reported decisions on his discipline and his unsuccessful reinstatement efforts do not describe the facts of his misconduct nor the rules he violated, but unpublished (and public) BBO documents show that he failed to comply with Rule 1.14.

In *Matter of Zinni*,²³⁸ the respondent followed the instructions of one daughter to revise the estate plan of an impaired mother to favor that daughter and to disinherit the remaining siblings. Discipline was charged based on his lack of competence and diligence on behalf of the mother, and his conflict of interest in representing the daughter along with the mother. He was not charged with violating Rule 1.14, and his reliance on that rule in his defense did not help. He received a public reprimand. In *Matter of Robin*,²³⁹ and *Matter of Ward*,²⁴⁰ the respondents together represented a woman with diminished capacity and, following her wishes and instructions, assisted her to pursue several frivolous court filings. The attorneys' reliance on Rule 1.14 as a defense was unavailing.²⁴¹

In *AD 17-06*,²⁴² counsel for an elderly woman responded to his client's having retained a new lawyer and transferred funds to a family member as evidence of that family member exercising undue influence over the client. Without conferring with his client, but instead only with the client's daughter who objected to the transfer of funds, the lawyer advised the daughter to move all remaining client funds into his trust account. He also refused to cooperate with successor counsel. Once the respondent learned that his client had authorized the initial actions, he immediately returned all client funds and provided successor counsel with his papers. He received an admonition for his inappropriate application of the discretion provided by Rule 1.14.

Consistent with the Massachusetts experience, the ABA's Standards for Imposing Lawyer Sanctions do not refer to conduct involving misjudgments involving the representation of a client with diminished capacity.²⁴³

²³⁶ 30 Mass. Att'y Disc. R. 130 (2014).

²³⁷ 460 Mass. 1012, 27 Mass. Att'y Disc. R. 895 (2011).

²³⁸ 31 Mass. Att'y Disc. R. ___, 2015 WL 9309029 (2015).

²³⁹ 32 Mass. Att'y Disc. R. ___ (2016) (three-month suspension, stayed).

²⁴⁰ 32 Mass. Att'y Disc. R. ___ (2016) (public reprimand).

²⁴¹ In neither *Robin* nor *Ward* did the discipline report cite to Rule 1.14.

²⁴² 33 Mass. Att'y Disc. R. ___ (2017).

²⁴³ See AMERICAN BAR ASSOCIATION, STANDARDS FOR IMPOSING LAWYER DISCIPLINE (1991).

Part IV

Problems of Conflicts of Interest: Concurrent Conflicts, Successive Conflicts, and Business Transactions (Rules 1.7, 1.8, 1.9(a) and (b), and 1.10)

I. Introduction

A lawyer must avoid conflicts of interest that might impair her representation of her clients. A lawyer is a fiduciary who must put her client's interests above her own, and must not accept or continue representation if the work needed for one client will interfere with the lawyer's duties on behalf of another client. A lawyer may not represent a client whose interests are directly adverse to another current unless that current client consents. Sometimes even the other client's consent will not suffice to permit such opposition.

The conflict of interest responsibilities of lawyers are among the most common, and complex, ethical issues that arise in a lawyer's work. Most large law firms appoint one lawyer or committee whose responsibility is to monitor client work to avoid, remedy, or negotiate about possible conflicts of interest. Small firm lawyers, legal services lawyers, in-house counsel, and government lawyers all encounter possible conflicts in their work. Despite their frequency, conflicts of interest are not the most common example of lawyer misconduct addressed in the Massachusetts disciplinary system.²⁴⁴ Perhaps because other remedies often exist for a lawyer's having engaged in conduct amounting to a conflict of interest, including, in litigation matters, the availability of motions to disqualify or other court-generated sanctions, and, in all matters, the prospect of a malpractice claim, parties or counsel who discover a conflict do not always treat that misconduct as a matter for the disciplinary system. But engaging in a conflict without informed consent is misconduct that will subject a lawyer to discipline.

Conflicts of interest appear in two quite different temporal guises. First, a lawyer may not proceed in the face of a *concurrent conflict of interest*. A concurrent conflict means that the lawyer either opposes an ongoing client through some other representation, or suffers from some impairment that limits the lawyer's ability to offer unfettered, zealous representation to a client. Second, a lawyer may not proceed in the face of a *successive conflict of interest*. A successive conflict arises when the work for an existing client opposes, and relates to the work the lawyer or her law firm did for, a former client. Each is more fully described in the following materials.

²⁴⁴ According to the annual reports of the Office of Bar Counsel, the most common disciplinary matters involve neglect and mishandling of trust accounts. See OFFICE OF BAR COUNSEL, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2015 (2015) at 7 (Table 3); OFFICE OF BAR COUNSEL, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2014 (2014) at 7 (Table 3).

This Part of Chapter 7 will offer a separate discussion of concurrent conflicts, successive conflicts, and the principles governing imputation of conflicts among lawyers. For each such topic, the section will describe, using examples from the BBO's and the SJC's reported decisions and reports, the typical or expected sanction that would accompany various manifestations of conflicts of interest.

II. Concurrent Conflicts of Interest

A. Concurrent Conflicts Under Rule 1.7

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer's.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

1) The Types of Concurrent Conflicts Lawyers Encounter

Massachusetts regulates concurrent conflicts through two rules—Rules 1.7 and 1.8 of the Rules of Professional Conduct. Rule 1.7 addresses the general concurrent conflict of interest principles, while Rule 1.8 governs several more specific instances of that kind of conflict. The analysis begins with Rule 1.7.

Rule 1.7 proscribes a lawyer's representation in two types of settings.²⁴⁵ Rule 1.7(a) states that a lawyer "shall not represent a client if the representation involves a concurrent conflict of interest . . ." A concurrent conflict of interest exists if "the representation of one client will be directly adverse to another client,"²⁴⁶ or if "there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer's."²⁴⁷ Both of the 1.7(a) prohibitions may be waived, however, in certain circumstances with client consent. The process for obtaining such consent is discussed below.

Rule 1.7 therefore covers two prototypical, improper conflict scenarios: (1) where a lawyer sues (or otherwise opposes) an existing client (whether or not the action is related to the lawyer's work for that existing client); and (2) where a lawyer represents a client when some interest of the lawyer, whether related to another client or to a personal or financial interest, might distort or interfere with the lawyer's ability to advocate for the first client. Not surprisingly, both of these types of conflicts can arise in innumerable ways. Many useful resources are available to lawyers to help them understand the intricate and sometimes confusing nuances involved in concurrent conflicts.²⁴⁸ However, addressed below are some examples of misconduct leading to lawyer discipline under Rule 1.7

Concurrent Conflicts Summary

Generally speaking, lawyers encounter concurrent conflicts when:

- They accept joint representation of multiple clients in circumstances when the clients' interests are not fully harmonized or aligned;
- They accept representation of a new client whose claim is directly adverse to an existing client of the lawyer or the law firm;
- They fail to realize that some personal or family interest is affected by the claims of a new client, leading the lawyer possibly to soft-pedal the advocacy for client; or
- They offer advice, even with the best intentions, to two disputing parties in an effort to mediate the dispute.

2) Obtaining Consent to Concurrent Conflicts

²⁴⁵ The language of the Massachusetts version of Rule 1.7 is different from the language of Rule 1.7 of the Model Rules of Professional Conduct, but its message is exactly the same.

²⁴⁶ Rule 1.7(a)(1).

²⁴⁷ Rule 1.7(a)(2).

²⁴⁸ See TUONI, *supra* note 92; GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING § 1, p. 128 (3rd ed. Supp. 2007).

If a lawyer discovers that her representation of one client triggers a conflict of interest, she may have to end that representation, but she may also explore the possibility of obtaining consent from the affected client or clients. Rule 1.7(b) permits a lawyer to continue to represent a client notwithstanding a concurrent conflict if the following four conditions are met: (1) the lawyer “reasonably believes” the representation will not be adversely affected, notwithstanding the conflict; (2) the representation is not prohibited by law; (3) the representation does not involve the lawyer’s representation of opposing parties in the same litigation or matter; and (4) each affected client gives consent, confirmed in writing, after having been informed of the material risks of and alternatives to continued representation.²⁴⁹ This means that if the lawyer’s professional judgment is that her work for the client will not be impaired by the conflict, and the lawyer’s judgment is objectively reasonable, she may approach the client to explain the nature of the conflict and what risks and benefits the client faces in continuing with the representation. In order to proceed notwithstanding a conflict, the lawyer must obtain fully informed consent from the client, confirmed in writing, which typically means explaining the nature of the conflict in such a way that the client can appreciate the tensions arising from the conflict.²⁵⁰ If the lawyer cannot reveal facts relating to a different client necessary to have an informed discussion, the lawyer may not seek a consent to the conflict.

Practice Tip

Many concurrent conflicts of interest may be consented to by the affected client or clients, but the lawyer must document carefully both the fact of the consent, and the preceding discussion about the risks involved, in case a disagreement arises in the future. The informed consent discussion must be confirmed in a writing to the client that addresses all of the considerations addressed by the lawyer. Also, in order to seek consent when the representation of one client conflicts with that of another, the lawyer must be able to explain the conflict to each affected client without disclosing protected information about the other affected client. Sometimes that will be impossible and the conflict cannot be consented to.

B. Discipline for Concurrent Conflicts Under Rule 1.7

In 2002, the BBO articulated a set of standards applicable to discipline to be imposed for conflicts of interest generally. In AD 02-13, the Board described those standards as follows:

In conflicts cases, suspension has been reserved for conduct involving self-dealing, or egregious conflicts causing substantial injury to clients or innocent

²⁴⁹ Rule 1.7(b)(1)–(4).

²⁵⁰ Rule 1.0(c) requires such a writing, and Rule 1.0(f) describes the nature of the informed consent discussion that the writing must memorialize.

third parties. Otherwise, public [reprimand] will be imposed if harm results from an obvious conflict. . . . In the absence of proof of any actual harm to the estates, an admonition is the appropriate sanction for engaging in these conflicts.²⁵¹

That description corresponds, generally, to the actual discipline imposed in the reported BBO decisions as well as those of the SJC.

1) Disbarment

While some lawyers have been disbarred for egregious misconduct that included engaging in a conflict of interest, such as in *Matter of Conley*²⁵² and *Matter of McDonald*,²⁵³ no lawyer has ever been disbarred solely as a result of engaging in a conflict of interest.²⁵⁴

2) Suspension

You Should Know

Term suspensions have been imposed for conflicts of interest where the lawyer's breach of duty was egregious or self-interested, and caused harm to the clients. Relative to other kinds of misconduct, the term suspensions for conflicts of interest tend to be shorter in duration.

While disbarment has not been a common sanction for serious conflicts of interest, suspensions for that misconduct are not rare. *Matter of Pike* is perhaps the most notable serious conflict of interest disciplinary matter in Massachusetts.²⁵⁵ In *Pike*, the lawyer was suspended for six months for his actions representing both a tenant and

²⁵¹ 18 Mass. Att'y Disc. R. 640 (2002) (citations omitted).

²⁵² 25 Mass. Att'y Disc. R. 138 (2009). Among six counts of misconduct, including serious mishandling of client funds, "Conley filed a wrongful death suit against the administratrix of an estate of which Conley was a named co-administrator, thereby creating an impermissible and unwaivable conflict with the interests of his clients in violation of Mass. R. Prof. C. 1.7 (a) and (b)."

²⁵³ 20 Mass. Att'y Disc. R. 381 (2004). Among several counts of misconduct, including serious mishandling of client funds, McDonald represented his son at a loan closing while also serving as the agent for the title insurance company in violation of 1.7(b). *See also*, *Matter of Roberts*, 22 Mass. Att'y Disc. R. 656 (2006) (disbarment after conversion of client funds and conflict of interest); *Matter of Clark*, 21 Mass. Att'y Disc. R. 87 (2005) (disbarment after conversion of client funds and improper business transaction with client).

²⁵⁴ This result differs from the standards for presumptive discipline articulated by the American Bar Association (ABA). The ABA's Standards for Imposing Lawyer Sanctions state, among other bases for disbarment, that "[d]isbarment is generally appropriate when a lawyer, without the informed consent of client(s) . . . engages in representation of a client knowing that the lawyer's interests are adverse to the client's with intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client . . ." AMERICAN BAR ASSOCIATION, STANDARDS FOR IMPOSING LAWYER SANCTIONS § 4.31(a) (2012).

²⁵⁵ *Matter of Pike*, 408 Mass. 740, 6 Mass. Att'y Disc. R. 256 (1990). *Pike* is a matter arising under the former Code of Professional Responsibility, and the Court found that the lawyer had violated Canon 1, DR 1-102 (A)(4) and (6).

landlord in the lease of commercial rental unit. The attorney recommended the unit to his tenant client with the intention of earning a commission from the landlord client, and encouraged the landlord to increase the rent to cover his brokerage fee. The attorney never disclosed to his tenant client that he had a fiduciary duty to the landlord, or that he had a personal financial interest in the terms of the transaction. The SJC concluded that more than a token suspension was appropriate given that the lawyer “acted deliberately for his own benefit and in disregard of his client’s interests,” and that the client had suffered prejudice as a result.²⁵⁶

The other suspension examples include findings that the lawyers acted selfishly or with complete disregard to the interests of their clients. For instance, in *Matter of Wise*,²⁵⁷ a lawyer representing a nonprofit corporation colluded with some members of the board of directors against other members of the board (and, in fact, against the wishes of the controlling members of the board), in part to assure that he would receive payment of his legal fees. The SJC rejected the Board’s recommendation for a public reprimand and concluded that the lawyer’s actions warranted a six-month suspension from practice, in part because the attorney displayed a “vengeful attitude” and his multiple violations were “motivated by selfishness and anger.” Similarly, in *Matter of Lupo*,²⁵⁸ the Court imposed an indefinite suspension for the lawyer’s multiple conflicts of interest with his clients through which he enriched himself at their expense. The court imposed this substantial discipline because the lawyer’s misconduct was “characterized less by a divided loyalty and more by a motivation to subjugate the interests of his clients to his own.”²⁵⁹

A lawyer may receive a suspension for a conflict of interest not involving fraud, deceit, or predatory intent if other accompanying misconduct or a disciplinary history warrants such greater discipline.²⁶⁰ The sanctions in Massachusetts for conflicts of interest without those other factors may be less severe than in other jurisdictions.²⁶¹

3) Public Reprimand

²⁵⁶ *Pike*, 408 Mass. at 745.

²⁵⁷ *Matter of Wise*, 433 Mass. 80, 16 Mass. Att’y Disc. R. 416 (2000). The *Wise* matter appears in this chapter’s discussion of representation of organizational clients. See Part III, Section III.B.

²⁵⁸ *Matter of Lupo*, 447 Mass. 345, 22 Mass. Att’y Disc. R. 513 (2006).

²⁵⁹ *Id.*, 447 Mass. at 359–60, 22 Mass. Att’y Disc. R. at 531.

²⁶⁰ See, e.g., *Matter of Lansky*, 22 Mass. Att’y Disc. R. 446 (2006) (six-month suspension for combination of neglect, conflict of interest, and substantial harm); *Matter of Doherty*, 20 Mass. Att’y Disc. R. 130 (2004) (two-year suspension for lawyer who represented both driver and estate of deceased passenger in auto accident, plus commingling client funds); *Matter of Owens*, 19 Mass. Att’y Disc. R. 348 (2003) (six-month suspension for attorney who allowed the buyer of lots to direct his judgment in defending adverse possession suit, while simultaneously purporting to represent the deceased client’s estate and executrix as seller of the lots; lawyer also engaged in neglect and caused substantial harm).

²⁶¹ The reported suspension cases in Massachusetts show sanctions that are less than that recommended by the ABA in its Standards for Imposing Lawyer Sanctions. The ABA Standards describe the criterion for the imposition of a suspension for an impermissible conflict of interest as follows:

Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra* note 254, at § 4.32.

You Should Know

A lawyer will typically receive a public reprimand for causing harm to a client while engaged in an “obvious” conflict and not acting with a predatory or selfish motive.²⁶²

As noted earlier, in Massachusetts “public discipline will be imposed if harm results from an *obvious conflict*.”²⁶³ While the BBO decisions and the Supreme Judicial Court opinions do not expressly define “obvious,” several examples of such conflicts leading to public reprimands permit an understanding of that term. In *Matter of Carnahan*, for instance, the SJC full bench decision employing the “obvious” characterization, the lawyer agreed on behalf of one client to accept representation of an elderly, disabled man whose interests were in conflict with those of the first client. The lawyer’s work for the second client benefitted the first client, and neither client gave informed consent to the representation.²⁶⁴

The *Carnahan* court cited the following examples of conflicts of interest warranting a public reprimand: *Matter of Manelis*²⁶⁵ (attorney drafted new will for father at request of beneficiary son without discussing matter separately with father and without conducting reasonable investigation into father’s competency); *Matter of Reynolds*²⁶⁶ (attorney drafted estate planning documents benefiting live-in caregivers of elderly woman without inquiring about the parties’ relationship and knowing that documents represented fundamental change in estate plan detrimental to family members); and *Matter of Epstein*²⁶⁷ (attorney prepared will for father-in-law’s seventy-two year old sister benefiting father-in-law where attorney knew or should have known that sister was not competent to execute will). Each of the preceding conflicts was in fact “obvious,” in that an attentive lawyer would recognize that the lawyer’s interests on behalf of one client were not aligned with those of another client or constituent.

Attorneys should be diligent about not engaging in an unwaivable conflict, even at the request of the parties—for instance, the divorcing couple who have divided their assets and ask the lawyer to represent both of them in their divorce, or the “amicable lease” where the lawyer is asked to advise both the landlord and the tenant. A recent example of this pitfall is *Matter of Martinian*,²⁶⁸ where the lawyer prepared the separation agreement on behalf of both of the spouses and prepared and signed both of their financial statements. After the respondent submitted the various pleadings, the

²⁶² See *Matter of Martinian*, 26 Mass. Att’y Disc. R. 342 (2010) (described below).

²⁶³ *Matter of Carnahan*, 449 Mass. 1003, 1004–05, 23 Mass. Att’y Disc. R. 56 (2007) (quoting AD 02-13, 18 Mass. Att’y Disc. R. 640 (2002)) (emphasis added).

²⁶⁴ *Carnahan*, 449 Mass. at 1004–05. The Office of Bar Counsel sought a six-month suspension for Carnahan, but the SJC concluded that his misconduct warranted a public reprimand.

²⁶⁵ 18 Mass. Att’y Disc. R. 375 (2002).

²⁶⁶ 15 Mass. Att’y Disc. R. 497 (1999).

²⁶⁷ 7 Mass. Att’y Disc. R. 93 (1991).

²⁶⁸ 26 Mass. Att’y Disc. R. 342 (2010).

probate court rejected her attempt to appear on behalf of both of the divorcing spouses. The respondent received a public reprimand for violating Rule 1.7, and her attempt to do so demonstrated a lack of competence in violation of Rule 1.1.²⁶⁹

4) Admonition

You Should Know

A lawyer who engages in a conflict of interest without causing actual harm to a client will typically receive an admonition.

Any finding of an impermissible conflict of interest that does not cause harm and is not unwaivable will lead to an admonition. As the Board has noted, “[i]n the absence of proof of any actual harm to the estates [or, presumably, the client], an admonition is the appropriate sanction for engaging in these conflicts.”²⁷⁰ The reported decisions correspond to the Board’s description.

For example, in AD 05-11,²⁷¹ the Board admonished a lawyer for authorizing a lawsuit against an active client to collect his unpaid fee, in violation of Rule 1.7(a)(1) as it read in 2005. In AD 08-11,²⁷² the Board admonished two lawyers employed by a large law firm after the firm’s conflict-checking system failed to detect a conflict because a partner had not recorded a client name properly on firm’s conflict-detection database. The Board noted that the lawyers “apparently acted in good faith reliance on their firm’s detection system and on the advice of the firm’s ethics committee,” but without having any authority to discipline the firm,²⁷³ the Board admonished the individual lawyers. The Board also noted that, once the conflict was disclosed, the lawyers refused the demand of

²⁶⁹ The ABA standard for conflict of interests will impose a public reprimand more readily than is demonstrated by the reported decisions in Massachusetts. For public reprimands, the ABA Standards say the following:

Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer’s own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client. STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra* note 254, at § 4.33. The ABA employs the term “negligent,” while the Massachusetts authorities use the term “obvious,” in advising when to impose a public reprimand. The former term implies the presence of conflicts that are less than obvious, but still recognizable with due care and attention.

²⁷⁰ AD 02-13, 18 Mass. Att’y Disc. R. 640 (2002).

²⁷¹ 21 Mass. Att’y Disc. R. 694 (2005). *See also* AD 06-08, 22 Mass. Att’y Disc. R. 858 (2006), in which a lawyer violated Rules 1.7(b) and 1.16(a) by suing a client for unpaid fees without first formally withdrawing his representation of the client.

²⁷² 24 Mass. Att’y Disc. R. 861 (2008).

²⁷³ In some states, the disciplinary authorities may impose sanctions on law firms. *See, e.g.*, N.J. RULE OF PROF’L CONDUCT 5.1(a); N.Y. RULE OF PROF’L CONDUCT 5.1. For a discussion of this topic, see Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991) (advocating discipline for law firms); Julie Rose O’Sullivan, *Professional Discipline for Law Firm? A Response to Professor Schneyer’s Proposal*, 16 GEO. J. LEGAL ETHICS 1 (Fall 2002) (disagreeing with the need for law firm discipline). In 2015, the SJC rejected the proposal of its Standing Advisory Committee to permit discipline against a law firm.

one of the clients that they withdraw from litigation in which she had an adverse interest. Despite that added factor beyond the original conflict, the Board still imposed only an admonition.

In AD 11-04,²⁷⁴ a lawyer violated Rule 1.7(b) as it read in 2011, along with Rules 1.16(a)(1) and 1.4(b), when she represented a client in the probate of his uncle's estate, knowing that her former law firm, in which her father was a principal, had helped the uncle establish his estate plan but had neglected to fund an important trust as part of that plan. The lawyer did not explain to the nephew the implications of her father's mistake. The Board found that the attorney's representation was "materially limited by her responsibilities to her father and her former and present law firm when she did not seek the consent of the client after consultation." The earlier error cost the nephew-client substantially more in legal fees during the probate of the estate, but the lawyer ultimately forgave her fees, so the client suffered little financial damage.

In AD 07-14,²⁷⁵ a partner and associate violated Rule 1.7(a)(2), as it read in 2007, and Rule 1.8(a) when the two lawyers represented a wife in the sale of her marital home. The lawyers included a five percent commission for their firm in the purchase and sale agreement, without explaining the commission clause to the client, obtaining her informed consent, or advising her that she should consult with independent counsel. In AD 10-18,²⁷⁶ a lawyer violated Rule 1.7(a) while she and her partner were representing co-trustees and beneficiaries in a trust reformation dispute with adverse trustees, and she undertook simultaneous representation of the adverse trustees. She advised the adverse trustees that there was no conflict of interest because all of the trustees and beneficiaries "shared a common interest in seeking reformation." (The lawyer's partner also received an admonition for his violation of Rule 1.10(a) by representing the trustees and beneficiaries when the original lawyer was disqualified from doing so.)

C. Concurrent Conflicts Under Rule 1.8

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

²⁷⁴ 27 Mass. Att'y Disc. R. 930 (2011).

²⁷⁵ 23 Mass. Att'y Disc. R. 959 (2007).

²⁷⁶ 26 Mass. Att'y Disc. R. 794 (2010).

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use confidential information relating to representation of a client to the disadvantage of the client or for the lawyer's advantage or the advantage of a third person, unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not, for his own personal benefit or the benefit of any person closely related to the lawyer, solicit any substantial gift from a client, including a testamentary gift, or prepare for a client an instrument giving the lawyer or a person closely related to the lawyer any substantial gift, including a testamentary gift, unless the lawyer or other recipient of the gift is closely related to the client. For purposes of this Rule, a person is "closely related" to another person if related to such other person as sibling, spouse, child, grandchild, grandparent, or as the spouse of any such person.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) Reserved.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Rule 1.8 effectively covers a subset of the Rule 1.7 concerns. Rule 1.8 is a rule that offers more specifically-tailored guidance to a lawyer facing certain types of concurrent conflicts of interest. The rule offers guidance to those lawyers who wish to engage in a business transaction with a client (which is not prohibited, even if it is perilous);²⁷⁷ to lawyers with potentially famous clients who wish to pay the lawyer by offering some intellectual property rights to the client's story;²⁷⁸ to lawyers writing wills or similar estate-planning documents where the lawyer or a family member will be a

²⁷⁷ Rule 1.8(a).

²⁷⁸ Rule 1.8(d).

beneficiary;²⁷⁹ to lawyers who wish to advance living expenses or similar aid to a litigation client;²⁸⁰ to lawyers whose work for one client is paid for by a third party;²⁸¹ to lawyers representing several clients who wish to engage in an aggregate settlement of their claims;²⁸² and to lawyers who wish to limit liability by an agreement with the client waiving prospectively any malpractice claims against the lawyer.²⁸³ In many of these instances, Rule 1.8 expressly prohibits the identified conduct.

Rule 1.8 formerly addressed the “Adam’s Rib” conflict of interest for lawyers who are closely related to one another and represent clients whose interests are directly adverse.²⁸⁴ That issue is now covered in Comment 11 of Rule 1.7. The principle remains the same: A lawyer may not oppose in a matter a party represented by that lawyer’s parent, child, sibling, or spouse, subject to the informed consent provisions discussed above.

One may easily see how each one of these Rule 1.8 examples generates a potential conflict covered by Rule 1.7(a)(2). Each one of those settings finds the lawyer having some interests or incentives that are not entirely congruent with those of the client. The benefit of Rule 1.8 over the generic Rule 1.7(a)(2) is that each respective subsection of Rule 1.8 offers more guidance to a lawyer than the general pronouncement of the latter rule.

Most of the provisions of Rule 1.8 cannot be waived by a client’s informed consent.²⁸⁵

D. Discipline for Concurrent Conflicts Under Rule 1.8

Practice Tip

The two most common troubles that lawyers encounter with Rule 1.8 are engaging in improper business transactions with a client,²⁸⁶ and providing improper financial assistance to a client.²⁸⁷

1) Disbarment

²⁷⁹ Rule 1.8(c).

²⁸⁰ Rule 1.8(e).

²⁸¹ Rule 1.8(f).

²⁸² Rule 1.8(g).

²⁸³ Rule 1.8(h).

²⁸⁴ See Rule 1.8(i) (2014 version, since removed). See ADAM’S RIB (Metro-Goldwin-Mayer 1949) (comedy involving husband and wife lawyers played by Spencer Tracy and Katharine Hepburn).

²⁸⁵ Only the provisions of Rules 1.8(b), (f), and (g) permit conduct requiring client informed consent, and always with other conditions.

²⁸⁶ Since 1999, at least 35 lawyers have been disciplined for violation of Rule 1.8(a).

²⁸⁷ Since 1999, at least 15 lawyers have been disciplined for violation of Rule 1.8(e).

The Board has not recommended, nor has the SJC imposed, disbarment for a violation of Rule 1.8, except when combined with violations of other rules. For instance, in *Matter of Azzam*,²⁸⁸ the SJC disbarred an attorney after his felony conviction for exploiting client's personal financial data, which he shared with service providers. His use of confidential client information for his own benefit violated Rule 1.8(b).²⁸⁹

2) Suspension

You Should Know

Lawyers who engage in a series of improper business transactions with clients, especially those intended to secure or ensure payment of the lawyer's fees or with other aggravating factors, have been disciplined by term suspensions. "Sanctions for Rule 1.8 violations include substantial term suspensions that can range well over one year."²⁹⁰

The SJC has imposed term suspensions on lawyers whose conduct violated Rule 1.8. In *Matter of Duggan*,²⁹¹ the lawyer was suspended for six months for engaging in several self-interested transactions involving his clients' property. The lawyer entered into multiple business arrangements with his clients, including purchasing their home at a foreclosure sale, without complying with the notice or fairness requirements of Rule 1.8. The clients later sued the lawyer and obtained an order undoing the transactions.²⁹² In *Matter of Glynn*,²⁹³ the lawyer engaged in conduct prohibited by Rule 1.8(c) by drafting a will for a client in which he was the primary beneficiary. He also lost the will because of poor office management. The SJC accepted a stipulation for a suspension of six months and a day. In *Matter of Balliro*,²⁹⁴ the SJC accepted a stipulation for a suspension of a year and a day after the respondent arranged and prepared documents for a mortgage to secure his and his partner's attorney's fees, without obtaining his client's consent or otherwise complying with Rule 1.8(a). The respondent also represented multiple parties to the transaction, in violation of Rule 1.7.

In *Matter of Lupo*,²⁹⁵ discussed above in the context of Rule 1.7, the lawyer was suspended indefinitely for engaging in "a transaction . . . when the terms were not fair to

²⁸⁸ 26 Mass. Att'y Disc. R. 18 (2010).

²⁸⁹ See, also, *Matter of Conley*, 25 Mass. Att'y Disc. R. 138 (2009); *Matter of Cruz*, 20 Mass. Att'y Disc. R. 111 (2004); *Matter of Fuller*, 20 Mass. Att'y Disc. R. 152 (2004).

²⁹⁰ *Matter of Weisman*, 30 Mass. Att'y Disc. R. 440 (2014). Without multiple violations or other aggravating factors, lawyers have received public reprimands or even admonitions, as the next two sections describe. See, e.g., *Matter of Lathrop*, 24 Mass. Att'y Disc. R. 420 (2008) (public reprimand for a Rule 1.8 violation related to the attorney's fee); AD 10-12, 26 Mass. Att'y Disc. R. 782 (2010) (admonition for creating a lien to secure fees).

²⁹¹ 22 Mass. Att'y Disc. R. 305 (2006).

²⁹² *Duggan v. Gonsalves*, 65 Mass. App. Ct. 250 (2005).

²⁹³ 21 Mass. Att'y Disc. R. 282 (2005).

²⁹⁴ 29 Mass. Att'y Disc. R. 11 (2013).

²⁹⁵ 447 Mass. 345, 22 Mass. Att'y Disc. R. 513 (2006).

[the client] or fully disclosed,” in violation of Rule 1.8(a). In an earlier case similarly involving a predatory business transaction with clients, *Matter of Ferris*,²⁹⁶ the lawyer was suspended for three years for inducing trustee clients to loan him \$50,000 on terms unfavorable to the trust.²⁹⁷

3) Public Reprimand

Practice Tip

A lawyer who includes himself or a relative in an estate plan he creates for a client typically will receive a public reprimand, absent other misconduct. The reprimand typically results regardless of how long the lawyer or her family has known the client or how much work the lawyer has done for the client in the past; it remains true even if the client expressly instructed the lawyer to do so, if no one challenges the legitimacy of the document, and even if the lawyer has rejected or returned the gift.²⁹⁸

A lawyer’s violation of Rule 1.8(c), by including the lawyer or a member of the lawyer’s family as a beneficiary of a client’s estate plan, typically results in a public reprimand. For example, in *Matter of Viegas*,²⁹⁹ the Board imposed, by stipulation, a public reprimand of a lawyer who, seemingly with some reluctance, wrote a will for a non-relative client in which he received a large bequest. In *Matter of Field* (bequest to the respondent’s spouse),³⁰⁰ *Matter of Toner* (bequest to respondent, his wife, and his children),³⁰¹ and *Matter of Filosa* (bequest to lawyer as remainderman of a will),³⁰² the Board imposed the public reprimand sanction for similar conduct.

In *Matter of Lathrop*,³⁰³ the attorney borrowed \$2,000 from a client and did not repay it, but instead sought to “credit” the debt against the attorney’s fees that the client owed him. By entering into a business transaction without reducing the terms to writing, discussing how the loan would be repaid, giving the client a reasonable opportunity to

²⁹⁶ 9 Mass. Att’y Disc. R. 110 (1993).

²⁹⁷ See also *Matter of Moran*, 27 Mass. Att’y Disc. R. 612 (2011) (two-month suspension for violations of Rule 1.8(c) (the lawyer drafted a will naming himself as a beneficiary) and 1.8(a) (the lawyer solicited a loan from the same client that was not fair and reasonable and was preceded by none of the notice requirements).

²⁹⁸ See, e.g., *Matter of Filosa*, 24 Mass. Att’y Disc. R. 273 (2008) (public reprimand after lawyer drafted estate plan provisions favoring him at the client’s direct insistence after lawyer counseled otherwise; no party objected to the provision); *Matter of Viegas*, 20 Mass. Att’y Disc. R. 526 (2004) (attorney disclaimed what client bequeathed to him, and objection by an heir had no basis, but public reprimand still resulted); *Matter of Field*, 20 Mass. Att’y Disc. R. 140 (2004) (public reprimand still results despite the fact that attorney and his wife had known the testatrix for many decades, maintained a close relationship with her and frequently socialized and spent all major holidays together).

²⁹⁹ 20 Mass. Att’y Disc. R. 3 (2004).

³⁰⁰ 20 Mass. Att’y Disc. R. 140 (2004).

³⁰¹ 16 Mass. Att’y Disc. R. 394 (2000).

³⁰² 24 Mass. Att’y Disc. R. 273 (2008).

³⁰³ 24 Mass. Att’y Disc. R. 420 (2008).

seek the advice of independent counsel, or obtaining the client's informed consent, and by purporting to repay the loan through a credit without the client's consent, the attorney violated Rule 1.8(a). The Board imposed a public reprimand. Similarly, a single justice imposed a public censure (the previous equivalent of a public reprimand) against the lawyer in *Matter of Dionisi*, who represented a client in a transaction in which the attorney's immediate family had a substantial personal financial interest without full disclosure and consent from client.³⁰⁴

A lawyer received a public reprimand for compromising a potential malpractice claim against him without providing the client the protections required by Rule 1.8(h). In *Matter of Brown*,³⁰⁵ the lawyer neglected a matter. When his client discovered that neglect and complained, the lawyer settled with the client by agreeing to pay money to the client and to a third party. The lawyer did not advise the client to seek independent counsel before settling her claim with him. The Board also considered that the attorney had neglected the matter and had failed to act with competence. The Board found mitigating circumstances (the respondent's very stressful divorce) and implied that but for that mitigation the respondent would have been suspended.³⁰⁶

4) Admonitions

Admonitions are very common in Massachusetts for violations of Rule 1.8 where the client has not suffered significant harm. In most of the reported decisions resulting in an admonition, the lawyer failed to make the necessary disclosures to the client when engaging in a transaction in which the lawyer, or a member of the lawyer's family, might benefit.

For example, in AD 08-19,³⁰⁷ a lawyer purchased a condominium belonging to his client, without informing the client that he was not representing her as a lawyer in the matter. Although the terms of the agreement were fair and reasonable to the client, the attorney did not disclose all of the terms of the transaction to the client in writing and he did not give the client an adequate opportunity to seek the advice of independent counsel. Similarly, in AD 09-09,³⁰⁸ the lawyer borrowed \$5,000 from a client for a personal matter without obtaining the client's consent in writing, disclosing all of the terms of the agreement in writing, or giving client opportunity to consult independent counsel. The client was satisfied with the terms, however. In each instance the Board deemed an admonition to serve as an adequate sanction for the lawyer's misconduct.

In AD 01-51,³⁰⁹ a lawyer misused the confidences of a client to the detriment of the client, and to the benefit of a second client, in violation of Rule 1.8(b). The respondent lawyer was the trustee of two trusts; he withheld the distribution to a

³⁰⁴ 9 Mass. Att'y Disc. R. 99 (1993).

³⁰⁵ 20 Mass. Att'y Disc. R. 60 (2004).

³⁰⁶ See also *Matter of Humphries*, 24 Mass. Att'y Disc. R. 369 (2008) (public reprimand for respondent who, in an effort to assist his client, obtained title to her home).

³⁰⁷ 24 Mass. Att'y Disc. R. 897 (2008).

³⁰⁸ 25 Mass. Att'y Disc. R. 668 (2009).

³⁰⁹ 17 Mass. Att'y Disc. R. 757 (2001).

beneficiary of one trust to compel that beneficiary to make payments allegedly due to the second trust. In so acting, the respondent used the confidential information he acquired in his role as trustee of both trusts to the detriment of one of the beneficiaries (and for his own benefit). The lawyer made full restitution.

Lawyers have received admonitions for assisting clients with living expenses, in violation of Rule 1.8(e). In AD 09-16,³¹⁰ the lawyer violated Rule 1.8(e) when he loaned a client \$7,500 for living expenses while he was representing the client in a personal injury suit, and the claims were pending. After settlement of the claims, the lawyer repaid himself from the client's settlement proceeds. Similarly, in AD 06-12,³¹¹ a lawyer violated the same rule by co-signing a loan for the benefit for the client while the client's personal injury case was pending. The lawyer had no prior history of discipline.

In AD 04-44,³¹² the respondent violated Rule 1.8(f), which prohibits a lawyer from accepting payment from a third party under circumstances where the lawyer's independent professional judgment may be affected. An insurer regularly referred its insureds who had potential Social Security disability insurance (SSDI) claims to the lawyer for representation on those claims, and then paid the lawyer for handling the client's SSDI claim. The lawyer assisted the insurance company in recouping retroactive benefits from the SSDI claimants, funds to which the insurer was entitled. The Board imposed an admonition, finding that the one client whose matter was before the Board suffered no harm.

In AD 10-12,³¹³ a lawyer received an admonition for his violation of Rule 1.8(j) (now Rule 1.8(i)) after he negotiated with his client for a lien on the client's property to secure the respondent's attorney's fees. The lien attached real estate belonging to the client (the subject of one of the matters for which the respondent represented the client), and the respondent recorded the lien with the Registry of Deeds. The Board concluded that the lawyer violated then-Rule 1.8(j) by acquiring an interest in the subject matter of the litigation. The reported admonition summary does not describe any harm suffered by the client.

E. Concurrent Conflicts Triggered by Lawyers Sharing Office Space

Lawyers who share office space must take special care to avoid triggering inadvertent concurrent conflicts of interest. Rule 1.10 (reprinted in the next section) establishes the general principle that lawyers in a law firm are treated as one lawyer for purposes of conflicts of interest. Rule 1.10(a) states, "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited by [the concurrent and successive conflict rules]."³¹⁴

³¹⁰ 25 Mass. Att'y Disc. R. 682 (2009).

³¹¹ 22 Mass. Att'y Disc. R. 877 (2006).

³¹² 20 Mass. Att'y Disc. R. 743 (2004).

³¹³ 26 Mass. Att'y Disc. R. 782 (2010).

³¹⁴ One exception not imputed to other members of the firm is that triggered by the lawyer's relative representing the adverse party, per Rule 1.7, Comment 11.

In conventional law firms, partnerships with partners and employee associates, or professional corporations with shareholders and employee associates, the imputation principle is easy to apply. In other settings, though, whether lawyers constitute a “firm” for conflicts purposes may not be so clear. Rule 1.10 addresses one such possible ambiguity. The rule states that private lawyers assigned to represent indigent criminal defendants by the Committee of Public Counsel Services (CPCS, the Massachusetts version of the public defender) through its Private Counsel Division are not deemed to be members of CPCS.³¹⁵ The Comments to the rule also advise that “[l]awyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units.”³¹⁶

For the many lawyers who share office space, the critical question is whether those lawyers constitute a law firm, implicating imputed conflicts. The general understanding is that, absent an agreement to operate as one law firm, or actual operations that require treating the lawyers as if they are practicing as one firm, lawyers simply sharing office space do not need to be treated as one firm. Lawyers who share an office suite and operate distinct law practices do not need to check with each other for the conflicts discussed here and later under the topic of successive conflicts. At the same time, those lawyers must ensure that they do not inadvertently operate as one firm. According to one authority, “Lawyers sharing office space may be considered ‘associated in a firm’ if they share information and staff or if they hold themselves out as a firm.”³¹⁷ Employing a common receptionist who has access to client information therefore presents, at a minimum, a complication for lawyers who share office space.

One decision of the SJC concluded that, for purposes of a claim of ineffective assistance of counsel after a criminal conviction, the mere sharing of an office suite is not sufficient to conclude that the lawyers should be treated as one firm for conflict of interest purposes, especially where the firm had taken precautions to separate the two practices. In *Commonwealth v. Alison*, the Court wrote, “Each attorney must have his or her own telephone number. If a shared receptionist is employed, the receptionist should be instructed to answer the telephone as if it were the individual law office of the particular attorney. These safeguards, although defeating some cost-saving benefits of a shared-office relationship, are necessary to ensure that the public is not [misled] into believing that the lawyers are associated as a firm.”³¹⁸

³¹⁵ Rule 1.10(a).

³¹⁶ Rule 1.10, Comment 3.

³¹⁷ AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (7th ed. 2011) (citing *In re Sexson*, 613 N.E.2d 841 (Ind. 1993) (“firm” found when two lawyers practiced separately but used common letterhead, had apparent access to each other’s confidential information, and shared phone lines and office personnel); *Monroe v. City of Topeka*, 988 P.2d 228 (Kan. 1999) (indicia of lawyers presenting themselves to public as a firm for purposes of imputed disqualification included sharing office space, telephone, facsimile number, and mailing address); D.C. Ethics Op. 303 (2001) (whether sharing office space leads to imputation of disqualification depends upon specific arrangements); Or. Ethics Op. 2005-50 (2005) (disqualification imputed if lawyers share common employee with access to protected information)).

³¹⁸ *Commonwealth v. Alison*, 434 Mass. 670, 691 (2001). The Restatement of the Law Governing Lawyers concurs: “The key inquiry is whether the physical organization and actual operation of the office

The risk of being treated as one firm for conflicts purposes is worrisome.³¹⁹ The sharing of space is one of the most common “traps for the unwary” about which ethics advisors warn practicing attorneys to be particularly vigilant.³²⁰

III. Successive Conflicts of Interest

A. Successive Conflicts Under Rules 1.9 and 1.10

Practice Tip

The rules governing successive conflicts of interest and imputation of those conflicts among firm members who formerly practiced elsewhere are somewhat different in Massachusetts compared to the ABA’s Model Rules. Take special care to understand the Massachusetts versions, especially if you were trained in law school using the Model Rules.

RULE 1.9: DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

space is such that the confidential client information of each lawyer is secure from the others. Where such security is provided and where no other plausible risks to confidentiality and loyalty are presented, the conflicts of the lawyers are not imputed to each other by reason of their office-sharing arrangement.”

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 (2000).

³¹⁹ For a discussion of that concern when a lawyer has “of counsel” status with more than one firm, see Nancy Kaufman, *The Of Counsel Relationship*, available at <https://bbopublic.blob.core.windows.net/web/f/ofcounsel.pdf>.

³²⁰ See, e.g., Susan R. Martyn & Lawrence J. Fox, *Who Is Your Client?*, in DEVELOPMENTS IN LEGAL ETHICS: ATTORNEY-CLIENT RELATIONS AND THE ATTORNEY-CLIENT PRIVILEGE (2005). The Office of Bar Counsel has advised Massachusetts lawyers about the risks of sharing office space. See Daniel C. Crane & John W. Marshall, *Space Sharers Beware!* (2000), at <https://bbopublic.blob.core.windows.net/web/f/space.pdf>. The authors wrote:

Section 16 of MGL Chapter 108A, the Uniform Partnership Act, essentially says that a person can be held vicariously liable as a partner if he or she consents to being held out as a partner and a third party relies on the partnership to his or her detriment. What the comment to Rule 7.5(d) says is that space-sharers practicing under a joint name without a disclaimer of joint liability are holding themselves out as partners. The case of *Atlas Tack Corp. v. DiMasi*, 37 Mass. App. Ct. 66 (1994) is to the same effect. The new comment to [Massachusetts] Rule [of Professional Conduct] 7.5(d) [addressing law firm names] probably will make it easier to prove a partnership by estoppel claim against space-sharers who do not use effective disclaimers of joint liability.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information relating to the representation to the disadvantage of the former client or for the lawyer's advantage or the advantage of a third person, except as Rule 1.6, Rule 3.3, or Rule 4.1 would permit or require with respect to a client; or

(2) reveal confidential information relating to the representation except as Rule 1.6, Rule 3.3 or Rule 4.1 would permit or require with respect to a client.

RULE 1.10: IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. A lawyer employed by the Public Counsel Division of the Committee for Public Counsel Services and a lawyer assigned to represent clients by the Private Counsel Division of that Committee are not considered to be associated. Lawyers are not considered to be associated merely because they have each individually been assigned to represent clients by the Committee for Public Counsel Services through its Private Counsel Division.

(b) When a lawyer has terminated an association with a firm ("former firm"), the former firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the former firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the former firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) When a lawyer becomes associated with a firm (“new firm”), the new firm may not undertake to or continue to represent a person in a matter that the firm knows or reasonably should know is the same or substantially related to a matter in which the newly associated lawyer (the “personally disqualified lawyer”), or the former firm had previously represented a client whose interests are materially adverse to the new firm’s client unless:

(1) the personally disqualified lawyer has no information protected by Rule 1.6 or Rule 1.9 that is material to the matter (“material information”); or

(2) the personally disqualified lawyer (i) had neither involvement nor information relating to the matter sufficient to provide a substantial benefit to the new firm’s client and (ii) is screened from any participation in the matter in accordance with paragraph (e) of this Rule and is apportioned no part of the fee therefrom.

(e) For the purposes of paragraph (d) of this Rule and of Rules 1.11 and 1.12, a personally disqualified lawyer in a firm will be deemed to have been screened from any participation in a matter if:

(1) all material information possessed by the personally disqualified lawyer has been isolated from the firm;

(2) the personally disqualified lawyer has been isolated from all contact with the new firm’s client relating to the matter, and any witness for or against the new firm’s client;

(3) the personally disqualified lawyer and the new firm have been precluded from discussing the matter with each other;

(4) the former client of the personally disqualified lawyer or of the former firm receives notice of the conflict and an affidavit of the personally disqualified lawyer and the firm describing the procedures being used effectively to screen the personally disqualified lawyer, and attesting that (i) the personally disqualified lawyer will not participate in the matter and will

not discuss the matter or the representation with any other lawyer or employee of the new firm, (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter; and

(5) the personally disqualified lawyer and the new firm reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the new firm and its client.

In any matter in which the former client and the new firm's client are not before a tribunal, the firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening procedures used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

(f) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Massachusetts regulates successive, or former client, conflicts through Rules 1.9 and 1.10. Unlike with current clients, a lawyer *may*, without that former client's informed consent, oppose a former client, even directly, except when the new matter relates to the work the lawyer performed for the former client in the past. Rule 1.9(a) states:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.³²¹

This rule is consistent with Massachusetts common law developed before the adoption of the rule.³²² In order to protect the prior client's confidences, Rule 1.9 bars representation (absent a waiver) when two elements are present: a substantial relationship to the prior representation, and adversity to the former client. Unlike the concurrent conflicts rules, which protect the loyalty commitment and the lawyer's independent professional judgment, the successive conflict rule protects confidential information.³²³ The substantial relationship test serves as a proxy for determining when a lawyer would

³²¹ The Massachusetts version of Rule 1.9(a) is identical to the ABA's Model Rules version.

³²² See *Adoption of Erica*, 426 Mass. 55, 61 (1997) (after noting that "[w]e have often discussed the substantial relationship test, but have never adopted it," the SJC applied the test in this case).

³²³ *Id.*

have learned information from a client in the first representation that could be used against that client in the second representation. If the two matters are substantially related, the doctrine presumes conclusively that the lawyer acquired information that could be used against the client in the second matter.³²⁴

Rule 1.9 covers three aspects of former client representation. First, Rule 1.9(a) prohibits a lawyer from later opposing her former client on substantially related matters—the essence of this rule. Then, Rule 1.9(b) states that a lawyer who worked at a firm that represented a client may not later, at a different firm, oppose that client on a substantially related matter if the migrating lawyer learned information at the first firm that would be covered by Rule 1.6 and would be material to the new representation. Finally, Rule 1.9(c) prohibits a lawyer who once represented a client from using information learned in the earlier representation to the disadvantage of the former client or to the lawyer’s advantage (except in certain specified situations), whether or not some later adverse representation is permitted.

Rule 1.9 concerns are far more likely to arise in the context of motions to disqualify in litigation matters than in the disciplinary process before the BBO. A paradigmatic example of the successive conflicts worry addressed by Rule 1.9 is the case of *O’Donnell v. Robert Half International, Inc.*³²⁵ In this action on behalf of several employees against an employment-placement firm alleging violations of the Fair Labor Standards Act, the defendant was represented by a large national law firm, and the plaintiff by a smaller local law firm. The large firm representing the defendant assigned a new associate to assist in some small parts of the preparation of the defendant’s case. When the recession of 2008 reduced the national law firm’s business, the firm dismissed that associate. The associate, in turn, applied for an opening at the plaintiff’s law firm. After unsuccessfully seeking a waiver from the defendant’s firm of any possible conflict, the plaintiff’s firm hired the associate. The associate did not work on any legal matters at her new firm connected to the *O’Donnell* litigation.

Upon learning of the hire, the defendant filed an emergency motion to disqualify the plaintiff’s firm. Its argument was based directly on Rule 1.9 (along with Rule 1.10, which is discussed next). The federal District Court judge held that, because the associate formerly represented the defendant, but now represents the plaintiff (by virtue of working for the plaintiff’s firm), the plaintiff’s firm had created an impermissible conflict of interests. Whether applying Rule 1.9(a), under which the associate would qualify as a lawyer who formerly represented a client in the same matter, or Rule 1.9(b), under which the associate would qualify as a lawyer who left a firm at which a lawyer had formerly represented the client, she was disqualified. Under Rule 1.9(b), the court found, after a careful assessment of the disputed facts, that the plaintiff’s firm could not rebut the presumption that the associate learned material information about the former

³²⁴ *Bays v. Theran*, 418 Mass. 685, 691 (1994) (quoting from Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1315 (1981)).

³²⁵ *O’Donnell v. Robert Half Int’l, Inc.*, 641 F. Supp. 2d 84, 87 (D. Mass. 2009).

client while at the defendant's firm.³²⁶ Also, because of the nature of the information that the associate either had, or was deemed to have, she was not eligible to be screened at her new firm under Rule 1.10, which is discussed below.³²⁷ Therefore, despite the length of the litigation and the fact that the matter was a few weeks from a firm trial date, the District Court disqualified the plaintiff's firm, requiring the plaintiff to retain new counsel.³²⁸

As noted above, successive conflicts matters tend not to appear very often in the disciplinary reports, most likely because they are addressed through motions to disqualify. While it is not uncommon for a former client, not understanding the implications of Rule 1.9, to complain to the BBO that his former lawyer is now opposing him and therefore betraying a duty to him, most of those complaints arise from proper actions by the respondent lawyer, and Bar Counsel typically dismisses the charges or otherwise deals with the complainants on an informal basis. Only a handful of reported disciplinary decisions have arisen from successive conflicts matters, as seen below.

As with concurrent conflicts covered by Rule 1.7, and as seen in the discussion above of the *O'Donnell* disqualification, successive conflicts of one firm lawyer are imputed to the remainder of that lawyer's firm, absent informed consent of the former client,³²⁹ per Rule 1.10(a). The discussion above about this imputed disqualification applies with equal force here, with an important exception—the availability of *screening* in some circumstances in successive representation conflicts. Screening for concurrent conflicts is not permitted under the Massachusetts rules.

Rule 1.10 addresses the imputed disqualification implications of a lawyer's moving to a new law firm that represents a client adverse to a client of the lawyer's former firm. If the lateral hire possesses no information material to the adverse matter, the new firm may proceed without screening the lawyer. The rule appears to allow that lateral lawyer to participate in the matter against his prior firm. If that lawyer possesses some information, but "had neither involvement nor information relating to [the prior] matter sufficient to provide a substantial benefit to the firm's client," the new firm may

³²⁶ *Id.*, at 89. Rule 1.9 Comment [6] establishes a rebuttable presumption that a lawyer learned relevant information during a prior representation.

³²⁷ *Id.*, at 88. Massachusetts Rule 1.10(d) permits screening of a migrating lawyer who does not have "substantial material information" about the previous client matter. See the discussion below.

³²⁸ *Id.*, at 91. A different federal court judge later concluded that, after the "tainted attorney" had left the second firm, the firm was not precluded from representing another plaintiff against the same defendant in a similar claim because the "risk of recalling the substantial material information to which she was exposed and . . . the subsequent intolerably strong temptation to divulge such information . . . dissolved when . . . the [tainted attorney] moved on." *O'Donnell v. Robert Half Int'l, Inc.*, 724 F. Supp. 2d 217, 223 (D. Mass. 2010).

³²⁹ Note that if a lawyer were to obtain informed consent from a previous client to oppose that client in a new, substantially related matter (an unlikely scenario), the new representation likely will trigger a *Rule 1.7 concurrent conflicts* issue for the new client. The lawyer may need to obtain informed consent from the new client to oppose a party with whom the lawyer used to have a relationship, given the possibility that the lawyer's current representation might be limited by the lawyer's relationship with the former client, or by the lawyer's inability, under Rule 1.9(c), to use information obtained in the previous representation. For a discussion of that posture, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 (2000).

proceed only if it screens the “personally disqualified” lawyer who moved. That screening opportunity is narrower than that permitted under the Model Rules.³³⁰ Finally, if the lateral lawyer possesses information that would provide a benefit to the new firm’s client, the new firm may not proceed, even if it screens the lateral lawyer. Rule 1.10(e) details the requirements necessary for an effective screen.

B. Typical Discipline for Former Client Conflicts Under Rule 1.9(a) and 1.9(b)

You Should Know

The SJC has stated that a violation of the successive conflict rules, without a finding that the lawyer was motivated by self-interest, should result in an admonition.³³¹

Discipline under Rule 1.9, where a lawyer has improperly represented a client in a substantially related matter adverse to a former client without the latter’s consent, is rare in Massachusetts. Rule 1.9 protection is essentially focused on the confidences of the former client, and the reported disciplinary decisions regarding misuse of confidences, in violation of Rule 1.6, are less uncommon (see Part II of this chapter). But few of those decisions or opinions rely on Rule 1.9.³³² In some cases, though, lawyers have been disciplined for conflicts of interest involving former clients.

1) Disbarment

Massachusetts has never disbarred a lawyer for a Rule 1.9 violation arising from a former client conflict of interest. On occasion, the SJC has disbarred a lawyer for misconduct that included improper use of former client confidences in violation of Rule 1.9(c). For example, in *Matter of McDonald*,³³³ the respondent lawyer violated thirteen separate rules in an extensive series of misconduct, including using the confidences of former clients to enrich himself. The single justice accepted the respondent’s resignation and entered an order of disbarment.

2) Suspension

Only a few reported decisions involving a former client conflict have resulted in the lawyer receiving a suspension from practice. The examples each involve multiple

³³⁰ Under Model Rule 1.10(a), a migrating lawyer who otherwise would be disqualified under Rule 1.9(a) or (b) may be screened, and the new firm may represent the new client, regardless of how much information the lawyer possesses about the former client, if certain procedures are followed, including notice to the affected former client and other disclosures.

³³¹ In re Discipline of an Attorney, 449 Mass. 1001, 1002 (Rescript, 2007).

³³² The 2002 treatise on Massachusetts ethics and discipline, TUONI, *supra* note 92, cites no discipline examples at all in its discussion of Rule 1.9, except a series of disciplinary actions taken against lawyers for violation of Rule 1.6 or its predecessor in the Code of Professional Responsibility. *See id.* at 9-30 to 9-33.

³³³ 20 Mass. Att’y Disc. R. 381 (2004).

instances of misconduct, so no reported disciplinary decision resulting in suspension involved simply a Rule 1.9(a) or (b) violation. In *Matter of Airewele*,³³⁴ the respondent, practicing in Georgia without having been admitted to the Georgia bar (a Rule 5.5 violation), represented a man in a divorce after having represented the man's wife in an immigration proceeding, and without the wife's consent. In the course of the later representation, the respondent "forwarded to his local Georgia counsel damaging information about the businessman's wife relevant to the wife's immigration proceedings the respondent had handled."³³⁵ The respondent was suspended for six months and a day for this and other misconduct.

In *Matter of Wise*,³³⁶ the respondent lawyer received a six-month suspension for his actions regarding a client, a nonprofit corporation, which the lawyer had represented for some time and within which an internal power struggle arose. The lawyer acted in concert with former board members of the nonprofit organization against the interests of the current (and allegedly unfaithful) board members, after he had been dismissed as counsel by the latter managers. The actions in *Wise* occurred before the adoption of Rule 1.9, and neither the Board nor the SJC refers to the lawyer's conflicts as "former client" conflicts, but they were precisely that. The suspension in *Wise* resulted from the lawyer's also violating the rules against contact with a represented party and the lawyer's disclosure of confidential information without adequate client consent.

3) Public Reprimand

At least one serious violation of Rule 1.9 involving betrayal of a former client has resulted in a public reprimand for the lawyer, although that decision included a separate instance of misconduct on a different matter and a history of prior discipline. In *Matter of Lederman*,³³⁷ the respondent lawyer represented four siblings in a litigated dispute with a fifth sibling over the proceeds of a testamentary trust. After the lawyer's initial strategy failed to produce the results the clients hoped for, he proceeded to represent one of the four siblings in a new strategy against the interests of the remaining siblings, three of whom were the respondent's former clients. Combined with a separate matter in which the lawyer used deceptive tactics in an effort to obtain documents belonging to the other spouse in a divorce matter, and a history of one prior admonition, the lawyer's misconduct resulted in the public reprimand.

In *Matter of Horrigan*,³³⁸ the lawyer violated Rule 1.9(a), and then more seriously violated Rule 1.9(c). He received a public reprimand for his misconduct. After having represented a man in a personal injury and worker's compensation matter, the lawyer agreed to represent the man's wife in a divorce action. The lawyer then recognized the conflict, and withdrew the same day. He later shared the husband's medical records, obtained during the previous representation, with the wife, although neither the wife nor

³³⁴ 28 Mass. Att'y Disc. R. 3 (2012).

³³⁵ *Id.* at 6.

³³⁶ *Matter of Wise*, 433 Mass. 80, 16 Mass. Att'y Disc. R. 416 (2000).

³³⁷ 22 Mass. Att'y Disc. R. 462 (2006).

³³⁸ 26 Mass. Att'y Disc. R. 250 (2010) (discussed *supra* at text accompanying note 145).

her lawyer reviewed the records. With no prior discipline and no other misconduct in the present proceeding, the lawyer's actions warranted a public reprimand.

Finally, in *Matter of Schwartz*,³³⁹ a lawyer agreed to represent two passengers in a motor vehicle accident, until he learned that his law firm represented the driver of the second car involved in the accident. He withdrew from the passenger representation, but he authorized his firm to remain as counsel for the driver of the second car. Later, the respondent represented one of the original two clients in a new matter adverse to the other original client and to the driver of the second car, without permission from either. Those violations of Rules 1.9(a) and 1.10 led to a stipulated public reprimand. In addition to the multiple conflicts, there was an aggravating factor, as the respondent had received an admonition for mishandling client funds.

In *Matter of Glassman*,³⁴⁰ the respondent initially represented the driver and two passengers in the same vehicle, all of whom were injured in a motor vehicle accident. Under the circumstances (including insufficient liability insurance), the interests of all three clients were adverse to one another. When one passenger discharged the respondent, he continued to represent the driver and the other passenger, thus maintaining an ongoing conflict of interest. Thereafter, the insurer offered an aggregate settlement, which the respondent did not handle properly under Rule 1.8(g). He received a public reprimand for this misconduct as well as his failing to withdraw from representing the remaining clients after discharge by one passenger.

4) Admonition

In a 2007 rescript opinion from the SJC, a lawyer who violated Rule 1.9(a) or (b) received an admonition, even though the affected former client suffered some harm. In *Discipline of an Attorney*,³⁴¹ the respondent lawyer represented a former client's son, as mortgagor, and recorded a discharge of the client's mortgage, even though the lawyer had represented the father, as mortgagee, in drafting the original security instrument. The hearing committee found that the lawyer's betrayal of his former client's interests "caused financial and physical harm to the father."³⁴² The SJC agreed with the Board that the proper sanction was an admonition, and not, as requested by Bar Counsel, a suspension or, at minimum, a public reprimand. Because "[the respondent's] actions were not motivated by self-interest and the rule violations were isolated incidents," the breach did not compare to other examples cited in the opinion warranting a public reprimand.³⁴³ This opinion may seem inconsistent with *Matter of Lederman*, discussed above and decided after *Matter of the Discipline of An Attorney*, as *Lederman* did not involve harm and did result in a public reprimand. But *Lederman* involved two violations and prior discipline that served as an aggravating factor.

³³⁹ 18 Mass. Att'y Disc. R. 455 (2002).

³⁴⁰ 25 Mass. Att'y Disc. R. 224 (2009).

³⁴¹ In re Discipline of an Attorney, 449 Mass. 1001 (2007).

³⁴² 449 Mass. at 1001.

³⁴³ 449 Mass. at 1002 (distinguishing *Matter of Dionisi*, 9 Mass. Att'y Disc. R. 99, 100 (1993); *Matter of Warren*, 8 Mass. Att'y Disc. R. 260, 261 (1992)). None of the cited examples involved Rule 1.9(a) or (b).

In AD 05-38,³⁴⁴ two lawyers (a principal and his associate) initially accepted the representation of the driver and two passengers, all of whom were injured in a motor vehicle accident. In contrast with *Glassman*, it initially appeared that the passengers would have no claim against their driver. Several months later, the respondents obtained a police report that indicated the driver may have been at fault and therefore a direct conflict of interest existed. The principal attorney attempted to cure the conflict by discharging the driver as a client. He also transferred representation of the passengers to his associate. By continuing to represent the two passengers after withdrawing as counsel for the driver without the driver's consent, the respondents violated Rule 1.9(a). In mitigation, the respondents later withdrew from all representation in the matter and waived any fee claims.

C. The “Hot Potato” Doctrine

As noted earlier, Rule 1.7 bars any representation adverse to a current client, regardless of whether it is substantially related to the work for the current client or not, unless the current client gives informed consent in writing. By contrast, Rule 1.9 only bars representation adverse to a former client if the new work is substantially related to the work for the former client. Rule 1.9 is therefore much less strict than Rule 1.7. Law firms have sought to take advantage of that difference by withdrawing from ongoing representation of an existing client in order to accept unrelated, and presumably more lucrative, work from a new client against the now-former client. Most states have adopted a principle that has come to be known as the “hot potato” doctrine,³⁴⁵ forbidding such abandonment of a client, prior to accepting the new client, in order to exploit the less restrictive former-client conflicts rule.³⁴⁶

In Massachusetts, the SJC has never expressly adopted the “hot potato” doctrine.³⁴⁷ A 2016 decision by the Court did not resolve whether Massachusetts will follow the rest of the country in forbidding such a maneuver. In *Bryan Corp. v. Abrano*,³⁴⁸ the SJC disqualified a law firm for its violation of Rule 1.7. The law firm represented a company in a litigation matter. After a dispute among the family members comprising management, the law firm was asked by the formerly controlling constituents to sue the company. The firm sought to terminate its work on behalf of the company in order to accept the new matter. The SJC concluded that the firm had not withdrawn from its representation of the company before commencing adverse representation, thus violating Rule 1.7. Because of the existence of a current conflict, the Court declared that

³⁴⁴ 21 Mass. Att’y Disc. R. 756 (2005).

³⁴⁵ The phrase was coined in *Picker Int’l v. Varian Assocs.*, 670 F.Supp. 1363, 1365–1366 (N.D. Ohio 1987).

³⁴⁶ See Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 78 n.17 (2014) (“Typically, courts . . . preclude the lawyer or firm from dropping (i.e., firing) a current client like a ‘hot potato’ in order to sue that client.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. c & Reporter’s Note to cmt. c. (2000).

³⁴⁷ See Paul Lannon & Jeffrey D. Woolf, *When Clients Clash: Abrano, Hot Potato and the Duty of Loyalty*, 60 BOSTON BAR J. 4 (2016).

³⁴⁸ 474 Mass. 504 (2016).

it need not reach the “hot potato” question.³⁴⁹ The Court, however, strongly emphasized a lawyer’s duty of loyalty to an existing client when considering the representation of another client that will create, or is likely to create, a conflict with the existing client, stating “rule 1.7 encompasses a lawyer’s duty to anticipate potential conflicts and, where appropriate, decline representation.”³⁵⁰

D. Discipline for Conflicts Under Rule 1.10

Because Rule 1.10 operates to impute conflicts of interest originating under another rule, including Rules 1.7, 1.8, and 1.9(a) and (b), any disciplinary decision relying on Rule 1.10 would be derivative of the direct misconduct under those rules. For example, in *Matter of Schwartz*,³⁵¹ discussed above under Rule 1.9, the lawyer’s misconduct involved a conflict of interest of his firm. Likewise, the associate in AD 05-38, above, who took over the representation of the passengers after the driver was discharged as a client, violated Rule 1.10(a).

In AD 08-11,³⁵² however, multiple respondents received an admonition for the principal violation of Rule 1.10(a). A large international law firm failed to enter properly into its database the names of some clients, and as a result the firm accepted representation directly adverse to one of its clients. While that misconduct included a Rule 1.7 violation, the only basis cited for the admonition was Rule 1.10.

³⁴⁹ 475 Mass. at 510. In its solicitation of amicus briefs on this case, the SJC had asked “whether, and if so in what circumstances, Massachusetts recognizes the so-called ‘hot potato’ doctrine, which precludes an attorney from resolving a disqualifying conflict by dropping one client in favor of the other.”

³⁵⁰ 475 Mass. at 512.

³⁵¹ 18 Mass. Att’y Disc. R. 455 (2002).

³⁵² 24 Mass. Att’y Disc. R. 860 (2008).

Part V

Other People's Money (Rules 1.5, 1.15)

I. Introduction

Among the reasons for which lawyers get in trouble and end up before the BBO, misconduct involving money is among the most common, and often the most serious. A review of the disciplinary decisions issued by the BBO and the SJC over the past quarter century reveals close to a thousand reported cases where the matter involved some misconduct involving client funds or lawyers' fees. This Part reviews generally the obligations lawyers assume regarding money and property, and describes the kinds of sanctions that accompany that variety of misconduct.

This topic comprises two related but separable areas, each governed by its own rule of professional conduct. The first is the issue of lawyer's fees and related payment for legal services, governed by Rule 1.5, along with some state statutes and common law. The second is the lawyer's responsibility to hold funds and property belonging to clients, and sometimes to third parties, in trust and separate from the lawyer's own funds, governed by Rule 1.15. Lawyers sometimes err by charging clients fees that are clearly excessive or illegal. Much more often, lawyers err because they fail to handle safely enough, or engage intentionally in misuse of, funds or property held in trust. Both represent a serious breach of the lawyer's fiduciary duties to clients or to third parties.

II. The Lawyers' Fees

RULE 1.5: FEES

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b)

(1) Except as provided in paragraph (b)(2), the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) The requirement of a writing shall not apply to a single-session legal consultation or where the lawyer reasonably expects the total fee to be charged to the client to be less than \$500. Where an indigent representation fee is imposed by a court, no fee agreement has been entered into between the lawyer and client, and a writing is not required.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph

(d) or other law. Except for contingent fee arrangements concerning the collection of commercial accounts and of insurance company subrogation claims, a contingent fee agreement shall be in writing and signed in duplicate by both the lawyer and the client within a reasonable time after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the lawyer for a period of seven years after the conclusion of the contingent fee matter. The writing shall state the following:

(1) the name and address of each client;

(2) the name and address of the lawyer or lawyers to be retained;

(3) the nature of the claim, controversy, and other matters with reference to which the services are to be performed;

(4) the contingency upon which compensation will be paid, whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected for him or her by the lawyer, and if the lawyer is to be

paid any fee for the representation that will not be determined on a contingency, the method by which this fee will be determined;

(5) the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer out of amounts collected, and unless the parties otherwise agree in writing, that the lawyer shall be entitled to the greater of (i) the amount of any attorney's fees awarded by the court or included in the settlement or (ii) the amount determined by application of the percentage or other formula to the recovery amount not including such attorney's fees;

(6) the method by which litigation and other expenses are to be calculated and paid or reimbursed, whether expenses are to be paid or reimbursed only from the recovery, and whether such expenses are to be deducted from the recovery before or after the contingent fee is calculated;

(7) if the lawyer intends to pursue such a claim, the client's potential liability for expenses and reasonable attorney's fees if the attorney-client relationship is terminated before the conclusion of the case for any reason, including a statement of the basis on which such expenses and fees will be claimed, and, if applicable, the method by which such expenses and fees will be calculated; and

(8) if the lawyer is the successor to a lawyer whose representation has terminated before the conclusion of the case, whether the client or the successor lawyer is to be responsible for payment of former counsel's attorney's fees and expenses, if any such payment is due.

Upon conclusion of a contingent fee matter for which a writing is required under this paragraph, the lawyer shall provide the client with a written statement explaining the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. At any time prior to the occurrence of the contingency, the lawyer shall, within twenty days after either 1) the termination of the attorney-client relationship or 2) receipt of a written request from the client when the relationship has not terminated, provide the client with a written itemized statement of services rendered and expenses incurred; except, however, that the lawyer shall not be required to provide the statement if the lawyer informs the client in writing that he or she does not intend to claim entitlement to a fee or expenses in the event the relationship is terminated before the conclusion of the contingent fee matter.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee (including a referral fee) between lawyers who are not in the same firm may be made only if the client is notified before or at the time the client enters into a fee agreement for the matter that a division of fees will be made and consents to the joint participation in writing and the total fee is reasonable. This limitation does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

(f)

(1) The following forms of contingent fee agreement may be used to satisfy the requirements of paragraphs (c) and (e) if they accurately and fully reflect the terms of the engagement.

(2) A lawyer who uses Form A does not need to provide any additional explanation to a client beyond that otherwise required by this rule. The form contingent fee agreement identified as Form B includes two alternative provisions in paragraphs (3) and (7). A lawyer who uses Form B shall show and explain these options to the client, and obtain the client's informed consent confirmed in writing to each selected option. A client's initialing next to the selected option meets the "confirmed in writing" requirement.

(3) The authorization of Forms A and B shall not prevent the use of other forms consistent with this rule. A lawyer who uses a form of contingent fee agreement that contains provisions that materially differ from or add to those contained in Forms A or B shall explain those different or added provisions or options to the client and obtain the client's informed consent confirmed in writing. For purposes of this rule, a fee agreement that omits option (i) in paragraph (3), and, where applicable, option (i) in paragraph (7) of Form B is an agreement that materially differs from the model forms. A fee agreement containing a statement in which the client specifically confirms with his or her signature that the lawyer has explained that there are provisions of the fee agreement, clearly identified by the lawyer, that materially differ from, or add to, those contained in Forms A or B meets the "confirmed in writing" requirement.

(4) The requirements of paragraphs (f)(I) -(3) shall not apply when the client is an organization, including a non-profit or governmental entity.

[Contingent Fee Agreement Form A and Form B omitted.]

A. The Basics of Rule 1.5

Rule 1.5 expresses a straightforward obligation whose practical application can be remarkably ambiguous. The rule provides that a lawyer's fees must not be clearly excessive or illegal. It lists eight nonexclusive factors that help determine whether a fee is excessive or illegal. Those factors primarily require that a lawyer's fees must not exceed the prevailing market for the kind of work the lawyer provides, but also take into consideration the lawyer's skill level, the nature of the tasks the lawyer must perform (including how long the work will take), the demands and particular needs of the client (including how urgent the matter is), and, significantly, whether the fee is fixed or contingent.³⁵³ Because those factors are not exclusive, other considerations may affect whether any given fee is permitted under the rule. Rule 1.5 also regulates contingent fees with great specificity, as described in a later section. The rule also prohibits a lawyer from "collect[ing] an unreasonable amount for expenses."³⁵⁴

Massachusetts requires that all fee arrangements as well as the scope of the representation be communicated to the client in writing, "except when the lawyer will charge a regularly represented client on the same basis or rate,"³⁵⁵ or in single-meeting consultation, or when the engagement is for a total fee not exceeding \$500.³⁵⁶ The writing requirement, promulgated in 2012, is different from the practice in most jurisdictions,³⁵⁷ and a signature of the client is not required unless the arrangement is for a contingent fee. Inclusion of the scope of the representation is not only required by the rule, but is essential for both parties' understanding of what the lawyer will address, and what she will not address, during the representation. Recall that Rule 1.2(c) requires the client's informed consent if the objectives of the representation are to be limited. The exception to the writing requirement for regular, repeated representation "on the same basis" most likely refers to arrangements where the lawyer offers services for a flat fee, discussed below.

One further aspect of Rule 1.5 deserves mention, because it is quintessentially a Massachusetts practice and tradition. Unlike almost every other jurisdiction in the nation, Massachusetts permits an attorney's fee to be divided with a lawyer who does not practice in the firm of the primary lawyer (i.e., a referral fee), even if the referring lawyer does nothing more than refer the matter.³⁵⁸ The rules in most jurisdictions, however, provide that a lawyer may not pay a referring lawyer any fee unless the latter lawyer works on the matter or accepts responsibility for the representation, and even then the fee must be divided proportionately.³⁵⁹ The Massachusetts rule permits a pure referral fee, as long as the client knows in advance that the fee will be divided with the referring lawyer

³⁵³ MASSACHUSETTS RULES PROF. CONDUCT 1.5(a)(1)–(8).

³⁵⁴ Rule 1.5(a).

³⁵⁵ Rule 1.5(b)(1).

³⁵⁶ Rule 1.5(b)(2) ("The requirement of a writing shall not apply to a single-session legal consultation or where the lawyer reasonably expects the total fee to be charged to the client to be less than \$500.").

³⁵⁷ The ABA's Model Rule, which most jurisdictions follow, states that the fee basis shall be communicated "preferably in writing." *See* MODEL RULES OF PROF. CONDUCT 1.5(b).

³⁵⁸ Rule 1.5(e).

³⁵⁹ *See* MODEL RULES OF PROF. CONDUCT 1.5(e).

and the client consents to the joint participation in writing, and as long as the total fee charged to the client is reasonable.

While a discussion of the provisions of Rule 1.5 as it pertains to the requirements of contingency fee agreements is beyond the scope of this treatise, the Office of the Bar Counsel has written several articles on fee agreements in general and contingency fee agreements in particular, which are available on its website.³⁶⁰

Other topics of interest to lawyers arising from Rule 1.5 concern payments in kind, and measures taken by lawyers to secure payments due in the future. These issues will be addressed in Part II.C.(4) below, along with more in-depth discussion of the requirements of a reasonable fee and a proper contingent fee.

B. Discipline for Violation of Rule 1.5

You Should Know

A lawyer who charges a client a clearly excessive fee typically receives a public reprimand. The discipline for a lawyer who charges a clearly excessive fee while misleading the client is a term suspension. On occasion, when a lawyer has refunded the excess fees and the client suffers little harm, the lawyer may receive an admonition. Disbarment has not been imposed for violation of Rule 1.5 alone.

1) Disbarment

If a lawyer intentionally charges or collects fees for work not actually performed it may be viewed as equivalent to misappropriation, or theft, of a client's funds. The presumptive sanction for misappropriation of client money is disbarment or indefinite suspension.³⁶¹ Ordinarily, charging a client a clearly excessive fee is not treated in the disciplinary reports in the same fashion as misappropriation of client funds or property.

You Should Know

In *Matter of Schoepfer*, the SJC established the following presumptive sanctions for misappropriation of client funds, which an excessive fee might represent:

If . . . an attorney intended to deprive the client of funds, permanently

³⁶⁰ See, e.g., Nancy E. Kaufman & Constance V. Vecchione, *The Ethics of Charging and Collecting Fees*, <https://bbopublic.blob.core.windows.net/web/f/ethicsfees.pdf> (2015); Constance V. Vecchione, *FAQs: Mass. R. Prof. C. 1.5(b) and Written Fee Arrangements*, [https://bbopublic.blob.core.windows.net/web/f/FAQs%201.5\(b\).pdf](https://bbopublic.blob.core.windows.net/web/f/FAQs%201.5(b).pdf) (2013); Constance V. Vecchione, *Write It Up, Write It Down: Amendments to Mass. R. Prof. C. 1.5 Require Fee Arrangements to Be in Writing* <https://bbopublic.blob.core.windows.net/web/f/WriteItUp.pdf> (2012); Constance V. Vecchione, *Fees and Feasibility: Amendments To Mass. R. Prof. C. 1.5 on Fees*, <https://bbopublic.blob.core.windows.net/web/f/Fees2011.pdf> (2011).

³⁶¹ *Matter of Schoepfer*, 426 Mass. 183, 185-188 & n.2, 13 Mass. Att'y Disc. R. 679 (1997).

or temporarily, or if the client was deprived of funds (no matter what the attorney intended), the standard discipline is disbarment or indefinite suspension.³⁶²

In *Matter of Goldstone*,³⁶³ the attorney charged and collected an excessive fee from his client, a national retailer, by intentionally and in bad faith charging fees to which he was not entitled. The corporation sued the lawyer for breach of contract and won a judgment against him.³⁶⁴ Relying on the facts established conclusively in the civil action, the SJC disbarred the lawyer. The Court wrote, “[The respondent] intentionally overbilled and collected from his client hundreds of thousands of dollars in fees and costs to which he was not entitled, on both closed and active cases. Where an attorney lacks a good faith belief that he has earned and is entitled to the monies, such conduct constitutes conversion and misappropriation of client funds.”³⁶⁵ In *Matter of Smith*,³⁶⁶ decided soon after *Goldstone*, an attorney filed an affidavit of resignation after Bar Counsel charged him with charging his client excessive fees. The attorney charged a widowed, elderly client a total of \$60,000 for services that had a maximum value of \$7,500. The single justice accepted his resignation. While many lawyers have been disbarred for intentional misappropriation of client funds held by the lawyers, *Goldstone* and *Smith* represent disciplinary matters where the bad faith charging of an excessive fee led to a disbarment.³⁶⁷

On other occasions, lawyers have been disbarred for misconduct involving excessive fees, although always with other serious misconduct as well. In *Matter of Pepyne*,³⁶⁸ the single justice accepted the respondent’s affidavit of resignation after reviewing six separate instances of misconduct, several of which involved the lawyer’s imposing liens or accepting fees to which he was not entitled. He also neglected matters, was held in contempt of court, and was convicted of an unrelated crime. In *Matter of O’Connor*,³⁶⁹ the single justice disbarred a lawyer for misconduct involving his collecting a higher fee in a worker’s compensation matter than that provided for in the settlement and misleading his client about the true fee. He also engaged in separate misconduct where he neglected a matter and lied to his client about his carelessness.

³⁶² 426 Mass. at 185–188 & n.2 (*citing* Matter of the Discipline of an Attorney, 392 Mass. 827, 836-837 (1984)).

³⁶³ 445 Mass. 551, 21 Mass. Att’y Disc. R. 288 (2005).

³⁶⁴ *See* *Sears, Roebuck & Co. v. Goldstone & Sudalter, P.C.*, 128 F. 3d 10 (1st Cir. 1997) (confirming that the attorney bears the burden of proof in a controversy with a client to establish that his fees were reasonable).

³⁶⁵ 455 Mass. at 566.

³⁶⁶ 21 Mass. Att’y Disc. R. 609 (2005).

³⁶⁷ In *Matter of Pomeroy*, 26 Mass. Att’y Disc. R. 515 (2010), the respondent was retained by an elderly client to liquidate several bank accounts and turn the proceeds over to him. The lawyer converted over \$812,000. When her conduct was discovered, she initially claimed this represented a contingent fee she was owed for these services. She later fabricated documents to conceal her activities. Ultimately the respondent submitted an affidavit of resignation and was disbarred. *See* *Matter of Pomeroy*, and 25 Mass. Att’y Disc. R. 507 (2009) (temporary suspension).

³⁶⁸ 26 Mass. Att’y Disc. R. 502 (2010).

³⁶⁹ 26 Mass. Att’y Disc. R. 458 (2010).

You Should Know

There is a difference between a *clearly excessive* fee and an *illegal* fee. An illegal fee is a fee not allowed by the contractual or regulatory terms under which the lawyer is to be paid, even if the actual amounts charged would not be deemed “clearly excessive.” Lawyers have been disciplined under Rule 1.5 for charging an illegal fee in a workers’ compensation matter³⁷⁰ and a criminal defense matter,³⁷¹ among others.

2) Suspension

The lawyers who have been suspended for violating Rule 1.5 typically have overcharged a client intentionally, with some misrepresentation about the fee. For instance, in *Matter of Beaulieu*,³⁷² an attorney was suspended for four years and had to make restitution before submitting an application for reinstatement. The attorney billed the Committee for Public Counsel Services for his legal services and violated Rule 1.5(a) by submitting inaccurate and grossly inflated reports of his hours. In a recent disposition that ought to be of considerable interest to many private firm lawyers, *Matter of Murphy*,³⁷³ an attorney was suspended for a year and a day where, in order to increase his billable hours, he knowingly spent more time on client matters than necessary. The attorney, an associate in a law firm, earned an annual salary with a bonus tied to his billings. The attorney billed his clients for extra hours when he should have delegated tasks to lawyers of lesser seniority, and for tasks that were duplicated and billed by others in his firm.³⁷⁴

In *Matter of Rafferty*,³⁷⁵ the single justice imposed a four-month suspension on an attorney, with reinstatement conditioned on his passing the MPRE and making restitution, after he intentionally complied with the questionable instructions of his wealthy and overzealous client, litigating her matter excessively and collecting from her fees of \$700,000. The fees were far in excess of any amount she could reasonably hope to win in the lawsuit. Because the lawyer collected an excessive fee through his failure to restrain his client’s unreasonable litigation desires, the single justice determined that his

³⁷⁰ *O’Connor, supra*.

³⁷¹ *Matter of Serpa*, 30 Mass. Att’y Disc. R. 358 (2014).

³⁷² 29 Mass. Att’y Disc. R. 33 (2013).

³⁷³ 28 Mass. Att’y Disc. R. 643 (2012).

³⁷⁴ The misconduct present in *Matter of Murphy* has been, by many accounts, a very common phenomenon within competitive firm law practice, where associates experience intense pressure to meet billable hour quotas and partners encounter similar incentives to report high hours. For a discussion of this problem, see, e.g., Susan Saab Fortney, *Soul for Sale: An Empirical Study of Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239 (2000); Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205 (1999); Christine Parker & David Ruschena, *The Pressures of Billable Hours: Lessons From a Survey of Billing Practices Inside Law Firms*, 9 U. ST. THOMAS L.J. 619 (2011); William G. Ross, *Kicking the Unethical Billing Habit*, 50 RUTGERS L. REV. 2199 (1998).

³⁷⁵ 26 Mass. Att’y Disc. R. 538 (2010).

sanction ought to be higher than the presumptive sanction for charging excessive fees, which would have been a public reprimand.

In *Matter of Beatrice*,³⁷⁶ the respondent was suspended for two years for several instances of misconduct, including entering into and collecting a contingent fee in a criminal case. And in *Matter of Landry*,³⁷⁷ the respondent was suspended for nine months after charging, and suing to collect, an excessive contingent fee for representation regarding the sale of corporate stock. The respondent also misled his client about the propriety of a contingent fee arrangement in that type of representation.³⁷⁸

3) Public Reprimand

“The typical sanction for charging an excessive fee is a public reprimand.”³⁷⁹ Many lawyers have received public reprimands for violating Rule 1.5, either after charging an hourly fee or where the arrangement involved a contingent fee arrangement. The most prominent SJC treatment of the discipline for an excessive fee has been *Matter of Fordham*,³⁸⁰ discussed in more detail below. In *Fordham*, the SJC imposed a public reprimand for the respondent’s having charged his unsophisticated client a clearly excessive fee (despite providing very high quality, and successful, legal services, and despite the fact that the excessive fee was not actually collected).

Other recent matters in which the lawyer received a public reprimand for violating Rule 1.5 include *Matter of Henry*,³⁸¹ where an attorney was reprimanded after representing a husband and wife in their petition to partition a two-family duplex. The attorney charged the clients more than \$91,000, while the total reasonable amount, according to the Fee Arbitration Board, was \$35,000. In *Matter of Tierney*,³⁸² an attorney received a public reprimand because the fees she charged and collected were disproportionate to the size and value of the estate on which she worked. The net proceeds from the real estate in question amounted to less than \$98,000, and the attorney charged \$22,500 for her work on the estate, which the Board concluded was clearly excessive under the circumstances.

³⁷⁶ 14 Mass. Att’y Disc. R. 56 (1998).

³⁷⁷ 31 Mass. Att’y Disc. R. ___, 2015 WL 10322929 (2015).

³⁷⁸ See also *Matter of Gibson*, 27 Mass. Att’y Disc. R. 396 (2011) (single justice order suspending the respondent indefinitely, without reference to Rule 1.5, after the respondent entered into a grossly unfair contingent fee agreement, and misappropriated the funds held).

³⁷⁹ *Matter of Rafferty*, 26 Mass. Att’y Disc. R. 538, (2010). The ABA model standards for discipline apply a more flexible approach. Those standards recommend varying sanctions for “unreasonable or improper fees,” depending on the mental state of the lawyer and the harm caused to the client. See ABA MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS § 7.0 – 7.4 (2012).

³⁸⁰ 423 Mass. 481, 12 Mass. Att’y Disc. R. 161 (1996), cert. denied, 519 U.S. 1149 (1997). *Fordham* charged but did not actually collect a clearly excessive fee. However, since then Bar Counsel has stipulated to public reprimands in cases where lawyers have both charged and actually collected clearly excessive fees, when the lawyer has made restitution. See, e.g., *Matter of Chignola*, 25 Mass. Att’y Disc. R. 112 (2009) (restitution and other factors in mitigation); *Matter of Olchowski*, 24 Mass. Att’y Disc. R. 520 (2009) (restitution).

³⁸¹ 28 Mass. Att’y Disc. R. 450 (2012).

³⁸² 28 Mass. Att’y Disc. R. 850 (2012).

Lawyers who have failed to document a contingent fee in writing have usually received admonitions, as discussed below. There have been instances when the lawyers have received public reprimands, but in each case the lawyer also committed separate misconduct. (Indeed, in each case Bar Counsel seemingly would not have known of the absence of a written agreement but for the separate misconduct.) For example, in *Matter of Carroll*,³⁸³ the respondent neglected a contingent-fee matter for which there was no written fee agreement, and caused the client's case to be time-barred through his lack of diligence, among other things. He received a public reprimand. In *Matter of Kelleher*,³⁸⁴ the attorney ignored a previous lawyer's claim to a share of contingent-fee proceeds, and also did not prepare a written contingent fee agreement. In *Matter of Faria*,³⁸⁵ the lawyer received a public reprimand after he entered into an oral contingent fee agreement, neglected the matter, and was responsible for the dismissal of the client's case. He had previously received an admonition for neglect, including missing a statute of limitations.³⁸⁶

4) Admonition

On occasion, lawyers who charged excessive fees or otherwise violated Rule 1.5 have received only an admonition. The admonitions tend to appear where the misconduct was not intentional and the client suffered little or no harm. For example, in AD 00-78,³⁸⁷ the respondent charged his client, an elderly woman for whom he served as trustee, legal services rates for assistance that did not require legal skills. Because the lawyer "ha[d] also taken very good care of the client over the years that he has been her trustee" and made restitution to the trust, he received only an admonition. In AD 09-02,³⁸⁸ an attorney failed to execute a written contingent-fee agreement with the client, leading to disagreement about its terms. The lawyer also offered less-than-competent services to the client, but made full amends to remedy any potential harm.³⁸⁹ In AD 06-02,³⁹⁰ the attorney charged his client for services that were unnecessary and redundant. He made

³⁸³ 28 Mass. Att'y Disc. R. 130 (2012). *See also* *Matter of Kelleher*, 26 Mass. Att'y Disc. R. 281 (2010) (attorney also faced public reprimand for *conduct including* not having a written contingent fee agreement); *Matter of Foley*, 25 Mass. Att'y Disc. R. 207 (2009) (attorney faced three-month suspension, stayed for one year under probationary conditions, for, among other violations, entering into a contingent fee agreement without a written fee agreement).

³⁸⁴ 26 Mass. Att'y Disc. R. 281 (2010).

³⁸⁵ 25 Mass. Att'y Disc. R. 201 (2009).

³⁸⁶ *See also* *Matter of Neal*, 19 Mass. Att'y Disc. R. 330 (2003) (public reprimand for misconduct including failing to maintain a copy of the contingent fee agreement).

³⁸⁷ 17 Mass. Att'y Disc. R. 563 (2000).

³⁸⁸ 25 Mass. Att'y Disc. R. 655 (2009).

³⁸⁹ For a similar, if perhaps more surprising, example, see AD 08-18, 24 Mass. Att'y Disc. R. 895 (2008) (no written contingent fee agreement, plus neglect leading to dismissal of client's case; successor counsel obtained reversal of the dismissal, so ultimately no substantial harm to the client). *Compare* AD 00-12, 16 Mass. Att'y Disc. R. 467 (2000) (admonition solely for failure to have contingent fee agreement in writing).

³⁹⁰ 22 Mass. Att'y Disc. R. 848 (2006).

restitution of the fees to which he was not entitled. In AD 04-05,³⁹¹ the attorney received an admonition after calculating his contingent fee on amounts (personal injury protection (PIP) benefits) that were not contingent at all. The attorney refunded that portion of his fee after his client filed a complaint with the Office of the Bar Counsel. Other examples of a similar nature exist in the disciplinary reports.³⁹²

In AD 99-58,³⁹³ a lawyer received an admonition for failing to disclose to a client his receipt of a referral fee, in violation of DR 2-107(A)(1), the predecessor to Rule 1.5(e). The lawyer had referred a matter, received a contingent fee, but neither he nor the lawyer to whom he referred the matter disclosed the arrangement to the client.

In *Matter of the Discipline of an Attorney*,³⁹⁴ the Supreme Judicial Court declined to admonish a lawyer for including in his contingent-fee agreement a provision stating that if the attorney were discharged prior to the conclusion of the representation, the attorney would be compensated for the fair value of his services or one third of any settlement offer that had been made at the time of discharge, whichever was greater. Because this specific provision could result in fee that exceeded the fair value of the work and could discourage the client from discharging the lawyer, the Court doubted whether a contingent-fee agreement should contain any such provision. But because the respondent had neither charged nor collected an unreasonable fee based upon that contract, the Court concluded that discipline was not warranted. (Because the respondent's conduct was not expressly prohibited by Rule 1.5, after that opinion the Court amended Rule 1.5 and included clause (6) of both versions of the Model Fee Agreement to limit such fees.) However, the SJC did admonish the lawyer for knowingly misrepresenting to insurers on several occasions the existence of a statutory lien in his favor, and for failing to notify his client promptly about his receipt of funds payable to the client.

C. Other Fee Issues

1) Determining Whether a Fee Is Clearly Excessive

Whether a lawyer's fee is "clearly excessive" cannot be determined formulaically. That determination calls for careful and nuanced judgment based on the many factors set forth in Rule 1.5(a). Most discussions use *Matter of Fordham*,³⁹⁵ described earlier in Section B.3, as a benchmark for that assessment. In *Fordham*, an experienced and well-respected member of the Massachusetts bar with no history of any previous discipline received a public reprimand for charging a client an excessive fee for representation of a young man in a driving under the influence (DUI) criminal matter. The lawyer succeeded in the goal of the representation, achieving an acquittal for the client. The

³⁹¹ 20 Mass. Att'y Disc. R. 668 (2004).

³⁹² See AD 06-06, 22 Mass. Att'y Disc. R. 855 (2006); AD 05-17, 21 Mass. Att'y Disc. R. 706 (2005); AD 03-32, 19 Mass. Att'y Disc. R. 577 (2003); AD 02-55, 18 Mass. Att'y Disc. R. 745 (2002); AD 02-50, 18 Mass. Att'y Disc. R. 732 (2002); AD 00-34, 16 Mass. Att'y Disc. R. 501 (2000).

³⁹³ AD 99-58, 15 Mass. Att'y Disc. R. 759 (1999).

³⁹⁴ 451 Mass. 131, 24 Mass. Att'y Disc. R. 824 (2008).

³⁹⁵ 423 Mass. 481, 12 Mass. Att'y Disc. R. 161 (1996) (public reprimand), cert. denied, 519 U.S. 1149 (1997).

parties stipulated that the lawyer had worked diligently every hour he billed, and had billed the client at an acceptable hourly rate. However, the fee the lawyer charged (close to \$50,000) was so far beyond what a typical DUI defense lawyer charged similar clients (almost never more than \$10,000, according to even respondent's own experts) that it qualified as "clearly excessive." The Court was also critical of the fact that the lawyer had charged his client for the time he spent learning an area of the law he did not previously know. The Court wrote, "A client 'should not be expected to pay for the education of a lawyer when he spends excessive amounts of time on tasks which, with reasonable experience, become matters of routine.'"³⁹⁶

Fordham emphasizes the importance of the prevailing practices among lawyers in similar settings offering comparable services. *Fordham* also makes clear that a lawyer may not charge a client for the lawyer's own education in the law if that extra effort results in an excessive fee. In fact, however, in most of the discipline for violation of Rule 1.5, aside from contingent-fee matters, the lawyer charged fees for work that the lawyer never performed or performed poorly.

2) Contingent Fees

Rule 1.5(c) addresses the topic of contingent fees with great specificity. It is beyond the scope of this treatise to review in detail the logistics of charging and collecting a reasonable contingent fee. Useful resources exist for Massachusetts lawyers who charge contingent fees.³⁹⁷ The requirements for contingent fee agreements in Massachusetts are set forth in Rules 1.5(c) and (f), and Comments [3] and [3A]-[3D]. With few exceptions, a lawyer who charges a contingent fee in Massachusetts must enter into a written agreement signed by the lawyer and the client. The agreement must contain several mandated provisions. It must identify the contingency on which the fee award will be based, the rate used, whether the rate is based on the gross proceeds or the net proceeds after litigation expenses have been deducted, and whether the lawyer or the client will be responsible for those expenses. In addition, in a relatively new provision, the agreement must address the question of how the lawyer will be paid, if at all, should the representation end before the matter resolves. If the lawyer is a successor lawyer to a previous lawyer with a contingent-fee agreement who performed some work on the matter, the agreement must address who will pay the previous lawyer.³⁹⁸ If the agreement is silent, the successor lawyer will be responsible for the previous lawyer's fees.

The revised Massachusetts rule offers lawyers two template versions of a contingent-fee agreement, Form A, which has standard, default provisions, and Form B,

³⁹⁶ 423 Mass. at 490 (quoting *Matter of the Estate of Larson*, 103 Wash.2d 517, 531, 694 P.2d 1051 (1985)).

³⁹⁷ See, e.g., Timothy Dacey III, *Fee Agreements*, in *ETHICAL LAWYERING IN MASSACHUSETTS*, Chapter 5 (James Boland ed. 2009 and 2013 Supp.); Nancy E. Kaufman & Constance V. Vecchione, *The Ethics of Charging and Collecting Fees*, at <https://bbopublic.blob.core.windows.net/web/f/ethicsfees.pdf> (2012).

³⁹⁸ The Supreme Judicial Court in 2009 sought comments on the question of how to allocate the responsibility for paying the discharged lawyer in a successful contingent fee matter, responding to an issue decided by the SJC a few years before. See *Malonis v. Harrington*, 442 Mass. 692 (2004).

which offers elections for the lawyer to choose among certain provisions. Lawyers are not required to use those template forms, but if they choose to proceed with a different agreement, the lawyers “shall explain those different or added provisions or options to the client and obtain the client’s informed consent confirmed in writing.”³⁹⁹ In *Matter of Diviacchi*,⁴⁰⁰ the lawyer was suspended for twenty-seven months for using a non-conforming contingent fee agreement and not explaining its terms to the client, among much other misconduct.

Several SJC decisions articulated the principles to be applied when a client discharges a contingent-fee lawyer before the final resolution of the matter. In *Salem Realty v. Matera*,⁴⁰¹ the SJC affirmed the Appeals Court determination that a discharged lawyer may not rely on the contingent fee agreement for his fees, but should be compensated on a *quantum meruit* basis for the value his work produced. In *Malonis v. Harrington*,⁴⁰² the SJC decided on the facts before it that the successor lawyer was responsible to pay for the discharged lawyer’s fees. That decision triggered the ultimate revision to Rule 1.5 addressing the question of who will pay the discharged lawyer. In *Liss v. Studeny*,⁴⁰³ the Court rejected a lawyer’s effort to collect a *quantum meruit* fee in a contingent fee matter after he withdrew from the case before it was concluded, and after the former client had lost at trial. In so doing, the Court announced the general rule that there will be no *quantum meruit* recovery under contingent fee agreements when the contingency has not occurred, i.e., when the client has not obtained a recovery.⁴⁰⁴

3) Changing the Fee Agreement with a Client

A lawyer may alter an existing fee agreement with a client by giving the client notice of such changes in writing.⁴⁰⁵ Most authorities agree that a lawyer may increase an hourly fee prospectively, or make comparable adjustments to the fee agreement, as time passes, as long as the client has received adequate notice of the change and the changes are reasonable and the fee agreement provides that the rates may be increased.⁴⁰⁶

³⁹⁹ Rule 1.5(f)(3).

⁴⁰⁰ 475 Mass. 1013 (2016).

⁴⁰¹ 10 Mass.App.Ct. 571 (1980), *aff’d* 384 Mass. 803 (1981).

⁴⁰² 442 Mass. 692 (2004).

⁴⁰³ 450 Mass. 473 (2008).

⁴⁰⁴ 450 Mass. at 480–481. The Court noted, however that it was not categorically prohibiting *quantum meruit* recovery where the contingency does not occur; particularly compelling circumstances might permit recovery. The Court provided some indication of what such circumstances might be: “[T]here is no evidence that Studeny used Liss’s services without intending that the contingency occur. That is, Studeny did not defeat Liss’s reasonable expectation that he was using Liss’s services to bring about the contingency on which Liss might be compensated.” *Id.* at 481.

⁴⁰⁵ Rule 1.5(b)(1) (“Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.”).

⁴⁰⁶ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18(1)(a) (2000) (if a fee agreement or modification “is made beyond a reasonable time after the lawyer has begun to represent the client in the matter . . . the client may avoid it unless the lawyer shows that the contract and the circumstances of its formation were fair and reasonable to the client”). See also RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (1981) (modification of an existing contract is enforceable without additional consideration only upon an unanticipated change of circumstances making a contractual task more onerous or more valuable, and the modification is fair and equitable).

In some circumstances, a material change to an existing contract might qualify as a business transaction between a lawyer and a client, triggering the requirements of Rule 1.8(a).⁴⁰⁷ For example, in *Matter of Weisman*,⁴⁰⁸ an attorney renegotiated his fee agreement with his organizational client in the middle of the representation in a manner that the hearing committee found was neither fair nor was preceded by sufficient informed consent of the client. That modification represented a business transaction with the client, and the respondent did not comply with Rule 1.8. For that misconduct, and his mishandling of the fees he received, he was suspended for one year.

4) Payment in Kind and Liens for Fees

Lawyers typically receive their compensation in the form of money, by cash, check, or credit card payment. However a lawyer may receive payment in kind, subject to some restrictions. As the Office of Bar Counsel has advised, “A lawyer may accept property instead of money as a fee, so long as the lawyer is not acquiring a proprietary interest in the subject matter of the litigation in violation of Mass. R. Prof. C. 1.8(j). A fee paid in property may constitute a business transaction with a client and be subject to Mass. R. Prof. C. 1.8(a).”⁴⁰⁹ The ban on acquiring a “proprietary interest” in litigation means that a lawyer cannot accept ownership, aside from a contingent fee interest, in the property or matter that is the subject matter of the litigation for which the lawyer represents the client. In the words of one authority, “the lawyer’s interest in the case cannot be that of a co-plaintiff.”⁴¹⁰

In some settings, accepting property as a fee will qualify as a business transaction between the lawyer and her client, triggering the strict requirements of Rule 1.8(a).⁴¹¹ One common example of an attorney’s fee being subject to the Rule 1.8(a) requirements

⁴⁰⁷ Note that while Rule 1.8(a), concerning business transactions between attorney and client, generally does not apply to the original fee agreement, *see Matter of an Attorney*, 451 Mass. 131, 139–140, 24 Mass. Att’y Disc. R. 824, 832-835 (2008), amendments to the fee agreement might fall within that rule. *See Kaufman & Vecchione, supra* note 397, at 7 (“If an attorney . . . changes the fee agreement, this is a business transaction with a client and the lawyer must comply with the requirements of Mass. R. Prof. Conduct 1.8(a), including that the transaction must be fair and reasonable and understood by the client, the client must be given an opportunity to consult independent counsel, and the client must consent in writing.”). While this advice from the Office of Bar Counsel seems to indicate that *all* changes in a fee agreement require the protections of Rule 1.8(a), it seems very unlikely that a regular adjustment of an hourly fee rate made after a significant period of time would qualify as a business transaction between a lawyer and her client, or that Bar Counsel would consider it as such. *See also Matter of Murray*, 24 Mass. Att’y Disc. R. 483 (2008) (respondent charged with violation of Rule 1.8(a) after demanding changes to a contingent fee agreement; that count rejected by the hearing committee and the board).

⁴⁰⁸ 30 Mass. Att’y Disc. R. 440 (2014).

⁴⁰⁹ Kaufman & Vecchione, *supra* note 397, at 7.

⁴¹⁰ RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.8-10 (2012-2013 ed.) (“In other words, the client may not assign to the attorney part of his cause of action in a way that would allow the lawyer to prevent settlement. The client cannot waive his right to decide when to settle litigation.”).

⁴¹¹ According to Rule 1.8(a), a business transaction between an attorney and a client must be objectively fair, with all terms disclosed in writing, and the client must have the opportunity to consult with separate counsel, and must consent in writing to the transaction.

is when a lawyer accepts, as his fee, an award of stock in a corporate client.⁴¹² Lawyers may accept such an equity interest in the client as the fee,⁴¹³ but, in addition to complying with Rule 1.8(a), the lawyer must ensure that the resulting fee is reasonable. In making that determination, the focus must be on the value of the stock at the time the transfer is made, not at a later time when the stock's value may be very different from what the parties had earlier predicted.⁴¹⁴ The sanctions for violations of Rule 1.8 are discussed in Part IV Section II.D.

If a client does not pay a lawyer the fees owed for the work the lawyer performed in a matter that goes to litigation, the lawyer is entitled to a lien on the claim or the proceeds of the claim, pursuant to a Massachusetts statute,⁴¹⁵ a device sometimes known as an “attorney’s lien”⁴¹⁶ or a “charging lien”⁴¹⁷ If the relationship ends by the lawyer’s withdrawing as counsel before final judgment, “[w]hether withdrawal works a waiver of the attorney’s lien depends on whether the attorney had good cause to withdraw.”⁴¹⁸ A lawyer may not withhold a client’s papers and other materials in order to collect a fee,⁴¹⁹ but in a matter that is not a contingency-fee case, may properly withhold work product for which the client has not yet paid the lawyer,⁴²⁰ except when doing so “would prejudice the client unfairly.”⁴²¹

Practice Tip

The Office of Bar Counsel hears often from clients whose former lawyers refuse to return or transfer the client’s file. Most often, these matters resolve without formal proceedings through the intervention of Bar Counsel’s Attorney and Consumer Assistance Program (ACAP). The resolution inevitably includes the attorney’s return of the file to the former client.

⁴¹² See, e.g., *Rubin v. Murray*, 79 Mass. App. Ct. 64 (2011). For commentary about that practice, see John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEX. L. REV. 405 (2002); Jason M. Klein, *No Fool for a Client: The Finance and Incentives Behind Stock-Based Compensation for Corporate Attorneys*, 1999 COLUM. BUS. L. REV. 330; Donald C. Langevoort, *When Lawyers and Law Firms Invest in Their Corporate Clients’ Stock*, 80 WASH. U. L.Q. 569 (2010); Therese Maynard, *Ethics for Business Lawyers Representing Start-Up Companies*, 11 WAKE FOREST J. BUS. & INTELL. PROP. L. 401 (2011).

⁴¹³ *Rubin v. Murray*, 79 Mass. App. Ct. 64 (2011).

⁴¹⁴ *Id.*, 79 Mass. App. Ct. at 75.

⁴¹⁵ G.L. c. 221 § 50.

⁴¹⁶ See, e.g., *Matter of King*, 23 Mass. Att’y Disc. R. 352 (2007).

⁴¹⁷ See, e.g., *Boswell v. Zephyr Lines, Inc.*, 414 Mass. 241, 244 (1993).

⁴¹⁸ *Phelps Steel, Inc. v. Von Deak*, 24 Mass. App. Ct. 592, 594 (1987). “A withdrawal occasioned by a breakdown in the lawyer-client relationship is sufficient reason for an attorney to remove himself from the case, and will leave the attorney’s lien intact.” *Bartermax, Inc. v. Discover Boston Multi-Lingual Trolley Tours, Inc.*, 71 Mass. App. Ct. 1107 (2008) (unpublished opinion).

⁴¹⁹ Rule 1.16(e).

⁴²⁰ *Kaufman & Vecchione*, *supra* note 397, at 7; see Rule 1.16(e)(4) and (6).

⁴²¹ Rule 1.16(e)(7).

In 2017, the SJC proposed adding Rule 1.16A to the Rules of Professional Conduct.⁴²² Rule 1.16A articulates a lawyer’s responsibility to maintain client files, to return files to clients when requested or required, and to maintain files for at least six years after the termination of representation. Files may be maintained electronically. Rule 1.16A(b) offers the following guidance to attorneys: “[A] lawyer may not refuse, on grounds of nonpayment, to make available materials in the client’s file when retention would prejudice the client unfairly.”

III. Holding and Safekeeping Property

RULE 1.15: SAFEKEEPING PROPERTY

(a) Definitions:

(1) “Trust property” means property of clients or third persons that is in a lawyer’s possession in connection with a representation and includes property held in any fiduciary capacity in connection with a representation, whether as trustee, agent, escrow agent, guardian, executor, or otherwise. Trust property does not include documents or other property received by a lawyer as investigatory material or potential evidence. Trust property in the form of funds is referred to as “trust funds.”

(2) “Trust account” means an account in a financial institution in which trust funds are deposited. Trust accounts must conform to the requirements of this Rule.

(b) Segregation of Trust Property. A lawyer shall hold trust property separate from the lawyer’s own property.

(1) Trust funds shall be held in a trust account.

(2) No funds belonging to the lawyer shall be deposited or retained in a trust account except that:

(i) Funds reasonably sufficient to pay bank charges may be deposited therein, and

(ii) Trust funds belonging in part to a client or third person and in part currently or potentially to the lawyer shall be deposited in a trust account, but the portion belonging to the lawyer must be withdrawn at the earliest reasonable time after the lawyer’s interest in that portion becomes fixed. A lawyer who knows that the right of the lawyer or law firm to receive such portion is disputed shall not withdraw the funds until the dispute is resolved. If the right of the lawyer or law firm to receive such portion is disputed within a reasonable time after notice is given that the funds have been

⁴²² MASS. RULES OF PROF’L CONDUCT r. 1.16A (likely effective in 2018).

withdrawn, the disputed portion must be restored to a trust account until the dispute is resolved.

(3) A lawyer shall deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or as expenses incurred.

(4) All trust property shall be appropriately safeguarded. Trust property other than funds shall be identified as such.

(c) Prompt Notice and Delivery of Trust Property to Client or Third Person. Upon receiving trust funds or other trust property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or as otherwise permitted by law or by agreement with the client or third person on whose behalf a lawyer holds trust property, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third persons entitled to receive.

(d) Accounting.

(1) Upon final distribution of any trust property or upon request by the client or third person on whose behalf a lawyer holds trust property, the lawyer shall promptly render a full written accounting regarding such property.

(2) On or before the date on which a withdrawal from a trust account is made for the purpose of paying fees due to a lawyer, the lawyer shall deliver to the client in writing (i) an itemized bill or other accounting showing the services rendered, (ii) written notice of amount and date of the withdrawal, and (iii) a statement of the balance of the client's funds in the trust account after the withdrawal.

(e) Operational Requirements for Trust Accounts.

(1) All trust accounts shall be maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person on whose behalf the trust property is held, except that all funds required by this Rule to be deposited in an IOLTA account shall be maintained in this Commonwealth.

(2) Each trust account title shall include the words "trust account," "escrow account," "client funds account," "conveyancing account," "IOLTA account," or words of similar import indicating the fiduciary nature of the account.

(3) For each trust account opened, the lawyer shall submit written notice to the bank or other depository in which the trust account is maintained confirming to the depository that the account will hold trust funds within the meaning of this Rule. The lawyer shall retain a copy executed by the bank and the lawyer for the lawyer's own records. The notice shall identify the bank, account, and type of account, whether pooled, with interest paid to the IOLTA Committee (IOLTA account), or individual account with interest paid to the client or third person on whose behalf the trust is properly held. For purposes of this Rule, one notice is sufficient for a master or umbrella account with individual subaccounts.

(4) No withdrawal from a trust account shall be made by a check which is not prenumbered. No withdrawal shall be made in cash or by automatic teller machine or any similar method. No withdrawal shall be made by a check payable to "cash" or "bearer" or by any other method which does not identify the recipient of the funds.

(5) Every withdrawal from a trust account for the purpose of paying fees to a lawyer or reimbursing a lawyer for costs and expenses shall be payable to the lawyer or the lawyer's law firm.

(6) Each lawyer who has a law office in this Commonwealth and who holds trust funds shall deposit such funds, as appropriate, in one of two types of interest-bearing accounts: either (i) a pooled account ("IOLTA account") for all trust funds which in the judgment of the lawyer are nominal in amount, or are to be held for a short period of time, or (ii) for all other trust funds, an individual account with the interest payable as directed by the client or third person on whose behalf the trust property is held. The foregoing deposit requirements apply to funds received by lawyers in connection with real estate transactions and loan closings, provided, however, that a trust account in a lending bank in the name of a lawyer representing the lending bank and used exclusively for depositing and disbursing funds in connection with that particular bank's loan transactions, shall not be required but is permitted to be established as an IOLTA account. All IOLTA accounts shall be established in compliance with the provisions of paragraph (g) of this Rule.

(7) Property held for no compensation as a custodian for a minor family member is not subject to the Operational Requirements for Trust Accounts set out in this paragraph (e) or to the Required Accounts and Records in paragraph (f) of this Rule. As used in this paragraph, "family member" refers to those individuals specified in Rule 7.3(a)(3).

(f) Required Accounts and Records: Every lawyer who is engaged in the practice of law in this Commonwealth and who holds trust property in connection with a representation shall maintain complete records of the receipt, maintenance, and disposition of that trust property, including all

records required by this paragraph. Records shall be preserved for a period of six years after termination of the representation and after distribution of the property. Records may be maintained by computer subject to the requirements of subparagraph (1)G of this paragraph (f) or they may be prepared manually.

(1) Trust Account Records. The following books and records must be maintained for each trust account:

A. Account Documentation. A record of the name and address of the bank or other depository; account number; account title; opening and closing dates; and the type of account, whether pooled, with net interest paid to the IOLTA Committee (IOLTA account), or account with interest paid to the client or third person on whose behalf the trust property is held (including master or umbrella accounts with individual subaccounts).

B. Check Register. A check register recording in chronological order the date and amount of all deposits; the date, check or transaction number, amount, and payee of all disbursements, whether by check, electronic transfer, or other means; the date and amount of every other credit or debit of whatever nature; the identity of the client matter for which funds were deposited or disbursed; and the current balance in the account.

C. Individual Client Records. A record for each client or third person for whom the lawyer received trust funds documenting each receipt and disbursement of the funds of the client or third person, the identity of the client matter for which funds were deposited or disbursed, and the balance held for the client or third person, including a subsidiary ledger or record for each client matter for which the lawyer receives trust funds documenting each receipt and disbursement of the funds of the client or third person with respect to such matter. A lawyer shall not disburse funds from the trust account that would create a negative balance with respect to any individual client.

D. Bank Fees and Charges. A ledger or other record for funds of the lawyer deposited in the trust account pursuant to paragraph (b)(2)(i) of this Rule to accommodate reasonably expected bank charges. This ledger shall document each deposit and expenditure of the lawyer's funds in the account and the balance remaining.

E. Reconciliation Reports. For each trust account, the lawyer shall prepare and retain a reconciliation report on a regular and periodic basis but in any event no less frequently than every sixty days. Each reconciliation report shall show the following balances and verify that they are identical:

(i) The balance which appears in the check register as of the reporting date.

(ii) The adjusted bank statement balance, determined by adding outstanding deposits and other credits to the bank statement balance and subtracting outstanding checks and other debits from the bank statement balance.

(iii) For any account in which funds are held for more than one client matter, the total of all client matter balances, determined by listing each of the individual client matter records and the balance which appears in each record as of the reporting date, and calculating the total. For the purpose of the calculation required by this paragraph, bank fees and charges shall be considered an individual client record. No balance for an individual client may be negative at any time.

F. Account Documentation. For each trust account, the lawyer shall retain contemporaneous records of transactions as necessary to document the transactions. The lawyer must retain:

(i) bank statements.

(ii) all transaction records returned by the bank, including canceled checks and records of electronic transactions.

(iii) records of deposits separately listing each deposited item and the client or third person for whom the deposit is being made.

G. Electronic Record Retention. A lawyer who maintains a trust account record by computer must maintain the check register, client ledgers, and reconciliation reports in a form that can be reproduced in printed hard copy. Electronic records must be regularly backed up by an appropriate storage device.

(2) Business Accounts. Each lawyer who receives trust funds must maintain at least one bank account, other than the trust account, for funds received and disbursed other than in the lawyer's fiduciary capacity.

(3) Trust Property Other than Funds. A lawyer who receives trust property other than funds must maintain a record showing the identity, location, and disposition of all such property.

(4) Dissolution of a Law firm. Upon dissolution of a law firm, the partners shall make reasonable efforts to ensure the maintenance of client trust account records specified in this Rule.

(g) Interest on Lawyers' Trust Accounts.

(1) The IOLTA account shall be established with any bank, savings and loan association, or credit union authorized by Federal or State law to do business in Massachusetts and insured by the Federal Deposit Insurance Corporation or similar State insurance programs for State-chartered institutions. At the direction of the lawyer, funds in the IOLTA account in excess of \$100,000 may be temporarily reinvested in repurchase agreements fully collateralized by U.S. Government obligations. Funds in the IOLTA account shall be subject to withdrawal upon request and without delay.

(2) Lawyers creating and maintaining an IOLTA account shall direct the depository institution:

(i) to remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the IOLTA Committee;

(ii) to transmit with each remittance to the IOLTA Committee a statement showing the name of the lawyer who or law firm which deposited the funds; and

(iii) at the same time to transmit to the depositing lawyer a report showing the amount paid, the rate of interest applied, and the method by which the interest was computed.

(3) Lawyers shall certify their compliance with this Rule as required by SJC Rule 4:02, § (2).

(4) This court shall appoint members of a permanent IOLTA Committee to fixed terms on a staggered basis. The representatives appointed to the committee shall oversee the operation of a comprehensive IOLTA program, including:

(i) the receipt of all IOLTA funds and their disbursement, net of actual expenses, to the designated charitable entities, as follows: sixty-seven percent (67%) to the Massachusetts Legal Assistance Corporation and the remaining thirty-three percent (33%) to other designated charitable entities in such proportions as the Supreme Judicial Court may order;

(ii) the education of lawyers as to their obligation to create and maintain IOLTA accounts under this Rule;

(iii) the encouragement of the banking community and the public to support the IOLTA program;

- (iv) the obtaining of tax rulings and other administrative approval for a comprehensive IOLTA program as appropriate;**
- (v) the preparation of such guidelines and rules, subject to court approval, as may be deemed necessary or advisable for the operation of a comprehensive IOLTA program;**
- (vi) establishment of standards for reserve accounts by the recipient charitable entities for the deposit of IOLTA funds which the charitable entity intends to preserve for future use; and**
- (vii) reporting to the court in such manner as the court may direct.**

(5) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall receive IOLTA funds from the IOLTA Committee and distribute such funds for approved purposes. The Massachusetts Legal Assistance Corporation may use IOLTA funds to further its corporate purpose and other designated charitable entities may use IOLTA funds either for (a) improving the administration of justice or (b) delivering civil legal services to those who cannot afford them.

(6) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall submit an annual report to the court describing their IOLTA activities for the year and providing a statement of the application of IOLTA funds received pursuant to this Rule.

(h) Dishonored Check Notification.

All trust accounts shall be established in compliance with the following provisions on dishonored check notification:

(1) A lawyer shall maintain trust accounts only in financial institutions which have filed with the Board of Bar Overseers an agreement, in a form provided by the Board, to report to the Board in the event any properly payable instrument is presented against any trust account that contains insufficient funds, and the financial institution dishonors the instrument for that reason.

(2) Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon thirty days notice in writing to the Board.

(3) The Board shall publish annually a list of financial institutions which have signed agreements to comply with this Rule, and shall establish rules and procedures governing amendments to the list.

(4) The dishonored check notification agreement shall provide that all reports made by the financial institution shall be identical to the notice of dishonor customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors. Such reports shall be made simultaneously with the notice of dishonor and within the time provided by law for such notice, if any.

(5) Every lawyer practicing or admitted to practice in this Commonwealth shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(6) The following definitions shall be applicable to this subparagraph:

(i) “Financial institution” includes (a) any bank, savings and loan association, credit union, or savings bank, and (b) with the written consent of the client or third person on whose behalf the trust property is held, any other business or person which accepts for deposit funds held in trust by lawyers.

(ii) “Notice of dishonor” refers to the notice which a financial institution is required to give, under the laws of this Commonwealth, upon presentation of an instrument which the institution dishonors.

(iii) “Properly payable” refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this Commonwealth.

A. The Lessons of Rule 1.15

Related to how much a lawyer may charge her client in fees is the topic of how the lawyer manages the funds she receives from client, or from other persons as part of her representation. Often the funds the lawyer holds will be prepayment of the attorney’s fees she has charged her client; sometimes the funds are proceeds from the representation, such as real estate payments held pending some closing event, or payment of a settlement or judgment. At other times, lawyers hold funds and properties in express fiduciary capacities, such as a trustee, guardian, or escrow agent. In general, it does not matter the nature of the lawyer’s role in accepting funds—the same principles will apply to ensure the safeguarding of those funds.⁴²³ In Massachusetts the regulation of handling other people’s money or property is extensive, as Rule 1.15 includes layers of detailed requirements. Lawyers frequently make mistakes in the record-keeping requirements of Rule 1.15, or simply fail to comply with some of the provisions. There is also a disturbingly high incidence of both the intentional and the negligent misuse of funds held for others. These kinds of misconduct are a very common and typically result in serious discipline, as discussed below.

⁴²³ It is true, however, as we will see below in the discussion of suspensions under Rule 1.15, that a lawyer who misappropriates third-party funds may receive lesser discipline than a lawyer who misappropriates client funds.

Before addressing the requirements of Rule 1.15 generally, this Section will highlight one important distinction relating to the attorney’s fees discussion just above. When a client pays a sum of money to a lawyer at the commencement of a representation relationship, that money usually will be called a “retainer,” but that term covers two entirely different concepts, and lawyers and clients must understand the distinctions between the two. Most often, the money paid by a client as a retainer represents an advance for the payment of attorney’s fees that have not yet been earned, but likely will be earned in the future. That deposit, the typical understanding of the term “retainer,”⁴²⁴ remains the client’s money until the lawyer earns the fees, and therefore is covered by this general topic and in particular by Rule 1.15. Because the funds belong to the client, they must be returned to the client if not earned. Nonrefundable advance fee payments are not permitted in Massachusetts.⁴²⁵

On occasion, a client will pay money to a lawyer not as a deposit toward the fees to be earned later, but as compensation for the lawyer’s availability and willingness to forego other lucrative work. That payment, known in Massachusetts as a “classic retainer,”⁴²⁶ belongs to the lawyer when paid, and need not (and in fact may not) be held as property of another or placed in the lawyer’s trust account.⁴²⁷ Lawyers at times confuse the two versions of a retainer, but at considerable peril. Any lawyer charging a classic retainer will bear the burden of showing that the arrangement is not simply a version of a nonrefundable advance fee, which a lawyer may not charge a client.

For purposes of the discussion in this Chapter, the term “retainer” will refer to the advance fee retainer which must be held in trust, and not the “classic” retainer, unless the context indicates otherwise.

For funds held by a lawyer for another, Rule 1.15 provides detailed guidance with two essential and unwavering messages—the lawyer must always separate the funds held for another from his own personal or business funds, and must account scrupulously for the funds held in trust. All of the procedural and documentary requirements of Rule 1.15 aim to achieve those two ends. As with the discussion of contingent fees above, this Section will not review in detail the mechanisms for a lawyer’s management of funds;

⁴²⁴ *Matter of Sharif*, 459 Mass. 558, 27 Mass. Att’y Disc. R. 809 (2011) (citing *Matter of Garabedian*, 415 Mass. 77, 80–81, 9 Mass. Att’y Disc. R. 132, (1993)). Some scholars refer to this as a “special retainer.” See Dacey, *supra* note 39, at § 5.10.5; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.2.2, 505–06 (1986).

⁴²⁵ *Matter of Zak*, 476 Mass. 1034, 1040 (2017).

⁴²⁶ *Sharif*, 459 Mass. at 568.

⁴²⁷ *Id.* (“While the funds in an advance fee retainer belong to the client and must be held in a trust account on a client’s behalf until the fees are earned, . . . classic retainers are considered earned by the attorney when paid because the attorney ‘gives up the possibility of being employed by [other parties] in the very matter to which the retainer relates.’”) (quoting *Blair v. Columbian Fireproofing Co.*, 191 Mass. 333, 336 (1906)).

other resources cover that ground ably.⁴²⁸ This Section will, however, address a few issues that practicing lawyers ought to understand in order to avoid mistakes.

Withdrawing Earned Fees from Trust Accounts: A lawyer who has earned fees that will be paid out of trust account funds (whether a retainer held there, or funds received as payment on a litigated claim) faces an important judgment call.⁴²⁹ The “no-commingling” rule prohibits a lawyer from keeping her money—the earned fees—in the client trust account. But if the lawyer immediately withdraws the fees from the trust account once she has earned them or once the check clears, a client may later claim, and perhaps correctly, that some of the withdrawn money was not earned, and therefore the lawyer has misappropriated client funds. Rule 1.15 recognizes this dilemma and provides some guidance. Rule 1.15(b)(2)(ii) states that “the portion belonging to the lawyer must be withdrawn at the earliest reasonable time after the lawyer’s interest in that portion becomes fixed.” If a lawyer has no reason to believe that the client will dispute the lawyer’s withdrawal, then the lawyer must withdraw the funds promptly.

On or before withdrawing such funds, however, “the lawyer shall deliver to the client in writing (i) an itemized bill or other accounting showing the services rendered, (ii) written notice of amount and date of the withdrawal, and (iii) a statement of the balance of the client’s funds in the trust account after the withdrawal.”⁴³⁰ Moreover, the “lawyer shall promptly deliver to the client or third person any funds or other property that the client or third persons [is] entitled to receive.”⁴³¹ The lawyer will be hard-pressed to explain why he is withdrawing funds due to himself while not concurrently making a distribution to the client as required by this rule. Accordingly, the lawyer ought to render a full accounting under Rule 1.15(d)(1) and distribute the funds due to the client and himself at the same time. The lawyer should be aware, however, that Rule 1.15 provides that if the client receives notice of the withdrawal and objects to it, the lawyer must restore the disputed portion of the funds to the trust account until the dispute is resolved.⁴³²

If the lawyer knows that a dispute exists as to the ownership of the funds, the lawyer must keep the disputed funds in the trust account until that dispute has been resolved. The SJC has made clear that a lawyer must pay funds to a client from such a trust account even if a third party claims to have the right to those funds, unless the lawyer is certain that the funds claimed by the third party “belonged to and were earmarked for” that third party.⁴³³ “[A]n attorney is not required to serve as a collection

⁴²⁸ See, e.g., JAYNE B. TYRRELL & STEPHEN M. CASEY, *MANAGING CLIENTS’ FUNDS AND AVOIDING ETHICAL PROBLEMS* (Mass. IOLTA Committee 2015); Daniel C. Crane, *Records for Other People’s Money*, <http://www.mass.gov/obcbbo/money.htm> (2003).

⁴²⁹ For a discussion of this topic in Massachusetts, see Dorothy Anderson, *At What Cost, Payment? Or, Possession Is Not Nine-Tenths of Your Ethical Obligations*, at <https://bbopublic.blob.core.windows.net/web/f/cost.pdf> (2005).

⁴³⁰ Rule 1.15(d).

⁴³¹ Rule 1.15(c).

⁴³² Rule 1.15(b)(2)(ii).

⁴³³ *Frontier Enterprises, Inc. v. Anchor Company of Marblehead, Inc.*, 404 Mass. 506, 513 (1989).

agent for [a third party],”⁴³⁴ but a lawyer holding funds in a trust account to which a third party has a legitimate claim possesses a fiduciary duty to that third party not to distribute the funds until the claim has been resolved.⁴³⁵

IOLTA Accounts: Massachusetts lawyers holding funds for others must hold those funds in one of two different kinds of accounts. Every Massachusetts lawyer who holds funds for clients or other persons must establish an Interest on Lawyers’ Trust Account (known colloquially, if redundantly, as an IOLTA account).⁴³⁶ Lawyers must use IOLTA accounts for any funds that are either of small amounts or to be held for a short time, such that the transaction costs of creating a separate, interest-bearing account for those funds outweigh any benefit of doing so. Rule 1.15(e)(6)(ii) requires that, for funds that are large or to be held for a longer period of time, the lawyer must establish a separate interest-bearing account so that the funds held in trust will earn interest for the client. IOLTA accounts pool all of those short-term or small deposits so that in the aggregate the funds will earn interest. That interest, according to the IOLTA guidelines, will be used for legal services and other access-to-justice purposes.⁴³⁷

It is a breach of a lawyer’s duty to his client to deposit larger amounts, or amounts held for a longer period of time, into an IOLTA account, unless the client consents to that strategy.⁴³⁸

Client Trust Account Management: For both IOLTA and conventional interest-bearing accounts, a Massachusetts lawyer must follow strict protocols to account meticulously for the funds held in trust and to reconcile the bank statements on a regular basis. Rule 1.15(f) describes the steps a lawyer must take to ensure the safety and security of the funds held in trust. In addition to those requirements, Massachusetts has adopted a “dishonored check notification” policy, described in Rule 1.15(h). If a bank where a lawyer’s trust account is held dishonors a check drawn on such an account, the bank will notify the BBO at the same time and in the same fashion as it notifies the lawyer.

Flat Fees: The only exception to the requirement that a lawyer hold in a trust account any payments from clients that have not yet been earned is for flat fees, according to language added by the SJC in 2015. A flat fee is defined in the Comment to Rule 1.15 as “a fixed fee that an attorney charges for all legal services in a particular

⁴³⁴ *Id.* (quoting *Blue Cross of Mass., Inc. v. Travaline*, 398 Mass. 582, 590 (1986)).

⁴³⁵ *See Matter of Hilson*, 448 Mass. 603, 23 Mass. Att’y Disc. R. 265 (2007) (indefinite suspension after respondent distributed funds held in escrow despite outstanding claims to the funds).

⁴³⁶ Rule 1.15(e)(6)(i) refers to this as a “pooled account (‘IOLTA account’).”

⁴³⁷ *IOLTA Guidelines*, MASS. INTEREST ON LAWYERS’ TRUST ACCOUNTS (July 1, 2009), http://www.maiolta.org/attorneys/index_3_3062607528.pdf. The IOLTA program in Massachusetts has served to fund a significant amount of legal services and to support other important initiatives. At its peak, the Massachusetts IOLTA program generated \$31,000,000 in funds for those purposes. In FY2015, the program generated \$6,442,000.

⁴³⁸ *See Matter of Montague*, 26 Mass. Att’y Disc. R. 367 (2010) (“By retaining a non-nominal amount of client funds for a more than a short amount of time in her IOLTA, the respondent violated Mass. R. Prof. C. 1.15(e)(5) [now (e)(6)]”). Rule 1.15(e)(6) creates an exception for conveyancing accounts, and Rule 1.15(e)(7) creates an exception for “property held for no compensation for a minor family member.”

matter, or for a particular discrete component of legal services, whether relatively simple and of short duration, or complex and protracted.”⁴³⁹ A flat fee may be deposited directly into the attorney’s operating account. If the lawyer chooses instead to deposit a flat fee into his trust account, all of the trust account provisions will apply. Also, if the client ends the representation before the lawyer has performed all of the work for which the flat fee was paid, the lawyer must return to the client any unearned portion of that fee.⁴⁴⁰

The handling of other people’s funds has been a persistent source of trouble for lawyers and has caused many to face disciplinary proceedings at the BBO. More than 750 reported disciplinary decisions since 1999 include a reference to Rule 1.15. More than 120 such reports include a reference to Rule 1.5. The Office of Bar Counsel reports receiving more than 300 complaints each year involving fee disputes.⁴⁴¹ The discussion below will highlight some typical examples of violations leading to discipline, and how Bar Counsel, the BBO and the SJC impose sanctions for this type of misconduct.

B. Discipline for Violation of Rule 1.15

Rule 1.15 has served as the basis for hundreds of disciplinary matters in Massachusetts in recent years. The SJC, along with the Board, has offered some reliable guidance about the appropriate sanction for mishandling of funds held for another. In 1997, in *Matter of Schoepfer*,⁴⁴² the SJC confirmed the standards articulated in its 1984 decision, *Matter of Discipline of an Attorney*⁴⁴³ (known as “the Three Attorneys” case). The *Schoepfer* Court described the presumptive disciplinary standard for this type of misconduct as follows:

The intentional use of clients’ funds normally calls for ‘a term suspension of appropriate length.’ . . . If additionally an attorney intended to deprive the client of funds, permanently or temporarily, or if the client was deprived of funds (no matter what the attorney intended), the standard discipline is disbarment or indefinite suspension.⁴⁴⁴

An inadvertent misuse of funds held for others with some deprivation to the owner of the funds warrants a term suspension,⁴⁴⁵ as does intentional misuse without deprivation or intent to deprive.⁴⁴⁶ An unintentional misappropriation of funds without any deprivation to the funds’ owners will typically lead to a public reprimand.⁴⁴⁷ Commingling alone,

⁴³⁹ Rule 1.15, Comment 2A.

⁴⁴⁰ *Id.* Comment 2A addresses everything described in the paragraph in the text.

⁴⁴¹ Kaufman & Vecchione, *supra* note 397, at 1.

⁴⁴² 426 Mass. 183 (1997), 13 Mass. Att’y Disc. R. 679 (1997).

⁴⁴³ 392 Mass. 827 (1984).

⁴⁴⁴ 426 Mass. at 187 (quoting *Three Attorneys*, 392 Mass. at 836), 13 Mass. Att’y Disc. R. 679 (1997).

⁴⁴⁵ *Matter of Jackman*, 444 Mass. 1013, 1014, 21 Mass. Att’y Disc. R. 349 (2005) (rescript) (“where, as here, the unintentional misconduct has resulted in even temporary deprivation, a term suspension is typical”; two-year suspension).

⁴⁴⁶ *Matter of Guerrero*, 31 Mass. Att’y Disc. R. ___, 2015 WL 9254810 (2015) (six-month suspension, with conditions).

⁴⁴⁷ *Matter of Murray*, 455 Mass. 872, 879, 26 Mass. Att’y Disc. R. 402 (2010) (citing *Matter of Abromovitz*, 23 Mass. Att’y Disc. R. 6 (2007); *Matter of McCarthy*, 21 Mass. Att’y Disc. R. 471 (2005)).

without deprivation, will result in an admonition.⁴⁴⁸ For purposes of this discipline, “Deprivation arises when an attorney’s intentional use of a client’s funds results in the unavailability of the client’s funds after they have become due, and may expose the client to a risk of harm, even if no harm actually occurs.”⁴⁴⁹

1) Disbarment

You Should Know

“If . . . an attorney intended to deprive the client of funds, permanently or temporarily, or if the client was deprived of funds (no matter what the attorney intended), the standard discipline is disbarment or indefinite suspension.”⁴⁵⁰
“Whether a respondent has made restitution is a factor in choosing between disbarment and indefinite suspension.”⁴⁵¹

The several disbarments on record for violation of a lawyer’s duties under Rule 1.15 typically evidence some factor beyond intention to deprive and actual deprivation, such as prior discipline, failure to make restitution, or accompanying misconduct. Because the *Schoepfer* standard requires either “disbarment or indefinite suspension” for this type of misconduct, the more serious disciplinary sanction tends to be imposed when the other misconduct is present, or where restitution has not been made. Disbarment matters also typically include a violation of Rule 8.4(c), prohibiting “conduct involving dishonesty, fraud, deceit or misrepresentation.”⁴⁵² An apt example is *Matter of Pasterczyk*,⁴⁵³ in which the single justice disbarred the respondent for his intentional misuse of a client’s funds. After the lawyer settled a personal injury matter for \$4,500 without his client’s permission (and forged the client’s signature to the release), the attorney deposited the settlement check into his IOLTA account, again forging the client’s signature. He then withdrew all but \$395 from the account for his own use. The single justice opted for disbarment over an indefinite suspension because of the lawyer’s prior disciplinary record and his failure to make restitution until Bar Counsel’s involvement. In *Matter of Dasent*,⁴⁵⁴ the SJC disbarred a lawyer who commingled and misappropriated his client’s funds. The respondent had not made restitution, failed to cooperate with Bar Counsel, made misrepresentations during the disciplinary proceeding, and furnished fabricated evidence.

⁴⁴⁸ See, e.g., AD 07-44, 23 Mass. Att’y Disc. R. 1036 (2007).

⁴⁴⁹ *Matter of Watt*, 430 Mass. 232, 236 (1999).

⁴⁵⁰ *Schoepfer*, 426 Mass. at 187 (quoting *Three Attorneys*, 392 Mass. at 836). Note that intentional misuse of trust funds typically leads to a charge based on both Rule 1.15 and Rule 8.4(c), covering dishonesty and deceit. See, e.g., *Matter of Morad*, 31 Mass. Att’y Disc. R. ___, 2015 WL 9309017 (2015).

⁴⁵¹ *Matter of Nwogu*, 32 Mass. Att’y Disc. R. ___, 2016 WL 8255044 (2016).

⁴⁵² MASS. RULES OF PROF’L CONDUCT r. 8.4(c). Since 1999, at least 75 disbarment judgments based upon misuse and deprivation of funds have included reference to Rule 8.4(c).

⁴⁵³ 29 Mass. Att’y Disc. R. 507 (2013).

⁴⁵⁴ 446 Mass. 1010, 22 Mass. Att’y Disc. R. 173 (2006).

Several comparable examples exist in the disciplinary reports. For instance, in *Matter of McBride*,⁴⁵⁵ an attorney representing a criminal defendant misappropriated the client's forfeiture funds by transferring much of the money from his IOLTA account to his business operating business account, without any justification or the knowledge of his client. The respondent argued for an indefinite suspension under the *Schoepfer* standard, but the SJC concluded not only that the lawyer's intentional deprivation of funds on its own could support disbarment under the Court's standard, but also that the lawyer's prior history of discipline and his lack of honesty during the disciplinary process justified the more serious sanction. In *Matter of Donaldson*,⁴⁵⁶ the respondent paid himself \$17,000 from an IOLTA account without his client's permission or other justification and misled the client about the terms of his representation. The misappropriation of his client's money alone, according to the single justice, merited disbarment, and his other misconduct only confirmed the appropriateness of that sanction.⁴⁵⁷

A single justice has concluded that a lawyer's addiction will not necessarily serve as the basis for a lesser sanction than disbarment. In *Matter of Clifford*,⁴⁵⁸ the attorney invaded his client trust account in order to satisfy his drug addiction. He later successfully overcame that addiction, but did not make any significant efforts to repay his clients. The single justice agreed that even if the lawyer's addiction could serve as a mitigating factor, his failure to attempt to repay the funds owed to his client, along with other misconduct, led to the order of disbarment.⁴⁵⁹ In *Matter of Collins*,⁴⁶⁰ the Court reserved the question of whether addiction to illegal drugs (as opposed to, say alcoholism) could ever mitigate the sanction for intentional misuse.

The disciplinary reports also contain scores of examples of disbarments or resignations after a recommendation for disbarment where the respondent attorney did not contest the charges of mishandling client funds.⁴⁶¹

⁴⁵⁵ 449 Mass. 154, 23 Mass. Att'y Disc. R. 443 (2007).

⁴⁵⁶ 28 Mass. Att'y Disc. R. 221 (2012).

⁴⁵⁷ For other instances of disbarment primarily based on misuse of client funds, but with other misconduct or aggravating factors, see, e.g., *Matter of Bailey*, 439 Mass. 134, 19 Mass. Att'y Disc. R. 12 (2003) (included false testimony under oath concerning the misappropriated assets); *Matter of Paczkowski*, 26 Mass. Att'y Disc. R. 483 (2010) (included failure to cooperate with Bar Counsel); *Matter of Sardeson*, 23 Mass. Att'y Disc. R. 635 (2007) (same); *Matter of Dragon*, 440 Mass. 1023, 1023-1024, 19 Mass. Att'y Disc. R. 121 (2003) (included lack of candor to Bar Counsel and vulnerability of clients who were harmed); *Matter of Bryan*, 411 Mass. 288, 7 Mass. Att'y Disc. R. 24 (1991) (failure to make restitution and included noncompliance with terms of temporary suspension).

⁴⁵⁸ 26 Mass. Att'y Disc. R. 74 (2010).

⁴⁵⁹ See also *Matter of Gustafson*, 6 Mass. Att'y Disc. R. 140 (1990) (attorney obtained treatment for alcoholism and made substantial restitution to client, but still disbarred as alcoholism was found not to be "but for" cause of wrongdoing). Compare *Matter of Collins*, 455 Mass. 1020, 26 Mass. Att'y Disc. R. 102 (2010) (attorney completed rehabilitation program, self-reported misappropriation of client funds to Bar Counsel, and paid back more than half of what he owed; indefinite suspension on the condition that attorney complete restitution); *Matter of Hull*, 6 Mass. Att'y Disc. R. 152 (1990) (lawyer's rehabilitation efforts regarding addiction served as mitigation after misappropriation of client funds; indefinite suspension ordered).

⁴⁶⁰ 455 Mass. 1020, 26 Mass. Att'y Disc. R. 102 (2010) (on its specific facts, indefinite suspension).

⁴⁶¹ For a sample of such matters, see, e.g., *Matter of Catala*, 28 Mass. Att'y Disc. R. 136 (2012); *Matter of Reynolds*, 28 Mass. Att'y Disc. R. 723 (2012); *Matter of Daniels*, 27 Mass. Att'y Disc. R. 159 (2011);

2) Suspension

You Should Know

The typical sanction for a lawyer who has intentionally misappropriated client funds with deprivation to the client is disbarment or an indefinite suspension, absent other misconduct. If the attorney has voluntarily made restitution, the sanction is typically an indefinite suspension. By contrast, a lawyer who misappropriates funds but not while engaged in the practice of law will typically receive an order of a term suspension. Misuse of client funds that is not intentional, but does lead to deprivation, typically warrants a term suspension.

Most often, based on the *Schoepfer* standard, a lawyer who has intentionally misappropriated client funds with deprivation to the client will receive the sanction of an indefinite suspension and not disbarment, if he has voluntarily made restitution. As noted above, the more serious sanction of disbarment results when restitution has not been made or some additional factor is present.⁴⁶²

Examples of indefinite suspensions for intentional misuse of client funds with deprivation are many. For example, in the leading case of *Matter of Schoepfer*,⁴⁶³ the Court imposed an indefinite suspension for a lawyer's intentional misappropriation of client funds. In *Matter of Thalheimer*,⁴⁶⁴ an attorney intentionally misappropriated IOLTA funds to pay off her personal debts and previous client obligations, which resulted in constant shortages in the account. She also commingled her own funds with client funds. The single justice accepted the Board's recommendation of an indefinite suspension instead of disbarment based upon the principle that "it is important to encourage lawyers to make restitution of misappropriated funds." In *Matter of Abelson*,⁴⁶⁵ the lawyer mismanaged his IOLTA account, leading to commingling of his money with that of his clients, and some loss of his clients' funds. In choosing between disbarment and indefinite suspension, the single justice deferred to the Board's recommendation of the suspension, even though the lawyer had not made full restitution.

Matter of O'Malley, 26 Mass. Att'y Disc. R. 462 (2010); *Matter of Lamond*, 26 Mass. Att'y Disc. R. 299 (2010); *Matter of Connor*, 26 Mass. Att'y Disc. R. 107 (2010); *Matter of Hodgdon*, 24 Mass Att'y Disc. R. 349 (2008); *Matter of Yonce*, 20 Mass. Att'y Disc. R. 552 (2004).

⁴⁶² Usually, the restitution must be voluntary to work to the lawyer's credit. As the SJC has stated, "Recovery obtained through court action 'is not "restitution" for purposes of choosing an appropriate sanction.'" *Matter of LiBassi*, 449 Mass. 1014, 1017, 23 Mass. Att'y Disc. R. 396 (2007) (quoting *Matter of Hollingsworth*, 16 Mass. Att'y Disc. R. 227, 236 (2000)). On occasion, an order of indefinite suspension might include a requirement of restitution of the amounts lost, including interest calculated according to the "prudent investor" rule, at a schedule based upon the lawyer's ability to repay. See *Matter of Collins*, 455 Mass. 1020, 1022, 26 Mass. Att'y Disc. R. 102 (2010) (citing, as a source of authority for the "prudent investor" rule as a calculation of the rate of interest, *Piemonte v. New Boston Garden Corp.*, 377 Mass. 719, 735 (1979)).

⁴⁶³ 426 Mass. 183, 13 Mass. Att'y Disc. R. 679 (1997).

⁴⁶⁴ 24 Mass. Att'y Disc. R. 684 (2008).

⁴⁶⁵ 24 Mass. Att'y Disc. R. 1 (2008).

The justice concluded that the respondent had made good faith efforts to do so and had accomplished as much as his finances allowed.

In *Matter of Johnson*,⁴⁶⁶ the attorney commingled funds and misappropriated his clients' funds, along with other misconduct. The SJC vacated an order of a single justice imposing a thirty-month suspension, and ordered an indefinite suspension, concluding that nothing in the record "warrant[ed] a lesser sanction than is usual and presumptive."⁴⁶⁷ In *Matter of Haese*,⁴⁶⁸ the respondent was disbarred despite having made restitution, because of the seriousness of his misconduct.

Departures from the *Schoepfer* presumptive discipline are rare. As *Schoepfer* itself noted, the presumptive standards may not apply in the instance where the lawyer's disability, or similar mitigating circumstance, warrants a lesser sanction.⁴⁶⁹ One such example is *Matter of Guidry*,⁴⁷⁰ where a single justice imposed a thirty-month suspension, proposed by the parties in their stipulation, after the respondent intentionally converted client trust funds. The single justice accepted the departure from the *Schoepfer* standard because the lawyer's misconduct was a result of "extreme financial and emotional stress arising from grave and acute family problems." Respondents have relied on *Guidry* on occasion to justify a lesser sanction than an indefinite suspension.⁴⁷¹ For instance, in *Matter of Dodd*,⁴⁷² the lawyer neglected and mismanaged his IOLTA account for several years, including failing to keep adequate records and intentionally appropriating client funds to cover obligations to other clients. He also made restitution. The single justice ordered a one-year suspension, with conditions. The single justice concluded that the respondent's "debilitating and worsening medical condition during the relevant period was a significant contributing cause of his misconduct," along with the fact that his practice had already been restricted for six years, justifying a departure from the presumptive sanction.

The Court has distinguished between misappropriation of client funds while in the role of counsel, and third party funds outside of the practice of law, imposing a greater disciplinary sanction for the former. As the SJC has written:

⁴⁶⁶ 444 Mass. 1002, 21 Mass. Att'y Disc. R. 355 (2005).

⁴⁶⁷ 444 Mass. at 1003. For a sampling of other indefinite suspension matters similar to those described in the text, see, e.g., *Matter of Eleey*, 28 Mass. Att'y Disc. R. 275 (2012); *Matter of Montague*, 26 Mass. Att'y Disc. R. 367 (2010); *Matter of Tolins*, 24 Mass. Att'y Disc. R. 691 (2008); *Matter of Moriarty*, 21 Mass. Att'y Disc. R. 494 (2005); *Matter of Gonick*, 15 Mass. Att'y Disc. R. 230 (1999); *Matter of Milgroom*, 14 Mass. Att'y Disc. R. 506, 518 (1998).

⁴⁶⁸ 468 Mass. 1002, 30 Mass. Att'y Disc. R. 196 (2014).

⁴⁶⁹ *Schoepfer*, 426 Mass. at 188 ("If a disability caused a lawyer's conduct, the discipline should be moderated").

⁴⁷⁰ 15 Mass. Att'y Disc. R. 255 (1999).

⁴⁷¹ For those that succeeded, see *Matter of Sweeney*, 32 Mass. Att'y Disc. R. ____, 2016 WL 695826 (2016) (eighteen-month suspension); *Matter of Greenidge*, 30 Mass. Att'y Disc. R. 174 (2014) (one-year suspension); *Matter of Jebb*, 24 Mass. Att'y Disc. R. 374 (2008) (thirty-month suspension). For those that did not succeed, see *Matter of (John) Johnson*, 444 Mass. 1002 (2005) (indefinite suspension); *Matter of Gayle Johnson*, 23 Mass. Att'y Disc. R. 326 (2007) (indefinite suspension).

⁴⁷² 21 Mass. Att'y Disc. R. 196 (2005).

Although we presently discern a basis to treat differently the attorney who acts dishonestly by misappropriating the funds of another while acting outside the practice of law from the attorney who does so while acting within the practice of law, we see no reason to treat differently an attorney who misappropriates third-party funds from the attorney who misappropriates client funds when the misconduct occurs within the practice of law.⁴⁷³

In *Matter of Barrett*,⁴⁷⁴ the respondent, acting in the role of CEO of a company of which he was the majority stockholder but not as its counsel, converted company funds for his own use. The SJC imposed a two-year suspension. In *Matter of Hilson*,⁴⁷⁵ the respondent was indefinitely suspended for conversion of third-party funds held while he represented a real estate broker. The Court wrote, “Had the respondent simply converted third-party funds while acting outside the practice of law, a two-year suspension might be in order.”⁴⁷⁶

Misuse of a funds advanced for fees paid by the client is different from misuse of purely client-owned funds, as the lawyer has a reasonable expectation of earning the retainer.⁴⁷⁷ In *Matter of Sharif*,⁴⁷⁸ the SJC explained the difference:

[W]here an attorney intentionally uses funds advanced to pay legal fees with intent to deprive the client of those funds, either permanently or temporarily, or where the client was actually deprived of those funds, regardless of the attorney’s intent, the attorney’s misconduct is serious and merits a severe sanction. But we do not agree that the sanctions of disbarment or indefinite suspension should presumptively apply to all such cases. . . . The presumptive sanction of disbarment or indefinite suspension that we established in cases involving the intentional misuse of traditional client funds is not mandatory, but “[a]n offending lawyer has a heavy burden to demonstrate” that the sanction should not be applied, and we will not depart from the presumed sanction without providing “clear and convincing reasons for doing so.”⁴⁷⁹

⁴⁷³ *Matter of Hilson*, 448 Mass. 603, 23 Mass. Att’y Disc. R. 265 (2007).

⁴⁷⁴ 447 Mass. 453, 464–465, 22 Mass. Att’y Disc. R. 58 (2006).

⁴⁷⁵ 448 Mass. 603, 23 Mass. Att’y Disc. R. 265 (2007).

⁴⁷⁶ 448 Mass. at 618. See also *Matter of Cortiella*, 23 Mass. Att’y Disc. R. 84 (2007) (as CEO of corporation, respondent misdirected money to himself; full restitution paid; two-year suspension); *Matter of Carreiro*, 25 Mass. Att’y Disc. R. 91 (2009) (two year suspension for conversion of check payable to employer firm, aggravated by fabricated check in effort to conceal the misuse); *Matter of Chum*, 29 Mass. Att’y Disc. R. 125 (2013) (18-month suspension for two incidents of stealing cash from employer; restitution paid).

⁴⁷⁷ See, e.g., *Matter of Hopwood*, 24 Mass. Att’y Disc. R. 354 (2008) (one-year suspension) (“Neither the Court nor the board has held or even opined that misuse of a retainer is to be treated with the same severity as the classic conversion of client funds addressed in *Three Attorneys* and clarified in *Matter of Schoepfer* . . .”); *Matter of Pudlo*, 460 Mass. 400, 27 Mass. Att’y Disc. R. 736 (2011) (one-year suspension, six months stayed with conditions); *Matter of Sharif*, 459 Mass. 558, 27 Mass. Att’y Disc. R. 809 (2011) (three-year term suspension, third year stayed).

⁴⁷⁸ 459 Mass. 558, 27 Mass. Att’y Disc. R. 809 (2011).

⁴⁷⁹ 459 Mass. at 566–67 (quoting *Schoepfer*).

Misuse of client funds that is not intentional, but does lead to deprivation, warrants a term suspension. As the SJC has stated in *Matter of Jackman*, “While the negligent, unintentional misuse of client funds might warrant a public reprimand in the absence of actual deprivation, where . . . the unintentional misconduct has resulted in even temporary deprivation, a term suspension is typical.”⁴⁸⁰ In *Jackman*, the lawyer kept shoddy records of his client trust account, leading to commingling with his own funds and some misuse of client funds. The lawyer made full restitution, so no client suffered any lasting harm. The lawyer’s mishandling of the account was unintentional but did result in some deprivation. He also assisted in the unauthorized practice of law by permitting his paralegal to settle matters without supervision. The Court imposed a two-year suspension, with the condition that upon reinstatement, should he be reinstated, his practice could not include any representation in civil matters. The SJC or single justices have imposed term, rather than indefinite, suspension orders in other situations comparable to those in *Jackman*.⁴⁸¹

The burden of proof to establish facts in disciplinary proceedings will typically rest with Bar Counsel. But a respondent will bear the burden of proof to establish lack of misconduct intent when funds received in cash are not accounted for. According to the SJC, “Once a showing has been made by Bar Counsel that client cash has been received, has not been deposited in a bank account, and has not been accounted for, . . . it will be the burden of the attorney to demonstrate whether the funds are indeed missing, whether his actions were intentional or negligent, and whether there has been deprivation. Should an attorney fail to convince that funds are missing by virtue of negligence rather than purpose, deprivation will be presumed, and a sanction of disbarment or indefinite suspension will be imposed.”⁴⁸²

Practice Tip

A quick response to and repair of an inadvertent deprivation of client funds can make an important difference in the ultimate sanction an attorney receives. Some lawyers have received public reprimands after they demonstrated immediate, good faith efforts to correct any mistake involving deprivation of client funds.⁴⁸³

3) Public Reprimand

⁴⁸⁰ *Matter of Jackman* 444 Mass. 1013, 1014 (2005), 21 Mass. Att’y Disc. R. 349 (2005) (citing *Matter of Newton*, 12 Mass. Att’y Disc. R. 351 (1996)) (two years); *Matter of Zelman*, 10 Mass. Att’y Disc. R. 302 (1994) (two years); *Matter of Barnes*, 8 Mass. Att’y Disc. R. 8 (1992) (three years, with third year suspended and attorney placed on probation).

⁴⁸¹ *See, e.g.*, *Matter of Murray*, 455 Mass. 872, 26 Mass. Att’y Disc. R. 402 (2010) (six-month suspension); *Matter of Wilsker*, 25 Mass. Att’y Disc. R. 625 (2009) (nine-month suspension); *Matter of Ryan*, 24 Mass. Att’y Disc. R. 621 (2008) (nine-month suspension); *Matter of Sylvia*, 24 Mass. Att’y Disc. R. 673 (2008) (three-month suspension).

⁴⁸² *Murray*, 455 Mass. at 887-88.

⁴⁸³ *See, e.g.*, *Matter of Manoff*, 29 Mass. Att’y Disc. R. 421 (2013); *Matter of LaPre*, 26 Mass. Att’y Disc. R. 302 (2010).

You Should Know

The typical sanction for a lawyer who has negligently misappropriated client funds with no deprivation to the client, or for a lawyer who has not managed a trust account properly, is a public reprimand.

Lawyers presumptively receive public reprimands for mishandling of funds held in trust when the misconduct results from negligence and the client suffers no deprivation.⁴⁸⁴ The disciplinary reports are filled with such examples. For instance, in *Matter of Molle*,⁴⁸⁵ an attorney received a public reprimand after commingling his own funds with clients' funds, negligently misusing client funds, and failing to maintain adequate trust account records. The Board determined that his actions were negligent and his clients suffered no deprivation. Similarly, in *Matter of Barnes*,⁴⁸⁶ the attorney, who as a result of poor bookkeeping negligently withdrew client funds to pay his fees, but caused no deprivation to the client, received a public reprimand. In *Matter of Hitchcock*,⁴⁸⁷ the attorney, again as a result of careless bookkeeping, commingled personal funds with client funds over an extended period of time, resulting in his negligent misuse of client funds, but without deprivation to client. The attorney made full restitution. He received a public reprimand.⁴⁸⁸

In *Matter of Franchitto*,⁴⁸⁹ the SJC concluded that a public reprimand was the proper sanction, notwithstanding some intentional misuse of trust account funds, after the respondent mismanaged his real estate trust account, leading to shortfalls. Although certain parties, but not his clients, were temporarily deprived of funds, the lawyer was a victim of duplicity by his client, which justified a departure from the presumptive sanction.

4) Admonition

You Should Know

Under the *Schoepfer/Three Attorneys* standards, commingling of client funds without misuse or deprivation warrants an admonition. As noted above, if that commingling has resulted from faulty recordkeeping practices, the recent trend has been to impose a public reprimand.

⁴⁸⁴ *Matter of Jackman* 444 Mass. 1013, 1014, 21 Mass. Att'y Disc. R. 349 (2005).

⁴⁸⁵ 25 Mass. Att'y Disc. R. 390 (2009).

⁴⁸⁶ 18 Mass. Att'y Disc. R. 64 (2002).

⁴⁸⁷ 17 Mass. Att'y Disc. R. 299 (2001).

⁴⁸⁸ For other examples of mishandled client accounts, without intention and without deprivation, leading to a public reprimand, see, e.g., *Matter of Cabana*, 29 Mass. Att'y Disc. R. 77 (2013); *Matter of Fallon*, 29 Mass. Att'y Disc. R. 237 (2013); *Matter of Powers*, 29 Mass. Att'y Disc. R. 540 (2013); *Matter of Kantrovitz*, 28 Mass. Att'y Disc. R. 507 (2012); *Matter of Dialessi-Lafley*, 26 Mass. Att'y Disc. R. 133 (2010).

⁴⁸⁹ 448 Mass. 1007, 23 Mass. Att'y Disc. R. 162 (2007).

Admonitions have been common for lawyers who commingled client funds with their own funds. Since 1999, Bar Counsel has issued at least 150 admonitions that have cited Rule 1.15 as a basis for the discipline.⁴⁹⁰ The most common reports document commingling of personal and client funds.⁴⁹¹ Other lawyers violated the rule by failing to notify their clients in a prompt manner of receipt of settlement funds.⁴⁹² For example, in AD 04-34,⁴⁹³ the attorney received an admonition after he processed a settlement check through a personal, rather than a trust, account, with no harm to the client. Several lawyers have received admonitions after a bank dishonored a client trust account check for insufficient funds. For example, in AD 10-01,⁴⁹⁴ the lawyer's commingling of funds led to the bounced check, but with no harm to a client. In AD 07-44,⁴⁹⁵ the lawyer, who seldom held client funds in trust, mistakenly used her IOLTA account instead of her business checking account for ordinary expenses, leading to a dishonored check.

In general, most of the admonitions in this area resulted when the lawyer made a record-keeping mistake but did not misuse any client funds. For example, in AD 01-66,⁴⁹⁶ the attorney failed to withdraw his fee on contingent cases promptly and did not keep careful track of the fees he had withdrawn, which caused an IOLTA check to be returned for insufficient funds. In AD 10-12,⁴⁹⁷ the lawyer, who represented lenders on real estate closing matters, on several occasions recorded the closing documents in the registry of deeds prior to verifying that the funds for the closing were received in his IOLTA account. As noted, many similar examples may be found in the disciplinary reports.

The disciplinary reports show that since 2010 every instance of a trust account check returned for insufficient funds has led to a sanction of public reprimand or worse, but those numbers are misleading. Many of those insufficient fund matters result in "diversion agreements," where Bar Counsel will defer disciplinary charges if the respondent cooperates in rectifying any trust account errors.⁴⁹⁸ Those without diversion agreements, or who fail to honor such agreements, face more serious charges. As a result, most of the Rule 1.15 violations in the past decade have led to public reprimands, evidencing a trend away from admonitions in this area.⁴⁹⁹

⁴⁹⁰ Westlaw search, July 27, 2013 (153 admonition reports citing Rule 1.15).

⁴⁹¹ The Westlaw search shows 89 reports since 1999 referring both to Rule 1.15 and commingling.

⁴⁹² See, e.g., AD 04-34, 20 Mass. Att'y Disc. R. 723 (2004).

⁴⁹³ 20 Mass. Att'y Disc. R. 723 (2004). See also AD 05-34, 21 Mass. Att'y Disc. R. 746 (2005). Of the 53 lawyers admonished for failing to notify a client about receipt of funds, none has received an admonition under Rule 1.15 since 2007.

⁴⁹⁴ 26 Mass. Att'y Disc. R. 761 (2010).

⁴⁹⁵ 23 Mass. Att'y Disc. R. 1036 (2007).

⁴⁹⁶ 17 Mass. Att'y Disc. R. 787 (2001).

⁴⁹⁷ 26 Mass. Att'y Disc. R. 782 (2010).

⁴⁹⁸ For a discussion of diversion agreements, see Chapter 4.

⁴⁹⁹ Of the 355 reported cases citing Rule 1.15 between 2007 and July, 2017, only fifteen were admonitions.

Part VI

Candor to the Court and Third Parties (Rules 3.3, 4.1(a), 8.4(c))

I. Introduction

In Massachusetts, many of the lawyers who find themselves in the disciplinary process end up there because they have lied, deceived, or otherwise proceeded in a way that was not fully honest while representing clients (and, on occasion, outside of the representation context). The Disciplinary Reports are filled with examples of this kind of misconduct, with lawyers often suffering grave consequences. Most lawyers resist whatever temptations arise to bend the facts to obtain a good result, but some do not. A few dissemble to further their own ends. This Part introduces the rules governing candor and honesty, reviews the types of discipline imposed for violations of those rules, and then describes some of the more challenging issues lawyers confront in this area.

II. The Nature of the Lawyer's Responsibilities Regarding Candor Before a Tribunal

A lawyer's obligation of candor emerges from three rules of professional conduct—Rule 3.3, which prohibits dishonesty directed to a tribunal and similar misconduct; Rule 4.1(a), which prohibits a lawyer from making a material misstatement of fact or law to a third person when representing a client; and Rule 8.4(c), a broad provision that prohibits deception and dishonesty by a lawyer. The rules are discussed in that order.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false, except as provided in Rule 3.3 (e). If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than

the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding including all appeals, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed.

(1) If a lawyer discovers this intention before accepting the representation of the client, the lawyer shall not accept the representation,

(2) If, in the course of representing a defendant prior to trial, the lawyer discovers this intention and is unable to persuade the client not to testify falsely, the lawyer shall seek to withdraw from the representation, requesting any required permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to withdraw, the lawyer may not prevent the client from testifying.

(3) If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false

testimony in closing argument or in any other proceedings, including appeals.

A. The Lessons of Rule 3.3

Most lawyers understand Rule 3.3 as the “no perjury” rule. While it has several nuances, that understanding serves as a nicely crystallized, if narrow, description of the rule. Simply stated, lawyers cannot lie to a tribunal, offer testimony the lawyer knows is false (either in court or out of court, including depositions, answers to interrogatories and other pleadings), or present false evidence. The rule provides that a lawyer may not make a false statement of fact or law to a tribunal,⁵⁰⁰ offer evidence that the lawyer knows is false, or fail to correct false material evidence or the attorney’s own misstatement of material fact or law.⁵⁰¹ If the lawyer learns that a person (either his client or another person) intends to offer or has offered false evidence, the lawyer “shall take reasonable remedial measures,”⁵⁰² which may include disclosure of the falsehood to the tribunal.⁵⁰³ The rule also provides lawyers the discretion to refuse to offer evidence that the lawyer “reasonably believes is false.”⁵⁰⁴ When the proposed perjury is by a defendant in a criminal proceeding, the rule provides for a different process.⁵⁰⁵

Statements whose content is true but that are intentionally misleading may violate Rule 3.3.⁵⁰⁶ Statements that are “technically accurate” or “literally true,” but that nevertheless are “clearly intended to mislead” or “beg[] [a] false inference” amount, in appropriate cases, to false statements within the meaning of Rule 3.3(a)(1).⁵⁰⁷ “[H]alf-truths may be as actionable as whole lies.”⁵⁰⁸

Finally, Rule 3.3 requires lawyers appearing *ex parte* before a tribunal to inform the tribunal of all material facts known to the lawyer needed for a fair decision (thus serving as an exception to the usual principle that lawyers need not disclose unfavorable

⁵⁰⁰ MASS. RULES OF PROF’L CONDUCT R. 3.3(a)(1) (2015).

⁵⁰¹ *Id.*, at R. 3.3(a)(3).

⁵⁰² *Id.*, at R. 3.3(b).

⁵⁰³ *Id.*, at R. 3.3(a)(3), (b).

⁵⁰⁴ *Id.*, at R. 3.3(a)(3).

⁵⁰⁵ *Id.*, at R. 3.3(e). In essence, Rule 3.3(e) provides for special procedures on withdrawal and disclosure depending on when the lawyer knows that the client proposes to commit perjury and forbids a criminal defense lawyer from disclosing to the tribunal hearing the matter the fact that his client intends to commit perjury. The Rule offers a method through which the lawyer may offer a narrative version of the false testimony if the lawyer “is unable to persuade the client not to testify falsely.” Rule 3.3(e)(2). The lawyer may not actively elicit the false testimony, and may not refer to it in closing argument or elsewhere. Rule 3.3(e)(3).

⁵⁰⁶ *Matter of Hession*, 29 Mass. Att’y Disc. R. 338 (2013) (“calculatedly misleading” statement violates Rule 3.3(a); *Matter of O’Toole*, 31 Mass. Att’y Disc. R. ___, 2015 WL 9309021 (2015) (citing authorities). In *Matter of Angwafo*, 453 Mass. 28, 25 Mass. Att’y Disc. R. 8 (2009), the Board concluded that the “deceitful” statements made by the respondent were not sufficiently false to violate Rule 3.3, but did violate Rule 8.4(c).

⁵⁰⁷ *Matter of Pemstein*, 16 Mass. Att’y Disc. R. 339, 348 (2000).

⁵⁰⁸ *Kannavos v. Annino*, 356 Mass. 42, 48 (1969).

facts if not asked),⁵⁰⁹ and establishes a duty of lawyers to reveal to a tribunal “legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”⁵¹⁰ According to a Massachusetts Bar Association ethics opinion, the duty to disclose adverse authority applies even if the authority is factually distinguishable from the matter before the tribunal, and continues until the tribunal renders its decision.⁵¹¹

The requirement that a lawyer reveal intended or completed perjury to someone, including if necessary to the judge or administrative officer deciding the matter, is broader than the duties imposed by the previous Massachusetts Disciplinary Rules, which limited that obligation to revealing non-privileged material.⁵¹² The duties established by Rule 3.3 apply when the attorney “knows” that the evidence is false. Actual knowledge is required, but it may be inferred from the circumstances.⁵¹³

While the question about what a lawyer should *do* when she knows that her client’s, a witness’s, or a third party’s testimony is not truthful is one that has perplexed practitioners and commentators for decades,⁵¹⁴ for purposes of cataloguing the treatment of Rule 3.3 violations in the disciplinary process, the path is much more straightforward. When a lawyer is certain that the evidence she is planning to use is false, she must not use it, and must prevent its use by her client. If the false evidence comes in through the lawyer’s client or witness, despite the lawyer’s efforts, the lawyer must take steps to rectify the false evidence.

B. Discipline for Violation of Rule 3.3

Practice Tips

Lawyers who lie will almost always get in serious trouble if they get caught, and they frequently get caught. The most serious sanctions come when a lawyer lies (1) *before a court*, (2) *under oath*, (3) *on behalf of a client* and (4) *to further the lawyer’s, and not the client’s, interests*. The more of those four factors present,

⁵⁰⁹ *Id.*, at R. 3.3(d).

⁵¹⁰ *Id.*, at R. 3.3(a)(2).

⁵¹¹ Mass. Bar Ass’n. Op 80-3 (1980). While this opinion interpreted DR 7-106(B)(1), the predecessor to Rule 3.3(d), the substance of the current rule is exactly the same as that of the former Disciplinary Rule.

⁵¹² See MASS. CODE OF PROF’L RESPONSIBILITY DR 7-102(B)(1) (1969).

⁵¹³ Matter of Angwafo, 453 Mass. 28, 34 (2009). See also Matter of Zimmerman, 17 Mass. Att’y Disc. R. 633 (2001) (“[A] lawyer cannot avoid ‘knowing’ a fact by purposefully refusing to look. While a lawyer ‘is not under an obligation to seek out information,’ his or her ‘studied ignorance of a readily accessible fact by consciously avoiding it is the functional equivalent of knowledge of the fact.’” (citations omitted)).

⁵¹⁴ See, e.g., Jay S. Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339 (1994); Susan E. Thrower, *Neither Reasonable Nor Remedial: The Hopeless Contradictions of the Legal Ethics Measures to Prevent Perjury*, 58 CLEV. ST. L. REV. 781, 796-97 (2010) (describing the traditional client perjury solutions of withdrawal and disclosure as unworkable); Harris Weinstein, *Client Confidences and the Rules of Professional Responsibility: Too Little Consensus and Too Much Confusion*, 35 S. TEX. L. REV. 727, 739 (1994). It is fair to say that the level of confusion and uncertainty is significantly higher in the case of perjury by criminal defendants, given their constitutional right to effective assistance of counsel and protection against self-incrimination.

the more serious a sanction the lawyer will receive. The least serious Lesser sanctions have come when a lawyer lies in his own private matters, such as during the lawyer's divorce proceeding.

* * *

Lying before a tribunal, the misconduct covered by Rule 3.3, is more serious than lying outside of a tribunal, such as in a negotiation, to a client or to a third party, which is covered by Rule 4.1.

The presumptive sanction for making a false statement or presenting false evidence to a tribunal is now a term suspension, either one year for a misrepresentation made or facilitated by the lawyer but not under oath, and two years for a false statement made by the lawyer under oath. The SJC has stated, "For making a deliberate misrepresentation to a court, the presumptive sanction is a one-year suspension."⁵¹⁵ It has also stated that, "Where an attorney has made false statements under oath, the presumptive sanction is a two-year suspension from the practice of law,"⁵¹⁶ because "an attorney who lies under oath engages in 'qualitatively different' misconduct from an attorney who makes false statements and presents false evidence."⁵¹⁷

In rare circumstances a lawyer has received either a public reprimand or even an admonition for misconduct implicating Rule 3.3, but those dispositions tend to be outliers, as explained below.

1) **Disbarment**

An attorney's giving false testimony under oath can justify disbarment, but only in egregious circumstances, typically those involving other misconduct or aggravating

⁵¹⁵ Matter of Slavitt, 22 Mass. Att'y Disc. R. 720 (2006). See also Matter of Zimmerman, 17 Mass. Att'y Disc. R. 633 (2001) ("one-year suspension is 'standard' sanction for material misrepresentations to tribunal," citing Matter of McCarthy, 416 Mass. 423, 9 Mass. Att'y Disc. R. 225 (1993)); Matter of Neitlich, 413 Mass. 416, 8 Mass. Att'y Disc. R. 167 (1992). Note that the respondent in *Slavitt* later had his one-year suspension reduced to a two-month suspension after reconsideration of the nature of his false statements. Matter of Slavitt, 449 Mass. 25, 23 Mass. Att'y Disc. R. 662 (2007).

⁵¹⁶ Matter of Sousa, 25 Mass. Att'y Disc. R. 557, 566 (2009) (citing Matter of O'Donnell, 23 Mass. Att'y Disc. R. 508, 514, n.3 (2007)). See also Matter of Shaw, 427 Mass. 764, 767-769 (1998) (two-year suspension for false testimony in court, filing false affidavits and issuing misleading opinion letters signed under oath with forged notarization).

⁵¹⁷ Matter of Shaw, 427 Mass. at 769 (quoting Matter of Budnitz, 425 Mass. 1018, 1019 (1997)).

factors.⁵¹⁸ In *Matter of Bailey*,⁵¹⁹ for example, the lawyer was disbarred in part because of his false testimony regarding his handling of a client's property, but also for his misappropriation of that property and his improper ex parte contacts with a judge. There, the SJC wrote that an attorney's false testimony "under oath, by itself, can justify disbarment."⁵²⁰ However, no reported case since then has resulted in disbarment for false statements to a tribunal, without some other factor, such as a conviction, other accompanying misconduct, or aggravating factors. In *Matter of Finneran*,⁵²¹ the respondent, a former Speaker of the Massachusetts House of Representatives, offered misleading and false statements at a trial when he testified, as a witness, that he was unaware of gerrymandering that occurred as a result of legislation he oversaw. After his conviction in federal district court of obstruction of justice, the SJC concluded that the felony conviction warranted disbarment, the presumptive discipline for such convictions.⁵²²

2) Suspension

You Should Know

According to the SJC, the presumptive sanction for making a deliberate misrepresentation to a court is a one-year suspension.⁵²³ But, "Where an attorney has made false statements under oath, the presumptive sanction is a two-year suspension from the practice of law."⁵²⁴

⁵¹⁸ See *Matter of Balliro*, 453 Mass. 75, 86, 25 Mass. Att'y Disc. R. 35, 51 (2009) (citing *Matter of Sleeper*, 251 Mass. 6 (1925)); *Matter of Budnitz*, 425 Mass. 1018 (1997). The ABA's recommended standards suggest disbarment without the egregious and aggravating circumstances. See ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (REV. 2012) § 6.11:

Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal system."

The ABA also does not make the distinction, used by the SJC, between false statements under oath and false statements not under oath.

⁵¹⁹ 439 Mass. 134 (2003) (attorney disbarred for lying to a judge under oath, misappropriating client funds, engaging in ex-parte communications with a judge in an effort to influence the outcome of a proceeding, divulging confidential client information, and violating court orders).

⁵²⁰ *Bailey*, 439 Mass. at 149, 151.

⁵²¹ 26 Mass. Att'y Disc. R. 177 (2010).

⁵²² See also *Matter of Kelly*, 26 Mass. Att'y Disc. R. 282 (2010) (disbarment after felony conviction on 20 counts, including forgery of documents submitted to court); *Matter of Lonardo*, 25 Mass. Att'y Disc. R. 360 (2009) (disbarment after conviction of conspiracy to commit insurance fraud). In *Matter of Foley*, 439 Mass. 324 (2003) (three-year suspension), the respondent fabricated a defense for a criminal defense client but never presented it because the putative client was actually an undercover FBI agent; the case was nolle prossed when the district attorney learned the true identity of the defendant and that his arrest had been part of an undercover investigation. *Id.* at 331. The Court went on to say that, had the respondent actually "presented the false story he had concocted and the false testimony he had developed . . . , the sanction respondent would be facing most assuredly would have been disbarment." *Id.* at 335-336.

⁵²³ *Matter of Slavitt*, 22 Mass. Att'y Disc. R. 720 (2006).

⁵²⁴ *Matter of Sousa*, 25 Mass. Att'y Disc. R. 557, 566 (2009) (citing *Matter of O'Donnell*, 23 Mass. Att'y Disc. R. 508, 514, n.3 (2007)).

Some cases involving false affidavits filed by counsel without false oral testimony have resulted in a one-year suspension, rather than a two-year suspension.⁵²⁵

Most Rule 3.3 violations result in some form of suspension. As noted above, the presumptive sanction for false statements made to a tribunal is a one-year suspension, unless the false statement is made under oath, and then the presumptive sanction is a two-year suspension. In *Matter of Sousa*,⁵²⁶ the respondent was suspended for the presumptive two-year period after she testified falsely in court against her client. The respondent in *Sousa* had engaged in a romantic relationship with her former client, which later deteriorated, leading to claims of stalking and considerable acrimony between the two. The single justice concluded that her misconduct was no more, nor less, culpable than that for which the typical sanction applies. Other examples of that disposition exist.⁵²⁷

Some lawyers who offer testimony or evidence under oath have been suspended for longer periods than the presumptive sanction. For instance, in *Matter of O'Donnell*,⁵²⁸ the attorney was suspended indefinitely for his false testimony under oath, combined with his misuse of client funds. In *Matter of Foley*,⁵²⁹ the respondent was suspended for three years for “calculated corruption” in “assisting and encouraging his client in the preparation of a fabricated defense to a criminal complaint” and also presenting the fabricated defense to the prosecutor. The respondent in *Foley* never offered evidence under oath.

Some lawyers have been suspended for less than two years after presenting false evidence under oath to a tribunal, with most involving statements made not on behalf of a client, but in a role as a witness⁵³⁰ or concerning the lawyer’s personal affairs. (In 2015, the SJC added a new Comment [1] to Rule 3.3, stating that the “Rule governs the conduct

⁵²⁵ See *Matter of Powell*, 30 Mass. Att’y Disc. R. 319, 324 n.2 (2014) (noting that “[c]ases involving false affidavits usually result in a one-year suspension,” but imposing a six-month suspension in light of lack of materiality); *Matter of Livingstone*, 27 Mass. Att’y Disc. R. 548 (2011) (one-year suspension by stipulation); *Matter of Cross*, 15 Mass. Att’y Disc. R. 157 (1999) (public reprimand in light of lack of materiality). *But see* *Matter of Diviacchi*, 32 Mass. Att’y Disc. R. ___, 2016 WL 695823 (2016) (applying presumptive two-year suspension standard after the respondent filed a false complaint signed under oath, then relied on the false statements in arguments to the court).

⁵²⁶ 25 Mass. Att’y Disc. R. 557, 566 (2009).

⁵²⁷ For other instances of the presumptive sanction of a two-year suspension for false evidence made under oath, see, e.g., *Matter of Shaw*, 427 Mass. 764 (1998) (two-year suspension for false testimony in court, filing false affidavits and issuing misleading opinion letters signed under oath with forged notarization); *Matter of Beatrice*, 14 Mass. Att’y Disc. R. 56 (1998) (two-year suspension for lying under oath about relationship with suspended attorney working in his office, mishandling bankruptcy proceedings and charging a contingency fee in a criminal case, aggravated by testifying falsely to hearing committee).

⁵²⁸ 23 Mass. Att’y Disc. R. 508 (2007).

⁵²⁹ 439 Mass. 324, 19 Mass. Att’y Disc. R. 141 (2003).

⁵³⁰ *Matter of Bartley*, 30 Mass. Att’y Disc. R. 16 (2014) (respondent suspended for a year and a day for false testimony as a witness).

of a lawyer who is representing a client in the proceedings of a tribunal.”⁵³¹) In *Matter of Finnerty*,⁵³² the respondent was suspended for six months after he intentionally misrepresented to the Probate and Family Court (under penalties of perjury⁵³³) his financial worth in connection with divorce proceedings. While some mitigating factors were present (including the respondent’s history of public service, the emotional impact of the divorce, and the supportive statements of his former wife), the Court stated that “we are satisfied that this disposition is consistent with the sanctions imposed in other cases.”⁵³⁴ In *Matter of Angwafo*,⁵³⁵ the respondent was suspended for one month for misstating financial and other matters in a Probate and Family Court proceeding. She suffered from extreme domestic violence, amounting to “terror,” at the time.⁵³⁶ In *Matter of Leahy*,⁵³⁷ the single justice suspended the respondent for two months after he submitted false affidavits in a dispute about custody and visitation with his children during his divorce. The single justice noted that “[a]ttorneys who have acted improperly in the course of their own divorce and child custody proceedings have generally been suspended for a period of three or more months.”⁵³⁸ The respondent’s lack of financial motive justified a shorter suspension. In *Matter of Vinci*,⁵³⁹ the attorney, just like the respondents in *Finnerty* and *Angwafo*, filed a false financial statement under the penalties of perjury with the Probate and Family Court in his own divorce case, and served that statement on his opposing counsel. He also failed to honor an administrative suspension. The single justice accepted the parties’ stipulation to a nine-month suspension.⁵⁴⁰

⁵³¹ MASS. RULES OF PROF’L CONDUCT r. 3.3, Comment [1]. See also discussion note 594 *infra*.

⁵³² 418 Mass. 821, 10 Mass. Att’y Disc. R. 86 (1994).

⁵³³ The Court noted that the false financial statement submitted by the respondent was subject to Probate Court Rule 401, which reads, “All financial statements shall be signed by the party filing the same and shall be subject to the pains and penalties of perjury.” 418 Mass. at 828.

⁵³⁴ 418 Mass. at 830. In *Matter of Angwafo*, 453 Mass. 28, 25 Mass. Att’y Disc. R. 8 (2009), the SJC observed that in *Finnerty* there existed “no finding that the lawyer knowingly made a false statement of material fact” (453 Mass. at 38), even though the Court in *Finnerty* had concluded the following: “[The respondent] deliberately misrepresented to the court his total financial worth, including the fair value of his law practice and other assets, in order to obtain an unwarranted judgment, favorable to him, with respect to the division of marital assets.” 418 Mass. at 828.

⁵³⁵ *Angwafo*, *supra*, 453 Mass. 28.

⁵³⁶ The Court concluded that because the respondent quickly corrected her false statements to the court, no discipline under Rule 3.3 was warranted. She was disciplined instead under Rule 8.4(c) for other dishonest activity in the same proceeding. See discussion of *Angwafo* in the context of Rule 8.4(c) *infra*.

⁵³⁷ 28 Mass. Att’y Disc. R. 529 (2012).

⁵³⁸ 28 Mass. Att’y Disc. R. at 537 (citing *Matter of Ring*, 427 Mass. 186, (1998) (three months); *Matter of Kersey*, 432 Mass. 1020 (2000) (three months); *Matter of Finnerty*, 418 Mass. 821 (1994) (six months); *Matter of Kilkenny*, 26 Mass. Att’y Disc. R. 288 (2010) (five months)).

⁵³⁹ 23 Mass. Att’y Disc. R. 742 (2007). For a similar type of misconduct, see *Matter of Wong*, 21 Mass. Att’y Disc. R. 659 (2005) (one-year suspension where lawyer failed to update her personal bankruptcy filings to show increased income; presumably the original filing was under oath, but lawyer omitted facts rather than misstated facts).

⁵⁴⁰ See also *Matter of Pezza*, 29 Mass. Att’y Disc. R. 535 (2013) (a year and a day suspension for submitting a false affidavit to a court to help an acquaintance; only Rules 8.4(c) and (d) cited); *Matter of Powell*, 30 Mass. Att’y Disc. R. 319 (2014) (stipulation; suspension of six months and a day for false affidavit in same proceeding as *Pezza*; no rules cited).

In *Matter of Balliro*,⁵⁴¹ an attorney was suspended for six months for having made false statements to a Tennessee prosecutor and police, and having given false testimony under oath at trial in Tennessee. The attorney was a victim of domestic violence by a man with whom she was in a romantic relationship, and her testimony occurred at his criminal trial. She understood that a conviction meant jail time for the defendant and loss of any possibility of his paying child support. After the prosecutor denied her request to have the charges dismissed, the respondent claimed falsely, under oath, that her injuries were caused by a fall. After the BBO accepted the hearing committee's recommendation of a public reprimand, the SJC disagreed and imposed the six-month suspension.⁵⁴²

If the misrepresentations to the tribunal are made by the lawyer in the role of counsel but not under oath, the presumptive sanction is a shorter one-year suspension, and that has been the norm for many years. For instance, in 1993, in *Matter of McCarthy*,⁵⁴³ the respondent's sanction was a one-year suspension after he elicited false testimony, introduced false records, and then failed to correct the erroneous record before a rent control board. In *Matter of Neitlich*,⁵⁴⁴ the attorney also was suspended for one year for actively misrepresenting terms of a real estate transaction in a divorce proceeding to opposing counsel and to the court. In two recent matters the Court applied that presumptive standard but added one day to the suspension, thereby triggering the additional requirement that the respondent petition for reinstatement.⁵⁴⁵

In 2003, the SJC suggested that the penalty for misrepresentation might need to be stiffer. In *Matter of Griffin*,⁵⁴⁶ after imposing a one-year suspension on a respondent who had assisted his client to prepare false and misleading discovery responses, the Court stated:

We advise for future reference that this sanction is tailored to the factors in this case and the novelty of the issues. Counsel who engage in similar misconduct in the future should not necessarily expect a maximum sanction of a one-year suspension. We emphasize that “[a]n effective judicial system depends on the honesty and integrity of lawyers who appear in their tribunals.” *Matter of Finnerty, supra*. This principle applies not only to trials, but also to trial preparation and discovery.⁵⁴⁷

⁵⁴¹ 25 Mass. Att’y Disc. R. 31 (2009).

⁵⁴² The Court acknowledged the following dissonance resulting from the decision: “We recognize and share the board’s concern about the perceived inequity of sanctioning the respondent more severely than attorneys who have been convicted of domestic assault. See *Matter of Grella*, 438 Mass. 47, 51 (2002) (attorney suspended for two months after conviction of misdemeanor arising from violent assault on estranged wife).” *Id.* See also *Matter of Angwafo, supra* (one-month suspension for false statements resulting from severe domestic abuse).

⁵⁴³ 416 Mass. 423, 9 Mass. Att’y Disc. R. 225 (1993).

⁵⁴⁴ 413 Mass. 416, 8 Mass. Att’y Disc. R. 167 (1992).

⁵⁴⁵ See *Matter of Corben*, 26 Mass. Att’y Disc. R. 115 (2010) (attorney fabricated a story to challenge parking tickets); *Matter of Cosmos*, 22 Mass. Att’y Disc. R. 157 (2006) (false statement on a pleading).

⁵⁴⁶ 440 Mass. 500, 20 Mass. Att’y Disc. R. 174 (2003).

⁵⁴⁷ 440 Mass. at 509 (citing *Matter of Finnerty*, 418 Mass. 821, 10 Mass. Att’y Disc. R. 86 (1994)).

In the years since the *Griffin* decision, however,, few sanctions for misrepresentation not under oath have been longer than the presumptive one-year suspension, and cases in which those sanctions were imposed typically included other misconduct. In *Matter of Ozulumba*,⁵⁴⁸ the order acknowledged that a one-year suspension is the presumptive sanction for making a misrepresentation to a court but not under oath; however, the single justice imposed a two-year suspension because of multiple instances of submitting false evidence to courts, along with other separate misconduct. In *Matter of Harris*,⁵⁴⁹ an attorney incurred a suspension for eighteen months after he falsely stated to the court, and arranged for his client to testify under oath, that the client and the lawyer had difficulty communicating, in an effort to permit the lawyer to withdraw and the client to obtain a continuance. That lawyer also had engaged in an impermissible business relationship with the client. In *Matter of Carchidi*,⁵⁵⁰ the attorney was suspended for thirty months after he filed a false accounting with the Probate and Family Court and intentionally misstated his fees charged to the estate, but the lawyer had also mismanaged the client accounts and had been suspended twice for similar misconduct involving mismanagement of client funds.⁵⁵¹ In *Matter of Munroe*,⁵⁵² an attorney was suspended for two years and six months for filing false accountings and false pleadings plus several other separate instances of misconduct.

In matters where the misrepresentations were either less material or less intentionally deceitful, the Rule 3.3 violations have resulted in shorter suspensions. For instance, in *Matter of MacDonald*,⁵⁵³ a newly-admitted lawyer was suspended for six months, with probation conditions, after preparing false affidavits and backdating documents in an effort to reinstate cases dismissed because of his carelessness. The single justice in *MacDonald* deemed that conduct more egregious than *Matter of Long*,⁵⁵⁴ where, to receive a continuance of a pretrial conference, the lawyer made deliberate misrepresentations to a court official that he was scheduled to appear elsewhere. Long's suspension was for three months followed by three years probation on certain conditions. The lawyer in *MacDonald*, in contrast, made false statements on more than one occasion and altered documents, and therefore his suspension was longer than in *Long*.

⁵⁴⁸ 23 Mass. Att'y Disc. R. 515 (2007).

⁵⁴⁹ 20 Mass. Att'y Disc. R. 220 (2004).

⁵⁵⁰ 29 Mass. Att'y Disc. R. 111 (2013). The report implies that the accounting filed with the court was *not* made under oath.

⁵⁵¹ For similar violations of Rule 3.3 where the attorney filed a false account in probate court, see *Matter of Zadworny*, 26 Mass. Att'y Disc. R. 722 (2010) (attorney's violation of 3.3 by filing a false account in probate court led to an indefinite suspension); *Matter of Steinkrauss*, 26 Mass. Att'y Disc. R. 650 (2010) (violation led to an order accepting respondent's resignation); *Matter of Nicholls*, 26 Mass. Att'y Disc. R. 441 (2010) (attorney disbarred after misrepresenting his handling of escrow funds in the accounting to the court); *Matter of Reardon*, 22 Mass. Att'y Disc. R. 640 (2006) (attorney was disbarred for filing a false account with Probate Court saying that he had distributed funds to a beneficiary's estate when no such distributions were made).

⁵⁵² 26 Mass. Att'y Disc. R. 385 (2010).

⁵⁵³ 23 Mass. Att'y Disc. R. 411 (2007).

⁵⁵⁴ 16 Mass. Att'y Disc. R. 250 (1999).

More recently, in *Matter of Macero*,⁵⁵⁵ the single justice adopted the Board memorandum, which declined to recommend a suspension greater than one year and cited *Neitlich* and *McCarthy* for the “presumptive sanction” of a “one-year suspension.”⁵⁵⁶ In *Macero*, the respondent had failed to pay an Appeals Court docketing fee on time, which resulted in the appeal being dismissed. She therefore backdated her check and misrepresented to the Appeals Court that the post office was to blame for the delay. In addition, she testified falsely about the backdated check at the disciplinary hearing. The Board memorandum made no reference to the Court’s warning in *Griffin* that stiffer sanctions might be necessary.

A lawyer who forges a signature of an absent individual to an otherwise truthful document or statement may receive a shorter suspension, or, as seen below, may receive a public reprimand (the presumptive minimum sanction for that misconduct) or even an admonition. In *Matter of Molloy*,⁵⁵⁷ the respondent was suspended for three months for signing or directing someone else to sign a client’s name to an affidavit and then filing the paper with the court. The respondent also lied to Bar Counsel about the event, which increased his sanction.

3) Public Reprimand

You Should Know

The presumptive minimum sanction for signing another’s name, without the requisite authority, to an otherwise truthful document is a public reprimand, if it is not signed under oath or is not an affidavit. However, if the respondent has been convicted under state or federal criminal laws, or if the document is an affidavit, the misconduct may result in greater sanctions.

The BBO has asserted that the presumptive minimum sanction for signing another’s name to an otherwise truthful document is a public reprimand. In *Matter of Cowin*,⁵⁵⁸ a lawyer received a censure (the previous version of a public reprimand) after he arranged for a client to sign a blank sheet of paper, which the lawyer used to fill in material sworn to under oath by the client. The respondent also permitted the client to lie about those events during a deposition. Despite that serious violation of DR 7-102(A), the predecessor to Rule 3.3, the single justice adopted the board’s recommendation and imposed a public censure, noting in mitigation his many years of public service. In a less serious version of that same tactic, in *Matter of Colella*,⁵⁵⁹ an attorney received a public

⁵⁵⁵ 27 Mass. Att’y Disc. R. 554 (2011).

⁵⁵⁶ *Id.*

⁵⁵⁷ 19 Mass. Att’y Disc. R. 302 (2003).

⁵⁵⁸ 2 Mass. Att’y Disc. R. 48 (1981). *Cowin* is over thirty-five years old and discipline today would likely be a term suspension. See *Matter of Guinane*, 20 Mass. Att’y Disc. R. 191 (2004) (single justice imposed a one-month suspension, relying on *Cowin*, for signing a client’s name to a truthful affidavit without client knowledge or consent; substantial mitigation factors were present).

⁵⁵⁹ 22 Mass. Att’y Disc. R. 155 (2006).

reprimand after he, with the client's authorization, signed the client's name to a truthful affidavit under the penalties of perjury. That signing constituted a misrepresentation to the court.

In *Matter of Cross*,⁵⁶⁰ the lawyer received a public reprimand by stipulation after she intentionally misrepresented the facts on a return of service of process, and later on an affidavit she filed in response to a motion challenging the service. Because the respondent conceded (when challenged) that service was ineffective, and did not seek to rely on it, her misrepresentation was not material.

No other public reprimands or censures appear in the disciplinary reports for violations of Rule 3.3 or its predecessor, DR 7-102(A).

4) Admonition

Very few lawyers who have been found to have violated Rule 3.3 have received admonitions. In AD 15-02,⁵⁶¹ the respondent asserted a fact in a pleading that he believed to be true, but later learned was false. He informed his supervisor that he could not pursue an appeal that relied on the false statement, and the supervisor relieved him of that task, which the supervisor pursued himself. The respondent never informed the court or opposing counsel of the prior false statement, contrary to his obligation under Rule 3.3(a)(3). He received an admonition. In AD 06-41,⁵⁶² the respondent signed an affidavit for a witness without her knowledge, and filed it in court in support of motion for a continuance. The witness did not authorize the attorney to sign her name, but she was aware of the affidavit and had approved the substance of its contents, which were generally accurate. Most likely because the attorney was inexperienced and was in treatment for depression, he received a less severe sanction than the lawyer in *Colella*, described above.

The only other admonition related to Rule 3.3 concerns Rule 3.3(d), which pertains to disclosure during an ex parte proceeding. In AD 00-24,⁵⁶³ a lawyer sought an ex parte real estate attachment, and in doing so he failed to disclose material facts that would have influenced the court's decision. The lawyer received an admonition for that misconduct. No other admonitions appear in the disciplinary reports for violations of Rule 3.3 or its predecessor.

III. The Nature of the Lawyer's Responsibilities Regarding Candor Outside of the Tribunal Setting

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

⁵⁶⁰ 15 Mass. Att'y Disc. R. 157 (1999).

⁵⁶¹ 31 Mass. Att'y Disc. R. ___, 2015 WL 5440557 (2015).

⁵⁶² 22 Mass. Att'y Disc. R. 960 (2006).

⁵⁶³ 16 Mass. Att'y Disc. R. 484 (2000).

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person[.]

A. The Lessons of Rule 4.1(a)

Lawyers understand Rule 4.1(a) to be the out-of-court counterpart to Rule 3.3. Lawyers may not lie to or deceive others about material facts or legal principles when representing a client.

Rule 4.1(a) forbids false statements of “material” fact or law. The Rule therefore allows a lawyer to make a knowingly false representation to another (but not to a tribunal or a client) while representing a client if the falsehood concerns a fact that is not material, or an assertion that is not factual, such as an opinion. The Comment to the Rule explains that qualification with examples:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.⁵⁶⁴

Commentators agree that this language means that a lawyer engaged in a negotiation may affirmatively misstate her client’s “bottom line” and limits of her negotiating authority.⁵⁶⁵ (Of course, most experienced lawyers understand that, even if permitted by the rules, flat-out misstatements to other lawyers or parties almost always will be a strategic and reputational mistake.)

As with Rule 3.3,⁵⁶⁶ Rule 4.1 covers more than outright false statements. Comment [1] to Rule 4.1 states that “[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”⁵⁶⁷ The SJC has stated that “[s]tatements that are ‘technically accurate’ or ‘literally true,’ but that nevertheless are ‘clearly intended to mislead’ or ‘beg[] [a] false inference’ amount, in appropriate cases, to false statements within the meaning” of Rule

⁵⁶⁴ MASS. RULES OF PROF’L CONDUCT R. 4.1 cmt. 2 (2015).

⁵⁶⁵ See, e.g., Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63 (2002); Douglas R. Richmond, *Lawyers’ Professional Responsibilities and Liabilities in Negotiations*, 22 GEO. J. LEGAL ETHICS 249 (Winter 2009); Brian C. Haussmann, Note, *The ABA Ethical Guidelines for Settlement Negotiations: Exceeding the Limits of the Adversarial Ethic*, 89 CORNELL L. REV. 1218, 1220 (2004).

⁵⁶⁶ See discussion at text accompanying notes 500–513 *supra*.

⁵⁶⁷ Rule 4.1 cmt. [1].

4.1(a).⁵⁶⁸ Also, false or deceptive statements made by a lawyer may also be subject to sanction under Rule 8.4(c), which prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation.”⁵⁶⁹

In some jurisdictions, but likely not in Massachusetts, Rule 4.1(a) poses a problem for lawyers involved in certain undercover investigations, including civil rights “testers.” Undercover investigations are addressed as part of the discussion of Rule 8.4(c) below. Even if civil rights and similar testing is permitted, a lawyer cannot use “excessively intrusive investigative techniques” and claim he was doing so as a private tester. In *Matter of Crossen*,⁵⁷⁰ the SJC has held that such conduct violates Rules 4.1(a) and 8.4(c) and, on those facts, warranted disbarment.

B. Discipline for Violation of Rule 4.1

You Should Know

The presumptive sanction for out-of-court deception is less than for deception occurring in court. But lawyers who have lied about material facts while representing clients have received significant discipline. Disbarment may be rare, but suspension is not.

1) Disbarment

No Massachusetts lawyer has been disbarred solely for making false statements to others, outside of a tribunal setting, in violation of Rule 4.1(a), although several were disbarred for criminal convictions relating to making such false statements.⁵⁷¹ Moreover, several lawyers have been disbarred for such misconduct when combined with other serious misconduct. For example, in *Matter of Pepyne*,⁵⁷² an attorney was disbarred after multiple instances of misconduct. One of these occurred after a client, a plaintiff in a

⁵⁶⁸ *Matter of O’Toole*, 31 Mass. Att’y Disc. R. ___, 2015 WL 9309021 (2015) (citing authorities). *See also* *Matter of Hession*, 29 Mass. Att’y Disc. R. 338 (2013) (“calculatedly misleading” statements, even if literally true, may qualify as misrepresentations; addressing Rule 3.3(a), not Rule 4.1). In *Matter of Angwafo*, 453 Mass. 28, 37, 25 Mass. Att’y Disc. R. 8 (2009), the SJC concluded that certain “deceitful” conduct will not qualify as “misrepresentation” for purposes of Rule 3.3(a) (and, presumably, Rule 4.1(a)), but would nevertheless violate Rule 8.4(c).

⁵⁶⁹ MASS. RULES OF PROF’L CONDUCT R. 8.4(c) (2015). *See* *Matter of Farber*, 27 Mass. Att’y Disc. R. 249 (2011) (attorney who misrepresented terms while acting as a real estate broker found to have violated Rule 8.4(c); public reprimand). *See also* discussion of Rule 8.4(c) *infra*.

⁵⁷⁰ 450 Mass. 533, 555-568, 24 Mass. Att’y Disc. R. 122, 149-65 (2008).

⁵⁷¹ *See, e.g.*, *Matter of Concemi*, 422 Mass. 326, 12 Mass. Att’y Disc. R. 64 (1996) (attorney disbarred after being convicted of thirty-five felony counts including conspiracy to defraud bank, bank fraud, and making false statement to federally insured bank while acting in his capacity as a lawyer); *Matter of Walsh*, 13 Mass. Att’y Disc. R. 829 (1997) (affidavit of resignation accepted and disbarment ordered after conviction of making false statements to a federally-insured bank). A third lawyer received an indefinite suspension for making false statements without being convicted of bank fraud, but there were also substantial mitigating factors. *Matter of Nickerson*, 422 Mass. 333, 12 Mass. Att’y Disc. R. 367 (1996).

⁵⁷² 26 Mass. Att’y Disc. R. 502 (2010).

personal injury matter, died before the matter was resolved. The attorney failed to inform the insurer of the client's death, and continued to engage in settlement matters while lying to the family of his deceased client. In *Matter of Siciliano*,⁵⁷³ the attorney agreed to a settlement of a malpractice lawsuit after his clients refused to settle. He forged their names to a release, and sent the release to the defendant's counsel. He also misappropriated the funds when he received them. In *Matter of Hoffman*,⁵⁷⁴ the lawyer misused mortgage loan proceeds and arranged for an employee to forge another attorney's signature on six insurance policies without that attorney's knowledge or authority. He also refused to cooperate with Bar Counsel.

Lawyers who misuse funds belonging to others, and then misrepresent the facts in order to avoid detection or to mislead others, will be disbarred for those multiple rule violations, including Rule 4.1(a).⁵⁷⁵

2) Suspension

You Should Know

Lengthy suspensions have been imposed on lawyers for making intentionally false statements outside of court settings, especially in real estate transactions.

The sanction for lawyers who misrepresent facts in order to deceive others and cause them harm is often a term suspension. While neither the SJC nor the BBO has announced a presumptive sanction for misrepresentations under Rule 4.1(a), a single justice decision has stated that the presumptive sanction for a false statement to a third person, not in connection with a tribunal, should be less than that occurring before a tribunal.⁵⁷⁶ Nevertheless, lawyers have incurred suspensions for periods longer than one year for violation of Rule 4.1(a). In a recent decision, *Matter of Friery*,⁵⁷⁷ an attorney was suspended for two years for misrepresenting her credentials in her professional capacity, in violation of Rule 4.1(a). The respondent falsely represented to her law firm that she had graduated from medical school, and her name appeared as "M.D." or "Dr." on the firm's letterhead, business cards, and other documents. Despite no harm to any clients or to the law firm, and no aggravating factors, this unambiguous falsehood warranted the two-year suspension, most likely because of the extent of the misrepresentations, the length of time over which the respondent repeated them or

⁵⁷³ 23 Mass. Att'y Disc. R. 654 (2007).

⁵⁷⁴ 23 Mass. Att'y Disc. R. 301 (2007).

⁵⁷⁵ For other examples of a lawyer disbarred for a combination of misconduct including misrepresentation to others, see, e.g., *Matter of Connolly*, 23 Mass. Att'y Disc. R. 80 (2007) (cover-up of neglect of probate matters); *Matter of Roberts*, 22 Mass. Att'y Disc. R. 656 (2006) (misrepresentations to cover for mishandling client funds); *Matter of McDonald*, 20 Mass. Att'y Disc. R. 381 (2004) (misrepresentations about mishandling of client funds, including in bankruptcy proceeding).

⁵⁷⁶ *Matter of Goodman*, 22 Mass. Att'y Disc. R. 352 (2006) ("The respondent correctly distinguishes cases involving misrepresentations to a tribunal, where the presumptive sanction is a one-year suspension, from cases involving misrepresentations to others.").

⁵⁷⁷ 28 Mass. Att'y Disc. R. 337 (2012).

allowed them to be repeated, and the number of people who heard or repeated the misrepresentation.

Several lawyers have been suspended for longer than one year for misrepresentations during real estate closings, typically to obtain mortgages where the borrower would not otherwise qualify for the loan. For example, in *Matter of Alberino*,⁵⁷⁸ an attorney was suspended for eighteen months after he prepared, signed, and made the buyers and sellers sign false HUD-1 Disclosure Statements as part of a scheme to rescue homeowners in foreclosure. In *Matter of Hanserd*,⁵⁷⁹ the respondent participated in the same schemes as the lawyer in *Alberino*. She was suspended for one year and a day, the lighter discipline likely the result of her having less responsibility for the orchestration of the scheme.⁵⁸⁰ Other lawyers involved in fraudulent real estate transactions have received similar suspensions, with the length of the suspension seemingly determined by the level of responsibility of the respondent lawyer and the number of transactions affected by misrepresentations.⁵⁸¹

In *Matter of Goodman*,⁵⁸² the single justice imposed a one-year suspension for what he termed the respondent's "brazen" misrepresentations while representing clients in personal injury cases. In one matter, the attorney made false statements to a health insurer in order to release its lien against the proceeds of a client's recovery. In another case, that attorney failed to disclose the death of his client to the insurer and implied that the plaintiff was alive. The single justice rejected the Board's recommendation of a term suspension of a year and a day, but did require a reinstatement petition even though the suspension did not meet the usual standard triggering that step.⁵⁸³ By comparison, in *Matter of Mulvey*,⁵⁸⁴ an attorney received a suspension for six months for knowingly providing misleading, deceptive, and false information to a third party in order to obtain funding for his client. Had the lawyer communicated accurate information, the third party would not have advanced the funds. The lawyer made full restitution to the third party. The restitution, and the fact that there was only one transaction, likely account for his relatively short suspension.

⁵⁷⁸ 27 Mass. Att'y Disc. R. 1 (2011).

⁵⁷⁹ 26 Mass. Att'y Disc. R. 229 (2010).

⁵⁸⁰ See also *Matter of Sementelli*, 29 Mass. Att'y Disc. R. 584 (2013). In *Sementelli*, the single justice imposed an eighteen-month suspension for making false statements to obtain three mortgage loans for properties she was buying, and a fourth loan for the benefit of another lawyer. The respondent was charged under Rule 8.4, however, not Rule 4.1.

⁵⁸¹ See, e.g., *Matter of Palmer*, 25 Mass. Att'y Disc. R. 486 (2009) (twenty-one month suspension for executing false HUD-1 settlement statements); *Matter of Robbins*, 25 Mass. Att'y Disc. R. 533 (2009) (nine-month suspension for participation in real estate closing fraud; lawyer acted at employer's direction).

⁵⁸² 22 Mass. Att'y Disc. R. 352 (2006).

⁵⁸³ The single justice permitted the filing of a reinstatement petition after nine months of the suspension. This is now the current rule. See SJC Rule 4:01, § 18(2) (effective September 1, 2009). The reason for allowing a suspended lawyer to apply early for reinstatement is so the time required to process the reinstatement petition and conduct a hearing does not effectively add three months to the length of the suspension. For a discussion of the difference between a suspension of one year, and that of a year and a day, see Chapter 4 of this Treatise.

⁵⁸⁴ 25 Mass. Att'y Disc. R. 398 (2009).

In *Matter of Ghitelman*,⁵⁸⁵ the lawyer was suspended for a year and a day after she fabricated immigration documents that she had never filed and then provided to successor counsel to cover her neglect. Her misconduct was aggravated by prior discipline, implying that without the aggravating factors her sanction would have been less. In *Matter of Robbins*,⁵⁸⁶ the respondent was suspended for one year after he drafted documents for and presided over a fraudulent transaction based on a sham purchase and sale agreement. The single justice, in comparing this misconduct to previous disciplinary matters, concluded that a one-year suspension was appropriate.⁵⁸⁷ The attorney's total suspension was eighteen months, as it was increased for another six months for commingling client funds.

The shortest suspension for misconduct implicating Rule 4.1(a) or its predecessor occurred in *Matter of Connolly*.⁵⁸⁸ In *Connolly*, the single justice agreed to a stipulated three-month suspension after the lawyer prepared, but did not sign, a false HUD-1 settlement statement for his client, misrepresenting that his client had paid \$5,700 in points to the bank, so that client could fraudulently obtain reimbursement of that sum from his employer.

3) Public Reprimand

Aside from instances of lying to clients (misconduct not covered by Rule 4.1(a), which only applies to third persons), no lawyer has received a public reprimand in Massachusetts for making misrepresentations outside of court in violation of this rule. In one instance, *Matter of Farber*,⁵⁸⁹ the respondent received a public reprimand for having made false statements to another during a negotiation. Because the Board found that the respondent was acting as a broker and not a lawyer in that negotiation, the sanction was based upon a violation of Rule 8.4(c), not Rule 4.1(a).

4) Admonition

The Board has concluded that some misrepresentations to third parties in violation of Rule 4.1 may warrant an admonition, especially if the recipient has not been harmed and there are mitigating factors. In *Matter of an Attorney*,⁵⁹⁰ the lawyer wrote a letter to her opposing counsel in a divorce case seeking an advance on marital assets to purchase a house without mentioning the fact that the lawyer's client was engaged in a related transaction with her new paramour. While the individual statements in the attorney's letter could be read as literally true, and while she believed the statements to be true, the attorney violated Rule 4.1(a) because the letter was "deliberately misleading"—through half-truths and omissions, it was calculated to create false impressions in the mind of the recipient. Ultimately, the lawyer disclosed the falsehood and the other party suffered no

⁵⁸⁵ 20 Mass. Att'y Disc. R. 162 (2004).

⁵⁸⁶ 17 Mass. Att'y Disc. R. 480 (2001).

⁵⁸⁷ The single justice used as a relevant benchmark *Matter of Eastwood*, 10 Mass. Att'y Disc. R. 70 (1994) (one-year suspension for participation in fraudulent real estate transaction).

⁵⁸⁸ 11 Mass. Att'y Disc. R. 43 (1995).

⁵⁸⁹ 27 Mass. Att'y Disc. R. 249 (2011).

⁵⁹⁰ AD 07-33, 23 Mass. Att'y Disc. R. 1012 (2007).

harm from the deception. After concluding that the conduct constituted a misrepresentation in violation of Rule 4.1(a) despite the document's literal truth, the Board decided against imposing a public reprimand, and instead admonished the lawyer. A single justice approved that order.

In *Matter of an Attorney*,⁵⁹¹ the SJC imposed a sanction of an admonition against a lawyer who wrongfully asserted statutory liens in communications to insurers, without any authority to assert the liens. The Court cited Rule 8.4(c), not Rule 4.1(a), for this misconduct.

IV. The Nature of the Lawyer's Responsibilities Regarding Deception Generally

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

* * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]

A. The Lessons of Rule 8.4(c)

Rule 8.4(c) broadly prohibits deception by lawyers, and must be read in harmony with the treatment of deception under Rules 3.3(e) and 4.1(a), each of which, as noted above, permits some attorney deception in identified limited circumstances.⁵⁹² Rule 8.4(c) applies to lawyers acting within or outside the role of attorney, unlike Rules 3.3 and 4.1, which apply to a lawyer acting on behalf of a client.⁵⁹³ Section C, below, addresses several specific areas in which Rule 8.4(c) deserves careful consideration by Massachusetts lawyers.

Rule 8.4(c) prohibits four separate types of misconduct: dishonesty, fraud, deceit, and misrepresentation. Those four items are often referenced collectively in the

⁵⁹¹ Admonition No. 08-02, 451 Mass. 131, 24 Mass. Att'y Disc. R. 824 (2008).

⁵⁹² Rule 3.3(e) permits a lawyer to participate, in limited circumstances, in the presentation of false evidence by a criminal defendant. *See* discussion at note 505 *supra* and accompanying text. Rule 4.1(a) and its comments permit a lawyer to misstate her authority and other non-material facts in negotiation. *See* discussion at note 565 *supra* and accompanying text. Neither of those authorities is undermined by the blanket prohibitions in Rule 8.4 against lawyer deception or dishonesty.

⁵⁹³ Rule 3.3, Comment [1] states: "This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal." That language was added in 2015. Previously, some lawyers received discipline for violating Rule 3.3 in matters not involving representation of a client. *See, e.g.,* *Matter of Balliro*, 25 Mass. Att'y Disc. R. 31 (2009) (criminal trial involving the father of her child); *Matter of Szostkiewicz*, 31 Mass. Att'y Disc. R. ____, 2015 WL 1275827 (2015) (personal child support matter); *Matter Leahy*, 28 Mass. Att'y Disc. R. 529 (2012) (respondent's divorce). Rule 4.1 applies to lawyers "in the course of representing a client." Rule 4.1.

disciplinary reports, but the type of wrongdoing may affect the sanction the lawyer receives. For example, in *Matter of Angwafo*,⁵⁹⁴ the Court stated: “Although we have concluded the evidence does not support a finding that the respondent knowingly made a false statement of material fact as to her assets, the special hearing officer properly could conclude on this record that the respondent’s conduct was deceitful, and adversely reflected on her fitness to practice law in violation of rule 8.4(c), (d), and (h).”⁵⁹⁵ To qualify as fraud or misrepresentation, the misconduct must be intentional,⁵⁹⁶ but reliance is not necessary.⁵⁹⁷ No disciplinary report or SJC opinion has relied upon the term “dishonesty” as a direct basis for discipline,⁵⁹⁸ but other jurisdictions have disciplined attorneys for dishonesty that did not amount to fraud, deceit, or misrepresentation.⁵⁹⁹

B. Discipline for Violation of Rule 8.4(c)

You Should Know

Rule 8.4(c) is cited in a wide variety of settings and circumstances. Often, the rule serves as the basis for discipline for misconduct that also violates Rule 3.3 or Rule 4.1. But at times Rule 8.4(c) serves more independently as the basis for discipline, given its broader coverage than those two rules.⁶⁰⁰ Also, cases involving intentional misuse of funds are often charged both under Rule 1.15 and Rule 8.4(c).⁶⁰¹

The Massachusetts Disciplinary Reports include more than 500 disciplinary matters since 1999 where Rule 8.4(c) played a role in the disposition.

1) Disbarment

⁵⁹⁴ 453 Mass. 28, 25 Mass. Att’y Disc. R. (2009).

⁵⁹⁵ 453 Mass. at 37–38.

⁵⁹⁶ See Rule 1.0(e) (“‘Fraud’ or ‘fraudulent’ denotes conduct that is fraudulent under substantive or procedural law and has a purpose to deceive.”) In *Matter of O’Connor*, 21 Mass. Att’y Disc. R. 525 (2005), the single justice found that the respondent’s negligent misrepresentations to the client violated Rules 1.2, 1.3, and 1.4, but not Rule 8.4 or 4.1; his intentional misrepresentations violated Rule 8.4(c).

⁵⁹⁷ See *Matter of Hutton*, 31 Mass. Att’y Disc. R. ___, 2015 WL 10322933 (2015) (“Our cases have not construed rule 8.4(c) to require a showing of detrimental reliance.”).

⁵⁹⁸ While not relying expressly on the term “dishonesty,” the disciplinary reports in *Angwafo* and *O’Toole* determined that the respondent’s misconduct was “deceitful.” See *Angwafo*, 453 Mass. at 37-38; *Matter of O’Toole*, 31 Mass. Att’y Disc. R. ___, 2015 WL 9309021 (2015).

⁵⁹⁹ See *In re Shorter*, 570 A.2d 760, 768 (D.C. 1990) (dishonesty includes “conduct evincing a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness”); *In re Scanio*, 919 A.2d 1137, 1142-1143 (D.C. Cir. 2007) (“[W]hat may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty” (citations omitted)); *Attorney Grievance Comm’n of Maryland v. McDonald*, 85 A.3d 117, 140 (Md. 2014).

⁶⁰⁰ For one such example, see *Matter of Sementelli*, 29 Mass. Att’y Disc. R. 584 (2013) (eighteen-month suspension where Rule 8.4 served as the primary basis for three of four counts where the misconduct involved lawyer deception of others).

⁶⁰¹ See, e.g., *Matter of Sweeney*, 32 Mass. Att’y Disc. R. ___, 2016 WL 695826 (2016).

Several lawyers have been disbarred for major misconduct “involving dishonesty, fraud, deceit, or misrepresentation,” in violation of Rule 8.4(c). These disbarment cases frequently involve a lawyer who engaged in a significant crime involving theft or fraud, and the presumptive discipline for a felony conviction while in the course of practicing law is disbarment, or, in some instances, indefinite suspension.⁶⁰² For instance, in *Matter of Ciapciak*,⁶⁰³ an attorney was disbarred after his guilty plea to several counts of mail fraud and filing false tax returns. The attorney had defrauded his client, an insurance company, of substantial funds. In *Matter of Castelluccio*,⁶⁰⁴ an attorney was disbarred for violations of 8.4(c) when he misappropriated a law firm’s funds for his own personal use and intentionally concealed his misappropriation by falsifying office records. In *Matter of Ricci*,⁶⁰⁵ the single justice disbarred an attorney for removing a check from an acquaintance’s mailbox, forging the signature, depositing it into his own bank account, and spending the money, all without the acquaintance’s knowledge or authorization.

In *Matter of Cohen*,⁶⁰⁶ the single justice disbarred an attorney who had devised a “scheme to defraud insurers by submitting false, inflated, and back-dated medical bills to demonstrate that clients’ medical expenses exceeded a \$500 threshold for bringing third-party claims on behalf of clients.” The attorney pleaded guilty to mail fraud. In *Matter of Crossen*,⁶⁰⁷ discussed elsewhere in this treatise including the section of this chapter on the limits of zealous advocacy,⁶⁰⁸ the SJC disbarred a lawyer for overseeing a “sham” job interview of a judge’s law clerk, and surreptitiously recording the interview.

2) Suspension

Many lawyers have been suspended for misconduct involving misrepresentation or deceit in violation of Rule 8.4(c). In some of these cases, the attorneys received lengthy suspensions. For instance, in *Matter of Lupo*,⁶⁰⁹ the SJC indefinitely suspended an attorney who engaged in conflicts of interest and made misrepresentations to elderly, unsophisticated clients for his own financial gain. In its opinion, the Court noted that, “while there is a distinction between the respondent’s intentional misrepresentations that inured to his financial benefit, and the intentional deprivation of client funds, for purposes of comparable sanctions the two forms of misconduct bear remarkable similarities. In both cases the attorney benefits financially from his misdeeds at the expense of clients. We therefore conclude that an indefinite suspension is appropriate.”

⁶⁰² *Matter of Patch*, 466 Mass. 1016, 1018 (2013).

⁶⁰³ 25 Mass. Att’y Disc. R. 116 (2009).

⁶⁰⁴ 23 Mass. Att’y Disc. R. 62 (2007).

⁶⁰⁵ 20 Mass. Att’y Disc. R. 460 (2004).

⁶⁰⁶ 5 Mass. Att’y Disc. R. 75 (1988).

⁶⁰⁷ 450 Mass. 533, 24 Mass. Att’y Disc. R. 122 (2008).

⁶⁰⁸ See Part III. See also *Matter of Curry*, 450 Mass. 503, 24 Mass. Att’y Disc. R. 188 (2008) (companion case to *Crossen*; lawyer disbarred); *Matter of Donahue*, 22 Mass. Att’y Disc. R. 193 (2006) (companion case; three-year suspension).

⁶⁰⁹ 447 Mass. 345, 22 Mass. Att’y Disc. R. 513 (2006).

In *Matter of Voros*,⁶¹⁰ the lawyer was suspended indefinitely after he fraudulently induced his client to enter into a joint venture concerning the purchase of real estate. The attorney intentionally misrepresented to his client the future profitability of the joint venture and the lawyer's own real estate experience, failed to note several outstanding obligations on the property that adversely affected its value, and grossly overstated his net worth as a general partner. In *Matter of Hallal*,⁶¹¹ the respondent's right to practice was suspended indefinitely after the attorney, a partner at a law firm, billed \$68,000 of his own personal expenses to clients, implying in his billing statements that the expenses were legitimate.

In *Matter of Gleason*,⁶¹² the respondent was suspended for two years for coordinating a real estate investment scheme in which he overstated the acquisition costs to investors and lenders, retained part of the inflated sales price, forged an investor's signature on a document, and induced his secretary to notarize the false signature. The Board compared this misconduct to *Matter of Jacobson*,⁶¹³ where the lawyer was suspended for one year for creating fraudulent documents in a real estate scheme. The single justice accepted the BBO's recommendation of a two-year suspension, without an explanation for the difference between *Gleason* and *Jacobson*. In *Matter of Cloonan*,⁶¹⁴ an attorney was suspended for six months after he re-typed the last page of a severance agreement with his employer, significantly altering the document, including adding a provision that he be paid a bonus of \$850,000. The respondent later retained counsel in order to file suit to enforce the agreement.

Lawyers have been suspended for misrepresenting their status as lawyers, or for deceiving the Board of Bar Examiners during their admission process. For example, in *Matter of Betts*,⁶¹⁵ an attorney was suspended for one year after it was discovered that he failed to disclose his prior charges for illegal possession of a Class D substance and operation of a vehicle with a suspended license in his petition for admission to the Massachusetts bar. In *Matter of Soufflas*,⁶¹⁶ an attorney was suspended for six months after he created an inflated résumé and altered his law school transcript. In *Matter of Days*,⁶¹⁷ an attorney was suspended for two months for failing to notify the Board that her professional liability insurance had lapsed and continuing to represent indigent criminal defendants in violation of her agreement with the Committee for Public Counsel Services to maintain insurance. During the period she was not covered by insurance, the attorney falsely certified in her Attorney Annual Registration Statement that she had insurance.

⁶¹⁰ 11 Mass. Att'y Disc. R. 287 (1995).

⁶¹¹ 20 Mass. Att'y Disc. R. 207 (2004).

⁶¹² 10 Mass. Att'y Disc. R. 141 (1994).

⁶¹³ 7 Mass. Att'y Disc. R. 123 (1991).

⁶¹⁴ 25 Mass. Att'y Disc. R. 121 (2009).

⁶¹⁵ 26 Mass. Att'y Disc. R. 44 (2010).

⁶¹⁶ 22 Mass. Att'y Disc. R. 739 (2006).

⁶¹⁷ 30 Mass. Att'y Disc. R. 89 (2012); *see also* *Matter of Dennis M. Powers*, 26 Mass. Att'y Disc. R. 518 (2010) (attorney's violation of 8.4(c) by altering pages to CPCS falsely affirming that he was covered by professional liability insurance led to a suspension of a year and a day).

3) Public Reprimand

It is usually the case that misconduct “involving dishonesty, fraud, deceit or misrepresentation” in violation of Rule 8.4(c) will lead to serious discipline for the lawyer, most likely a suspension. But some instances of dishonesty or deceit have resulted in a sanction of a public reprimand, where the misrepresentation or deception involved less serious matters. For example, in *Matter of Cross*,⁶¹⁸ the lawyer received a public reprimand by stipulation for making intentional, but non-material, misrepresentations in a return of service; she later did not seek to rely upon the document, thus further mitigating its effect. In *Matter of Weitz*,⁶¹⁹ the lawyer received a public reprimand for notarizing signatures he had not witnessed, relying instead on the client’s representations that they were authentic (and they were not). And in *Matter of Cowin*,⁶²⁰ the attorney had his client sign a blank page, which was used as his client’s signature on a verified complaint filed in court.

In *Matter of Baker*,⁶²¹ an attorney received a public reprimand, by stipulation, for failing to affirmatively disclose to a participant in a real estate closing that the HUD-1 statement signed by his client was inaccurate and misrepresented the facts. In *Matter of Lederman*,⁶²² an attorney received a public reprimand, again by stipulation, for violating Rule 8.4(c) while representing a husband in a contested divorce. The attorney wrote to the wife’s former mortgage company and requested information from it, knowing that the company would infer that the attorney was representing the wife in an estate planning matter. The attorney neither sent a copy of this letter to the wife nor had the wife’s permission to send the letter. Neither *Baker* nor *Lederman* relied upon Rule 4.1(a) in assessing the misconduct; both Board opinions refer only to Rule 8.4(c). Also, in *Matter of Farber*,⁶²³ discussed above, a lawyer acting in the role of a real estate broker violated Rule 8.4(c) by misrepresentations made in negotiating a sale of a home, and received a public reprimand.

4) Admonition

Practice Tip

Busy lawyers, or lawyers with busy clients, sometimes are tempted to sign their clients’ names to truthful documents, or to ask a client to sign a blank sheet of paper that the lawyer will later use to insert true material. Actions like those, even if well-intended and without any harm to any person, have led to admonitions.

⁶¹⁸ 15 Mass. Att’y Disc. R. 157 (1999). *Cross* was mentioned in the discussion of Rule 3.3, *supra*.

⁶¹⁹ 10 Mass. Att’y Disc. R. 286 (1994).

⁶²⁰ 2 Mass. Att’y Disc. R. 48 (1981).

⁶²¹ 23 Mass. Att’y Disc. R. 25 (2007).

⁶²² 22 Mass. Att’y Disc. R. 462 (2006).

⁶²³ 27 Mass. Att’y Disc. R. 249 (2011).

Similar to the treatment of Rule 4.1(a) violations, lawyers who misrepresent the facts in an effort to accomplish a lawful purpose may receive an admonition, particularly if there is no harm to the client or others. For instance, in AD 12-08,⁶²⁴ an attorney received an admonition after she submitted an affidavit on which she had signed her client's signature, with her client's permission, after the client had reviewed the document. In AD 07-27,⁶²⁵ an attorney received an admonition after he signed a real estate deed outside of the presence of a notary, expecting it to be notarized later, as it was. And in AD 08-12,⁶²⁶ an attorney submitted documents to the IRS and DOR that appeared to be (but were not) submitted by his ex-wife and former employee. He did so in order to protect the two taxpayers, but also for his own business reasons. After a hearing committee recommended a public reprimand, the Board admonished the respondent, based on the lack of harm and the fact that the deception occurred outside of the practice of law.

C. Some Special Considerations Involving Rule 8.4(c)

Practice Tip

Although Rules 3.3, 4.1, and 8.4(c) combine to prohibit deception in nearly all instances, certain instances of deceptive conduct are beyond the purview of those rules. Under Rule 3.3(e)(2), a criminal defense lawyer in very limited circumstances may not prevent the introduction of some limited false evidence at trial. Rule 4.1(a) permits some limited deception of others as to non-material facts. Rule 8.4(c), which prohibits all dishonesty, fraud, deceit, or misrepresentation, is not intended to undercut those other rules, but applies in all other circumstances.

While both Rule 3.3 and Rule 4.1 refer to a lawyer's professional activities, the requirements of Rule 8.4 apply to the lawyer's conduct within or outside of the attorney's professional employment.⁶²⁷ A lawyer may receive discipline under this rule for dishonesty or fraud occurring while not representing a client. Several Massachusetts lawyers have been disciplined for conduct outside of the practice of law. For example, in

⁶²⁴ 28 Mass. Att'y Disc. R. 925 (2012). Similarly, in AD No. 12-06, 28 Mass. Att'y Disc. R. 922 (2012), an attorney violated Rule 8.4(c) by notarized a document without witnessing his client's signature. For other cases involving false signatures and false witnessing of signatures, see AD No. 08-14, 24 Mass. Att'y Disc. R. 881 (2008); AD No. 05-19, 21 Mass. Att'y Disc. R. 710 (2005); AD No. 04-44, 20 Mass. Att'y Disc. R. 743 (2004); AD No. 03-09, 19 Mass. Att'y Disc. R. 534 (2003); AD No. 03-60, 19 Mass. Att'y Disc. R. 635 (2003); AD No. 03-62, 19 Mass. Att'y Disc. R. 638 (2003).

⁶²⁵ 23 Mass. Att'y Disc. R. 987 (2007).

⁶²⁶ 24 Mass. Att'y Disc. R. 876 (2008).

⁶²⁷ See MASS. RULES OF PROF'L CONDUCT R. 8.4 cmt. [1] (2015); AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (7th ed. 2011) ("like the other provisions of Rule 8.4, encompasses conduct outside the realm of the practice of law").

Matter of Lee,⁶²⁸ the lawyer was suspended for violating Rules 8.4(c) and 8.4(h) while acting as a real estate broker. In *Matter of Barrett*,⁶²⁹ the lawyer was suspended for two years for multiple instances of misconduct while acting as a corporate officer.

Some well-intended, but deceptive, activities engaged in by lawyers raise perplexing questions about the meaning of Rule 8.4(c) for Massachusetts law practice. One question concerns the use of undercover agents or testers to ferret out wrongdoing. Another concerns the practice by some lawyers of ghostwriting pleadings for *pro se* litigants to assist them without assuming a more formal representation capacity.

Testing and Undercover Ruses: Lawyers may be asked by clients to assist in investigation of wrongdoing by setting up undercover schemes or similar ruses to determine whether the wrongdoing is occurring. District attorneys and other prosecutors or government lawyers cooperate with law enforcement agencies in using informants to infiltrate criminal enterprises. Civil rights lawyers challenging discrimination in employment or housing employ testers who apply for jobs or apartments in an effort to establish patterns of discriminatory conduct. In all of those settings, the undercover actors engage in “dishonesty, . . . deceit, or misrepresentation,” with the active participation of lawyers.

Massachusetts state courts have not addressed the question directly yet,⁶³⁰ but a federal district court judge has concluded that lawyers do not violate Rule 8.4(c) by such covert activities so long as the lawyer acts in good faith to identify ongoing housing or employment discrimination, or ongoing violations of law for law-enforcement purposes. In *Leysock v. Forest Laboratories, Inc.*,⁶³¹ the District Court dismissed a complaint as a sanction after the plaintiff’s “attorneys engaged in an elaborate scheme of deceptive conduct in order to obtain information from physicians about their prescribing practices, and in some instances about their patients.” The Court concluded that Massachusetts

⁶²⁸ 25 Mass. Att’y Disc. R. 352 (2009). This was the respondent’s third suspension. His first, *Matter of Lee*, 17 Mass. Att’y Disc. R. 358 (2001), was also for conduct not in the role as a lawyer.

⁶²⁹ 447 Mass. 453, 22 Mass. Att’y Disc. R. 58 (2006).

⁶³⁰ Two prominent Massachusetts Supreme Judicial Court companion decisions referred to the question, in determining that the lawyers’ extremely deceitful ruse fell well outside of any plausible understanding of a “testers” exception to Rule 8.4(c). See *Matter of Crossen*, 450 Mass. 533, 565–66, 24 Mass. Att’y Disc. R. 122 (2008); *Matter of Curry*, 450 Mass. 503, 522–25, 24 Mass. Att’y Disc. R. 188 (2008). While the language of the *Crossen* opinion does not read favorably toward private ruses outside of the law enforcement context, see 450 Mass. at 566, language from its companion case *Curry* is more encouraging. See note 636 *infra*.

⁶³¹ 2017 WL 1591833 (May 25, 2017) (Saylor, J.).

common law likely permitted proper investigative testing,⁶³² but the action here far exceeded the allowable, limited deception.⁶³³

While some courts or commentators from outside of the Commonwealth have concluded that such activity does violate Rule 8.4(c),⁶³⁴ the authority in most states that have addressed the question is consistent with the *Leysock* analysis.⁶³⁵ As *Leysock* concluded, the SJC has implied that it will accept the use of testers in private litigation as well as within the law enforcement context so long as appropriate safeguards are in place.⁶³⁶

Ghostwriting: Ghostwriting is the practice by which lawyers draft documents for clients to use while representing themselves *pro se*, typically in court. Lawyers engage in ghostwriting most often for good faith reasons, to assist clients who cannot afford to pay for full representation, and to narrow the “access to justice” gap. Many authorities—including a 1998 Massachusetts Bar Association ethics opinion—consider ghostwriting to be inherently deceptive and, depending on the facts, a possible violation of Rule 8.4(c).⁶³⁷ One animating concern is that judges tend to treat *pro se* litigants more leniently, and if those litigants in fact have a lawyer that favorable or lenient treatment will have been received unfairly. Another is the worry that lawyers, and especially paid counsel, will participate in litigation with no accountability. The American Bar

⁶³² The Court wrote:

Although the rules on their face impose sweeping prohibitions, in fact they have been interpreted to contain narrowly defined exceptions that permit the gathering of evidence under certain circumstances. . . . [Massachusetts law] permits civil attorneys to use investigators in certain circumstances to obtain information that would normally be available to any member of the public (such as a prospective renter or a consumer making a similar inquiry). For example, attorneys may use “testers”—individuals who pose as renters or purchasers with no intent to actually rent or purchase a home—in order to gather evidence of housing discrimination.

Id., Slip Op. at 11–12 .

⁶³³ *Id.*, slip op. at 15–23.

⁶³⁴ See *In re Gatti*, 8 P.3d 966 (Or. 2000) (concluding that lawyers, including prosecutors, in Oregon violate Rule 8.4(c) by covert investigation using undercover agents). The State of Oregon later amended its rules to invalidate the effect of that decision.

⁶³⁵ *Apple Corps Ltd. v. Int’l Collectors Soc’y*, 15 F.Supp.2d 456 (D.N.J. 1998) (“The prevailing understanding in the legal profession is that a public or private lawyer’s use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.”). For a list of similar authorities, see ANNOTATED MODEL RULES, *supra* note 628, at Rule 8.4(c).

⁶³⁶ Compare *Crossen*, 450 Mass. at 566 (“The crucial factor distinguishing government and private attorneys is the lack of oversight for the latter. Whatever leeway government attorneys are permitted in conducting investigations, they are subject not only to ethical constraints, but also to supervisory oversight and constitutional limits on what they may and may not do, constraints that do not apply to private attorneys representing private clients.”) with *Curry*, 450 Mass. at 523-24 (after describing authorities holding that private testers violate no ethical rules, the Court noted, “Curry’s scheme is different from such investigations not only in degree but in kind Unlike discrimination testers or investigators who pose as members of the public in order to reproduce pre-existing patterns of conduct, Curry built an elaborate fraudulent scheme whose purpose was to elicit or potentially threaten the law clerk into making statements that he otherwise would not have made.”).

⁶³⁷ See, e.g., *Duran v. Carris*, 238 F.3d 1268, 1272-73 (10th Cir. 2001); *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F.Supp. 1075, 1078 (E.D.Va. 1997); *Johnson v. Bd. of Cnty. Comm’rs*, 868 F.Supp. 1226, 1231 (D.Colo. 1994); Mass. Bar Ass’n. Op. 98-1 (1998).

Association has reversed its position on the issue. After concluding in an informal 1978 ethics opinion that the practice was deceptive and troublesome,⁶³⁸ the ABA issued a formal opinion in 2007 concluding that the practice of ghostwriting generally presents no ethical problems at all.⁶³⁹

The SJC now permits limited assistance representation, including, in certain circumstances, ghostwriting for pro se litigants. The Court's Standing Order, "In Re: Limited Representation," permits limited appearances in any trial court that chooses to allow it.⁶⁴⁰ That order addresses ghostwriting with the following instructions to lawyers:

An attorney may assist a client in preparing a pleading, motion or other document to be signed and filed in court by the client, a practice sometimes referred to as "ghostwriting." In such cases, the attorney shall insert the notation "prepared with assistance of counsel" on any pleading, motion or other document prepared by the attorney. The attorney is not required to sign the pleading, motion or document, and the filing of such pleading, motion or document shall not constitute an appearance by the attorney.⁶⁴¹

The District, Housing, and Probate Court departments have implemented limited assistance representation (LAR) in their courts.⁶⁴² The Superior Court has not yet done so.

⁶³⁸ ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1414 (1978).

⁶³⁹ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007).

⁶⁴⁰ See <http://www.mass.gov/courts/case-legal-res/rules-of-court/sjc/lar.html> (April, 2009).

⁶⁴¹ *Id.* The standing order is clear that a lawyer may not make a limited appearance in court without having completed a training session. The order is not clear that a lawyer must have completed that training session in order to ghostwrite pleadings.

⁶⁴² See <http://www.mass.gov/courts/programs/legal-assistance/lar-gen.html> (Housing and Probate Courts); <http://lawlib.state.ma.us/source/mass/rules/district/orders/dist1-11.html> (District Courts).

Part VII

Other Limits on Zealous Advocacy (Rules 1.2(d), 3.1, 3.2, 3.4, 3.5, 4.2, and 4.3)

I. Introduction

Lawyers serve as zealous advocates for their clients.⁶⁴³ In both litigation and transactional matters, a lawyer's duty is to advance her client's interests as best as she can, limited only by the bounds of the law, ethics, and the client's instructions. While on occasion lawyers fail to act zealously or with adequate diligence, such as when they find themselves overwhelmed or suffering from a conflict of interest,⁶⁴⁴ most often lawyers pursue their clients' matters with great dedication, in an effort to satisfy both the clients' and the lawyers' interests. Sometimes, though, lawyers go too far in an effort to win or to achieve some goal. This Part addresses the rules limiting a lawyer's zealous advocacy.

This Part will not address misrepresentation to and fraud on a tribunal, actions that often arise from a lawyer's overly-zealous stance. Those issues are addressed elsewhere in this chapter.⁶⁴⁵ This section covers those rules that prohibit a lawyer from proceeding in ways that, while perhaps beneficial to a client, cause great unfairness to another person or party, or to a lawful process. The rules canvassed and explained here establish boundaries for the lawyer's zeal. At times lawyers exceed those boundaries and are disciplined as a result. This topic is divided into three categories: (1) limitations on what claims a lawyer may pursue on behalf of a client; (2) limitations on litigation tactics; and (3) limitations on contact with others in the course or representing a client. For each topic, different rules apply and different sanctions are imposed.

II. Rules 1.2(d) and 3.1

RULE 1.2: SCOPE OF REPRESENTATION

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may

⁶⁴³ Massachusetts is one of the few states that retained the sentence in Rule 1.3 stressing the duty of zeal, after the ABA eliminated it in the Model Rule version. *Compare* MASS. RULES OF PROF. CONDUCT r. 1.3 ("The lawyer should represent a client zealously within the bounds of the law.") *with* MODEL RULES OF PROF. CONDUCT r. 1.3 (omitting that sentence).

⁶⁴⁴ See discussion of Problems of Diligence, *supra*, and Problems of Conflicts of Interest, *supra*.

⁶⁴⁵ See Part VI.

counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring, continue, or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

A. Limits on Pursuit of Claims: Rule 1.2(d) and 3.1

There are some ways in which a lawyer simply may not help a client, no matter how generously the client offers to pay for the work. Two separate rules establish some outer limits—although hardly crystal clear limits—on the services a lawyer may provide to a client. The first is Rule 1.2(d), which says the following:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

A lawyer who offers assistance to a client in a matter that the lawyer knows is criminal or fraudulent has committed misconduct. In some extreme cases, lawyers have been disbarred for doing so.

Rule 3.1 establishes a different, but related, constraint on lawyer conduct. That rule says:

A lawyer shall not bring, continue, or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

Even if the client has no criminal or fraudulent scheme in mind, a lawyer may not assist him in a proceeding if there is no good-faith basis, in law or fact, for the assertions the lawyer would make. Lawyers may not pursue frivolous claims for a client, even if the client's situation cries out for some justice, and even if the client might benefit by the lawyer's assertions (for instance, by leveraging a settlement from another party).

However, as the rule explains, a lawyer may assert otherwise-unsupported claims if the lawyer has a good-faith basis to claim that the law ought to be changed or extended.

B. Discipline for Violation of Rules 1.2(d) and 3.1

You Should Know

Generally, a Rule 1.2(d) violation, where the lawyer assists a client with a criminal or fraudulent claim, will result in more serious discipline than a Rule 3.1 violation, where the lawyer pursues insubstantial or frivolous claims. Suspension is common for the former, but not for the latter.

1) Disbarment

Massachusetts lawyers typically do not get disbarred for pursuing frivolous claims or assisting with client fraud, unless the lawyer's actions have led to a felony conviction, for which the presumptive sanction is disbarment.⁶⁴⁶ For instance, in *Matter of Kelly*,⁶⁴⁷ the respondent was convicted of twenty felony counts, including forgery of documents, witness intimidation, larceny over \$250, and disruption of court proceedings. His conduct involved interference with court proceedings by instructing witnesses not to appear in court, forging the names of judges and assistant district attorneys to court documents, and altering docket entries to mislead the court. The single justice accepted his resignation and entered a judgment of disbarment.⁶⁴⁸ Similarly, in *Matter of Lonardo*,⁶⁴⁹ the respondent agreed to a disbarment order after he was convicted of conspiracy to commit automobile fraud.

In *Matter of Cobb*,⁶⁵⁰ the respondent was disbarred for three instances of misconduct, two of which included pursuing frivolous, vindictive, and defamatory claims against lawyers and judges, in violation of Rules 3.1 and 8.2.⁶⁵¹ The SJC wrote, "The respondent has demonstrated rather convincingly by his quick and ready disparagement of judges, his disdain for his fellow attorneys, and his lack of concern for and betrayal of

⁶⁴⁶ *Matter of Patch*, 466 Mass. 1016, 1018 (2013). In *Matter of Foley*, 439 Mass. 324, 19 Mass. Att'y Disc. R. 141 (2003), the respondent was suspended for three years after assisting his client in presenting a fabricated defense in a criminal trial. The SJC concluded that had the false story been presented in court, "the sanction respondent would be facing most assuredly would have been disbarment." 439 Mass. at 336. The absence of that Rule 3.3 violation meant that a suspension was the appropriate sanction.

⁶⁴⁷ 26 Mass. Att'y Disc. R. 282 (2010).

⁶⁴⁸ The opinion of the single justice implies that the respondent, despite engaging in such egregious obstruction of justice, originally received an indefinite suspension for his misconduct, and only was disbarred after he failed to honor his suspension. See *id.*

⁶⁴⁹ 25 Mass. Att'y Disc. R. 360 (2009).

⁶⁵⁰ 445 Mass. 452, 21 Mass. Att'y Disc. R. 93 (2005).

⁶⁵¹ Rule 8.2 reads in part, "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge"

his clients, that he is utterly unfit to practice law. The only appropriate sanction is disbarment.”⁶⁵²

One of the more dramatic and noteworthy examples of excessive advocacy in violation of DR 7-102(A)(7), the predecessor to Rule 1.2(d), is *Matter of Crossen*,⁶⁵³ along with its companion case *Matter of Curry*.⁶⁵⁴ In *Crossen*, the client believed that unjust and unwarranted decisions had entered against him in a significant litigation matter, and the client’s lawyers, Curry and Crossen, orchestrated an elaborate ruse involving the clerk of the judge who had ruled against the client. The ruse included a counterfeit corporation with a false job offer and secret recording of conversations with the clerk. The lawyer used the recordings to threaten the former clerk with bar discipline proceedings. The SJC, noting “the elementary observation that ‘an attorney is not free to [do] anything and everything imaginable . . . under the pretext of protecting his client’s right to a fair trial and fair representation,’”⁶⁵⁵ concluded that the lawyer’s actions were so far beyond the limits of proper advocacy as to warrant disbarment. While the respondent pointed to other examples of excessive advocacy that had resulted in suspensions of various lengths, the SJC determined that the combination of misrepresentation and damage to the administration of justice justified the harshest punishment.⁶⁵⁶

Practice Tip

The respondents in both *Crossen* and *Curry* were disbarred for their overly-zealous tactics. The third active participant and respondent in the consolidated petition was suspended for three years, with four of the eleven BBO members voting for a substantially shorter suspension.⁶⁵⁷ That respondent persuaded the Board that “he participated only in the planning, and not the execution, of the [intolerable] venture.”⁶⁵⁸

2) Suspension

Lawyers who have represented their clients’ interests by engaging in fraud have often been suspended. Several of these suspensions involved active fraud by the lawyer on a tribunal (including assisting in perjury), and those are discussed in a different section

⁶⁵² 445 Mass. at 480.

⁶⁵³ 450 Mass. 533 (2008). While the decision in the two matters occurred in 2008, the respondents’ actions occurred before 1998, when Massachusetts adopted the Rules of Professional Conduct.

⁶⁵⁴ 450 Mass. 503 (2008).

⁶⁵⁵ *Crossen*, 450 Mass. at 563 (quoting *United States v. Cooper*, 872 F.2d 1, 3 (1st Cir. 1989)).

⁶⁵⁶ *Id.* at 576. The respondent in *Matter of Curry* made similar arguments and the SJC responded consistent with its analysis in *Crossen*. 450 Mass. at 530-31.

⁶⁵⁷ *Matter of Donahue*, 22 Mass. Att’y Disc. R. 193 (2006).

⁶⁵⁸ 22 Mass. Att’y Disc. R. at 276. Bar counsel and the respondent stipulated to the three-year suspension before the single justice, so this matter was never argued before the single justice or the full court.

of this chapter.⁶⁵⁹ But other lawyers have been suspended for violations that primarily involved a breach of the duties imposed by Rule 1.2(d). For instance, the lawyer in *Matter of Buck*⁶⁶⁰ assisted his client in the sale of stolen videotapes, including creating a Delaware corporation to use in the scheme to sell the tapes. The single justice ordered an indefinite suspension. The lawyer also made false statements to Bar Counsel, which contributed to his severe sanction. By comparison, in *Matter of Phillips*⁶⁶¹ the lawyer was suspended for three months after counseling and assisting a client to violate a Probate and Family Court order establishing a trust for child support and similar payments. The respondent in *Phillips* made full restitution and disgorged all legal fees, and the resulting lack of financial harm to the parties affected the length of the suspension.

Several reported suspensions involved lawyers participating in real estate transactions where the documents presented at the closing were not entirely true, typically to mislead a lender.⁶⁶² The length of the suspension in these matters generally corresponded to the experience and responsibility of the lawyer involved and whether or not the lawyer was convicted of a crime. In *Matter of Alberino*,⁶⁶³ an experienced practitioner was suspended for eighteen months for his participation in several fraudulent real estate transactions where straw purchasers misled lenders about the true nature of the sale and the later occupancy of the properties. In *Matter of Hanserd*,⁶⁶⁴ a different lawyer involved in the same schemes as those in *Alberino* was suspended for a year and a day. In *Hanserd*, the lawyer was inexperienced and suffering from medical issues, and those mitigating factors likely account for the difference between his sanction and the sanction in *Alberino*. In *Matter of Robbins*,⁶⁶⁵ a salaried lawyer working as an associate in a firm handling real estate closings participated in an arrangement where, while his firm represented the lender, 24 condominium units were sold, each one with documents that misstated the buyer's creditworthiness at the closing. The lawyer, who had acted at his employer's direction, was suspended for nine months. In *Matter of Palmer*,⁶⁶⁶ a lawyer who prepared inaccurate "HUD-1" settlement statements for several real estate closings was suspended for twenty-three months. The longer suspension in *Palmer* compared to *Robbins* likely would be explained by the latter's playing a less leading role in the schemes than the former, although both cases arose from stipulations.⁶⁶⁷

⁶⁵⁹ See, e.g., *Matter of McCarthy*, 416 Mass. 423 (1993) (one-year suspension); *Matter of Neitlich*, 413 Mass. 416 (1992) (one-year suspension); *Matter of Foley*, 439 Mass. 324 (2003) (three-year suspension).

⁶⁶⁰ 27 Mass. Att'y Disc. R. 92 (2011).

⁶⁶¹ 24 Mass. Att'y Disc. R. 547 (2008).

⁶⁶² These cases seem to have emerged from the lawyers' participation in what was, before the housing crash of 2008-09, a common scheme to sell homes to and obtain mortgages for individuals whose creditworthiness did not support the loans. The usual term at the time for those arrangements was "liar loans." See, e.g., Charles W. Murdock, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd-Frank Prevent Future Crises?*, 64 SMU L. REV. 1243, 1257-58 (2011) (discussing the housing market collapse and the role of liar loans).

⁶⁶³ 27 Mass. Att'y Disc. R. 1 (2011).

⁶⁶⁴ 26 Mass. Att'y Disc. R. 229 (2010).

⁶⁶⁵ 24 Mass. Att'y Disc. R. 605 (2008) (stipulation to nine-month suspension).

⁶⁶⁶ 25 Mass. Att'y Disc. R. 486 (2009).

⁶⁶⁷ For other real estate-based discipline where the lawyer's level of responsibility determined the sanction, see, e.g., *Matter of Nickerson*, 422 Mass. 333 (1996) (indefinite suspension of salaried, non-equity partner);

Lawyers have been suspended for pursuing claims without sufficient justification with aggravating circumstances. In *Matter of Cohen*,⁶⁶⁸ a lawyer was suspended for one year for pursuing several claims in various federal courts after a class action judgment had barred those claims. His suspension resulted from the application of issue preclusion based on several contempt judgments issued by those various courts.

Several lawyers have been suspended for making baseless and vindictive accusations against judges, misconduct that also violated Rule 8.2. In *Matter of Kurker*,⁶⁶⁹ the respondent was suspended for a year and a day after he made repeated, baseless allegations that various state judges and opposing counsel were engaged in conspiracy against him. The attorney filed two civil actions in United States District Court against judges and lawyers. He had not contacted any potential witnesses nor undertaken any investigation into the basis for his allegations; he had no evidence or personal knowledge to provide a reasonable basis for making any of the allegations against the judges or attorneys.⁶⁷⁰ In *Matter of Harrington*,⁶⁷¹ the respondent was suspended for a year and a day for repeatedly making baseless accusations about a judge's honesty, character, fitness and qualifications and for misrepresenting facts and case law, all while representing himself in his post-divorce proceedings. And in *Matter of O'Leary*,⁶⁷² the single justice suspended a respondent who had been sanctioned by the court under G. L. c. 231, § 6F, which authorizes an award of fees and costs against an attorney who pursues a claim that is "wholly insubstantial, frivolous and not advanced in good faith." (The respondent pursued the claim on his own behalf, not on behalf of a client.) That conduct also contravened Rule 3.1. The single justice noted that most sanctions for violation of Rule 3.1 are public reprimands, but the suspension in this case was warranted because of

the respondent's total lack of acceptance of the judgment that his lawsuit was frivolous, lack of insight about the nature of his misconduct, and his inability to appreciate the abusive (and ultimately self-defeating) nature of his behavior in this matter.

Matter of Concemi, 422 Mass. 326 (1996) (disbarment solo practitioner in same types of transactions as Nickerson, *supra*); *Matter of Walsh*, 13 Mass. Att'y Disc. R. 829 (1997) (affidavit of resignation and disbarment). Nickerson received a lesser sanction because she was a salaried employee and not a decision maker who profited from the fraud, but she also "cooperated with the authorities, providing both testimony and documentary evidence in the prosecution of others involved." 422 Mass. at 336-337.

⁶⁶⁸ 435 Mass. 7, 16 Mass. Att'y Disc. R. 57 (2000).

⁶⁶⁹ 18 Mass. Att'y Disc. R. 353 (2002).

⁶⁷⁰ See also *Matter of Van Hoozer*, 20 Mass. Att'y Disc. R. 522 (2004) (attorney suspended for three years for various misconduct in a divorce case, including filing pleadings with no good faith basis; other serious misconduct contributed to the lengthy suspension).

⁶⁷¹ 27 Mass. Att'y Disc. R. 432 (2011). In both *Kurker* and *Harrington*, the lawyer's baseless accusations also violated Rule 8.2, prohibiting a lawyer from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or a magistrate."

⁶⁷² 25 Mass. Att'y Disc. R. 461 (2009).

Practice Tip

While “[i]t is clear . . . that a judicial imposition of a sanction under G. L. c. 231, § 6F, does not result automatically or generally in the initiation of disciplinary proceedings, much less a sanction of suspension from the practice of law,”⁶⁷³ many court-ordered sanctions under G. L. c. 231, § 6F will also constitute a violation of Rule 3.1.

3) Public Reprimand

No Massachusetts lawyer has received a public reprimand for assisting a client with fraud outside of the fraud-on-the-court context, which is addressed elsewhere.⁶⁷⁴ By contrast, a common sanction for filing groundless pleadings or pursuing frivolous claims in violation of Rule 3.1 has been a public reprimand. The single justice in *O’Leary*, discussed just above, noted that as of 2009 many Rule 3.1 violations had resulted in public reprimand (formerly called “public censure”), citing *Matter of Landers*,⁶⁷⁵ *Matter of Weissman*,⁶⁷⁶ and *Matter of Dittami*.⁶⁷⁷ The Justice also noted that other such violations had resulted in admonitions, a topic discussed below.

4) Admonition

No lawyer has received an admonition after having been found to have violated Rule 1.2(d) by assisting a client in a crime or fraud.⁶⁷⁸ Some lawyers have received admonitions for violation of Rule 3.1. One such admonition is instructive. In AD 00-53,⁶⁷⁹ a husband in an unfriendly divorce matter asked the respondent to file a motion for relief from judgment. The respondent warned his client that there was scant legitimate basis to do so and that the court might order the husband to pay his wife’s counsel fees. The husband insisted, and the respondent filed the motion. The court denied the motion and awarded attorney’s fees to the wife. Despite the lawyer’s warning and the client’s insistence, the lawyer violated Rule 3.1 and received an admonition. In the related

⁶⁷³ *O’Leary, supra*.

⁶⁷⁴ See Part VI. In *Matter of Baghdady*, 25 Mass. Att’y Disc. R. 26 (2009), the respondent received a public reprimand for a violation of Rule 1.2(d), but the fraud the lawyer participated involved court pleadings and a deposition, so more aptly qualifies as a Rule 3.3 violation.

⁶⁷⁵ 24 Mass. Att’y Disc. R. 416 (2008) (among number of other disciplinary violations, attorney’s making frivolous allegation in pleading).

⁶⁷⁶ 22 Mass. Att’y Disc. R. 790 (2006) (attorney’s seeking execution and filing for lien against client in amount over what was due to her, without checking what was due).

⁶⁷⁷ 9 Mass. Atty. Disc. R. 102 (1993) (public censure; attorney brought suit against various parties for payment of debt to his client although attorney knew at time of filing that debt had been paid; court had awarded attorney’s fees and costs under G. L. c. 231, § 6F). See also *Matter of Dillon*, 28 Mass. Att’y Disc. R. 212 (2012) (attorney received a public reprimand after filing, with no support, complaint for contempt in Probate and Family Court alleging that the ex-husband of his client had violated a court order by failing to pay for the client’s son’s tuition costs).

⁶⁷⁸ See *Matter of Connell*, 31 Mass. Att’y Disc. R. ___, 2015 WL 2452839 (2015) (noting this fact).

⁶⁷⁹ 16 Mass. Att’y Disc. R. 530 (2000).

matters AD 02-09⁶⁸⁰ and AD 02-11,⁶⁸¹ two lawyers served an unsupported Chapter 93A demand letter on their former client and the former client's new lawyer, claiming as damages the respondents' lost contingent fees. Each lawyer received an admonition.

III. Rules 3.2, 3.4, 3.5, 4.4

RULE 3.2: EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence:

(2) assert personal knowledge of facts in issue except when testifying as a witness: or

(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, but the lawyer may argue, upon analysis of the

⁶⁸⁰ 18 Mass. Att'y Disc. R. 619 (2002).

⁶⁸¹ 18 Mass. Att'y Disc. R. 629 (2002).

evidence, for any position or conclusion with respect to the matters stated herein;

* * *

(h) present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a private civil matter; or

(i) in appearing in a professional capacity before a tribunal, engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person. This paragraph does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, or sexual orientation, or another similar factor is an issue in the proceeding.

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer, either directly or through communications with the judge or otherwise, a desire not to communicate with the lawyer; or
 - (3) the communication involves misrepresentation, coercion, duress, or harassment; or
 - (4) the communication is initiated without the notice required by law; or
- (d) engage in conduct intended to disrupt a tribunal.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

A. Limits on Actions Within a Lawful Representation Context: Rules 3.2, 3.4, 3.5, 4.4

The Rules of Professional Conduct and Massachusetts common and statutory law impose other limitations to a lawyer's efforts to obtain what her client wants her to achieve. These constraints might be divided into two categories—limits on litigation tactics and limits on contact with persons whose interests are opposed to the lawyer's client. This section addresses the limits on litigation tactics. The next section addresses limits on contact with others. Two subsections of Rule 3.4—subsections (g) and (f)—will be addressed in that next section.

Lawyers, and especially litigators, act strategically to accomplish their goals. Sometimes those strategies call for tactics that the other parties would find unfair. Some of those unfair tactics are prohibited in Massachusetts. Rule 3.2 requires a lawyer to “make reasonable efforts to expedite litigation consistent with the interests of the client.” Sometimes it is very much in a client's interest to delay matters by all means possible, and this rule, despite the ending clause, prohibits a lawyer's bad-faith strategy to delay purely for the sake of delay. As the comment to the rule explains:

Although there will be occasion when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. *Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.*⁶⁸²

⁶⁸² Rule 3.1, Comment 1 (emphasis added).

Rule 3.4 lists several other ways in which a lawyer may not seek to gain an advantage for her client. Lawyers may not “unlawfully” obstruct another party’s access to evidence, falsify evidence, disobey the orders of a tribunal, or make frivolous arguments or proffers of evidence.⁶⁸³ Rule 3.4 prohibits some contact by a lawyer with, or payments to, witnesses, and those restrictions are addressed in the next part of this section. Finally, Rule 3.4 includes two provisions that are not self-evident, and deserve some separate discussion.

First, a lawyer may not “present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a private civil matter.”⁶⁸⁴ The threat to file a complaint with the police or with the BBO might add considerably to the client’s leverage and work to the client’s benefit. If that is the lawyer’s sole purpose in making such a threat, the rule prohibits the lawyer from doing so. However, as an earlier Massachusetts Bar Association ethics opinion explained,

[This provision], however, only prohibits presenting or threatening to present criminal charges where such action is taken “*solely to obtain an advantage in a civil matter*” (Emphasis added). Thus, the attorney’s purpose in threatening or presenting charges is critical. Where criminal charges are pursued in furtherance of the public’s interest in the enforcement of criminal law rather than to gain leverage in a private dispute, no ethical violation exists⁶⁸⁵

Second, Rule 3.4(i) articulates one further constraint on a lawyer’s advocacy efforts, even if the tactic would be beneficial to a client. That rule states that a lawyer, when acting in a professional capacity before a tribunal, may not “engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person.”⁶⁸⁶ Lawyers may engage in “legitimate advocacy” when the factors just listed are in issue in the proceeding.⁶⁸⁷

No lawyer has ever been disciplined by the BBO or the SJC for violation of Rule 3.4(i).

Rule 3.5 establishes boundaries on a lawyer’s actions in communicating with tribunals and jurors. In 2015 the SJC amended Rule 3.5(c), covering contact with jurors, expanding counsel’s contact rights after a trial is completed. That amendment created ambiguities in light of the Court’s long-standing common law principles established in

⁶⁸³ Rule 3.4(a)–(e).

⁶⁸⁴ That principle, maintained from the prior Code of Professional Responsibility at DR 7-105(A), did not make it into the ABA’s Model Rules of Professional Conduct. Massachusetts opted to keep the language in its Rules, and added the word “disciplinary” to ensure that reports to the BBO would be included in this prohibition.

⁶⁸⁵ MBA Op. 83-2 (1983) (interpreting DR 7-105(A)).

⁶⁸⁶ The ABA amended its Rule 8.4 in 2016 to include a similar prohibition. MODEL R. PROF. CONDUCT 8.4(g). The Massachusetts rule cabins the prohibition on expressing or manifesting bias to lawyers appearing before a tribunal, whereas the Model Rule includes lawyers in all representative capacities.

⁶⁸⁷ Rule 3.4(i).

Commonwealth v. Fidler.⁶⁸⁸ In *Commonwealth v. Moore*,⁶⁸⁹ the Court sought to resolve any conflicts, and proposed another revision to Rule 3.5(c), which went into effect in 2017.⁶⁹⁰

Rule 4.4 limits attorneys' zealous advocacy efforts by forbidding them to "use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."⁶⁹¹ The second part of that clause confirms a lawyer's duty to respect the attorney-client privilege rights of others with whom the lawyer interacts.⁶⁹² For example, in *Matter of Ebitz*,⁶⁹³ a lawyer peeked into an opposing counsel's briefcase and found useful, privileged documents. She was caught, and was suspended for six months for violating the disciplinary rules in effect in 1992.

Blatant misconduct like that is an easy call. What happens when an opposing lawyer mistakenly sends a lawyer documents that otherwise would be fully privileged? Should she read them? Should she tell the other lawyer about his mistake? That is a much more difficult call. Rule 4.4(b) addresses that question in a limited fashion. The rule requires the recipient of inadvertently sent material to "promptly notify the sender."⁶⁹⁴ The rule says nothing more about the lawyer's duties. Since in Massachusetts the attorney-client privilege is not automatically waived by an inadvertent disclosure, but instead may or may not be waived depending on the level of care taken by the party or the lawyer,⁶⁹⁵ a lawyer must proceed with caution when in receipt of an otherwise privileged document sent apparently in error.⁶⁹⁶

B. Discipline for Violation of Rules 3.2, 3.4, 3.5, and 4.4

⁶⁸⁸ 377 Mass. 192 (1979).

⁶⁸⁹ 474 Mass. 541 (2016).

⁶⁹⁰ The nuances of the *Fidler* and *Moore* issues are beyond the scope of this Treatise. In brief, *Moore* concluded that the 2015 amendment to Rule 3.5(c) overruled *Fidler* in its requirement of court approval prior to counsel's contact with jurors, but not in its ban on certain inquiries about the jurors' deliberations. *Moore* also clarified the timing of a lawyer's duties for cases tried before and those tried after July 1, 2015, the effective date of the amendment. *Moore*, 474 Mass. at 553–54.

⁶⁹¹ Rule 4.4(a).

⁶⁹² See *Matter of Barnes*, 25 Mass. Att'y Disc. R. 52 (2009).

⁶⁹³ 8 Mass. Att'y Disc. R. 77 (1992).

⁶⁹⁴ Rule 4.4(b).

⁶⁹⁵ See *In the Matter of the Reorganization of Electric Mutual Liability Ins. Co. Ltd. (Bermuda) ("EMLICO")*, 425 Mass. 419, 422 (1997) (documents sent to opposing party by an anonymous source were presumably leaked or stolen; privilege not waived since "reasonable precautionary steps were taken"). *Compare Hoy v. Morris*, 79 Mass. (13 Gray) 519 (1859) (privilege waived as reasonable steps not taken to prevent attorney-client conversation from being overheard).

⁶⁹⁶ Lawyers who wish to use the inadvertently-disclosed document find support from the Massachusetts Bar Association Committee on Professional Ethics. See MBA Op. 99-4 (1999) ("If Lawyer concludes that it is in his client's best interest to do so, he should resist the opposing counsel's demand for return of the letter and should urge the tribunal to reject the claim of attorney-client privilege."). In matters involving civil discovery, however, the recipient of "mistakenly produced" material later claimed to be privileged must follow the steps described in Rule 26(b)(5)(B) of the Massachusetts Rules of Civil Procedure.

You Should Know

According to the SJC, the “standard” sanction for repeated violation of court orders is “at least a suspension.”⁶⁹⁷ Disbarment and long-term suspensions only appear, however, when the lawyer resorts to fraud or misrepresentation. Misconduct involving a lawyer’s personal affairs tends to receive lesser sanctions than misconduct involving representation of a client.

1) Disbarment

No lawyer has been disbarred solely for a violation of Rules 3.2 or 3.5, although on occasion those rules appear within a long list of rules violated by a lawyer who has been disbarred.⁶⁹⁸ Some lawyers have been disbarred for engaging in misconduct in violation of Rule 3.4. Many disbarred lawyers have violated Rule 3.4(c) by continuing to practice law after an administrative suspension and by failing to cooperate with the Office of Bar Counsel during its investigation, each of which reflects disobedience of “an obligation under the rules of a tribunal.”⁶⁹⁹

Many lawyers have been disbarred for perpetrating a fraud on the court, in violation of several rules including Rule 3.4. For example, in *Matter of Finnerty*,⁷⁰⁰ an attorney represented a witness called to appear before a federal grand jury hearing claims involving James “Whitey” Bulger. The attorney advised a witness to lie to the grand jury, and the witness complied. The lawyer was disbarred for that misconduct. In *Matter of Terzian*,⁷⁰¹ an attorney was disbarred after he was convicted on one count of attempting to procure perjury and another count of intimidating a witness in a court proceeding. (The presumptive sanction for a felony conviction is disbarment, as noted earlier.⁷⁰²) Similarly, in *Matter of Jones*,⁷⁰³ an attorney used false evidence in court. The attorney represented a client in Bankruptcy Court; having failed to present his client’s claim within the permissible time, the attorney moved for an extension, supporting his motion with an affidavit of his client, which he had forged. He did not know that his client had died prior to the date of the purported affidavit. For that fraud on the court, the lawyer was convicted of mail fraud and disbarred.

⁶⁹⁷ *Matter of Johnson*, 23 Mass Att’y Disc. R. 403 (2006), *aff’d*, 450 Mass. 165 (2007). *See also* *Matter of Ring*, 427 Mass. 186, 191 (1998).

⁶⁹⁸ *See, e.g.*, *Matter of Friedman*, 22 Mass. Att’y Disc. R. 326 (2006).

⁶⁹⁹ Rule 3.4(c). For examples of that misconduct, *see*, for example, *Matter of Clifford*, 26 Mass. Att’y Disc. R. 74 (2010); *Matter of Connor*, 26 Mass. Att’y Disc. R. 107 (2010); *Matter of Veysey*, 26 Mass. Att’y Disc. R. 701 (2010).

⁷⁰⁰ 24 Mass. Att’y Disc. R. 278 (2008).

⁷⁰¹ 21 Mass. Att’y Disc. R. 647 (2005); *see also* *Commonwealth v. Terzian*, 61 Mass. App. Ct. 739 (2004) (the underlying criminal matter).

⁷⁰² *See* notes 522 & 602 *supra*.

⁷⁰³ 16 Mass. Att’y Disc. R. 282 (2000).

A lawyer has been disbarred for, among other misconduct, engaging in fraud within the BBO proceedings. In *Matter of Geller*,⁷⁰⁴ an attorney falsely denied to Bar Counsel that he ever represented a certain client. The attorney also provided Bar Counsel fabricated letters that falsely documented a refund to the client on an earlier date, and provided other fabricated documents to Bar Counsel. He was disbarred for this and other misconduct, including conversion of funds.

2) Suspension

Suspension is not a common sanction for overzealous misbehavior before a court, except when the lawyer's misconduct affected, or could have affected if it had succeeded, the fairness and integrity of the proceedings. Suspensions also occur when the misconduct includes offering false evidence, which of course implicates other rules. Misconduct involving a lawyer's *personal* affairs, such as a divorce, has been treated somewhat more leniently than that involving representation of a client.

Reports involving Rule 3.2 as the primary misconduct are rare. One lawyer was suspended for violating Rule 3.2 by not pursuing his client's cases diligently. In *Matter of Brooks*,⁷⁰⁵ a Massachusetts lawyer practicing as an Assistant United States Attorney for the Department of Justice in Washington, DC, allowed six felony cases to be dismissed for want of prosecution because of his carelessness. That misconduct, along with the respondent's failure to cooperate with Bar Counsel, led to his suspension for a year and a day. No other reported disciplinary decision involves principally a violation of Rule 3.2.⁷⁰⁶

A single justice has written that "for [violation of court orders,] the standard sanction is at least a suspension."⁷⁰⁷ The reports do not disagree with that description, but examples are not plentiful. Aside from instances of falsified evidence, misbehavior that violates both Rules 3.4(c) and 3.3 and is covered elsewhere in this Treatise, only a handful of the Rule 3.4 violations for wrongdoing in court, including violation of court orders, have led to suspensions. Two reports are illustrative.

In *Matter of Alexander*,⁷⁰⁸ an attorney was suspended for two years for withholding evidence in order to mislead a court. As a city solicitor in a race discrimination case, the attorney withheld from the court and the plaintiff a document that supported the plaintiff's reinstatement claim, and filed a misleading affidavit implying facts that were not true. The respondent's actions were intended to retaliate against the employee for filing the discrimination claim. After federal court proceedings establishing those facts, and a punitive damage award against the respondent, the BBO recommended and a single justice imposed the suspension.

⁷⁰⁴ 23 Mass. Att'y Disc. R. 182 (2007).

⁷⁰⁵ 26 Mass. Att'y Disc. R. 61 (2010).

⁷⁰⁶ Because Rule 3.2 requires expediting litigation, many matters involving serious neglect cite Rule 3.2 as well as Rule 3.1, but the primary concern is the latter misconduct.

⁷⁰⁷ *Matter of Johnson*, 22 Mass Att'y Disc. R. 403 (2006), *aff'd*, 450 Mass. 165 (2007). See also *Matter of Ring*, 427 Mass. 186, 191 (1998) (same).

⁷⁰⁸ 23 Mass. Att'y Disc. R. 9 (2007).

In *Matter of Goodman*,⁷⁰⁹ an attorney represented a client in a claim for injuries sustained in a fall. The client died from unrelated causes after the attorney had notified the insurer of the claim. The attorney directed his staff not to disclose the client's death unless specifically asked and further told his staff to alter a medical report, omitting the reference to client's death. The staff refused to comply with that instruction, so the respondent altered the report himself. The attorney forwarded the altered medical report to the insurer, in violation of Rules 3.4(a) and 4.1(a). He was suspended for a year (but with a reinstatement hearing required) for this and two other instances of dishonesty; the single justice was particularly concerned about the respondent's lack of insight about his "brazen" misconduct.

Other instances of lawyers whose dishonest excesses when representing clients led to term suspensions include *Matter of Gross*,⁷¹⁰ *Matter of Foley*,⁷¹¹ and *Matter of Griffith*.⁷¹² In *Gross*, the respondent pursued a defense of alibi and mistaken identification in a criminal case by having an individual impersonate the defendant at counsel table, hoping the victim would misidentify him. The scheme unraveled after a continuance was granted. The respondent was suspended for eighteen months.

In *Foley*, the respondent fabricated a defense for a criminal defendant client who was arrested for driving under the influence and illegal possession of a handgun. Before the defense could be employed, the putative defendant was revealed to be an undercover FBI agent. The single justice imposed an eighteen-month suspension but the full bench increased it to three years, noting that, "[h]ad the case proceeded to trial and the respondent presented the false story he had concocted and the false testimony he had developed . . . , the sanction respondent would be facing most assuredly would have been disbarment."⁷¹³

In *Griffith*, the respondent represented the estate of a man in a lawsuit alleging police misconduct by the city. The decedent and the respondent were both Cape Verdean and the respondent believed the police were antagonistic toward Cape Verdeans. In preparing answers to interrogatories and document responses, the respondent omitted reference to providers whose records contained reference to the decedent's HIV status and did not produce medical records containing such references, without objecting or moving for a protective order. The respondent further did not disclose the decedent's HIV status to his expert witness or to the court at a pretrial conference. On appeal, the full bench rejected as mitigating the respondent's professed obsession with the case due to perceived mistreatment of Cape Verdeans and his view that the decedent's HIV condition was somehow privileged. The Court focused on the intentional nature of the respondent's misconduct and suspended him for a year.⁷¹⁴

⁷⁰⁹ 22 Mass. Att'y Disc. R. 352 (2006).

⁷¹⁰ 435 Mass. 455, 16 Mass. Att'y Disc. R. 214 (2001).

⁷¹¹ 439 Mass. 324, 19 Mass. Att'y Disc. R. 141 (2003).

⁷¹² 440 Mass. 500, 20 Mass. Att'y Disc. R. 174 (2003).

⁷¹³ 439 Mass. at 336. *Foley* served as an example of a violation of the rules against presenting false testimony, *supra*.

⁷¹⁴ *Griffith* served as an example of a violation of the rules against presenting false testimony, *supra*.

Compare those reports to *Matter of Diamond*,⁷¹⁵ where an attorney was suspended for three months for using inappropriate and offensive language in open court,⁷¹⁶ and for using in court a confidential Criminal Offender Record Information (CORI) report to which it appears the lawyer was not entitled.

While many lawyers have been suspended for misconduct that included a violation of Rule 3.4(c), which covers disobeying an obligation under the rules of a tribunal, most of those sanctions resulted because of the lawyer's refusal to comply with obligations within the BBO disciplinary process, including continuing to practice after an administrative suspension.⁷¹⁷ Other lawyers have been suspended for disobeying an obligation of a court or administrative tribunal other than the BBO, but those sanctions often followed from the lawyer's mishandling the underlying client work. For instance, in *Matter of Munroe*,⁷¹⁸ an attorney was suspended for two and one-half years for multiple Rule 3.4 violations, in addition to other rules. The attorney, acting as temporary executor of an estate belonging to his deceased client, failed to comply with court orders, in violation of 3.4(c). The attorney also obstructed a court-appointed special administrator of the estate from selling the business and blocked the special administrator's access to the business premises and records. The attorney also fabricated stock certificates and minutes that he attached to court pleadings and provided to the special administrator and Bar Counsel. In *Matter of McGuirk*,⁷¹⁹ the attorney was suspended for a year and a day after failing to make court-ordered accountings on matters for which she served as a fiduciary. In *Matter of Quinn*,⁷²⁰ the lawyer was suspended for three months for failing to comply with orders of the Probate Court to file an inventory and account, resulting in the entry of a contempt judgment and two arrests on *capias* warrants.

On occasion, a lawyer violates Rule 3.4(c) in the context of his or her own personal litigation, not while representing a client (and often in their own divorce proceedings). While those lawyers are, as one Justice wrote, "not entitled to a free pass" because of the personal or private quality of the dispute,⁷²¹ the sanction for personal misconduct tends to be less severe than misconduct in representing a client. In *Matter of Cullen*,⁷²² for instance, a lawyer failed to comply with an order of his probation after having been found guilty of assault and battery. That failure constituted a violation of

⁷¹⁵ 16 Mass. Att'y Disc. R. 100 (2000).

⁷¹⁶ The lawyer said to the lawyer representing the other party, "If you want discovery, you're going to get discovery up the ass." *Id.*

⁷¹⁷ *See, e.g.*, *Matter of Feeney*, 29 Mass. Att'y Disc. R. 240 (2013) (a year and a day suspension); *Matter of Saletan*, 29 Mass. Att'y Disc. R. 574 (2013) (six-month suspension); *Matter of Dowell*, 28 Mass. Att'y Disc. R. 244 (2012) (a year and a day suspension); *Matter of Days*, 30 Mass. Att'y Disc. R. 89 (2014) (two-month suspension); *Matter of Johnson*, 27 Mass. Att'y Disc. R. 490 (2011) (two-year suspension); *Matter of Cooney*, 24 Mass. Att'y Disc. R. 114 (2008) (indefinite suspension). All of these matters obviously implicated other misconduct, as the lawyers were in the midst of BBO disciplinary procedures.

⁷¹⁸ 26 Mass. Att'y Disc. R. 385 (2010).

⁷¹⁹ 29 Mass. Att'y Disc. R. 449 (2013).

⁷²⁰ 12 Mass. Att'y Disc. R. 463 (1996).

⁷²¹ *Matter of Leahy*, 28 Mass. Att'y Disc. R. 529 (2012).

⁷²² 28 Mass. Att'y Disc. R. 165 (2012).

Rule 3.4(c) and led to his being suspended for six months (with four of the six months stayed). In *Matter of Vinci*,⁷²³ an attorney was suspended for nine months after filing inaccurate financial statements with the Probate Court in his own divorce proceeding. Similarly, in *Matter of Leahy*,⁷²⁴ a lawyer was suspended for two months for his failure to comply with court obligations in his divorce matter. After reviewing comparable examples of lawyer discipline in personal matters before a court, the single justice rejected the Board's recommendation of a one-year suspension, stayed for two years.⁷²⁵ A review of the disciplinary reports shows several other examples of lawyers receiving short suspensions after having failed to comply with orders related to their own personal criminal conduct or domestic relations dispute,⁷²⁶ while others have received public reprimands, as described below.⁷²⁷

Lawyers have been suspended on occasion for violating Rule 3.5, which requires fair tactics and decorum before a tribunal, or its predecessor Disciplinary Rules 7-106, 7-108 (D), and 7-110 (B). Two such matters involved *ex parte* communication with a judge. In *Matter of Lipis*,⁷²⁸ the respondent was suspended for two years for improper *ex parte* contact with a judge on a pending matter, among other misconduct (including posing as a judge's clerk in a telephone call to an insurer, in which the respondent "quoted the judge as saying the insurer was going to get 'hammered'" if it did not settle). The misconduct also violated Rule 4.4(a). In aggravation, the same lawyer had previously received a public reprimand for a different violation of Rule 3.5 a few years earlier.⁷²⁹ Another instance of improper *ex parte* contact with a judge led to a three-month suspension, with a dissent by one Justice. In *Matter of Orfanello*,⁷³⁰ the lawyer arranged a lunch date with a judge, during which the lawyer discussed a matter involving a different lawyer who had supported the judge's judicial nomination. The Board did not conclude that this conduct violated DR 7-110(B), because of the scant evidence of the true purpose of the lunch meeting, but the SJC disagreed. Justice Nolan dissented on the sanction to be applied, concluding that an isolated instance of indiscretion in an otherwise "unimpeachable forty-year devotion to the system of justice" warranted at most a public reprimand as recommended by Bar Counsel and the respondent.⁷³¹

3) Public Reprimand

⁷²³ 23 Mass. Att'y Disc. R. 742 (2009).

⁷²⁴ 28 Mass. Att'y Disc. R. 529 (2012).

⁷²⁵ The single justice compared this respondent's actions to the following examples: *Matter of Kilkenny*, 26 Mass. Att'y Disc. R. 288, 290 (2010) (suspension for five months); *Matter of Angwafo*, 453 Mass. 28, 37, 39 (2009) (suspension for one month); *Matter of Kersey*, 432 Mass. 1020 (2000) (suspension for three months); *Matter of Ring*, 427 Mass. 186, 186 (1998) (suspension for three months); *Matter of Finnerty*, 418 Mass. 821, 830 (1994) (suspension for six months).

⁷²⁶ See sources cited at notes 721–24 *supra*.

⁷²⁷ See notes 741–42 *infra*.

⁷²⁸ 24 Mass. Att'y Disc. R. 431 (2008).

⁷²⁹ *Matter of Lipis*, 18 Mass. Att'y Disc. R. 369 (2002) (at a court-ordered mediation, the respondent interrupted the defense counsel's presentation by calling him a "liar" and "a piece of shit," and referred to the defense counsel as "Satan" and the defense experts as "whores").

⁷³⁰ 411 Mass. 551, 8 Mass. Att'y Disc. R. 184 (1992).

⁷³¹ 411 Mass. at 558. The respondent at the time served as the executive secretary to the Administrative Justice of the Superior Court.

Public reprimands are less common than suspensions when lawyers engage in misconduct affecting the fairness of the judicial or administrative proceedings. However, some lawyers have received public reprimands, presumably because their conduct was less egregious than the examples above. Two instances involved inappropriate contact with a judge or hearing officer. In *Matter of Sydney*,⁷³² an attorney served as a state representative for a town that had a matter pending before a state agency. In violation of Rule 3.5(a) and (b), the attorney wrote a letter to the administrative law judge who was to rule on a pending motion to dismiss, encouraging a particular outcome. (The attorney sent this letter not on behalf of a client, but in his role as a public official.) He received a public reprimand. In *Matter of Wilson*,⁷³³ an attorney received a public censure for violating DR 7-110(B) by sending a letter to a judge, without copying counsel for the other party, to complain about an opposing party and to comment on the merits of the matter before the judge. In *Wilson*, the Board had recommended a term suspension for several instances of misconduct, but its report stated that “the ex parte communication at issue in the second count would merit public reprimand if it were the only misconduct found.”⁷³⁴ The single justice ordered a public censure.

Similarly, in *Matter of Ryan*,⁷³⁵ a district attorney was publicly censured for speaking with a judge before whom a defendant (not prosecuted by the respondent’s office) was scheduled for sentencing on a gambling conviction, in violation of DR 7-110(B). The attorney had been asked by a congressman to talk to the judge in order to show the client some consideration.

Some lawyers have received a public reprimand for misconduct in court other than misrepresentation. In *Matter of Reisman*,⁷³⁶ a lawyer advised his client that it would be acceptable for the client to “scrub” a computer hard drive, notwithstanding a discovery order requiring preservation of the electronic files on the computer. The lawyer’s advice was more inept than malicious, but his conduct warranted the reprimand. In *Matter of Nelson*,⁷³⁷ an attorney was publicly reprimanded for violating Rule 3.4(e) (as it read in 2009) in the course of representing the Commonwealth as an assistant district attorney against two co-defendants. The attorney asserted his own personal knowledge of the facts in issue and vouched for the credibility of witnesses. And, as noted above, in *Matter of Lipis*,⁷³⁸ a lawyer received a public reprimand for his obscenity-laden tirade in court.

In *Matter of Campbell*,⁷³⁹ the lawyer received a public reprimand after violating court orders, but the reprimand resulted from factors in mitigation. The lawyer failed to comply with court orders regarding his duty to file accountings in a fiduciary matter in

⁷³² 17 Mass. Att’y Disc. R. 556 (2001).

⁷³³ 17 Mass. Att’y Disc. R. 608 (2001).

⁷³⁴ 17 Mass. Att’y Disc. R. at 619.

⁷³⁵ 6 Mass. Att’y Disc. R. 275 (1990).

⁷³⁶ 29 Mass. Att’y Disc. R. 556 (2013).

⁷³⁷ 25 Mass. Att’y Disc. R. 413 (2009).

⁷³⁸ 18 Mass. Att’y Disc. R. 369 (2002) (discussed *supra* at note 728).

⁷³⁹ 24 Mass. Att’y Disc. R. 86 (2008).

the Probate Court. The lawyer's mental health issues were a mitigating factor, and that mitigation led to a lesser sanction than the lawyer otherwise would have received.⁷⁴⁰

Other public reprimands resulting from violation of Rule 3.4 occurred in the lawyers' personal matters. In both *Matter of Sanchez*⁷⁴¹ and *Matter of Silva*,⁷⁴² the lawyer in question was held in contempt by a Probate and Family Court judge for failure to abide by a child support order issued in the lawyer's own divorce matter. Each lawyer received a public reprimand as a result of the contempt order.

Lawyers have also received public reprimands for violations of Rule 4.4(a). For example, in *Matter of Melican*,⁷⁴³ the respondent, after learning about salacious materials involving an opposing party, tried to exploit that material, involving "means that had no substantial purpose other than to embarrass one of the plaintiffs into agreeing to a settlement of the matter involving the respondent's client." She received a public reprimand. And in *Matter of Barnes*,⁷⁴⁴ the respondent obtained information from a witness that impaired her rights against self-incrimination, in violation of Rule 4.4. He received a public reprimand.

4) Admonition

In at least one instance, PR 87-23,⁷⁴⁵ a lawyer received private discipline for failing to expedite his client's case. The client sought the attorney's help in a legal malpractice action against another lawyer. The attorney filed suit but failed to serve the defendant and took no other action.

A few lawyers who have violated Rule 3.4 have received an admonition, and none in the past several years. In AD 06-16,⁷⁴⁶ an attorney defended her actions to a court after her criminal defense client moved to withdraw a guilty plea; in doing so she stated her personal opinion of the merits of the defendant's claim, in violation of Rule 3.4(e).⁷⁴⁷ In AD 00-60,⁷⁴⁸ the prosecutor in a criminal jury trial was found to have cross-examined the defendant in an unnecessarily inflammatory way and asked an irrelevant question to degrade the witness. The attorney further violated 3.4(e) by asking the defendant to comment on the credibility of another witness, vouching for the credibility of the prosecution's evidence, and characterizing himself as the "thirteenth juror," referring to his past experience as an altar boy.

⁷⁴⁰ Compare *Matter of Quinn*, 12 Mass. Att'y Disc. R. 463 (1996) (three-month suspension for similar misconduct; discussed *supra* at note 720).

⁷⁴¹ 23 Mass. Att'y Disc. R. 633 (2007).

⁷⁴² 22 Mass. Att'y Disc. R. 710 (2006).

⁷⁴³ 26 Mass. Att'y Disc. R. 364 (2010).

⁷⁴⁴ 25 Mass. Att'y Disc. R. 52 (2009).

⁷⁴⁵ 5 Mass. Att'y Disc. R. 515 (1987).

⁷⁴⁶ AD No. 00-60, 16 Mass. Att'y Disc. R. 541 (2000).

⁷⁴⁷ See also AD 05-04, 21 Mass. Att'y Disc. R. 671 (2005) (attorney violated 3.4(e) by making improper closing remarks in a criminal proceeding).

⁷⁴⁸ 22 Mass. Att'y Disc. R. 884 (2006).

In AD 97-106,⁷⁴⁹ an attorney sent a letter to a client's business competitor that stated, "If you agree with these terms, we will not seek criminal and civil action against you." The attorney received an admonition for threatening to present criminal charges solely to obtain an advantage in a civil matter. Similarly, in AD 01-02,⁷⁵⁰ an attorney violated Rule 3.4(h) when he spoke with the mother of his former client, who had refused to repay a loan, and threatened to call the police and have the client arrested for larceny.

In AD 14-14,⁷⁵¹ the respondent instructed her client, who was involved in divorce litigation with her husband, to open a letter mailed to the husband but received at the client's home. That violation of the husband's rights violated Rule 4.4(a), and led to the admonition.

IV. Rules 3.4(f) and (g), 4.2, 4.3

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

* * *

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

**(1) the person is a relative or an employee or other agent of a client;
and**

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information;

(g) pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

**(1) expenses reasonably incurred by a witness in preparing, attending
or
testifying;**

(2) reasonable compensation to a witness for loss of time in preparing, attending or testifying; and

(3) a reasonable fee for the professional services of an expert witness;

⁷⁴⁹ 13 Mass. Att'y Disc. R. 1054 (1997).

⁷⁵⁰ 17 Mass. Att'y Disc. R. 657 (2001).

⁷⁵¹ 40 Mass. Att'y Disc. R. 505 (2014).

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

A. Impermissible Contact with Others (Rules 3.4(f) and (g), 4.2, and 4.3)

The Massachusetts rules also prohibit certain types of contact with individuals as part of a lawyer's representation. Those restrictions appear in three types of contexts.

First, two parts of Rule 3.4 limit a lawyer's contact with individuals with knowledge about the matter in question. Rule 3.4(f) precludes a lawyer from requesting that a person not talk to one of the other parties in a matter, except for a very narrow set of circumstances involving a client's relatives or agents.⁷⁵² And Rule 3.4(g) forbids payments to witnesses contingent on the outcome of a case. Discipline under either of these sections has been rare in Massachusetts, but on occasion lawyers have been sanctioned for engaging in such activity.

Second, Rule 4.2 prohibits a lawyer from communicating about the subject matter of the representation with a person represented by counsel, unless the lawyer is authorized by law to do so or has the consent of that person's attorney. Consent of the

⁷⁵² The prohibition does not apply to a "relative or an employee or other agent of a client," but even then only if the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." Rule 3.4(f).

other person does not suffice. This rule is easily understood in the context of contact with individuals. The rule is much more challenging to apply when the contact is with agents or employees of organizations. Until 2002, a lawyer could not communicate about the subject matter of the representation with any employee or agent of an organization that was represented by counsel.⁷⁵³ In 2002, however, the SJC decided the *Messing* case.⁷⁵⁴ Soon thereafter the Court amended the comments to Rule 4.2. By both actions it expanded considerably the universe of corporate constituents to whom a lawyer may speak about the subject matter of the representation. In *Messing*, the SJC concluded that the interpretation of Rule 4.2 in place at that time was “strikingly protective of corporations regarding employee interviews.”⁷⁵⁵ The Court established a less restrictive standard to be applied from then on. The amended Comment to Rule 4.2 states:

[T]his Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation only with those agents or employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the organization to make decisions about the course of the litigation.⁷⁵⁶

If the person whom the lawyer hopes to contact is a *former* employee or agent, the prohibition does not apply, even if that person fits one of the categories specified in the Comment.⁷⁵⁷ Even if a lawyer has a right to speak with a corporate employee or agent under Rule 4.2, the lawyer may not seek to learn otherwise privileged information.⁷⁵⁸

One other aspect of the current treatment of organizational constituents deserves note here. If the organization in question is a governmental agency, constitutional principles serve to authorize some contact that the literal language of the Rule or its Comment might otherwise forbid. Therefore, a lawyer would not violate Rule 4.2 by communicating with a public official if the lawyer’s client had a constitutional right to petition that official.⁷⁵⁹

⁷⁵³ Before the SJC actions in 2002 described in the text, the rule in Massachusetts prohibited contact with any constituent of a represented organization “whose statement may constitute an admission on the part of the organization.” Rule 4.2, comment [4] (1998). Because the Massachusetts evidence rules treat any statement by an agent made within the scope of that person’s agency as an admission under the hearsay rule, *see, e.g.,* *Ruszyk v. Secretary of Pub. Safety*, 401 Mass. 418 (1988), that standard effectively barred all contact by a lawyer with any constituent of an organization represented by counsel.

⁷⁵⁴ *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 436 Mass. 347 (2002).

⁷⁵⁵ *Messing*, 436 Mass. at 354 (quoting the Superior Court judge who had imposed sanctions on the plaintiff firm in that case).

⁷⁵⁶ Rule 4.2 Comment [7].

⁷⁵⁷ *See Clark v. Beverly Health & Rehabilitation Services, Inc.*, 440 Mass. 270 (2003).

⁷⁵⁸ *Clark v. Beverly Health & Rehabilitation Services, Inc.*, 440 Mass. 270, 279 (2003) (“[C]ounsel must also be careful [when exercising the permission afforded under Rule 4.2] to avoid violating applicable privileges or matters subject to appropriate confidences or protections. Existing attorney disciplinary procedures should adequately address any less than scrupulous professional conduct.”).

⁷⁵⁹ Rule 4.2 Comment [5] (“Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.”). *See also* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 97-408 n.9 (1997)

As discussed below, Massachusetts lawyers have on occasion faced discipline for violation of Rule 4.2.

The third limitation on contact with others restricts communications with persons not represented by counsel when a lawyer is acting on behalf of a client. Rule 4.3 requires that the lawyer not state or imply disinterest and make clear to the unrepresented person that the lawyer is not disinterested if the person misunderstands the lawyer's role. Rule 4.3 also prohibits a lawyer from giving advice to an unrepresented person whose interests may be in conflict with those of the lawyer's client, other than the advice to secure counsel.

That latter part of Rule 4.3 may be the source of some confusion in Massachusetts, especially in certain litigation contexts. In some high-volume courts, such as the Probate and Family Court, the District Court, and the Housing Court, many litigants proceed *pro se*. Lawyers representing opposing clients in those courts must communicate, and negotiate, with the unrepresented litigants on a regular basis.⁷⁶⁰ Lawyers representing clients in those settings regularly employ legal arguments and cite to legal authority when conversing with unrepresented opposing parties in efforts to settle or to expedite the legal proceedings. Rule 4.3 appears to permit such negotiation as not violating the prohibition against offering legal advice to the *pro se* individual. As Comment [2] explains:

So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Bar Counsel, however, has taken a far more restrictive view of that interpretation of Rule 4.3. Relying on slightly different language from the Comment as it read before 2015, Bar Counsel warned Massachusetts lawyers that explaining the lawyer's understanding of the law to a *pro se* litigant within a negotiation setting may violate this rule. Bar Counsel wrote:

The comment should not be taken, however, as license to predict the outcome of court proceedings The rule does allow a lawyer to state the client's position and the remedies that the lawyer will seek on behalf of the client, but it does not

(noting that Model Rule 4.2 is subject to the First Amendment right to petition the government for redress of grievances); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §101 cmt. *b* (2002).

⁷⁶⁰ The proliferation of unrepresented litigants in community courts, litigants who typically cannot afford counsel, has emerged as a serious public policy concern. *See, e.g.,* Massachusetts Access to Justice Commission, Statement of Strategies, Objectives and Goals for 2013 (June 8, 2013), *available at* <http://www.massaccesstojustice.org/>.

permit pressuring the unrepresented adversary by describing the probable legal consequences of the actions the lawyer plans to take.⁷⁶¹

Because it is almost impossible to negotiate effectively without “predict[ing] the outcome of court proceedings” or “describing the probable legal consequences of the actions the lawyer plans to take,” Bar Counsel’s stance creates a hazard for Massachusetts lawyers.⁷⁶² However, in the years since publication of the article, no Massachusetts lawyer has been disciplined for having predicted what a court would do or describing the expected legal consequences to an unrepresented person.⁷⁶³ Several lawyers have been disciplined for inappropriate contact with unrepresented persons, but few of those cases involve negotiation with a *pro se* litigant.

B. Discipline for Violation of Rules 3.4(f) and (g), 4.2, and 4.3

You Should Know

The typical sanction for improper contact with others is an admonition. If a lawyer offers advice to an unrepresented party in violation of Rule 4.3, however, the typical sanction is a public reprimand.

1) Disbarment

On occasion, lawyers have been disbarred for flagrant misconduct implicating Rule 3.4(f), which prohibits a lawyer from instructing a witness not to speak to another party. The disbarment occurred because the lawyer engaged in serious criminal conduct involving trial proceedings. In *Matter of Hyatt*,⁷⁶⁴ the lawyer was disbarred after he was convicted of a felony for violating a domestic relations protective order and intimidating a witness, with the single justice concluding that the latter constituted a violation of Rule 3.4(f). In *Matter of Reed*,⁷⁶⁵ after a client reported him to Bar Counsel for having settled a matter without authority and misappropriating the proceeds, the lawyer urged the client not to testify in the BBO proceedings and offered her \$4,000 not to attend her deposition. Presumably the respondent’s interference with the witness’s testimony contributed to the disbarment, although he defaulted in the BBO proceedings so the Court did not parse his violations.

⁷⁶¹ Nancy Kaufman, *Can We Talk: Communicating with Unrepresented Persons*, MASSACHUSETTS LAWYERS WEEKLY, November 17, 2003.

⁷⁶² One of the contributors to this treatise has made such arguments in response to the Bar Counsel’s column. See Paul R. Tremblay, *Column on 4.3 Sends “Worrisome” Message*, MASSACHUSETTS LAWYERS WEEKLY, December 15, 2003.

⁷⁶³ In one instance, a lawyer misstated the law during a negotiation and pressured an unrepresented person to pay a judgment he did not owe, and as a result received a public reprimand. See *Matter of Monaco*, 22 Mass. Att’y Disc. R. 571 (2006) (discussed below).

⁷⁶⁴ 23 Mass. Att’y Disc. R. 309 (2007).

⁷⁶⁵ 25 Mass. Att’y Disc. R. 523 (2009).

No lawyer has been disbarred for misconduct solely or primarily involving a violation of Rules 4.2 or 4.3.

2) Suspension

A remarkable violation of Rule 4.2 occurred in *Matter of Bianco*,⁷⁶⁶ leading to a suspension of a year and a day. In *Bianco*, a newly-admitted lawyer assisted a more experienced attorney in defending a sexual harassment lawsuit filed by a woman employee against a hospital. The employee telephoned the respondent at her home; the respondent proceeded to talk to the plaintiff about the case on at least eighty occasions, without disclosing that contact to the employer, the court, or her firm. The improper communications led to a mistrial and to the hospital's seeking new counsel for that and several other cases. Because of the serious harm that resulted and the extent of the breach of the duty, the lawyer was suspended for a year and a day, by stipulation.

No other suspensions have occurred for the principal violation of Rule 4.2. In *Matter of Watts*,⁷⁶⁷ the single justice ordered an indefinite suspension for multiple acts of misconduct, including unauthorized contact with a represented person, but principally involving the lawyer's misuse of client funds. The attorney was the administratrix of a client's estate, and she failed to maintain a complete set of bank statements and to produce records that were requested by the beneficiary's attorney. She sent a letter to the beneficiary directly, without the beneficiary's attorney's knowledge or consent, asking the beneficiary to sign and approve a draft account.

No lawyer has been suspended solely or principally for providing advice to an unrepresented person in violation of Rule 4.3. However, in *Matter of Galat*,⁷⁶⁸ the single justice ordered an indefinite suspension for multiple counts of misconduct, including a violation of the predecessor to Rule 4.3. The attorney worked alongside a receiver overseeing an investment company's assets. The receiver instructed the attorney to carry on communications with the company's investors and to advise them to rely on the receiver to protect their interests in upcoming lawsuits. Because the attorney provided legal advice to the investors other than the advice to retain counsel, the attorney violated DR 7-104(A)(2). Her suspension, however, resulted from other, more serious misconduct involving misuse of the receivership assets.

3) Public Reprimand

Two lawyers have received public reprimands for violating Rule 4.2 or its predecessor, although in each instance the matter involved other violations as well. In *Matter of Kent*,⁷⁶⁹ the attorney represented a client regarding a possible purchase of a house owned by an elderly woman, who had counsel. Without obtaining the consent of the elderly woman's attorney, the attorney visited the woman at a nursing home and

⁷⁶⁶ 21 Mass. Att'y Disc. R. 46 (2005).

⁷⁶⁷ 21 Mass. Att'y Disc. R. 654 (2005).

⁷⁶⁸ 18 Mass. Att'y Disc. R. 229 (2002).

⁷⁶⁹ 21 Mass. Att'y Disc. R. 366 (2005).

discussed the management of her financial affairs and her interest in the property. In *Matter of Allen*,⁷⁷⁰ the attorney on several occasions communicated with another party despite knowing that the party was represented by counsel and despite the opposing counsel's specific request that communications cease. The attorney received a public censure.

Several lawyers have received public reprimands for violation of Rule 4.3 or its predecessor. One notable example of a pure violation of Rule 4.3 is *Matter of Barnes*.⁷⁷¹ In *Barnes*, an attorney represented a man who had been charged by a woman with domestic assault and battery, kidnapping, and threatening to commit a crime. The two individuals reconciled and the respondent agreed to meet with the couple together in advance of the criminal hearing. During the meeting, the attorney offered legal and strategic advice to the woman about the proceeding, without making clear his role as the defendant's lawyer and without advising her to obtain her own counsel.

Similarly, in *Matter of Monaco*,⁷⁷² an attorney received a public reprimand for her actions in negotiating with an individual during a supplementary process proceeding. The respondent attempted to enforce a judgment against a corporation by serving a *capias* on a former officer of the corporation. At court, the respondent advised that individual incorrectly about his obligation to pay the judgment of the corporation and altered court papers to include the name of the former officer.

Two other reported matters resulted in public reprimands for offering legal advice to an unrepresented person. In *Matter of Fischbach*,⁷⁷³ after representing a married couple as their tax lawyer, an attorney decided to represent only the husband after the couple separated. The respondent then offered advice to the wife without advising her to secure separate counsel, revealed information from the wife to the husband, and later represented the husband in the divorce. In *Matter of Levine*,⁷⁷⁴ the lawyer represented a client, a principal in a corporation, in several different matters, including possible purchases of real estate and manufacturing of soft drinks. The client drafted a contract between the corporation and a lender, and both the client and the lender appeared in the attorney's office without an appointment. The attorney hurriedly reviewed the draft contract and let both parties sign the document, but without advising the lender to consult her own attorney before doing so.

4) Admonition

In at least two instances, the Board imposed private discipline for conduct violating the predecessor to Rule 3.4(g). In PR 97-38,⁷⁷⁵ an attorney received an admonition after he negotiated an agreement by the terms of which his client would give

⁷⁷⁰ 5 Mass. Att'y Disc. R. 4 (1988).

⁷⁷¹ 25 Mass. Att'y Disc. R. 52 (2009).

⁷⁷² 22 Mass. Att'y Disc. R. 571 (2006).

⁷⁷³ 18 Mass. Att'y Disc. R. 190 (2002).

⁷⁷⁴ 11 Mass. Att'y Disc. R. 162 (1995).

⁷⁷⁵ 13 Mass. Att'y Disc. R. 929 (1997).

twenty percent of any recovery to his principal witness. In PR 88-26,⁷⁷⁶ an attorney received a private reprimand for allowing the compensation of witnesses to be determined by a percentage of the settlements obtained in lawsuits. The attorney routinely employed expert witnesses on behalf of his clients and he routinely agreed to compensate the witnesses based on the outcome.

The Board has issued many admonitions for simple violations of Rule 4.2 without any serious harm to the represented person. For example, in AD 03-16,⁷⁷⁷ a pro se husband in a divorce matter obtained counsel after extensive litigation as an unrepresented party. After learning that the man had a lawyer, the respondent, who represented the wife in the divorce, wrote two letters directly to the husband. In AD 02-32,⁷⁷⁸ a lawyer, who was a tenant, communicated with the trustee of the trust that owned the leased premises, not only knowing that the trust was represented by counsel but also having received a letter from counsel instructing the respondent not to communicate directly with the trustee. The landlord's interests were not harmed in any significant way, if at all.

In AD 02-33,⁷⁷⁹ an attorney represented a wife in a divorce proceeding, which resulted in an agreement that the wife receive certain payments and that the husband apply for a life insurance policy to benefit the wife. The husband's mother was a party to a separate equity action because of a claim that she held some of the husband's assets, and the mother was represented by counsel. The respondent met with the mother and prepared a document for her to sign, without consent of the mother's attorney. And in AD 01-36,⁷⁸⁰ an attorney discussed legal matters with a former employee whom his client had sued for breach of an employment non-competition and non-disclosure agreement. The employee contacted the attorney to discuss settlement, informing the lawyer that he wanted to resolve the case without his own counsel. Based on that request, the respondent discussed the matter with the employee.

Many other examples exist of admonitions for unauthorized contact with a represented person, without any significant harm to the represented person.⁷⁸¹

The Board has issued few admonitions for violations of Rule 4.3, instead imposing more serious discipline when a lawyer advises an unrepresented person with interests different from the lawyer's client. In one unusual disposition, AD 10-03,⁷⁸² the lawyer received only an admonition for misconduct that closely resembled that described above leading to a public reprimand. In that matter, the lawyer represented a daughter in

⁷⁷⁶ 4 Mass. Att'y Disc. R. 465 (1988).

⁷⁷⁷ 19 Mass. Att'y Disc. R. 549 (2003).

⁷⁷⁸ 18 Mass. Att'y Disc. R. 691 (2002).

⁷⁷⁹ 18 Mass. Att'y Disc. R. 693 (2002).

⁷⁸⁰ 17 Mass. Att'y Disc. R. 724 (2001).

⁷⁸¹ See, e.g., AD 00-46, 16 Mass. Att'y Disc. R. 519 (2000); AD 99-77, 15 Mass. Att'y Disc. R. 795 (1999); AD 96-4, 12 Mass. Att'y Disc. R. 601 (1996); AD 96-49, 12 Mass. Att'y Disc. R. 682 (1996); AD 96-62, 12 Mass. Att'y Disc. R. 705 (1996); PR 80-16, 2 Mass. Att'y Disc. R. 223 (1980); PR 78-2, 1 Mass. Att'y Disc. R. 384 (1978).

⁷⁸² 26 Mass. Att'y Disc. R. 763 (2010).

her quest to effect a transfer of the mother's house into the daughter's name. Throughout the attorney's drafts of and negotiation about the agreement, the attorney never explained to the mother that he was not representing her and he did not advise her to seek her own counsel.

DRAFT

Part VIII

Law Practice Management (Rule 1.17; Rules 5.1 through 5.7)

I. Introduction

The legal profession is self-regulated. No individual who is not a licensed attorney may practice law, and those who are licensed attorneys must oversee carefully the work of others who assist them in their practices. The Rules of Professional Conduct enforce these principles, by limiting the role that nonlawyers may play in the operation of law firms, by prohibiting nonlawyers from owning an interest in law firms or from directing legal practice by lawyers, and by prohibiting a lawyer's assistance of the unauthorized practice of law. The Rules also limit how a lawyer may sell an ongoing business which includes the practice of law. Rule 1.17 addresses the latter topic. Rules 5.1 through 5.7 address the broader question of nonlawyers' interactions with the business of lawyers.

If lawyers do not respect the limitations established by these rules, they face the possibility of discipline. The number of cases involving these issues is relatively small, and most of those involve a lawyer's violation of Rules 5.3, addressing a lawyer's supervision of his staff, and Rule 5.5, which forbids a lawyer from assisting in the unauthorized practice of law. This Part describes the various rules briefly and assesses the types of discipline typically associated with their violation.

II. The Nature of the Lawyer's Responsibilities Regarding the Sale of a Law Practice

RULE 1.17: SALE OF LAW PRACTICE

A lawyer or law firm may sell, and a lawyer or law firm may purchase, with or without consideration, a law practice, including good will, if the following conditions are satisfied:

(a) Reserved

(b) Reserved

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

**(2) the client's right to retain other counsel or to take possession of the file;
and**

(3) the fact that the client’s consent to the transfer of that client’s representation will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera confidential information relating to the representation only to the extent necessary to obtain an order authorizing the transfer.

(d) The fees charged clients shall not be increased by reason of the sale. The purchaser may, however, refuse to include a particular representation in the purchase unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

(e) Upon the sale of a law practice, the seller shall make reasonable arrangements for the maintenance of property and records specified in Rule 1.15.

A. The Lessons of Rule 1.17

In Massachusetts, a lawyer may sell or transfer all or part of his law practice, but only after meeting certain conditions spelled out in Rule 1.17 and its comments. The essence of this rule is that the lawyer may only transfer the practice to another lawyer or group of lawyers, the transferring lawyer must give notice to each client, who may elect not to accept transfer to the new lawyer but who will be presumed to agree to the transfer if no objection has been made within 90 days. While the fees charged clients may not be increased by reason of the sale, a purchaser may insist that any transferred clients must pay the fees that the purchaser typically charged its clients before the sale.

The Massachusetts rule is different from the ABA’s model rule, and the two “Reserved” sections of the Massachusetts rule reflect the SJC’s unwillingness to accept two central provisions of the ABA’s standard. Unlike in Massachusetts, the ABA’s Rule 1.17(b) limits any such transfer to “the entire practice, or the entire area of practice,” of the transferring lawyer. In other words, under the model rule a lawyer cannot sell or transfer part of her practice, but in Massachusetts that arrangement is acceptable. Then, Model Rule 1.17(a) requires that the transferring lawyer “cease to engage in the private practice of law, or in the area of practice that has been sold,” in the geographic or jurisdictional area where the lawyer has worked. Massachusetts is different. It does not forbid a lawyer from selling or transferring a practice or an area of practice while continuing to accept new clients in that area. Massachusetts also includes the phrase “with or without consideration” in its description of the sale and purchase of a law practice, while the ABA rule omits that description, implying that Massachusetts permits a free transfer of a practice while the ABA rule does not.

In one other respect the Massachusetts version diverges from the ABA model rule. Massachusetts Rule 1.17(d) agrees with the model rule that “[t]he fees charged clients shall not be increased by reason of the sale.” But the Massachusetts rule permits the purchasing lawyer to “refuse to include a particular representation in the purchase unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.” The ABA rule previously included that same language, but in 2002 the ABA deleted that provision. According to one authority, “Lawyers had used this statement to demand higher fees or else the client would be dropped and the ABA thought this result was improper.”⁷⁸³

Practice Tip

A lawyer who loses her license to practice because of a disbarment or suspension order will likely be permitted to sell her portfolio if she chooses. An ethics opinion from the Maine Board of Bar Overseers concludes that Rule 1.17 permits a sale in such circumstances.⁷⁸⁴ No report or opinion in Massachusetts forbids the practice. The disbarred lawyer selling a practice might not be able to receive payment from the purchaser of her pro rata share of legal fees collected later, because of the rule prohibiting sharing of legal fees with a nonlawyer. But that lawyer may receive referral fees for a referral made before the disbarment was effective.⁷⁸⁵

B. Discipline for Violation of Rule 1.17

Despite Massachusetts’s choice to treat this area of the business of the legal profession differently from the rest of the country, no issue has ever arisen regarding Rule 1.17, no court has ever addressed it, the BBO has never commented upon it, and no disciplinary report cites it as the basis of a lawyer’s misconduct.

III. The Nature of the Lawyer’s Responsibilities Regarding Supervision Within a Law Practice

RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

⁷⁸³ RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 696, § 1.17 (2012-2013 ed.).

⁷⁸⁴ Me. Ethics Op. 178 (2002) (construing a predecessor to Maine Rule 1.17, with similar language). The South Carolina Bar has concluded the opposite, but it construed language requiring notice to “active” clients, a qualification not present in the Maine or Massachusetts rules. See S.C. Ethics Op. 2003-06 (2003).

⁷⁸⁵ A referral fee is earned when the referral is made. Having been earned while the lawyer was not disbarred, the fee may be accepted by the lawyer.

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

*** * ***

RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

*** * ***

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

A. The Lessons of Rules 5.1, 5.2, and 5.3

Massachusetts Rules 5.1 through 5.3 explain the respective responsibilities of supervising and subordinate lawyers working in law firms or organizations. Together, they establish lines of responsibilities and clarify the allocation of authority for complex ethical decisions between a senior lawyer and a junior lawyer, as well as the duties regarding nonlawyers who assist the lawyers in their delivery of legal services.

Rule 5.1, while stating obvious principles, describes important duties of supervising lawyers. It first states that those lawyers who manage a law practice must establish systems and policies to ensure that the lawyers and staff comply with their ethical duties. A managing lawyer who neglects to do so will face discipline.⁷⁸⁶ The rule next holds that a lawyer who supervises another lawyer shall take reasonable steps to ensure that the supervised lawyer acts in an ethical manner. And finally, Rule 5.1(c) imposes responsibility on a supervising lawyer for misconduct of a supervised lawyer in two settings: (1) if the supervising lawyer orders or ratifies the misconduct; or (2) if the senior lawyer (which may include a partner or a manager who does not directly supervise the junior lawyer) knows of the impending misconduct and “fails to take reasonable remedial action” to prevent or mitigate it.⁷⁸⁷ Unless one of those two circumstances exists, a manager or supervisor may not be subject to discipline for the misconduct of a junior or supervised lawyer.

Rule 5.1 only addresses a lawyer’s liability under the Rules of Professional Conduct, and the lawyer’s exposure to discipline. The rule says nothing about whether the lawyer may have responsibility in any civil action based upon the misconduct of a

⁷⁸⁶ See, e.g., *Matter of Foley*, 26 Mass. Att’y Disc. R. 199 (2010) (suspension).

⁷⁸⁷ MASS. RULES OF PROF’L CONDUCT R. 5.1(c)(2).

junior lawyer, and this treatise will not address that question, as it raises issues beyond the scope of this work.⁷⁸⁸

Rule 5.2 addresses the responsibilities of the supervised, or junior, lawyer. It first establishes that a supervised lawyer may not escape discipline for misconduct directed or ordered by the lawyer's supervisor. Sensibly, a lawyer may not defend against a charge of having violated a rule by asserting that he did so at the request of his boss. The second part of Rule 5.2 is of some passing interest to lawyers in firms but has never had any effect on a junior lawyer in Massachusetts.⁷⁸⁹ Rule 5.2(b) states that a subordinate lawyer will not be subject to discipline if he "acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." If the "reasonable resolution" ends up being a violation of a disciplinary rule, the supervisor, and not the subordinate, will face discipline. While some subordinate lawyers across the country have tried to rely on that provision to shift responsibility to a superior, none has ever succeeded.⁷⁹⁰

The disciplinary reports show that when a supervisor and a supervisee engage in related misconduct, the supervisor typically receives more serious discipline.⁷⁹¹

Rule 5.3 essentially replicates the responsibilities set out for managers, partners, and supervisors under Rule 5.1, but applies them to lawyers who supervise paralegals, support staff, and other nonlawyers who work in law offices with lawyers. The role of nonlawyer assistants becomes most interesting when we consider the question of unauthorized practice of law, and consider the contours of what a nonlawyer may do without violating that principle. To continue the themes of Rules 5.1 through 5.3, the treatise will take up the unauthorized practice of law question in the next subsection.

⁷⁸⁸ As Comment [5] to Rule 5.1 states, "Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules." For consideration of that topic, see, e.g., John L. Whitlock, *Ethical Responsibilities in Supervising Others and Sale of a Law Practice*, 82 MASS. L. REV. 289 (1997); John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Predispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. TEX. L. REV. 967 (1995).

⁷⁸⁹ Nor has Rule 5.2(b) led to a lawyer's discipline elsewhere. See Andrew M. Perlman, *The Silliest Rule of Professional Conduct: Model Rule 5.2(b)*, THE PROFESSIONAL LAWYER (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467910.

⁷⁹⁰ See, e.g., *In re Okrassa*, 799 P.2d 1350, 1353-54 (Ariz. 1990) (rejecting junior prosecutor's defense based on consultation with superiors); *People v. Casey*, 948 P.2d 1014, 1015-18 (Colo. 1997) (sanctioning associate where ethics rule clearly governed his conduct); *Statewide Grievance Comm. v. Glass*, 1995 WL 541810, at *2 & n.1 (Conn. Super. Ct. Sept. 6, 1995) (declining to excuse associate's dishonesty); *In re Douglas's Case*, 809 A.2d 755, 761-62 (N.H. 2002) (rejecting Rule 5.2(b) defense because question of professional duty was not arguable); *In re Kelley's Case*, 627 A.2d 597, 600 (N.H. 1993) (rejecting associate's Rule 5.2(b) defense because "there could have been no 'reasonable' resolution of an 'arguable' question of duty"); *In re Howes*, 940 P.2d 159, 164 (N.M. 1997) (rejecting junior prosecutor's defense based on New Mexico version of Rule 5.2(b) principally because "there was no 'arguable question of professional duty'").

⁷⁹¹ For example, *compare* *Matter of Newman*, 31 Mass. Att'y Disc. R. ___, 2015 WL 3551163 (2015) (four month suspension for filing an appellate brief relying on statement discovered to be false, after an associate declined to file that brief for that reason) *with* AD 15-02, 31 Mass. Att'y Disc. R. ___, 2015 WL 5440557 (admonition for the associate, who did not disclose the false statement).

This Part will postpone consideration of Rule 5.4 for now, and consider it alongside the context of Rule 5.7.

B. Discipline for Violation of Rules 5.1, 5.2 and 5.3

Practice Tip

Lawyers hire subordinate lawyers, paralegals, and support staff in order to delegate work and operate a more efficient law practice. Delegation requires careful oversight, however. While a lawyer obviously need not reproduce all of the work performed by others under her supervision, she must have in place systems to ensure that the work gets done right. It will not be a defense to a misconduct charge that the mistakes were made by others over whom the lawyer had authority.⁷⁹²

1) Disbarment

No lawyer has been disbarred for the central reason that she had violated one of these rules governing the management of a law practice and supervision of subordinate lawyers. On at least one occasion the SJC accepted a disciplinary resignation after Bar Counsel charged a lawyer with misconduct related to Rule 5.3. In *Matter of Babchuck*,⁷⁹³ the respondent and his assistant mismanaged his IOLTA account, leading to deprivation of client funds. His failure to train and supervise the assistant constituted a violation of Rule 5.3.

2) Suspension

Practice Tip

Misconduct involving failure to supervise support staff and paralegals, with some client harm, tends to result in a term suspension. If that misconduct does not cause client harm, a public reprimand is the typical sanction. If the lapse is inadvertent and no client has been harmed the respondent may receive an admonition.

Lawyers have been suspended when they have failed to supervise support staff who mishandled client matters. In *Matter of Goldberg*,⁷⁹⁴ an attorney's failure to supervise his office staff contributed to a suspension for a year and a day, with a probationary period of two years during which his financial recordkeeping would be monitored by a certified public accountant. The attorney's secretary, who was in charge

⁷⁹² See, e.g., *Matter of Abelson*, 24 Mass. Att'y Disc. R. 1 (2008).

⁷⁹³ 26 Mass. Att'y Disc. R. 20 (2010) (resignation but no order of disbarment).

⁷⁹⁴ 23 Mass. Att'y Disc. R. 191 (2007).

of reviewing and balancing his business and IOLTA accounts, embezzled money from closing funds. The lawyer not only did not supervise the secretary's work, but he also did not conduct a background check, which would have disclosed that she had lost her previous employment for similar misconduct.⁷⁹⁵ In *Matter of Heartquist*,⁷⁹⁶ the respondent failed to supervise his employee, who embezzled client funds. The Board Memorandum compared those embezzlement cases warranting a suspension and those warranting a public reprimand, and concluded that the respondent's lack of adequate systems in place in his office, along with other misconduct, justified a suspension of six months and a day.

Other lawyers have been suspended while failing to prevent, or encouraging, unethical practices by support staff. For instance, in *Matter of Goodman*,⁷⁹⁷ the respondent was suspended for one year after he instructed his staff on more than one occasion not to reveal a client's death to an insurance company. He also directed his staff to alter a medical report that contained a reference to the client's death. The primary basis for his suspension was his dishonesty, but his involvement of his staff contributed to the discipline imposed.

3) Public Reprimand

While term suspensions are common for failure to supervise office staff with some harm or potential harm occurring, lesser sanctions are imposed when a lawyer's failure to supervise a subordinate is less intentional or less endemic. For example, in *Matter of Hopper*,⁷⁹⁸ an attorney failed to ensure that his bookkeeper maintained his IOLTA and business account records in compliance with Rule 1.15. As a result of the lack of oversight, one IOLTA account check bounced. Because the attorney did not intentionally use client funds for his personal use or gain, he received a public reprimand. And in *Matter of Levy*,⁷⁹⁹ an attorney's failure to supervise his bookkeeper and paralegal also resulted in a public reprimand. The attorney had settled a client's case and the bookkeeper correctly deposited the settlement check into the attorney's IOLTA account. However, a firm paralegal did not pay the client her net share of the settlement or pay off a lien before leaving the attorney's employ. Upon discovering the mistake, the attorney paid the client her net share of the settlement proceeds with interest.⁸⁰⁰

⁷⁹⁵ See also *Matter of Collins*, 25 Mass. Att'y Disc. R. 132 (2009)(six-month suspension with a required reinstatement hearing after office manager embezzled client and fiduciary funds).

⁷⁹⁶ 29 Mass. Att'y Disc. R. 332 (2013.)

⁷⁹⁷ 22 Mass. Att'y Disc. R. 352 (2006).

⁷⁹⁸ 25 Mass. Att'y Disc. R. 259 (2009). See also *Matter of Kalperis*, 24 Mass. Att'y Disc. R. 390 (2008) (attorney faced public reprimand for failure to supervise bookkeepers' incorrect management of IOLTA account and funds).

⁷⁹⁹ 25 Mass. Att'y Disc. R. 355 (2009).

⁸⁰⁰ See also *Matter of Perrone*, 23 Mass. Att'y Disc. R. 545 (2007) (public reprimand where long-time trusted secretary's embezzlement was hard to discover, and undetected by respondent's accountant and title insurer).

Other reports show a sanction of public reprimand for lawyers who failed to supervise subordinate lawyers in their law firm. In *Matter of Baron*,⁸⁰¹ the Board accepted a stipulation for a public reprimand where a supervisory partner in a law firm failed to adequately supervise a managing partner in a satellite office regarding proper handling of client funds. In *Matter of Newton*,⁸⁰² the Board also accepted a stipulation for a public reprimand after the respondent failed to supervise his son, also a lawyer, to assure that the firm's trust account was maintained properly. In both of these matters, the respondents had prior discipline, but in neither instance did a client suffer any deprivation. In the 1993 case *Matter of Jerome*,⁸⁰³ the lawyer received a public reprimand after he entrusted all responsibility for recordkeeping of his busy firm's trust and operating accounts to a secretary whose work he did not oversee and who, unknown to the attorney, embezzled more than \$80,000 in funds, mostly from the respondent but also some from lienholders. The same misconduct with the same level of consequences would most likely result in a term suspension today.

4) Admonition

Admonitions are common as a sanction for sloppy office procedures or supervision. For instance, in AD 10-19,⁸⁰⁴ an attorney received an admonition for failing to insure that his firm had measures to prevent lawyers from engaging in conflicts of interest. No lawyer or staff member in the firm conducted an investigation that would have revealed that the firm had previously represented one of its clients' adversaries. In AD 07-20,⁸⁰⁵ an attorney's inexperienced secretary sent a letter containing confidential information to a client's insurer, having misunderstood the attorney's instructions concerning the letter. In AD 06-18,⁸⁰⁶ an attorney assigned a paralegal to send a check from some closing proceeds to a broker. Mistakenly believing that the amount was in dispute, the paralegal held the funds instead of sending the check to the broker as instructed. And in AD 05-10,⁸⁰⁷ the respondent did not review the final draft of a will his secretary prepared. The secretary had mistakenly inserted the attorney's name in an article of the will, which would result in the attorney's being a beneficiary, contrary to the Rules of Professional Conduct.

Other examples exist of admonitions involving violations of Rule 5.3. For instance, in AD 05-26,⁸⁰⁸ two attorneys, partners in a two-person law firm, each received an admonition after their paralegal made errors in judgment regarding the logistics of a real estate closing. The firm did not have an adequate system in place to supervise the paralegal. In AD 05-18,⁸⁰⁹ the respondent accused the judge, the opposing party, and that party's counsel of collusion based on matters that the lawyer's paralegal had incorrectly

⁸⁰¹ 17 Mass. Att'y Disc. R. 62 (2001).

⁸⁰² 12 Mass. Att'y Disc. R. 348 (1996).

⁸⁰³ 9 Mass. Att'y Disc. R. 176 (1993).

⁸⁰⁴ 26 Mass. Att'y Disc. R. 797 (2010).

⁸⁰⁵ 23 Mass. Att'y Disc. R. 973 (2007).

⁸⁰⁶ 22 Mass. Att'y Disc. R. 887 (2006).

⁸⁰⁷ 21 Mass. Att'y Disc. R. 712 (2005).

⁸⁰⁸ 21 Mass. Att'y Disc. R. 726 (2005).

⁸⁰⁹ 21 Mass. Att'y Disc. R. 8 (2005).

included in a brief submitted by the respondent, a brief the respondent had never read. And in AD 03-06,⁸¹⁰ an attorney overseeing a closing did not supervise a paralegal who improperly recorded a mortgage before all of the proper funds had cleared.

IV. The Nature of the Lawyer's Responsibilities Regarding Unauthorized Practice of Law Within a Law Practice

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

⁸¹⁰ 19 Mass. Att'y Disc. R. 529 (2003).

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law or rule of this jurisdiction.

A. The Lessons of Rule 5.5

In every jurisdiction, it is unlawful for a person who is not a licensed lawyer to engage in the practice of law. In Massachusetts, practicing law without a license may be a crime,⁸¹¹ and may be enjoined by a court.⁸¹² Since the Massachusetts Rules of Professional Conduct apply to lawyers admitted to practice in the state, the prohibition on unauthorized practice of law (known often as “UPL”) has little direct relevance to the coverage of this treatise, since Massachusetts lawyers are typically authorized to practice law in this state.⁸¹³ But the UPL topic does have significance for Massachusetts lawyers in three ways, and Rule 5.5 addresses each of those areas.

Assisting in the Unauthorized Practice of Law: First, and perhaps of greatest interest here, Rule 5.5(a) prohibits a lawyer from *assisting* in UPL. Connected to the lessons of Rule 5.3 discussed above, a lawyer who helps or permits nonlawyers to engage in the practice of law will have violated this rule, and will be subject to discipline.⁸¹⁴ The most common example of this misconduct is where a lawyer irresponsibly delegates to a staff member important lawyering tasks.⁸¹⁵ This worry also

⁸¹¹ M.G.L. c. 221 § 41. Note that inactive lawyers may provide pro bono services in limited circumstances, as described below. See Chapter 14, Part II.A(7).

⁸¹² See, e.g., *Mass. Conveyancers Assoc., Inc. v. Colonial Title & Escrow, Inc.*, No. Civ. 96–2746–C, 2001 WL 669280 (Mass. Super. 2001) (finding the defendant corporation engaged in unauthorized practice of law and enjoining the defendant from certain activities).

⁸¹³ According to Rule 8.5, “A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal service in the jurisdiction.” SJC Rule 4:01, § 1 also states that “Any lawyer . . . engaging in the practice of law in this Commonwealth shall be subject to this court’s exclusive disciplinary jurisdiction.” Therefore, a lawyer admitted elsewhere (whether in good standing there or on suspension) who improperly practices in Massachusetts violates Rule 5.5. No non-Massachusetts lawyer has ever been subject to discipline in Massachusetts, however.

⁸¹⁴ See, e.g., *Matter of Hrones*, 457 Mass. 844, 26 Mass. Att’y Disc. R. 252 (2010).

⁸¹⁵ A lawyer may lawfully delegate out-of-court tasks to a nonlawyer, such as a paralegal, as long as the lawyer responsibly supervises the work of the nonlawyer. While some authorities have stated that a lawyer may not delegate to paralegals certain kinds of activities, such as communicating legal advice to clients, a

arises when lawyers assist laypersons in activities, such as real estate closings, when the activity in question qualifies as the practice of law. In recent years the activity of laypersons overseeing residential real estate closings has led to some significant appellate guidance about the scope of UPL,⁸¹⁶ and Bar Counsel has followed that guidance with its own warnings to lawyers about their need to exercise care in their participation in closings overseen by corporations not authorized to engage in the practice of law.⁸¹⁷ The discussion below addresses briefly the question of what qualifies as “the practice of law.”

The prohibition against assisting in the unauthorized practice of law has special relevance to a lawyer’s employing a disbarred or suspended lawyer to serve as a paralegal. One might think that a disbarred or suspended lawyer becomes effectively a layperson and may be hired, as with any nonlawyer, to assist a licensed lawyer in her practice. That assumption would be wrong, at least most of the time. An SJC rule limits the activities of a suspended or disbarred lawyer in a paralegal capacity. The rule states:

Except as provided in [a different section] of this rule, no lawyer who is disbarred or suspended, or who has resigned or been placed on disability inactive status under the provisions of this rule shall engage in legal or paralegal work, and no lawyer or law firm shall knowingly employ or otherwise engage, directly or indirectly, in any capacity, a person who is suspended or disbarred by any court or has resigned due to allegations of misconduct or who has been placed on disability inactive status.⁸¹⁸

The exception referred to in this excerpt provides an opportunity for a suspended or disbarred lawyer to apply to the SJC for special permission to serve as a paralegal after a designated, and substantial, waiting period set forth in the rule.⁸¹⁹

Practice Tip

recent review of the literature disputed that conclusion. See Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice Within Law Firms*, 85 INDIANA L. J. 653 (2009). The lawyers disciplined in Massachusetts for permitting paralegals or other nonlawyers to engage in the practice of law inevitably failed to supervise the work of the nonlawyers.

⁸¹⁶ See Real Estate Bar Ass’n for Massachusetts, Inc. v. National Real Estate Information Services, 459 Mass. 512, 521-522 (2011); Real Estate Bar Ass’n for Mass. v. National Real Estate Info. Servs., 608 F.3d 110 (1st Cir. 2010).

⁸¹⁷ Bruce T. Eisenhut, *Bearing Witness: REBA v. NREIS and Witness-Only Closings* (May 2013), at <https://bbopublic.blob.core.windows.net/web/f/bearingwitness.pdf>.

⁸¹⁸ SJC Rule 4:01 § 17(7).

⁸¹⁹ SJC Rule 4:01 § 18(3), which reads as follows:

Employment as Paralegal. At any time after the expiration of the period of suspension specified in an order of suspension, or after the expiration of four years in a case in which an indefinite suspension has been ordered, or after the expiration of seven years in a case in which disbarment has been ordered or a resignation has been allowed under section 15 of this rule, a lawyer may move for leave to engage in employment as a paralegal. When the term of suspension or disbarment or resignation has been extended pursuant to the provisions of section 17(8) of this rule, the lawyer may not petition to be employed as a paralegal until the expiration of the extended term. The court may allow such motion subject to whatever conditions it deems necessary to protect the public interest, the integrity and standing of the bar, and the administration of justice.

An attorney may not pay or engage a suspended or disbarred lawyer to perform any task, including a job unconnected to the practice of law.

Practice of Law After Suspension: Second, a lawyer who has been suspended from practice but continues to offer legal services or to hold herself out as a lawyer will also have violated Rule 5.5.⁸²⁰ Because those individuals remain members of the Massachusetts bar, even if their license to practice has been suspended, they must honor the prohibition against UPL and Rule 5.5 applies to them.⁸²¹

Multijurisdictional Practice: The third aspect of Rule 5.5—“multijurisdictional practice,” or sometimes “MJP”—is one that is of the greatest interest to practicing lawyers as a practical matter, but has less apparent relevance in the disciplinary process, and therefore will receive very brief treatment in this treatise. Rule 5.5(c) addresses the proper scope of legal services that a lawyer admitted in another jurisdiction may offer to clients in Massachusetts. Rule 5.5 applies primarily to Massachusetts lawyers, but it also describes (and limits) what activities non-Massachusetts lawyers may engage in. An out-of-state lawyer who engages in activity beyond what Rule 5.5(c) permits may face discipline in his own home state for violating the limits imposed by Massachusetts, and may face discipline in this state. More likely, however, the lawyer who engages in practice banned by a state’s Rule 5.5 will encounter consequences other than discipline, such as a loss of fees or injunctive relief.⁸²²

Briefly, here is how Rule 5.5(c) addresses the question of practice across state borders into Massachusetts. The rule establishes that a lawyer who is not licensed in Massachusetts may practice law here “on a temporary basis” only in the following circumstances: (1) when the out-of-state lawyer associates with a Massachusetts lawyer who accepts responsibility for the matter;⁸²³ (2) when a court permits an appearance under a *pro hac vice* arrangement;⁸²⁴ and, most importantly from a practical, operational standpoint, (3) in matters that “arise out of or are reasonably related to the lawyer’s practice” in her own jurisdiction.⁸²⁵ These categories, borrowed directly from the ABA’s Model Rule 5.5, have been the subject of considerable attention and commentary in the

⁸²⁰ See, e.g., Matter of Linnehan, 26 Mass. Att’y Disc. R. 310 (2010) (suspension); Matter of Gillespie, 26 Mass. Att’y Disc. R. 223 (2010) (public reprimand); AD 09-03, 25 Mass. Att’y Disc. R. 657 (2009) (admonition).

⁸²¹ See SJC Rule 4:01 §17(8) (imposing further delays for reinstatement for lawyers who practice while their license is suspended).

⁸²² An authoritative treatise on the Model Rules of Professional Conduct does not even list discipline in its review of remedies for violation of Rule 5.5. See ROTUNDA & DZIENKOWSKI, *supra* note 783, at § 5.5-5 (listing loss of fees, disgorgement of fees, criminal prosecution, injunctive or declaratory relief, and contempt as the remedies for unauthorized practice).

⁸²³ Rule 5.5(c)(1).

⁸²⁴ Rule 5.5(c)(2).

⁸²⁵ Rule 5.5(c)(4). We have omitted reference to the safe harbor contained in Rule 5.5(c)(3) because that item is wholly covered by the safe harbor described in Rule 5.5(c)(4).

literature, and practitioners interested in the scope of this liberty to practice across state lines may find ample guidance elsewhere.⁸²⁶

One other aspect of Rule 5.5's coverage warrants mention. Often, a lawyer from outside of Massachusetts will move to the Commonwealth in order to work in-house at a national corporation or government agency, offering advice to that organizational client while resident in Massachusetts. Rule 5.5(d) confirms that such a lawyer (including an attorney admitted in a foreign country) need not become licensed in this state as long as he is providing legal services in-house to his "employer or its organizational affiliates," except for appearances in court, which remain off-limits to the non-Massachusetts lawyer except through the usual *pro hac vice* application.⁸²⁷ This permission to practice as an in-house counsel or government lawyer does not permit the attorney to offer legal services to clients in Massachusetts outside of that role.⁸²⁸ Any such lawyer must register with the bar as an in-house counsel.⁸²⁹

A Massachusetts lawyer considering a representation in another state must check that state's version of 5.5 and other applicable rules to determine whether the representation would be permitted. Massachusetts lawyers have occasionally been disciplined for handling cases in another state in violation of the other state's rules.⁸³⁰

Practice Tip

In 1998 the California Supreme Court concluded that a New York law firm must forfeit substantial legal fees incurred in its work in California for a California client because its lawyers were not licensed to practice law in California.⁸³¹ While Massachusetts has no such opinion, and while Rule 5.5 has changed since 1998, lawyers here must ensure that they are permitted to perform work involving out-of-state clients and out-of-state legal issues.

Defining the Practice of Law: Whether an attorney or a non-attorney has engaged in the unauthorized practice of law often turns on whether the activities performed by the

⁸²⁶ See, e.g., Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L. J. 953 (2012); Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age*, 48 SAN DIEGO L. REV. 489 (2011). The categories established by the ABA in Rule 5.5(c) emerged after the disorienting decision of the California Supreme Court in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P. 2d 1 (Cal. 1998) (after client sued law firm for malpractice, law firm counterclaimed for its fee; without deciding the malpractice claim, the court denied fees for work performed by New York lawyers "in" California).

⁸²⁷ See SJC Rule 3:15 (requiring registration and payment of a fee of \$301 to the BBO (except in *pro bono* matters) if appearing *pro hac vice*).

⁸²⁸ See SJC Rule 4:02(9) (requiring registration of out-of-state lawyers working as in-house counsel, and permitting certain forms of *pro bono* legal services outside of that setting).

⁸²⁹ See SJC Rule 4:02(9). See also Chapter 14, Part II.A(5).

⁸³⁰ See, e.g., *Matter of Finn*, 433 Mass. 418 (2001); *Matter of Shea*, 7 Mass. Att'y Disc. R. 269 (1991); *Matter of Weitz*, 26 Mass. Att'y Disc. R. 710 (2010).

⁸³¹ *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998).

individual qualify as “the practice of law.” If they do so qualify, the person will have violated the state statute and the lawyer will have violated Rule 5.5. If not, the activity will be lawful. Given the significance of that determination, one might hope for some clarity within reported decisions about what exactly qualifies as the practice of law. Unfortunately, that clarity is lacking, and a definition of the practice of law elusive. The SJC has attempted to offer some guidance in the context of lawyers participating with nonlawyers in real estate closings. In *REBA v. NREIS*,⁸³² the Court offered the following guidance:

“It is not easy to define the practice of law.” . . . As general observations, we have noted that the practice of law involves applying legal judgment to address a client’s individualized needs, and that custom and practice may play a role in determining whether a particular activity is considered the practice of law. More specifically, we have stated:

“[D]irecting and managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving or furnishing legal advice as to such rights and methods and the practice, as an occupation, of drafting documents by which such rights are created, modified, surrendered or secured are all aspects of the practice of law.” [And], for an activity to be considered the “practice of law” such that a nonlawyer cannot perform it without committing the unauthorized practice of law, the activity itself must generally fall “wholly within” the practice of law.⁸³³

That standard is about the best that any court could craft. Lawyers who contemplate assisting nonlawyers with activities that come close to the practice of law must exercise careful judgment to discern whether the work fits inside or outside of this somewhat fluid definition. For purposes of discipline, however, few if any Massachusetts lawyers have been sanctioned for guessing wrong about the standard. In the discipline cases involving a violation of Rule 5.5(a), there typically has been little or no question that the activity in question was plainly the practice of law.

⁸³² *Real Estate Bar Ass’n for Massachusetts, Inc. v. National Real Estate Information Services*, 459 Mass. 512 (2011).

⁸³³ 459 Mass. at 517-18 (internal citations omitted) (quoting *Lowell Bar Ass’n v. Loeb*, 315 Mass. 176, 180 (1943); *Matter of the Shoe Mfrs. Protective Ass’n*, 295 Mass. 369, 372 (1936); *Matter of Chimko*, 444 Mass. 743, 750 (2005)). In *REBA*, the SJC, in its response to questions posed by the First Circuit, declined to hold that conveyancing as a whole was the practice of law, and offered a functional analysis of the component parts of a real estate transaction. For a discussion of this opinion and its relevance for Massachusetts practitioners, see Alexis J. Anderson, “*Custom and Practice*” *Unmasked: The Legal History of Massachusetts’s Experience with the Unauthorized Practice of Law*, 94 MASS. L. REV. 124 (2013).

Practice Tip

Conduct that would be viewed not as UPL when performed by a layperson may be deemed the practice of law when performed by a suspended or disbarred attorney.⁸³⁴

B. Discipline for Violation of Rule 5.5

1) Disbarment

Several lawyers have been disbarred for violations involving Rule 5.5. Some disbarment judgments follow from a lawyer's practicing after administrative suspension;⁸³⁵ some disbarment orders follow from the lawyer's assisting in unauthorized practice. In all disbarment matters, though, the lawyer had engaged in other misconduct as well. In one of those matters, *Matter of Flak*,⁸³⁶ the attorney associated with a non-attorney, who was a convicted felon and a "jailhouse lawyer," and who had established a business called Federal Parole Legal Services (FPLS) to provide legal services to federal inmates. The attorney entered into a partnership with the nonlawyer as the sole principals of FPLS and agreed to divide all income equally. The attorney also commingled client funds, deceived the inmates about the nature of the services, and had several other separate items of misconduct.

2) Suspension

You Should Know

Continuing to practice law knowingly after an administrative suspension for failure to register and pay bar fees constitutes a violation of Rule 5.5. The most common sanction for that misconduct has been a term suspension.

The most common discipline for a violation of Rule 5.5 has been a term suspension. A common report involves a lawyer who continues to practice law after an administrative suspension. Several of those lawyers have been suspended for six months, or six months and a day.⁸³⁷ If the lawyers committed misconduct while practicing law

⁸³⁴ See *Matter of Bott*, 462 Mass. 430 (2012) (a suspended lawyer is prohibited from a broader range of activity than a nonlawyer). For further discussion of the restrictions on suspended or disbarred lawyers, see Chapter 12, Part III.C.

⁸³⁵ See, e.g., *Matter of Veysey*, 26 Mass. Att'y Disc. R. 701 (2010) (practicing during administrative suspension); *Matter of Lamond*, 26 Mass. Att'y Disc. R. 299 (2010) (same); *Matter of Clifford*, 26 Mass. Att'y Disc. R. 74 (2010) (same); *Matter of Libassi*, 449 Mass. 1014, 23 Mass. Att'y Disc. R. 396 (2007) (same).

⁸³⁶ 6 Mass. Att'y Disc. R. 118 (1990).

⁸³⁷ See, e.g., *Matter of Saletan*, 29 Mass. Att'y Disc. R. 574 (2013) (six months and a day); *Matter of Gustafson*, 28 Mass. Att'y Disc. R. 397 (2012) (six months); *Matter of Blessington*, 19 Mass. Att'y Disc. R. 54 (2003) (six months and a day). *But see* *Matter of Blodgett*, 25 Mass. Att'y Disc. R. 71 (2009) (attorney

during the administrative suspension, the resulting sanction has been greater. For instance, in *Matter of Linnehan*,⁸³⁸ the attorney continued to practice law, including appearing in court multiple times, and failed to advise his clients, courts, or other parties of his administrative suspension. The attorney was suspended for eighteen months. Other lawyers, as seen below, have received public reprimands, or even admonitions, for this misconduct, so the facts and circumstances of the lawyer's having practiced after the administrative suspension will play a crucial role in determining the level of discipline.

Practice Tip

The most common reason for a lawyer's administrative suspension is the lawyer's failure to register and pay annual fees. If the BBO does not have a current address for the lawyer, the chances increase that the lawyer will fail to meet those obligations. The BBO's rule requiring every lawyer to provide an email address should limit this kind of mistake.⁸³⁹

The other common source of suspensions in this area is an attorney's permitting a nonlawyer to conduct activities without supervision. Of course, in the situations where lawyers did so something usually went wrong (hence Bar Counsel's attention to the problem), so the suspensions typically include some representational misconduct in addition to the failure to supervise the employee. A recent example is *Matter of Hrones*.⁸⁴⁰ In *Hrones*, an attorney was under the mistaken belief that his paralegal was authorized to practice before the Massachusetts Commission Against Discrimination and assisted the paralegal while he effectively managed an MCAD practice under the attorney's name. The Board determined that the attorney's misconduct was not simply a violation of 5.3(b) where the attorney failed to supervise the paralegal, but that the paralegal's considerable responsibilities coupled with the attorney's failure to supervise constituted assisting the unauthorized practice of law. The attorney was suspended for a year and a day.⁸⁴¹ In *Matter of Jackman*,⁸⁴² the attorney created a law partnership with a nonlawyer and shared fees with him. The nonlawyer also commingled and misappropriated client funds. The SJC analogized that misconduct to negligent misuse of client funds with deprivation, and imposed a two-year suspension (rejecting the single

suspended for two months after failure to comply with the terms of her administrative suspension); *Matter of Johnson*, 27 Mass. Att'y Disc. R. 490 (2011) (two year suspension for practicing while under administrative suspension, but with other misconduct and aggravating factors).

⁸³⁸ 26 Mass. Att'y Disc. R. 310 (2010).

⁸³⁹ See Chapter 4 for a discussion of administrative suspensions. A lawyer who has been administratively suspended because he did not get notice from the BBO typically can be reinstated by payment of the fees due along with an affidavit explaining the lawyer's circumstances.

⁸⁴⁰ 457 Mass. 844, 26 Mass. Att'y Disc. R. 252 (2010).

⁸⁴¹ See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt g; *Matter of DiCicco*, 6 Mass. Att'y Disc. R. 83 (1989) (attorney was found to assist in unauthorized practice of law when he formed a business with a paralegal to represent prison inmates, listed the paralegal as "Of Counsel," and failed to supervise the paralegal).

⁸⁴² 444 Mass. 1013, 21 Mass. Att'y Disc. R. 349 (2005).

justice’s sanction of a three-year suspension) followed by a practice limitation (representing only criminal defendants in District Court) upon reinstatement.

In *Matter of Burns*,⁸⁴³ an attorney was suspended for six months after he hired a disbarred lawyer and used him actively in his criminal defense practice. He treated the disbarred attorney as a paralegal, but he did not supervise the employee’s work. The report does not claim that the disbarred attorney provided substandard service. By contrast, in *Matter of Dash*,⁸⁴⁴ the lawyer not only named his law firm after his paralegal, but he left her unsupervised and she essentially practiced law. The nonlawyer also commingled her funds with the firm’s IOLTA account funds, and paid her own bills from that account. The BBO and the single justice accepted the proposed suspension of six months and a day—merely one day more than in *Matter of Burns* (although that extra day triggered additional reinstatement requirements). And in *Matter of Levin*,⁸⁴⁵ an attorney was suspended for six months after assisting a lawyer who had been suspended from the practice of law. The attorney appeared at approximately sixty residential real estate closings at the suspended lawyer’s request and assisted in completing deals with the suspended lawyer’s clients. The respondent did not simply take over the suspended lawyer’s practice, which would have been proper; instead, he assisted the suspended lawyer to continue to participate in an active real estate closing business. The suspended lawyer did all of the underlying substantive work, and the respondent merely appeared at the closing as the properly licensed lawyer needed to complete the transactions.

In *Matter of Vasa*,⁸⁴⁶ following *Matter of O’Neill*,⁸⁴⁷ the single justice imposed a three-month suspension for the lawyer’s assisting a nonlawyer with activities within the respondent’s law firm that qualified as the practice of law.

In *Matter of Ramos*, a Massachusetts lawyer was suspended for six months for practicing law in Ohio without a license to practice in that state.⁸⁴⁸ The report does not indicate that the lawyer offered any substandard services to his Ohio clients.⁸⁴⁹

You Should Know

Most of the reported violations of Rule 5.5 have led to suspensions of six months or six months and a day, even when other misconduct accompanies that violation.

3) Public Reprimand

⁸⁴³ 16 Mass. Att’y Disc. R. 35 (2000).

⁸⁴⁴ 22 Mass. Att’y Disc. R. 179 (2006).

⁸⁴⁵ 18 Mass. Att’y Disc. R. 363 (2002).

⁸⁴⁶ 32 Mass. Att’y Disc. R. ___, 2016 WL 7493931 (2016).

⁸⁴⁷ 30 Mass. Att’y Disc. R. 297 (2014).

⁸⁴⁸ 29 Mass. Att’y Disc. R. 554 (2013). The lawyer also failed to report a conviction to Bar Counsel.

⁸⁴⁹ See also *Matter of Airewele*, 28 Mass. Att’y Disc. R. 3 (2012) (suspension of six months and a day for practicing in Georgia without a license, along with neglect and conflict of interest).

Since 1999, few lawyers who have violated Rule 5.5 have received a public reprimand except when the violation occurred by the lawyer's practice during an administrative suspension.⁸⁵⁰ In *Matter of Hutton*,⁸⁵¹ the respondent, misled by his partner, allowed a suspended lawyer to return to the firm to work on client matters. The hearing report found his misconduct less egregious than other cases of assisting with UPL, and recommended a public reprimand, which the Board imposed.⁸⁵²

In *Matter of Gillespie*,⁸⁵³ an attorney received a public reprimand after she continued to practice law despite her administrative suspension, in violation of Rule 5.5(a). Unlike the lawyers who received term suspensions for that misconduct (see above), this respondent reasonably believed that her registration fees had been paid by her then-partner. The Board's report states, "Where the respondent did not in fact have actual knowledge of her administrative suspension, public reprimand is the appropriate discipline."⁸⁵⁴ Despite that assertion by the board, however, some lawyers whose conduct fits that description have received admonitions,⁸⁵⁵ as the next section shows.

In *Matter of McSwiggan*,⁸⁵⁶ a lawyer was publicly reprimanded for practicing law while administratively suspended and but did not claim lack of knowledge or a belief that an employee was responsible for completing his registration.

4) Admonition

Several lawyers have received admonitions for continuing to practice law after an administrative suspension, misconduct that presumptively warrants a public reprimand, according to the BBO's statement in 2010.⁸⁵⁷ The admonitions appear both before⁸⁵⁸ and after⁸⁵⁹ that BBO statement. None of the later admonitions has addressed the

⁸⁵⁰ Compare *Matter of Nardi*, 10 Mass Att'y Disc. R. 204 (1994) (public reprimand after respondent assisted the principal and staff of a Massachusetts corporation in the unauthorized practice of law).

⁸⁵¹ 31 Mass. Att'y Disc. R. ___, 2015 WL 10322933 (2015).

⁸⁵² The partner who "duped" Hutton and more actively assisted the suspended lawyer to return to the firm was suspended for three months. See *Matter of Vasa*, 32 Mass. Att'y Disc. R. ___, 2016 WL 7493931 (2016).

⁸⁵³ 26 Mass. Att'y Disc. R. 223 (2010).

⁸⁵⁴ See also *Matter of Cavanaugh*, 26 Mass. Att'y Disc. R. 68 (2010) (public reprimand where attorney believed firm had paid the registration fee); *Matter of Payton*, 26 Mass. Att'y Disc. R. 495 (2010) (public reprimand where respondent's wife, to whom he had given registration fee and materials, failed to mail them).

⁸⁵⁵ See AD No. 12-01, 28 Mass. Att'y Disc. R. 913 (2012); AD No. 12-07, 28 Mass. Att'y Disc. R. 923 (2012); AD No. 09-03, 25 Mass. Att'y Disc. R. 657 (2009); AD No. 09-10, 25 Mass. Att'y Disc. R. 670 (2009); AD No. 04-20, 20 Mass. Att'y Disc. R. 697 (2004); AD No. 03-07, 19 Mass. Att'y Disc. R. 531 (2003).

⁸⁵⁶ 29 Mass. Att'y Disc. R. 454 (2013).

⁸⁵⁷ *Matter of Gillespie*, 26 Mass. Att'y Disc. R. 223 (2010).

⁸⁵⁸ See, e.g., AD No. 09-03, 25 Mass. Att'y Disc. R. 657 (2009); AD No. 09-10, 25 Mass. Att'y Disc. R. 670 (2009); AD No. 04-20, 20 Mass. Att'y Disc. R. 697 (2004); AD No. 03-07, 19 Mass. Att'y Disc. R. 531 (2003).

⁸⁵⁹ See, e.g., AD No. 12-01, 28 Mass. Att'y Disc. R. 913 (2012); AD No. 12-07, 28 Mass. Att'y Disc. R. 923 (2012).

presumptive standard, but each of the admonitions involved an innocent mistake by the lawyer.

On occasion, the Board has admonished a lawyer for practicing, in a limited way, in another jurisdiction without a license. For instance, in AD 99-13,⁸⁶⁰ the attorney received an admonition after he entered an appearance on behalf of three defendants in a California court when he was not admitted to practice there. The attorney did not have, nor had he sought, court permission to appear *pro hac vice*. The lawyer had also engaged in other misconduct involving making harassing telephone calls in the middle of the night to an attorney with whom he had a family-related dispute. In AD 99-43,⁸⁶¹ the attorney had registered as a retired lawyer in Massachusetts, yet entered appearances in probate court on behalf of several relatives in a will contest.

V. **Regulating the Relationship Between Lawyers and Nonlawyers in the Delivery of Legal Services**

Rule 5.4: Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer or law firm may agree to share a statutory or tribunal-approved fee award, or a settlement in a matter eligible for such an award, with a qualified legal assistance organization that referred the matter to the lawyer or law firm, if (i) the organization is one that is not for profit, (ii) the organization is tax-exempt under federal law, (iii) the fee award or settlement is made in connection with a proceeding to advance one or more of the purposes by virtue of which the organization is tax-exempt, and (iv) the client consents, after being informed that a division of fees will be made, to the sharing of the fees and the total fee is reasonable.

⁸⁶⁰ 15 Mass. Att'y Disc. R. 668 (1999).

⁸⁶¹ 15 Mass. Att'y Disc. R. 729 (1999).

(b) A lawyer shall not form a partnership or other business entity with a nonlawyer if any of the activities of the entity consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a limited liability entity authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation including a limited liability company; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

*** * ***

RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures, which shall include notice in writing, to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client lawyer relationship do not exist.

(b) The term "law related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

A. The Lessons of Rules 5.4 and 5.7

Rules 5.4 and 5.7 address similar topics—the proper relationship between lawyers and nonlawyers in the delivery of legal services. This is an important and developing issue in the legal profession, but, as yet, the source of little activity within the disciplinary reports. As a result, this summary of the provisions of these rules will be brief.

Nonlawyers may not engage in the practice of law. Related to that fundamental tenet, Rule 5.4(b) states that lawyers may not practice law in an organization or firm in which nonlawyers own an interest. Nonlawyers may not own law firms or own equity interests in law practices. Lawyers may lawfully practice in nonprofit organizations in which nonlawyers serve as managers or directors, as long as the nonlawyers do not interfere with the independent professional judgment of the lawyers. Also, Rule 5.4(a) provides that lawyers may not share legal fees with nonlawyers, except to pay the nonlawyers for services provided, with some other narrow exceptions. These provisions establish a limitation in Massachusetts on most forms of multidisciplinary practice (often termed “MDP”), where lawyers and other professionals jointly own and operate a full-service establishment offering complementary products to clients who have multiple needs. The legal profession has been debating whether to change that fundamental restriction on multidisciplinary practice, but any such efforts have thus far failed.⁸⁶²

No lawyer in Massachusetts has been disciplined for engaging in multidisciplinary practice. A handful of lawyers have been disciplined for sharing legal fees with nonlawyers, as discussed below. Those cases serve as the only reported discipline under Rule 5.4.

Rule 5.7 is complementary to Rule 5.4. It establishes procedures to be followed when a lawyer offers to his clients “ancillary services” that are not legal services. Typical examples include title insurance, consulting services, or real estate appraisals. While true multidisciplinary practice is not permitted in Massachusetts, a lawyer or law firm may offer such non-legal services to customers, as long as the limitations of Rule 5.4 about ownership interests of and fee payments to the nonlawyers have been honored. If a lawyer chooses to offer both legal services and ancillary non-legal services, Rule 5.7 establishes protocols the lawyer must follow to ensure that clients and customers understand what part of the delivery of services qualifies for the ethical protections that legal services get, and what parts do not.

The Boston Bar Association Ethics Committee has issued a formal ethics opinion outlining the proper steps for a lawyer to take to satisfy Rule 5.7 and the rules governing conflicts and confidentiality.⁸⁶³

B. Discipline for Violation of Rules 5.4 and 5.7

⁸⁶² For one example of the ongoing efforts within the ABA to permit some limited form of multidisciplinary practice, see AMERICAN BAR ASS’N, DISCUSSION DRAFT FOR COMMENT: ALTERNATIVE LAW PRACTICE STRUCTURES 6 (Dec. 2, 2011).

⁸⁶³ Boston Bar Association, Op. 2002-B, at <http://www.bostonbar.org/sc/ethics/Ethics2002-B.PDF>.

Four lawyers have been disciplined since 1999 for violations of Rule 5.4, all for sharing legal fees with nonlawyers. In *Matter of Hale*,⁸⁶⁴ the attorney received a public reprimand for having agreed to pay his paralegal 25% of the legal fees received for his immigration work. The lawyer's prior admonition served as an aggravating factor. Two other lawyers received admonitions for sharing fees. In AD No. 08-04,⁸⁶⁵ the lawyer received an admonition for agreeing to pay his office manager 33% of all of his legal fees as her salary. In AD No. 99-31,⁸⁶⁶ the lawyer paid a referral fee to a nonlawyer, and also mismanaged his IOLTA account. And in *Matter of Shalom*,⁸⁶⁷ the lawyer was suspended indefinitely for multiple instances of misconduct, including paying a "finder's fee" to a nonlawyer in return for a referral.⁸⁶⁸

Only two Massachusetts lawyers have been disciplined, both receiving admonitions, for misconduct involving Rule 5.7, arising out of their provision of ancillary services to customers in a fashion that did not make clear that the activities were not legal services. In AD 03-30,⁸⁶⁹ the respondent, while operating a corporation in New York City that offered tax preparation and tax representation services, prepared back tax returns and sought to resolve IRS bills for overdue taxes. The attorney did not explain to the client that his services were not legal services. And in AD 03-02,⁸⁷⁰ the attorney failed to inform his clients that his brokerage services in a real estate closing were not legal services, and received an admonition.

VI. The Nature of the Lawyer's Responsibilities Regarding Restrictions on the Right to Practice

Rule 5.6: Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

⁸⁶⁴ 20 Mass. Att'y Disc. R. 201 (2004).

⁸⁶⁵ 24 Mass. Att'y Disc. R. 848(2008).

⁸⁶⁶ 15 Mass. Att'y Disc. R. 708 (1999).

⁸⁶⁷ 19 Mass. Att'y Disc. R. 389 (2003).

⁸⁶⁸ See also *Matter of Jackman*, 444 Mass. 1013, 21 Mass. Att'y Disc. R. 349 (2005), noted in the discussion of Rule 5.5 above. In *Jackman*, the full SJC concluded that a term suspension was the appropriate sanction for a lawyer who practiced and shared fees with a nonlawyer.

⁸⁶⁹ 19 Mass. Att'y Disc. R. 573 (2003).

⁸⁷⁰ 19 Mass. Att'y Disc. R. 520 (2003).

A. The Lessons of Rule 5.6

Rule 5.6 prohibits a lawyer from entering into any agreement that restricts the lawyer's right to practice in the future. This rule prohibits restrictive covenants in employment agreements or in settlement terms. The rule restates previous Massachusetts law.⁸⁷¹ Its purpose is to prevent either law firms or opposing parties from insisting that a lawyer agree not to engage in certain representation activities in the future, as such terms interfere with "[t]he strong public interest in allowing clients to retain counsel of their choice."⁸⁷²

Rule 5.6 has seldom been the source of discipline in Massachusetts.⁸⁷³ Its relevance has been more apparent in disputes about partners' departure from law firms and the firms' efforts to limit later activity by former partners. The SJC has decided important cases in which the court relied upon the principles of Rule 5.6 and its predecessor, DR 2-108, to invalidate some provisions of partnership agreements that served to limit the practices of lawyers who leave the firm.⁸⁷⁴ At the same time, Rule 5.6 does not prohibit the SJC or the BBO from imposing limitations on a lawyer's practice as part of the lawyer's disciplinary sanction. While not common, such conditions appear in the disciplinary reports.⁸⁷⁵

⁸⁷¹ See DR 2-108.

⁸⁷² *Meehan v. Shaughnessy*, 404 Mass. 419, 431 (1989).

⁸⁷³ In *Matter of Traficonte*, 22 Mass. Att'y Disc. R. 747, the respondent "violated Canon Two, DR 2-108(B) (entering into an agreement in connection with a settlement that restricts the lawyer's right to practice law)," among many other instances of misconduct, and received a one-year suspension.

⁸⁷⁴ See, e.g., *Meehan v. Shaughnessy*, *supra*; *Pettingell v. Morrison, Mahoney & Miller*, 426 Mass. 253, 256 (1997); *Eisenstein v. David G. Conlin, P.C.*, 444 Mass. 258, 262–263 (2005); *Pierce v. Morrison Mahoney LLP*, 452 Mass. 718 (2008).

⁸⁷⁵ See, e.g., *Matter of Jackman*, 444 Mass. 1013, 21 Mass. Att'y Disc. R. 349 (2005) (ordering that the respondent's "practice shall be limited to representation of criminal defendants in the District Court Department").

Part IX

Advertising and Solicitation (Rules 7.1 through 7.5)

I. Introduction

The Massachusetts Rules of Professional Conduct limit the ways in which Massachusetts lawyers may market their practice. Until the latter part of the twentieth century lawyers were essentially forbidden from advertising their services in a commercial way, but decisions of the United States Supreme Court, relying on the First Amendment rights of lawyers and associational rights of clients, opened up the commercial marketing world for attorneys, beginning about forty years ago. But many restrictions still apply, and lawyers need to understand them. While Massachusetts lawyers have not been disciplined often for violating rules regulating advertising and solicitation, on occasion lawyers have run into trouble by overreaching in this area. With the emergence of social networking and similar creative marketing opportunities, this topic may lead to intriguing questions of discipline in the future.

II. The Nature of the Lawyer's Responsibilities Regarding Advertising and Solicitation

The regulation of lawyers' efforts to obtain clients appears in Rules 7.1 through 7.5. Those rules permit advertising by lawyers quite liberally, but limit, while not banning, more focused solicitation of individual clients. The rules also restrict the trade names and associational references that lawyers use to identify their practices, as well as claims of expertise or specialization. The critical theme throughout this regulatory scheme is that all marketing endeavors must be honest, not be misleading, and not pressure any prospective client. The next part reviews briefly each of the five rules, without an extensive discussion of the regulatory details.⁸⁷⁶

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

⁸⁷⁶ For a more extensive discussion of the advertising, solicitation, and marketing protocols applicable to Massachusetts lawyers, see, e.g., Ronald F. Kehoe, *Lawyer Marketing*, in *ETHICAL LAWYERING IN MASSACHUSETTS*, Chapter 2 (4th ed., James S. Bolan ed., 2015 and 2017 Supp.); Steven W. Kasten, *Professional Ethics and Social Media*, 55 *BOSTON BAR J.* 40 (Summer 2011); Sherri Gilmore, *The Ethical Limits on Lawyer Advertising and Solicitation*, <https://bbopublic.blob.core.windows.net/web/f/advertising.pdf>; Sarah A. Chambers, *Pick Me! Pick Me! Pick Me! (An Advertising and Solicitation Update)*, <https://bbopublic.blob.core.windows.net/web/f/pickme.pdf> (2005).

RULE 7.2: ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan, not-for-profit lawyer referral service, or qualified legal assistance organization;

(3) pay for a law practice in accordance with Rule 1.17;

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement;

and

(5) pay fees permitted by Rule 1.5(e) or Rule 5.4(a)(4).

(c) Any communication made pursuant to this Rule shall include the name of the lawyer, group of lawyers, or firm responsible for its content.

RULE 7.3: SOLICITATION OF CLIENTS

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment for a fee, unless the person contacted:

(1) is a lawyer;

(2) has a prior professional relationship with the lawyer;

(3) is a grandparent of the lawyer or the lawyer's spouse, a descendant of the grandparents of the lawyer or the lawyer's spouse, or the spouse of any of the foregoing persons; or

(4) is (i) a representative of an organization, including a non-profit or government entity, in connection with the activities of such organization, or (ii) a person engaged in trade or commerce as defined in G.L. c. 93A, §1(b), in connection with such person's trade or commerce.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress or harassment; or

(3) the lawyer knows or reasonably should know that the physical, mental, or emotional state of the target of the solicitation is such that the target cannot exercise reasonable judgment in employing a lawyer, provided, however, the prohibition in this clause (3) only applies to solicitations for a fee.

(c) [Reserved]

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association or other non-profit organization, and cooperate with any other qualified legal assistance organization.

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) Lawyers may hold themselves out publicly as specialists in particular services, fields, and areas of law if the communication is not false or misleading. Such holding out includes a statement that the lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular service, field, or area of law. Lawyers who hold themselves out specialists shall be held to the standard of performance of specialists in that particular service, field, or area.

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law unless the name of the certifying organization is clearly identified in the communication and:

(1) the lawyer has been certified as a specialist by an organization that has

been approved by an appropriate state authority or accredited by the American Bar Association, or

(2) the communication states that the certifying organization is “a private organization, whose standards for certification are not regulated by a state authority or the American Bar Association.”

RULE 7.5: FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

A. The Lessons of Rule 7.1

Rule 7.1 states: “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.” This rule establishes a high standard of truthfulness for communications by lawyers. It requires lawyers to ensure that none of their communications about their practices or skills is misleading to prospective clients.⁸⁷⁷ For instance, two Massachusetts lawyers sought out prospective clients and others by advertising in Rhode Island and claiming, truthfully, that they were “members of the ‘Rhode Island Bar Association’ without stating that these memberships were as ‘associates’ and that neither respondent was licensed to practice law in Rhode Island.” That conduct violated Rule 7.1.⁸⁷⁸

This rule applies to all marketing and business-generating communications by a lawyer, and in that way serves as an overlay to the remaining rules we discuss.

⁸⁷⁷ In *Matter of Zak*, 476 Mass. 1034, 1038 (2017), the SJC, in disbaring an attorney who engaged in unfair and deceptive practices in marketing his legal practice, noted that “[i]t is not necessary to show that a client or potential client relied on the respondent’s deliberate misrepresentations in order to establish that he made them.”

⁸⁷⁸ AD No. 03-47, 19 Mass. Att’y Disc. R. 609 (2003).

Practice Tip

Lawyers are permitted to publicize prior successes in their marketing campaigns, but must exercise special care to be accurate in how they describe those successes. Lawyers may not imply any promise of success to prospective clients or favorably compare their services to other lawyers unless they can substantiate the claim.

B. The Lessons of Rule 7.2

Rule 7.2 provides guidance to lawyers about advertising, which is different from solicitation, the subject of Rule 7.3. Lawyers may advertise freely, so long as their advertising is not false or misleading. The only requirements are that the lawyer must include the lawyer's name on any such advertising,⁸⁷⁹ and may not pay or otherwise reward anyone for recommending the lawyer's services,⁸⁸⁰ except for such understandable items as payment for the cost of advertising or for a lawyer referral service.⁸⁸¹

Advertising means marketing to a broad audience, and not targeted to specific individuals known to need legal services. Because lawyers' websites and home pages are a form of advertising, as are attorney profiles on sites such as LinkedIn,⁸⁸² lawyers must comply with Rule 7.2 with respect to those communications. Some sources have expressed concern that advertising that employs testimonials about the lawyer's successes may violate the "misleading" standard if the statements made cannot be documented as true for prospective clients, or imply that the lawyer will obtain certain results for a client.⁸⁸³

Practice Tip

Social media counts.⁸⁸⁴ Anything you say about your practice on social media sites may qualify as advertising and therefore must conform to the Rules.

C. The Lessons of Rule 7.3

⁸⁷⁹ MASS. RULES OF PROF. CONDUCT 7.2(c).

⁸⁸⁰ Rule 7.2(b). *See Zak* (sharing fees with a nonlawyer agent to locate clients violated this Rule; respondent disbarred).

⁸⁸¹ Rule 7.2(b)(1), (2).

⁸⁸² *See Kasten, supra* note 876, at 42. *See also* Matter of Saletan, 29 Mass. Att'y Disc. R. 574 (2013) (inactive lawyer's identification as counsel on LinkedIn page violates Rule 7.1).

⁸⁸³ *See, e.g.,* Utah State Bar Ethics Advisory Comm., Op. No. 09-01 (2009) (client testimonials are prohibited to the extent they are "false or misleading"); Connecticut Informal Op. 01-07 (2001) (expressing that worry).

⁸⁸⁴ *See, e.g.,* Hunter v. Va. State Bar, 744 S.E.2d 611, 613 (Va. 2013) (lawyer's blog entries constituted a form of advertising); *Board Wrestles with LinkedIn Issues*, THE FLORIDA BAR NEWS (January 1, 2014) (Florida Bar Board of Governors "authorized a committee to explore preparing an opinion on lawyers using the business networking site LinkedIn").

The most extensive business-generating regulation applies to solicitation, which is governed by Rule 7.3. The Comment to Rule 7.3 defines solicitation as “a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services.”⁸⁸⁵ This Rule states that lawyers may not solicit prospective clients *at all* if the person has indicated to the lawyer a desire not to be solicited;⁸⁸⁶ may not solicit *for a fee* if the prospective client is vulnerable and cannot exercise reasonable judgment;⁸⁸⁷ and may not solicit *for a fee* by the use of telephone, email, real-time electronic communication, or in-person communication, except for certain relatives of the lawyer, prior clients, and the representatives of a business or an organization, including a nonprofit.⁸⁸⁸

Therefore, if not intending to receive a fee from the client, lawyers may solicit individual clients directly (unless they have expressed a desire not to be contacted), by any means other than those that are deceptive or pressuring. If the lawyer is seeking a paying client, the lawyer may write to prospective clients generally. And if the lawyer is seeking a paying client, she may not communicate with the prospective client directly by telephone, email, real-time electronic communication, or in person, unless the individual is related to the lawyer, is a former client, or the prospective client is an organization or engaged in a business.

Practice Tip

Be especially careful about soliciting business by telephone, email, real-time electronic communication, or in-person conversation from individual clients who you believe are in need of your legal services. Rule 7.3 is particularly protective of potentially-vulnerable individuals.

D. The Lessons of Rule 7.4

Rule 7.4 regulates lawyers’ claims to special expertise. A Massachusetts lawyer may claim to be an expert or a specialist, but only if that claim is not false or misleading.⁸⁸⁹ If the lawyer wishes to claim that she is “certified” in a specific legal area, she must identify the certifying organization and explain (if true) that the organization is not a governmental body.⁸⁹⁰ Claiming such expertise or certification no doubt has some marketing benefits, but it has a corresponding cost. If a lawyer claims such special expertise or proficiency, or even if she simply claims to concentrate in or limit her practice to that area, she will be held to a higher standard of care.⁸⁹¹ That consequence

⁸⁸⁵ Rule 7.3, Cmt. [1].

⁸⁸⁶ Rule 7.3(b)(1).

⁸⁸⁷ Rule 7.3(b)(3).

⁸⁸⁸ Rule 7.3(a)(1)–(4).

⁸⁸⁹ Rule 7.4(b)

⁸⁹⁰ Rule 7.4(c).

⁸⁹¹ Rule 7.4(b). The ABA’s Model Rules do not include a provision corresponding to Rule 7.4(b), although some common law principles from other jurisdictions establish that point. *See, e.g.,* Hizey v.

will have meaning for the lawyer facing a civil claim of malpractice, but seldom, if ever, will affect a disciplinary proceeding.⁸⁹²

Lawyers have on occasion faced discipline for misconduct implicating Rule 7.4, including earlier versions of this limitation.⁸⁹³

E. The Lessons of Rule 7.5

Rule 7.5 governs what name a lawyer might use for a law firm or practice.⁸⁹⁴ The rule restricts the options available to lawyers in a very minor way. Law firm names may not be false or misleading, of course, but a law firm may use a trade name if the name satisfies that criterion.⁸⁹⁵ A Massachusetts law firm may use its name in a different jurisdiction (the converse is also true), but it must identify the jurisdictional limitations of its lawyers. If a law practice uses a name that implies more than one attorney (such as “Law Group” or “Associates”), that usage must not be misleading.⁸⁹⁶

Rule 7.5 becomes challenging in two settings.⁸⁹⁷ One relates to the role of a lawyer with an “of counsel” relationship with the firm. The other relates to the situation where lawyers share space but without operating as a single firm.

In Formal Op. 90-357,⁸⁹⁸ the ABA’s Committee on Ethics and Professional Responsibility defined the concept of an “of counsel” arrangement as a lawyer with “a close, regular, personal relationship” with a law firm but excluding “that of a partner (or its equivalent, a principal of a professional corporation), with the shared liability and/or managerial responsibility implied by that term,” and excluding an associate, defined as “a

Carpenter, 830 P.2d 646, 651–52 (Wash. 1992) (noting the principle but not applying it); 1 R. MALLIN & J. SMITH, *LEGAL MALPRACTICE* § 15.4 (5th ed. 2000).

⁸⁹² No reported Massachusetts malpractice case has relied upon Rule 7.4(b), and no disciplinary case in the Commonwealth has cited that provision.

⁸⁹³ See *Matter of Capone*, 17 Mass. Att’y Disc. R. 105 (2001) (indefinite suspension for multiple instances of misconduct, including falsely claiming board certification on letterhead); AD 09-12, 25 Mass. Att’y Disc. R. 674 (2009) (Rule 7.4(a) violation by holding out as a specialist in immigration law without experience in that area). In 1986, at a time when lawyers were forbidden to claim to be specialists, a lawyer received a private reprimand under DR 2-105(A) for advertising that his law firm “specialized” in employee/employer disputes. See PR 86-30, 5 Mass. Att’y Disc. R. 472 (1986). That claim, if true, would not violate any rule today. Also, a lawyer received a reprimand in 1995 for claiming that his law firm had “specialists,” when those persons were paralegals. See PR 95-34, 11 Mass. Att’y Disc. R. 371 (1995).

⁸⁹⁴ See also SJC Rule 3:06(2)(c) (if a law firm operates as a limited liability entity, “[t]he name of the entity shall contain words or abbreviations that indicate that it is a limited liability entity”).

⁸⁹⁵ Rule 7.5. Cmt. [1]. If the trade name includes a geographic reference, the firm might have to disclaim any implication that it has any relationship to a governmental body. *Id.* In addition, a law firm may not use the name of a lawyer who is not in good standing with the bar, given the requirements of Comment [1] that a firm name may only include only current, retired or deceased law firm members.

⁸⁹⁶ See *Matter of Miller*, 28 Mass. Att’y Disc. R. 608 (2012) (solo marketed his firm as “group” and “associates,” among other misconduct; public reprimand); AD 05-05, 21 Mass. Att’y Disc. R. 672 (2005) (admonition for implying associates while operating a solo practice).

⁸⁹⁷ See Sarah A. Chambers, *Pick Me! Pick Me! Pick Me! (An Advertising and Solicitation Update)*, <https://bbopublic.blob.core.windows.net/web/f/pickme.pdf> (2005).

⁸⁹⁸ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 90-357 (1990).

junior non-partner lawyer, regularly employed by the firm.” The Office of Bar Counsel has declared that firm names should not include lawyers serving in an “of counsel” position:

The name of a lawyer who is of counsel to a firm should not appear in the name of the firm unless the lawyer who is of counsel is a retired name partner of the firm. Including the name of a lawyer who is simply of counsel without the status of a prior named partner would be deceptive and misleading in violation of Mass. R. Prof. C. 7.1 and 7.5 because of the implication that the of counsel lawyer is an actual member of the firm.⁸⁹⁹

Based on the same reasoning, lawyers who share office space but do not operate as a single law firm may not employ a trade name that implies the existence of a law firm or partnership. Comment 2 to Rule 7.5 explains the limitation:

[L]awyers who are not in fact partners, such as those who are only sharing office facilities, may not denominate themselves as, for example, “Smith and Jones,” or “Smith and Jones, A Professional Association,” for those titles, in the absence of an effective disclaimer of joint responsibility, suggest partnership in the practice of law or that they are practicing law together in a firm. Likewise, the use of the term “associates” by a group of lawyers implies practice in either a partnership or sole proprietorship form and may not be used by a group in which the individual members disclaim the joint or vicarious responsibility inherent in such forms of business in the absence of an effective disclaimer of such responsibility.⁹⁰⁰

This Comment to Rule 7.5 does not forbid lawyers who share space from using a collective name for their practice setting. With “an effective disclaimer” of joint responsibility, lawyers who practice together may share a common trade name. The Office of Bar Counsel has offered guidance for such lawyers:

In order for a disclaimer to be effective, a more detailed statement about the relationship among the attorneys in the group practice is necessary, such as: “Each attorney in this office is an independent practitioner who is not responsible for the practice or the liability of any other attorney in the office.” This type of detailed disclaimer must appear on the letterhead, web site, advertising, and any other medium in which the name of the office appears, and not just the name of the individual attorney.⁹⁰¹

On occasion, lawyers receive discipline for violating Rule 7.5 because of the trade name chosen, although typically the discipline arose in conjunction with other, more

⁸⁹⁹ Nancy Kaufman, *The Of Counsel Relationship*, <https://bbopublic.blob.core.windows.net/web/f/ofcounsel.pdf> (2000). For further consideration of the “of counsel” relationship, see HAROLD G. WREN & BEVERLY J. GLASCOCK, *THE OF COUNSEL AGREEMENT: A GUIDE FOR LAW FIRM AND PRACTITIONER* (3rd. ed. 2005).

⁹⁰⁰ Rule 7.5, Cmt. [2].

⁹⁰¹ Daniel C. Crane & J. W. Marshall, *Space-Sharers, Beware!*, <https://bbopublic.blob.core.windows.net/web/f/space.pdf> (2000).

significant misconduct.⁹⁰² At least one attorney, however, has been publicly reprimanded for using misleading trade names, with no other misconduct.⁹⁰³

Practice Tip

Besides ensuring that the name of the practice is not misleading, lawyers in separate firms who share office space encounter many other ethical challenges, especially involving confidentiality duties and avoiding conflicts of interest. Review other chapters of this treatise to learn more about how to protect yourself if you share office space and a receptionist.

III. Typical Sanctions Imposed for Violation of the Rules Governing Advertising and Solicitation

This section reviews the discipline imposed upon Massachusetts lawyers for violations of the rules governing marketing and solicitation. The review proceeds without separate treatments of each respective rule, as the decisions are few in number and therefore may be treated collectively. The most common sanction for violating the bar's marketing rules has been an admonition, but on occasion more serious discipline has been imposed.

You Should Know

Lawyers do receive discipline for violating the marketing and solicitation rules. For improper solicitation of vulnerable prospective clients, lawyers typically receive public reprimands. For advertising and marketing misconduct, lawyers typically receive admonitions.

1) Disbarment

No lawyer in Massachusetts has ever been disbarred solely for breaking the rules about marketing his legal services or violating the duties imposed by these rules. On occasion the SJC has included a marketing violation among other misconduct in a disbarment decision,⁹⁰⁴ but the sanction for getting into trouble in this area will always be something less than loss of one's license.

⁹⁰² See, e.g., Matter of Airewele, 28 Mass. Att'y Disc. R. 3 (2012) (suspension for more serious misconduct); Matter of O'Reilly, 26 Mass. Att'y Disc. R. 466 (2010) (suspension for more serious misconduct).

⁹⁰³ Matter of Zachery, 23 Mass. Att'y Disc. R. 792 (2007) (use of the name of a lawyer who was not part of the law firm).

⁹⁰⁴ See, e.g., Matter of Zak, 476 Mass. 1034 (2017) (noting the lawyer's lack of understanding of the "seriousness of his misconduct with respect to the [false] radio announcements" as one of the factors warranting his disbarment for wide-ranging misconduct involving a loan modification business); Matter of Krantz, 31 Mass. Att'y Disc. R. ___, 2015 WL 9309022 (2015) (along with serious misappropriation of funds, practice of law in Florida without a license there, with a misleading firm name; disbarment); Matter

2) Suspension

No Massachusetts lawyer has been suspended for a primary violation of Rules 7.1 through 7.5. Some lawyers have practiced law in jurisdictions where they were not licensed to practice, and marketed their business as though they were so licensed, and that combination of missteps has led to suspensions. For instance, in *Matter of Saletan*,⁹⁰⁵ the respondent was suspended for six months and a day for engaging in the practice of law while he was in retired/inactive status. The attorney's letterhead used the term "Esquire," and his LinkedIn page and his résumé claimed he was an attorney. And in *Matter of Airewele*,⁹⁰⁶ the attorney was suspended for six months and a day after he opened a law office in Georgia and used a business card that failed to disclose that he was not authorized to practice law in Georgia. The attorney also used a misleading firm name, "Airewele & Associates."⁹⁰⁷

Aside from those unauthorized practice cases, and some occasional matters where the lawyers engaged in serious misconduct but also, incidentally, failed to comply with the rules governing marketing of their services,⁹⁰⁸ no Massachusetts lawyer has been suspended for violating the rules governing advertising and solicitation.

3) Public Reprimand

Many lawyers have received public reprimands for misconduct related to marketing of legal services. Typically, that sanction occurs when the marketing violation accompanies other misconduct, but not always. In-person solicitation by a lawyer for a fee has led to a public reprimand on several occasions (although sometimes the same misconduct results in an admonition). In *Matter of D'Arcy*,⁹⁰⁹ the attorney urged a defendant to retain him for a fee even though the attorney knew that the defendant was represented by court-appointed counsel, in violation of DR 2-103(D), the predecessor to

of Duerr, 21 Mass. Att'y Disc. R. 212 (2005) (along with having done several improper things, the respondent distributed business cards after his administrative suspension, in violation of Rule 7.1); *Matter of Kaigler*, 6 Mass. Att'y Disc. R. 158 (1990) (among much misconduct, including conversion of client property, the respondent offered free legal services in return for referrals, in violation of DR 2-103(E), the predecessor to Rule 7.3(f)); *Matter of Flak*, 6 Mass. Att'y Disc. R. 118 (1990) (disbarment for serious misconduct including, as one count, falsely holding himself out as specialist in federal parole post-conviction relief).

⁹⁰⁵ 29 Mass. Att'y Disc. R. 574 (2013).

⁹⁰⁶ 28 Mass. Att'y Disc. R. 3 (2012).

⁹⁰⁷ For similar suspensions combined with unauthorized practice, see *Matter of Larkowich*, 31 Mass. Att'y Disc. R. ___, 2015 WL 9309007 (2015); *Matter of Daniels*, 23 Mass. Att'y Disc. R. 102 (2007); *Matter of Finn*, 17 Mass. Att'y Disc. R. 200 (2001); *Matter of Shea*, 7 Mass. Att'y Disc. R. 269 (1991).

⁹⁰⁸ See, e.g., *Matter of Barros*, 29 Mass. Att'y Disc. R. 27 (2013) (along with assistance of unauthorized practice, misrepresenting the size and nature of the firm on letterhead and website; suspension of six months and a day); *Matter of Shalom*, 19 Mass. Att'y Disc. R. 389 (2003) (conversion of client funds, assisting criminal conduct, and payment to another to refer matters to the lawyer; indefinite suspension); *Matter of Galat*, 18 Mass. Att'y Disc. R. 229 (2002) (serious conflict of interest, misrepresentations to clients, and use of improper firm name; indefinite suspension).

⁹⁰⁹ 11 Mass. Att'y Disc. R. 51 (1995).

Rule 7.3(d).⁹¹⁰ In *Matter of Gordon*,⁹¹¹ the respondent solicited a defendant after the man's arraignment on charges of driving while under the influence. The attorney personally approached the defendant and his mother in the courthouse hallway to solicit their business and offered to charge a discounted rate. The attorney again offered his legal services via a letter sent on the same day and improperly implied that he had contacts in the District Attorney's Office that could be advantageous. In *Matter of Mannion*,⁹¹² an attorney appeared in person at a jail to offer to represent an inmate for a fee of \$5000. Other examples appear in the disciplinary reports of a sanction of public reprimand for in-person solicitation.⁹¹³

Outside of the direct solicitation context, few disciplinary matters primarily involving marketing have led to public reprimands. In *Matter of Zachery*,⁹¹⁴ mentioned above, an attorney used stationery that misleadingly identified her practice as a partnership, the law firm called "Williams & Zachery." The respondent listed two other attorneys as "of counsel" without any affiliation to or authorization from them. All of the other public reprimands involving a violation of Rules 7.1 through 7.5 have involved other, separate misconduct.⁹¹⁵

4) Admonition

Most disciplinary matters involving improper marketing lead to admonitions, if the matters are not resolved informally through Bar Counsel's ACAP diversion program. Lawyers who make mistakes about how they describe their practices or their status seemingly can expect at most an admonition, absent any significant harm to others or some special element of irresponsibility. For example, in AD 06-07,⁹¹⁶ the attorney, a

⁹¹⁰ Because the defendant whom the lawyer solicited already had counsel, the Board cites a separate violation of DR 1-102(A)(5) ("A lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice."). That Board citation is puzzling, because, as the discussion of Rule 4.2 in this chapter shows, it is not improper for a lawyer to discuss with a prospective client the merits of the client's case or the possibility of representation, as long as the lawyer complies with the rules governing solicitation. See Part VII, Section IV.

⁹¹¹ 23 Mass. Att'y Disc. R. 203 (2007); see also *Matter of D'Arcy*, 11 Mass. Att'y Disc. R. 51 (1995) (attorney received a public reprimand after urging a defendant to retain him for a fee after overhearing a discussion between the presiding judge and the defendant).

⁹¹² 12 Mass. Att'y Disc. R. 265 (1996). In aggravation, the Hearing Committee found that the lawyer intentionally lied about his actions during the BBO proceedings.

⁹¹³ See, e.g., *Matter of Holzberg*, 12 Mass. Att'y Disc. R. 200 (1996) (solicitation letter with intentionally too-small font (as required by prior version of the rules) identifying the communication as marketing). Cf. *Matter of White*, 28 Mass. Att'y Disc. R. 893 (2012) (improper solicitation, with a separate count of neglect of a matter; public reprimand).

⁹¹⁴ 23 Mass. Att'y Disc. R. 792 (2007).

⁹¹⁵ See, e.g., *Matter of Nardi*, 10 Mass. Att'y Disc. R. 204 (1994) (public reprimand where attorney allowed corporation to solicit professional employment on his behalf in the course of selling living trusts to consumers; also conflict of interest, poor representation, and assistance with unauthorized practice); *Matter of Connell*, 6 Mass. Att'y Disc. R. 63 (1990) (public reprimand and one-year probation where attorney, while performing legal services as an independent contractor, acquiesced in the use of his name in misleading advertising; also assisted with unauthorized practice).

⁹¹⁶ 22 Mass. Att'y Disc. R. 856 (2006). See also, AD No. 05-05, 21 Mass. Att'y Disc. R. 672 (2005) (attorney was a solo practitioner yet used a firm name that falsely implied he employed associates or

sole practitioner, used a letterhead that identified his law practice as his name “& Associates.” In AD 00-23,⁹¹⁷ the attorney practiced law in an office run by a paralegal who lawfully represented clients in Social Security disability matters. The office’s marketing materials failed to clarify that the paralegal was not a lawyer and that the organization was not a law firm. And in AD 96-41,⁹¹⁸ the respondent placed an advertisement in the yellow pages for a multi-service domestic relations center comprised of a lawyer, a therapist, an accountant, and a business advisor. No such center existed; the attorney intended to refer clients to outside professionals, who would charge separate fees. The attorney received an admonition conditioned upon his attendance at a CLE course designated by Bar Counsel.

Several lawyers have received admonitions or private reprimands for improper listings on their stationery and letterhead. In AD 96-12,⁹¹⁹ an attorney on inactive status in Massachusetts identified himself on letterhead as a member of the Massachusetts bar without noting his inactive status. In PR 86-19,⁹²⁰ the attorney’s law office included on firm letterhead the name of an attorney whom the firm hoped to hire, but had not hired. In PR 87-8,⁹²¹ the lawyer listed a nonlawyer on his stationery without any designation as to her actual status.

In two of these matters involving improper stationery or letterhead, the respondents practiced law without a license and marketed themselves as a lawyer, and received an admonition. (As noted above, a similar type of misconduct resulted in term suspensions for two lawyers.⁹²²) In AD 98-22,⁹²³ the attorney filed a petition in court on behalf of a client one month before she was admitted to the Massachusetts bar and identified herself as an attorney on the petition. She also used stationery identifying herself as a member of the bar. In AD 99-43,⁹²⁴ the attorney elected “retired” status, yet identified herself on her letterhead as a member of the bar without noting her retired status, represented clients, and made appearances in at least two probate court matters. While both lawyers received admonitions, the lawyers’ unauthorized practice was minimal compared to the active practices of the two lawyers who were suspended from the practice of law. Both of the reports showing a lesser sanction were older as well, perhaps suggesting less tolerance today for that misconduct.

On occasion, a lawyer has received an admonition for improper solicitation, which as indicated above typically would result in a public reprimand. In each case, however, the solicitation effort was less egregious than those encountered above. For

worked with partners in violation of 7.1); AD No. 98-64, 14 Mass. Att’y Disc. R. 928 (1998) (lawyer in solo practice admonished for use of “Associates” in firm name).

⁹¹⁷ 16 Mass. Att’y Disc. R. 482 (2000).

⁹¹⁸ 12 Mass. Att’y Disc. R. 667 (1996).

⁹¹⁹ 12 Mass. Att’y Disc. R. 617 (1996).

⁹²⁰ 5 Mass. Att’y Disc. R. 452 (1986).

⁹²¹ 5 Mass. Att’y Disc. R. 490 (1987).

⁹²² See *Matter of Saletan*, 29 Mass. Att’y Disc. R. 574 (2013), discussed *supra* at note 905; *Matter of Airewele*, 28 Mass. Att’y Disc. R. 3 (2012), discussed *supra* at note 334.

⁹²³ 14 Mass. Att’y Disc. R. 845 (1998).

⁹²⁴ 15 Mass. Att’y Disc. R. 729 (1999).

example, in AD 05-25,⁹²⁵ an inexperienced lawyer approached a disabled woman in a nursing home to convince her to retain him, but only after having received a telephone call from her son. In AD 99-17,⁹²⁶ the attorney sent letters to real estate brokers announcing “a special offer for your buyers who wish to have their Purchase & Sale Agreements reviewed by an attorney.” Bar Counsel concluded that this tactic circumvented the rules prohibiting personal solicitation. In PR 93-1,⁹²⁷ the respondent attorney sent solicitation letters to prospective clients, not labeled as advertising as required by the rules in effect at that time. And in PR 93-35,⁹²⁸ the attorney sent a letter to an individual expressing condolences for the death of his wife and offering legal assistance if needed, three days after death of the wife and on the day of her funeral. The respondent attorney thought that the husband and wife were former clients, but in fact they had been former opposing parties.

A lawyer received an admonition for claiming expertise that he did not have, in violation of Rule 7.4(a). In AD 09-12,⁹²⁹ the attorney claimed to be a specialist in immigration law despite having only represented a few clients in immigration matters. On his website, the attorney represented that he provided “professional legal services to American and international clients with respect to corporate and commercial transactions, small business matters and immigration law matters.” The lawyer’s exaggerated claim of expertise led to his providing inadequate advice to his client.

IV. Special Considerations for Use of Social Media

Lawyers use social media all the time, and not just particularly tech-savvy members of the bar. While this treatise cannot address in depth all of the complicated ethical issues that arise when lawyers practice using the internet, the cloud, and social media sites,⁹³⁰ a few important points deserve mention:

1. *Websites qualify as advertising.* Your law practice’s website is a form of advertising, so everything on the site must comply with Rule 7.2.⁹³¹ Assertions on the site that are not true may subject you to discipline.⁹³²
2. *Social networking sites qualify as advertising:* If you belong to LinkedIn, or even if you belong to Facebook, the descriptions you provide on your profile may qualify as advertising.⁹³³

⁹²⁵ 21 Mass. Att’y Disc. R. 724 (2005).

⁹²⁶ 15 Mass. Att’y Disc. R. 678 (1999).

⁹²⁷ 9 Mass. Att’y Disc. R. 355 (1993).

⁹²⁸ 9 Mass. Att’y Disc. R. 416 (1993).

⁹²⁹ 25 Mass. Att’y Disc. R. 674 (2009).

⁹³⁰ For a general discussion of the points listed here and others, see Robert Ambrogia et al., *Social Media: Best Practices and Caveats*, in PRACTICING WITH PROFESSIONALISM (Mass. Cont. Legal Ed. 2014).

⁹³¹ See Constance V. Vecchione, *Tangled Web: Advertising, Solicitation, Ethics, and the Internet* (1999), available at <https://bbopublic.blob.core.windows.net/web/f/web.pdf>; Matter of Barros, 29 Mass. Att’y Disc. R. 27 (2013).

⁹³² See, e.g., *Barros*; AD 03-47, 19 Mass. Att’y Disc. R. 609 (2003) (admonition for misleading statements on website about bar membership).

⁹³³ Kasten, *supra* note 876.

3. *Emails are written correspondence.* An email qualifies as a “written communication” under Rule 7.3(c), which regulates certain solicitations in writing to persons known to be in need of legal services.

4. *Tweets may also qualify as written correspondence.* If you use Twitter and send “tweets,” those messages may qualify as “written communications” under Rule 7.3(c), as just described above.

5. Real-time electronic communications are considered in-person communications, so live chats and other communications with prospective clients in real time can constitute in-person solicitation. Those interactions can also form attorney-client obligations.⁹³⁴

6. *Be cautious about the unauthorized practice of law.* Part VIII of this chapter described the limitations imposed upon a Massachusetts attorney providing legal services outside of the jurisdiction to which she is admitted. When you are communicating with others via social media and the internet, you may inadvertently offer legal advice to clients with no connection to Massachusetts. Your responsibility is to be certain that any prospective client is one for whom you are permitted to offer help under Rule 5.5.

7. *Use disclaimers.* Your email messages probably include a disclaimer intended to preserve attorney-client privilege in the case of an errant “send.” Your firm website may also have a disclaimer to protect against inadvertent creation of an attorney-client relationship.⁹³⁵ You should review your LinkedIn, Facebook, or similar social media presences to determine whether a similar disclaimer might be necessary there to ensure that visitors and readers do not misunderstand your intentions.⁹³⁶

8. *Be cautious about testimonials and endorsements.* If a social media site permits endorsements, recommendations, or testimonials, your responsibility is to ensure that anything said about your practice comports with Rules 7.1 and 7.2.⁹³⁷ And if you pay someone to endorse your practice, you likely will have violated Rule 7.2(b).

9. *When blogging, attend to your clients’ interests.* Lawyers may blog about any topics they wish (without revealing client confidences, of course), but if you use a blog post to argue for a position adverse to that which you will be

⁹³⁴ See Paul R. Tremblay, *Forming Involuntary Client Relationships*, 52 BOSTON B. J. 12 (Feb. 2008) (describing the risks of offering advice during casual conversations).

⁹³⁵ *Id.*

⁹³⁶ See ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010); Michael E. Lackey, Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 TOURO L. REV. 149, 155 (2012).

⁹³⁷ Op. 09-10, S.C. Bar. Eth. Adv. Comm., 2009 WL 6850298 (2009).

advocating on behalf of a client, you may have created a conflict of interest, or undercut your competence on behalf of that client.⁹³⁸

10. *Social media is discoverable.* This last one is a message best directed to your clients, but worth keeping in mind as you conduct your practice.

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⁹³⁸ See Vanessa S. Browne-Barbour, *A Fork in the Road: The Intersection of Virtual Law Practice and Social Media*, 52 WASHBURN L.J. 267 (2013).

Part X

Prosecutor Duties (Rules 3.8, 4.2, and 4.3)

I. Introduction

Lawyers who represent private parties do not have an obligation to ensure that the results of the proceedings in which they participate, or of the work they perform, are fair and just; instead, those lawyers act as zealous advocates for their clients within the bounds of the law. Not so for prosecutors. A prosecutor “owe[s] a particular care in discharging his duty to *seek justice* and not merely a conviction by trying the case factually and dispassionately without inflammatory tactics.”⁹³⁹ While prosecutors may (and usually do) perform zealously, they must temper their zeal with a concern for the rights of the defendant. “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”⁹⁴⁰ If a lawyer acting in that role fails to honor that responsibility, she may receive discipline, and may be sanctioned by a court and face the possibility of a reversal of any conviction obtained by her improper actions. While the latter two consequences may happen from time to time, professional discipline of a lawyer serving in the role of a prosecutor in Massachusetts has been rare, as explained below.

II. The Nature of the Prosecutor’s Special Responsibilities

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting where the prosecutor lacks a good faith belief that probable cause to support the charge exists, and refrain from threatening to prosecute a charge where the prosecutor lacks a good faith belief that probable cause to support the charge exists or can be developed through subsequent investigation;**
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;**
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, unless a court first**

⁹³⁹ Commonwealth v. Smith, 387 Mass. 900, 905 (1983) (emphasis added). This special duty may apply to all government lawyers. See Catherine J. Lancot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991).

⁹⁴⁰ MASS. R. PROF. CONDUCT 3.8 Cmt. [1].

has obtained from the accused a knowing and intelligent written waiver of counsel;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the prosecutor reasonably believes: (i) the information sought is not protected from disclosure by any applicable privilege; (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (iii) there is no other feasible alternative to obtain the information; and

(2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose:

(1) refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule; and

(2) take reasonable steps to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule;;

(g) not avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused; and

(h) refrain from seeking, as a condition of a disposition agreement in a criminal matter, the defendant's waiver of claims of ineffective assistance of counsel or prosecutorial misconduct.

(i) When, because of new, credible, and material evidence, a prosecutor knows that there is a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) if the conviction was not obtained by that prosecutor's office, disclose that evidence to an appropriate court or the chief prosecutor of the office that obtained the conviction, and

(2) if the conviction was obtained by that prosecutor's office,

(i) disclose that evidence to the appropriate court;

(ii) notify the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;

(iii) disclose that evidence to the defendant unless a court authorizes delay for good cause shown; and

(iv) undertake or assist in any further investigation as the court may direct.

(j) When a prosecutor knows that clear and convincing evidence establishes that a defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the injustice.

(k) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (i) and (j), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

A. The Lessons of Rule 3.8

Before Massachusetts adopted Rule 3.8 in 1998, Massachusetts prosecutors were governed by SJC Rule 3:08, which included the Standards Relating to the Prosecution Function. The SJC repealed Rule 3:08 after incorporating many of its provisions into the then-new Rule 3.8, which was then substantially revised in 2016. Rule 3.8, which resembles but is different in certain respects from the ABA Model Rule 3.8, outlines the following requirements for prosecutors, which are described in general fashion here, but which are much more complex than this summary will describe.⁹⁴¹

⁹⁴¹ The substantive law governing the duties of prosecutors is vast and intricate, implicating critical rights of defendants and complex constitutional doctrine. This Part will only touch upon the most pertinent ethical duties. For a more in-depth discussion of this area, see, e.g., R. MICHAEL CASSIDY, PROSECUTORIAL

Charging Only with Probable Cause: Rule 3.8(a) prohibits a prosecutor from prosecuting a charge against a defendant without probable cause. Because charging is a powerful tool, a prosecutor must exercise that power with great care. The substantive law doctrine about the amount of evidence that qualifies as “probable cause” is complex,⁹⁴² but the duty of a prosecutor to honor that law is clear. No Massachusetts lawyer has ever been disciplined for violating this duty.

Limits on Seeking Waivers from Unrepresented Persons: While lawyers generally may seek to settle disputes or controversies with individuals who do not have counsel, prosecutors may not request from an unrepresented accused any “waiver of important pretrial rights, . . . unless a court first has obtained from the accused a knowing and intelligent waiver of counsel.”⁹⁴³ This restriction is less rigorous than the version of the ABA Model Rule in effect in most other jurisdictions. Model Rule 3.8 does not provide for the judicial review exception to the ban on seeking pretrial waivers of important rights.⁹⁴⁴

Duty to Disclose Exculpatory Evidence: Rule 3.8(d) augments an obligation imposed by the Due Process clause of the United States Constitution.⁹⁴⁵ It requires prosecutors to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense,” among other requirements.⁹⁴⁶ The contours of this fundamental constitutional obligation are complex and the subject of considerable dispute; those complexities are beyond the scope of this treatise.⁹⁴⁷

Limits on Subpoenas to Attorneys: Rule 3.8(e) limits a prosecutor’s discretion to issue and enforce a subpoena to a lawyer to appear at a grand jury or other criminal proceeding to testify about a client. This provision arose after controversy in the 1980s and 1990s about prosecutors subpoenaing defense counsel, taking advantage of the non-applicability of the attorney-client privilege to certain aspects of a criminal defense

ETHICS (2nd ed. 2013); Cathleen Cavell, *Ethical Issues for Government Lawyers*, in *ETHICAL LAWYERING IN MASSACHUSETTS* Chapter 18 (James S. Bolan ed., 4th ed., 2015, 2017 Supp.).

⁹⁴² See, e.g., *Com. v. Perkins*, 464 Mass. 92 (2013).

⁹⁴³ Rule 3.8(c).

⁹⁴⁴ Compare MODEL R. PROF. CONDUCT 3.8(c) (identical to the Massachusetts rule except for the absence of the “unless” clause).

⁹⁴⁵ See *Cone v. Bell*, 556 U.S. 449 (2009); *United States v. Ruiz*, 536 U.S. 622 (2002); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

⁹⁴⁶ Rule 3.8(d). The Massachusetts rule implies that it imposes duties beyond those required by *Brady* and its progeny. Comment [3A] states, “The obligations imposed on a prosecutor by the rules of professional conduct are not coextensive with the obligations imposed by substantive law.”

⁹⁴⁷ For a discussion of the debates about the scope of the prosecutor’s disclosure duties, see, e.g., R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429 (2011); Peter A. Joy & Kevin C. McMunigal, *Implicit Plea Agreements and Brady Disclosure*, 22 CRIM. JUST. 50 (2007).

lawyer's communications with clients engaged in criminal enterprises.⁹⁴⁸ The Massachusetts provision, which is stricter than that of the ABA Model Rule, prohibits a prosecutor from issuing a subpoena to a lawyer unless the material sought is not privileged, is "essential" to the investigation and prosecution, there is "no other feasible alternative" available to the prosecutor, and the prosecutor obtains prior judicial approval of the subpoena.⁹⁴⁹

Ban on Asserting Personal Opinions: Rule 3.4(e), applicable to all lawyers, prohibits a lawyer from asserting a personal opinion as to the guilt or innocence of an accused, or the justness of a cause.⁹⁵⁰ At least one commentator has asserted that this ban is more important for a prosecutor than for other lawyers.⁹⁵¹

B. Typical Sanctions Imposed for Violation of the Rules Governing the Special Duties of Prosecutors

You Should Know

The discipline imposed on a prosecutor who exceeds the bounds of Rule 3.8 seems to turn on whether the misconduct affected the fairness of the trial. A prosecutor whose improper argument led to a reversal received a public reprimand; one whose misconduct did not affect the defendant's right to a fair trial received an admonition.

Only a handful of reported Massachusetts disciplinary decisions implicate Rule 3.8. In *Matter of Nelson*,⁹⁵² an Assistant District Attorney in his closing argument asserted his personal opinions about the facts and the witnesses' credibility, and improperly invited the jurors to act vengefully. After the jury convicted the defendant, the SJC ordered a new trial because of the prosecutor's misconduct. The BBO accepted the parties' stipulation to a public reprimand.

In AD 00-60,⁹⁵³ the prosecutor engaged in similar misconduct during a trial, including making inflammatory arguments, asserting personal opinions about the evidence, calling himself "the thirteenth juror," and referring to his past experience as an

⁹⁴⁸ For a review of that history, see, e.g., *Stern v. U.S. Dist. Court for Dist. of Mass.*, 214 F.3d 4, 8-9 (1st Cir. 2000) (ultimately concluding that the restrictive Massachusetts rule did not apply to federal prosecutors).

⁹⁴⁹ Rule 3.8(e)(1), (2). The ABA's Rule 3.8(e) omits the requirement of prior judicial approval.

⁹⁵⁰ See Rule 3.4(e)(2), (3) ("A lawyer shall not . . . appearing before a tribunal on behalf of a client . . . assert personal knowledge of facts in issue except when testifying as a witness; or assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . .") Until 2015, Rule 3.8(h) stated the same thing specifically for prosecutors.

⁹⁵¹ See Cavell, *supra* note 941, at § 18.6.1 ("prosecutors have a heightened obligation not to assert personal opinions as to credibility, culpability, and innocence, particularly because overstepping the bounds as to such matters can be deemed so prejudicial to a criminal defendant that otherwise solid prosecutions become tainted and subject to appellate reversal").

⁹⁵² 25 Mass. Att'y Disc. R. 413 (2009).

⁹⁵³ 16 Mass. Att'y Disc. R. 540 (2000).

altar boy. The Appeals Court sustained the conviction but criticized the lawyer's conduct. Relying on the Appeals Court's conclusion that "the respondent's errors did not deprive the defendant of a fair trial because errors were corrected by instructions from the trial judge and did not make a difference to the jury's conclusions," the BBO imposed an admonition.

An earlier report shows a more lax standard. In AD 80-18,⁹⁵⁴ the prosecutor made an improper closing argument that relied upon his personal opinions and personal knowledge of the case, and referred to matters not supported by the evidence. As in *Nelson*, an appellate court overturned the defendant's conviction because of the prosecutor's misconduct. This respondent, however, received a private reprimand, and not a public reprimand as requested by Bar Counsel. The single justice concluded that the respondent's intentions were good, and noted that neither the trial judge nor the defense lawyer took any steps to limit his "maladroit" closing argument.⁹⁵⁵

III. The Limits on the Prosecutor's Contact with Represented Persons

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

A. The Lessons of Rule 4.2 for Prosecutors

Rule 4.2, the provision limiting a lawyer's contact with a represented person, receives in-depth treatment elsewhere in this chapter.⁹⁵⁶ It deserves separate consideration here, because the applicability of the rule's limitations to prosecutors has been the topic of some controversy in the past few decades. While the rule sensibly forbids communication by a lawyer, directly or through others, with a person who is represented by counsel regarding the subject matter of the communication, its enforcement presents a challenge for prosecutors working with undercover informants investigating criminal activity by persons who have counsel on retainer. Enforced strictly, Rule 4.2 would prohibit District Attorneys, Assistant Attorneys General, and Assistant United States Attorneys from overseeing covert investigations of suspected crime figures who are known to have lawyers.

⁹⁵⁴ 2 Mass Att'y Disc. R. 110 (1980).

⁹⁵⁵ The former private reprimand sanction was a permanent part of a respondent's record, unlike today's admonition, which will be vacated after eight years without further discipline. See Chapter 4, Part II.D. That difference might account for the appearance of a more lax treatment of the misconduct.

⁹⁵⁶ See Part VII *supra*.

Rule 4.2 reads as follows: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.” Prosecutors who wish to oversee a covert plan for contact with a suspect known to have a lawyer may only do so if one of two situations applies. First, if the investigation and communication concerns a subject matter *different from* that for which the suspect has counsel, the ban on contact does not apply. That issue has been the subject of some reported decisions, although not in Massachusetts.⁹⁵⁷ Because in many instances the investigation will concern matters for which the suspect does not yet know he is a suspect, the prosecutor may successfully conclude that the lawyer is not the person’s lawyer for that matter. Sometimes, though, the suspect has the equivalent of “house counsel,” in which event that argument will not work for the prosecutor.⁹⁵⁸

The second possible justification for a prosecutor to oversee an informant’s contact with a person represented by counsel is the argument that a prosecutor, by virtue of her responsibilities, is “authorized by law” to investigate crimes through covert means.⁹⁵⁹ If that were so, the ban would not apply. Whether a prosecutor has such authority is a topic of much dispute across the country, although the issue has not been addressed in Massachusetts or the First Circuit.⁹⁶⁰ A noteworthy opinion of the Second Circuit in 1988 concluded that a prosecutor was “authorized by law” for purposes of the state’s no-contact rules:

As we see it, under DR 7-104(A)(1) [the predecessor to Rule 4.2, with similar language], a prosecutor is “authorized by law” to employ legitimate investigative techniques in conducting or supervising criminal investigations, and the use of informants to gather evidence against a suspect will frequently fall within the ambit of such authorization. . . . [T]he use of informants by government prosecutors in a pre-indictment, noncustodial situation . . . will generally fall within the “authorized by law” exception.⁹⁶¹

The *Hammad* principle has been followed by most courts,⁹⁶² but the controversy it created led the federal government to seek to exempt federal prosecutors from the

⁹⁵⁷ See, e.g., *United States v. Ford*, 176 F.3d 376 (6th Cir. 1999) (government could place informant in prison cell to investigate threats defendant allegedly made against government officials; threats not related to offense for which defendant imprisoned); cf. *In re Criminal Investigation of Doe*, 2008 WL 3274429 (D. Mass. 2008) (suspect had a lawyer for a related civil proceeding, but not for the criminal matter being investigated; covert contact allowed by order of the court and therefore “authorized by law”).

⁹⁵⁸ *U.S. v. Hammad*, 858 F.2d 834, 839 (2nd Cir. 1988), cert. denied, 498 U.S. 871 (1990) (using the term “house counsel”).

⁹⁵⁹ A defendant has a separate Sixth Amendment right not to be questioned outside of his counsel’s presence after “judicial proceedings have commenced.” *Brewer v. Williams*, 430 U.S. 387 (1977). The investigative questions addressed here arise before any such proceedings have commenced and before any indictment, so the constitutional rights would not play a role in determining the propriety of the contact.

⁹⁶⁰ For a discussion of the history of this topic, see, e.g., Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080 (2000).

⁹⁶¹ *Hammad*, 858 F.2d at 839, 840.

⁹⁶² See *United States v. Balter*, 91 F.3d 427 (3d Cir. 1995) (collecting cases).

coverage of state ethics laws, efforts that in the end were unsuccessful.⁹⁶³ The question of the scope of the “authorized by law” exception remains open for Massachusetts prosecutors.

B. Typical Sanctions Imposed for Violation of the No-Contact Rule by a Prosecutor

No Massachusetts lawyer has been disciplined for improper contact with a represented person as a prosecutor, and in no reported decision has a judge granted relief to a defendant for that reason.⁹⁶⁴

Practice Tip

Even though no prosecutor in the Commonwealth has been disciplined for improper contact with a represented person through an undercover investigation, prosecutors’ offices must exercise care in establishing covert contact with a person known to be represented by counsel, as the law remains unsettled in this area.

IV. Limits on the Prosecutor’s Use of Deception in Undercover Investigations

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation

A. The Lessons of Rule 8.4(c) for Prosecutors

⁹⁶³ The effort ultimately failed when Congress passed the McDade Amendment, requiring federal prosecutors to follow state ethics rules. For a discussion of the long and at times chaotic history of those efforts, see Gregory B. LeDonne, *Revisiting the McDade Amendment: Finding the Appropriate Solution for the Federal Government Lawyer*, 44 HARV. J. ON LEGIS. 231, 234 (2007); Note, *supra* note 960.

⁹⁶⁴ *Cf.* In re Criminal Investigation of Doe, 901 F.Supp.2d 251 (D. Mass. 2012) (refusing to grant federal prosecutors advance authority to contact a targeted individual through covert means without the consent of that individual’s counsel, but not addressing whether under appropriate circumstances the prosecutors would be authorized by law to do so proactively); In re Criminal Investigation of Doe, 2008 WL 3274429 (D. Mass. 2008) (allowing government to conduct a noncustodial interview of an unindicted individual believed to have retained counsel in a related civil proceeding).

A different part of this chapter addresses Rule 8.4(c), the provision prohibiting a lawyer from “engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation,”⁹⁶⁵ but in one respect that rule warrants inclusion here. That separate discussion noted that lawyers sometimes use testers or undercover agents as part of their client representation to investigate suspected wrongdoing. The use of undercover informants by a prosecutor literally involves “deceit” and “misrepresentation,” so the question considered here is whether a prosecutor who oversees such a strategy is subject to discipline under Rule 8.4(c), as at least one court in a different state has concluded.⁹⁶⁶

While neither the BBO nor any Massachusetts court has ever addressed that question directly, the SJC has implied strongly that it would not consider a prosecutor’s actions involving undercover agents to qualify as a violation of Rule 8.4(c). In *Matter of Crossen*,⁹⁶⁷ the respondent lawyer charged with violating Rule 8.4(c) analogized his deceptive conduct on behalf of a private client to that of a prosecutor, and cited authority from other jurisdictions supporting a prosecutor’s right to be deceptive. In rejecting his analogy, the SJC signaled its willingness to approve the government attorneys’ use of such deception:

The crucial factor distinguishing government and private attorneys is the lack of oversight for the latter. Whatever leeway government attorneys are permitted in conducting investigations, they are subject not only to ethical constraints, but also to supervisory oversight and constitutional limits on what they may and may not do, constraints that do not apply to private attorneys representing private clients.⁹⁶⁸

A judge of the federal District Court of Massachusetts has read *Crossen* in this same approving way.⁹⁶⁹ Therefore, prosecutors in Massachusetts may feel confident that their investigative strategies involving undercover agents or imposters will not subject them to discipline under Rule 8.4(c).

B. Typical Sanctions Imposed for the Prosecutor’s Use of Deception in Undercover Investigations

No Massachusetts prosecutor has ever been disciplined for violating Rule 8.4(c). One assistant district attorney was disciplined for violating DR 1-102(A)(4), the

⁹⁶⁵ See Part VI *supra*.

⁹⁶⁶ See *In re Gatti*, 8 P.3d 966 (Or. 2000) (concluding that prosecutors in Oregon would violate Rule 8.4(c) by covert investigation using undercover agents). The State of Oregon later amended its rules to invalidate the effect of that decision.

⁹⁶⁷ *Matter of Crossen*, 450 Mass. 533, 565-66, 24 Mass. Att’y Disc. R. 122 (2008).

⁹⁶⁸ 450 Mass. at 566. In a companion case to *Crossen*, the SJC expressed a willingness to permit private lawyers to use imposters as investigative tools in appropriate circumstances, which were not present in that case or in *Crossen*. See *Matter of Curry*, 450 Mass. 503, 523-25, 24 Mass. Att’y Disc. R. 188 (2008).

⁹⁶⁹ *Leysock v. Forest Laboratories, Inc.*, 2017 WL 1591833 (May 25, 2017) (Saylor, J.) (discussed at text accompanying note 631 *supra*).

predecessor to Rule 8.4(c). In *Matter of Bloom*,⁹⁷⁰ in a matter the single justice labeled as “outrageous,” the respondent tried to trick two defendants into signing a false confession, and forged both a false confession of a third participant, and a police officer’s signature on that document. The respondent received a public reprimand, despite a proposal by Bar Counsel (called “inexplicable” by the single justice) for a private reprimand.

⁹⁷⁰ 9 Mass. Att’y Disc. R. 23 (1993). The single justice’s opinion does not cite DR 1-104(A)(4), or any rule, but the lawyer’s misconduct presumably implicated that rule.

Part XI

Special Advocacy Duties (Rules 3.6, 3.7, and 3.9)

I. Introduction

An earlier discussion reviewed the several provisions within the Massachusetts Rules of Professional Conduct limiting a lawyer's zealous advocacy tactics.⁹⁷¹ This Part XI covers three rules that also apply to the lawyer's role as an advocate.

II. The Nature of the Lawyer's Special Advocacy Duties

This Part covers rules applicable to lawyers in three contexts. Rule 3.6 attempts to balance a litigant's right to a fair trial with a lawyer's right to communicate publicly about her work. Rule 3.7 establishes protocols about when a lawyer who may need to testify in a proceeding may also serve as counsel to a client in that proceeding. And Rule 3.9 describes the responsibilities of lawyers who serve as lobbyists or in a rule-making or policy-making capacity.

The BBO and the SJC have seldom disciplined a lawyer for violating the three rules discussed here.

RULE 3.6: TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved;**
- (2) the information contained in a public record;**
- (3) that an investigation of the matter is in progress;**
- (4) the scheduling or result of any step in litigation;**

⁹⁷¹ See Part VII *supra*.

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6): (i) the identity, residence, occupation, and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time, and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) This rule does not preclude a lawyer from replying to charges of misconduct publicly made against him or her or from participating in the proceedings of a legislative, administrative, or other investigative body.

A. The Lessons of Rule 3.6

Massachusetts's laws and policies reflect a deep commitment to fairness and integrity of trials and similar adjudicative hearings. A participant in a litigated matter, and especially a defendant in a criminal proceeding, has the right to a fair trial untainted by pervasive publicity that might taint the finder of fact.⁹⁷² At the same time, Massachusetts lawyers who represent clients in such hearings have a constitutional right and, at times, a professional duty to speak publicly about their clients' cases when necessary to advance the interests of the clients. Rule 3.6 is an effort to balance those two principles. The rule expressly limits what lawyers may say in some settings, but also offers safe harbors to permit lawyers to speak freely when the circumstances ought to permit such speech.

⁹⁷² Commonwealth v. Morales, 440 Mass. 536, 540–542 (2003).

No lawyer has ever been disciplined in Massachusetts for violating Rule 3.6, and the rule has been relied upon only once in reported case law in the Commonwealth.⁹⁷³ For purposes of this treatise, therefore, the rule is not a significant player in the disciplinary world, and the discussion about it will be brief. The Office of Bar Counsel has published a helpful guide for lawyers about the meaning of this rule, and interested readers would benefit from reviewing that column.⁹⁷⁴

Essentially, Rule 3.6 forbids a lawyer who participates or has participated in a matter from making any extrajudicial statement that “a reasonable person” would expect to be publicly communicated, if the lawyer knows or should know that the statement “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”⁹⁷⁵ Lawyers therefore may not make statements to the media, including social media,⁹⁷⁶ if the statements have a good chance of prejudicing the proceeding about which the lawyer speaks. Because lawyers do have to speak about their work, though, the remainder of Rule 3.6 provides certain safe harbors, categories of information that lawyers may comment about without violating the rule. Also, the Comments to Rule 3.6 list six types of information that “are more likely than not to have a material prejudicial effect on a proceeding,” especially with respect to jury cases, criminal matters, and any other proceeding where incarceration is possible.⁹⁷⁷

In the most celebrated disciplinary matter involving Rule 3.6, a matter arising out of Nevada which reached the United States Supreme Court, the original sanction for the lawyer’s prejudicial statements was a private reprimand.⁹⁷⁸ One commentator has expressed some dismay at the lack of attention paid by Bar Counsel and the BBO to this rule, writing,

Commentary on Rule 3.6 would not be complete without a realistic word about the Rule in operation. It would be hard to imagine a lawyer or a lay reader of this text who believes that the Rule is not broken by attorneys, particularly in the context of infamous criminal and civil cases which are widely publicized in the news media. Correspondingly, the Rule does not appear to be aggressively enforced, at least not in this jurisdiction. Realistically, the Rule primarily serves as guidance to lawyers as to the bounds of their pretrial public commentary, but, perhaps unfortunately, has not seemed to serve as extremely effective restraint of

⁹⁷³ PCG Trading, LLC v. Seyfarth Shaw, LLP, 460 Mass. 265 (2011) (lawyer’s public statements not sufficient grounds to deny him *pro hac vice* admission). Cf. Matter of Cobb, 445 Mass. 452 (2005) (Rule 3.6 not applicable to the respondent’s statements).

⁹⁷⁴ See Arnold R. Rosenfeld, *Spin Control and the Ethical Rules: When the Press Comes Knocking, Should You Be Talking?* (December, 1998), at <https://bbopublic.blob.core.windows.net/web/f/spin.pdf>.

⁹⁷⁵ MASS. RULES OF PROF. CONDUCT 3.6(a).

⁹⁷⁶ See Michael E. Getnick, *Social Media: The Good, the Bad and the Ugly*, 81 N.Y. ST. B.J. 5, 5 (2009) (Model Rule 3.6 applies equally to blogs and social networking sites just as it does to traditional media outlets).

⁹⁷⁷ Rule 3.6 Cmt. [5].

⁹⁷⁸ *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). In *Gentile*, the Supreme Court reviewed a previous version of Rule 3.6 and, while sustaining its constitutionality generally, vacated the bar’s sanction because of the state’s ambiguous application of the rule. The ABA amended Model Rule 3.6 after *Gentile*, and that revised version is largely the basis of the Massachusetts rule.

lawyers faced with the glare of media lights and cameras and the presence of reporters and recorders.⁹⁷⁹

RULE 3.7: LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

B. The Lessons of Rule 3.7, and Discipline for its Violation

On occasion, a lawyer representing a client in a matter in litigation will have personal knowledge of some matters that are in dispute in the litigation. For example, in a lawsuit for breach of contract, the lawyer who negotiated and drafted the contract may be the same lawyer who represents one of the parties to the lawsuit, and the negotiations about the terms of the contract may be relevant to the resolution of the claims. If the lawyer serves both as a trial counsel and as a witness for his client, complications ensue. Rule 3.7 offers guidance to lawyers who find themselves in such a situation. The basic message of Rule 3.7 is that a lawyer ordinarily *may not* serve in both roles in a trial. Therefore, if the lawyer will likely be called as a witness in a trial, the lawyer ought not serve as trial counsel. By its terms, the rule applies to both jury and jury-waived trials, although in practice in Massachusetts it has far greater relevance to trials conducted before a jury. The rule offers three exceptions to the presumptive ban: (1) when the lawyer will testify about uncontested matters; (2) when the lawyer will testify about the nature and value of legal services provided; and, most importantly, (3) when disqualification of the lawyer “would work substantial hardship on the client.”⁹⁸⁰

The rationales for this rule are several, and not always consistent.⁹⁸¹ Some claim that Rule 3.7 protects the opposing party who would need to cross-examine the testifying

⁹⁷⁹ TUONI, *supra* note 92, at § 36.04.

⁹⁸⁰ Rule 3.7(a)(1)–(3).

⁹⁸¹ For a discussion of this rule and its policies, see Judith A. McMorrow, *The Advocate as Witness: Understanding Context, Culture and Client*, 70 *FORDHAM L. REV.* 945 (2001).

lawyer. This claim asserts that a party gains an advantage by having her lawyer serve as her witness, and the other side a disadvantage in attacking the lawyer who will be known to, and perhaps liked by, a judge or jurors in a different capacity. Others claim that the rule protects the lawyer's client, reasoning that a testifying lawyer may have a hobbling conflict of interest between her duty as a witness to offer undistorted, truthful testimony and her duty as an advocate to present the facts in the most persuasive and favorable manner possible. Still others view the rule as protecting the trier of fact, who may be confused by observing a lawyer who, in the same proceeding, both testifies personally about some facts and later argues to the fact-finder that those and other facts should be believed. While all three considerations have force, the choice of which one justifies the rule will matter, because the question of whether to permit a waiver of the rule will call for different answers depending on the rationale adopted. If the rule is intended to protect one of the two parties, that party should be permitted to waive its protections if it so chooses. If the rule is for the benefit of the trier of fact, it should not be waivable by the parties, and a judge should raise it *sua sponte*, even if the parties do not.

The SJC has agreed that the rule is primarily to prevent jury confusion,⁹⁸² but also to protect the lawyer's client.⁹⁸³ Courts are also concerned that Rule 3.7 may be used strategically by an opposing counsel to disqualify a law firm, a strategy that courts discourage. Discouraged or not, that tactic is not an uncommon one in Massachusetts, and court decisions about Rule 3.7 and DR 5-101(B) and 5-102(A) are far more common than discipline of lawyers for a violation of the rules.⁹⁸⁴

Practice Tip

Lawyers who receive discipline based upon a violation of Rule 3.7 often have chosen to continue to represent a client rather than to withdraw from representation in order to be able to testify in the matter. That choice appears to prioritize the lawyer's financial interests over the client's legal interests, and can lead to discipline.

Since Massachusetts adopted Rule 3.7 in 1998, few disciplinary matters have referred to it. In *Matter of Lebensbaum*,⁹⁸⁵ the respondent was suspended for six months

⁹⁸² See, e.g., *Smaland Beach Ass'n, Inc. v. Genova*, 461 Mass. 214, 222 (2012) ("The primary purpose of the rule is 'to prevent the jury as fact finder from becoming confused by the combination of the roles of attorney and witness.'" (quoting *Steinert v. Steinert*, 73 Mass. App. Ct. 287, 291 (2008))).

⁹⁸³ *Smaland*, 461 Mass. at 222 ("Such strategic decisions [about whether trial counsel may testify but not withdraw] rest with the attorney and his client, unless a judge concludes that the attorney's failure to testify is 'obviously contrary to the client's interests.'" (quoting *Borman v. Borman*, 378 Mass. 775, 791 (1979))).

⁹⁸⁴ At least twenty-five Massachusetts court decisions catalogued on Westlaw refer to Rule 3.7, and more than half of those involve a question of the disqualification of a lawyer. More than twenty reported cases refer to DR 5-101(B) or 5-102(A). The Superior Court rules themselves limit a lawyer's freedom to testify in a matter in which she serves as trial counsel, so this matter is more than an ethical rule. See MASS. SUP. CT. R. 12 ("No attorney shall be permitted to take part in the conduct of a trial in which he has been or intends to be a witness for his client, except by special leave of the court.").

⁹⁸⁵ 21 Mass. Att'y Disc. R. 391 (2005).

for multiple counts of misconduct, one of which was a Rule 3.7(a) violation. While representing a woman in a divorce action, the attorney commenced a sexual relationship with her, and accompanied her when she unlawfully occupied the marital home when the husband was out of the country. The attorney represented the wife at a criminal hearing resulting from her unauthorized entry, and from her allegedly taking cash and using the husband's computer while there. Because the lawyer was likely to be a necessary witness at that hearing, his representation in that criminal proceeding violated Rule 3.7. In *Matter of Zinni*,⁹⁸⁶ the respondent represented a party at trial despite an obvious conflict of interest. He sought, unsuccessfully, to rely on Rule 3.7 for the proposition that he need not have withdrawn as counsel until it was necessary for him to serve as a witness.

Other disciplinary matters arising because of this kind of misconduct occurred under DR 5-101(B), and resulted sometimes in a public reprimand, and sometimes in a private reprimand. In *Matter of Carroll*,⁹⁸⁷ an attorney received a public reprimand for violation of DR 5-101(B) when she represented her nephew to have him appointed the administrator of the attorney's aunt's estate. Because the attorney's aunt had consulted with the attorney before her death regarding her property and possible heirs, the attorney was a likely witness to her aunt's intentions regarding her bank accounts. She also was an heir-at-law, and therefore had a conflict of interest that she ignored. And in *Matter of Hurley*,⁹⁸⁸ an attorney received a public reprimand for having violated this obligation as well as suffering a conflict of interest leading to a serious error in judgment at trial. The attorney represented a client who was a suspect in the robbery and the murder of a police officer. She accompanied her client to the police station where two detectives interviewed him. When a detective later testified at trial to a more damaging version of that interview, the lawyer did not testify to impeach the detective. The Board concluded that she should not have represented the client at all at the trial and in doing so violated the predecessor to Rule 3.7.⁹⁸⁹

The remaining discipline for violation of DR 5-101(B) or DR 5-102(A) have been private reprimands. In PR 90-39,⁹⁹⁰ the attorney received a private reprimand for representing one of his former joint clients in a lawsuit against the other former client on an issue related to the subject matter of his prior work. The primary misconduct was his clear conflict of interest, but the Board summary also cited his violation of DR 5-101(B). As the summary noted, "Respondent received a private reprimand only because he withdrew from representing the daughter at an early stage of the civil litigation," implying that otherwise the lawyer would have received a public reprimand. And in PR 88-19,⁹⁹¹ the attorney failed to withdraw from representing a client at a time when he knew he would be called as a witness, and engaged in other misconduct, including attempting to acquire from a former client a waiver of liability for his malpractice.

⁹⁸⁶ 31 Mass. Att'y Disc. R. ____, 2015 WL 9309029 (2015) (public reprimand).

⁹⁸⁷ 15 Mass. Att'y Disc. R. 105 (1999).

⁹⁸⁸ 17 Mass. Att'y Disc. R. 315 (2001).

⁹⁸⁹ The Board opinion relied upon DR 5-102(A), which addressed the need to withdraw when a lawyer's testimony becomes necessary.

⁹⁹⁰ 7 Mass. Att'y Disc. R. 449 (1990).

⁹⁹¹ 5 Mass. Att'y Disc. R. 560 (1988).

RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

C. The Lessons of Rule 3.9

While representing clients, lawyers on occasion will advocate for those clients before legislative panels, regulatory agencies, and other rule-making bodies, but not in an adjudicative posture. Rule 3.9 addresses the obligations of lawyers in those settings. It has essentially two messages. First, a lawyer who appears in a nonadjudicative proceeding on behalf of a client must disclose that his appearance is on behalf of a client. It *matters* to a regulator or legislator whether the arguments from a participant come from a position of particular interest, and therefore a lawyer should not imply that he is disinterested if he is not. Second, more by implication than by direct language, Rule 3.9 confirms that a lawyer advocating in a nonadjudicative proceeding is not bound by many of the same restrictions that he must honor if he were before a tribunal. The rule lists the obligations that the lawyer must honor, and they are obvious—those prohibiting offering false evidence, obstructing justice, and seeking to influence decisionmakers by unlawful means. A comment to Rule 3.9 clarifies that in most settings the bar against *ex parte* contact with those before whom the lawyer advocates will not apply to nonadjudicative proceedings.⁹⁹² The rule also confirms, again by implication, that a lawyer appearing in this role is *not* prohibited from making frivolous arguments.⁹⁹³

Rule 3.9 has not been the source of discipline in Massachusetts.

⁹⁹² MASS. RULES OF PROF. CONDUCT r. 3.9 Cmt. [4].

⁹⁹³ ANNOTATED MODEL RULES, *supra* note 317, at § 3.9.

Chapter 8

Mitigating and Aggravating Factors

I. Introduction

A lawyer who has engaged in misconduct by violating the Rules of Professional Conduct will receive an appropriate sanction taking into account the nature of the misconduct and the factors described in Chapter 7. The sanction imposed upon the lawyer cannot be “markedly disparate from those ordinarily entered by the various single justices in similar cases,” recognizing that “[e]ach case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances.”¹ The BBO and the SJC must, however, consider mitigating and aggravating factors in assessing the severity of the sanction imposed.² This chapter describes the factors that may serve to mitigate a lawyer’s misconduct and therefore reduce the sanction, or to aggravate it and increase the sanction.

This chapter first describes those factors that may serve to mitigate a sanction, along with those that, according to the SJC, ordinarily ought not be given significant weight in mitigation. It then describes the considerations that may serve as aggravating factors. Finally, the chapter describes what steps the parties must take in order to maintain the opportunity to introduce evidence of such factors in a disciplinary hearing.

You Should Know

How a successful assertion of a mitigation or aggravation claim will affect the ultimate sanction will depend on the circumstances of the lawyer’s misconduct. Except with suspensions, a successful claim will typically change the sanction by one “step”—that is, a presumptive admonition will typically end up as a public reprimand if aggravation is shown, while a presumptive public reprimand will become an admonition if mitigation has been proven. With suspensions, at times the aggravation or mitigation will change the length of the suspension; at other times a presumptive suspension may be stayed, or turn into a public reprimand or a disbarment.

II. Mitigating Factors

In some instances, mitigating circumstances may justify “a departure from the standard discipline” for the respondent’s misconduct.³ The SJC, a single justice, or the Board must

¹ *Matter of Collins*, 455 Mass. 1020, 1021, 26 Mass. Att’y Disc. R. 102, 104 (2010) (citations omitted) (quoting *Matter of Alter*, 389 Mass. 153, 156 (1983); *Matter of the Discipline of an Attorney*, 392 Mass. 827, 837, 4 Mass. Att’y Disc. R. 155 (1984)).

² *Matter of Hurley*, 418 Mass. 649, 652 (1994), cert. denied, 514 U.S. 1036 (1995).

³ *Matter of Johnson*, 20 Mass. Att’y Disc. R. 3 (2004) (overruled on other grounds, 444 Mass. 1002, 21 Mass. Att’y Disc. R. 355 (2005)). *See also* *Matter of Balliro*, 453 Mass. 75, 25 Mass. Att’y Disc. R. 31 (2009); *Matter of*

consider appropriate mitigating evidence if properly presented at a hearing, with the respondent bearing the burden to prove any mitigating factors.⁴ Not all explanations offered by respondent lawyers will serve to excuse or ameliorate their misconduct. This section reviews what the SJC has termed “typical” mitigating factors, the kinds of circumstances that probably will not lead to a more favorable disposition. It then reviews “special” factors, the types of evidence that may justify such a departure.

A. “Typical” Claims that Usually *Do Not* Serve as Mitigating Factors

You Should Know

The SJC has used the term “typical” to describe mitigating factors the Court ordinarily will not consider relevant or persuasive to reduce a sanction. As the discussion below shows, however, typical factors at times do play a role in the determination of the sanction, so respondents should raise them if a good faith basis for doing so exists.

A respondent who has committed misconduct and faces some disciplinary sanction must understand what facts, if proven, will lessen the likely sanction. Before this chapter addresses that important topic, however, it first will canvass those considerations that the SJC has stated usually will not serve as mitigation.⁵

The SJC has identified certain “typical” mitigating factors that usually will not serve to lessen a sanction. In *Matter of Alter*, the Court wrote:

One Justice has aptly listed typical mitigating circumstances as follows: (1) an otherwise excellent reputation in the community and a satisfactory record at the Bar, (2) cooperation in the disciplinary proceeding and with governmental authorities, (3) the occurrence of the criminal proceedings, (4) the pressures of practice, (5) the conviction as a punishment, (6) the absence of any dishonesty, such as a false tax return, and (7) in the final result, no harm to anyone else by the misconduct.⁶

While the SJC announced that list several decades ago, the Court continues to treat those circumstances as ordinarily not warranting a reduction in a typical or presumptive sanction. In 2010, the Court wrote that “bar discipline cases have recognized most of these considerations

Goldberg, 434 Mass. 1022, 1023 (2001) (“the mitigating circumstances warrant[] departure from the presumptive sanction”).

⁴ *Matter of Dodd*, 21 Mass. Att’y Disc. R. 196, 209-10 (2005).

⁵ “Typical” mitigation may nonetheless play some role in some circumstances. *Matter of Doyle*, 429 Mass. 1013, 1014 n. 5, 15 Mass. Att’y Disc. R. 170 (1999) (rescript) (although typical mitigation historically has not been given substantial weight, “[t]hat is not to say, however, that these considerations can play no role at all in the process, in an appropriate case”); *Matter of Dodd*, 21 Mass. Att’y Disc. R. 196, 209-10 (2005) (single justice may consider typical factors as part of the “totality of the circumstances,” when considered along with special mitigating factors); *Matter of Grew*, 23 Mass. Att’y Disc. R. 232, 241 (2007) (typical mitigating factors may be considered to place sanction within the range of permissible sanctions).

⁶ *Matter of Alter*, 389 Mass. 153, 157, 7 Mass. Att’y Disc. R. 3, 7 (1983) (citing *Matter of Barkin*, 1 Mass. Att’y Disc. R. 18, 21 (1977)).

[offered by the respondent] as “typical” mitigating circumstances’ that, while relevant, do not affect the presumptive sanction.”⁷ The Court then stated that “typical mitigating evidence generally [is] not given substantial weight.”⁸

The following “typical” mitigating considerations, rejected by the SJC or the Board as a basis for a lesser sanction, will usually carry little weight in a hearing committee’s deliberations:

Pro bono and volunteer service: In *Matter of Otis*, the respondent offered evidence of “her frequent pro bono representation of indigent clients” in an effort to avoid disbarment, but the SJC considered that fact as a “typical” mitigating factor.⁹ In *Matter of Dragon*,¹⁰ the single justice rejected as a factor in mitigation the respondent’s record of substantial pro bono service on BBO matters. The respondent had claimed that his volunteer work had affected his ability to manage his practice, but the single justice noted the special hearing officer’s conclusion that “the extra time invested by the respondent in connection with his pro bono work had a ‘negligible impact on his workload’” Several other reports emphasize that this factor will not serve as mitigation, because it is typical.¹¹ On occasion, though, a report will cite a lawyer’s performance of pro bono services as a factor in his or her favor in determining an appropriate sanction. For instance, in *Matter of Gleason*,¹² in approving a stipulation to a public reprimand, the Board stated, “In mitigation, the respondent . . . had served as a past president of his local bar association and performed pro bono work in his community, especially for veterans and veterans’ organizations.”¹³

Providing legal services to underserved or underprivileged communities: Several reports describe as “typical” the claim that a lawyer has dedicated his career to working with underserved populations.¹⁴ For instance, in *Matter of Serpa*,¹⁵ the respondent was a criminal

⁷ *Matter of Finneran*, 455 Mass. 722, 735, 26 Mass. Att’y Disc. R. 177, 193 (2010) (quoting *Alter*, 389 Mass. at 157; citing *Matter of Saab*, 406 Mass. 315, 327, 13 Mass. Att’y Disc. R. 177 (1989)).

⁸ *Finneran*, 455 Mass. at 735 (citing *Matter of Bailey*, 439 Mass. 134, 151, 19 Mass. Att’y Disc. R. 12, 32 (2003) (that false testimony did not have material effect on proceedings not a mitigating factor); *Matter of Otis*, 438 Mass. 1016, 1017 n. 3, 19 Mass. Att’y Disc. R. 344, 346 (2003) (frequent pro bono representation of indigent clients and lack of prior record of discipline); *Matter of Kennedy*, 428 Mass. 156, 159, 14 Mass. Att’y Disc. R. 383, 388 (1998) (community service, pro bono representation of clients, and a favorable reputation in the community); *Matter of Budnitz*, 425 Mass. 1018, 1019 (1997) (no prior discipline for eighteen years); *Matter of Concemi*, 422 Mass. 326, 330, 12 Mass. Att’y Disc. R. 63, 69 (1996) (reputation in community)).

⁹ 438 Mass. 1016, 1017 n. 3, 19 Mass. Att’y Disc. R. 344, 346 (2003).

¹⁰ 18 Mass. Att’y Disc. R. 171 (2002) (single justice opinion), *affirmed*, 440 Mass. 1023, 19 Mass. Att’y Disc. R. 121 (2003).

¹¹ *See, e.g.*, *Matter of Dascent*, 446 Mass. 1010, 22 Mass. Att’y Disc. R. 173 (2006) (disbarment); *Matter of Dragon*, 440 Mass. 1023, 19 Mass. Att’y Disc. R. 121 (2003) (disbarment); *Matter of Johnson*, 23 Mass. Att’y Disc. R. 326 (2007), *aff’d*, 452 Mass. 1010, 24 Mass. Att’y Disc. R. 380 (2008) (indefinite suspension).

¹² 28 Mass. Att’y Disc. R. 352 (2012).

¹³ *See also* *Matter of Jebb*, 24 Mass. Att’y Disc. R. 374 (2008) (reciprocal discipline; New York treated pro bono work as mitigating, single justice accepted that factor in imposing thirty-month suspension).

¹⁴ *See, e.g.*, *Matter of Osagiede*, 24 Mass. Att’y Disc. R. 523 (2008) (devotion of his practice to work with an underserved community considered typical); *Matter of Abelson*, 24 Mass. Att’y Disc. R. 1 (2008) (service to underprivileged clients considered typical); *Matter of Moore*, 442 Mass. 285, 20 Mass. Att’y Disc. R. 400 (2004) (services provided to an underserved population considered typical); *Matter of Finn*, 17 Mass. Att’y Disc. R. 200, 433 Mass. 418 (2001) (services provided to an underserved population considered typical).

¹⁵ 30 Mass. Att’y Disc. R. 358 (2014).

defense lawyer who regularly represented low-income defendants, but that fact was deemed “typical” by the single justice.

Cooperation with Bar Counsel: In *Matter of Bulger*, the respondent argued for a less severe sanction based on several mitigating considerations, including “that he cooperated with Bar Counsel’s investigation.”¹⁶ The Board report rejected that claim as a “typical” mitigating factor, and imposed a public reprimand. Similarly, in *Matter of Doyle*, the SJC described such a claim as “[t]ypical mitigating evidence,” adding, “Remorse and cooperation do not necessarily warrant a level of discipline less than disbarment.”¹⁷ While never stated explicitly in SJC opinions or Board reports, the reasoning is that respondents are required to cooperate with Bar Counsel’s investigation, so doing so does not entitle one to any extra credit.¹⁸

However, extraordinary cooperation with and assistance to Bar Counsel may serve to mitigate a presumptive sanction in some instances. In *Matter of Scola*, the attorney unintentionally mismanaged his IOLTA account, leading to his using some client funds to cover other client obligations. The hearing committee recommended a suspension of one year. The Board imposed a public reprimand, relying on mitigating factors, including the fact that the lawyer’s “efforts went far beyond merely cooperating with the investigation. The committee observed that such efforts would ordinarily be described as ‘typical’ mitigating factors, but that, in this case, the efforts were unusual and noteworthy.”¹⁹ (The respondent had on his own initiative ordered “a long and costly forensic audit” to uncover the source of an inadvertent accounting imbalance in his IOLTA account.) On appeal, the SJC imposed a term suspension but stayed the sanction largely because of the mitigating factor.²⁰

Lack of prior discipline: While, as a later section shows, prior discipline will usually serve as an aggravating factor, lack of prior discipline is ordinarily a “typical” factor. As the SJC wrote in *Matter of Pike*, “The absence of prior misconduct by the attorney carries little or no weight.”²¹ On occasion, however, this factor may play a mitigating role.²²

Excessive workload: The fact that an attorney faced a burdensome workload at the time he engaged in misconduct will not serve to justify a departure from the standard discipline. For example, in *Matter of Dragon*,²³ the SJC rejected a claim by a lawyer that his workload served as a special mitigating factor. He was disbarred after mismanaging his client funds account.

Criminal Punishment for the Same Offense: The fact that an attorney has received criminal punishment for the same offense, or an argument the attorney has otherwise received

¹⁶ 29 Mass. Att’y Disc. R. 65, 68 (2013).

¹⁷ 429 Mass. 1013, 15 Mass. Att’y Disc. R. 170 (1999). See also AD 02-12, 18 Mass. Att’y Disc. R. 631 (2002).

¹⁸ See SJC Rule 4:01 § 3(1)(b)-(d) (failure to cooperate is grounds for discipline).

¹⁹ 26 Mass. Att’y Disc. R. 568 (2010).

²⁰ 460 Mass. 1003, 27 Mass. Att’y Disc. R. 785, 800 (2011).

²¹ 408 Mass. 740, 745, 6 Mass. Att’y Disc. R. 256, 261 (1990).

²² See, e.g., *Matter of Goldfarb*, 18 Mass. Att’y Disc. R. 260 (2003) (lack of prior discipline listed as a mitigating factor).

²³ 440 Mass. 1023, 1024, 19 Mass. Att’y Disc. R. 121 (2003).

punishment for his misconduct, is given no weight.²⁴ As the SJC has written, “The question is not whether the respondent has been ‘punished’ enough. To make that the test would be to give undue weight to [the respondent’s] private interests, whereas the true test must always be the public welfare.”²⁵

Effect on the Attorney’s Career: Because any public sanction is likely to have detrimental effect on a lawyer’s career, that harm is not treated as a factor in support of mitigation. For example, in *Matter of Luongo*, the Court dismissed the argument that an indefinite suspension would be a particular detriment to an older lawyer, and serve as a “life sentence.”²⁶

Absence of aggravating factors: The absence of factors in aggravation does not constitute a basis for mitigation of an otherwise appropriate sanction. In *Matter of Daniels*,²⁷ the single justice wrote, “While personal financial motive and harm are usually considered aggravating factors, their absence is not a basis for departing downward from a sanction that is warranted without them.”

The list of matters the Court will not give significant weight in mitigation did not close after *Alter*. The Court continues the common-law process of considering, accepting, or rejecting matters offered in mitigation, taking into account the general purposes of bar discipline, i.e., general deterrence of members of the bar and the public perception that the bar is adequately policing itself with the public welfare in mind.²⁸

B. “Special” Claims that May Serve as Mitigating Factors

The SJC uses the term “special” mitigation for those categories of factors that may serve to reduce an otherwise appropriate sanction.²⁹ The principle underlying a special mitigating consideration is that the factor shows that the lawyer who committed misconduct did not act intentionally, had some reason beyond the attorney’s voluntary control for engaging in the misconduct, or otherwise was less culpable than the category of misconduct would otherwise imply. Practitioners should bear in mind that the facts and circumstances of a case might distinguish it from precedent and indicate the propriety of a lesser sanction without necessarily satisfying some predetermined category of “special mitigation.” For instance, the absence of a recognized factor in aggravation such as harm might not, standing on its own, serve as mitigation, but it could be argued as a basis for the attorney receiving a sanction somewhat less

²⁴ *Matter of Concemi*, 422 Mass. 326, 330, 12 Mass. Att’y Disc. R. 63 (1996); *Matter of McCarthy*, 416 Mass. 423, 431 (1993); *Matter of Neitlich*, 413 Mass. 416, 425 (1992).

²⁵ *Matter of Keenan*, 314 Mass. 544, 547 (1943), *quoted in* *Matter of Nickerson*, 422 Mass. 333, 337, 12 Mass. Att’y Disc. R. 367, 375 (1996).

²⁶ *Matter of Luongo*, 416 Mass. 308, 311, 9 Mass. Att’y Disc. R. 199, 203 (1993); *Matter of Dawkins*, 432 Mass. 1009, 1012 (2000) (rescript).

²⁷ 23 Mass. Att’y Disc. R. 102 (2007).

²⁸ *See, e.g.,* *Matter of Otis*, 438 Mass. 1016, 1017 n. 3, 19 Mass. Att’y Disc. R. 344, 346 (2003) (pro bono service); *Matter of Dragon*, 440 Mass. 1023, 1024, 19 Mass. Att’y Disc. R. 121 (2003) (excessive workload).

²⁹ *Alter*, 389 Mass. at 157 (“We emphasize the term ‘special,’ since it is apparent that ‘typical’ mitigating circumstances have not diverted the Justices from the imposition of disbarment or suspension”).

severe than, for instance, that imposed on an attorney who similarly violated the same rules while causing harm. This is a straightforward application of the general principle that each case must be decided on its merits and that each attorney must receive the disposition most appropriate under the circumstances.³⁰

The categories of special mitigating factors are limited in number, and they do not always achieve the goal intended by the respondent. But respondents need to understand them and incorporate them into a strategic defense plan. The following are mitigation arguments that on occasion have worked to reduce a sanction from its presumptive or typical level to something more favorable for the respondent.

Practice Tip

To serve as a special mitigating factor, the favorable or ameliorating circumstances must have been alleged by the respondent lawyer in his answer, proven by competent evidence at the hearing, and (perhaps most critically important) be causally connected to the misconduct.

Inexperience: In appropriate circumstances, a mistake made by an inexperienced attorney may result in lesser discipline if the inexperience helps explain the lawyer's error. This factor typically carries most weight when an inexperienced subordinate lawyer is carrying out the directives of a senior lawyer. For example, in *Matter of an Attorney*,³¹ the SJC ordered an admonition for a lawyer who had participated with her supervisor in making misleading statements in negotiations and in mishandling client funds. The Court concluded that "[t]he board properly considered the respondent's inexperience" in recommending a lighter sanction.³² This factor is not likely to carry much weight where the inexperienced lawyer was not overborne by another, more senior, lawyer, or where the misconduct was so clearly wrong that even a new lawyer would know not to engage in it.³³

Self-reporting: A lawyer's proactive, voluntary report to Bar Counsel of his misconduct may serve as a special mitigating factor. In *Matter of Franchitto*,³⁴ a lawyer who had participated in improper residential real estate transactions not only alerted banking officials to the documentary problems and took the initiative to rectify the fraud, but "[p]erhaps most

³⁰ *Matter of Balliro*, 453 Mass. 75, 85, 25 Mass. Att'y Disc. R. 35, 47 (2009); *Matter of Slavitt*, 449 Mass. 25, 30, 23 Mass. Att'y Disc. R. 662 (2007); *Matter of Foley*, 439 Mass. 324, 333, 19 Mass. Att'y Disc. R. 141 (2003).

³¹ 448 Mass. 819, 24 Mass. Att'y Disc. R. 786 (2007).

³² *See also* *Matter of Grossman*, 3 Mass. Att'y Disc. R. 89 (1983) (one year suspension for fraud on the court; inexperience taken into account); *Matter of McIntyre*, 426 Mass. 1012, 1015, 14 Mass. Att'y Disc. R. 526, 531 (1998); *Matter of Hanserd*, 26 Mass. Att'y Disc. R. 229 (2010); AD 05-04, 21 Mass. Att'y Disc. R. 671 (2005); *Matter of Nickerson*, 422 Mass. 333, 12 Mass. Att'y Disc. R. 367 (1996).

³³ *Matter of Bryan*, 411 Mass. 288, 292, 7 Mass. Att'y Disc. R. 24 (1991) (misappropriation of funds with deprivation; disbarment despite inexperience); *Matter of Marshall*, 16 Mass. Att'y Disc. R. 275 (2000) (identity theft by a graduate of an unaccredited law school in order to become a member of the Arizona bar; indefinite suspension despite inexperience).

³⁴ 448 Mass. 1007, 23 Mass. Att'y Disc. R. 162 (2007).

commendably, [the respondent] himself brought his own conduct to the attention of the board.” Those actions served as explicit mitigation in the SJC’s order imposing a public reprimand.

Family stress and illness: At times, if causally connected, the fact that a lawyer or his family is experiencing extraordinary stress or suffering from illness may serve as a special mitigating factor. In *Matter of Schoepfer*, the SJC stated: “Our rule [about sanctions] is not mandatory. If a disability caused a lawyer’s conduct, the discipline should be moderated, and, if that disability can be treated, special terms and considerations may be appropriate.”³⁵ In order for those facts to justify a departure from the standard discipline, the difficulties must have contributed directly to, and helped account for, the misconduct. For instance, in *Matter of Dodd*,³⁶ the lawyer claimed that his serious cardiac illness interfered with his ability to manage his IOLTA account. The single justice agreed: “[T]his case involves special mitigating circumstances that warrant a departure from the usual sanction. [The respondent’s] debilitating and worsening medical condition during the relevant period was a significant contributing cause of his misconduct.” In *Matter of Guidry*,³⁷ a respondent who mismanaged his client trust account and misappropriated client funds “was under extreme financial and emotional stress arising from grave and acute family problems.” That factor contributed to the misconduct, and therefore served as a mitigating factor.

Similarly, in *Matter of Blodgett*,³⁸ a lawyer failed to pay her annual registration fees to the Board and continued to practice after her license had been administratively suspended. In approving a two-month suspension, the single justice wrote:

In mitigation, the respondent’s failure to register and unauthorized practice occurred during a time when an immediate member of the respondent’s family was suffering from a mental illness and undergoing a serious crisis requiring direct, daily care by the respondent. The burden on the respondent caused substantial stress and significantly distracted the respondent from the requirements of her legal practice.³⁹

To serve as special mitigation, the stresses must be causally related to the misconduct. In *Matter of Johnson*,⁴⁰ the SJC concluded that they were not. As the Court wrote,

The panel of the board that heard the respondent’s evidence specifically concluded that he had not demonstrated a causal relationship between his circumstances and his misconduct. For example, while the tragic fatal injuries of a family member surely caused him anguish, his misappropriation of client funds commenced before he received

³⁵ 426 Mass. 183, 188, 13 Mass. Att’y Disc. R. 679 (1997).

³⁶ 21 Mass. Att’y Disc. R. 196 (2005).

³⁷ 15 Mass. Att’y Disc. R. 255 (1999) (30 month suspension for intentional misuse of client funds where respondent experienced “extreme financial and emotional stress arising from grave and acute family problems”).

³⁸ 25 Mass. Att’y Disc. R. 71 (2009).

³⁹ See also *Matter of Hanserd*, 26 Mass. Att’y Disc. R. 229, 233 (2010) (“the respondent was dealing with three very serious family illnesses during the relevant time, which involved hospitalizations and frequent travel out of town to care for family members, as a result of which she paid less attention than she should have to the consequences of her acts”); AD 04-11, 20 Mass. Att’y Disc. R. 680, 681 (2004) (“The respondent’s own divorce and a serious illness in his family contributed to his neglect of the complainant’s case.”).

⁴⁰ 444 Mass. 1002, 21 Mass. Att’y Disc. R. 355 (2005).

word of that event. Moreover, the respondent's professional difficulties and financial reversals began years before the misconduct and, while they undoubtedly were stressful, cannot excuse or explain abdication of professional responsibilities.⁴¹

Mental health problems: The fact that a lawyer suffers from a mental health illness may at times serve as a special mitigating factor, but only if the condition causally relates to the misconduct and only if the respondent has attempted to address the problem responsibly. For instance, in *Matter of MacDonald*,⁴² the young lawyer committed serious neglect as a sole practitioner and made false statements to tribunals to cover the neglect. He sought a hearing limited to his claim of mitigation, including his psychological problems. In ordering a six-month suspension, the single justice wrote, "In mitigation, [the respondent] offered evidence that he suffered from depression and was severely sleep deprived during the relevant time period. ... [I]n light of the mitigating circumstances established by [the respondent], which I weigh heavily in the balance in this case, I agree that the board's recommendation is reasonable, proportionate, and will protect the public."⁴³ By comparison, in *Matter of Barrat*,⁴⁴ the respondent did not prove with sufficient evidence that his condition caused his misconduct. While the illness played some role in the length of the suspension imposed by the single justice, it did not achieve the mitigation sought by the respondent.⁴⁵

In *Matter of Balliro*,⁴⁶ a lawyer who testified falsely in a hearing involving a man who had physically abused her received a lesser sanction because of the psychological state she was in at the time she testified. In *Matter of Davidson*,⁴⁷ the lawyer offered evidence of his depression as mitigation. The single justice accepted that factor as it related to his neglect of client matters, but did not credit that excuse for his intentional misconduct involving fabrication of court documents.

Of course, a respondent who alleges psychological problems as a basis for mitigation must offer competent evidence of that condition at the hearing including, usually, expert testimony. Absent that submission, the respondent may not argue for a departure from the standard discipline.⁴⁸ Furthermore, an argument for mitigation based on alleged psychological maladies such as depression might be less than compelling where the respondent has been proved to have engaged in intentional and systematic misconduct.⁴⁹

Addiction: Addiction is, of course, an illness, but that medical condition has received different treatment from other forms of mental or physical illness when raised as a factor in

⁴¹ 444 Mass. at 358-59.

⁴² 23 Mass. Att'y Disc. R. 411 (2007).

⁴³ See also *Matter of Patch*, 20 Mass. Att'y Disc. R. 445 (2004) (respondent's "depression and financial situation continued to deteriorate" despite treatment efforts; that condition served as mitigation).

⁴⁴ 20 Mass. Att'y Disc. R. 27 (2004).

⁴⁵ See also, *Matter of Haese*, 468 Mass. 1002, 30 Mass. Att'y Disc. R. 196 (2014) (no evidence that attorney's multiple acts of intentional misconduct were the product of his medical illness).

⁴⁶ 453 Mass. 75, 25 Mass. Att'y Disc. R. 31 (2009).

⁴⁷ 16 Mass. Att'y Disc. R. 81 (2000).

⁴⁸ See, e.g., *Matter of Eberle*, 25 Mass. Att'y Disc. R. 181 (2009) (unspecified "disability" warrants no weight); *Matter of Wasserman*, 23 Mass. Att'y Disc. R. 767 (2007) (no evidence of psychological distress offered).

⁴⁹ *Matter of Haese*, 468 Mass. 1002, 30 Mass. Att'y Disc. R. 196 (2014); *Matter of Johnson*, 452 Mass. 1010, 1011, 24 Mass. Att'y Disc. R. 380 (2008) (rescript); *Matter of Davidson*, 16 Mass. Att'y Disc. R. 81 (2000).

mitigation. The fact that a lawyer suffers from an addiction to drugs or alcohol might serve as a mitigating factor, but the results of the cases addressing this factor are mixed. In *Matter of Sterritt*,⁵⁰ the single justice accepted a stipulated suspension for a year and a day after a respondent neglected several matters. The report noted, in mitigation, that the neglect resulted from the attorney's severe alcoholism. His achieving sobriety after the contact from Bar Counsel also served as a favorable fact. In *Matter of Epstein*,⁵¹ the lawyer's addiction to painkillers served to explain the misconduct and served as a mitigating factor.

The SJC has expressed some uncertainty, however, whether drug addiction ought to serve as a special mitigating factor. In *Matter of Collins*, in ordering a suspension after a lawyer misappropriated client funds, the Court wrote:

Setting aside the question whether Collins's cocaine addiction caused or otherwise contributed to his misappropriations (*or whether, even if it had, his addiction to an illegal drug should be considered a mitigating factor*) the other circumstances of this case support the single justice's choice of an indefinite suspension over disbarment. The sanction is justified in light of [other circumstances].⁵²

In an older report, *Matter of Hull*,⁵³ an attorney received an indefinite suspension for converting approximately \$96,000 in clients' funds. His use of cocaine was rejected as mitigating factor. In the more recent report of *Matter of Morgan*,⁵⁴ the attorney's alcoholism did not serve as a mitigating factor because she had not sought treatment for it.

In both *Hull* and *Collins*, the Court emphasized as favorable the respondents' significant and successful rehabilitation efforts. Absent such efforts, addiction is unlikely to serve as a mitigating factor.

You Should Know

If a respondent relies on mental illness, including addiction, as a factor in mitigation, he must establish at a minimum three things:

- 1) He has the condition asserted;
- 2) He proves that the condition affected the actions constituting the misconduct;
and
- 3) He has been successfully treated for the condition.

⁵⁰ 17 Mass. Att'y Disc. R. 542 (2001). *See also* *Matter of Morgan*, 17 Mass. Att'y Disc. R. 437 (2001) (one year and one day suspension for numerous instances of neglect; in mitigation, attorney treated for anxiety and severe depression).

⁵¹ 25 Mass. Att'y Disc. R. 199 (2009).

⁵² 455 Mass. 1020, 1021, 26 Mass. Att'y Disc. R. 102, 105 (2010) (emphasis added). *See also* *Matter of Gustafson*, 6 Mass. Att'y Disc. R. 140, 141 (1989) (alcoholism, even if proven, should not serve as mitigation in cases of misappropriation of client funds).

⁵³ 6 Mass. Att'y Discipline R. 152, 153 (1990).

⁵⁴ 20 Mass. Att'y Disc. R. 428 (2004).

The respondent must be prepared to disclose all relevant medical records to Bar Counsel.

Restitution: Restitution to the person or organization from whom a lawyer misappropriated funds, or to whom the attorney otherwise caused financial harm, is always a helpful fact, because failure to make restitution is a well-accepted aggravating factor.⁵⁵ On some occasions restitution has been identified as a special mitigating factor,⁵⁶ but making restitution will not serve as a special mitigating factor if the restitution occurs because of a complaint by the client or a court order.⁵⁷

In matters involving intentional misappropriation of funds with resulting deprivation to the intended recipient, the standard discipline is either disbarment or indefinite suspension, and the difference often turns on whether the lawyer has made restitution.⁵⁸ In that respect restitution directly serves a mitigating role, even if it does not receive that label. For example, in *Matter of Boxer*,⁵⁹ the single justice concluded that “as between disbarment and indefinite suspension, the aggravating circumstances and the absence of restitution tip the scales decisively in favor of disbarment.” Similarly, in *Matter of Guidry*,⁶⁰ the single justice implied that the respondent’s proactive efforts to find a way to pay back the client whose money he had misappropriated, even before Bar Counsel’s involvement, served to justify a 30-month suspension, less than the presumptive indefinite suspension.⁶¹

Forced restitution, by contrast, typically does not serve as a mitigating consideration. In *Matter of LiBassi*, the SJC wrote that “[r]ecoverly obtained through court action ‘is not “restitution” for purposes of choosing an appropriate sanction.’”⁶² Also, payment to the injured party through the respondent’s liability carrier will likely not qualify as a mitigating factor, but it may affect the degree of harm caused by the lawyer’s misconduct.

Practice Tips

⁵⁵ See Part III *infra*.

⁵⁶ See AMERICAN BAR ASSOCIATION, MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, Rule 10, Commentary (2002) (“timely good faith effort to make restitution or to rectify consequences” is considered as matter in mitigation); AMERICAN BAR ASSOCIATION, MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS, §9.3(d) (1992) (mitigating factors include “timely good faith effort to make restitution or to rectify consequences of misconduct”).

⁵⁷ See, e.g., *Matter of Sharif*, 459 Mass. 558, 563 n.4, 27 Mass. Att’y Disc. R. 809 (2011) (“the payment of restitution to a client after a client files suit and complains to Bar Counsel typically is not considered in mitigation”); *Matter of LiBassi*, 449 Mass. 1014, 1017, 23 Mass. Att’y Disc. R. 396 (2007) (restitution made through court action not considered in mitigation of sanction).

⁵⁸ See *Matter of Bryan*, 411 Mass. 288, 292, 7 Mass. Att’y Disc. R. 24, 29 (1992); *Matter of the Discipline of an Attorney (“Three Attorneys”)*, 392 Mass. 827, 836-837, 4 Mass. Att’y Disc. R. 155, 166-167 (1984); *Matter of Schoepfer*, 426 Mass. 183, 187-188, 13 Mass. Att’y Disc. R. 679, 685-686 (1997).

⁵⁹ 14 Mass. Att’y Disc. R. 74 (1998).

⁶⁰ 15 Mass. Att’y Disc. R. 255 (1999).

⁶¹ See, e.g., *Matter of Johnson*, 444 Mass. 1002, 1004, 21 Mass. Att’y Disc. R. 355, 358 (2005) (distinguishing *Guidry* based on the proactive restitution, among other reasons).

⁶² 449 Mass. 1014, 1016, 23 Mass. Att’y Disc. R. 396, 402-03 (2007) (quoting *Bryan*, 411 Mass. at 292). See also AMERICAN BAR ASSOCIATION, STANDARDS FOR IMPOSING LAWYER SANCTIONS § 9.4 (a) (1992) (“forced or compelled restitution” should not be considered as either aggravating or mitigating factor).

Do not confuse restitution with absence of injury. As the single justice wrote in *Matter of Lansky*,⁶³ “There is no merit to the respondent’s claim that because the estate was made whole by his reimbursement of the \$41,132 paid by the estate, it did not sustain serious injury. The respondent confuses restitution, which in certain circumstances may be a factor in mitigation, with injury. Here, the restitution does not even merit mitigating weight because it was made two years after Bar Counsel commenced the investigation in this case.”

Regardless of what kind of harm the lawyer’s misconduct has caused (misappropriation of client property, loss of a meritorious lawsuit, excessive fees charged, or other financial injury), it is always to the respondent’s benefit to minimize the loss suffered by compensation from some source.

Delay in the disciplinary hearing process: Significant delay in Bar Counsel’s pursuit of the disciplinary process may be considered in mitigation, but only if the respondent can show substantial prejudice caused by the delay. The SJC has stated that delay in the disciplinary proceeding “is a mitigating circumstance to be considered,”⁶⁴ but “delay in the prosecution of attorney misconduct does not constitute a mitigating factor absent proof that the delay has substantially prejudiced the defense, or evidence of resulting public opprobrium.”⁶⁵

Very few respondents have successfully used the fact of delay to obtain mitigation. In *Matter of Kerlinsky*,⁶⁶ while the respondent’s attempt to have the proceedings dismissed on the grounds of laches did not succeed, the Court implied that the sanction imposed was mitigated by a substantial delay which interfered with his ability to obtain witness testimony. In *Matter of Perrone*,⁶⁷ the special hearing officer’s report insisted that he did not apply mitigating factors to arrive at his sanction, but did note the “unexplained” eight-year delay in the proceedings and the harm that delay caused to the attorney’s career. The report does describe delay as a factor in mitigation, even if it did not have that effect in this case. In *Matter of Gross*,⁶⁸ the SJC concluded that extensive delay in the disciplinary proceedings did not entitle the respondent to mitigation, because the attorney’s case was not prejudiced and there was no public awareness of pending charges, and thus no prolonged period of public embarrassment, humiliation or anxiety. Other lawyers have sought mitigation based on delay, but none has succeeded.⁶⁹

Practice Tip

⁶³ 22 Mass. Att’y Disc. R. 443 (2006).

⁶⁴ *Matter of Kerlinsky*, 406 Mass. 67, 76 n.8 (1989), cert. denied, 498 U.S. 1027 (1991).

⁶⁵ *Matter of Grossman*, 448 Mass. 151, 23 Mass. Att’y Disc. R. 242 (2007).

⁶⁶ 406 Mass. 67, 76 n.8 (1989), cert. denied, 498 U.S. 1027 (1991).

⁶⁷ 23 Mass. Att’y Disc. R. 545 (2007)

⁶⁸ 435 Mass. 445, 451, 17 Mass. Att’y Disc. R. 271, 277 (2001).

⁶⁹ See, e.g., *Matter of Crossen*, 450 Mass. 533, 577, 24 Mass. Att’y Disc. R. 122 (2008) (no prejudice proven); *Matter of Early*, 21 Mass. Att’y Disc. R. 220 (2005) (no prejudice proven); *Matter of McBride*, 21 Mass. Att’y Disc. R. 455 (2005) (same).

If delay in the prosecution of a disciplinary matter has caused difficulty for the respondent to obtain evidence or witnesses to assist with her defense, that fact should be brought to the attention of the hearing committee or hearing officer, either as a basis for mitigation or as a factor in determining whether Bar Counsel has met her burden of proof.⁷⁰

III. Aggravating Factors

In determining an appropriate sanction for a lawyer who has committed misconduct, the Board and the SJC will consider aggravating circumstances, which if present will contribute to a more serious level of discipline, or will diminish the effect of a proven mitigating factor. The SJC and the Board have identified the following factors as aggravating under the right circumstances:

Prior discipline: Prior discipline must be considered in aggravation. In 1992 the SJC declared, “The existence of prior discipline, unlike the absence of prior discipline, is a substantial factor in selecting the level of discipline. We consistently have considered a record of past misconduct, even if unrelated to the current charges, in determining the appropriate sanction.”⁷¹ That position has not changed in the intervening decades.⁷² At times, the Board will employ a “step” approach, where each successive instance of discipline leads to the next level of sanction.⁷³ In *Matter of Barrat*,⁷⁴ for example, the single justice accepted the Board’s recommendation that “[i]t is . . . appropriate to take the ‘next step’ up the ladder of disciplinary sanctions” given the lawyer’s prior discipline for similar misconduct. Prior discipline that is similar to the misconduct at issue in the new proceeding “is an especially weighty aggravating factor.”⁷⁵

You Should Know

Prior discipline as an aggravating factor is different from, but related to, the cumulative effect on a sanction of multiple counts of misconduct. Just as it is proper for a sanction to increase because of prior discipline, it is proper for a sanction based on the respondent’s

⁷⁰ In a disciplinary proceeding that has been sealed and therefore cannot be cited, the Board memorandum noted that Bar Counsel’s attempt to establish misconduct through facts that occurred twenty-two years before presented serious obstacles for the respondent. “While there is no basis for disturbing [the] rejection [of a witness’s affidavit] as an abuse of discretion, the proffer is ample proof that the respondent was foreclosed, by the passage of so much time, from introducing critical testimony in support of his position.”

⁷¹ *Matter of Dawkins*, 412 Mass. 90, 96, 8 Mass. Att’y Disc. R. 64, 70 (1992).

⁷² See, e.g., *Matter of Murray*, 455 Mass. 872, 883, 26 Mass. Att’y Disc. R. 402, 418 (2010) (“An increased sanction may be appropriate where the attorney has a prior history of discipline, even if the prior misconduct is unrelated to the present charges.”) (citing *Dawkins*).

⁷³ See *Matter of Chambers*, 421 Mass. 256, 260, 11 Mass. Att’y Disc. R. 31, 36 (1995) (“[I]n the absence of mitigating factors, discipline should proceed in increments of escalating severity.”).

⁷⁴ 20 Mass. Att’y Disc. R. 27 (2004).

⁷⁵ *Matter of Ryan*, 24 Mass. Att’y R. 632, 641 (2008).

having committed multiple violations to be more severe than that typically imposed for any one of those instances of misconduct.⁷⁶

Lack of candor during the disciplinary process: The SJC and the Board frequently identify a respondent's lack of candor during the disciplinary proceedings as an aggravating factor justifying more serious discipline. For instance, in *Matter of Crossen*, the SJC, in ordering the respondent disbarred, noted, as "even more compelling" an aggravating factor, the respondent's "'marked' lack of candor in the disciplinary proceedings."⁷⁷ In *Matter of Moore*,⁷⁸ the respondent received a two-year suspension for his failure to disclose pertinent information on his bar application, a sanction aggravated by his lack of candor at the disciplinary hearing. The Court has emphasized that the presentation of an unsuccessful defense is not a factor in aggravation, as long as the testimony presented is not shown to be untruthful.⁷⁹ A finding of lack of candor typically requires finding deliberately false testimony, or testimony given with an intent to deceive.⁸⁰

Presenting false testimony at a disciplinary hearing, or being untruthful to Bar Counsel during its investigation, will be a factor in aggravation even though Bar Counsel may not have listed that misconduct in its petition for discipline.⁸¹

Selfish motive and intentional actions: The SJC and the Board have cited as aggravating factors a lawyer's intent in committing the misconduct, and, separately, a corrupt or selfish motive. The fact that a lawyer's actions were intentional, and not negligent, may be treated as a factor in aggravation.⁸² In *Matter of Foley*,⁸³ the respondent intentionally prepared a false defense for his client who faced criminal charges. In imposing a three-year suspension, the SJC noted as aggravating factors that the attorney's conduct included "calculated corruption" that "repeatedly reflect[ed] complete disregard, if not utter contempt, for the fundamental ethical obligations of an officer of the court," involved his client in "premeditat[ed] and deliberate []" misconduct, and also appeared to be his common method of practice. Similarly, in *Matter of*

⁷⁶ See *Matter of Saab*, 406 Mass. 315, 327, 6 Mass. Att'y Disc. R. 278, 290 (1989) (in deciding sanction, the "consideration of the cumulative effect of several violations is proper").

⁷⁷ 450 Mass. 533, 581, 24 Mass. Att'y Disc. R. 122, 179 (2008).

⁷⁸ 442 Mass. 285, 289-290, 296, 20 Mass. Att'y Disc. R. 400, 406 (2004). See also *Matter of Murray*, 29 Mass. Att'y Disc. R. 465 (2013); *Matter of Macero*, 27 Mass. Att'y Disc. R. 554 (2011); *Matter of Buck*, 27 Mass. Att'y Disc. R. 92 (2011); *Matter of Lagana*, 26 Mass. Att'y Disc. R. 295 (2010).

⁷⁹ *Matter of Eisenhower*, 426 Mass. 448, 455-456, 14 Mass. Atty. Disc. R. 251, 261, cert. denied 524 U.S. 919 (1998).

⁸⁰ *Matter of Crossen*, 450 Mass. 533, 580, 24 Mass. Att'y Disc. R. 122, 179-180 (2008) (special hearing officer found "deliberately false testimony"); *Matter of Hoicka*, 442 Mass. 1004, 1006, 20 Mass. Att'y Disc. R. 239, 243 (2004) (rescript) (hearing officer must determine whether respondent's testimony was deliberately false or simply mistaken); *Matter of Friedman*, 7 Mass. Att'y Disc. R. 100, 103 (1991) (lack of candor before tribunal weighed as aggravating circumstance)..

⁸¹ See, e.g., *Matter of Macero*, 27 Mass. Att'y Disc. R. 554 (2011) (respondent's "continued lack of candor at the disciplinary hearing" a factor in determining sanction).

⁸² See *Matter of Pike*, 408 Mass. 740, 6 Mass. Att'y Disc. R. 256 (1990); *Matter of Wise*, 433 Mass. 80, 16 Mass. Att'y Disc. R. 416 (2000).

⁸³ 439 Mass. 324, 335, 339, 19 Mass. Att'y Disc. R. 141, 152, 158 (2003).

Aufiero,⁸⁴ the attorney received a two-year suspension where the board found that he deliberately continued his false statements “for years” after his initial attempts at covering up his actions.

A lawyer’s motive is also relevant in determining the appropriate sanction,⁸⁵ and a selfish motive will be an aggravating factor. In *Matter of DeMarco*,⁸⁶ the lawyer’s disbarment resulted in part from his “selfish” motivation in misappropriating funds as a trustee.⁸⁷ And in *Matter of Rafferty*,⁸⁸ the respondent’s motive “to retain a client who was paying him large fees” constituted an aggravating factor.

Harm to others: The fact that the lawyer’s actions have harmed a client or third party serves as an aggravating factor. In 1997, in *Matter of Aufiero*,⁸⁹ the single justice identified harm caused to an innocent party as a factor in aggravation, and that consideration remains applicable today. In *Matter of Eskenas*,⁹⁰ the lawyer mishandled the affairs of an elderly, disabled client. In determining that a public reprimand was the appropriate sanction, the Board noted that “his conduct had the potential to cause serious harm to his client.” In *Matter of Heartquist*,⁹¹ the lawyer’s criminal activity caused physical harm to a victim, and that fact served as an aggravating consideration. In *Matter of Gleason*,⁹² the lawyer received a public reprimand after the Board considered as an aggravating factor the harm his neglect had caused to his clients.⁹³

Vulnerable client or third party: A lawyer who engages in misconduct will receive a more severe sanction if that misconduct affects a vulnerable client or third party, even in the absence of actual harm. In *Matter of Lupo*, the SJC identified as a factor in aggravation that the respondent “took advantage of elderly, unsophisticated, and vulnerable clients.”⁹⁴ In *Matter of Pemstein*,⁹⁵ the single justice considered as an aggravating factor that the lawyer took advantage

⁸⁴ 13 Mass. Att’y Disc. R. 6, 25 (1997).

⁸⁵ See, e.g., *Matter of Leahy*, 28 Mass. Att’y Disc. R.529 (2012) (no financial motive distinguished this matter from otherwise comparable matters); *Matter of O’Neill*, 30 Mass. Att’y Disc. R. 289 (2014) (“[i]n mitigation, the respondent had no selfish motive and gained no personal advantage”).

⁸⁶ 25 Mass. Att’y Disc. R. 156 (2009).

⁸⁷ See also *Matter of Hilson*, 448 Mass. 603, 619, 23 Mass. Att’y Disc. R. 269, 289 (2007) (conduct motivated by personal financial interests and gain is aggravating); *Matter of O’Leary*, 25 Mass. Att’y Disc. R. 461 (2009); *Matter of Bailey*, 439 Mass. 134, 152, 19 Mass. Att’y Disc. R. 12, 32 (2003); *Matter of Kennedy*, 428 Mass. 156, 159, 14 Mass. Att’y Disc. R. 383, 388 (1998); *Matter of Pike*, 408 Mass. 740,745-746, 6 Mass. Att’y Disc. R. 256, 261 (1990).

⁸⁸ 26 Mass. Att’y Disc. R. 538 (2010)

⁸⁹ 13 Mass. Att’y Disc. R. 6 (1997).

⁹⁰ 30 Mass. Att’y Disc. R. 130 (2014).

⁹¹ 29 Mass. Att’y Disc. R. 332 (2013).

⁹² 28 Mass. Att’y Disc. R. 352 (2012).

⁹³ The Board has announced guidelines for sanctions for neglect and for conflict of interest that specifically designate the presence of harm as an aggravating factor triggering a higher sanction. *Matter of Kane*, 13 Mass. Att’y Disc. R. 321 (1997) (existence of harm raises sanction for neglect to public reprimand); AD-02-13, 18 Mass. Att’y Disc. R. 640, 655 (2002) (while unadorned conflict will warrant an admonition, an obvious conflict aggravated by harm will warrant a public reprimand).

⁹⁴ 447 Mass. 345, 354, 22 Mass. Att’y Disc. R. 513 (2006).

⁹⁵ 16 Mass. Att’y Disc. R. 339, 345 (2000).

of “vulnerable elderly women.” More recently, in *Matter of Font*,⁹⁶ the single justice found as an aggravating factor that “the respondent was dealing with a vulnerable client who was distressed by her son’s death and the military’s classification of that death as a suicide.” The lawyer received a three-month suspension, stayed for a year, with conditions.⁹⁷

Failure to make restitution: The presumptive sanction for intentional misappropriation of client funds with deprivation is disbarment or indefinite suspension, with the choice between those two sanctions usually turning on whether the lawyer has made efforts at restitution.⁹⁸ Failure to make restitution, therefore, will serve as an aggravating factor in misappropriation matters.⁹⁹ So, in *Matter of Pasterczyk*,¹⁰⁰ the single justice wrote, “Most significantly, in deciding to recommend disbarment over indefinite suspension, the board and the hearing committee relied on the respondent’s failure to pay restitution. This was entirely appropriate.” On a petition for reinstatement, “making restitution ... is an outward sign of the recognition of one’s wrongdoing and the awareness of a moral duty to make amends to the best of one’s ability. Failure to make restitution, and failure to attempt to do so, reflects poorly on the attorney’s moral fitness.”¹⁰¹ On this reasoning, a failure to offer or to attempt restitution might be taken as evidence that the attorney lacks an appreciation of his professional obligations or refuses to acknowledge the wrongfulness of his misconduct, another factor often cited in aggravation.¹⁰²

Experience in the field: Having a long career, even a discipline-free career, can serve as an aggravating factor, as an experienced lawyer has fewer excuses for committing misconduct. The SJC and the Board often cite experience as an aggravating factor, and not (as some respondents claim) a mitigating factor. In *Matter of Luongo*,¹⁰³ for example, the SJC determined that length of service is aggravating, not mitigating. “An older, experienced attorney should understand ethical obligations to a greater degree than a neophyte.”¹⁰⁴ In *Matter of Weisman*,¹⁰⁵ the single justice, quoting the *Luongo* language, treated a lawyer’s experience as an aggravating factor. In *Matter of Bulger*,¹⁰⁶ the respondent received a public reprimand, with the Board influenced by the lawyer’s long experience. And in *Matter of Rafferty*,¹⁰⁷ the lawyer received a four-month suspension for charging and collecting an excessive fee, where the standard discipline is a public reprimand. Among the aggravating factors was the lawyer’s extensive experience as a practicing lawyer.

⁹⁶ 30 Mass. Att’y Disc. R. 155 (2014). See also *Matter of Cammarano*, 29 Mass. Att’y Disc. R.582 (2013); *Matter of Donaldson*, 28 Mass. Att’y Disc. R. 221 (2012); *Matter of Espinosa*, 28 Mass. Att’y Disc. R. 307 (2012).

⁹⁷ See also *Matter of Crossen*, 450 Mass. 533, 581 (2008) (harm caused to a judicial clerk).

⁹⁸ *Matter of Schoepfer*, 426 Mass. 183, 187-188, 13 Mass. Att’y Disc. R. 679, 685-686 (1997).

⁹⁹ See *Matter of Bryan*, 411 Mass. 288, 292, 7 Mass. Att’y Disc. R. 24, 29 (1992).

¹⁰⁰ 29 Mass. Att’y Disc. R. 507 (2013).

¹⁰¹ *Matter of McCarthy*, 23 Mass. Att’y Disc. R. 469, 470 (2007).

¹⁰² See *Matter of Cobb*, 445 Mass. 452, 480, 21 Mass. Att’y Disc. R. 93, 125-126 (2005); *Matter of Moore*, 442 Mass. 285, 295, 20 Mass. Att’y Disc. R. 400 (2004); *Matter of Kerlinsky*, 428 Mass. 656, 666, 15 Mass. Att’y Disc. R. 304, 315 (1999); *Matter of Clooney*, 403 Mass. 654, 657, 5 Mass. Att’y Disc. R. 59, 67-68 (1988); ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, § 9.22(g) (1992).

¹⁰³ 416 Mass. 308, 9 Mass. Att’y Disc. R. 199 (1993).

¹⁰⁴ *Id.* 416 Mass. at 311-12.

¹⁰⁵ 30 Mass. Att’y Disc. R. 440 (2014).

¹⁰⁶ 29 Mass. Att’y Disc. R. 65 (2013); see also *Matter of Brandt*, 26 Mass. Att’y Disc. R. 59 (2010) (public reprimand, experience cited as an aggravating factor).

¹⁰⁷ 26 Mass. Att’y Disc. R. 538 (2010).

Failure to cooperate in the disciplinary process: Attorneys subject to discipline in Massachusetts are required to cooperate in certain ways with Bar Counsel's investigation of complaints against them (or other attorneys), and failure in that regard is itself an act of professional misconduct subject to discipline.¹⁰⁸ In addition, failure by an attorney to cooperate with Bar Counsel's investigation is often cited in aggravation of other charges and warrants increased discipline.¹⁰⁹

As with mitigation, the range of facts that might constitute aggravation is not a closed class, and the Court continues the common-law development of factors considered in aggravation. These have included consideration of a respondent's role as instigator of a fraudulent scheme entered into for personal gain,¹¹⁰ the extent of an attorney's planning, premeditation, and manipulation in the course of the misconduct,¹¹¹ the length of time an attorney allowed a misrepresentation to stand uncorrected,¹¹² the attorney's failure to appreciate the fundamental obligations of a member of the bar,¹¹³ the decision to involve the client or a third party in dishonest behavior,¹¹⁴ or in the persistence of misconduct after Bar Counsel has commenced an investigation.¹¹⁵

IV. Procedural Requirements for Mitigating and Aggravating Claims

A. Presenting Evidence in Mitigation

1. Procedural Requirements

In order to present facts in mitigation at a disciplinary hearing, a respondent must have alleged the facts supporting mitigation in her answer (or, as often happens, in an amended answer). Otherwise, she will be barred from offering such evidence.¹¹⁶ The BBO Rules state the following:

(f) Request to Be Heard in Mitigation. The Respondent shall include in the answer any facts in mitigation and may request that a hearing be held on the issue of mitigation. Failure to include facts in mitigation constitutes a waiver of the right to present evidence of those facts.¹¹⁷

¹⁰⁸ S.J.C. Rule 4:01, § 3(1).

¹⁰⁹ Matter of Gustafson, 464 Mass. 1021, 29 Mass. Att'y Disc. R. 292 (2013); Matter of Jean, 18 Mass. Att'y Disc. R. 331, 339 (2002); Matter of Bartlett, 15 Mass. Att'y Disc. R. 28 (1999).

¹¹⁰ Matter of Curry, 450 Mass. 503, 532, 24 Mass. Att'y Disc. R. 188 (2008).

¹¹¹ Matter of Foley, 439 Mass. 324, 338-339, 19 Mass. Att'y Disc. R. 141, 158 (2003).

¹¹² Matter of Griffith, 440 Mass. 500, 508-510, 20 Mass. Att'y Disc. R. 174, 189 (2003).

¹¹³ Matter of Clooney, 403 Mass. 654, 657, 5 Mass. Att'y Disc. R. 59, 63-64 (1988) (the respondent "continues to be unmindful of certain basic ethical precepts of the legal profession").

¹¹⁴ Matter of Gross, 435 Mass. 445, 17 Mass. Att'y Disc. R. 271 (2001).

¹¹⁵ Matter of Kerlinsky, 428 Mass. 656, 665, 15 Mass. Att'y Disc. R. 304, 314 (1999); Matter of Shorton, 16 Mass. Att'y Disc. R. 376, 381, 383 (2000).

¹¹⁶ See Matter of Patch, 466 Mass. 1016 (2007).

¹¹⁷ BBO Rules, § 3.15(f), available at <http://www.mass.gov/obcbbo/rules.htm>.

If the respondent does allege such facts, the Board rules imply a requirement that she also request a hearing on the mitigation claims. As noted, the Board rules state that the respondent in her answer “may request that a hearing be held on the issue of mitigation.”¹¹⁸ The Board has permitted respondents to offer evidence of facts alleged in the answer relating to mitigation even if they did not expressly request a hearing on the mitigation issue. If the respondent admits the facts alleged in the petition but includes in her answer claims of mitigation, the hearing will address only those mitigation matters (along with any aggravating factors raised by Bar Counsel).¹¹⁹

In *Matter of Patch*,¹²⁰ the SJC refused to consider as mitigation the respondent’s psychological condition, because he did not include that factor in his answer, did not offer evidence of it at his hearing, and did not argue it before the single justice.¹²¹ In *Matter of Lonardo*,¹²² the lawyer filed an answer but did not allege any facts in mitigation. His effort to introduce mitigating evidence at the hearing was denied. By contrast, in *Matter of D’Amato*, the respondent waived any claims of mitigation and waived his right to a hearing. On appeal from the resulting sanction, he asserted mitigation claims, and the single justice did consider them, although she ultimately rejected the mitigation claims in imposing a six-month suspension.

Practice Tip

The hearing committee or Bar Counsel will ordinarily permit a respondent to file an amended answer if done so at a time that does not cause prejudice to the proceedings. A respondent who fails to allege mitigating facts in his original answer should consider seeking leave to file an amended answer if he later realizes that mitigation is an issue that should be raised.¹²³

2. Evidentiary requirements

If a respondent has preserved the opportunity to present evidence in mitigation, he has the burden of proof to establish the facts supporting a departure from the standard discipline. The respondent must not only prove the facts on which the mitigation claim is based, but also the causal connection between the evidence and the misconduct. For example, in defending against a claim of lack of diligence, failure to maintain proper communications, or poor recordkeeping (none of which includes intentional misconduct), a respondent’s alcoholism or drug addiction can account for his missteps, and serve as mitigation. Some lawyers have failed to establish that relationship. For instance, in *Matter of (John Arthur) Johnson*,¹²⁴ the lawyer had misappropriated client funds, and alleged both the fact of a family tragedy and his alcoholism as factors in mitigation. The single justice concluded that those claims did not account for the

¹¹⁸ *Id.*

¹¹⁹ *Id.* at § 3.19(b).

¹²⁰ 466 Mass. 1016 (2007).

¹²¹ 466 Mass. at 1018.

¹²² 25 Mass. Att’y Disc. R. 360 (2009).

¹²³ For a discussion of the process for filing a motion to file an amended answer, see Chapter 6.

¹²⁴ 444 Mass. 1002, 21 Mass. Att’y Disc. R. 355 (2005).

misconduct, and therefore did not serve as mitigating factors.¹²⁵ At other times, respondents have sought to introduce evidence of a psychological or medical condition that might serve to explain the lawyer's misconduct, but have failed to offer reliable evidence proving the existence of that condition, and as a result their efforts to establish mitigation have failed.¹²⁶

While the facts regarding possible mitigation must be decided by the hearing committee, whether those facts properly qualify as mitigating is a question of law for the reviewing Board, single justice, or SJC. In *Matter of Early*,¹²⁷ the hearing committee had credited as mitigation the respondent's evidence that he was suffering from serious family-related stress when he mismanaged a medical malpractice claim on behalf of a child client and mishandled funds related to that client. In light of the mitigation, the hearing committee recommended an eighteen-month suspension. On appeal, the Board recommended a three-year suspension, in part because it disagreed that the stress-related factors qualified as special mitigation. The single justice affirmed the Board's actions and its suggested sanction. The single justice noted that while the committee determines credibility, the Board and the Court determine whether those facts amount to a proper mitigation claim.¹²⁸ In this case, they did not.

B. Presenting Evidence in Aggravation

Neither the SJC rules nor the BBO rules governing the disciplinary process explicitly address Bar Counsel's responsibilities for alleging aggravating circumstances. In practice, Bar Counsel will often include in her petition for discipline facts in aggravation, except prior discipline. Typically, however, the aggravating factors will arise either from the respondent's disciplinary history and therefore known to the respondent, or from the circumstances of the misconduct claims (e.g., selfish or corrupt motive; vulnerable client; failure to make restitution; experience; etc.). As a result, in contrast to efforts by respondents to pursue mitigation claims, no disciplinary report appears in which Bar Counsel has been precluded from introducing evidence in aggravation because of a failure to allege the facts on which the aggravation claim rests. But an effort by Bar Counsel to introduce a new issue about which the respondent has no knowledge or ability to confront may not be allowed, on basic fairness principles.

¹²⁵ See also *Matter of (Gale Rosalyn) Johnson*, 452 Mass. 1010, 1011 (Rescript 2008) ("the respondent's long-standing financial problems, exacerbated by gambling large sums of money over a substantial period of time, rather than a medical or psychological disability, caused the misappropriation of client funds").

¹²⁶ See *Matter of Pemstein*, 23 Mass. Att'y Disc. R. 532 (2007) (committee rejected psychiatrist's contention that respondent suffered from major depression).

¹²⁷ 21 Mass. Att'y Disc. R. 220 (2005).

¹²⁸ This division of function is consistent with the board's power to "review, and . . . revise the findings of fact, conclusions of law and recommendation of the hearing committee . . . paying due respect to the role of the hearing committee . . . as the sole judge of the credibility of the testimony presented at the hearing," S.J.C. Rule 4:01, §8(5), and the power of the single justice to review whether the board's findings are supported by substantial evidence, S.J.C. Rule 4:01, §8(6), and to review de novo the board's recommendation concerning the sanction. *Matter of the Discipline of an Attorney*, 448 Mass. 819, 829-830 (2007).

Chapter 9

Post-Hearing Review

I. Introduction

Chapter 6 described the process by which the Board, through hearing committees, special hearing officers, or special hearing panels, conducts adjudicatory hearings to determine whether a respondent lawyer has committed misconduct and, if so, what sanction should result. The factfinder's resulting report will have been informed by the post-hearing briefs submitted by the parties. The findings and conclusions in the report of the committee, officer, or panel must be adopted—or amended—by the Board. This chapter reviews the procedures by which a hearing report becomes a final order for discipline or a final order of dismissal of a petition, as well as the avenues for review and appeal after certain orders enter. The Board reviews every disciplinary hearing report, even if no appeal has been taken, and some reports receive a review by a single justice of the SJC. Some of the resulting orders will be reviewed by the full SJC. This chapter describes each of the processes and offers some practical tips to lawyers navigating these areas.¹

II. The Scope of Review

In any review of the hearing committee's action, the committee's findings of fact and recommendation carry great weight. In the Board's review of the findings and the recommendation of a hearing committee, the Board may revise any findings of fact that it determines to be erroneous, except for credibility determinations. The Board must "pay[] due respect to the role of the hearing committee . . . as the sole judge of the credibility of the testimony presented at the hearing,"² but otherwise the Board may make its own independent findings of fact based upon the evidence it reviews. The Board also will review *de novo* the recommended sanction, although in practice the Board gives great deference to the recommendation of the hearing committee. If the Board does revise any finding or recommendation, it must state the reasons for doing so in its vote or memorandum.³

In a proceeding before a single justice, "subsidiary facts found by the Board and contained in its report filed with the information shall be upheld if supported by substantial evidence, upon consideration of the record."⁴ "Substantial evidence" means such evidence as a

¹ For the sake of convenience, as in Chapter 6, the discussion here will refer to a hearing committee as the trier of fact, and in doing so encompasses special hearing officers and hearing panels. If the procedure differs for those other triers of fact, the chapter will note those differences expressly.

² BBO Rules, § 3.53; See *Matter of Saab*, 406 Mass. 315, 328, (1989) ("Our rules concerning bar discipline . . . accord to the hearing committee the position of 'the sole judge of the credibility of the testimony presented at the hearing'"); *Matter of Hachey*, 11 Mass. Att'y Discipline R. 102, 103 (1995) (credibility finding may not be rejected unless it can be "said with certainty" that finding was "wholly inconsistent with another implicit finding").

³ BBO Rules, § 3.53.

⁴ SJC Rule 4:01, § 8 (6).

reasonable mind might accept as adequate to support a conclusion.”⁵ The SJC has explained the standard of review of factual findings as follows: “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*.”⁶ “[A]lthough not binding on this court, the findings and recommendations of the board are entitled to great weight.”⁷

With regard to the sanction to be imposed, the single justice’s review of the Board’s recommendation is “*de novo*, but tempered with substantial deference to the board’s recommendation.”⁸ In practice, the single justice affords the Board great deference, but, as noted above, will on occasion order a sanction different from that recommended by the Board.⁹

III. The Review Process When Neither Party Appeals

As described in Chapter 6, after the close of the adjudicatory proceedings the hearing committee must issue its hearing report.¹⁰ If neither party files an objection to the hearing committee’s report, that does not mean that the committee’s decision is final. The Board must review every hearing report even if no appeal is taken.¹¹ After twenty days from service of the report on the parties without any appeal having been filed, the Board will review the matter.¹² Initially, the parties need do nothing except await the decision of the Board. Whether or not an appeal is filed, it should be borne in mind that the scope of the Board’s review over a hearing report is significantly broader than that of an appellate court reviewing a trial court’s judgment.

The Board must review the findings and conclusions of the committee, and has the authority to revise any findings, including findings of fact, “paying due respect to the hearing committee . . . as the sole judge of credibility of the testimony presented at the hearing,”¹³ and may order or recommend a different disposition or sanction. The Board will issue its own memorandum after its review. In many instances where neither party has appealed, the Board will adopt the committee’s findings of fact, conclusions of law, and recommended sanction, although it need not do so. If the proposed sanction is an admonition or a public reprimand, the Board will vote to adopt the findings of fact and conclusions of law, and serve the memorandum on the parties. Such service “shall constitute the admonition or public reprimand.”¹⁴ If the proposed sanction is a suspension or disbarment, the Board must file with the clerk of the SJC

⁵ G. L. c. 30A, § 1 (6).

⁶ *Matter of Segal*, 430 Mass. 359, 364, 15 Mass. Att’y Disc. R. 544 (1999). While *Segal* was a full bench opinion, the principle expressed there applies to single justice proceedings. *Matter of Buck*, 27 Mass. Att’y Disc. R. 92 (2011).

⁷ *Matter of Fordham*, 423 Mass. 481, 487 (1996), cert. denied, 519 U.S. 1149 (1997), *citing* *Matter of Hiss*, 368 Mass. 447, 461 (1975).

⁸ *Matter of Buck*, *supra*, *quoting* *Matter of Jackman*, 444 Mass. 1013, 1013 (2005).

⁹ See notes 2–3 *supra*.

¹⁰ See Chapter 6, Section XII; BBO Rules, § 3.46-3.49.

¹¹ BBO Rules, § 3.52.

¹² BBO Rules, § 3.50(a) establishes the twenty-day deadline for filing an appellate brief, subject to extension. Section 3.52 provides for Board review “[w]hen the time for filing an appeal . . . has expired and neither [party] . . . has filed an appeal with the Board.”

¹³ BBO Rules, § 3.53.

¹⁴ BBO Rules, § 3.56(a).

for Suffolk County a pleading known as an “Information,”¹⁵ because only the SJC may impose those sanctions.¹⁶ The procedure following the filing of an Information is described later in this chapter.

The Board is not required to accept the hearing committee’s findings or proposed sanction even where neither party has filed an objection. If the Board does not affirm the committee’s recommendation, it must give the parties “appropriate notice” of that decision, and the opportunity to file briefs.¹⁷ The matter then proceeds as if a party has appealed. The Board cannot and will not unilaterally change a hearing committee decision without the parties having had the opportunity to be heard.

When the parties have stipulated to factual findings and a recommended sanction, the Board need not accept the stipulation.¹⁸ The parties typically agree that if their stipulation is rejected by the Board it is void. Such a stipulation is referred to as “collapsible.” If the stipulation is collapsible and the Board does not accept the parties’ stipulation, and does not obtain a more satisfactory agreement from them, the Board will reject the proposal and Bar Counsel will pursue formal disciplinary proceedings. In other instances, the parties will agree that the stipulation will be binding as to the facts and disciplinary violations even if rejected (a “non-collapsible” stipulation). The strategic advantage to a respondent of a non-collapsible stipulation is that Bar Counsel will not oppose the respondent before the Board or the single justice.¹⁹

IV. The Review Process When a Party Appeals

A. The Procedural Steps for Appeal to the Board

A party seeking to appeal the findings, conclusions, or the proposed sanction in the hearing committee report must take the following steps to participate in the Board’s review of the committee hearing report.²⁰ (Remember, the Board will always review the report on its own; the steps described here provide the dissatisfied party the opportunity to participate in that review process and to persuade the Board that the committee was wrong in some respects.)

1. The dissatisfied party shall, within *twenty days after service of the committee report*, file a brief on appeal.²¹ That time deadline, and all briefing deadlines

¹⁵ BBO Rules, § 3.58.

¹⁶ SJC Rule 4:01, §§ 5(3)(g); 8(6).

¹⁷ BBO Rules, § 3.52.

¹⁸ Note that the Rule 3.52 process described immediately above, where the Board does not affirm a hearing report, is different from the situation where the parties propose to the Board a disposition by stipulation. For further discussion of the stipulation process, see Chapter 5.IV.

¹⁹ See *Matter of Ring*, 427 Mass. 186 (1998) (Bar Counsel and respondent defended a proposed disposition, requiring the Board to seek a different disposition before the single justice and later the full SJC). Compare *Matter of Neitlich*, 413 Mass. 416 (1992) (respondent unsuccessfully sought circumvent a stipulation with Bar Counsel accepting findings of a hearing committee).

²⁰ The procedure described here is established in BBO Rules, § 3.50.

²¹ BBO Rules, § 3.50(a).

described below, may be extended on motion to the Board.²² Note that the pleading due within this time period is not simply a notice of appeal or similar intention-documenting filing—it is the full brief.

Practice Tip

The party appealing the findings and recommendations of the hearing committee must act promptly to prepare not just a simple notice of appeal, but a full brief, within twenty days after the committee report has been served. The Board will generally allow for extensions of time if the party establishes good cause.

2. Within *twenty days of the filing of that appeal brief*, the other party must file its brief opposing the appeal and presenting any cross-appeal. The original appellant has another twenty days from that filing to file a response to the cross-appeal.²³
3. Further briefing will be permitted after those submissions only by leave of the Board. A party may file a motion with the Board requesting leave to file a further response, but additional filings are discouraged.²⁴
4. No party is entitled to oral argument unless it expressly requests that opportunity in its brief. A failure to request oral argument constitutes a waiver of that opportunity.²⁵ Even if oral argument is requested, the Board retains the discretion to proceed without a hearing, but typically when a party requests oral argument the Board allows it.
5. If neither party files a brief within the twenty days from service of the committee report, the parties will have waived the opportunity to participate in the Board review of the matter and to object to any of the committee’s findings, conclusions, or recommendation for disposition.²⁶
6. Upon receipt of an appeal, the Board will hear the matter as a full Board.²⁷
7. The Board will then schedule a hearing if a party has requested oral argument (and if the Board grants such request), and otherwise will review the full record and the briefs. It will then issue its report. While the Board has the discretion to remand the matter to the hearing committee for further evidence, it seldom does so.

²² The rule states that the time for filing the brief is twenty days or “such other longer *or* shorter time as may reasonably be fixed by a Board member.” BBO Rules, § 3.50(a) (emphasis added). The Board has never imposed a shorter deadline on a party.

²³ BBO Rules, § 3.50(a).

²⁴ *Id.*

²⁵ BBO Rules, § 3.50(b).

²⁶ BBO Rules, § 3.50(c). *But see* § 3.52, discussed above.

²⁷ BBO Rules, § 3.50(d). Rule 3.50(d) permits the Board to assign the appeal to a three-member appeal panel, but that is not the practice of the Board.

B. The Content and Form of the Briefs

An appeal brief filed by a party must include:²⁸

- A short statement of the case;
- A summary of the basic position of the party filing the brief;
- The grounds on which the appeals rests; and
- Argument in support of the appeal, with references to the record and to legal authority.

There is no requirement of a record appendix or other supporting documents, because the Board will have all of the exhibits and the transcripts available to the hearing committee. There is also no page limit imposed by the BBO rules.

Practice Tip

A brief challenging or proposing a particular sanction on appeal should focus primarily on prior Board discipline reports and SJC opinions to support that party's position. A brief challenging findings of fact should pay special attention to the record and cite it with specificity. While the Board has access to the full record, a party may attach parts of the record to its brief for ease of reference. Where appropriate, insist on subsidiary findings of fact.

If a party disagrees with the proposed sanction, the brief must explain the basis for that disagreement and argue for a different, identified disposition.

The party opposing the appeal has twenty days to file a brief in opposition, and that brief may also raise any cross-appeal. Any cross-appeal must be filed within that same 20 day period. The same rules governing the appellant's brief apply to the appellee's brief and an appellant's opposition to a cross-appeal, except that the appellee may omit the statement of the case if the appellant's brief has described it sufficiently.²⁹

C. The Board's Action on Appeal

After its consideration of the appeal, the Board will typically issue a decision with a memorandum, drafted with the aid of General Counsel. If the Board issues a decision and the proposed sanction is an admonition or a public reprimand, the Board will serve its report on the parties, and such service "shall constitute the admonition or public reprimand."³⁰ If the proposed sanction is a suspension or disbarment, the Board must file an Information with the clerk of the Supreme Judicial Court for Suffolk County.³¹

²⁸ BBO Rules, § 3.51.

²⁹ BBO Rules, § 3.51(b).

³⁰ BBO Rules, § 3.56(a).

³¹ BBO Rules, § 3.58.

V. Appeal from the Board Decision

If the parties accept the final report and disposition of the Board, then either (a) an admonition, a public reprimand, or a dismissal will go into effect through the service of the Board's report;³² or (b) the Board will file an Information to obtain the SJC's approval of a suspension or disbarment.³³

If the Board has recommended an admonition, a public reprimand, or a dismissal, a party who disagrees with the recommendation must seek SJC review of that decision. Otherwise the decision will be final. To obtain review of an admonition, a public reprimand, or a dismissal, a party must, *within twenty days of the date of service of the Board vote*, file with the Board a demand for the filing of an Information.³⁴ That twenty day time limit is jurisdictional; neither the Board nor the SJC may enlarge the time for the filing of the demand.³⁵ Upon receipt of such a demand, the Board will file the Information.

In the case of a proposed suspension or disbarment, no action by a party is required at the Board level because the Board must file an Information with the SJC and the dissatisfied party will have the opportunity to present its objections to the Court.

VI. The “Information” and the Proceeding Following Its Filing

A. Filing of an Information

Since the SJC has the exclusive authority to impose a suspension or disbarment, the Court will review every proposed disposition involving those sanctions. The SJC will also review any other disposition where a party has timely requested review of the Board recommendation. In each instance, the SJC review process begins with a document known as an “Information.”³⁶

An Information is a pleading that the Board presents to the SJC. The document typically opens as follows: “The Board of Bar Overseers brings to the attention of this Court, pursuant to Rule 4:01, Section 8(6), of the Rules of this Court, matters regarding the character and conduct of [the respondent lawyer].” The Information then identifies all of the steps of the proceedings before the Board, with dates and references to the record, including the proposed sanction approved by the Board vote, as well as the costs incurred by the Board in conducting the proceedings.

³² BBO Rules, § 3.56(a)

³³ BBO Rules, § 3.58.

³⁴ BBO Rules, § 3.57(a).

³⁵ SJC Rule 4:01, § 8(6); BBO Rules, § 3.57(a). While the rule for filing the demand is much stricter than most of the other filing deadlines identified in this chapter, nothing in the SJC nor BBO rules describes the calculation method to determine when the period has expired, and no disciplinary report shows any dispute about that deadline or its interpretation.

³⁶ SJC Rule 4:01, § 8(6).

Accompanying the Information is “the entire record of [the] proceedings” before the Board.³⁷ That includes the petition, the answer, dispositive or otherwise pertinent motions and rulings, the transcript of the hearing proceedings, the exhibits admitted into evidence (as well as any excluded exhibits if such exclusion is a matter in dispute), the committee report, the briefs of the parties, and the Board vote and memorandum, if any. The Board files all of that material with the clerk of the SJC for Suffolk County. On doing so, Board notifies the parties of such filing by serving a copy of the Information on them. A fictitious example of an Information is appended to this Treatise as Appendix G. The clerk of the SJC then docket the matter, using a special cover sheet designed for discipline cases. An example of the clerk’s cover sheet is appended to this Treatise as Appendix H.

The parties need not file anything with the SJC as part of this process.

You Should Know

With one exception, every sanction is entitled to review by the SJC through the filing of an Information. If a respondent who has received an admonition from Bar Counsel that has been accepted by the Board requests an expedited hearing to review that sanction, the order following that hearing is final, and no appeal to the SJC is allowed. That special expedited hearing process is reviewed at the end of this chapter.³⁸

B. Proceedings Before the SJC

1. The single justice Hearing

Upon receipt of an Information, the Chief Justice of the SJC assigns the matter to a single justice, in rotation,³⁹ and a hearing date is set before the single justice. The parties file no further pleadings at this stage. They simply await a hearing date.⁴⁰

Practice Tips

The SJC Clerk for Suffolk County typically telephones each party to the proceeding to arrange a mutually acceptable date for the single justice hearing.

* * *

A respondent who has defaulted at every stage of the proceedings prior to the single justice hearing will nevertheless receive notice of the hearing and may attend and argue. Of course, that strategy is hardly recommended, especially in light of the greater opportunity for the respondent to obtain reversal of subsidiary findings before the Board

³⁷ BBO Rules, § 3.58.

³⁸ See Section VI.

³⁹ SJC Rule 4:01, § 1(2).

⁴⁰ A party who cannot attend the hearing on the date assigned may file a motion with the single justice requesting a different date. The Court tends to be very accommodating of the parties’ scheduling needs.

than is available before the single justice. Also, if a respondent has not participated in the Board proceedings, the single justice will not have any brief in support of the respondent's position, unless the single justice allows such a filing.

The single justice will offer the parties the opportunity for oral argument, and will have received the briefs submitted at the Board level. On occasion, before or after the hearing, one or both parties will submit additional briefs to the court, either of their own motion or upon request by the single justice. After the oral arguments, the justice will either issue a decision or reserve and report the case to the full SJC for hearing. The single justice may accept the Board's recommendation,⁴¹ reject it and order a different sanction or disposition,⁴² or remand the matter for further proceedings at the Board level.⁴³ According to the SJC rules,

The subsidiary facts found by the Board and contained in its report filed with the Information shall be upheld if supported by substantial evidence, upon consideration of the record, or such portions as may be cited by the parties.⁴⁴

2. Appeal from the single justice Decision

A party dissatisfied with the decision by the single justice (including Bar Counsel, the respondent, or the Board) may request review by the full bench.⁴⁵ To expedite appeals, the SJC in 2009 issued a standing order governing such appeals, entitled "Order Establishing a Modified Procedure for Appeals in Bar Discipline Cases." That Standing Order was replaced in 2015 with SJC Rule 2:23.⁴⁶

Rule 2:23 establishes the following procedures. A party dissatisfied with the single justice decision must file a notice of appeal *within ten days of the entry of the order* by the single justice. That filing does not stay the order issued by the single justice. The appellant then prepares a record appendix containing copies of all relevant papers that were before the single justice and, at a minimum:

- The hearing committee report;
- The appeal panel report, if any;

⁴¹ See, e.g., Matter of Manoff, 29 Mass. Att'y Disc. R. 421 (2013) (accepting Board's recommendation of public reprimand).

⁴² See, e.g., Matter of Sousa, 28 Mass. Att'y Disc. R. 804 (2012) (rejecting Board's recommended sanction on indefinite suspension; two-year suspension imposed); Matter of Serpa, 30 Mass. Att'y Disc. R. 358 (2014) (rejecting Board's recommendation of six month suspension in favor of sixty day suspension).

⁴³ See, e.g., Matter of Greenidge, 30 Mass. Att'y Disc. R. 174 (2014) (remanding for evidentiary hearing on question of mitigation and appropriate sanction).

⁴⁴ SJC Rule 4:01 § 8(6).

⁴⁵ By comparison, a party in a civil action dissatisfied with the decision by the Appeals Court may petition the SJC to hear the matter, but is not entitled to further appellate review as a matter of right. MASS. R. APP. P. 27.1. In bar discipline matters, a party has the right to a review by the full SJC, but not to a hearing before the full bench.

⁴⁶ SJC Rule 2:23, effective April 1, 2015. The only difference between the Standing Order and the new rule is that Rule 2:23 changes references to "standing order" to "rule" in 2:23(d). The Order's subsection (e), instructing the court clerk to give a copy of the Order to all parties in bar discipline cases, was omitted from the rule.

- The Board memorandum; and
- The single justice order and memorandum.

The record appendix does not include the transcript of the hearing before the committee or the briefs submitted at the Board level. If there are multiple appellants, they will share the cost of producing the joint record appendix.

Practice Tip

While not addressed in Rule 2:23, parties with good cause to do so may request to supplement the record to include material not available before the single justice. While uncommon and not favored, this strategy has succeeded on occasion.

The appellant also must prepare a “preliminary memorandum,” not more than 20 pages double-spaced, with a summary of argument supported by citations. In that memorandum the appellant must demonstrate one or more of the following:

- That there has been an error of law or abuse of discretion by the single justice;
- That the decision is not supported by substantial evidence;
- That the sanction is markedly disparate from the sanctions imposed in other cases involving similar circumstances; or
- That for other reasons the decision will result in a substantial injustice.

The appellant must file nine copies of the record appendix and the preliminary memorandum *within thirty days of the appeal being docketed in the SJC*. Extensions “will rarely be granted,” so that deadline is effectively mandatory. In addition to filing the nine copies, the party will also serve those papers on the other party to the appeal. The appellee may file a responsive memorandum, but only if requested by the Court and within twenty days of that request, of the same length as the appellant’s. If the appellee should file such a responsive memorandum, it must file nine copies of that pleading and serve a copy on the appellant.

Typically, the Court decides the matter on the papers without oral argument. A party may request oral argument as part of this review but no such request has ever been granted. If three justices so vote, however, the matter may be directed to the “regular course” of appeals to the SJC, and the parties are then invited to file full briefs and await oral argument. By “full briefs,” the order refers to briefs filed in ordinary appeals, which may be as long as 50 pages for an appellant.⁴⁷ The appellee’s brief will have the same twenty page limit as required by the standing order.⁴⁸

VII. Review of an Admonition Through an Expedited Hearing

⁴⁷ Mass. R.A.P. 16(h).

⁴⁸ *Id.*

The procedures described above apply to reviews of all discipline imposed or recommended by the Board, except, in some instances, for admonitions, which at times trigger a separate review procedure. (The procedures above also do not apply in precisely the same fashion to reviews of Board recommendations after a hearing on a petition for reinstatement. The special reinstatement procedures are examined in Chapter 13.)

If the Board recommends a sanction of an admonition after a full hearing and the issuance of a hearing committee report, that sanction will be reviewed under the procedures described above. By contrast, if the admonition sanction results from the recommendation by Bar Counsel and approval by the Board *prior to a petition for discipline having been filed*, a different procedure applies. That procedure is known as an “expedited hearing.”⁴⁹ There is no review by the SJC after the results of an expedited hearing; the sanction order following that process is final.

You Should Know

The expedited hearing process has been used sparingly. The Office of Bar Counsel reports that, through the middle of 2017, only four such hearings have taken place. In three such cases, the matters were heard within 30 days.

The procedure for an expedited hearing is as follows:

1. After Bar Counsel serves the respondent with the admonition (which service shall effect the imposition of that sanction), the respondent who wishes to seek review of that sanction must, *within fourteen days of the date of the service of the admonition*, file a written demand with Bar Counsel that the admonition be vacated and a hearing provided. That deadline is jurisdictional, meaning that it cannot be extended by Bar Counsel or the Board, even for good cause.⁵⁰ The written demand must include a “statement of objections” to the factual allegations and the rule violations listed in the admonition, specifying in detail the reasons why the admonition must be rejected, and any facts to be considered in mitigation.⁵¹ Failure to identify mitigation factors in the demand pleading will prohibit the respondent from offering any such evidence at the hearing.
2. Upon receipt of the demand that the admonition be vacated, Bar Counsel will file its admonition summary along with the respondent’s demand with the Board. The Board will then assign a special hearing officer (not a hearing committee) to conduct an expedited hearing on the matter. That hearing will take place within

⁴⁹ SJC Rule 4:01, § 8(4); BBO Rules, §§ 2.11-2.12.

⁵⁰ BBO Rules, § 2.12. The BBO rules state that “service is complete upon mailing.” BBO Rules, § 3.4(c). Therefore, the respondent must ensure that his written demand is postmarked no later than fourteen days after the date of the service of the admonition.

⁵¹ BBO Rules, § 2.12(1)(a).

thirty days of Bar Counsel’s filing the papers with the Board. A later hearing date may be set by agreement or on motion, “for good cause shown.”⁵²

3. Prior to the expedited hearing the parties must exchange witness lists, proposed exhibits, and objections, and they must file agreed-upon exhibits and stipulations, all by dates specified in the notice of hearing. There is no mandatory prehearing conference procedure.⁵³ The hearing officer will then conduct the hearing. The hearing will be conducted in the same fashion as disciplinary hearings described in Chapter 6, except for the following difference.
4. At the conclusion of the hearing, the parties will not file briefs or requests for findings of fact or conclusions of law.⁵⁴ The hearing officer will issue a report in the same fashion as a hearing committee does after a conventional disciplinary hearing.⁵⁵ The report may recommend dismissal or the imposition of an admonition, or it may conclude that some discipline more severe than an admonition is warranted, and recommend that the matter be referred for full disciplinary proceedings.⁵⁶
5. A party dissatisfied with the report and recommendation of the hearing officer may file an appeal brief in the very same fashion as described above for disciplinary hearings, but the matter will be decided on the papers.⁵⁷
6. The decision by the Board after that review is final. No party may demand that the Board file an Information in order to obtain review by the SJC.⁵⁸

⁵² BBO Rules, § 2.12(2)(c). The language of this rule states that “the matter . . . shall be set for hearing within 30 days of the filing” That language might be read to mean that a hearing date must be established, but not necessarily occur, within 30 days, but the Board interprets it to require that the hearing occur within 30 days.

⁵³ BBO Rules, § 3.23(a)(1) (excepting expedited hearings from the prehearing conference requirement).

⁵⁴ BBO Rules, § 2.12(2)(d), (g).

⁵⁵ SJC Rule 4:01, § 8(4)(a).

⁵⁶ SJC Rule 4:01, § 8(4)(a).

⁵⁷ SJC Rule 4:01, § 8(4)(b). See Section III, *supra*.

⁵⁸ SJC Rule 4:01, § 8(4)(b).

Chapter 10

Reciprocal Discipline

I. Introduction

Many lawyers in Massachusetts are members of the bar of another state or jurisdiction, including a federal court. A lawyer may also be admitted to practice before an administrative tribunal, such as the United States Patent and Trademark Office. If a lawyer is disciplined in another jurisdiction in which he is licensed to practice law,¹ Massachusetts will respond reciprocally. This Chapter addresses how reciprocity works in the Commonwealth, and what lawyers should know about the process. Reciprocal discipline is common in Massachusetts, so the topic is important.

II. Reporting Sanctions to the Board of Bar Overseers

The Rules of the Supreme Judicial Court require every Massachusetts lawyer to report any sanction received from another disciplinary authority or from any tribunal to the Board of Bar Overseers and to Bar Counsel within ten days of the imposition of the sanction. Rule 4:01, § 16(6) reads as follows:

A lawyer subject to public or private discipline in another jurisdiction (including any federal court and any state or federal administrative body or tribunal), or whose right to practice law has otherwise been curtailed or limited in such other jurisdiction, shall provide certified copies of the order imposing such discipline or other disposition to the Board and to the Bar Counsel within ten days of the issuance of such order.²

In addition, a lawyer who has been denied admission to the bar of any other jurisdiction other than for failure to pass the bar examination must notify the Board and Bar Counsel in a similar fashion, and also within ten days of the issuance of the order.³

Failure to report the sanction may itself serve as an independent basis for discipline.⁴ There are important advantages to a lawyer in complying with that obligation. Bar counsel will

¹ A Massachusetts lawyer may be subject to primary discipline in the Commonwealth for misconduct that occurs in another state. That discipline, though, would not be considered reciprocal. *See, e.g.,* Matter of Airewele, 28 Mass. Att’y Disc. R. 3 (2012) (unauthorized practice of law in Georgia, among other misconduct; lawyer suspended for six months and one day); Matter of Marshall, 16 Mass. Att’y Disc. R. 275 (2000) (respondent used a false identity to apply for the Arizona bar; indefinite suspension ordered); Matter of Ramos, 29 Mass. Att’y Disc. R. 554 (2013) (unauthorized practice in Ohio; six-month suspension).

² SJC Rule 4:01, § 16(6).

³ *Id.*, § 16(7).

⁴ SJC Rule 4:01, § 3(1). *Cf.* Matter of Burnbaum, 28 Mass. Att’y Disc. R. 80 (2012) (“The respondent’s misconduct warranting sanction includes both failing to report his conviction and consequent disciplinary resignation from the Florida bar, in violation of S.J.C. Rule 4:01, §§ 12(8) and 16(6), and his felony conviction . . .”). The suspension sanction in *Burnbaum* was later overruled by the full bench of the SJC, which ordered the lawyer disbarred. Matter of Burnbaum, 466 Mass. 1024 (2013).

almost certainly learn of discipline in another jurisdiction, either from public reports or through the National Lawyer Regulatory Data Bank, a clearinghouse of discipline managed by the American Bar Association and monitored regularly by Bar Counsel.⁵ Once Bar Counsel learns of discipline in another jurisdiction, the reciprocal discipline process described below will commence. If the sanction from the other jurisdiction is a suspension, the lawyer will typically request that the Massachusetts reciprocal discipline order issue *nunc pro tunc*, retroactive to the date of the original sanction from the foreign jurisdiction.⁶ A lawyer who has failed to report the discipline will forfeit the opportunity to obtain *nunc pro tunc* treatment of the Massachusetts discipline.⁷

Practice Tip

A lawyer suspended in another state will typically want the Massachusetts discipline to operate *nunc pro tunc*, to avoid extending the local suspension period by the length of time the reciprocity process takes. Therefore, not only should a lawyer report a suspension promptly to the Board and to Bar Counsel, but the lawyer should also consider limiting her practice in Massachusetts upon receipt of the other state's suspension order. A retroactive reciprocal suspension order in Massachusetts will be easier to accommodate if the lawyer acts as if she is suspended once she reports the out-of-state suspension.

III. Out of State Discipline: Procedures and Standards

Discipline imposed upon a Massachusetts lawyer by another state bar will trigger a response by Bar Counsel, the nature of which differs depending on the level of the sanction received by the lawyer. This Section reviews the differences in the response and the process by the nature of the discipline imposed.

⁵ The ABA National Lawyer Regulatory Data Bank “is the only national repository of information concerning public regulatory actions relating to lawyers throughout the United States. It was established in 1968 and is operated under the aegis of the ABA Standing Committee on Professional Discipline.” American Bar Association, *National Lawyer Regulatory Data Bank*, at http://www.americanbar.org/groups/professional_responsibility/services/databank.html (last visited August 3, 2014). The Data Bank is not without its critics. See Jennifer Carpenter & Thomas Cluderay, *Implications of Online Disciplinary Records: Balancing the Public's Interest in Openness with Attorneys' Concerns for Maintaining Flexible Self-Regulation*, 22 GEO. J. LEGAL ETHICS 733, 746 (2009) (noting that “the Data Bank lacks widespread state participation”).

⁶ See e.g., *Matter of Dvorak*, 28 Mass. Att’y Disc. R. 269 (2012) (reciprocal discipline after suspension by the Board of Immigration Appeals, Immigration Courts, and the Department of Homeland Security; suspension order made retroactive to correspond to the immigration order); *Matter of Rocha*, 30 Mass. Att’y Disc. R. 352 (2014) (suspension in Rhode Island; Massachusetts suspension retroactive to the commencement of the Rhode Island order, and reinstatement conditioned on Rhode Island reinstatement).

⁷ See *Matter of Sheridan*, 449 Mass. 1005, 1008, 23 Mass. Att’y Disc. R. 646 (2007) (SJC upheld single justice’s refusal to make the respondent’s suspension retroactive because he failed to notify the Board and Bar Counsel of disciplinary orders against him in New Hampshire); *Matter of Cronin*, 23 Mass. Att’y Disc. R. 90, 91 (2007) (no retroactivity where lawyer failed to report discipline pursuant to § 16(6)); *Matter of Steinberg*, 22 Mass. Att’y Disc. R. 745, 756 (2006) (same); *Matter of Hager*, 19 Mass. Att’y Disc. R. 192, 192 (2003) (same); *Matter of Sussman*, 18 Mass. Att’y Disc. R. 518, 519 (2002) (same); *Matter of Albiani*, 14 Mass. Att’y Disc. R. 2, 4 (1998) (same).

A. Private Discipline

The SJC requires a lawyer to report private discipline within ten days,⁸ and once Bar Counsel has notice of that non-public sanction, it will treat that discipline the same as an admonition imposed in Massachusetts.

Practice Tip

A Massachusetts lawyer who fails to report an order from another jurisdiction imposing private discipline risks discipline for that misconduct. There may also be consequences later. If the lawyer should encounter the disciplinary process in the future, not only will the other jurisdiction's private discipline serve as a factor in aggravation, the lawyer's failure to report that sanction may also be considered as an aggravating consideration.

The SJC rules do not offer a lawyer the opportunity to challenge in Massachusetts the validity of an out-of-state private sanction.

B. Public Reprimand

Upon receipt of an order from another jurisdiction imposing a public reprimand or its equivalent upon a Massachusetts lawyer, Bar Counsel will give notice of that order to the Board and to the Clerk of the SJC. The order will then be filed and made public in the same manner as a public reprimand issued by the Board or the Court,⁹ and shall remain on the lawyer's public record like any other public reprimand.

The SJC rules do not offer a lawyer the opportunity to challenge in Massachusetts the validity of an out-of-state public reprimand.

C. Suspension or Disbarment

1. The Procedure for Reciprocal Discipline Involving Suspension or Disbarment

When Bar Counsel learns that a lawyer admitted to the bar in Massachusetts has been suspended or disbarred by another jurisdiction, it will obtain a certified copy of that order. (If the lawyer has properly self-reported, he would have filed with Bar Counsel and the Board a certified copy of the order. Otherwise, Bar Counsel will obtain the certified copy.) Bar counsel then submits the certified copy to the clerk of the SJC, along with a petition for reciprocal discipline.

Upon its receipt of that disciplinary order, the Court shall issue its own order directing the lawyer to inform the Court, *within thirty days from service of the notice*, of any claim or

⁸ SJC Rule 4:01, § 16(6).

⁹ SJC Rule 4:01, § 16(4).

argument that the Court should not impose identical discipline in Massachusetts.¹⁰ The Court's notice serves as an order to show cause why the same discipline should not be imposed in the Commonwealth. Bar counsel is required to serve that order and notice upon the lawyer. Included in that delivery will be a copy of the order from the other jurisdiction.¹¹

If the lawyer does not respond within thirty days, the Court will almost always impose the same suspension or disbarment order in Massachusetts as the other jurisdiction had imposed, unless Bar Counsel has filed a pleading with the Court requesting a different sanction. While the SJC rules do not expressly authorize such a filing by Bar Counsel, the Court will permit it.¹² The Court (typically through assignment to a single justice) holds a hearing on the matter before issuing its reciprocal discipline order, unless the parties waive a hearing and assent to the entry of an order.

Practice Tip

A lawyer who receives a suspension order from the SJC equal in length to the suspension order from the other jurisdiction will, by necessity, be suspended in Massachusetts for a later period of time than in the first jurisdiction, given the time it will take to process the Massachusetts sanction, *unless* the Massachusetts suspension order is made retroactive to the date of the out-of-state order.

2. The Substantive Standards for Reciprocal Discipline Involving Suspension or Disbarment

In determining the proper sanction in reciprocal discipline involving a suspension or disbarment, the single justice “may enter such order as the facts brought to its attention may justify.”¹³ Presumably, this includes any of the “reasons” a respondent is entitled to present to the Court to show that the imposition of discipline in Massachusetts is unwarranted.¹⁴ The judgment of the other jurisdiction carries great, and almost conclusive, weight with respect to the misconduct:

The judgment of suspension or disbarment shall be conclusive evidence of the misconduct unless the Bar Counsel or the Respondent-lawyer establishes, or the court concludes, that the procedure in the other jurisdiction did not provide reasonable notice or opportunity to be heard or there was significant infirmity of proof establishing the misconduct.¹⁵

¹⁰ SJC Rule 4:01, § 16(1).

¹¹ *Id.*

¹² *See* Matter of Tunney, 28 Mass. Att’y Disc. R. 857 (2012) (no appearance by respondent, yet hearing held before a single justice, evidencing Bar Counsel’s attempt to impose a stricter sanction).

¹³ SJC Rule 4:01 § 16(3).

¹⁴ *Id.*, § 16(1)(b).

¹⁵ *Id.*, § 16(3).

As the Court has stated, “[O]ur inquiry ‘is generally limited to determining whether the attorney received a fair hearing at which sufficient evidence was presented to justify our taking reciprocal disciplinary action.’”¹⁶ In *Matter of McCabe*,¹⁷ for example, the SJC refused to impose any sanction at all on an attorney who had received a term suspension of five years in federal court in Louisiana. The respondent had played a minor role as defense counsel in an action involving the enforcement of a purchase and sale agreement, an action in which prior defense counsel had behaved unprofessionally.¹⁸ After reviewing the record, the Court found that the respondent had engaged in no activity that it recognized as meriting discipline.¹⁹ The Court noted that the respondent had unfortunately managed to get “caught in the vortex of justified anger and disbelief on the part of the District Court judge created by unethical and pettifogging conduct of other lawyers. The judge seemed unable to divorce [the respondent’s] representation and minor part in this litigation from the whole.”²⁰ The court therefore declined to impose reciprocal discipline on the respondent.²¹

Where discipline is warranted, the single justice presumptively will order the same discipline as the other jurisdiction:

The court may impose the identical discipline unless (a) imposition of the same discipline would result in grave injustice; (b) the misconduct established does not justify the same discipline in this Commonwealth; or (c) the misconduct established is not adequately sanctioned by the same discipline in this Commonwealth.²²

The SJC has stated that “Rule 4:01, § 16, implicitly adopts a modified rule of *res judicata*” on the question of the nature of the sanction.²³ The Court has indicated, however, a more independent role in reviewing reciprocal discipline:

In determining the appropriate level of discipline to be imposed in Massachusetts, however, we look to Massachusetts law because “our task is not to replicate the sanction imposed in another jurisdiction but, rather, to mete out the sanction appropriate in this jurisdiction, ‘even if that discipline exceeds, equals, or falls short of the discipline imposed in another jurisdiction.’”²⁴

¹⁶ *Matter of Bailey*, 439 Mass. 134, 136 (2003), quoting *Matter of Lebbos*, 423 Mass. 753, 756 (1997). The language in the text was quoted approvingly by the Court in *Matter of Mitrano*, 453 Mass. 1026, 1027, 25 Mass. Att’y Disc. R. 385, 386–87 (2009).

¹⁷ 411 Mass. 436, 450, 7 Mass. Att’y Disc. R. 181 (1991).

¹⁸ *Id.* at 437.

¹⁹ *Id.* at 450.

²⁰ *Id.* at 449.

²¹ *Id.* at 450.

²² *Id.* The use of the word “may” in the quoted language of the SJC rule is not how the rule operates. The practice is to treat that word as if it read “shall.” The Court has stated, “[O]ur inquiry is generally limited to determining whether the attorney received a fair hearing at which sufficient evidence was presented to justify our taking reciprocal disciplinary action.” *Matter of Bailey*, 439 Mass. 134, 136 (2003), quoting *Matter of Lebbos*, 423 Mass. 753, 756, 12 Mass. Att’y Disc. R. 237 (1996). *See also* *Matter of McCabe*, 411 Mass. 436 (1991) (no discipline imposed; not warranted on the record of the other jurisdiction).

²³ *Lebbos*, 423 Mass. at 755.

²⁴ *Matter of Burnbaum*, 466 Mass. 1024 (2013) (quoting *Matter of Steinberg*, 448 Mass. 1024, 1025, 23 Mass. Att’y Disc. R. 689 (2007); *Matter of Watt*, 430 Mass. 232, 234, 15 Mass. Att’y Disc. R. 624 (1999)).

If the respondent or Bar Counsel can demonstrate that identical discipline would be unfair or inappropriate, then the single justice will perform an independent analysis to determine the appropriate sanction.²⁵ As the Court has stated, after reviewing the facts to determine what the appropriate sanction should be, a single justice may impose discipline “that is greater than, equal to, or lesser than that which was originally imposed in another jurisdiction.”²⁶ As with all discipline cases, any single justice decision will be subject to review by a full bench of the SJC.²⁷

Imposing an equivalent sanction is by far the most common form of reciprocal discipline,²⁸ but there have been cases in which sanctions ordered were greater or lesser than those originally imposed. On occasion, Bar Counsel will support a lesser sanction. For example, in *Matter of Amaral*,²⁹ Bar Counsel argued that the respondent should only receive an indefinite suspension for conduct that led to his disbarment in Rhode Island, and the single justice agreed. In *Matter of Watt*, the Court imposed a more severe sanction than that ordered by the foreign jurisdiction. The respondent had received a term suspension of one year in Rhode Island for commingling client funds with his personal funds and converting them for his own use.³⁰ Bar counsel argued that the discipline imposed in Rhode Island was inadequate and sought an indefinite suspension.³¹ A single justice ordered a two-year suspension and Bar Counsel appealed. The SJC affirmed the two-year term suspension.³² The Court confirmed that, while deference is ordinarily shown to decisions of other courts in reciprocal discipline matters, it is not required when the presumptive discipline in Massachusetts is different from that imposed in the other jurisdiction.³³ The SJC declined to impose the presumptive sanction in Massachusetts, however, “in deference to our sister jurisdiction.”³⁴

When appropriate, the Court will consider the jurisprudence of the other jurisdiction, in comparison to that of Massachusetts, in assessing whether to accept the presumptive, out-of-state sanction. In *Matter of Grew*,³⁵ New Hampshire had imposed a six-month suspension upon a lawyer who had been convicted of insurance fraud. After much consideration of the lawyer’s misconduct in comparison to previous Massachusetts discipline reports, the single justice imposed a one-year suspension, retroactive to the date of the lawyer’s

²⁵ See, e.g., *Matter of Kilduff*, 27 Mass. Att’y Disc. R. 510 (2011); *Matter of Brett*, 22 Mass. Att’y Disc. R. 102 (2006).

²⁶ *Matter of Watt*, 430 Mass. 232, 233, 15 Mass. Att’y Disc. R. 624 (1999), citing *Matter of Daley*, 11 Mass. Att’y Disc. R. 57 (1995). Note that some states do not allow reciprocal discipline to be more severe than the original sanction. See, e.g., *In re Welker*, 100 P.3d 1197 (Utah 2004) (Utah rule as written only permits equivalent or lesser sanctions).

²⁷ See SJC Rule 2:23 (2015). Until April 1, 2015, Rule 2:23 existed as SJC Standing Order Establishing a Modified Procedure for Appeals in Bar Discipline Cases (2009) (discussed in Chapter 9, Section V.B.2).

²⁸ See, e.g., *Matter of Lepore*, 29 Mass. Att’y Disc. R. 390 (2013) (imposed same sanction as in foreign jurisdiction); *Matter of Martin*, 29 Mass. Att’y Disc. R. 430 (2013) (same); *Matter of Kesinger*, 29 Mass. Att’y Disc. R. 363 (2013) (same); *Matter of Massicotte*, 29 Mass. Att’y Disc. R. 433 (2013) (same); *Matter of Pellenz*, 29 Mass. Att’y Disc. R. 530 (2013) (same).

²⁹ 26 Mass. Att’y Disc. R. 7 (2010).

³⁰ 430 Mass. 232, 233, 15 Mass. Att’y Disc. R. 624 (1999).

³¹ *Id.*, 430 Mass. at 234.

³² *Id.* at 236.

³³ *Id.* at 234.

³⁴ *Id.* at 236.

³⁵ 23 Mass. Att’y Disc. R. 232 (2007).

temporary suspension. In noting that the New Hampshire sanction order was on appeal, the single justice observed:

[T]here are two significant differences between New Hampshire and Massachusetts jurisprudence. First, New Hampshire, it seems, does not make a distinction between misconduct outside the practice of law and misconduct committed in the practice of law. Massachusetts makes such a distinction. . . . Second, New Hampshire allows a disbarred attorney to petition for reinstatement at any time, whereas Massachusetts does not permit reinstatement until eight years after disbarment, or five years after an indefinite suspension.³⁶

If the sanction imposed in another jurisdiction has been stayed, any reciprocal discipline given in Massachusetts may, but need not, be deferred as well.³⁷ For example, in *Matter of Foley*,³⁸ the respondent received a term suspension of six months in New Hampshire, with the suspension stayed on certain conditions. A single justice issued an order for reciprocal discipline, but with the execution of the order stayed provided the respondent complied with the conditions set forth in the New Hampshire disciplinary proceeding. In *Matter of Cronin*,³⁹ by contrast, the lawyer's six-month suspension imposed by New Hampshire was stayed in that state, but his having failed to report that sanction to Bar Counsel or the Board led to his receiving a suspension without a stay in Massachusetts.⁴⁰

For purposes of reinstatement, the SJC has written, "In cases involving reciprocal discipline, it is the usual practice to condition reinstatement in the Commonwealth upon prior reinstatement in the jurisdiction in which the discipline originated."⁴¹

Practice Tip

Reciprocal discipline adheres to a presumption of matching the foreign jurisdiction's sanction. But, as the reports show, Bar Counsel will at times argue for a stiffer sanction, and the respondent will sometimes argue for less severe discipline, and the Court must consider those arguments. Ultimately, the Court must honor the bedrock principle that it consider whether any sanction imposed "is markedly disparate from those ordinarily entered by the various single justices in similar cases," recognizing that "[e]ach case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances."⁴²

³⁶ *Id.*

³⁷ SJC Rule 4:01, § 16(2).

³⁸ 29 Mass. Att'y Disc. R. 268 (2013).

³⁹ 24 Mass. Att'y Disc. R. 120 (2008).

⁴⁰ See also *Matter of Alcalá*, 21 Mass. Att'y Disc. R. 8 (2005) (California suspension stayed there, but not in Massachusetts because of the lawyer's failure to report the foreign sanction).

⁴¹ *Matter of Tunney*, *supra*, citing *Matter of Ritzo*, 26 Mass. Att'y Disc. R. 555 (2010); *Matter of Carey*, 25 Mass. Att'y Disc. R. 89 (2009); *Matter of Anderson*, 23 Mass. Att'y Disc. R. 14 (2007). See also *Matter of Kesinger*, 29 Mass. Att'y R. 363 (2013); *Matter of Martin*, 29 Mass. Att'y Disc. R. 430 (2013).

⁴² *Matter of Pudlo*, 460 Mass. 400, 404, 27 Mass. Att'y Disc. R. 736 (2011) (citations omitted), quoting *Matter of Alter*, 389 Mass. 153, 156 (1983); *Matter of Crossen*, 450 Mass. 533, 574 (2008); *Matter of the Discipline of an Attorney*, 392 Mass. 827, 837 (1984) ("Three Attorneys").

D. Disciplinary Resignations

As described in Chapter 11 of this treatise, a lawyer may resign during disciplinary proceedings or investigation, and that resignation has implications vastly different from those resulting from a non-disciplinary resignation by a lawyer in good standing.⁴³ If a lawyer submits a disciplinary resignation in another jurisdiction, that action will have reciprocal effect in Massachusetts.

SJC Rule 16(1) makes clear that the Court will issue the same notice to show cause described in Section III.C. above to a lawyer who “has resigned during the pendency of a disciplinary investigation or proceeding” in a foreign jurisdiction.⁴⁴ The challenges are whether, and if so how, the Court will give conclusive effect to the judgment of the other jurisdiction in the case of a resignation, especially in those jurisdictions where the lawyer need not admit the truth of the allegations against him as a condition of the resignation.⁴⁵ In a 2009 opinion of the full SJC, the Court answered those questions.

In *Matter of Ngobeni*,⁴⁶ Bar Counsel sought a reciprocal disbarment order after a lawyer had resigned from the practice of law in Connecticut, without his having made any admission of misconduct. The lawyer contended that he resigned not to avoid a sanction, but in to order avoid the expense and hardship of contesting discipline in Connecticut while he was living in South Africa. After reviewing carefully the language and the underlying purposes of Rule 16, the SJC held that “reciprocal discipline may be imposed on an attorney who has resigned during the pendency of a disciplinary investigation or proceeding in a foreign jurisdiction even where the resignation is not accompanied by an admission or finding of misconduct.”⁴⁷ The Court wrote,

Important policy reasons support the conclusion that the respondent’s voluntary resignation in Connecticut unaccompanied by an admission or finding of misconduct warrants the imposition of reciprocal discipline in Massachusetts without the need to litigate the validity of the Connecticut charges. If an attorney like the respondent may permanently resign in another State in the face of serious allegations of misconduct—here involving multiple clients—but do so without admission of misconduct, and then practice in Massachusetts without restriction unless Bar Counsel undertakes the burdensome and expensive task of investigating and proving the other State’s charges, it would “tend [] to undermine public confidence in the effectiveness of attorney disciplinary procedures and threaten[] harm to the administration of justice and to innocent clients.”⁴⁸

⁴³ Chapter 11, Section II.B.

⁴⁴ SJC Rule 4:01, § 16(1).

⁴⁵ In Massachusetts, a disciplinary resignation must include an affidavit by the lawyer acknowledging the accuracy of material facts alleged against him or that sufficient evidence exists of those facts. See SJC Rule 4:01, § 15(1)(c). Not every jurisdiction requires lawyers to made such an admission.

⁴⁶ 453 Mass. 233, 237, 25 Mass. Att’y Disc. R. 415 (2009).

⁴⁷ 453 Mass. at 233.

⁴⁸ *Id.* at 236 (quoting *Matter of Lebbos*, 423 Mass. 753, 755, 12 Mass. Att’y Disc. R. 237 (1996)).

The Court concluded that the equivalent discipline to a resignation is a disbarment order, noting other states' similar conclusions.⁴⁹ A lawyer who has resigned from another state bar and who faces reciprocal discipline in Massachusetts may seek to resign here to avoid a disbarment order, and that request may be allowed.⁵⁰

IV. Reciprocal Effect of Discipline from a Tribunal

As described earlier, a disciplinary sanction of suspension or disbarment imposed by a tribunal triggers the same reciprocal discipline attention as a sanction imposed by the bar of a foreign jurisdiction.⁵¹ However, only sanctions imposed by a tribunal with bar disciplinary authority, such as a federal court,⁵² will qualify as a disciplinary sanction triggering reciprocity.⁵³ All of the procedures are the same, including the obligation of the respondent lawyer to report the tribunal's order to Bar Counsel and to the Board.

You Should Know

The SJC requires a lawyer to report all “public or private discipline in . . . any federal court and any state or federal administrative body or tribunal” to the Board and to Bar Counsel.⁵⁴ A sanction order from a federal or state trial court, other than one that suspends the lawyer from practice before it, will not receive reciprocal treatment by Bar Counsel or the BBO. Case-management sanction orders must be reported by the attorney, but they will likely be treated as a complaint about or request for investigation of the underlying misconduct.

Because courts and administrative tribunals employ different sanctioning schemes from those typically employed by the bars of the various states or the District of Columbia, the presumptive replication of the foreign discipline cannot operate in the same fashion. Few reported reciprocal discipline cases involve courts or administrative tribunals, but the following principles appear to be well-founded:

⁴⁹ *Id.* at 237–38. The Court cited *In re Richardson*, 692 A.2d 427, 430–432 (D.C.1997), *cert. denied*, 522 U.S. 1118 (1998) (concluding that under Florida law, attorney's voluntary resignation from practice in Florida while disciplinary proceedings were pending constituted discipline, and could form basis of reciprocal discipline in District of Columbia); *Florida Bar v. Eberhart*, 631 So.2d 1098, 1099 (Fla.1994) (resignation from Connecticut bar while disciplinary actions were pending treated as discipline warranting disbarment in Florida); *Office of Disciplinary Counsel v. Acker*, 583 N.E.2d 1305 (Ohio 1992) (resignation of attorney in Maine treated as disciplinary in nature, and basis of indefinite suspension in Ohio).

⁵⁰ *See Matter of Hormann*, 26 Mass. Att'y Disc. R. 248 (2010) (resignation accepted; no disbarment order); *Matter of Golburgh*, 24 Mass. Att'y Disc. R. 300 (2008) (same); *Matter of Tyler*, 22 Mass. Att'y Disc. R. 782 (2006) (same).

⁵¹ *See, e.g., Matter of Dvorak*, 28 Mass. Att'y Disc. R. 269 (2012) (immigration court and agency suspension; discussed *supra*).

⁵² *See, e.g., Matter of Zeno*, 23 Mass. Att'y Disc. R. 794 (2007).

⁵³ *Ellis v. Department of Indus. Accidents*, 463 Mass. 541, 551 (2012) (state statute administrative judge to discipline attorneys by denying or suspending their right to appear or practice before the department violates the state constitution and is invalid).

⁵⁴ SJC Rule 4:01, § 16(6).

- Whenever a lawyer has been disciplined by a court or tribunal, the lawyer must report that discipline to the Board and to Bar Counsel.⁵⁵ As noted above, however, not every sanction by a court or agency will constitute “discipline” with reciprocal effect.⁵⁶
- If the tribunal’s sanction represents public discipline other than a suspension or disbarment (or its equivalent given the nature of practice before the tribunal), the Board will “file [the order] and make it available to the public to the extent that the record of any other public disciplinary proceeding would be made available.”⁵⁷
- The Board does not make public or file a petition for discipline based upon an order of a trial court imposing upon a lawyer a sanction of costs and attorney’s fees for violation of the rules of a tribunal, such as an order under Rule 37 of the Rules of Civil Procedure sanctioning a lawyer for discovery abuse,⁵⁸ or an order under Rule 11 of the Rules of Civil Procedure or G.L. c. 231 § 6F awarding fees and costs because of frivolous positions asserted in a civil matter.⁵⁹ Those sanctions might, however, serve as the basis for non-reciprocal discipline against the lawyer.⁶⁰
- If the court has suspended a lawyer from practice before it, the presumption that the SJC will impose identical discipline does still apply. For instance, in *Matter of Zeno*,⁶¹ the respondent was suspended by the United States District Court for the District of Puerto Rico for three months for engaging in improper behavior during a criminal case in that court. The single justice, noting the deference required to be given to the decisions of another jurisdiction, ordered an identical three-month suspension. The single justice did take pains to ensure that the term suspension was “not ‘markedly disparate from that ordered in comparable cases’ in the Commonwealth.”⁶² The three-month suspension was not retroactive, however, because the respondent reported his sanction to the Board more than ten days after he had received the order.

V. Reinstatement After Reciprocal Discipline

A lawyer who been suspended from practice in Massachusetts as the result of reciprocal discipline is eligible for reinstatement under the same rules as any other lawyer having received a

⁵⁵ *Id.*

⁵⁶ No Board or SJC report or decision addresses this distinction, however. The guidance in the text represents the best assessment of the understanding of the reporting duty.

⁵⁷ SJC Rule 4:01, § 16(4).

⁵⁸ MASS. R. CIV. P. 37; *cf.* *In re Williams*, 156 F.3d 86 (1st Cir. 1998) (imposing sanctions against counsel under the federal rule).

⁵⁹ MASS. R. CIV. P. 11; G. L. c. 231 § 6F; *see, e.g.*, *Doe v. Nutter, McClennen & Fish*, 41 Mass. App. Ct. 137, 144 (1996), further appellate review denied, 423 Mass. 1111 (1996) (lawyer sanctioned by Superior Court under Rule 11); *Tilman v. Brink*, 74 Mass.App.Ct. 845, 855 (2009) (violation of G.L. c. 231 § 6F resulted in attorney’s fees assessed against plaintiff’s counsel).

⁶⁰ *See, e.g.*, *Matter of Cobb*, 445 Mass. 452, 21 Mass. Att’y Disc. R. 93 (2005) (disbarment after court-imposed sanctions); *Matter of O’Leary*, 25 Mass. Att’y Disc. R. 461 (2009) (term suspension after court-imposed sanctions).

⁶¹ 23 Mass. Att’y Disc. R. 794 (2007).

⁶² *Id.* (quoting *Matter of Kersey*, 444 Mass. 65, 70, 21 Mass. Att’y Disc. R. 369 (2005); citing *Matter of Lebbos, supra*, 423 Mass. at 754-755).

suspension order in Massachusetts.⁶³ However, reinstatement from reciprocal discipline will likely be conditioned on reinstatement in the other jurisdiction.⁶⁴ For a full discussion of the reinstatement process, see Chapter 13.

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⁶³ *See, e.g.*, Matter of Dobie, 2009 WL 8598146 (2009) (single justice order requiring respondent to submit petition for reinstatement before reinstatement may occur after reciprocal suspension sanction).

⁶⁴ *See, e.g.*, Matter of Doerr-Hicks, 32 Mass. Att’y Disc. R. ___, 2016 WL 3681514 (2016); Matter of Hoffman, 31 Mass. Att’y Disc. R. ___, 2015 WL 3551159 (2015); Matter of Tunney, 28 Mass. Att’y Disc. R. 857 (2012).

Chapter 11

Resignation and Disability Inactive Status

I. Introduction

There are four contexts in which a lawyer may lose the right to practice by some means other than a sanction following a stipulation to, or formal findings after a hearing on, charges of misconduct. A lawyer may resign while under disciplinary investigation; may be required to stop practicing because the lawyer is no longer physically or mentally capable of practicing law; may be disbarred by consent; and may be temporarily suspended. This chapter reviews the procedures involved in each of those situations.

II. Resignation While Under Disciplinary Investigation

A. The Process of Resignation While Under Disciplinary Investigation

Chapter 4 described the opportunity for a lawyer who is the subject of an investigation by Bar Counsel to resign voluntarily and thereby end the investigation and the disciplinary process.¹

Once Bar Counsel has opened an investigation of a lawyer, that lawyer may not resign from practice in the Commonwealth during the pendency of that investigation or the resulting disciplinary proceedings without admitting that she has committed misconduct or that sufficient evidence exists that could prove such misconduct at a hearing. The steps a lawyer must take in order to resign during pending disciplinary proceedings are as follows:

1. The attorney must file with the Board an affidavit stating that she desires to resign. The affidavit must include the following four statements:
 - a) That the resignation is “freely and voluntarily rendered,” not the result of coercion or duress, and that the lawyer understands the implications of resigning;²
 - b) That the lawyer is aware of a pending investigation regarding alleged misconduct, the nature of which must be specifically set forth;
 - c) That the material facts, or some identified portions of those material facts, upon which the complaint against the lawyer is based are true, or can be proved by a preponderance of the evidence;³ and

¹ Of course, as noted in Chapter 4, a lawyer may resign at any time for any reason. If the lawyer does so while under investigation, however, special steps must be taken, and the resignation will have a different effect compared to a non-disciplinary resignation.

² SJC Rule 4:01, § 15(1)(a).

³ A lawyer need not admit that the misconduct occurred, only that it can be proved. To get Bar Counsel’s consent, a lawyer typically has to agree not to contest the facts in any admission or reinstatement proceeding, whether or not

- d) That the lawyer waives the right to the disciplinary hearing otherwise provided under SJC Rule 4:01.

Note the implications of this affidavit. A lawyer will not be permitted to resign during Bar Counsel's investigation, or during the disciplinary proceedings after a petition has been filed, without admitting that she has committed some misconduct or that sufficient evidence exists that could prove such misconduct at a hearing.

Practice Tip

Because a resignation request must include the lawyer's admitting to certain facts, some counsel advise that a lawyer facing discipline should instead not respond to the investigation at all, and receive discipline by default. While a failure to respond to the disciplinary proceedings is a form of misconduct and can be a factor in aggravation,⁴ the default strategy permits the respondent to not have any affirmative statement on record admitting to any facts.

Under the applicable rules,⁵ the respondent lawyer must file the affidavit with the Board. Upon receipt, the Board will serve that request and affidavit on Bar Counsel, who, *within seven days of receipt*, must file with the Board her recommendation and the reasons for the recommendation.⁶ Bar counsel must serve that document on the respondent. The seven day period may be extended by a Board member for good cause. In a typical case, the respondent will negotiate the specifics of the affidavit of resignation with Bar Counsel. As a result, the Board usually receives a complete packet from Bar Counsel indicating Bar Counsel's assent to the resignation.

Having received the affidavit and Bar Counsel's recommendation or assent, the Board must vote whether to approve the resignation. If needed, the Board may order "any hearing or investigation it deems appropriate."⁷ While it is conceivable that the hearing so ordered would be for the presentation of witnesses and evidence, and therefore would follow the procedures described in Chapter 6 of this Treatise, in practice the Board decides the matter on the papers. Otherwise, the point of the resignation—permitting the attorney to withdraw from practice without the necessity of a hearing or a stipulation to all or most of the charges presented by Bar Counsel—would be defeated.

the lawyer admits to the facts, or instead agree that Bar Counsel can prove the charges by a preponderance of the evidence. A resigning attorney is not entitled to a declaration by the Court that she did not admit to factual guilt. *Matter of Dahl*, 15 Mass. Att'y Disc. R. 160 (1999).

⁴ See, e.g., *Matter of Gustafson*, 464 Mass. 1021, 1023-1024, 29 Mass. Att'y Disc. R. 292 (2013); *Matter of Greenidge*, 30 Mass. Att'y Disc. R. 174 (2014).

⁵ SJC Rule 4:01, § 15; BBO Rules, § 4.1. Technically, these rules require the attorney to file a request to resign supported by affidavit. In practice, the affidavit serves both functions.

⁶ SJC Rule 4:01, § 15(2); BBO Rules, § 4.1.

⁷ BBO Rules, § 4.1.

On occasion, Bar Counsel has objected to the proposed resignation,⁸ although, as noted above, it usually supports the lawyer's offer to resign and assists the lawyer by assembling and presenting to the Board a complete resignation "package."

If the Board votes to accept the resignation, it files the document with the clerk of the SJC, along with its recommendation and "the entire record of any hearing."⁹ The matter is then assigned to a single justice, who must accept the resignation before it can be effective. As described in Chapter 4, a disciplinary resignation does not always include an order of disbarment, although most often the Court will order the lawyer disbarred if the admitted matters would have warranted disbarment.¹⁰ On rare occasions, a single justice has rejected a proposed resignation,¹¹ but it is unclear whether that would occur now that the Court has adopted the practice of accepting a resignation with additional orders or language, such as that the attorney is also disbarred, or that the resignation is accepted "as a disciplinary sanction."¹² The possibility of such additional orders or language, and that Bar Counsel might recommend them, is typically acknowledged in affidavits that result from negotiation with Bar Counsel, and the resigning attorney is typically given the opportunity to address the Board concerning the propriety of them.

If the Board receives an affidavit that complies with Section 15(2), it will submit the affidavit to the SJC with its recommendation, either to accept the resignation, or with an

⁸ Bar counsel has argued, thus far unsuccessfully, that the lawyer's resignation came too late in the process, that is, after a hearing or the filing of a hearing report. *See, e.g.*, *Matter of Lee*, 3 Mass. Att'y Disc. R. 129 (1983); *Matter of Orme*, 27 Mass. Att'y Disc. R. 677 (2011). *But see* *Matter of Oates*, 5 Mass. Att'y Disc. R. 274 (1986), where the single justice imposed disbarment rather than accepting resignation where the resignation was tendered after the Board had filed an information recommending disbarment.

Bar counsel may object if the resigning attorney has failed to acknowledge enough misconduct in the affidavit. For instance, where an attorney seeks to resign with an admission to technical violations of trust account record-keeping rules while under investigation for intentional misuse of trust funds, Bar Counsel might argue that the respondent must admit to more. A primary reason for such a demand is Bar Counsel's desire to establish misconduct for the purpose of any reinstatement proceedings, should the lawyer seek readmission after the mandatory eight-year waiting period. *See* Chapter 13, discussing reinstatement. Neither the rule nor, to date, decisional law has provided useful guidance on the sufficiency of admissions in an affidavit of resignation. *See* SJC Rule 4:01, § 15(1)(c) (requiring that "the lawyer acknowledge[] that the material facts, or specified material portions of them, upon which the complaint is predicated are true or can be proved by a preponderance of the evidence"). *Compare* *Matter of McCarthy*, 27 Mass. Att'y Disc. R. 584 (2011) (resignation accepted, with disbarment order, over Bar Counsel's objections that the respondent's affidavit did not admit sufficient misconduct) *with* *Matter of Murawski*, 28 Mass. Att'y Disc. R. 636 (2012) (after hearing before the single justice, the respondent submitted a revised affidavit clarifying his admissions).

⁹ SJC Rule 4:01, § 15(2); BBO Rules, § 4.1.

¹⁰ Chapter 4, Section II.H. *See* *Matter of Nason*, 7 Mass. Att'y Disc. R. 202 (1991) (first reported instance of acceptance of resignation, with disbarment, over the Board's objection). In *Matter of Clark*, 21 Mass. Att'y Disc. R. 87 (2005), the attorney challenged the disbarment order on constitutional grounds, but the single justice rejected the challenge and ordered the disbarment along with accepting the resignation.

¹¹ *See* *Matter of Toscano*, 5 Mass. Att'y Disc. R. 364, 371–372 (1987) (both Board and Bar Counsel recommended acceptance of resignation; single justice denied the request and ordered disbarment). In *Toscano*, the published report includes a June, 1986 order and memorandum from the single justice allowing, over Bar Counsel's objections, the respondent's request for a limited suspension applicable only to civil matters and not to criminal matters, followed by a May, 1987 order denying, contrary to all of the parties' recommendations, the proffered resignation. A reader's inference is that the single justice was displeased with the respondent's actions after the 1986 favorable order.

¹² *See infra*, and Chapter 4.

alternative recommendation, typically that the Court disbar the attorney without the accompanying resignation.¹³

Practice Tip

The Board's records show that few lawyers' proffered resignations have been rejected by the Board. However, the SJC and Board rules give the Board the authority to recommend that the resignation be rejected, and give the Court the power to reject it. A lawyer seeking to resign while under investigation cannot be assured of that result. Therefore, a lawyer seeking to resign should enlist the cooperation of Bar Counsel, where possible, so that the resignation goes before the Board and the Court as an agreed disposition. While this strategy will not guarantee acceptance of the resignation, it makes it more likely.

B. The Effect of Resignation While Under Disciplinary Investigation

There are few differences between resigning with an accompanying order of disbarment and awaiting a formal disbarment order following formal disciplinary proceedings. The fact that lawyers elect the former status, and that Bar Counsel or the Board has on occasion sought to block such resignations,¹⁴ suggests that resignation offers some advantages to the respondent relative to a disbarment order. In *Matter of Orme*,¹⁵ the single justice has addressed this question as follows:

An order of disbarment arising from the allowance of an affidavit of resignation filed in accordance with Supreme Judicial Court Rule 4:01, § 15, is no less an order of disbarment than one arising from a Board finding and recommendation. The practical consequences for the disbarred attorney are the same; under Supreme Judicial Court Rule 4:01, § 17, he must take the same course of action [i.e., notices of withdrawal, closing trust accounts, etc.] and, under § 18(2), he must wait the same period of time before he may petition for reinstatement to the bar. [The respondent] acknowledges that it is doubtful he will ever practice law again, but believes that acceptance of his resignation will allow him "to leave the practice of law with a modicum of self respect." . . . I share the view that "the purpose of the resignation provision is to permit respondent attorneys who wish to acknowledge their wrongdoing and exit the profession with dignity to do so forthwith, while saving Bar Counsel, the Board and the court the time and expense of lengthy disciplinary proceedings."¹⁶

In *Orme*, Bar Counsel objected to the respondent's seeking to resign after a full evidentiary hearing with a committee report recommending disbarment. The single justice nevertheless

¹³ SJC Rule 4:01, § 15(2). See *Matter of Lee*, 3 Mass. Att'y Disc. R. 129 (1983) (single justice describing a "Motion of the Board not to accept this resignation"; resignation accepted).

¹⁴ See, e.g., *Matter of Lee*, *supra* (Board objection); *Matter of Orme*, 27 Mass. Att'y Disc. R. 677 (2011) (Bar Counsel objection).

¹⁵ 27 Mass. Att'y Disc. R. 677 (2011).

¹⁶ *Id.*, quoting *Matter of Oates*, 5 Mass. Att'y Disc. R. 274, 277 (1986).

accepted the resignation, noting that the respondent's actions saved the Board and single justice from a full review of the discipline.

For the reasons articulated by the single justice in *Orme*, disbarment following a hearing and the Board's filing of an Information and resignation have some identical consequences. Still, there are some practical differences beyond preserving the lawyer's "modicum of dignity" and saving the time of the Board and the Court. The lawyer who resigns under an affidavit acknowledging that the charges could be proved arguably avoids issue preclusion in related civil or administrative proceedings, and also avoids the creation of a transcript of testimony and statements by counsel that might be useful to potential opponents in civil, criminal, or related administrative proceedings. Further, use of an affidavit of resignation gives the lawyer some control over what record of misconduct exists in the event the lawyer seeks reinstatement.

Not every accepted resignation includes an order of disbarment, because not every resignation is for conduct that warrants disbarment.¹⁷ On occasion, a lawyer facing even lesser suspension will choose to resign and be done with practicing law. The resulting order will be "resignation as a disciplinary sanction" but not resignation with disbarment. Lawyers whose order of resignation is not accompanied by disbarment, while they may gain some advantage by the omission of the "disbarment" label, nevertheless face precisely the same restrictions on practice as a disbarred lawyer, and they are required to petition for reinstatement, and only after an eight-year period. For the most part, and except with respect to the contents of the record of discipline in any subsequent reinstatement proceedings, there is no substantive disciplinary difference at all.

III. Disability Inactive Status

A lawyer whose capacity to practice law has failed by reason of physical or mental disability may be transferred to "disability inactive status." While in such status, the lawyer's license to practice law is suspended until reinstated, and the lawyer must follow all of the requirements of a lawyer under suspension. The transfer to disability inactive status may be effected voluntarily, or involuntarily.

A. Involuntary or Stipulated Assignment to Disability Inactive Status

There are three avenues by which a lawyer may encounter or present a claim that he ought to be transferred to disability inactive status: (1) when he has received an order from a separate source relating to his incompetence or incapacity; (2) when he makes a claim in a

¹⁷ See, e.g., *Matter of Sohmer*, 25 Mass. Att'y Disc. R. 553 (2009) ("the Court entered a judgment accepting the affidavit of resignation as a disciplinary sanction effective immediately"; no order of disbarment issued); *Matter of Lallier*, 23 Mass. Att'y Disc. R. 388 (2007) (same). See also MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2016 at 14 (SJC accepted disciplinary resignations from three lawyers without disbarment); MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2015 at 15 (ten such lawyers); MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2014 at 15 (three such lawyers).

disciplinary proceeding that he is unable to assist in his defense; and (3) when Bar Counsel proves the respondent's incapacity and the SJC enters an order transferring him to that status.¹⁸

1) Adjudication of Incompetence

If a lawyer has been declared by a court to be incompetent, has been committed by a court to a hospital or facility for the mentally ill, or has been placed on disability inactive status by a different jurisdiction, any such determination will lead to an order transferring the lawyer to disability inactive status.¹⁹ The SJC, once it has “proper proof” of the order relied upon, “shall enter an order transferring the lawyer to disability inactive status.”²⁰ The due process rights afforded to the lawyer would, in an appropriate circumstance, permit him to challenge the “proper proof” of the facts required by section 13(1) to be submitted to the SJC.²¹

2) Inability to Assist in Defense

SJC Rule 4:01, § 13(3) states that if a lawyer in the course of a disciplinary proceeding alleges that he is unable to assist in his own defense due to mental or physical incapacity he will “immediately” be transferred to disability inactive status until further order of the SJC. The rule requires Bar Counsel (or the respondent) to file a petition with the Court describing the respondent's allegation, and upon receipt of such petition the Court will enter the order. If Bar Counsel contests the respondent-lawyer's allegation—meaning that Bar Counsel challenges whether the lawyer is as incapacitated as he claims—an expedited adjudicatory hearing will occur as described in the next subsection.

A respondent who seeks to invoke Section 13(3) must satisfy the *Dusky* standards of incompetence to stand trial.²² “The standard for determining incapacity under this rule is the same as the standard for determining whether a criminal defendant is competent to stand trial: ‘[W]hether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceeding against him.’”²³

If after the expedited hearing the committee determines that the lawyer's claim is invalid, the Court upon accepting that determination “shall immediately temporarily suspend the

¹⁸ Of course, a disabled lawyer who proactively recognizes a disability has the option of simply electing “inactive” status. A lawyer may elect to transfer to inactive status by filing a notice with the Board and then paying the reduced fee associated with that status. See SJC Rule 4:02, § 4(a). The lawyer will be removed from the rolls of active lawyers and be ineligible to practice law “until and unless he or she requests reinstatement to the active rolls and pays for the year of reinstatement the fee imposed . . . for active attorneys.” Rule 4:02, § 4(b). This action will not, however, suspend or terminate any pending disciplinary investigation or charges.

¹⁹ Rule 4:01, § 13(1).

²⁰ *Id.*

²¹ See *Matter of Ruffalo*, 390 U.S. 544 (1968) (attorney entitled to due process in disciplinary proceedings); *Matter of Foley*, 439 Mass. 324, 336 n.13 19 Mass. Att’y Disc. R. 141 (2013) (“Attorneys in bar discipline proceedings are entitled to due process rights.”).

²² *Dusky v. United States*, 362 U.S. 402 (1960).

²³ *Matter of Puglia*, 14 Mass. Att’y Disc. R. 581, 586 (1998) (quoting *Dusky*, 362 U.S. at 402). See also *Matter of Margolis*, 15 Mass. Att’y Disc. R. 372, 376 (1999) (applying the *Dusky* standard).

respondent-lawyer from the practice of law pending final disposition of the [underlying disciplinary] matter.”²⁴

Section 13(3) operates as follows:

- During a disciplinary proceeding, the respondent claims to have a disability that precludes him from assisting with his defense.
- If Bar Counsel does not object and the SJC accepts the claim, the Court orders the lawyer be transferred to disability inactive status, and the disciplinary proceedings cease until the lawyer is reinstated from disability inactive status.
- If Bar Counsel objects to the claim that the lawyer is unable to assist in his defense, a hearing takes place as described in the next subsection, during which the disciplinary proceedings are not stayed. Because the hearing is expedited, the absence of a stay is not likely to be disruptive. If the respondent prevails, the Court orders the lawyer transferred to disability inactive status, and the disciplinary proceedings cease until the lawyer regains capacity.
- If the SJC determines that the respondent is not unable to assist with his defense, the Court immediately temporarily suspends the lawyer and the disciplinary process resumes. The temporary suspension remains in place until the conclusion of the disciplinary proceeding. If that proceeding does not result in a suspension or a disbarment, the lawyer may then resume practice.

3) Petition to Determine Incapacity

Practice Tips

Disability inactive status is almost always achieved by agreement. No reported decisions address the procedure under Section 13(4). The Court has, however, made determinations of the sufficiency of a claim of incapacity, such as in *Matter of Puglia*, discussed above.²⁵

* * *

Separate from the process described here, Bar Counsel may, if appropriate, seek a temporary suspension of an attorney who presents an immediate threat to a client under SJC Rule 4:01 § 12A.²⁶

²⁴ SJC Rule 4:01, § 13(4)(f).

²⁵ See *Puglia*, *supra*.

²⁶ See Chapter 4, Part II.F.5.

This section describes the procedure for the involuntary transfer of an attorney to disability inactive status. The expedited hearing process has not yet occurred in practice,²⁷ but the discussion here explains how it would occur.

Proceedings for transfer to disability inactive status most commonly occur when Bar Counsel investigates a claim that a lawyer has lost his ability to function adequately in that role. Typically, this issue would arise after Bar Counsel had received complaints about the lawyer's actions, and in the course of investigating those claims learns that the lawyer may be suffering from a physical or mental disability that interferes with his functioning. If that happens, Bar Counsel must seek permission from the Board to file a petition alleging that the lawyer is incapable of maintaining his practice.²⁸

Upon the approval of the Board, Bar Counsel will file a petition in the same manner as it does when seeking to impose discipline for misconduct.²⁹ The matter will be assigned to a hearing committee, special hearing officer, or panel of the Board in the same fashion as any other disciplinary proceeding, and will proceed in the usual fashion, with two exceptions. First, unlike in disciplinary hearings, the Board may appoint a lawyer to represent the respondent lawyer if he does not have representation.³⁰ Second, the rules expressly state that the hearing committee "may require the examination of the respondent-lawyer by qualified medical experts designated by them."³¹ The standard to be applied by the hearing committee, the Board and then the SJC is whether the respondent is "incapacitated from continuing to practice law," presumably as a result of a physical or mental condition that adversely affects the lawyer's ability to practice.³² No report or SJC decision has interpreted that phrase.

The resulting order will effect the lawyer's transfer to disability inactive status, usually for an indefinite period. The order may also state how long the lawyer must wait before petitioning for reinstatement (as described below), or the length of the intervals between successive petitions for reinstatement.

The Board will publish a notice of the lawyer's transfer to disability inactive status "in the same manner as a disciplinary sanction imposed under section 8 of [SJC Rule 4:01] is published."³³ Notwithstanding that quoted language, the SJC does not include in its single justice reports ordering such a transfer any of the facts or arguments involved in the matter, as it does regularly with discipline reports. The published report lists only the fact that the lawyer has been transferred to that status, with the notation, "The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County."³⁴

²⁷ Cf. *Matter of Dwyer-Jones*, 470 Mass. 582 (2015) (Court imposes reciprocal disability inactive status based upon an order from another jurisdiction without a separate hearing in Massachusetts).

²⁸ SJC Rule 4:01, § 13(2).

²⁹ SJC Rule 4:01, § 13(4)(a). See Chapter 6, Section II for a discussion of adjudicatory proceedings.

³⁰ SJC Rule 4:01, § 13(4)(c).

³¹ SJC Rule 4:01, § 13(4)(b). The rule states that the lawyer "may" be required to pay for the experts, implying that otherwise the Board or the Court will pay that cost. *Id.*, § 13(4)(f).

³² SJC Rule 4:01, §§ 13(2), (4)(e).

³³ SJC Rule 4:01, § 13(5).

³⁴ See, e.g., *Matter of White*, 30 Mass. Att'y Disc. R. 458 (2014). Orders of administrative and temporary suspension are often similarly unilluminating concerning the basis for the order.

B. Effect of Disability Inactive Status

A lawyer who is placed on disability inactive status is not permitted to practice law until reinstated. The status is tantamount to a suspension for an unstated term, and all of the steps that must be taken by a lawyer subject to a disciplinary suspension must be taken by the lawyer, or by a representative of the lawyer if appropriate.

Just as with any suspended or disbarred lawyer, the lawyer transferred to disability inactive status may not participate in any activities that qualify as the practice of law, or otherwise work in any capacity for a lawyer.³⁵ For a discussion of the limits on the activities of a suspended or disbarred lawyer, see Chapter 12.

C. Appointment of Commissioner

Because a disabled lawyer might be unable to take the steps necessary to wind down a practice as required of a suspended lawyer, Section 14 of SJC Rule 4:01 provides for the appointment of a lawyer to serve as a “commissioner” to manage the inactive lawyer’s practice and to protect the interests of the lawyer’s clients.³⁶ The appointed commissioner may inventory the files and take whatever actions may be necessary in order to effect a transition to new counsel. The commissioner’s reasonable expenses, and, if appropriate, reasonable compensation will be paid by the inactive lawyer unless otherwise ordered by the court.³⁷ The commissioner may not reveal any information contained in the lawyer’s files without client consent.³⁸

D. Reinstatement from Disability Inactive Status

A lawyer transferred to disability inactive status may seek reinstatement in the same fashion as any other lawyer subject to a suspension, with some important qualifications. Reinstatement generally is covered in Chapter 13, and the discussion there will apply to these reinstatements. This section will address those steps and requirements unique to reinstatement from disability inactive status.

Unless the order transferring the lawyer to disability inactive status states a different interval, the lawyer shall be entitled to petition for transfer to active status once a year.³⁹ That requirement means that, absent a different interval set by the Court, the lawyer must wait one year from the date of the transfer before seeking reinstatement. (A transfer order based upon an external determination, such as a judicial determination of incapacity or a disability finding from a different jurisdiction, may forbid the lawyer to seek reinstatement except when that external order has been vacated or withdrawn.) The lawyer seeks reinstatement by filing a petition with the SJC, as described in Chapter 13. The Board may retain an expert or experts to examine the

³⁵ See *Matter of Kolofolias*, 25 Mass. Att’y Disc. R. 334 (2009) (disabled inactive attorney worked as a paralegal; term suspension of six months and one day imposed).

³⁶ A commissioner may be appointed in other circumstances as well. See SJC Rule 4:01, § 14(1) (authorizing such appointment when a lawyer disappear or dies). See also Chapter 3.

³⁷ SJC Rule 4:01, § 14(1).

³⁸ SJC Rule 4:01, § 14(2).

³⁹ SJC Rule 4:01, § 13(6)(b). The order from the Court may designate a different time frame. *Id.*

lawyer and advise the Board as to the current fitness of the lawyer.⁴⁰ In addition, the lawyer seeking reinstatement must (1) disclose affirmatively the identity of all medical and psychological providers consulted since the time of the transfer, and (2) provide to the Court and to Bar Counsel written consent to the release of all information related to the disability.⁴¹

In the reinstatement proceeding, the lawyer has the burden of establishing two separate elements: (1) that his medical and physical condition does not adversely affect his ability to practice law, and (2) that he possesses the competency and learning required for admission to practice.⁴² Therefore, a lawyer whose incapacity has been remedied and who has recovered from his disabling condition may still be denied reinstatement if he cannot prove that he otherwise has the skills necessary to practice law competently.

In *Matter of Dodge*,⁴³ the petitioner sought reinstatement after having been placed on disability inactive status because of major depressive episodes that interfered significantly with his ability to serve his clients and manage his practice.⁴⁴ At the hearing on his petition for reinstatement, he persuaded the hearing panel that his condition had improved, that he was competent to resume practice, and that he has adequate learning in the law. The panel recommended reinstatement, subject to several conditions, including mentoring and participation in firm management seminars. In *Matter of White*,⁴⁵ the respondent had been placed on inactive disability status in 2014 after suffering from severe anxiety and depression. In 2015 she petitioned for reinstatement. The hearing panel denied her petition. The panel determined that the petitioner met her burden to show competence and learning in the law, but, based on her conduct during the reinstatement proceeding, concluded that her illness was not under control and her judgments were still impaired.

If a lawyer has been transferred to disability inactive status because of some external order, such as a judicial determination of incapacity or transfer to disability inactive status from a different jurisdiction, then, if that external order has been removed or vacated, the Court may, after its own hearing and without referral to the Board, immediately reinstate the lawyer.⁴⁶

⁴⁰ SJC Rule 4:01, § 13(6)(c).

⁴¹ SJC Rule 4:01, § 13(7).

⁴² SJC Rule 4:01, § 13(6)(e).

⁴³ 31 Mass. Att’y Disc. R. ___, 2015 WL 9308993 (2015).

⁴⁴ 28 Mass. Att’y Disc. R. 217 (2012). The 2012 report (as with all disability inactive status assignment reports) omits all relevant information, instructing the reader to request the full report from the Clerk of the SJC.

⁴⁵ 32 Mass. Att’y Disc. R. ___ (2016).

⁴⁶ SJC Rule 4:01, § 13(6)(d). See *Matter of Dwyer-Jones*, 470 Mass. 582, 589 (2015) (“if [the respondent] is returned to active status in [the original] jurisdiction, she may petition a single justice of this court to ‘immediately direct’ her reinstatement to active status, without the necessity of petitioning for reinstatement”).

Chapter 12

Duties and Restrictions After Suspension or Disbarment

I. Introduction

This Chapter reviews the requirements a lawyer must meet after having received an order of suspension, disbarment, or transfer to disability inactive status, or after having a resignation accepted as a disciplinary sanction. In each instance, the lawyer must cease the practice of law for some defined or undefined period of time. This Chapter addresses two topics: (1) the steps a lawyer must follow in order to effect the end of an ongoing practice; and (2) what activities the lawyer may, and may not, engage in during that period of time. Chapter 4 discussed both of these topics, but only in passing. For ease of the proceeding discussion, this Chapter will refer to the lawyer who cannot practice as a “suspended lawyer,” referring to both disbarred and suspended lawyers.

Chapter 13 addresses what a suspended lawyer must do in order to have his law license reinstated.

II. The Required Steps After an Order to Cease Practice

A. Required Steps in All Instances

A lawyer who must cease practice because of a suspension order, a disbarment order, a disciplinary resignation, or an order transferring the attorney to disability inactive status must follow a structured series of steps in order to accomplish the termination of an active practice.

Practice Tip

A suspended lawyer who practices within a firm will likely find the transition to non-practice easier on clients than a sole practitioner. In most instances a client’s relationship will effectively be with the law firm rather than the individual lawyer, so in a firm setting other lawyers may continue with the client representation if the client agrees.¹ The clients of a solo lawyer, by contrast, will need to retain new counsel unless the clients choose to proceed *pro se*.

1) Within Fourteen Days: Notices to Clients, Courts, Agencies, and Other Counsel

¹ See, e.g., *In re Kiley*, 459 Mass. 645, 652 (2011) (“Where, as here, the client enters into a representation agreement with a law firm rather than a sole practitioner, the law firm may not terminate the agreement simply because the attorney who had been handling the case has died, left the practice of law, or moved to a different firm. While the departure of the responsible attorney may cause the client to leave the firm, it may not cause the firm to leave the client if withdrawal will have a material adverse effect on the client's interests and none of the circumstances requiring or permitting withdrawal is present. See Mass. R. Prof. C. 1.16.”).

An order restricting a lawyer's practice will be entered by the SJC, and (except for temporary suspensions; see next subsection) will typically become effective thirty days after the entry of that order.² The suspended lawyer will be authorized to practice law in a limited fashion during those thirty days (and may not accept any new matters), but must cease all practice at the expiration of the thirty day period. The thirty-day period gives the lawyer time to accomplish the steps necessary to cease practice. As the following list shows, complying with the requirements applicable to suspended lawyers is detailed and time-consuming, especially during the first two weeks.

You Should Know

The steps described here apply to *every* suspension order, no matter how short, unless the order states otherwise. A lawyer suspended for as little as one month must follow all of these steps.³

Within *fourteen days* from the date of the entry of the order, the lawyer must do the following, with every notice described here to be sent by certified mail, return receipt requested:⁴

- a) Provide a notice (the "Client Notice") to each active client, ward, heir, and beneficiary,⁵ stating that the lawyer has been disbarred, suspended, temporarily suspended, resigned, or been transferred to disability inactive status, with the effective date of the exclusion; and stating that, if the recipient is not represented by co-counsel, the recipient should act promptly to locate successor counsel.⁶ The Client Notice must be sent by in a format approved by the Board, or in a manner substantially similar to that template.

Practice Tip

The Client Notice as described is mandatory. In many instances, of course, the suspended lawyer will work with the affected client or beneficiary to retain successor counsel. That assistance, even if successful, does not relieve the lawyer of sending the notice.

² The suspended lawyer may request an extension of the thirty-day period from the SJC if the lawyer needs more time to accomplish all of the required items. Also, in some instances the SJC will make a suspension order retroactive to the date of a prior administrative or temporary suspension, if the affidavit of compliance was timely filed following the earlier suspension. In that instance, the suspended lawyer will have fewer than thirty days to comply with the requirements described in the text.

³ See, e.g., *Matter of Guinane*, 20 Mass. Att'y Disc. R. 191 (2004) (one month suspension, not stayed).

⁴ SJC Rule 4:01 § 17(1). The fourteen-day period consists of calendar days, not business days, and runs from the date of the entry of the order, not the date of receipt of notice of the order.

⁵ The word "beneficiary" refers to any person for whom the lawyer serves as a fiduciary at the time of the order. See BBO Rules § 4.17(a).

⁶ Section 17(1)(c).

- b) Send notice to counsel for each party (or the party itself if not represented by counsel) in “pending matters” stating the fact and basis for the lawyer’s exclusion and the effective date of the loss of license to practice.⁷ (This communication will be referred to here as the “Other Counsel Notice,” but the term refers also to the notice sent to unrepresented parties.) In litigation contexts, the identity of the participants in a “pending matter” will be largely apparent. In transactional matters, the excluded lawyer should include all counsel and parties to the transaction. The Other Counsel Notice must be sent by certified mail, return receipt requested, in a format approved by the Board, or in a manner substantially similar to that template.⁸
- c) File a notice of withdrawal with every court, agency, or tribunal before which a matter is pending, and include in that communication a copy of both the Client Notice and the Other Counsel Notice described above, as well as the client’s residential address.⁹ Each such notice of withdrawal must be sent by certified mail, return receipt requested.
- d) Resign, as of the effective date of the exclusion from practice, from all appointments as guardian, executor, administrator, trustee, attorney-in-fact (which includes an appointment under a power of attorney), or similar fiduciary capacity. The resignation notice must be in writing, and must include a copy of both the Client Notice and the Other Counsel Notice described above, as well as the residential address of each ward, heir, and beneficiary entitled to the Client Notice and the case caption and docket number of any pending proceedings.¹⁰ The resignation notice must be sent to each beneficiary, heir, and ward by certified mail, return receipt requested.¹¹

Forms for these various notices, etc., are attached as part of Appendix I.

Practice Tip

A suspended lawyer must resign from all appointments as guardian, executor, trustee, and similar roles, even if the appointment had no relationship to the lawyer’s practice of law, and even if the appointment predated the lawyer’s admission to the bar. A lawyer must take this step even in a short-term suspension. If the suspended lawyer serves as a fiduciary for a family member, he may request permission from the SJC to continue in that role. The SJC has granted such permission often.

⁷ Section 17(1)(d).

⁸ See BBO Rules, § 4.17(b).

⁹ Section 17(1)(a).

¹⁰ Section 17(1)(b).

¹¹ Section 17(1)(b) does not address the obvious complication of the suspended lawyer sending a resignation notice to a ward who is not competent to understand its meaning. If the fiduciary appointment came about because of a court proceeding, the notice will go to the court, so the ward will be protected. If the appointment came about because of a springing power of attorney without court oversight, the lawyer’s fiduciary duties seemingly would impose an obligation to give notice to some other person or agency capable of protecting the ward’s interests.

- e) Close every IOLTA account, as well as any other trust or fiduciary account, and disburse the client and fiduciary funds appropriately.¹²
- f) Refund all fees held by the suspended lawyer but not yet earned.¹³ The lawyer may earn fees during this period and use retained funds to cover those fees, but any fees accepted during this period will receive close scrutiny.
- g) Make available to each client in a pending matter the files and papers in the lawyer's possession to which the client is entitled.¹⁴
- h) Not accept any new matters, even if the lawyer is confident that she can accomplish the client's goals before her suspension becomes effective.¹⁵

Practice Tip

A suspended lawyer may not accept any new matters during the thirty-day wind-down period, but she may, and often must, continue to represent her ongoing clients during the transition month. She may bill her clients for that work, and may pay herself a reasonable fee from client funds held for that purpose. Those fees are likely to be scrutinized with special attention, however.

The suspended lawyer must complete all of these steps in less than two weeks (absent an extension granted by the SJC), given the time period between the entry of the order and the lawyer's notice of it.

2) Within Twenty-one Days: Compliance Affidavit and Reports

Within *twenty-one days* from the date of the entry of the order, the lawyer must do the following:

- a) File with the Office of Bar Counsel an affidavit certifying that the lawyer has complied with all of the requirements that must have been completed at the end of the fourteen-day period, as just described above.
- b) Append to that affidavit the following items:
 - i) A copy of the forms of Client Notice, Other Party Notice, tribunal withdrawal notice, and fiduciary resignation notice used by the lawyer, along with

¹² Section 17(1)(g).

¹³ Section 17(1)(f).

¹⁴ Section 17(1)(e). For a description of the materials to which the client is entitled upon a lawyer's withdrawal from representation generally, see MASS. R. PROF. C. 1.16(e). A lawyer may not withhold from a client any materials whose "retention would prejudice the client unfairly." Rule 1.16(e)(7). Rule 1.16(e) also addresses when the lawyer must pay for materials he chooses to keep, and when a client must pay for materials the lawyer is obligated to provide to the client.

¹⁵ Section 17(3).

the name and address of each recipient of any such notice, along with all return receipts or returned mail received by that point. (The suspended lawyer will supplement the filing of the return receipts or mail from time to time thereafter.) Bar counsel must maintain the confidentiality of the client names unless otherwise ordered by the SJC.¹⁶

ii) A schedule showing the location, title, and account number of any IOLTA, client, trust, or other fiduciary accounts held by the lawyer as of the entry date of the exclusion order.¹⁷

iii) Another schedule, tracking the schedule just described, showing the disposition of all of the fiduciary and client funds identified in the above schedule.¹⁸

iv) A list of every other jurisdiction to which the lawyer is admitted to practice (in order to facilitate Bar Counsel's giving notice to those other jurisdictions of the Massachusetts sanction).¹⁹

v) A residential or other street address (not a post office box) where the lawyer may receive communications from Bar Counsel, the Board, or the Court.²⁰

c) File with the Clerk of the SJC for Suffolk County a copy of the affidavit filed with Bar Counsel (but *without* all of the appendices just listed), along with a list of all other state, federal, and administrative jurisdictions to which the lawyer is admitted to practice, and a street address where the Court may direct communications to the suspended lawyer.²¹

A fictitious sample Affidavit of compliance, with attached schedules and form notices to clients, counsel, courts, etc. is attached as Appendix I.

3) Other Steps After Entry of the Order

In addition to the steps the suspended lawyer must take within fourteen days and then within twenty-one days, respectively, from the Court's entry of the exclusion order, other administrative processes follow from the order. The SJC may, in appropriate circumstances, appoint a commissioner to manage the responsibilities of the suspended lawyer.²² The Court will appoint a commissioner—always an attorney—when it concludes that the excluded lawyer lacks the capacity or the responsibility to provide the notices and protections needed when a

¹⁶ Section 17(5)(a).

¹⁷ Section 17(5)(b).

¹⁸ Section 17(5)(c).

¹⁹ Section 17(5)(e). For a discussion of reciprocal discipline, see Chapter 10.

²⁰ Section 17(5)(f).

²¹ Section 17(6).

²² Section 17(2).

practice ends on such short notice.²³ The lawyer will be responsible for paying for the commissioner's time, unless the Court orders otherwise.

You Should Know

A commissioner appointed by the SJC under Section 17(2) may be given the authority to appear, on a temporary basis, in court or before administrative tribunals as provisional substitute counsel for a suspended lawyer who cannot protect his clients' interests.

After receipt of the SJC's order, the Board must promptly send a copy of that order to the clerk of each state or federal court in the Commonwealth in which the Board has reason to believe that the excluded lawyer has been engaged in practice.²⁴ This step serves to increase the likelihood that the courts learn that the lawyer will soon have no right to practice.

B. Required Steps in Temporary Suspension Matters

As discussed in Chapter 4,²⁵ SJC Rule 4:01 refers to the concept of a "temporary suspension,"²⁶ even though that term is defined nowhere within the rule. SJC opinions use this term to refer to an immediate suspension under Rule 4:01 § 12A of a lawyer who "poses a threat of substantial harm to clients or potential clients, or [whose] whereabouts are unknown,"²⁷ or under Rule 4:01 § 12, applicable to lawyers convicted of a "serious crime."²⁸ Under Sections 12 and 12A, a lawyer may be immediately suspended pending final disposition of the disciplinary proceeding that Bar Counsel has commenced against the lawyer or will commence within a reasonable time.²⁹

For present purposes, the noteworthy requirement of a temporary suspension is that it *takes effect immediately*.³⁰ In contrast to the other suspension orders discussed in this chapter, this order gives the lawyer no advance time period during which to wrap up his practice. His right to practice ceases when the SJC enters the suspension order. The lawyer will have had considerable warning that such an order might enter, however. Under both Sections 12 and 12A, the Court will issue an order to show cause why the attorney should not immediately be suspended from practice.³¹

The temporarily suspended lawyer must still comply with every requirement described above, concerning notices, withdrawals, and closing of accounts, within the same fourteen-day

²³ See, e.g., Matter of Hodgdon, 26 Mass. Att'y Disc. R. 247 (2010) (disbarment; SJC appoints second commissioner).

²⁴ Section 17(4).

²⁵ See Chapter 4, Part II.F.5.

²⁶ See, e.g., §§ 17(1) - 17(6).

²⁷ Rule 4:01 § 12A.

²⁸ *Id.*, § 12(3), (4).

²⁹ See, e.g., Matter of Kenney, 399 Mass. 431, 437, 5 Mass. Att'y Disc. R.167 (1987); Matter of Griffin, 29 Mass. Att'y Disc. R. 286 (2013); Matter of Pomeroy, 25 Mass. Att'y Disc. R. 507 (2009).

³⁰ Section 17(3) ("[o]rders imposing temporary suspension shall be immediate and forthwith").

³¹ SJC Rule 4:01 §§ 12(4), 12A.

and twenty-one-day time periods. The critical difference is that she may not practice for thirty days while he wraps up his affairs.

Practice Tip

A lawyer who receives a temporary suspension order from the SJC most likely has a practice that is not in good shape, given the findings necessary for such an order to issue. The suspended lawyer must nevertheless act immediately to inform his clients that they must find other lawyers who will manage all ongoing activity, and who may appear at any court hearings.

C. Required Steps After an Administrative Suspension

A lawyer may receive an administrative suspension either for failure to comply with registration renewal requirements,³² or for failure to cooperate with Bar Counsel during an investigation.³³ As described more fully in Chapter 4,³⁴ an administratively suspended lawyer will have thirty days, during which she may continue her practice, in which to resolve the administrative difficulties (that is, cooperate with Bar Counsel, or fix the registration lapse). After that thirty-day period, the administratively suspended lawyer must take all of the steps described above.

The SJC rules addressing administrative suspensions may be read to treat a suspension based on non-cooperation as having immediate effect, and a suspension based on registration lapse as having delayed effect. Those rules state that a non-cooperation suspension “shall be effective forthwith upon entry of the suspension order,”³⁵ and the language regarding registration lapses omits the “forthwith” language.³⁶ Both rules, however, include the following reference: “[The suspension] shall be subject to the provisions of section 17(4) of this rule. If not reinstated within thirty days after entry, the lawyer shall become subject to the other provisions of section 17 of this rule.”³⁷

D. Consequences of Failure to Comply with the Required Steps After an Order to Cease Practice

³² SJC Rule 4:03(2).

³³ SJC Rule 4:01 § 3(2).

³⁴ For a discussion of administrative suspensions generally, see Chapter 4, Part II.F.6.

³⁵ SJC Rule 4:01 § 3(3).

³⁶ SJC Rule 4:03(3).

³⁷ SJC Rule 4:01 § 3(2). Rule 4:03(3) reads effectively, but not precisely, the same: “Any attorney suspended under the provisions of subsection (2) above shall become subject to the provisions of Rule 4:01, Section 17(4) , upon entry of the suspension order, and if not reinstated within thirty days after entry shall become subject to the other provisions of said Section 17.” The reference to Section 17(4) appears to be a misprint, with the Court most likely intending to refer to Section 17(3), which permits the lawyer to practice for thirty days after entry of the suspension order.

The suspended lawyer must comply with the requirements just described within the time limits noted above. Because the suspended lawyer must certify his compliance through the affidavit filed with Bar Counsel and the SJC, any failure to meet the required deadlines will be apparent. If the lawyer misses the deadlines by more than a few days, that lapse will constitute a serious problem for the lawyer when he later seeks reinstatement.³⁸ Even if the reinstatement would qualify as what the Court sometimes refers to as “automatic” under the SJC rule (which encompasses suspensions up to but not more than one year, ordinarily³⁹), the suspended lawyer must apply for reinstatement “by filing with the court and serving upon the Bar Counsel an affidavit stating that the lawyer . . . has fully complied with the requirements of the suspension order”⁴⁰ A lawyer who has missed the deadlines without having obtained an extension cannot submit such an affidavit.

Practice Tip

If a suspended lawyer needs more time to complete the required steps after suspension, he should request Bar Counsel’s assent to an extension of time.

A lawyer who fails to satisfy the above steps by continuing to practice, or by continuing to serve as a fiduciary without permission from the SJC, will likely be held in contempt,⁴¹ as discussed below in Part III.B. The term of the lawyer’s suspension will ordinarily be increased as a result of that failure to comply with the suspension order. SJC Rule 17(8) allows for the addition of “a specified term determined by the court after a finding that the lawyer has violated the provisions of this rule.”⁴² The lawyer’s failure to comply will also be considered in the later reinstatement proceeding.

III. Activities Not Permitted During the Suspension

A. The Limitations

When barred from practice, whether through a disbarment, suspension, disciplinary resignation, or assignment to disability inactive status, the suspended lawyer may not, without express permission from the SJC:

³⁸ For a discussion of the reinstatement process, see Chapter 13.

³⁹ Section 18(1). For examples of the Court referring to some reinstatements as “automatic,” see, e.g., *Matter of Gustafson*, 464 Mass. 1021, 1023 n.4 (2013); *Matter of Cullen*, 26 Mass. Att’y Disc. R. 123 (2010). *See also* Chapter 13.

⁴⁰ Section 18(1)(a), (b).

⁴¹ *See Matter of Johnson*, 28 Mass. Att’y Disc. R. 487 (2012) (contempt for failing to resign as trustee; two year suspension increased by one year). Because the contempt order is ordinarily accompanied by an order increasing the length of the suspension, it is not apparent what practical effect the contempt order itself creates.

⁴² Section 17(8). That section applies to a lawyer “who is found by the court to have violated the provisions of this rule by engaging in legal or unauthorized paralegal work prior to reinstatement” The SJC has held that acting as a fiduciary qualifies as “legal work.” *Matter of Johnson, supra*. Until recently, Section 17(8) required that the added suspension term be at least twice the length of the original suspension, or ten years if the original order was for an indefinite suspension or disbarment. *See* Section 17(8), effective until 2009. The current version of that section allows for a more flexible determination of the added sanction.

- Engage in legal or paralegal work; or
- Work for, volunteer for, or assist in any fashion a lawyer or law firm.⁴³

A suspended lawyer might be a valuable asset to a sole practitioner or law firm, serving as an assistant or paralegal, given her expertise and experience, but Rule 17 forbids that employment or activity. The rule also forbids the suspended lawyer from serving as a secretary, translator, IT consultant, or in any other capacity at all if the employer is a lawyer. As Bar Counsel has written, a suspended lawyer “can’t be employed as a janitor” in a law practice.⁴⁴

A suspended lawyer may file a motion with the SJC for permission to engage in employment as a paralegal (or, presumably, in another capacity in a law office, such as an office manager or secretary), but only after the following time periods:

- 1) After the period of a term suspension has expired (but before formal reinstatement); or
- 2) After four years of an indefinite suspension; or
- 3) After seven years in the case of a disbarment order or a disciplinary resignation.⁴⁵

A lawyer prohibited from practice because of assignment to disability inactive status may not move the Court for permission to perform services as a paralegal, at least not according to Rule 18.

A lawyer is not automatically permitted to work as a paralegal or for a lawyer in any capacity even if the suspension period has expired; he must prove to the court that permission to do so will not harm the public interest. In *Matter of Thalheimer*, the single justice wrote, “Permission to work as a paralegal is not a matter of right, and a motion for leave to engage in such employment is, in reality, ‘a motion for partial reinstatement of the rights and privileges the petitioner engaged before discipline.’ The respondent ‘bears the burden of showing that [s]he is qualified to work as a paralegal and that her proposed employment will not harm the public interest, the integrity and standing of the bar, or the administration of justice.’”⁴⁶ In *Thalheimer*, the respondent, who had been indefinitely suspended for misconduct involving misuse of client funds and representing clients with conflicting interests, sought permission to serve as a paralegal for her son, a solo practitioner. The single justice was not persuaded that the son would provide sufficient oversight to protect the public interest in light of the reasons for the suspension, and therefore denied the request.⁴⁷

⁴³ Section 17(7).

⁴⁴ Hope Viner Samborn, *Disbarred—but Not Barred from Work*, ABA JOURNAL (June 2007), available at http://www.abajournal.com/magazine/article/disbarred_but_not_barred_from_work/ (quoting Bar Counsel Constance V. Vecchione).

⁴⁵ Section 18(3) (not listing disability inactive status among the exceptions).

⁴⁶ *Matter of Thalheimer*, 28 Mass. Att’y Disc. R. 842 (2012) (quoting *Matter of Gonick*, 21 Mass. Att’y Disc. R. 307 (2005), and *Matter of Ellis*, 23 Mass. Att’y Disc. R. 130 (2007)).

⁴⁷ On her second attempt to obtain permission, Thalheimer succeeded. *Matter of Thalheimer*, 29 Mass. Att’y Disc. R.259 (2013).

In *Matter of Wynn*,⁴⁸ the single justice allowed a suspended lawyer to serve as a paralegal, and included conditions, including reports from the law firm lawyers about the supervision of the paralegal's work.

Practice Tips

A lawyer hoping to achieve reinstatement after a lengthy suspension or disbarment should petition the Court for permission to work as a paralegal if she qualifies to do so. In petitions for reinstatement, the Court must consider whether the suspended lawyer possesses “learning in law required for admission to practice in this Commonwealth,”⁴⁹ and several lawyers have been denied reinstatement for failure to prove that quality.⁵⁰ A single justice has described service as a paralegal as a “good step” in preparing for reinstatement.⁵¹

* * *

Suspended lawyers should attend continuing legal education classes and engage in similar professional development activities. Nothing prevents a suspended lawyer from actively *studying* law; she is only forbidden from *practicing* law.

B. The Consequences of Failure

A suspended lawyer who serves as a paralegal (or in another banned capacity in a law practice) without permission will likely be held in contempt and receive an extension to the original period of suspension, or will be denied reinstatement. Rule 17(8) declares that an excluded lawyer who engages in legal or paralegal work without permission “may not be reinstated until after the expiration of a specified term determined by the court after a finding that the lawyer has violated the terms of this rule.”⁵² For a lawyer assigned to disability inactive status, violation of the ban will result in the lawyer being temporarily suspended pending the outcome of disciplinary proceedings which Bar Counsel shall commence.⁵³

When Bar Counsel learns that an excluded lawyer has been engaged in banned activity, a petition for contempt will be filed with the SJC. In *Matter of McBride*,⁵⁴ a disbarred lawyer engaged in the practice of law, and in doing so also forged a check, for which he pled guilty. On Bar Counsel's petition for contempt, the single justice held the lawyer in contempt, and added

⁴⁸ 15 Mass. Att'y Disc. R. 643 (1999).

⁴⁹ Section 18(5).

⁵⁰ See, e.g., *Matter of Dawkins*, 432 Mass. 1009, 16 Mass. Att'y Disc. R. 94 (2000); *Matter of Fletcher*, 29 Mass. Att'y Disc. R. 259 (2013); cf. *Matter of Wong*, 442 Mass. 1016, 20 Mass. Att'y Disc. R. 540 (2004) (remanded for more evidence of learning in law).

⁵¹ *Matter of Sullivan*, 25 Mass. Att'y Disc. R. 578 (2009).

⁵² See note 42, *supra* (discussing the recent amendment to Section 17(8)). For one example of a lawyer being held in contempt and the length of her suspension increased, see *Matter of Johnson*, 28 Mass. Att'y Disc. R. 487 (2012).

⁵³ Section 17(8).

⁵⁴ 29 Mass. Att'y Disc. R.440 (2013).

eight more years to the period before the respondent could seek reinstatement, relying on Section 17(8). In *Matter of Shanahan*,⁵⁵ discussed below in the context of what constitutes the practice of law for excluded suspended lawyer, the respondent had been disbarred after he resigned following a conviction for bankruptcy fraud. He proceeded to join a consulting firm where he represented clients in development and permitting activities, including appearing on their behalf at local zoning and planning boards. Bar counsel filed a petition for contempt, seeking to add eight to ten additional years to his disqualification period before the lawyer could apply for reinstatement. After concluding that the respondent's actions did constitute the practice of law, the single justice issued a contempt order and added three additional years to the original eight-year disbarment period.⁵⁶

C. The Nature of the Restrictions on Practice

It is clear that an excluded lawyer may not serve as a lawyer for a client, or as a paralegal or in any other capacity for a lawyer or law firm without explicit SJC permission, during the exclusion period. Questions have arisen, however, about whether certain activities that non-lawyers may engage in will also be off limits to the excluded lawyer. Three SJC decisions have addressed that issue in Massachusetts.

In *Matter of Shanahan*, the excluded lawyer obtained employment at a firm that specialized in site analysis and property development consultation at the local, state, and federal levels. The firm employed no attorneys. After working there for almost two years, the respondent opened his own firm to provide similar services. Bar counsel filed a petition for contempt, claiming that the respondent was practicing law. The respondent argued that because non-lawyers may engage lawfully in the work he was doing, he could not be in violation of the disbarment order prohibiting him from the practice of law. He emphasized that his customers understood that he was not a licensed lawyer, and that he referred legal activities that he formerly provided, such as drafting and negotiating purchase and sale agreements and conducting real estate closings, to licensed lawyers.

The single justice concluded that his actions qualified as the practice of law. The Court relied on the principle that “[a]n activity that may not constitute practicing law when performed by another category of professional may well become the practice of law when a lawyer, disbarred or not, performs it.”⁵⁷ Even though nonlawyers engage in similar activities, the single justice concluded that the respondent's work was sufficiently similar to the work he performed as a lawyer, and involved “his ‘professional judgment in applying legal principles to address [his clients’] individualized needs.’”⁵⁸ The respondent was held in contempt, but his added sanction

⁵⁵ 26 Mass. Att’y Disc. R. 583 (2010).

⁵⁶ See also *Matter of Johnson*, 28 Mass. Att’y Disc. R. 487 (2012); *Matter of Kafkas*, 451 Mass. 1001, 24 Mass. Att’y Disc. R. 386 (2008) (contempt order confirmed, suspension period doubled based on prior version of Section 17(8)).

⁵⁷ *Id.* (citing *Matter of Eastwood*, 5 Mass. Att’y Disc. R. 70, 76-77 (1994) (disbarred real estate lawyer prohibited from work abstracting deeds); *Matter of Behenna*, 9 Mass. Att’y Disc. R. 17 (1993) (title examination, without rendering advice, constitutes practice of law); *Matter of Levine*, 20 Mass. Att’y Disc. R. 311 (2004) (real estate activity)).

⁵⁸ *Id.* (quoting *Matter of Chimko*, 444 Mass. 743, 750 (2005), quoting *Oregon State Bar v. Smith*, 149 Or. App. 171, 183 (1997), cert. denied, 522 U.S. 1117 (1998)).

(three additional years before he was permitted to seek reinstatement) was less than that imposed upon an excluded lawyer who directly practiced law.⁵⁹

Practice Tips

A suspended lawyer must take special care to avoid employment that relies upon the judgments lawyers typically make, even if that work is permitted to be performed by nonlawyers. It is especially important to avoid employment in fields that are close to the work performed before the lawyer lost his license.

* * *

While the SJC in recent years has begun to relax the strict interpretation of the doctrine barring nonlawyers from engaging in activities that come close to the practice of law,⁶⁰ any such relaxation will likely *not* apply to the suspended lawyer. A suspended lawyer should not infer that she may engage in activities in which nonlawyers might now be permitted to engage.

* * *

The above practice tips notwithstanding, a suspended lawyer most likely may engage in federal tax work, if authorized by the federal government, without risking a contempt order or an added suspension. Federal tax practice may not be limited by state authorities.⁶¹

A suspended lawyer's representation of himself in court proceedings does not qualify as forbidden practice of law. In *Matter of Ellis*,⁶² the respondent had been disbarred for participating in an insurance fraud scheme with his family's law firm. After disbarment, he brought an action against a former client of the firm seeking to recover legal fees. Bar counsel filed a petition for contempt, arguing that the fees were accrued while working in a partnership with his brother, so respondent was actually representing the partnership in court. The single justice concluded that, because his brother had assigned to the respondent all rights to the claim

⁵⁹ Compare *McBride*, *supra*.

⁶⁰ See, e.g., *Real Estate Bar Association, Inc. v. National Real Estate Information Services, Inc.*, 459 Mass. 512 (2011). For a discussion of the evolving standards regarding unauthorized practice, see Alexis Anderson, "Custom and Practice" *Unmasked: The Legal History of Massachusetts's Experience with the Unauthorized Practice of Law*, 94 MASS LAW REV. 124 (2013).

⁶¹ See *Sperry v. Florida ex rel. Florida State Bar*, 373 U.S. 379 (1963) (Supremacy Clause prevents states from restricting practice before federal agencies); *Lowell Bar Ass'n v. Loeb*, 315 Mass. 176, 181-183, 186 (1943) (federal tax practice not the practice of law); *Joffe v. Wilson*, 381 Mass. 47, 51 (1980) (certified public accountant's work as an advocate and negotiator with the Internal Revenue Service was not unlawful; relying on *Loeb* and *Sperry*) See also *Matter of Kafkas*, 451 Mass. 1001, 1002, 24 Mass. Att'y Disc. R. 386 (2008) (suspended lawyer's argument that he was completing forms that resembled tax forms, and therefore not in violation of the suspension order, rejected based on the finding that the lawyer's work was not federal tax work).

⁶² 24 Mass. Att'y Disc. R. 258 (2008).

against the former client, the respondent was merely representing himself as the sole assignee of the claim, and that a disbarred attorney may undertake legal work in a *pro se* capacity.

In *Matter of Bott*,⁶³ a lawyer who had resigned as a disciplinary sanction affirmatively petitioned the SJC for permission to serve as a mediator while suspended from the practice of law. The single justice reserved and reported the case to the full court, which addressed the question whether mediation is an activity, like the zoning and permitting advice in *Shanahan*, that is covered by the Section 17(7) exclusion. The Court first concluded that “as a general proposition, a person does not engage in the practice of law when acting as a mediator in a manner consistent with the [SJC’s Uniform Rules on Dispute Resolution].”⁶⁴ Whether excluded disbarred or suspended lawyer may nevertheless offer mediation services was a more complex question. The Court offered the following guidance:

The following considerations are relevant to determining whether mediation or other activities that do not constitute the practice of law when performed by nonlawyers may, in the context of bar discipline cases, nevertheless constitute legal work when performed by a lawyer: (1) whether the type of work is customarily performed by lawyers as part of their legal practice; (2) whether the work was performed by the lawyer prior to suspension, disbarment, or resignation for misconduct; (3) whether, following suspension, disbarment, or resignation for misconduct, the lawyer has performed or seeks leave to perform the work in the same office or community, or for other lawyers; and (4) whether the work as performed by the lawyer invokes the lawyer’s professional judgment in applying legal principles to address the individual needs of clients.⁶⁵

The Court also noted the difference between “facilitative” mediation (which does not call on the mediator’s exercise of professional judgment as a lawyer), and “evaluative” mediation, in which a mediator evaluates the merits of the case and may offer an opinion about its worth.⁶⁶ The latter is more likely to qualify as the practice of law; the former less likely.

The Court in *Bott* remanded the matter for more factfinding regarding the lawyer’s plans. The single justice later allowed the petition and approved the lawyer’s serving as a mediator, with several conditions, including that he only engage in “facilitative” mediation.⁶⁷

IV. Conclusion

A suspension of one’s license to practice law is a very serious matter, both for the lawyer and, especially so, for the lawyer’s clients. The SJC has established the protocols and requirements described here in order to ensure a responsible transition from active practice to a closed operation. The requirements are detailed and time-consuming but must be satisfied. It is crucial for a suspended lawyer to follow the SJC guidelines with care, and to ask for assistance

⁶³ 462 Mass. 430, 28 Mass. Att’y Disc. R. 51 (2012).

⁶⁴ 462 Mass. at 434 (citing *Uniform Rules on Dispute Resolution*, S.J.C. Rule 1:18, as amended, 442 Mass. 1301 (2005)).

⁶⁵ 462 Mass. at 438.

⁶⁶ 462 Mass. at 438-39.

⁶⁷ *Matter of Bott*, 28 Mass. Att’y Disc. R. 51 (2012).

or for extensions when the lawyer needs more time to complete the process. The most important responsibility is to ensure that each client has been attended to and cared for, so that no client matter gets compromised by the lawyer's suspension.

A lawyer who has been suspended, either for a definite term or indefinitely, should also anticipate and prepare for his later reinstatement petition. The lawyer should not engage in any activities that might be considered the practice of law, and should not work for any lawyer in any capacity. At the same time, the suspended lawyer should actively stay abreast of the law and attend seminars and continuing legal education programs.

DRAFT

Chapter 13

Reinstatement: Standards and Procedures

I. Introduction

A critical goal for a suspended or disbarred lawyer is recovering the privilege of practicing law. This chapter addresses how reinstatement works. The process is demanding and requires careful thought and preparation.

What a lawyer must do in order to return to the practice of law after the revocation of a license to practice depends on the nature of the conduct which gave rise to the suspension, the lawyer's conduct in the interim and the duration of the suspension. This chapter addresses reinstatement in three contexts: (1) reinstatement following suspension for one year or less; (2) reinstatement proceedings following a term suspension for more than one year; and (3) reinstatement proceedings following an indefinite suspension, disbarment, or disciplinary resignation. The chapter also explains the procedure for a contested reinstatement hearing.

Practice Tip

No reinstatement is automatic. The SJC on occasion has referred to the most routine reinstatement process after a short suspension as “automatic,”¹ but every reinstatement requires an order from the SJC upon an application by the suspended lawyer. Any application may be opposed by Bar Counsel if the circumstances so warrant.

II. Reinstatement Procedures and Protocols

A. Routine Reinstatement—Suspensions of One Year or Less

In general, a lawyer who has been suspended for any length of time must file a petition for reinstatement before he may be readmitted to practice. For shorter suspensions, though, the SJC rules permit a streamlined process without the need to file a petition. Those rules differ for suspensions of six months or less and those greater than six months but not more than one year.

1) Reinstatement After Suspensions of Six Months or Less

A lawyer who is suspended for a period of six months or less is entitled to routine reinstatement, unless the suspension order requires petitioning for reinstatement, as short

¹ See, e.g., *Matter of Gustafson*, 464 Mass. 1021, 1023 n.4, 29 Mass. Att’y Disc. R. 292 (2013) (“essentially, automatic reinstatement” after a suspension of six months or less); *Matter of Ramos*, 29 Mass. Att’y Disc. R. 554 (2013) (“automatic reinstatement” after six-month suspension); *Matter of Cullen*, 26 Mass. Att’y Disc. R. 123 (2010) (respondent “entitled to seek automatic reinstatement” after one-year suspension).

suspension orders occasionally do.² The routine reinstatement occurs after the respondent has filed with the SJC and Bar Counsel an affidavit showing compliance with every condition required by the suspension order unless Bar Counsel objects within ten days of the filing of the affidavit. Rule 4:01 § 18(1)(a) describes the content of that affidavit as follows:

A lawyer who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension by filing with the court and serving upon the Bar Counsel an affidavit stating that the lawyer (i) has fully complied with the requirements of the suspension order, (ii) has paid any required fees and costs, and (iii) has repaid the Clients' Security Board any funds awarded on account of the lawyer's misconduct.³

The lawyer may file the affidavit the day after the term suspension has been served.⁴ If Bar Counsel objects within ten days, a hearing before the single justice will occur, as described below. Otherwise, the court will enter an order reinstating the lawyer after ten days have passed. If, however, the lawyer has waited more than six months after the end of the suspension to file the affidavit, the reinstatement will not be routine, but will require a petition.⁵

Practice Tip

A lawyer who has prepared an affidavit seeking routine reinstatement should confer with Bar Counsel when serving the affidavit and request that Bar Counsel notify the court immediately in writing that she does not object to the reinstatement. Bar counsel accommodates such requests regularly.

2) Reinstatement After Suspensions of More than Six Months but Less than One Year and a Day

For suspensions of more than six months but not more than one year, the same routine reinstatement process occurs, but the lawyer's affidavit must address one added requirement accompanying the longer suspension. Rule 4:01, § 18(1)(b) requires that the suspended lawyer also certify that she "has taken the Multi-State Professional Responsibility Examination during

² See, e.g., *Matter of Beery*, 28 Mass. Att'y Disc. R. 46 (2012) (three-month suspension with a requirement that the respondent file a petition for reinstatement); *Matter of Rafferty*, 26 Mass. Att'y Disc. R. 538 (2010) (four-month suspension, with reinstatement conditioned on passing the Multistate Professional Responsibility Examination); *Matter of Collins*, 5 Mass. Att'y Disc. R. 132 (2009) (six-month suspension with an order to petition for reinstatement).

³ SJC Rule 4:01, § 18(1)(a).

⁴ Neither the SJC rules nor the BBO rules explicitly establish the date after which the lawyer may file her affidavit. The SJC rule states that the suspended lawyer eligible for routine reinstatement "shall be reinstated at the end of the period of suspension by filing" the compliance affidavit. SJC Rule 4:01, § 18(1)(a), (b). In contrast, a lawyer who has received a term suspension exceeding one year is explicitly permitted to file the petition for reinstatement three months before the end of the specified term. § 18(2)(c). A fair reading of the rules as a whole is that the compliance affidavit for suspensions of one year or less may not be filed until the full term of the suspension has been served.

⁵ SJC Rule 4:01, § 18(1)(d).

the period of suspension and received a passing grade as established by the Board of Bar Examiners.”⁶

As with suspensions of six months or less, the suspended lawyer will be reinstated automatically after ten days unless Bar Counsel objects, or unless the respondent has submitted the affidavit more than six months after the end of the suspension. In the latter case the lawyer must file a petition for reinstatement.

Practice Tip

A suspended lawyer who fails to file his affidavit within the required six-month period may file a petition to submit the affidavit late, if he has good cause for missing the deadline. If he has no good cause for the late filing, he must file a petition for reinstatement, the same as lawyers suspended for more than one year must file. That petition process adds significantly to the length of the lawyer’s suspension, so a lawyer suspended for six months or less should pay close attention to the deadlines within which to request routine reinstatement.

3) Bar Counsel Objection to a Routine Reinstatement

When the Office of Bar Counsel receives the suspended lawyer’s affidavit, it has ten days within which to file with the Court and serve on the respondent an objection to the reinstatement.⁷ Bar counsel will do so when she is aware of facts that raise concerns about the respondent’s return to practice, and where she believes a more deliberate consideration is warranted. The filing of the objection leads to a hearing before a single justice on the question whether the suspended lawyer must file a petition for reinstatement and proceed through that hearing process. If the Court concludes that questions remain about the lawyer’s fitness, it will require a petition. If not, it will permit the reinstatement.

Practice Tip

Because section 18(1)(c) permits Bar Counsel to object to an otherwise automatic reinstatement if concerns remain about the lawyer’s fitness to resume practice, a single justice has cited that protection in declining to impose a longer suspension that would trigger a reinstatement hearing.⁸ A respondent arguing at a disciplinary hearing for a suspension of one year or less might rely on that reasoning in support of the lesser sanction.

⁶ *Id.*, at § 18(1)(b).

⁷ *Id.*, at § 18(1)(c).

⁸ *Matter of Gustafson*, 28 Mass. Att’y Disc. R. 397 (2012). *See also* *Matter of Greenidge*, 30 Mass. Att’y Disc. R. 174 (2014) (same Justice noting Bar Counsel’s ability to prevent an automatic suspension if she has concerns).

When Bar Counsel objects, the procedure is as follows: Upon the SJC's receipt of an objection from Bar Counsel, the matter will be assigned to a single justice. The Court will schedule a hearing on short notice, where the question of the need for a reinstatement petition will be addressed. If the single justice concludes that routine reinstatement is not appropriate, the respondent will follow the petition process described below.

B. Reinstatement After Suspensions of More than One Year

An order suspending a lawyer from practice for a fixed term implies that, at the end of that term, the lawyer will have the opportunity to return to practice. But for any term suspension longer than one year, reinstatement requires a formal process, and the lawyer must persuade the Board and the Court that he should be reinstated. That process begins with the lawyer's filing of a petition for reinstatement and a questionnaire and is then followed by a hearing, usually before a panel of three Board members, then by the Board's review of the panel's recommendation and, ultimately, by the SJC's review of the Board's recommendation. Only the Court may order a lawyer reinstated.

You Should Know

An SJC order suspending a lawyer for a period of more than one year does not mean that the lawyer presumptively will return to practice after the time period has elapsed. The practical presumption, even with a term suspension, is that the lawyer *will not* return to practice at that time. The burden always rests with the lawyer to persuade the Board and the Court that she is fit to return to practice. And even when the lawyer satisfies that burden, the reinstatement process add months to the length of the ordered suspension.

* * *

For reinstatement purposes, an indefinite suspension is the equivalent of a five-year term suspension. A disbarment order is equivalent to an eight-year term suspension. A lawyer having received either such order must wait until three months prior to the end of those respective periods before she may file her reinstatement petition.

1) Petition for Reinstatement

The first step in the reinstatement process is the filing of a petition for reinstatement. A lawyer may file his petition for reinstatement with the Clerk of the SJC for Suffolk County as early as three months prior to the end of his suspension, and at the same time file with the Board and Bar Counsel a reinstatement questionnaire developed by the Board, and described below. The petition must state seven elements:⁹

- (a) Whether the lawyer has complied with all the terms and conditions of the order imposing his suspension;

⁹ SJC Rule 4:01, § 18(4)(a)–(g).

- (b) Whether the lawyer has paid any costs assessed by the Court to defray the expenses of the disciplinary process, as permitted by Rule 4:01, § 23;¹⁰
- (c) The extent to which the lawyer has made restitution to, or otherwise made whole, all clients or others injured by his misconduct;
- (d) Whether the lawyer has repaid the Clients' Security Board (CSB) any funds awarded by the CSB on account of his misconduct;
- (e) That the lawyer has taken and passed the Multistate Professional Responsibility Examination after entry of the order of suspension;
- (f) That the lawyer has posted with the Board any bond the Board may have required as a condition of reinstatement;¹¹ and
- (g) That the lawyer has filed with the Board and served upon Bar Counsel copies of the petition and the completed questionnaire required by the Board under its rules.

Practice Tips

The SJC rule requires the suspended lawyer to state “whether” he has complied with the listed conditions. A lawyer who reports in his affidavit that he has not yet fulfilled the conditions just listed will not be reinstated, except in the most unusual circumstances.¹²

* * *

A lawyer preparing a petition and its two-part questionnaire should share the documents with Bar Counsel before filing the petition, in order to learn from Bar Counsel whether the office has any concerns about the petition or the questionnaire. Bar counsel's advance opinion may aid the lawyer to improve the filing, or to defer filing until all concerns have been addressed and remedied. A lawyer who loses a reinstatement hearing must wait a year before filing a new petition.

2) Reinstatement Questionnaire, in Two Parts

The lawyer must also complete two parts of a lengthy questionnaire developed by the Board and appended to the Board rules.¹³ Both questionnaire parts must be signed by the lawyer

¹⁰ SJC Rule 4:01, § 23.

¹¹ Under Section 18(6), the Board may, in lieu of receiving full payment of any costs assessed against the lawyer, require the lawyer to post a bond to guarantee such payment.

¹² Demonstration of full restitution of misappropriated funds is, for all practical purposes, a requirement for reinstatement. “[W]hatever the discipline, no defalcating attorney has been reinstated to the practice of law without first having made full restitution.” *Matter of Collins*, 24 Mass. Att’y Disc. R. 105, 112 (2008)

¹³ BBO Rules, Subchapter F, Appendix, *available at* <http://www.mass.gov/obcbbo/BBORules.pdf>.

under the penalties of perjury. The two questionnaire parts are included with this chapter as Appendices A and B. Part I of the questionnaire must be filed with the Board and Bar Counsel (but not with the Court), and will be a public document. Part II of the questionnaire must be filed with Bar Counsel only and no part of it will be made public except as ordered during the hearing on reinstatement.

Part I requires the petitioner to describe in detail his activities since his suspension began, including all steps he has taken to develop competence and “learning in law”¹⁴ necessary to resume practice. It also requires a description of any other legal proceedings in which the lawyer has been involved since the suspension, and his plans for practice after reinstatement, including identification of mentors and monitors. It includes a “Personal Statement” section where the lawyer will advocate his case for reinstatement. The questionnaire also asks the lawyer to include three references, two of whom must be members of the Massachusetts Bar.

Part I of the questionnaire will be made public as part of the record of the open reinstatement hearing process.

Practice Tip

The Reinstatement Questionnaire Part I is a critical advocacy document. Once completed, it should leave the reader persuaded that this lawyer has earned the privilege of returning to the practice of law. Any suspended lawyer who hopes to be reinstated should prepare this submission diligently and honestly. Honesty is the most critical quality of this submission. A lawyer who treats this document with less than due care may signal to the Board and the Court that he is not yet to be trusted with the affairs of clients. The members of the hearing panel pay especially close attention to how the petitioner describes his earlier misconduct, accepts responsibility for it, and communicates his remorse. It does not help the lawyer to try to re-litigate the underlying misconduct claims.

Reinstatement Questionnaire Part II collects data and information not always appropriate for public attention, but nevertheless essential to persuade the Board and the Court that the lawyer may return to practice without risk to the welfare of clients. It is filed only with Bar Counsel, who will maintain it as a confidential document, except as any of the information is offered in evidence at the hearing. (Some hearing panels request to see Part II, however.) Part II of the Questionnaire reviews in considerable detail the lawyer’s complete financial status, requiring documentation, including tax returns, and releases to ensure that complete transparency has been achieved. It also asks for information and documents describing the status of the lawyer’s physical and mental health, and any other disabling condition or circumstance, if those factors played a role in the lawyer’s misconduct or discipline. Finally, Part II invites the lawyer to provide an “Additional Statement” describing “any other matter not previously described in the Questionnaire that should, in the interest of full disclosure, be brought to the attention of the Board of Bar Overseers in considering your petition for reinstatement.”

¹⁴ SJC Rule 4:01, § 18(5).

Practice Tips

Part II of the Reinstatement Questionnaire is not filed with the Board and therefore not provided by the Board to the hearing panel. Most hearing panels, however, will inquire about that submission at a prehearing conference, or will order that Part II be included as a hearing exhibit. The panel will also know of its contents to the extent Bar Counsel or petitioner seeks to introduce information from it.

* * *

The “Additional Statement” opportunity in Part II of the Reinstatement Questionnaire need not be completed by every lawyer seeking reinstatement. It is not the place to repeat what the lawyer included in his “Personal Statement” in Part I of the questionnaire. It is a useful place to identify anything, helpful or not-so-helpful, that has not been covered in either of the two parts of the questionnaire. And it is better to list an unfavorable fact or development here, and address it, than to hope that Bar Counsel or the Board will never learn of that fact or development.

The Board rules permit Part II to be admitted into evidence at the reinstatement hearing “at either party’s request . . . subject to redaction or protective order where warranted.”¹⁵ In practice, the parties and the Board will not permit public dissemination of personal financial or medical information about the petitioner unless the facts in dispute at the hearing make such disclosure necessary.

3) Filing of the Petition

A suspended lawyer seeking reinstatement will file documents in three places, along with a “cost deposit.” The petition itself is filed with the Clerk of the Supreme Judicial Court for Suffolk County.¹⁶ The lawyer at the same time will file *four copies* of Part I of the Reinstatement Questionnaire with the Board, and the originals of both Parts I and II of the questionnaire with Bar Counsel.¹⁷ The lawyer must also deposit with the Board \$500 “for costs” of the reinstatement proceedings.¹⁸ That sum will be held by the Board to be applied to any payment order at the end of the proceedings requiring the lawyer to pay the costs of the reinstatement hearing.¹⁹

Practice Tip

¹⁵ BBO Rules, § 3.63.

¹⁶ SJC Rule 4:01, § 18(4).

¹⁷ BBO Rules, § 3.62.

¹⁸ BBO Rules, § 3.64.

¹⁹ BBO Rules, § 3.66; SJC Rule 4:01, § 18(6).

If the costs of the reinstatement proceedings are less than the \$500 cost deposit, the petitioner is entitled to receive the balance from the Board at the conclusion of the reinstatement process.

4) Proceedings Upon Filing of a Petition for Reinstatement

Upon receipt of the petition, the Clerk of the SJC will transmit the petition to the Board within three days of its filing. The Board will then assign the matter for hearing. A hearing must first await the expiration of the suspension order, and, in any event, can be held no earlier than 60 days after the Board receives the petition from the Court.²⁰ Therefore, if the lawyer has filed his petition three months before his suspension is to expire (as the rules permit), no hearing will take place for at least three months, until the date of the end of his term suspension. If the lawyer files his petition after his suspension expiration date, his hearing will not take place for at least 60 more days.

At least two weeks before the date of the hearing, the Board must publish the notice of the filing of the reinstatement petition and the date and time of the hearing in at least two newspapers—“the newspaper designated by the Court as an authorized source for the publication of all Rules of court” (typically, Massachusetts Lawyers Weekly) and a general circulation newspaper in the community of the petitioner’s residence, and of his law office location.²¹ While not required by the rule, the Board also gives notice to the Clients’ Security Board.

The Board may hear the petition itself, or assign it to a hearing committee, a special hearing officer, or a panel of the Board.²² In practice, the Board will assign the matter to a panel of three Board members. A hearing will be held in the same fashion as in a disciplinary hearing as described in Chapter 6, except that the petitioner shall have the burden of proof to establish the qualifications for reinstatement. The hearing panel transmits to the Board its findings and recommendations, which the Board will review and accept or revise. The Board then will file with the SJC its findings and recommendations. The Court, through a single justice (the same single justice who imposed the suspension or disbarment order), will either allow the petition for reinstatement or hold a hearing on the matter. If a petitioner is dissatisfied with the order of the single justice, she may appeal to the full bench of the SJC through the procedure outlined in SJC Rule 2:23, described in Chapter 9, Part VI.B.2.

III. Requirements for Reinstatement

A. Standard for Reinstatement

A suspended lawyer seeking reinstatement, whether after a term or an indefinite suspension or a disbarment, bears the burden of showing that reinstatement is warranted. The

²⁰ SJC Rule 4:01, § 18(5).

²¹ BBO Rules, § 3.67.

²² SJC Rule 4:01, § 18(5).

standard to be proven by the petitioner at the reinstatement hearing has been described as follows:

“The test of fitness for reinstatement is two pronged. Not only must a petitioner demonstrate the requisite moral qualifications and learning in the law, but he also must show that his resumption of the practice of law will not be detrimental to the integrity of the bar, the administration of justice, or the public interest.” The petitioner must show that he has so rehabilitated himself that he “currently possesses the necessary moral character to be admitted to the bar of the Commonwealth,” and will “inspire public confidence once again, in spite of his previous actions.” “[I]t is appropriate, despite the lack of specific directives, to consider the public perception of and confidence in the bar when determining the fitness of original applicants to practice law in the Commonwealth.”²³

In making these determinations, a panel considering a petition for reinstatement “looks to ‘(1) the nature of the original offense for which the petitioner was [suspended], (2) the petitioner’s character, maturity, and experience at the time of his [suspension], (3) the petitioner’s occupations and conduct in the time since his [suspension], (4) the time elapsed since the [suspension], and (5) the petitioner’s present competence in legal skills.’”²⁴

The hearing panel must also consider the public’s perception of the legal profession as a result of the reinstatement and the effect on the bar. “In this inquiry we are concerned not only with the actuality of the petitioner’s morality and competence, but also on the reaction to his reinstatement by the bar and public.”²⁵ “The impact of a reinstatement on public confidence in the bar and in the administration of justice is a substantial concern.”²⁶

The panel must also attend to the petitioner’s compliance with any conditions imposed at the time of the suspension or disbarment order, including restitution. An application for reinstatement in the absence of at least a concerted effort at restitution and a realistic plan for payment of the remainder would have little, if any, chances of success.²⁷

B. Burden on the Petitioner; Likelihood of Reinstatement

²³ *Matter of Shyavitz*, 26 Mass. Att’y Disc. R. 612 (2010) (citations omitted) (quoting *Matter of Prager*, 422 Mass. 86, 92, 93 (1996); *Matter of Hiss*, 368 Mass. 447, 452, 1 Mass. Att’y Disc. R. 122 (1975)).

²⁴ *Matter of Daniels*, 442 Mass. 1037, 1038, 20 Mass. Att’y Disc. R. 120, 122-123 (2004) (quoting *Matter of Prager*, 422 Mass. 86, 92 (1996); *Matter of Hiss*, 368 Mass. 447, 460, 1 Mass. Att’y Disc. R. 122, 133 (1975)).

²⁵ *Matter of Gordon*, 385 Mass. 48, 53, 3 Mass. Att’y Disc. R. 69, 73 (1982).

²⁶ *Matter of Waitz*, 416 Mass. 298, 307, 9 Mass. Att’y Disc. R. 336, 345 (1993).

²⁷ *See, e.g.*, *Matter of Dawkins*, 432 Mass. 1009, 1010, 16 Mass. Att’y Disc. R. 94, 95 (2000) (factor in denial of reinstatement was failure to make restitution); *Matter of Heffernon*, 14 Mass. Att’y Disc. R. 305 (1998) (denial of reinstatement “until some monies have been paid on the malpractice judgments against him and a realistic plan for full payment of both judgments is proposed”); *Matter of Waitz*, 7 Mass. Att’y Disc. R. 302 (1989) (denial of reinstatement based in part on lack of sufficient attempts to pay debt to IRS); *Matter of Wynn*, 7 Mass. Att’y Disc. R. 316, 317 (1991) (failure to pay tax debt and lack of restitution to wronged clients “pose[d] substantial impediment to a finding that reinstatement would be in the interests of the bar and the public”). *See also* note 14 *supra*.

The SJC has stated that the petitioner bears a “*heavy burden* of establishing her present qualifications for readmission.”²⁸ A petitioner for reinstatement must understand that the misconduct giving rise to the petitioner’s suspension is “conclusive evidence that [he] was, at the time, morally unfit to practice law,”²⁹ and that the misconduct “continue[s] to be evidence of his lack of moral character . . . when he petition[s] for reinstatement.”³⁰

Lawyers have been denied reinstatement after serving a term suspension. For instance, in *Matter of Weiss*,³¹ the petitioner, who had been suspended for one year and a day in 2011,³² was denied reinstatement in 2016, after his third petition for reinstatement, because he had not persuaded the hearing panel or the Court that he “attained a sufficient understanding of the basis for his discipline to support true rehabilitation.”³³ In *Matter of Shaughnessy*,³⁴ the lawyer had been suspended for six months and one day for neglect.³⁵ That sanction, which would have permitted him to resume practice without a reinstatement petition, was doubled to one year and two days after the lawyer advised clients during the period of his suspension.³⁶ When he sought reinstatement at the end of that extended suspension, the hearing panel, Board, single justice, and full SJC each agreed in turn that he had not proven that he had the moral character or the learning in law to return to practice.

One reported case illustrates how a term suspension may not be lifted at the end of the term. In *Matter of Wong*,³⁷ the lawyer had been suspended by the SJC for three years, retroactive to 1993, after a conviction in New Hampshire of receiving stolen property. In 1995, before the three years had expired, the lawyer petitioned for reinstatement. The hearing panel of the Board recommended reinstatement, but the Board and the single justice refused his request.³⁸ The lawyer then reapplied for reinstatement in 1998, and had less success with the hearing panel this time. The panel recommended that his petition be denied, concluding that, even though he had served five years of his three-year suspension, the evidence presented at the hearing about his moral qualifications and his learning in law was “sketchy” and “weak.”³⁹ The Board and a single justice agreed. The full SJC reversed the finding below regarding the petitioner’s moral character, concluding that the evidence showed that he had the requisite character, but agreed that the proof of his learning in the law since his suspension was not adequate. The Court remanded the matter for further evidence on that question, and the lawyer was ultimately reinstated.

Lawyers seeking readmission after an indefinite suspension or disbarment face an even greater burden to persuade the Board and the Court to permit them to return to practice. The

²⁸ *Matter of Fletcher*, 466 Mass. 1018, 1020, 29 Mass. Att’y Disc. R. 259 (2013) (emphasis added).

²⁹ *Matter of Dawkins*, 432 Mass. 1009, 1010-1011, 16 Mass. Att’y Disc. R. 94, 95 (2000) (citations omitted).

³⁰ *Id.*

³¹ 474 Mass. 1001 (2016).

³² *Matter of Weiss*, 460 Mass. 1012 (2011).

³³ 474 Mass. at 1002.

³⁴ 456 Mass. 1021, 26 Mass. Att’y Disc. R. 601 (2010).

³⁵ *Matter of Shaughnessy*, 442 Mass. 1012, 20 Mass. Att’y Disc. R. 482 (2004).

³⁶ *Matter of Shaughnessy*, 446 Mass. 1013, 22 Mass. Att’y Disc. R. 674 (2006).

³⁷ 11 Mass. Att’y Disc. R. 308 (1995).

³⁸ Those facts appear in *Matter of Wong*, 442 Mass. 1016 n.1, 20 Mass. Att’y Disc. R. 540, 542 (2004).

³⁹ 442 Mass. at 1016, 20 Mass. Att’y Disc. R. at 542.

majority of the reports in which a lawyer who had received an indefinite suspension or had been disbarred sought reinstatement show the Court denying reinstatement. Besides not acknowledging responsibility for the original misconduct and its gravity,⁴⁰ the other major hurdle for reinstatement in this context is the length of time the lawyer has been away from the law, making proof of adequate learning in law difficult. For instance, in *Matter of Sullivan*,⁴¹ the lawyer sought reinstatement five years after an indefinite suspension, and nine years after he had last practiced law. The single justice denied his petition because, among other worries, “the petitioner ha[d] failed to put forth a specific plan for resuming a law practice after a hiatus of nine years.” In *Matter of Fletcher*,⁴² the full SJC denied the lawyer’s reinstatement petition in part because “[t]he petitioner has not practiced law in the Commonwealth for more than twenty years, and she has not practiced law or worked in a field related to the law for at least ten years.”⁴³ Her claim of having read and studied legal materials was not sufficient to show that she had sufficient learning in law to be trusted with client matters.

On occasion a disbarred lawyer will achieve reinstatement. The most noteworthy case in the Commonwealth of reinstatement after disbarment is *Matter of Hiss*.⁴⁴ In *Hiss*, the petitioner had been disbarred in 1952 after a perjury conviction following his highly-publicized testimony before the Committee on Un-American Activities of the House of Representatives during the “red scare” hearings of the 1940s. In 1974, the lawyer filed a petition for reinstatement, claiming that he possessed the qualifications to practice law again. While he persisted in denying his guilt on the perjury charge, the Court concluded that, on the record before it, his refusal to accept the conviction was not a sign of moral deficiency:

[W]e cannot say that every person who, under oath, protests his innocence after conviction and refuses to repent is committing perjury. Simple fairness and fundamental justice demand that the person who believes he is innocent though convicted should not be required to confess guilt to a criminal *act* he honestly believes he did not commit.⁴⁵

Finding that otherwise the petitioner had proven his qualifications, the Court granted the petition for reinstatement.

Practice Tip

While *Matter of Hiss* does show that a lawyer’s refusal to accept responsibility for actions established by a court or agency to have been misconduct will not necessarily prevent the lawyer’s reinstatement, as a practical matter a lawyer who fails to demonstrate contrition or to accept responsibility will have a much harder time

⁴⁰ See, e.g., *Matter of Fletcher*, 466 Mass. 1018, 1020, 29 Mass. Att’y Disc. R. 259 (2013) (reinstatement denied; petitioner’s claim of innocence of charges for which she had been convicted cited as evidence against her); *Matter of Shyavitz*, 26 Mass. Att’y Disc. R. 612 (2010) (reinstatement denied, but moral character shown by acceptance of responsibility); *Matter of Estrene*, 22 Mass. Att’y Disc. R. 313 (2006) (lawyer reinstated after 30-month suspension; his acceptance of responsibility helped prove his moral character).

⁴¹ 25 Mass. Att’y Disc. R. 578 (2009).

⁴² 466 Mass. 1018, 1020, 29 Mass. Att’y Disc. R. 259 (2013).

⁴³ 466 Mass. at 1020.

⁴⁴ *Matter of Hiss*, 368 Mass. 447, 1 Mass. Att’y Disc. R. 122 (1975).

⁴⁵ 368 Mass. at 457, 1 Mass. Att’y Disc. R. at 132 (emphasis in original).

persuading the Board and the Court that he should be permitted to resume the practice of law.

C. Proof of Facts in Support of Reinstatement

A suspended lawyer seeking reinstatement must prepare carefully and thoroughly for her reinstatement hearing, and understand what evidence and strategies tend to be persuasive, and which are typically self-defeating or ineffective. Experienced practitioners offer the following suggestions when developing a strategy for reinstatement after a suspension.

1) Careful Preparation of the Reinstatement Questionnaire

The petitioner's statements in her Reinstatement Questionnaire will drive her theory of the case in her reinstatement hearing. A suspended lawyer should, if at all possible, retain experienced counsel to assist her in preparing the Questionnaire, as it serves as a critical set of statements by the petitioner, under oath, establishing the arguments to be used in the hearing. The Questionnaire must acknowledge the misconduct that led to the suspension, communicate credible, genuine remorse for the misconduct, and describe credibly what has changed since the misconduct occurred, and why it will not recur. It should also address expressly why the public interest will be served by a reinstatement.

Practice Tips

In several places in this Treatise a Practice Tip has touted the advantages for a lawyer facing discipline of retaining counsel to represent him. That advice is never more important than in the reinstatement context. The reinstatement process is fraught with pitfalls, and experienced counsel can help navigate them.

* * *

A suspended lawyer who has precipitously filed a petition and submitted a Reinstatement Questionnaire before ensuring that every necessary step has been accomplished to achieve reinstatement should consider either withdrawing the petition, or negotiating with Bar Counsel to defer any action on the matter while the suspended lawyer arranges his affairs to present the best case to the hearing panel through an amended petition. As noted above, it is always beneficial to share the proposed petition with Bar Counsel before filing it.

2) Develop a Reinstatement Strategy that Accounts for Each of the Required Elements

The petitioner's reinstatement strategy must include persuasive evidence and arguments on each of the factors that the hearing panel must address in any reinstatement decision, as required by Rule 18(5). Those factors are : (1) the petitioner possesses sufficient moral

character, despite the prior misconduct; (2) he is competent to return to practice; (3) he has sufficient learning in law; and (4) his resumption of the practice of law will not be detrimental to the bar and will serve the public interest. The fact that he has served his suspension for the allotted time is not determinative.⁴⁶ He is, in fact, presumed not to be entitled to return after the suspension period is over; his discipline is “conclusive evidence that he was, at the time [of the sanction], morally unfit to practice law,” and continues to have evidentiary force showing unfitness.⁴⁷ He must now persuade the panel that he is no longer unfit. To do so, he bears the “difficult burden”⁴⁸ to prove each of the identified elements.

Each element presents important strategic opportunities for a petitioner. Experienced practitioners suggest the following considerations:

a) Proving sufficient moral character

The petitioner must account, if reasonably possible, for the fact, treated as established for the reinstatement proceedings, that he engaged in misconduct in the past, and that he has improved in some identifiable way to warrant being trusted to represent clients once again. His strategic reinstatement plan ought to include the following considerations, depending, of course, on the facts of his suspension or disbarment:

- Typically, and in all but the most unusual cases, the petitioner must be prepared to admit previous wrongdoing and communicate genuine remorse for mistakes he has made. But “sincere remorse, standing alone, does not equal reform.”⁴⁹
- If the petitioner stipulated to certain findings or entered into to an agreed-upon stipulation during the disciplinary proceedings, he cannot at his reinstatement hearing claim that he never engaged in misconduct, but only stipulated to the charges to avoid the risks of the hearing process. The stipulation and the resulting sanction mean that, for reinstatement purposes, the misconduct occurred.⁵⁰
- He must also demonstrate how he has changed. He may call witnesses or submit affidavits from witnesses, whether lay or professional. Supporters may write letters to the Board, and typically such letters will be considered.
- A witness who testifies about the petitioner’s good moral character must be prepared to answer questions about the fact that the petitioner has engaged in misconduct, and to reconcile the present favorable opinion with the facts from the lawyer’s past. It is

⁴⁶ “Passage of time alone is insufficient to warrant reinstatement.” *Matter of Daniels*, 442 Mass. 1037, 1038, 20 Mass. Att’y Disc. R. 120, 123 (2004)(rescript).

⁴⁷ *See Matter of Dawkins*, 432 Mass. 1009, 1010-11, 16 Mass. Att’y Disc. R. 94, 95 (2000) (rescript).

⁴⁸ *Matter of Corben*, 31 Mass. Att’y Disc. R. ___, 2015 WL 9308986 (2015).

⁴⁹ *Id.*

⁵⁰ A petitioner cannot lie about his reasons for engaging in negotiations during the disciplinary proceedings, of course. The lesson of the Practice Tip is that it is usually a strategic mistake to claim in a reinstatement petition that the suspended lawyer did not engage in misconduct, *Matter of Hiss* notwithstanding. *See Matter of Hiss*, 368 Mass. 447, 1 Mass. Att’y Disc. R. 122 (1975) (petitioner was not disqualified for reinstatement solely because he continued to deny that he had committed the crime on which his disbarment had been based).

essential that the witnesses understand fully the nature of the misconduct in which the petitioner engaged.

- Bar counsel or the hearing panel may ask the witnesses to relate how the petitioner described his misconduct to them, and his understanding of the basis for the suspension and why it occurred.
- Bar counsel may invite individuals who were affected or harmed by the petitioner's misconduct to attend the hearing and offer testimony. If the misconduct was associated with litigation outside of the disciplinary proceedings, Bar Counsel may explore evidence about the petitioner's stance and allegations in that litigation.⁵¹
- While never sufficient, it is almost always useful for the petitioner to show, with competent evidence beyond simply his own testimony, that he has engaged in volunteer, charitable activities throughout the period of suspension, and not only in the months before his reinstatement effort.
- Misstatements or failure to disclose all matters on the reinstatement questionnaire will always reflect poorly on the petitioner's moral character, and may be a basis on which a panel will recommend against reinstatement.⁵²

Often a petitioner's misconduct was related to a medical condition, including psychological distress, or an addiction to drugs or alcohol. In such instances, a reinstatement strategy must persuade the panel with competent evidence that the condition is reasonably under control, and unlikely to trigger recidivism. The following tactics might aid such a petitioner:

- As a practical matter, a petitioner who suffered from a medical or substance abuse difficulty in the past must offer evidence of a professional opinion that concludes that the medical problem has improved and no longer presents a substantial risk. Written testimony, along with medical records, will likely be accepted, making a doctor's in-person testimony unnecessary.
- A non-expert sponsor from an Alcoholics Anonymous-type program who has worked closely with the lawyer and can testify to the petitioner's personal development and commitment can be effective. Typically, the petitioner will want to offer professional medical testimony of her recovery beyond any sponsor testimony, where appropriate.
- A "sobriety mentor," offered as a condition of reinstatement, can play a useful role in ensuring that an addicted lawyer will remain in recovery. Lawyers Concerned for Lawyers can usually assist with sobriety monitoring.

b) Proving competence

⁵¹ See, e.g., *Matter of Harrington*, 27 Mass. Att'y Disc. R. 432 (2011) (petitioner suspended for having made baseless, insulting accusations against the judge who presided over his personal divorce; on his petition for reinstatement, the Board took notice of his continued pursuit of his claims through civil lawsuits and appeals).

⁵² See, e.g., *Matter of Weekes*, 31 Mass. Att'y Disc. R. ___, 2015 WL 9460215 (2015).

Rule 18(5) requires the petitioner to prove his “competency” to practice law.⁵³ This is different from, although connected to, his “learning in law,” discussed below. This factor will be most relevant in those matters where discipline was based upon a lack of competence, but every lawyer must prove it. Strategies to prove competence may include the following:

- A petitioner whose misconduct included mismanagement of her practice must demonstrate through specific, concrete strategies that she is now capable of maintaining a vibrant legal services business. She should expect direct questions from Bar Counsel or the hearing panel members about the specific requirements of Rule 1.15, governing client trust accounts, and similar law office management topics. She should be confident in explaining how a law firm engages in three-way reconciliation of its trust account.⁵⁴
- A petitioner’s management of the reinstatement process itself can reflect directly on her competence as a lawyer. Presenting a well-written, well-organized, and professional reinstatement effort will help persuade the hearing panel of the lawyer’s skill.⁵⁵
- Evidence of a high level of competence as a lawyer before the suspension will assist a petitioner to meet his burden on this element. Testimony from prior clients and other lawyers may be useful. Where the suspension was based on lack of competence, some explanation that the misconduct was aberrational and not likely to recur is important.
- A petitioner who offers proof of a well-developed support network will have a better chance of achieving reinstatement than one who has a limited or no support network. A reliable and respected “practice mentor” for the petitioner can make an important difference.

c) Proving learning in the law

Related to the requirement of competence is that requiring the petitioner to demonstrate sufficient “learning in law.”⁵⁶ Because a suspended or disbarred lawyer may not practice during the period of suspension, even as a paralegal, and may only act as a paralegal after the suspension period has ended upon a successful petition to the Court,⁵⁷ it can be a challenge to satisfy this required element with evidence demonstrating acquired learning. Some petitioners

⁵³ SJC Rule 4:01 § 18(5).

⁵⁴ *See, e.g.*, Matter of Ostrovitz, 31 Mass. Att’y Disc. R. ___ 2015 WL 4505964 (2015) (reinstatement allowed after panel “favorably impressed” with petitioner’s familiarity with three-way reconciliation required by Rule 1.15). *See* MASS. R. PROF’L C. 1.15(f)(1)(E).

⁵⁵ *See, e.g.*, Matter of Todrin, 32 Mass. Att’y Disc. R. ___, 2016 WL 7493936 (2016) (petitioner’s sloppy presentation, typographical errors, and math mistakes in the reinstatement proceeding evidenced a lack of competency).

⁵⁶ SJC Rule 4:01 § 18(5).

⁵⁷ *See* the discussion at Chapter 12, Part III.

have faltered in their reinstatement efforts on this element,⁵⁸ but many others have proven such learning satisfactorily.⁵⁹

In addressing this element, a petitioner might consider the following approaches:

- It is essential that the petitioner show a consistent pattern of attendance at continuing legal education courses and similar substantive law presentations, along with regular review of legal materials. Sporadic or only recent efforts may not be sufficient. A scattershot approach in choosing continuing legal education courses will be unpersuasive; a focus on intended areas of practice will be more persuasive.
- Evidence of mastery in a field of law pre-suspension can support the required showing, including evidence that the petitioner mentored others. The longer the suspension, however, the more evidence of continuing study will be needed.
- Petitioners who have demonstrated learning in law often present evidence from attorneys who can vouch for the petitioner's interest, activity, and ongoing curiosity about legal developments.⁶⁰
- A petitioner may expect at her reinstatement hearing specific questions about developments in the substantive or procedural law of her practice areas as well as about developments in the rules governing professional conduct. If the sanction was for mishandling fiduciary funds, the petitioner should be prepared to discuss the recordkeeping requirements for such funds. Her testimony that she has been following such developments carefully will not be enough; she must affirmatively demonstrate her expertise, and should prepare for direct questions.
- If possible, a petitioner should seek permission from the SJC to work or to volunteer as a paralegal after her suspension term has ended.⁶¹

d) Proving that reinstatement will serve the public interest

Reinstatement reports regularly address the “public interest prong”⁶² of the reinstatement requirements under Section 18(5). The petitioner must show with persuasive evidence that his reinstatement will not reflect badly on the bar, or undercut the public's confidence in the bar's oversight of lawyers. “In this inquiry we are concerned not only with the actuality of the petitioner's morality and competence, but also on the reaction to his reinstatement by the bar and

⁵⁸ See, e.g., Matter of Waitz, 416 Mass. 298, 9 Mass. Att'y Disc. R. 336 (1993); Matter of Fletcher, 466 Mass. 1018, 29 Mass. Att'y Disc. R. 259 (2013); Matter of Dawkins, 432 Mass. 1009; 16 Mass. Att'y Disc. R. 94 (2000).

⁵⁹ See, e.g., Matter of Owens, 21 Mass. Att'y Disc. R. 533 (2005) (“We find that the Petitioner has demonstrated he has the requisite learning in the law. In addition to his many years of able practice, while under suspension, he read advance sheets, subscribed to Lawyers Weekly, took an MPRE review and an MCLE in tort law.”).

⁶⁰ See, e.g., Matter of Gibson, 32 Mass. Att'y Disc. R. ___, 2016 WL 7493937 (2016); Matter of Owens 21 Mass. Att'y Disc. R. 533 (2005).

⁶¹ For a discussion of that process, see Chapter 12, Part III.

⁶² See, e.g., Matter of O'Sullivan, 31 Mass. Att'y Disc. R. ___, 2015 WL 9308984 (2015); Matter of Pudlo, 31 Mass. Att'y Disc. R. ___, 2015 WL 9308990 (2015).

public.”⁶³ “Consideration of the public welfare, not [a petitioner’s] private interest, dominates in considering the reinstatement of a [suspended] applicant.”⁶⁴

In most reinstatement reports, the public interest factor follows closely from, and often incorporates, the factors described above—petitioners who have proven remorse, good moral character, competence, and learning in law typically will not have problems showing that reinstatement will not create any problems for the public.⁶⁵ But the petitioner’s reinstatement strategy must address this component. Suggestions for such a strategy include the following:

- A petitioner’s record of substantial charitable and volunteer activities will assist him to argue that he has met this component by demonstrating an appropriate service-oriented moral compass.
- Petitioners often produce supportive documents, letters, or affidavits from members of the community or former clients attesting to the petitioner’s contributions and good character.⁶⁶
- If the petitioner’s suspension order included any conditions, such as the requirement to make restitution, the evidence at the hearing must show that the condition has been satisfied. If the lawyer has made restitution, proof of that fact through competent evidence is essential. If the lawyer has expended good faith efforts to make restitution, but has not yet completed the repayment process, a hearing panel may permit reinstatement on the condition that contributions continue on a schedule, but that result is very unusual.⁶⁷
- A critical issue, and perhaps the decisive issue, is whether the hearing panel can hold the petitioner out as worthy of trust without raising serious questions about consistency with precedent, concerns about special treatment, or the appearance that the underlying misconduct has been trivialized.

IV. Reinstatement After Administrative Suspension

⁶³ Matter of Gordon, 385 Mass. 48, 53, 3 Mass. Att’y Disc. R. 69, 73 (1982).

⁶⁴ Matter of Ellis, 457 Mass. 413, 414, 26 Mass. Att’y Disc. R. 162, 164 (2010).

⁶⁵ See Matter of Dawkins, 432 Mass. 1009, 1012 (2000) (rescript) (“[The petitioner]’s failure to prove the moral qualifications, competency, and learning in law necessary for reinstatement leads us to the inescapable conclusion that he also has failed to prove that the standing and integrity of the bar, the administration of justice, and the public interest would not be compromised if he were to be readmitted.”). For one example where this prong was the primary question at the hearing, see Matter of Allen, 400 Mass. 417, 420, 5 Mass. Att’y Disc. R. 14 (1987) (“Bar counsel and the Board agree that the petitioner has the necessary moral character, competency and learning for readmission. The more difficult issue concerns the second requirement, the public interest.”). The Court in *Allen* rejected the Board recommendation and ordered reinstatement.

⁶⁶ See, e.g., Matter of Wong, 19 Mass. Att’y Disc. R. 502 (2003) (In concluding that petitioner did not satisfy the public interest prong, the single justice wrote, “For example, there are no letters from any attorneys, bar associations, community leaders, business people, or the like. As Bar Counsel stated, the petitioner did not offer a single character witness, either in person or through letters or affidavits.”).

⁶⁷ See discussion at note 27 *supra*.

The reinstatement process for administrative suspensions is typically different from disciplinary suspensions or disbarments. How the administrative suspension ends will depend on how it first arose. If the administrative suspension occurred because the lawyer failed to register with the Board, the lawyer may be reinstated by registering and paying the past-due annual fees, a late assessment, and a reinstatement fee.⁶⁸ The lawyer must also file an affidavit with the Board confirming that she has complied with whatever obligations she had failed to meet leading up to the suspension.⁶⁹ The SJC rule implies, in cases where the administrative suspension resulted from a default on bar registration and nonpayment of fees, that reinstatement rests with the discretion of the Board and the Court.⁷⁰ In practice, however, reinstatement typically is automatic upon the lawyer's registering and paying all fees and the late assessment, assuming there is no other reason for discipline. While the administratively-suspended lawyer has no authority to practice during that suspension,⁷¹ those suspended for failure to register typically do not learn of their suspension until some weeks later. (Most failure-to-register suspensions result from the lawyer's having failed to notify the Board of a change of address.⁷²) The practice of Bar Counsel has been to overlook any intervening practice during the period of suspension if the attorney responds immediately once the suspension enters.⁷³

If the administrative suspension resulted instead from a failure to cooperate with Bar Counsel's investigation of a disciplinary complaint, the same process applies, including the reinstatement fee and the affidavit, but the Court's discretion about reinstatement may be exercised with more deliberation depending upon the quality of the lawyer's cooperation. The information requested by Bar Counsel must be provided for the lawyer to be reinstated, unless the single justice can be persuaded that Bar Counsel has no right to the information or that its substance has been provided.

One recent example shows that reinstatement in that setting may be prompt if the lawyer begins to cooperate. In *AD 12-09*,⁷⁴ the SJC entered an order of administrative suspension of the respondent for noncooperation with a disciplinary investigation about a claim that the lawyer had not returned unearned fees to a client. That suspension order issued on February 27, 2012. On March 8, 2012, the respondent met with Bar Counsel, and on March 9, 2012, filed a written

⁶⁸ In 2016, the late fee was \$50 and the fine was \$100. Those figures are of course subject to change.

⁶⁹ SJC Rule 4:03(3).

⁷⁰ The petition for reinstatement that the administratively suspended lawyer must file requires Court approval by the terms of SJC Rule 4:01.

⁷¹ *See, e.g.*, *Matter of Linnehan*, 26 Mass. Att'y Disc. R. 310 (2010) (term suspension for several instances of misconduct, including practicing law while subject to an administrative suspension); *Matter of Gillespie*, 26 Mass. Att'y Disc. R. 223 (2010) (public reprimand for practicing law while subject to an administrative suspension; lawyer had some reason to believe that a partner had paid her fees).

⁷² In 2014, the Board began to request an email address from attorneys in addition to an office address. That development may lead to fewer failure-to-register suspensions in future years.

⁷³ If the lawyer does not promptly address the lapse, however, discipline may result. *See, e.g.*, *Gillespie, supra* (reprimand after respondent failed to respond to several notices, and continued to practice); *Matter of Blessington*, 19 Mass. Att'y Disc. R. 54 (2003) (suspension of six months and one day after practicing while administratively suspended); *Matter of Payton*, 26 Mass. Att'y Disc. R. 495 (2010) (public reprimand for practice while administratively suspended; two prior admonitions served as aggravating factors).

⁷⁴ 28 Mass. Att'y Disc. R. 926 (2012).

response to the grievance. On March 9, 2012, the respondent returned the fees to the clients. On March 14, 2012, the respondent was reinstated.⁷⁵

⁷⁵ For other examples of administrative suspensions based upon failure to cooperate with Bar Counsel's investigation, see, e.g., Matter of Manchester, 28 Mass. Att'y Disc. R. 594 (2012) (prompt reinstatement, followed by further failure to cooperate, led to public reprimand); Matter of Beery, 28 Mass. Att'y Disc. R. 46 (2012) (lawyer did not seek reinstatement after administrative suspension for failure to cooperate; three-month suspension resulted); Matter of Brooks, 26 Mass. Att'y Disc. R. 61 (2010) (suspension for one year and one day after failure to cooperate and for the underlying misconduct of neglect; respondent never cooperated after the administrative suspension).

Chapter 14

Attorney Registration, Trust Accounts, and the Clients' Security Board

I. Introduction

This Chapter covers several administrative topics of importance to Massachusetts lawyers. It first reviews the requirements to become, and then to continue in good standing as, a member of the Massachusetts bar. That topic also includes alternative status designations offering nonlawyers certain privileges overseen by the Board of Bar Overseers. Next, the Chapter outlines the requirements for establishing and maintaining trust accounts, including Interest on Lawyers Trust Accounts (IOLTA). Finally, the Chapter reviews the operation of the Clients' Security Board.

II. Becoming and Remaining a Member of the Massachusetts Bar

A. Gaining Admission to the Massachusetts Bar or the Right to Practice in the Commonwealth

An individual may become a Massachusetts lawyer in one of three ways: (1) by taking and passing the Massachusetts bar examination, (2) by waiving in by motion after having been a member of the bar of another jurisdiction, or (3) by special permission given to members of the bar of another jurisdiction for a limited period of time while representing indigent clients through a nonprofit or law school program. In all instances the individual must also satisfy the Board of Bar Examiners (BBE) that he or she is a person of good moral character, and must have passed the Multistate Professional Responsibility Examination (MPRE).¹ An individual who is not a full member of the bar may also practice law in the Commonwealth under certain defined circumstances, (4) as a certified law student, (5) as a member of an in-house counsel office, (6) in a practice by an inactive member of the bar limited to certain pro bono legal services, or (7) as a lawyer from another jurisdiction appearing *pro hac vice* in an identified court proceeding with permission of the judge. Finally, (8) Massachusetts permits a lawyer admitted to practice in a foreign country to practice law in a very limited manner as a Foreign Legal Consultant.

1) Admission via Examination

Most persons seeking to become members of the Massachusetts bar do so by sitting for and passing the Massachusetts bar examination (MBE), offered each July and February. In order to sit for the MBE, an applicant must have a high school degree or its equivalent,² a bachelor's degree from a college or university or its equivalent,³ and have graduated from a law school accredited by the American Bar Association or an institution that is "authorized by statute of the

¹ It is possible that an applicant who attended law school prior to the introduction of the MPRE may gain admission on motion without having passed that test, but in the vast majority of instances an applicant will have to show a passing score on the MPRE.

² SJC Rule 3:01 § 3.1.1.

³ *Id.*, § 3.1.2.

Commonwealth to grant the degree of bachelor of laws or juris doctor.”⁴ In addition, a graduate of a law school from a foreign country may obtain permission from the BBE to sit for the MBE if the BBE concludes that the foreign law school provided an educational program “similar in nature and quality” to that of an ABA-accredited law school.⁵ Graduates from Canadian law schools that are recognized by the Law School Admissions Council are deemed to have graduated from an ABA-accredited United States law school.⁶

The SJC imposes several other requirements for applicants for the MBE, including a certification by the applicant’s law school of his moral qualifications to join the profession, a petition signed by a licensed lawyer from some United States jurisdiction requesting that the applicant be permitted to take the examination, two letters of recommendation, and proof of a passing, scaled score of 85 or above on the MPRE.⁷

Passing the MBE and the MPRE does not authorize the applicant to become a Massachusetts lawyer. The applicant must also satisfy the BBE that he has the requisite moral character to be entrusted with the responsibilities of the profession.⁸ Part II.B. below discusses that character and fitness requirement.

2) Admission on Motion

An applicant for the Massachusetts bar may alternatively seek admission by “waiving in” on motion after having been a member of the bar of another state, district or territory of the United States⁹ for at least five years, with educational credentials equivalent to those required of an applicant seeking to sit for the MBE.¹⁰ A Canadian lawyer may also seek admission on motion, with the same standards applying.¹¹ The applicant must have been involved in active practice for at least five of the seven years preceding the petition for admission on motion.¹² The

⁴ *Id.*, § 3.1.3.

⁵ SJC Rule 3:01 § 3.2. The BBE has articulated the criteria upon which it will rely in making that determination, with different standards applicable to common law and civil law countries. *See* Rules of the Board of Bar Examiners, Rule VI, Foreign Law School Graduates (2010) (hereinafter “BBE Rules”), *available at* <http://www.mass.gov/courts/docs/bbe/foreigneducated.pdf>. *See* *Wei Jia v. Board of Bar Examiners*, 427 Mass. 777 (1998) (applicant denied admission when his law degree from a law school in China not deemed equivalent to an accredited United States law school, despite his having an LL.M. degree from an accredited U.S. law school, and bar admission in two other states).

⁶ BBE Rules, Rule VI.7.

⁷ SJC Rule 3:01 § 1.1. Those requirements are also described on the BBE website. *See* <http://www.mass.gov/courts/court-info/sjc/attorneys-bar-applicants/bbe/>.

⁸ M.G.L. c. 221 § 37.

⁹ For convenience, the discussion below will use the term “jurisdiction” to refer to a state, district, or territory as contemplated by the SJC’s rule.

¹⁰ SJC Rule 3:01 §§ 1.2, 6.

¹¹ *Id.*, § 6.2.

¹² *Id.*, § 6.1.1. In *Schomer v. Board of Bar Examiners*, 465 Mass. 55 (2013), the applicant, a member of the bar in New Jersey, had spent three of the past seven years working as a contract attorney in New York, despite not possessing a New York license. The BBE denied his petition, asserting that the New York practice did not count toward the requisite “active” practice experience, because it was unauthorized and therefore “illegal.” 465 Mass. at 59. The SJC reversed that determination, and ordered the BBE to count that experience as active. The Court noted that New York had permitted the applicant to sit for the New York bar examination after his contract work, and

BBE had formerly required that “an attorney’s practice credited toward meeting the active practice requirement be physically located in a jurisdiction to which he or she is admitted in good standing to the bar.”¹³ The SJC has expressly disapproved of that requirement.¹⁴

An attorney who has practiced for the required length of time in another jurisdiction or in Canada must include along with her petition a character report from the National Conference of Bar Examiners, three letters of recommendation, a certificate of good standing from each jurisdiction in which the applicant is admitted, and confirmation from the bar disciplinary authority from each such jurisdiction attesting that no charges are pending against the applicant.¹⁵ In addition, having failed the MBE in the past creates a rebuttable presumption against admission on motion.¹⁶

No reported decision of the SJC since 1997 has denied an application by a member of the bar of another U.S. jurisdiction or of Canada for admission on motion.¹⁷ The SJC has denied an application on motion submitted by a lawyer licensed in Ghana.¹⁸

3) Limited Admission for Lawyers Working in Legal Assistance or Graduate Law School Programs

SJC Rule 3:04 permits a lawyer admitted in another United States (but not Canadian or other foreign) jurisdiction to obtain a temporary license in Massachusetts if the lawyer “is enrolled in a graduate criminal law or poverty law and litigation program in an approved Massachusetts law school,”¹⁹ or works for or is associated with “an organized nonprofit legal services program providing legal assistance to indigents in civil or criminal matters” in the Commonwealth.²⁰ The “graduate . . . program” referred to in the rule covers an LL.M. degree arrangement in which the participants supervise J.D. law students certified to represent clients in a clinical course. The Rule 3:04 authorization applies only to the lawyering activity associated with the graduate program or the legal assistance organization, and may last no longer than two years.²¹

4) Limited Admission for Certified Law Students

SJC Rule 3:03 permits certain law students to represent indigent clients or governmental entities while supervised by a Massachusetts lawyer in identified settings. While practicing

inferred from that fact that the practice was not “unauthorized.” 465 Mass. at 61. The applicant now appears on the rolls of Massachusetts lawyers on the BBO website.

¹³ Former language from the BBE website.

¹⁴ *Schomer, supra*, 465 Mass. at 56 n2.

¹⁵ All of these requirements are found on the BBE website, *available at* <http://www.mass.gov/courts/docs/forms/sjc/application-by-motion.pdf>.

¹⁶ SJC Rule 3:01 §6.1.

¹⁷ *See Matter of Corliss*, 424 Mass. 1005 (1997) (applicant sought permission to take a then-authorized limited bar examination for out-of-state lawyers; application denied).

¹⁸ *Yakah v. Board of Bar Examiners*, 448 Mass. 740 (2007) (denying application for admission by motion by an individual who was an attorney in Ghana).

¹⁹ SJC Rule 3:04(1).

²⁰ *Id.*

²¹ SJC Rule 3:04(2).

under this special arrangement, the law students assume all of the responsibilities and obligations of any other practicing lawyer, and all of the standard ethical rules apply to the students' representation of clients.²²

Rule 3:03 distinguishes between “senior” (typically third-year) law students and students who have “begun [their] next to the last year of law school” (typically second-year law students).²³ A senior law student may appear on behalf of the Commonwealth²⁴ or a municipality²⁵ in proceedings in the District Court, Juvenile Court, Probate and Family Court, or Housing Court, but not (unless special permission is obtained) in the Superior Court or an appellate court. The student must be supervised by a Massachusetts lawyer serving as an Assistant District Attorney, Assistant Attorney General, or an equivalent municipal or agency counsel.²⁶ A senior law student may appear on behalf of an indigent criminal defendant in the District Court, Juvenile Court, Housing Court, and the SJC and Appeals Court, but not in the Superior Court, even with permission of the judge, except in very limited circumstances.²⁷ For indigent criminal representation, the senior law student must be supervised by a Massachusetts attorney assigned by the Committee for Public Counsel Services (CPCS), or by a lawyer employed by a nonprofit legal assistance organization or a law school clinical program. A senior law student may represent an indigent party in a civil matter in the District Court, Juvenile Court, Probate and Family Court, or Housing Court, but not (unless special permission is obtained) in the Superior Court or an appellate court.²⁸ Finally, a senior law student may appear “on behalf of the Commonwealth or indigent persons before any administrative agency, provided such appearance is not inconsistent with its rules.”²⁹

A second-year law student has more limited appearance rights. He may appear only in civil matters in those courts available to senior law students, and only if he is enrolled in a law school clinical program.³⁰ Rule 3:03 by implication denies a second-year student the right to appear on behalf of indigent persons before administrative agencies, but that restriction has very limited effect, if any, given that state and federal administrative agencies generally permit nonlawyers to appear on behalf of parties in the administrative hearings.³¹

²² SJC Order Implementing Supreme Judicial Court Rule 3:03 (1986) [hereinafter “Rule 3:03 Implementing Order”] §§ 3, 4. A certified law student will be deemed to be a lawyer for purposes of all ethical duties. *Id.* at § 4; *see also* Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV. 815 (2004).

²³ For students enrolled in a part-time program, a “senior” student is one who is in her last year of the program, which ordinarily means her fourth year.

²⁴ Rule 3:03(1).

²⁵ Rule 3:03 Implementing Order § 1 (interpreting “Commonwealth” to include municipalities).

²⁶ Rule 3:03(1).

²⁷ *Id.*; Rule 3:03(5). A Superior Court judge may permit practice by a senior law student on behalf of an indigent criminal defendant in selected reviews of convictions or sentences.

²⁸ Rule 3:03(1).

²⁹ Rule 3:03(7).

³⁰ Rule 3:03(8).

³¹ Most agencies permit nonlawyer representation of claimants in agency adjudicatory proceedings. *See, e.g.*, 107 C.M.R. 1.00 (nonlawyers may represent claimants before the Massachusetts Rehabilitation Commission); 29 C.F.R. § 2200.22(a) (Occupational Safety and Health Review Commission); 29 C.F.R. § 702.131(a) (Department of Labor under the Longshoremen’s and Harbor Worker’s Compensation Act); 29 C.F.R. § 102.38 (National Labor Relations Board); 29 C.F.R. § 404.1705(b) (Social Security Administration, if the nonlawyer (1) is generally known to have a good character and reputation, (2) is capable of giving valuable help in connection to the claim; and (3) is not disqualified or suspended from acting as a representative in dealings before the agency).

The law students who represent clients pursuant to Rule 3:03 must do so “without compensation.”³² That phrase does not prohibit the law students from being paid for their work by their employer; instead, it prohibits the law students from receiving a fee from the client for work on the matter.³³

Any law student seeking to represent a client under Rule 3:03 must be enrolled in, or have successfully completed, a course in evidence or trial practice.³⁴ The rule implies necessarily, but does not state explicitly, that a certified law student, in addition to “appear[ing] . . . in proceedings in” the listed courts, may represent the eligible clients in pretrial and other nonlitigation activities outside of the courtroom setting. For courtroom appearances, the rule states that “supervision” by a member of the bar of the Commonwealth shall not “require the attendance in court of the supervising member of the bar.”³⁵ The prevailing practice of attorneys participating in client representation governed by Rule 3:03, however, is to accompany the law student to court in all instances, except, on rare occasions, when an appearance is entirely perfunctory.

For senior law students, who need not be enrolled in a law school clinical program, the Rule 3:03 authorization remains in effect until the date of the first bar examination following the student’s graduation. If the student sits for that bar, the certification remains in effect until the announcement of the results, and if the graduate has passed the bar, the certification continues for six months or until the individual is admitted to the bar, whichever is sooner.³⁶ The Rule also states that its authority “applies only to a student whose right to appear commenced at least three months prior to graduation from law school.”³⁷

Any law student representing a client under Rule 3:03’s authorization must obtain her client’s informed consent to the student representation, through a signed document which the student and her supervisor must file with the court or administrative agency where the matter is pending.³⁸

Rule 3:03 requires that any non-governmental party represented by any law student be “indigent.” The rule does not define that term. For nonprofit legal assistance organizations, the qualification will typically track the income and asset limits available to the organization’s clients generally.

5) In-House Counsel

An attorney admitted to practice in another jurisdiction or, in some circumstances, a foreign country, and not licensed in the Commonwealth, may provide legal services “through an office or other systematic and continuous presence in this jurisdiction that . . . are provided to the

³² Rule 3:03(1).

³³ Rule 3:03 Implementing Order § 7.

³⁴ Rule 3:03(1).

³⁵ Rule 3:03(2).

³⁶ Rule 3:03(3).

³⁷ Rule 3:03(9).

³⁸ Rule 3:03 Implementing Order § 2.

lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission."³⁹ This Rule 5.5(d)(1) exception to the usual prohibition on unauthorized practice of law covers in-house counsel providing legal services to a single employer,⁴⁰ but not to any other client except in *pro bono* matters, as described below. A lawyer who practices as in-house counsel on a regular basis in Massachusetts must register with the BBO and pay the same registration fee as a licensed Massachusetts lawyer, but does not receive a bar card.⁴¹

Certain foreign lawyers may practice law as in-house counsel in the manner just described.⁴² A foreign lawyer may serve as in-house counsel in Massachusetts and offer legal services to her employer if she is

a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.⁴³

The authority afforded to foreign lawyers to serve as counsel for an employer is broader than that available under the Model Rules' version of Rule 5.5(d), which limits the foreign lawyer's authority to provide legal services to advising on matters of law of that person's country.⁴⁴ A comparable limitation applies in Massachusetts to Foreign Legal Consultants, discussed below.⁴⁵

In-house counsel may not appear in court except with *pro hac vice* permission (described in the next subsection). Rule 4:02(9)(b) permits recognized in-house counsel "to provide on behalf of a single organization (including a governmental entity) or its organizational affiliates any legal services that constitute the practice of law." That blanket authorization, which by its literal language would include court appearances, is limited by Rule 4:02(9)(e), which states: "Nothing in this section permits an attorney registered under this section to provide services for which the forum requires *pro hac vice* admission."⁴⁶

³⁹ MASS. R. PROF'L C. 5.5(d)(1) (2015).

⁴⁰ SJC Rule 4:02(9)(b) ("to engage in the practice of law as in-house counsel" means to provide *on behalf of a single organization* (including governmental entity) or its organizational affiliates any legal services that constitute the practice of law") (emphasis added).

⁴¹ SJC Rule 4:02(9)(a).

⁴² MASS. R. PROF'L C. 5.5(d).

⁴³ MASS. R. PROF'L C. 5.5(e).

⁴⁴ Compare MODEL. R. PROF'L C. 5.5(d)(1):

[W]hen performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice.

⁴⁵ See Section II.A.8 *infra*

⁴⁶ See also MASS. R. PROF'L C. 5.5(d)(1) (authorizing practice activities so long as they "are not services for which the forum requires *pro hac vice* admission"). The exclusion of *pro hac vice* matters from Rule 5.5(d)(1)'s authorization to practice does not mean that an in-house counsel may not seek *pro hac vice* status in appropriate cases. Instead, that reference is intended to communicate that the authorization to practice provided to licensed in-house counsel by that rule does not include authority to appear in court. See Paul D. Boynton, *Some Question New Rule Aimed at In-House Counsel*, Mass. Lawyers Weekly (March 31, 2008) ("in-house lawyers affected by this rule still cannot appear in court unless admitted under *pro hac vice* rules").

Rule 4:02 permits a licensed in-house counsel to represent clients on a pro bono basis without compensation, as long as the lawyer does so in association with either a nonprofit legal assistance organization or any licensed Massachusetts lawyer.

6) Limited Pro Bono Representation

A Massachusetts lawyer who has assumed inactive status (and therefore would not ordinarily be authorized to represent clients) may nevertheless offer legal services on a pro bono basis under an arrangement adopted by the SJC.⁴⁷ The lawyer must file a specially designated registration statement with the BBO, without any required registration fee. The lawyer must limit her practice to pro bono matters in association with a legal assistance organization approved by the SJC.⁴⁸ A retired lawyer may register and practice in similar fashion.⁴⁹

7) Appearance *Pro Hac Vice*

The final avenue for an individual to practice as an attorney in the Commonwealth is through *pro hac vice* status in an ongoing court proceeding. An attorney who is not admitted to practice in Massachusetts can seek to be admitted to practice in Massachusetts on a particular case or occasion, *pro hac vice*, if he is a member in good standing of another state's bar, and the state in which he is admitted grants similar *pro hac vice* privileges to members of the Massachusetts state bar.⁵⁰ *Pro hac vice* admission is granted at the discretion of the Massachusetts court before which the out-of-state attorney is seeking to appear.⁵¹ Only individual attorneys, not law firms, can seek *pro hac vice* admission in Massachusetts.⁵²

To apply for *pro hac vice* admission, each attorney must fill out a registration form and pay a fee to the BBO.⁵³ In 2017, the fee to appear in the Superior Court, Land Court, or any appellate court is higher than the fee for all other courts.⁵⁴ The fee is non-refundable, and will not be returned in the event the attorney is not admitted to practice *pro hac vice* in Massachusetts.⁵⁵ The attorney must identify the court in which he is seeking *pro hac vice* admission, the party to be represented by the attorney, and the docket number of the case the

⁴⁷ SJC Rule 4:02(8)(a).

⁴⁸ Rule 4:02(8)(a), (c).

⁴⁹ Rule 4:02(8)(b).

⁵⁰ MASS. GEN. LAWS, ch. 221, §46A. Note that in this context, "state" means "state," not "state, district, or territory of the United States," as other provisions discussed in this chapter include. See note 9 *supra*.

⁵¹ *Id.* See also DiLuzio v. United Elec., Radio & Mach. Workers of Am., Local 274, 391 Mass. 211, 214 (1984) (no abuse of discretion in denial of motion for *pro hac vice* appearance); Meschi v. Iverson, 60 Mass.App.Ct. 678 (2004) (same).

⁵² See SJC Rule 3:15(1): Pro Hac Vice Registration Fee.

⁵³ *Id.*

⁵⁴ The registration form is available on the BBO website. See <https://bbopublic.blob.core.windows.net/web/f/prohacvice.pdf>. In 2017, the fee for the former courts is \$301 per case; for all other courts, the fee is \$101 per case. SJC Rule 3:15(1).

⁵⁵ .The fee may be waived for pro bono representation. SJC Rule 3:15(1).

attorney is to work on, if available.⁵⁶ In order to appear in the matter, the lawyer must have a member of the Massachusetts bar present the motion for his *pro hac vice* admission.⁵⁷

8) Foreign Legal Consultant

Massachusetts has established a designation for lawyers who are admitted to practice in foreign countries and who wish to advise clients in Massachusetts about foreign law.⁵⁸ An individual who “is a member in good standing of a recognized legal profession in a foreign country”⁵⁹ may apply to the SJC for a license as a Foreign Legal Consultant (FLC), and the SJC, in its discretion, may authorize practice under that designation. An FLC “may render legal services in this Commonwealth subject, however, to the limitations that he or she shall not . . . render professional legal advice on the law of this Commonwealth or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise) . . .”⁶⁰ The rule lists other more specific restrictions as well (including a ban on court appearances⁶¹), but the intent of the rule is that the FLC may not practice Massachusetts or federal law, and may only provide legal services related to foreign law. The FLC will be bound by the Massachusetts Rules of Professional Conduct,⁶² and the attorney-client privilege and work-product doctrines apply to the FLC’s communications in the same manner as they would apply to a Massachusetts lawyer.⁶³ An FLC may work for a law firm, and may become a partner, member, or equity owner of a law firm.⁶⁴

Recall that certain foreign lawyers may practice in Massachusetts as in-house counsel, as described above, without qualifying as Foreign Legal Consultants, and with no restrictions on the subject matter of the advice provided to their employers.⁶⁵

B. Character and Fitness Requirements

As noted above, to become a member of the Massachusetts bar an applicant must obtain approval from the BBE as to her character and fitness to practice law.⁶⁶ “The [BBE] considers good character to embody that degree of honesty, integrity and discretion that the public and members of the bench and the bar have the right to demand of a lawyer.”⁶⁷ Some applicants have been denied admission because of concerns about the applicants’ moral character. For example, in three unrelated bar admission cases in 2015, *Matter of Chalupowski*,⁶⁸ *Matter of*

⁵⁶ SJC Rule 3:15(1)(B).

⁵⁷ SJC Rule 3:15(2).

⁵⁸ SJC Rule 3:05.

⁵⁹ *Id.* § 1.2(a).

⁶⁰ *Id.* § 5.1(e).

⁶¹ *Id.* § 5.1(a).

⁶² *Id.* § 6.1.

⁶³ *Id.* § 6.3.

⁶⁴ *Id.* § 6.2(b), (c).

⁶⁵ See Section II.A.5 *supra*.

⁶⁶ M.G.L. c. 221 § 37; SJC Rule 3:01 § 1.3.

⁶⁷ BBE Rules, Rule VI.

⁶⁸ 473 Mass. 1008 (2015).

Panse,⁶⁹ and *Matter of Britton*,⁷⁰ the Supreme Judicial Court denied admission to the bar to the applicants, emphasizing their failure to make complete and accurate disclosure of information required by the bar applications and noting that candor with the Board of Bar Examiners is essential. The applicants also had a history of litigiousness that was a factor in the decisions.⁷¹

Some lawyers have gained admission by lying about or omitting reference to earlier misconduct that would have caused the BBE to have concerns and perhaps to have denied the application. When that application-related misconduct has come to light, the SJC did not revoke the attorney's license.⁷² The solution on two occasions was a one-year suspension, with reinstatement conditioned on the lawyer obtaining from the BBE a report confirming that he or she has satisfied the character and fitness qualifications.⁷³

Any dishonesty on the petition for admission, even about something that would not necessarily interfere with admission, can result in a sanction in a bar discipline proceeding. For example, not disclosing on the admission questionnaire pending charges for drunk driving or an out-of-state conviction for possession of drugs has resulted in bar discipline where the charges themselves probably would not have prevented admission had they been disclosed.⁷⁴

Some applicants have gained admission to the Massachusetts bar notwithstanding having been convicted of serious crimes in the past. In *Matter of Prager*,⁷⁵ the applicant, a graduate of Bowdoin College and a Harvard graduate school, had been convicted in federal court of crimes involving distribution of narcotics. He later graduated *summa cum laude* from the University of Maine Law School, and clerked for the Maine Supreme Court. He worked as a law student for a legal aid program as well. On his application to the Massachusetts bar, the BBE recommended admission, finding that he had rehabilitated and possessed satisfactory moral character. The SJC invited Bar Counsel to intervene, and that office opposed admission. The SJC denied the application in 1996,⁷⁶ but allowed admission in 2003.⁷⁷ In another example, an applicant applied for admission to the Massachusetts bar after having pleaded guilty in Maryland to conspiracy to

⁶⁹ 473 Mass. 1001 (2015).

⁷⁰ 471 Mass. 1015 (2015).

⁷¹ See also *Matter of Desy*, 452 Mass. 1012 (2008) (applicant, as a law student, engaged in abusive and unlawful debt collection practices; admission denied (applicant later published a book about how to succeed on the bar examination)); *In re Application for Admission to the Bar (Krohn)*, 444 Mass. 393 (2005) (applicant's history included two felonies; the SJC denied admission, expressing more concern about the record of abusive, accusatory tactics in litigation, including during work as a certified law student, than with the felony convictions).

⁷² See, e.g., *Matter of Voykhansky*, 24 Mass. Att'y Disc. R. 719 (2008) (Board memorandum stating: "Courts in other states sometimes revoke law licenses that were obtained through fraud, thus leaving it to the lawyer to seek fresh admission on a proper footing. . . . That disposition, however, is not listed among the available sanctions the Court has empowered us to recommend.") (citations omitted).

⁷³ *Voykhansky*, *supra*; *Matter of Resnick*, 26 Mass. Att'y Disc. R. 544 (2010). As of 2015, neither *Voykhansky* (one-year suspension in 2008) nor *Resnick* (one-year suspension in 2010) had been reinstated.

⁷⁴ See, e.g., *Matter of Betts*, 26 Mass. Att'y Disc. R. 44 (2010) (twelve-month suspension, six months stayed, with conditions, for failure to disclose misdemeanor record on bar admission application).

⁷⁵ 422 Mass. 86 (1996).

⁷⁶ 422 Mass. at 95.

⁷⁷ <https://www.massbbo.org/AttorneyLookup?firstName=Harvey&lastName=Prager>.

distribute marijuana, for which he received a one-year prison sentence.⁷⁸ After the applicant was denied admission in Florida because of his criminal history,⁷⁹ he successfully applied to the District of Columbia⁸⁰ and Massachusetts⁸¹ bars. He ultimately succeeded in gaining admission in Florida, where he was later subject to discipline for misconduct.⁸² Other lawyers have been reinstated after disbarment for serious criminal activity, with the SJC applying the same character and fitness test as the BBE applies to applicants.⁸³

C. Maintaining Membership in the Massachusetts Bar

1) Maintaining Good Standing for Permanent Members of the Massachusetts Bar

Once admitted to practice in Massachusetts, an attorney must renew his license annually, pay a registration fee determined by length of service, and report information about malpractice insurance and identify any IOLTA account. For a description of the processes by which an attorney may elect inactive status or resign (other than through the disciplinary process), see Part II.C. below. After admission to the bar, a lawyer in Massachusetts need not establish, nor will the BBE or any agency assess, her ongoing moral character or legal competence. Massachusetts does not impose any continuing legal education requirements.⁸⁴

The Board will identify for each attorney the date of his annual registration renewal.⁸⁵ In order to renew a registration, the lawyer must submit a form reporting his admission to practice in any other jurisdiction, including each Federal court and administrative agency. The lawyer must disclose whether he is in good standing in each such jurisdiction and, if not, explain the circumstances of that determination. The lawyer must also identify his IOLTA account information or assert an exemption from the requirement to maintain an IOLTA account.⁸⁶ The

⁷⁸ In re Kleppin, 768 A.2d 1010, 1013 (D.C. 2001).

⁷⁹ *Id.*, at 1013.

⁸⁰ *Id.*, at 1018.

⁸¹ As of 2015, attorney Kleppin appears on the roll of Massachusetts lawyers, with a 2001 admission date.

⁸² Fla. Bar v. Kleppin, 2010 WL 6983305 (Fla. 2010) (admonition for misconduct involving asserting unsubstantiated claims and discovery infractions during litigation).

⁸³ The most prominent example of an applicant satisfying the character and fitness test in Massachusetts despite serious misconduct in the past is the reinstatement case *Matter of Hiss*, 368 Mass. 447 (1975) (discussed in Chapter 13, Part III). Alger Hiss was disbarred in 1952 after his conviction on two counts of perjury for his false testimony before the Committee on Un-American Activities of the House of Representatives regarding Russian espionage. Despite Hiss's continued claims of innocence and his refusal to acknowledge that he did anything wrong, the SJC affirmed the Board's recommendation to reinstate Hiss because of his long record of successful work after he was released from prison. *See also* In Matter of Prager, 422 Mass. 86, 92–95 (1996) (the factors for evaluating reinstatement of an attorney after disbarment, as in *Hiss*, also apply to original applicants for admission after conviction of a felony).

⁸⁴ As of 2015, Massachusetts is one of only six jurisdictions (out of the 50 states, the District of Columbia, and the four U.S. Territories) that do not require continuing legal education. (The other jurisdictions are Connecticut, DC, Maryland, Michigan, and South Dakota.) *See* http://www.americanbar.org/cle/mandatory_cle/mcle_states.html. Massachusetts does, however, require every *new* admittee to complete a one-day, in-person, mandatory Practicing with Professionalism Course. SJC Rule 3:16.

⁸⁵ SJC Rule 4:02(1) (suggesting that the Board establish a “system of staggered annual registrations”).

⁸⁶ The form provided by the BBO to attorneys lists three bases for an IOLTA account exemption: (1) the lawyer is not practicing law in Massachusetts; (2) the lawyer does practice law but not in private practice (e.g., as a

lawyer must also disclose whether or not he is covered by professional liability insurance.⁸⁷ There is no requirement in Massachusetts that a lawyer have professional liability or malpractice insurance, but the BBO website reports to the public whether a lawyer does or does not carry such insurance. A misrepresentation to the BBO about the lawyer's insurance coverage may be a basis for discipline.⁸⁸

The registration submission must also include a business and residential address for each attorney, as well as an email address. The business address, including telephone number, is public. Email addresses may be shared with courts. The residential address must remain confidential with the Board and Bar Counsel, unless the residential address is the same as the business address.⁸⁹

The lawyer must submit the BBO form along with a "periodic assessment," or registration fee.⁹⁰ The fee structure provides a standard fee for most lawyers with active status, reduced for lawyers in practice for five or fewer years, or for more than fifty years. Those fees cover the costs of the BBO and Bar Counsel operations, the Clients' Security Board, and Lawyers Concerned for Lawyers.⁹¹ In addition to the standard required fee, the Board includes in its assessment a separate, voluntary annual fee to support access to justice.⁹² The requested fee includes that voluntary payment, so that a lawyer must affirmatively opt out if she chooses not to contribute. An election to opt out of the payment will be confidential.

An attorney who fails to file her registration statement and pay the required registration fee will be administratively suspended.⁹³

2) Maintaining Good Standing for Non-Permanent, Non-Active Members of the Massachusetts Bar

As described above, attorneys may practice law in Massachusetts under a variety of circumstances even if not an active full member of the bar. A foreign legal consultant must register in a similar fashion as an active attorney, including payment of a registration fee

government or in-house lawyer) and does not receive any client funds; or (3) some "other" explanation to be provided by the lawyer.

⁸⁷ SJC Rule 4:02(2A).

⁸⁸ *See, e.g.*, Matter of Days, 30 Mass. Att'y Disc. R. 89 (2014) (two-month suspension for falsely claiming coverage on the BBO registration form and an application for assignment of cases from the Committee for Public Counsel Services (CPCS)); Matter of Durodula, 28 Mass. Att'y Disc. R. 267 (2012) (two-month suspension for knowingly certifying falsely to the Board of Bar Overseers that he was covered by professional liability insurance and for accepting appointments from CPCS, knowing that he did not have professional liability insurance in effect); Matter of O'Meara, 28 Mass. Att'y Disc. R. 666 (2011) (similar facts, same discipline); *cf.* Matter of Powers, 26 Mass. Att'y Disc. R. 518 (2010) (one year and one day suspension for falsely claiming to CPCS, and altering documents to show, liability insurance coverage).

⁸⁹ SJC Rule 4:02(10). The BBO's practice is to allow lawyers to list a business address as a residential address only if the attorney actually resides at that address.

⁹⁰ SJC Rule 4:03(1).

⁹¹ *Id.* In FY2015, 78.36 percent of registration fees were allocated for BBO and Bar Counsel operations, 14.07 percent for Clients' Security Board awards, and 7.57 percent for Lawyers Concerned for Lawyers expenses.

⁹² SJC Rule 4:03(1)(b). The funds contributed are paid to the IOLTA Committee. See Part III below for a discussion of IOLTA funding.

⁹³ SJC Rule 4:02(3). For a description of administrative suspension, see Chapter 4, Part II.F.6.

established by the Board.⁹⁴ A retired attorney who wishes to represent clients on a pro bono basis must also file an annual registration statement, but without the payment of any fees.⁹⁵ An inactive attorney must register in the same fashion as an active attorney, but will pay a reduced fee.⁹⁶ An attorney practicing with her out-of-state license pursuant to Rule 3:04 (limited to indigent representation) must register in the same fashion as active members of the bar.⁹⁷

C. Electing to Resign or Retire, or to Assume Inactive Status

1) Resigning or Retiring Other Than While Subject to Discipline

A lawyer may stop his membership in the bar in one of two ways (aside from the disbarment or discipline-related resignation covered elsewhere in this Treatise⁹⁸): The lawyer may *resign*, or he may *retire*. The two are treated differently by the BBO. A non-disciplinary resignation offers very little, if any, advantage relative to retirement, as the following description demonstrates.

In order to resign, the attorney must be in good standing, which means that no discipline is pending. The attorney must submit a resignation request to the General Counsel of the Board, who will submit the request to the Board, which then makes a recommendation to the SJC.⁹⁹ The Board will not attend to any such resignation request for six months, in case any disciplinary charges appear. The SJC will then issue an order certifying that the attorney has resigned. A lawyer who has resigned but who then wishes to return to the practice of law in Massachusetts “likely”¹⁰⁰ must take and pass the bar examination and fulfill the other admission requirements. While resigned (if not for disciplinary reasons), the former lawyer may engage in the work of a paralegal.

A retirement is a less final alternative. In order to retire from practice, a lawyer will complete her registration renewal by checking the box for “Retired” status. She will not be charged any registration fees while retired. A retired lawyer must continue to file her registration statements for three years after assuming that status, in order that Bar Counsel may locate her should any disciplinary matters arise.¹⁰¹ In contrast to a resigned attorney, a retired attorney may resume practice at any time by requesting reinstatement and paying the fees for the years during which she was retired.¹⁰² Also, a retired attorney (but not a resigned attorney) may provide pro

⁹⁴ SJC Rule 4:02(1A) (a foreign legal consultant shall be subject to SJC Rule 4:03, requiring payment of annual registration fees).

⁹⁵ SJC Rule 4:03(1)(a).

⁹⁶ SJC Rule 4:02(4).

⁹⁷ SJC Rule 3:04(1).

⁹⁸ See Chapter 11, Part II.

⁹⁹ No rule addresses resignation, but the BBO website explains this process. See <http://massbbo.org/>. A 1978 Standing Order of the SJC addresses “Non-disciplinary Voluntary Resignations,” but offers very little detail about the process. That Standing Order is found at the end of this Treatise as Appendix J.

¹⁰⁰ That adverb is used on the BBO website. See <http://massbbo.org/>. The SJC Standing Order, *supra*, declares that the Clerk shall remove the attorney “from the office of attorney at law in the courts of this Commonwealth, without prejudice to any request of the said attorney for readmission at a later date.” The Standing Order does not state whether readmission includes retaking the bar examination.

¹⁰¹ SJC Rule 4:02(5)(a).

¹⁰² SJC Rule 4:02(5)(b).

bono legal services in connection with an authorized legal assistance program.¹⁰³ A retired lawyer may engage in the work of a paralegal if she chooses.

2) Electing Inactive Status

A lawyer may temporarily cease practice by electing inactive status on his annual registration filing. An inactive attorney may not practice law, but continues to register annually and pays a reduced registration fee.¹⁰⁴ Unlike a retired lawyer, who in order to resume practice must pay the full registration fee for each year of retirement, an inactive attorney may obtain authorization to practice by notifying the Board and paying the registration fee for the year of resumption of practice.¹⁰⁵ An inactive lawyer may engage in the work of a paralegal if he chooses.

III. IOLTA and Other Trust Account Obligations and Compliance

As described in Chapter 7,¹⁰⁶ Massachusetts lawyers holding funds for others must maintain the money in a separate interest-bearing account or, for amounts too small or held for too short a period of time to warrant the administrative costs of a separate account, in an Interest on Lawyers' Trust Account (IOLTA).¹⁰⁷ Banks issuing IOLTA accounts are required by law to pool all such funds, pay interest on the pooled funds, and deliver that interest, after some allowable administrative expenses, to the state's IOLTA Committee. The IOLTA Committee distributes the funds to legal assistance and nonprofit organizations for use in making improvements in the administration of justice, and delivering civil legal services to low-income clients.¹⁰⁸

The IOLTA Committee publishes a careful, comprehensive manual instructing lawyers about every step of the IOLTA and trust account requirements.¹⁰⁹ Every practicing attorney ought to have that handbook available and refer to it often. This subchapter will highlight some important considerations, but it cannot substitute for the handbook.

Every lawyer in Massachusetts must have an IOLTA account, individually or through her law firm, *unless* she is not engaged in private practice *and* does not hold client funds, or has other good cause.¹¹⁰ Only those banks certified to do so by the SJC's IOLTA Committee may open IOLTA accounts. In order to obtain certification, a bank must agree to pay interest at a minimum level, determined through a complicated formula.¹¹¹ Some select banks have agreed to

¹⁰³ SJC Rule 4:02(5)(a), (8)(b). *See* Part II.A(6) *supra*.

¹⁰⁴ SJC Rule 4:02(4)(a).

¹⁰⁵ SJC Rule 4:02(4)(b).

¹⁰⁶ *See* Chapter 7, Part V. III.

¹⁰⁷ MASS. R. PROF'L C. 1.15(e)(5)(i) refers to this as a "pooled account ('IOLTA account')."

¹⁰⁸ SJC Rule 4:03(1)(c); *see also* MASS R. PROF'L C. 1.15(g)(4)(i) (67% of IOLTA funding must be distributed to the Massachusetts Legal Assistance Corporation; the remaining 33% will be given to other agencies or programs as the SJC orders).

¹⁰⁹ *See* MANAGING CLIENTS' FUNDS AND AVOIDING ETHICAL PROBLEMS, *available at* http://www.maiolta.org/attorneys/index_37_1631179094.pdf.

¹¹⁰ No rules establishes this principle, but the BBO's annual registration form so states.

¹¹¹ According to Rule 1.15(g)(1), a lawyer may only establish an IOLTA account at a bank, savings and loan association, or credit union authorized by federal or state law to conduct business in the Commonwealth and is

pay interest at a higher level, and the IOLTA Committee recognizes them as “Leadership Institutions.”¹¹²

The lawyer’s requirements for any trust accounts, whether IOLTA or otherwise, are as follows:

1. The name of any trust account must include some variation of “IOLTA Account,” “client funds account,” or the like.¹¹³ For each account opened, the lawyer must provide written notice to the depository or bank confirming the nature of the trust account, and maintain a copy of that notice.¹¹⁴
2. While commingling of her own funds with those held in trust is a most serious breach of a lawyer’s fiduciary duties,¹¹⁵ the lawyer may deposit some of her own funds into the account in order to pay any required bank charges.¹¹⁶
3. Once the lawyer deposits funds in her trust account she must keep careful records of the funds and their movement. Rule 1.15(f) lists the specific requirements, including the following:
 - a) All funds in the account must be identified by the client or third person on whose behalf the funds are held.
 - b) The account must have a check register with numbered checks, and that register must show, in chronological order, all deposits, checks paid, or bank charges paid. No check may be paid to “cash”; all checks must be paid to an identified person or entity.¹¹⁷
 - c) The account must be reconciled at least every 60 days, such that the bank statements, individual client and bank ledgers, and the account register

insured by the Federal Deposit Insurance Corporation, or a similar state insurance program for state chartered financial institutions. The IOLTA Committee certifies compliance with its participating institutions on a yearly basis. *See* IOLTA Guidelines B.1(b), *available at* http://www.maiolta.org/financial/index_10_3553665165.pdf. To be eligible, a financial institution must have the following characteristics: it must pay interest on IOLTA accounts comparable to the interest rate it offers to non-IOLTA accounts with similar balances; it must waive administrative and services charges for IOLTA accounts or only charge reasonable fees; and it must remit all net interest monthly to the IOLTA Committee, with delivery of interest remittance reports to both the IOLTA Committee and to the IOLTA account holder. IOLTA Guidelines B.1(b), *at* http://www.maiolta.org/financial/index_10_3553665165.pdf. A list of financial institutions certified to hold IOLTA funds is available on the IOLTA Committee’s website. *See* <http://www.maiolta.org/financial/depositories.shtml>.

¹¹² For a list of Leadership Institutions, see <http://www.maiolta.org/financial/depositories.shtml>.

¹¹³ MASS. R. PROF’L C. 1.15(e)(2).

¹¹⁴ Rule 1.15(e)(3).

¹¹⁵ As noted in Chapter 7, commingling funds alone, without deprivation, will typically result in an admonition. *See, e.g.*, Matter of O’Driscoll, 22 Mass. Att’y Disc. R. 621 (2006) (noting an admonition in 2005 for commingling funds in an IOLTA account); Admonition 02-27 (2002).

¹¹⁶ *See* Rule 1.15(b)(2)(i). *See also* IOLTA Guidelines B(2), at 22, *available at* http://www.maiolta.org/financial/index_10_3553665165.pdf (permitting deposits of lawyer funds into a trust account for this purpose).

¹¹⁷ Rule 1.15(e)(4).

balance exactly. (This is known as the three-way reconciliation requirement.)

- d) Separate from the account registry, the lawyer must maintain a ledger for each client matter or third party matter for which funds are held, identifying the purpose of each deposit and recording all activity with respect to that client or third party matter. The lawyer must also maintain a separate ledger for personal funds in the bank account.
- e) The lawyer must establish a separate account for the lawyer's business funds.
- f) The accounts, records, and documentation required by Rule 1.15(f) may be maintained electronically, but, if so, the lawyer must be capable of producing a printed report of the records required by the rule. Any records required by the rule must be maintained for a period of six years after the final distribution of the funds and the termination of the representation.
- g) A lawyer may only distribute funds on behalf of a client or third party to achieve the purposes for which the funds were received. The bank used by the lawyer must have an agreement with the Board to report to the Board any instance of a check having been returned for insufficient funds.¹¹⁸ Therefore, if a lawyer writes a check on a trust account and the check is returned for insufficient funds, the Board will receive notice, and Bar Counsel will investigate.

IV. The Clients' Security Board and Fund

When the Supreme Judicial Court created the Board of Bar Overseers and the Office of Bar Counsel in 1974 to centralize and unify lawyer discipline, it also created the Clients' Security Board ("CSB") and the Client Security Fund (the "Fund"). The CSB consists of seven Massachusetts lawyers appointed by the Court to serve as Trustees of the Fund. The purpose of the Fund is to discharge, as far as practicable and in a reasonable manner, the collective professional responsibility of the members of the Massachusetts bar with respect to losses caused to the public by defalcations of members of the bar and thereby protect the reputation and integrity of the bar.

The CSB distributes funds to individuals who have suffered losses of money or other property caused by "defalcation" of members of the Massachusetts bar, acting either as attorneys or as fiduciaries.¹¹⁹ The CSB will entertain a claim for restitution triggered by "a wrongful act committed by a lawyer against a person by defalcation or embezzlement of money or the wrongful taking or conversion of money, property, or other things of value."¹²⁰ Any such payments from the Fund "shall be a matter of grace, not right, and no client, beneficiary,

¹¹⁸ Rule 1.15(h)(1).

¹¹⁹ SJC Rule 4:04 § 1.

¹²⁰ Clients' Security Board Rules, Rule 2(d), available at http://www.mass.gov/ClientsSecurityBoard/rules_.html#2.

employer, organization or other person shall have any right or interest in the fund.”¹²¹ Therefore, a denial of a claim for CSB reimbursement for a loss may not be reviewed or appealed,¹²² although the CSB will reconsider a decision if presented with new evidence or for other good cause. The Fund is financed by a portion of the annual registration fees paid by lawyers and foreign legal consultants and, to a minor extent, from monies recovered from defalcating lawyers or other parties responsible for the loss.¹²³ In Fiscal Year 2013, the most recent year for which a report is available, the Fund paid out close to \$3 million in awards.¹²⁴

In order for an applicant to be eligible for an award, the loss must have occurred by reason of defalcation during the representation of a client, and the lawyer, at the time the claim arose, must have been an active member of the bar with an office in the Commonwealth. In addition, the lawyer must have died, been disbarred or suspended, or have resigned from practice.¹²⁵ The CSB does not reimburse for losses caused by malpractice or other negligent practice by the lawyer, or resulting from a fee dispute. It only compensates for misappropriation of funds held in trust, or failure to return unearned fees.

A client claiming a reimbursable loss must file an application with the CSB, using an approved form.¹²⁶ The application requires detailed information about the facts surrounding the loss, and all efforts the client or others have made to attempt to recover the funds from the lawyer, an insurer, or some other source. The CSB sends a copy of the application to the attorney alleged to have caused the loss and asks Bar Counsel for any information in Bar Counsel’s possession. If there is a viable claim against a third party, the CSB will typically address the claim first and then, with an assignment of claims obtained from the injured party, pursue recovery from the third party. Once the CSB has a complete set of facts and documents, it will either adjudicate the claim without a hearing, or schedule a hearing on the matter. At any such hearing, one or more members of the CSB will serve as the hearing officer or panel. The respondent attorney may attend the hearing. The claimant may be represented by counsel, but no lawyer for a claimant may accept any fee for representation on a CSB claim. All such services must be provided on a pro bono basis.¹²⁷

The CSB will make awards based upon “fair, reasonable and consistent principles,”¹²⁸ including the following factors:

- The amount of funds available to the CSB in light of the projected claims for that fiscal year;
- The amount of the claimant’s loss;

¹²¹ SJC Rule 4:05 § 2.

¹²² SJC Rule 4:05 § 1 (“No decision to grant or deny reimbursement shall be subject to judicial review in a court of either appellate or original jurisdiction.”).

¹²³ See note 91 *supra* (describing the funding allocation to the CSB).

¹²⁴ CLIENTS’ SECURITY BOARD, 2103 ANNUAL REPORT, *available at* http://www.mass.gov/ClientsSecurityBoard/Annual_Report_2013.pdf (reporting awards totaling \$2,801,666). The CSB has not issued an annual report since the 2103 report.

¹²⁵ SJC Rule 4:05 § 2.

¹²⁶ For access to the application form, see http://www.mass.gov/ClientsSecurityBoard/Appli-Form-99_High.pdf.

¹²⁷ See CSB Rules, Rule 9.

¹²⁸ SJC Rule 4:05 § 3.

- The degree of hardship suffered by the claimant; and
- Any negligence or conduct of the claimant that may have contributed to the loss.¹²⁹

As a condition of any such award, a claimant must agree to cooperate with the CSB and any other source in any efforts to obtain payments for the loss from other sources, and must agree to any appropriate assignment or subrogation agreements.¹³⁰ Unlike most other jurisdictions, and unlike the arrangement suggested by the American Bar Association's Model Rules for Lawyers' Funds for Client Protection,¹³¹ Massachusetts does not impose a cap on the amount of any given award.

Summaries of the Board's decisions are published on its website and do not contain the claimant's name but do contain the names of the respondents. In determining whether to recommend reinstatement of a lawyer, the Board of Bar Overseers takes into account whether or not the lawyer has reimbursed the CSB for any award granted to his or her clients.¹³²

¹²⁹ *Id.*

¹³⁰ SJC Rule 4:05 § 4.

¹³¹ AMERICAN BAR ASSOCIATION, MODEL RULES FOR LAWYERS' FUNDS FOR CLIENT PROTECTION R. 14.A, (2006), available at

http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2017%20Meetings/Forum/forum_materials/hot_topics/I_model_rules_for_lawyers_funds_for_client_protection.authcheckdam.pdf. The ABA's Model Rules were developed after the Massachusetts program was established.

¹³² See, e.g., *Matter of Ostrovitz*, 31 Mass. Att'y Disc. R. ___, 2015 WL 4505964 (2015) (reinstatement allowed after suspension; payment to CSB cited approvingly); *Matter of McCarthy*, 23 Mass. Att'y Disc. R. 469 (2007) (reinstatement denied; "principal" reason for denial was failure to reimburse CSB).

Appendices

APPENDIX A

FORM AFFIDAVIT OF RESIGNATION

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

**AFFIDAVIT OF RESIGNATION BY JOHN DOE, ESQ.,¹
PURSUANT TO SUPREME JUDICIAL COURT RULE 4:01, § 15**

I, John Doe, hereby state that I desire to resign from the practice of law in the Commonwealth pursuant to S.J.C. Rule 4:01, § 15, and I aver and attest as follows:

1. I was admitted to the bar of the Commonwealth on December 23, 1999. I have no prior discipline. [Alternative: recite prior discipline.]
2. My resignation is freely and voluntarily rendered, I am not being subjected to coercion or duress, and I am fully aware of the implications of submitting my resignation. I hereby waive my rights to hearing and to evidentiary proceedings before a hearing committee, the Board of Bar Overseers, and the Supreme Judicial Court.
3. I understand that if my resignation is accepted, my name will be stricken from the roll of attorneys; I may be disbarred upon my resignation; my resignation or disbarment will be made public and will be reported to courts and disciplinary authorities in this and other jurisdictions; a summary of the proceedings, including my identity and the factual and legal basis for the sanction, will be published by the Board of Bar Overseers, sent to media outlets, and posted on the board's Web site; I will not be eligible to apply for reinstatement before at least eight years have passed from the effective date of the judgment of resignation or disbarment; and I may never be reinstated to the practice of law in the Commonwealth.
4. I am aware that there is currently pending an investigation into allegations

¹ "Esq." is not used if the attorney is not in good standing.

that I have been guilty of misconduct. The nature of this misconduct is set forth in a statement of disciplinary charges attached hereto and incorporated by reference.

[ALTERNATIVE WHERE PETITION IS FILED BEFORE AFFIDAVIT WAS PREPARED: The nature of this misconduct is set forth in a petition for discipline filed by bar counsel on or about December 17, 2017, a copy of which is attached and incorporated by reference.]

5. I do not wish to contest any bar discipline allegations or proceedings now pending, and I understand that a judgment for my [disbarment/suspension] would likely result if the matters were litigated.

6. I acknowledge freely and voluntarily that the material facts upon which the attached statement of disciplinary charges [ALTERNATIVE: the attached petition for discipline] is predicated can be proved by a preponderance of the evidence and that a hearing committee, the board and the Court would conclude that I have committed the disciplinary violations described in that statement. [ALTERNATIVE: If the resigning attorney is acknowledging only some material part of the charges, identify those as to which this admission is made.] I agree not to contest any of the facts and rule violations set forth in the attached statement of disciplinary charges in this or any other bar discipline or reinstatement proceeding in the Commonwealth or any other jurisdiction or in any proceedings for my admission to the bar of any jurisdiction. [ALTERNATIVE: If the resigning attorney is acknowledging only some material part of the charges, identify those as to which this admission is made.]

7. I understand and acknowledge that bar counsel will recommend that my affidavit of resignation be accepted, that I be disbarred upon my resignation, [alternative: that my affidavit of resignation be accepted as a disciplinary sanction] and that the effective date of my resignation and/or disbarment be the date of entry of the Court's order or judgment thereon. [If retroactivity is sought, give date and reason, e.g.,

temporary suspension for the conduct now admitted, and compliance as of a date certain] I understand that I may also make recommendations regarding these matters but that neither the board nor the Court is bound to adopt such recommendations or accept my resignation, that the board will likely recommend my disbarment [ALTERNATIVE FOR CONDUCT NOT LIKELY TO RESULT IN DISBARMENT: that the board will likely recommend that my affidavit be accepted as a disciplinary sanction], and that the Court may disbar me without further proceedings.

8. I understand and acknowledge that I have the right to be represented by counsel in these proceedings, and I am represented by counsel with whom I am satisfied. [ALTERNATIVE FOR PRO SE RESPONDENTS: Although I am aware of the assistance in locating counsel provided by the Board of Bar Overseers, I have voluntarily chosen to proceed without counsel in executing this affidavit and submitting my resignation.]

9. I understand and acknowledge that bar counsel has made no representations or promises to me whatsoever regarding the effects of executing this affidavit other than what is stated in the affidavit. I understand and acknowledge that there have been no representations or promises made to me regarding any present or future criminal or civil proceedings against me or as to the effect of this affidavit on my privilege against self-incrimination.

10. I am not now suffering from any disability or condition that would impair my understanding of the allegations and proceeding against me, the voluntariness of this action, or my full understanding of the consequences of the execution of this affidavit.

11. I am currently admitted to practice in the Commonwealth of Massachusetts, _____, and no other jurisdictions.

12. I hereby request that I be permitted to resign from the practice of law in the Commonwealth of Massachusetts. I understand that this affidavit of resignation and its attachment will not be impounded.

Signed and sworn to under the penalties of perjury this ____ day of December, 2017.

John Doe, Esq.

APPENDIX B

FORM STIPULATION FOR DISCIPLINE

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

BAR COUNSEL,

Petitioner

vs.

JOHN DOE, ESQ.,²

Respondent

B.B.O. File No. C8-67-5309

**RESPONDENT'S [AMENDED]³ ANSWER TO PETITION
FOR DISCIPLINE AND STIPULATION OF THE PARTIES**

Bar counsel and the respondent, John Doe, Esq., hereby stipulate and agree that this matter may be resolved without hearing, and they jointly recommend that a sanction of a public reprimand be imposed for the misconduct set forth in the petition for discipline of which a copy is attached hereto. The parties further stipulate as follows.

1. The respondent represents that he is admitted to practice in the Commonwealth of Massachusetts, _____ and in no other state or federal jurisdictions.

2. Subject to paragraph 10 below, the respondent admits the truth of the allegations of the petition for discipline, and the parties stipulate to findings that those allegations are established as facts. **ALTERNATIVE FOR BINDING STIPULATIONS:** The respondent admits the truth of the allegations of the petition for discipline, and the parties stipulate to findings that those allegations are established as facts.

² "Esq." is not included if the attorney is not in good standing.

³ If the stipulation is reached after an answer is filed, the stipulation will also serve as an amended answer.

ALTERNATIVE FOR STIPULATIONS WHERE THE RESPONDENT ADMITS SOME BUT NOT ALL OF THE CHARGES: The respondent admits the truth of the allegations of paragraphs ---- through ---- of the petition for discipline, and the parties stipulate to findings that those allegations are established as facts.

3. Subject to paragraph 10 below, the respondent admits the disciplinary rule violations set forth in the petition for discipline, and the parties stipulate to conclusions of law that the respondent violated the rules cited in the petition. ALTERNATIVE FOR BINDING STIPULATIONS: The respondent admits the truth of the allegations of the petition for discipline, and the parties stipulate to findings that those allegations are established as facts. ALTERNATIVE FOR STIPULATIONS WHERE THE RESPONDENT ADMITS SOME BUT NOT ALL OF THE CHARGES: The respondent admits the disciplinary rule violations set forth in paragraphs --- through ---- of the petition for discipline, and the parties stipulate to conclusions of law that the respondent violated the rules cited in those paragraphs.

4. Subject to paragraph 10 below, the parties waive their rights to an evidentiary hearing on the facts and disciplinary violations alleged in the petition for discipline and on matters in aggravation or mitigation. [ALTERNATIVE FOR BINDING STIPULATIONS: The parties waive their rights to an evidentiary hearing on the facts and disciplinary violations alleged in the petition for discipline and on matters in aggravation or mitigation.] They stipulate that this matter may be considered by the full Board of Bar Overseers on the petition for discipline and this answer and stipulation.

5. [For matters resolved by stipulation before the petition has been filed:] The respondent acknowledges that, upon the filing of the petition for discipline and this answer and stipulation with the Board of Bar Overseers, the petition, the answer and stipulation, and all further disciplinary proceedings thereon will become public.

6. The parties stipulate to the following circumstances in aggravation and mitigation:

A. In aggravation, [set forth agreed matters in aggravation]. . . .

B. In mitigation, [set forth agreed matters in mitigation]. . . .

7. The parties acknowledge, based on that misconduct and the factors in aggravation and mitigation, that a _____ is appropriate discipline in accordance with _____. [For cases with no closely similar precedent, cite and briefly discuss analogous precedent].

8. The parties stipulate that they have reached this agreement after due evaluation of all available evidence both on the merits and on the issue of appropriate discipline; that they have taken into account all aggravating and mitigating circumstances which are or otherwise might have been presented; and that, in consideration of this agreement, each party has foregone other allegations or defenses and submission of evidence on the merits and disposition that might have been advanced had the case been litigated.

9. [For pro se respondents:] The respondent acknowledges that he has declined to be represented by counsel in this matter. [For represented respondents:] The respondent acknowledges that he has been represented by counsel in this matter, and he is satisfied with that representation and the advice received.

10. [For collapsing stipulations:] The parties acknowledge that the Board of Bar Overseers is not bound by the parties' recommendation for discipline. The parties stipulate and agree that either party may appeal from a preliminary determination to recommend discipline that differs from the parties' joint recommendation and, if the Board upholds such a preliminary determination, that the parties reserve their right to a hearing and this stipulation will be void. In that event, pursuant to Section 3.19(e) of the Rules of the Board of Bar Overseers, the parties may amend their pleadings without

prejudice, and the matter will be assigned for hearing to an appropriate hearing committee or special hearing officer, a hearing panel of the Board, or the full Board. [For binding stipulations:] The parties acknowledge that the Board of Bar Overseers is not bound by the parties' recommendation for discipline. The parties stipulate and agree that either party may appeal from a recommendation for discipline that differs from the agreed-to disposition. However, the parties further agree that each party shall be bound by their stipulation of facts and disciplinary violations and by their joint recommendation for discipline regardless of the discipline recommended or imposed by the Board of Bar Overseers (including any committee or panel) or imposed by the Supreme Judicial Court.

John Doe, Esq.
Respondent

Constance V. Vecchione
Bar Counsel

John Doe, Esq
BBO #987654
Date: _____

By _____
Assistant Bar Counsel
BBO # 987653
Date: _____

**APPENDIX C
SAMPLE PETITION FOR DISCIPLINE**

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

BAR COUNSEL,

Petitioner

vs.

JOHN DOE,

Respondent

B.B.O. FILE NO. C8-67-5309

PETITION FOR DISCIPLINE

Count One

1. This petition is brought pursuant to Rule 4:01, Section 8(3), of the Rules of the Supreme Judicial Court and Sections 3.13(2) and 3.14 of the Rules of the Board of Bar Overseers

2. The respondent, John Doe, was admitted to practice in the Commonwealth of Massachusetts on December 23, 1999.

3. At all times relevant to this petition, the respondent maintained an IOLTA account at Sovereign Bank (Sovereign IOLTA). During this same time period the respondent also maintained an IOLTA account at Citizens Bank (Citizens IOLTA), and personal accounts with TD Bank (TD account) and Eastern Bank (Eastern account).

4. On August 10, 2012, bar counsel received notices of dishonored checks in the respondent's trust account from Sovereign Bank.

5. On or about August 16, 2012, bar counsel sent the respondent a copy of the dishonored check notices and requested an explanation along with trust account records. The respondent did not respond.

6. On or about September 20, 2012, bar counsel sent a second letter to the respondent enclosing a copy of the August 16 letter and requesting an explanation for the dishonored checks and trust account records. The respondent did not respond.

7. On October 1, 2012, pursuant to Supreme Judicial Court Rule 4:01, § 3, bar counsel filed a petition for administrative suspension with the Supreme Judicial Court for Suffolk County based on the respondent's failure to respond.

8. On October 7, 2012, the Supreme Judicial Court for Suffolk County entered an order immediately administratively suspending the respondent from the practice of law. The respondent received the order in due course.

9. On or about November 29, 2012, the respondent sent a motion for reinstatement, in the form of a letter, to Chief Justice Ireland. The motion was denied on January 20, 2013.

10. On January 21, 2013, the Board of Bar Overseers issued a subpoena *duces tecum* requiring the respondent to appear on February 24, 2013 at the Office of Bar Counsel to give testimony and to produce documents listed in the subpoena.

11. The respondent appeared pursuant to a subpoena to testify under oath on February 24, 2013. The respondent did not produce any records required by the subpoena.

12. By knowingly failing without good cause to respond to bar counsel's requests for information during the course of an investigation, the respondent violated Mass. R. Prof. C. 8.1(b) and 8.4(d) and (g).

Count Two

13. Paragraphs one through three are hereby incorporated as if fully set forth herein.

14. Prior to January 1, 2008, the Internal Revenue Service filed a lien against the respondent for over \$250,000. The lien is still in effect.

15. Prior to January 1, 2010, the Massachusetts Department of Revenue filed a lien against the respondent for over \$25,000. The lien is still in effect.

16. Between June 20, 2010 and June 1, 2012, the respondent made approximately sixteen deposits of personal funds into the Sovereign IOLTA account totaling about \$28,000.

17. Between June 22, 2010 and May 23, 2012, the respondent held both personal funds and client funds in the IOLTA account at the same time.

18. Between November 5, 2011 and December 22, 2011, the respondent wrote approximately fourteen checks from his Sovereign IOLTA directly to a creditor to pay personal expenses.

19. Between July 1, 2010 and August 1, 2012, the respondent made approximately forty-five cash withdrawals from his Sovereign IOLTA totaling about \$10,200.

20. The respondent made the above-described deposits and withdrawals of personal funds to and from his IOLTA account in order to avoid the IRS and DOR liens.

21. The respondent did not keep a check register listing every transaction, a client identifier for every transaction, and a running balance as required by Mass. R. Prof. C. 1.15(f)(1)(B) for his Sovereign IOLTA account.

22. The respondent did not keep an individual client ledger listing every transaction and a running balance after every transaction as required by Mass. R. Prof. C. 1.15(f)(1)(C) for his Sovereign IOLTA account.

23. The respondent did not keep an individual ledger for funds held for bank fees and expenses listing every transaction and a running balance as required by Mass. R. Prof. C. 1.15(f)(1)(D).

24. The respondent did not do a three-way reconciliation of his Sovereign IOLTA at least every sixty days as required by Mass. R. Prof. C. 1.15(f)(1)(E).

25. By failing to keep a check register listing every transaction with a client identifier for each transaction and running balance, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(B).

26. By failing to keep individual client matter ledgers listing every transaction with a running balance after every transaction, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(C).

27. By failing to keep an individual ledger for funds held for bank fees and expenses listing every transaction and a running balance after every transaction, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(D).

28. By failing to reconcile his bank statement balance with the total of his client ledgers balances and his adjusted bank statement balance, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(E).

29. By depositing and disbursing personal funds to and from his IOLTA account, the respondent violated Mass. R. Prof. C. 1.15(b)(2)(i).

30. By intentionally holding and disbursing personal funds in and from his IOLTA account to avoid an Internal Revenue Service lien, the respondent violated Mass. R. Prof. C. 8.4(c) and (h).

31. By intentionally holding and disbursing personal funds in and from his IOLTA account to avoid a Massachusetts Department of Revenue lien, the respondent violated Mass. R. Prof. C. 8.4(c) and (h).

32. By making cash withdrawals from his IOLTA account the respondent violated Mass. R. Prof. C. 1.15(e)(3).

Count Three

33. Paragraphs one through three are hereby incorporated as if fully set forth herein.

34. On or about September 30, 2010, the respondent was hired by Klaus Client to represent him in a personal injury case.

35. The fee agreement stated that the respondent was to be paid reasonable compensation not to exceed 33 1/3% of the settlement plus expenses.

36. On July 5, 2012, the respondent opened a personal account at TD Bank with a \$5 deposit. The balance in the TD account was never greater than \$5.

37. Between July 11 and August 12, 2012, the respondent wrote eleven checks from his TD account totaling \$13,000 to Bud E. Guy.

38. Bud E. Guy is an acquaintance or business associate of the respondent. Guy is not a client to whom the respondent owed any funds held in his IOLTA account at any time relevant to this petition.

39. On or about July 15, 2012, the respondent deposited a \$65 check from Guy into his TD account. This check was dishonored due to insufficient funds.

40. Between July 15 and July 19, 2012, the respondent wrote Guy four checks for a total of \$5,000 from his Sovereign IOLTA account against a balance of only \$25.18. The bank honored two checks totaling \$1,600, thereby creating an overdraft in the Sovereign IOLTA in the amount of (-\$1,574.82).

41. On or about July 16, 2012, the respondent settled the Client case for \$6,500. On or about July 20, 2012, the respondent deposited the settlement check into his Sovereign IOLTA.

42. The respondent used \$1,574.82 to cover the checks Guy already cashed to bring the Sovereign IOLTA balance back to \$0.

43. Between July 20 and July 31, 2012, the respondent intentionally misused the balance of the Client settlement by withdrawing funds and writing checks for his own business or personal purposes, including checks to Guy.

44. On or about July 27, 2012, the respondent wrote a check from his TD account payable to himself for \$3,000 and deposited it into his Sovereign IOLTA account.

45. The respondent knew when he wrote this check that he did not have sufficient funds in his TD Bank account to cover this deposit.

46. On or about July 30, 2012, the respondent withdrew a total of \$3,700 in cash from his Sovereign IOLTA. The respondent knew when he made these withdrawals that he did not have \$3,700 in his Sovereign IOLTA.

47. On or about August 1, 2012, the \$3,000 TD account check was dishonored due to insufficient funds.

48. On July 30, 2012, the balance in the respondent's Sovereign IOLTA was negative (-2,893.64), without any payment to or for the benefit of Client.

49. Between July 30 and September 7, 2012, the respondent wrote nine more checks to Guy from his Sovereign IOLTA account totaling \$6,689.50.

50. On September 7, 2012, Sovereign Bank closed the respondent's IOLTA account with a negative balance.

51. The respondent has never reimbursed Sovereign Bank for the overdrawn amount.

52. On or about October 30, 2012, Klaus Client filed a complaint with the Office of Bar Counsel. On December 14, 2012, the respondent remitted a cashier's check for \$5000 to an attorney representing Client.

53. By intentionally misusing Client's funds, the respondent violated Mass. R. Prof. C. 8.4(c) and (h) and 1.15(b) and (c).

54. By authorizing transactions from his IOLTA account that caused a negative balance for a client, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(C).

55. By writing checks from his IOLTA account when he knew he did not have sufficient funds in his IOLTA account to cover the checks, the respondent violated Mass. R. Prof. C. 8.4(b), (c), and (h).

56. By participating in a scheme to defraud banks, the respondent violated Mass. R. Prof. C. 8.4(b), (c), and (h).

57. By failing to promptly pay clients the funds due to them, the respondent violated Mass. R. Prof. C. 1.15(c).

58. The Rules of Professional Conduct violated by the respondent provide as follows:

Rule 1.15 Safekeeping Property

(b) Segregation of Trust Property. A lawyer shall hold trust property separate from the lawyer's own property.

(1) Trust funds shall be held in a trust account, except that advances for costs and expenses may be held in a business account.

(2) No funds belonging to the lawyer shall be deposited or retained in a trust account except that:

(i) Funds reasonably sufficient to pay bank charges may be deposited therein, and

(ii) Trust funds belonging in part to a client or third person and in part currently or potentially to the lawyer shall be deposited in a trust account, but the portion belonging to the lawyer must be withdrawn at the earliest reasonable time after the lawyer's interest in that portion becomes fixed. A lawyer who knows that the right of the lawyer or law firm to receive such portion is disputed shall not withdraw the funds until the dispute is resolved. If the right of the lawyer or law firm to receive such portion is disputed within a reasonable time after notice is given that the funds have been withdrawn, the disputed portion must be restored to a trust account until the dispute is resolved.

(3) Trust property other than funds shall be identified as such and appropriately safeguarded.

(c) Prompt Notice and Delivery of Trust Property to Client or Third Person. Upon receiving trust funds or other trust property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or as otherwise permitted by law or by agreement with the client or third person on whose behalf a lawyer holds trust property, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.

(e) Operational Requirements for Trust Accounts.

(3) No withdrawal from a trust account shall be made by a check which is not prenumbered. No withdrawal shall be made in cash or by automatic teller machine or any similar method. No withdrawal shall be made by a check payable to "cash" or "bearer" or by any other method which does not identify the recipient of the funds.

(f) Required Accounts and Records: Every lawyer who is engaged in the practice of law in this Commonwealth and who holds trust property in connection with a representation shall maintain complete records of the receipt,

maintenance, and disposition of that trust property, including all records required by this subsection. Records shall be preserved for a period of six years after termination of the representation and after distribution of the property. Records may be maintained by computer subject to the requirements of subparagraph 1G of this paragraph (f) or they may be prepared manually.

(1) **Trust Account Records.** The following books and records must be maintained for each trust account:

B. Check Register. A check register recording in chronological order the date and amount of all deposits; the date, check or transaction number, amount, and payee of all disbursements, whether by check, electronic transfer, or other means; the date and amount of every other credit or debit of whatever nature; the identity of the client matter for which funds were deposited or disbursed; and the current balance in the account.

C. Individual Client Records. A record for each client or third person for whom the lawyer received trust funds documenting each receipt and disbursement of the funds of the client or third person, the identity of the client matter for which funds were deposited or disbursed, and the balance held for the client or third person, including a subsidiary ledger or ledger for each client matter for which the lawyer receives trust funds documenting each receipt and disbursement of the funds of the client or third person with respect to such matter. A lawyer shall not disburse funds from the trust account that would create a negative balance with respect to any individual client.

D. Bank Fees and Charges. A ledger or other record for funds of the lawyer deposited in the trust account pursuant to paragraph (b)(2)(i) of this rule to accommodate reasonably expected bank charges. This ledger shall document each deposit and expenditure of the lawyer's funds in the account and the balance remaining.

E. Reconciliation Reports. For each trust account, the lawyer shall prepare and retain a reconciliation report on a regular and periodic basis but in any event no less frequently than every sixty days. Each reconciliation report shall show the following balances and verify that they are identical:

- (i) The balance which appears in the check register as of the reporting date.
- (ii) The adjusted bank statement balance, determined by adding outstanding deposits and other credits to the bank statement balance and subtracting outstanding checks and other debits from the bank statement balance.
- (iii) For any account in which funds are held for more than one client matter, the total of all client matter balances, determined by listing each of the individual client matter records and the balance which appears in each record as of the reporting date, and calculating the total. For the purpose of the calculation required by this paragraph, bank fees and charges shall be considered an individual client record. No balance for an individual client may be negative at any time.

Rule 8.1 Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (g) fail without good cause to cooperate with the Bar Counsel or the Board of Bar Overseers as provided in Supreme Judicial Court Rule 4:01, § 3; or
- (h) engage in any other conduct that adversely reflects on his or her fitness to practice law.

WHEREFORE, bar counsel requests that the Board of Bar Overseers:

- A. consider and hear the matter set forth herein;
- B. determine that discipline of the said John Doe is required;

C. file an Information concerning these matters with the Supreme Judicial Court.

Respectfully submitted,

CONSTANCE V. VECCHIONE
BAR COUNSEL

By _____
Sally Roe
Assistant Bar Counsel
BBO #987654
99 High Street
Boston, MA 02110

Date: _____

APPENDIX D
SAMPLE NOTICE TO RESPONDENT
ACCOMPANYING PETITION FOR DISCIPLINE

October 10, 2017

PERSONAL AND CONFIDENTIAL

John Doe
1 Any Road
Sometown, MA 02345

RE: BBO File No(s). C8-67-5309 (Bar Counsel)

Dear Mr. Doe:

You are hereby notified by the Board of Bar Overseers that your answer to the enclosed Petition for Discipline must be filed with the Board of Bar Overseers, 99 High Street, Boston, MA 02110, no later than 20 days after the date of this letter. In addition, you must send a copy of your answer to Assistant Bar Counsel Jane Roe at the same address.

These requirements are set forth in Rule 4:01, Section 8(3), of the Rules of the Supreme Judicial Court. Pursuant to Rule 4:01, Section 20(1), all pleadings and proceedings before the Board of Bar Overseers in this matter are public.

Please be advised that the originals of all documents in formal proceedings must be filed with the Board to maintain the docket and the records of the proceedings. See B.B.O. Rule 3.5(e). A copy of each document must be served on Bar Counsel.

Section 3.15 of the Rules of the Board of Bar Overseers sets forth the rules governing service of the petition and the answer of the respondent. In particular, please note:

- Failure without good cause to file a timely answer shall be deemed an act of professional misconduct in violation of S.J.C. Rule 4:01, § 3(1)(c), and shall be grounds for administrative suspension under § 3(2) without further hearing.
- Failure to file a timely answer shall be deemed an admission of the charges.
- Your answer must be in writing and state fully and completely the nature of the defense. The answer must admit or deny specifically, and in reasonable detail, each material allegation of the petition and state clearly and concisely the facts and matters of law relied upon. General statements like "denied" are not acceptable responses. Averments in the petition are admitted when not denied in the answer in accordance with these requirements.

- You must include in your answer any facts in mitigation, and you may request that a hearing be held on the issue of mitigation. Failure to include facts in mitigation constitutes a waiver of the right to present evidence of those facts.

In addition, Section 3.17(a) of the Rules of the Board of Bar Overseers, as amended effective September 1, 2009, governs discovery and provides as follows:

Section 3.17 Discovery

(a) Scope. Within 20 days following the filing of an answer, Bar Counsel and the Respondent shall exchange the names and addresses of all persons having knowledge of facts relevant to the proceedings. Bar Counsel and the Respondent shall, within 10 days, comply with reasonable requests made within 30 days following the filing of an answer for (1) non-privileged information and evidence relevant to the charges or the Respondent, and (2) other material upon good cause shown to the chair of the hearing committee, hearing panel or special hearing officer. Applications for depositions may be made pursuant to Sections 4.9 or 4.10.

You are entitled to be represented by counsel in these proceedings. Counsel must file a written notice of appearance on your behalf in accordance with the Rules of the Board of Bar Overseers, Section 3.4(b). If you wish to be represented in these proceedings but are unable to afford counsel, the Board will attempt to assist you in obtaining pro bono counsel. See Rules of the Board of Bar Overseers, Section 3.4(d). Such request should be addressed to me and made before you file your answer.

Finally, for scheduling purposes, please fill out the attached form and return it with your answer, to the Board and to Bar Counsel, estimating the length of time necessary to present your defense.

Sincerely yours,

Joseph S. Berman
General Counsel

JSB/prt
Enclosures

4. On August 10, 2012, bar counsel received notices of dishonored checks in the respondent's trust account from Sovereign Bank.

ANSWER:

Admitted, upon information and belief.

5. On or about August 16, 2012, bar counsel sent the respondent a copy of the dishonored check notices and requested an explanation along with trust account records. The respondent did not respond.

ANSWER:

Admitted that bar counsel sent the respondent a copy of the dishonored check notices and requested an explanation on or about August 16, 2012. Denied that respondent did not respond. Mr. Doe states that after receiving a letter from bar counsel, he telephoned bar counsel within a week to advise that he needed additional time in which to provide the documentation because he was preparing to relocate his office to his home.

6. On or about September 20, 2012, bar counsel sent a second letter to the respondent enclosing a copy of the August 16 letter and requesting an explanation for the dishonored checks and trust account records. The respondent did not respond.

ANSWER:

Admitted that on or about September 20, 2012, bar counsel sent a second letter to the respondent enclosing a copy of the August 16 letter and requesting an explanation for the dishonored checks and trust account records. Denied that respondent did not respond. Mr. Doe spoke with bar counsel in August, 2012 to advise that he needed additional time in which to provide the documentation because he was preparing to relocate his office to his home. Mr. Doe further states that he responded in writing to Bar Counsel on December 4, 2012 after relocating his office.

7. On October 1, 2012, pursuant to Supreme Judicial Court Rule 4:01, § 3, bar counsel filed a petition for administrative suspension with the Supreme Judicial Court for Suffolk County based on the respondent's failure to respond.

ANSWER:

Respondent admits that the Petition was purportedly brought by bar counsel pursuant to legal authority.

8. On October 7, 2012, the Supreme Judicial Court for Suffolk County entered an order immediately administratively suspending the respondent from the practice of law. The respondent received the order in due course.

ANSWER:

Admitted.

9. On or about November 29, 2012, the respondent sent a motion for reinstatement, in the form of a letter, to Chief Justice Ireland. The motion was denied on January 20, 2013.

ANSWER:

Admitted.

10. On January 21, 2013, the Board of Bar Overseers issued a subpoena duces tecum requiring the respondent to appear on February 24, 2013 at the Office of Bar Counsel to give testimony and to produce documents listed in the subpoena.

ANSWER:

Admitted.

11. The respondent appeared pursuant to a subpoena to testify under oath on February 24, 2013. The respondent did not produce any records required by the subpoena.

ANSWER:

Admitted that the respondent appeared pursuant to a subpoena to testify under oath on February 24, 2013. Denied that the respondent did not produce any records required by the subpoena. Respondent brought with him to the hearing checks books from several bank accounts as well as a list of cases that he worked on from 2010-2012. Under separate cover in December, 2012, respondent provided other documents, including a copy of his fee agreement with Klaus Client, a deposit slip, and the insurance company check from the Client matter.

12. By knowingly failing without good cause to respond to bar counsel's requests for information during the course of an investigation, the respondent violated Mass. R. Prof. C. 8.1(b) and 8.4(d) and (g).

ANSWER:

Denied. Respondent states that he provided to bar counsel documents responsive to bar counsel's request and testified at length under oath.

Count Two

13. Paragraphs one through three are hereby incorporated as if fully set forth herein.

ANSWER:

No response required.

14. Prior to January 1, 2008, the Internal Revenue Service filed a lien against the respondent for over \$250,000. The lien is still in effect.

ANSWER:

Admitted that prior to January 1, 2008, the Internal Revenue Service filed a lien against the respondent for over \$250,000. Respondent states, however, that he has not received notice that the lien has been renewed and thus does not believe that it remains in effect.

15. Prior to January 1, 2010, the Massachusetts Department of Revenue filed a lien against the respondent for over \$25,000. The lien is still in effect.

ANSWER:

Admitted that prior to January 1, 2010, the Massachusetts Department of Revenue filed a lien against the respondent for over \$25,000. Denied that the lien is still in effect. The debt was satisfied by a levy on a retirement account.

16. Between June 20, 2010 and June 1, 2012, the respondent made approximately fifteen deposits of personal funds into the Sovereign IOLTA account totaling about \$28,000.

ANSWER:

Admitted that between June 20, 2010 and June 1, 2012, the respondent deposited some personal funds into his Sovereign IOLTA account. Respondent is unable to state at this time the amount of such funds, and further states that some of the funds deposited in the account at that time were client funds.

17. Between June 22, 2010 and June 1, 2012, the respondent held both personal funds and client funds in the IOLTA account at the same time.

ANSWER:

Admitted.

18. Between November 5, 2011 and December 22, 2011, the respondent wrote approximately fourteen checks from his Sovereign IOLTA directly to a creditor to pay personal expenses.

ANSWER:

Admitted. Respondent further states that the funds used were not client funds.

19. Between July 1, 2010 and August 1, 2012, the respondent made approximately forty-five cash withdrawals from his Sovereign IOLTA totaling \$10,200.

ANSWER:

Admitted.

20. The respondent made the above-described deposits and withdrawals of personal funds to and from his IOLTA account in order to avoid the IRS and DOR liens.

ANSWER:

Denied. As stated above, the IRS and DOR liens were secured by liens on the respondent's property and/or were later satisfied with funds from his retirement account.

21. The respondent did not keep a check register listing every transaction, a client identifier for every transaction, and a running balance as required by Mass. R. Prof. C. 1.15(f)(1)(B) for his Sovereign IOLTA account.

ANSWER:

Denied. Respondent states that he kept a check register listing every transaction for his Sovereign IOLTA account but has been unable to locate it.

22. The respondent did not keep an individual client ledger listing every transaction and a running balance after every transaction as required by Mass. R. Prof. C. 1.15(f)(1)(C) for his Sovereign IOLTA account.

ANSWER:

Admitted. Respondent states that he maintained expense information in individual client files.

23. The respondent did not keep an individual ledger for funds held for bank fees and expenses listing every transaction and a running balance as required by Mass. R. Prof. C. 1.15(f)(1)(D).

ANSWER:

Admitted.

24. The respondent did not do a three way reconciliation of his Sovereign IOLTA at least every sixty days as required by Mass. R. Prof. C. 1.15(f)(1)(E).

ANSWER:

Admitted.

25. By failing to keep a check register listing every transaction with a client identifier for each transaction and running balance, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(B).

ANSWER:

Denied. As stated above, respondent kept a check register but has been unable to find it.

26. By failing to keep individual client matter ledgers listing every transaction with a running balance after every transaction, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(C).

ANSWER:

The respondent admits that he failed to keep individual client matter ledgers listing every transaction with a running balance after every transaction. The remainder of the allegations in this paragraph are denied.

27. By failing to keep an individual ledger for funds held for bank fees and expenses listing every transaction and a running balance after every transaction, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(D).

ANSWER:

The respondent admits that he failed to keep an individual ledger for funds held for bank fees and expenses listing every transaction and a running balance after every transaction. The remainder of the allegations in this paragraph are denied.

28. By failing to reconcile his bank statement balance with the total of his client ledgers balances and his adjusted bank statement balance, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(E).

ANSWER:

The respondent admits that he failed to reconcile his bank statement balance with the total of his client ledgers balances and his adjusted bank statement balance. The remainder of the allegations in this paragraph are denied.

29. By depositing and disbursing personal funds to and from his IOLTA account, the respondent violated Mass. R. Prof. C. 1.15(b)(2)(i).

ANSWER:

The respondent admits that he deposited and disbursed person funds to and from his IOLTA account. The remainder of the allegations in this paragraph are denied.

30. By intentionally holding and disbursing personal funds in and from his IOLTA account to avoid an Internal Revenue Service lien, the respondent violated Mass. R. Prof. C. 8.4(c) and (h).

ANSWER:

Denied. The respondent states that he did not intentionally hold or disburse personal funds in and from his IOLTA account to avoid an IRS lien. Respondent further states that the IRS lien was secured by a lien on the respondent's property.

31. By intentionally holding and disbursing personal funds in and from his IOLTA account to avoid a Massachusetts Department of Revenue lien, the respondent violated Mass. R. Prof. C. 8.4(c) and (h).

ANSWER:

Denied. The respondent states that he did not intentionally hold or disburse personal funds in and from his IOLTA account to avoid a DOR lien. Respondent further states that the DOR lien was satisfied with funds from his retirement account.

32. By making cash withdrawals from his IOLTA account the respondent violated Mass. R. Prof. C. 1.15(e)(3).

ANSWER:

Admitted.

Count Three

33. Paragraphs one through three are hereby incorporated as if fully set forth herein.

ANSWER:

No response required.

34. On or about September 30, 2010, the respondent was hired by Klaus Client to represent him in a personal injury case.

ANSWER:

Admitted.

35. The fee agreement stated that the respondent was to be paid reasonable compensation not to exceed 33 1/3% of the settlement plus expenses.

ANSWER:

Admitted.

36. On July 5, 2012, the respondent opened a personal account at TD Bank with a \$5 deposit. The balance in the TD account was never greater than \$5.

ANSWER

Admitted that on July 5, 2012, the respondent opened a personal account at TD Bank with a \$5 deposit. Respondent is uncertain as to the balance.

37. Between July 11 and August 12, 2012, the respondent wrote ten checks from his TD account totaling \$13,000 to Bud E. Guy.

ANSWER:

Admitted.

38. Bud E. Guy is an acquaintance or business associate of the respondent. Guy is not a client to whom the respondent owed any funds held in his IOLTA account at any time relevant to this petition.

ANSWER:

Admitted.

39. On or about July 15, 2012, the respondent deposited a \$65 check from Guy into his TD account. This check was dishonored due to insufficient funds.

ANSWER:

Admitted.

40. Between July 15 and July 19, 2012, the respondent wrote Guy four checks for a total of \$5,000 from his Sovereign IOLTA account against a balance of only \$25.18. The bank honored two checks totaling \$1,600, thereby creating an overdraft in the Sovereign IOLTA in the amount of (\$1,574.82).

ANSWER:

Admitted. Respondent further states that he was confused as to the remaining balance and the source of funds in his Sovereign IOLTA account at the time he issued the checks.

41. On or about July 16, 2012, the respondent settled the Client case for \$6,500. On or about July 20, 2012, the respondent deposited the settlement check into his Sovereign IOLTA.

ANSWER:

Admitted.

42. The respondent used \$1,574.82 to cover the checks Guy already cashed to bring the Sovereign IOLTA balance back to \$0.

ANSWER:

Denied that respondent "used \$1,574.82 to cover the checks Guy already cashed to bring the Sovereign IOLTA balance back to \$0," but respondent admits that such was the result of the transaction.

43. Between July 20 and July 31, 2012, the respondent intentionally misused the balance of Client settlement by withdrawing funds and writing checks for his own business or personal purposes, including checks to Guy.

ANSWER:

Denied. Respondent admits that between July 20 and July 31, 2012, he withdrew funds and wrote checks from the balance of the Client settlement, but denies that he did so intentionally. To the extent the respondent misused the Client settlement funds, such misuse was the result of confusion as to the source and amount of funds in the account.

44. On or about July 27, 2012, the respondent wrote a check from his TD account payable to himself for \$3,000 and deposited it into his Sovereign IOLTA account.

ANSWER:

Admitted.

45. The respondent knew when he wrote this check that he did not have sufficient funds in his TD Bank account to cover this deposit.

ANSWER:

Denied. Respondent states that he was not aware that he did not have sufficient funds in his TD Bank account to cover this deposit, as he was confused as to the source and amount of funds in the account.

46. On or about July 30, 2012, the respondent withdrew a total of \$3,700 in cash from his Sovereign IOLTA. The respondent knew when he made these withdrawals that he did not have \$3,700 in his Sovereign IOLTA.

ANSWER:

Admitted that on or about July 30, 2012, the respondent withdrew a total of \$3,700 in cash from his Sovereign IOLTA. Respondent denies that he knew when he made those withdrawals that he did not have \$3,700 in his account.

47. On or about August 1, 2012, the \$3,000 TD account check was dishonored due to insufficient funds.

ANSWER:

Admitted.

48. On July 30, 2012, the balance in the respondent's Sovereign IOLTA was negative (\$2,893.64), without any payment to or for the benefit of Client.

ANSWER:

Admitted.

49. Between July 30 and September 7, 2012, the respondent wrote nine more checks to Guy from his Sovereign IOLTA account, totaling \$6,689.50.

ANSWER:

Admitted.

50. On September 7, 2012, Sovereign Bank closed the respondent's IOLTA account with a negative balance.

ANSWER:

Respondent is without knowledge and information necessary to answer the allegation contained in this paragraph, as he has not received notification from Sovereign Bank regarding the alleged closure of his IOLTA account.

51. The respondent has never reimbursed Sovereign bank for the overdrawn amount.

ANSWER:

Admitted.

52. On or about October 30, 2012, Klaus Client filed a complaint with the Office of Bar Counsel. On December 14, 2012, the respondent remitted a cashier's check for \$5000 to an attorney representing Client.

ANSWER:

Admitted.

53. By intentionally misusing Client's funds, the respondent violated Mass. R. Prof. C. 8.4(c) and (h) and 1.15(b) and (c).

ANSWER:

Respondent denies that he intentionally misused Client's funds, and states that any such misuse of funds was the result of confusion as to the source and amount of funds in his IOLTA account.

54. By authorizing transactions from his IOLTA account that caused a negative balance for a client, the respondent violated Mass. R. Prof. C. 1.15(f)(1)(C).

ANSWER:

Respondent denies that he "authorized" transactions from his IOLTA account that caused a negative balance for a client, to the extent the use of the word "authorized" suggests that the conduct was intentional. Respondent further states that any misuse of funds was the result of confusion as to the source and amount of funds in the account.

55. By writing checks from his IOLTA account when he knew he did not have sufficient funds in his IOLTA account to cover the checks, the respondent violated Mass. R. Prof. C. 8.4(b), (c), and (h).

ANSWER:

The respondent denies that he knew he did not have sufficient funds in his IOLTA account when he wrote the checks.

56. By participating in a scheme to defraud banks, the respondent violated Mass. R. Prof. C. 8.4(b), (c), and (h).

ANSWER:

Denied. The respondent did not engage in a "scheme" to "defraud" banks.

57. By failing to promptly pay clients the funds due to them, the respondent violated Mass. R. Prof. C. 1.15(c).

ANSWER:

Respondent admits that he was untimely in paying settlement funds due to Client, but states that Client has since been paid in full.

58. The Rules of Professional Conduct violated by the respondent provide as follows: [text of rules omitted].

ANSWER:

Respondent admits that the rules bar counsel alleges him to have violated are excerpted accurately.

MITIGATION

Mr. Doe intends to introduce evidence as to the following mitigating factors: (1) his general reputation in the community for honesty and competency during his years at the bar; (2) his lack of any disciplinary history prior to the time period in question; and (3) his health problems during the time period in question.

JOHN DOE
By his attorneys

Mary Moe (BBO #666082)
Law Firm
One Post Office Square
Boston, Massachusetts 02109
Telephone: (617) 867-5309
mmoe@lawfirm.com

Dated: October 22, 2017

APPENDIX F
SAMPLE PREHEARING CONFERENCE ORDER

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

BAR COUNSEL, Petitioner)	BBO File No. C8-67-5309
)	
v.)	PREHEARING ORDER
)	
JOHN DOE, ESQ., Respondent)	

A prehearing conference in this matter was held on January 2, 2018, at 10:00 AM. Present were Assistant Bar Counsel Sally Roe; the respondent John Doe; his counsel, Mary Moe; the Chair of the Hearing Committee, William Smith; and Assistant General Counsel Amelia Withers. As a result of the conference, the following orders are entered:

A. **Exchanges of Exhibits and Witness Lists**

1. **Preliminary Exchange.** By the close of business on **Tuesday, January 9, 2018**, the parties shall exchange preliminary written lists of all their expected witnesses (with names and addresses) and exhibits, together with copies of all proposed exhibits that the parties intend to introduce on the merits (including bar counsel’s case in chief and the respondent’s defense), as well as on issues of aggravation and mitigation. If a party proposes to introduce testimony from any expert witness, that party shall also include, for each such expert, a written disclosure of the qualifications of the expert and the subject matter on which the expert is expected to testify, the substance of facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. **Each party shall also file a copy of the proposed witness list with the board and send copies to the hearing committee members.**

2. **Objections.** By the close of business on **Tuesday, January 16, 2018**, the parties shall exchange, in writing, lists of any objections to the other’s proposed witnesses and exhibits, specifying for each contested exhibit the grounds for each objection.

3. **Supplemental Exchange.** By the close of business on **Tuesday, January 23, 2018**, the parties shall furnish each other with written lists of any additional witnesses (with expert disclosure as described in ¶ 1 above for any additional expert witnesses) or proposed exhibits in supplementation of their prior disclosures, together with copies of all exhibits not previously provided. **Each party shall also file a copy of the supplemental witness list with the board and send copies to the hearing committee members.**

4. **Supplemental Objections.** By the close of business on **Tuesday, January 30, 2018**, the parties shall exchange, in writing, any objections to the other's proposed additional witnesses and exhibits, specifying for each contested exhibit the grounds for each objection.

B. Motions in Limine or Other Prehearing Motions Concerning Conduct of the Hearing

5. **Motions.** By the close of business on **Tuesday, February 6, 2018**, the parties shall file with the board and serve on the opposing party, with copies sent to each hearing committee member, any motions in limine or other prehearing motions concerning the conduct of the hearing, specifying the relief sought and the basis and authority therefor.

6. **Oppositions to Motions.** The parties shall file with the board and serve on the opposing party, with copies sent to each hearing committee member, any opposition to a prehearing motion within seven days of service of the motion, but in no event later than **Tuesday, February 13, 2018**.

C. Hearing Subpoena Requests

7. By the close of business on **Tuesday, February 6, 2018**, the parties shall file with the board any requests for hearing subpoenas for those on their witness lists. While subpoenas for witnesses not listed (such as witnesses called in rebuttal) may be requested beyond this date, please be advised that it takes the board several days to issue subpoenas. In addition, it is not the board's, but the party's obligation to serve subpoenas. A copy of each subpoena request shall be served on the opposing party.

D. Filing of Stipulations, Final Witness Lists, Agreed-Upon Exhibits, Lists of Disputed Exhibits and Objections

8. The parties are encouraged to stipulate as to the authenticity of documents and/or the purposes for which it is agreed they are admissible in order to expedite the hearing of the matter. The standard form of stipulation regarding documents is attached to this order.

9. By the close of business on **Tuesday, February 13, 2018**, the parties

shall file with the board and serve on the opposing party, with copies sent to each hearing committee member, any stipulations, final witness lists, a list of agreed-upon exhibits as described in ¶ 8, lists of disputed exhibits, and objections to exhibits with the grounds therefor.

(a) One set of agreed-upon exhibits shall be:

(1) pre-marked by number, sequentially, **with each exhibit having a colored numeric label (integers only) affixed to it and separated with a numeric tab;**

(2) this set of exhibits shall be filed with the board and shall not be bound in any manner, shall not be three-hole punched, and shall be placed in a redwell (with flaps and elastics) that is labeled with the case name; and

(b) An additional copy of the agreed-upon exhibits shall be filed with the board, and copies shall be sent to each hearing committee member and served on the opposing party. The copies for the board and hearing committee members shall be three-hole punched and placed in binders.

(c) All exhibits shall be Bates-numbered so that each page of each exhibit has a unique identifying number that can be used to locate that specific page without delay during the hearing. The originals and all copies of exhibits filed with the Board, circulated to committee members or used at the hearing shall be Bates-numbered in this fashion. **Exhibits that are not Bates-numbered may be rejected and returned to the submitting party or parties.**

(d) Disputed exhibits shall **not** be filed, forwarded, pre-marked or bound. The parties shall bring to the hearing **six copies** of any disputed exhibit that they intend to offer at the hearing.

10. All witness and exhibit lists and other evidentiary disclosures between the parties shall include evidence on the merits (including bar counsel's case in chief and the respondent's defense) as well as on issues of aggravation and mitigation. The witness and exhibit lists filed with the board and sent to the hearing committee pursuant to ¶ 9 shall be limited to evidence on the merits. The parties shall not disclose to the hearing committee any evidence of prior discipline until after the completion of bar counsel's case in chief. The parties are not required to exchange or list exhibits to be used in cross-examination or rebuttal, nor shall they be required to list rebuttal witnesses.

11. The parties shall be precluded from contesting the authenticity or admissibility of any listed exhibit absent timely objection thereto in accordance

with this order. In addition, if exhibits are not listed and exchanged or witnesses not listed or disclosed in accordance with this order, they may be excluded from the party's case in chief, unless good cause is shown.

12. The original of any pleading or other submission must be filed with the board.

13. All documents submitted to the committee or filed with the board must be redacted so that the document includes at most: (1) the last 4 digits of any social security number, taxpayer identification number, credit card or other financial account number, driver's license number, state-issued ID card number, or passport number (a dash or X characters or the phrase "ending in" can be used in place of the omitted digits); (2) the first initial of a person's mother's maiden name, if the document identifies it as such; (3) if an individual's date of birth must be included, then only the year should be used; and (4) if a minor child must be mentioned, then only the initials of the child should be used. A pseudonym, identified as such, may also be used. Where there is a reason to submit an unredacted document to the board, then prior to filing the document, the party shall file a motion to impound with the board, and if and when such motion is allowed, file the document with the board.

E. **Hearing**

14. The hearing on this matter will take place on **Tuesday, February 20, 2018, Wednesday, February 21, 2018, Thursday, February 22, 2018, and Friday, February 23, 2018, commencing at 10:00 AM and concluding at approximately 4:00 PM daily, at the offices of the Board of Bar Overseers**, and shall not be rescheduled except for good cause shown.

15. Please be advised that BBO Rule § 3.7(c) provides that the absence of one member of a hearing committee shall not be a basis for continuing the hearing.

16. **Please note that, based on the regulations concerning notaries public, the hearing stenographers require all witnesses to have state or federal photo identification.**

F. **Miscellaneous Matters**

17. The respondent's motion to amend the answer in accordance with the proposed answer attached to the motion is allowed.

18. If the respondent has placed his medical or psychological condition at issue, then by the close of business on **Tuesday, January 9, 2018**, the respondent shall identify and disclose to bar counsel all medical and psychological conditions which the respondent claims may have affected his or her professional conduct or is otherwise in issue and for which he or she has

received consultation, evaluation or treatment; and for each such condition, provide to bar counsel (1) all related hospital, medical, psychiatric, psychological, counseling and other records and reports in the respondent's possession or control; and (2) the name(s) and address(es) of all medical and mental health providers; and (3) executed releases authorizing bar counsel or his representatives to communicate with and receive information from each provider. Failure to do so may result in exclusion of such evidence if offered by the respondent.

Dated:

William Smith
Hearing Committee Chair

Standard Form for Document Stipulation

The parties stipulate as follows concerning the documents listed below, which have been marked with exhibit numbers corresponding to the numbers listed:

1. All the documents listed are authentic, that is, they are what they purport to be, including, in the case of communications, whether electronic or paper, that they were sent by the one party and received by the other.
2. The following numbered documents are admissible for all purposes, including as evidence of the truth of any hearsay contained within them: [followed by a list of numbered exhibits]
3. The following numbered documents are admissible for limited purposes [specify numbers and the purpose or purposes for which the parties agree they are admissible]. In addition, either party may offer the documents at the hearing for different or more general purposes, subject to the panel's ruling whether or not they should be admitted for that purpose or those purposes.

APPENDIX G
SAMPLE INFORMATION

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. BD-2018-107

IN RE: JOHN DOE, ESQ.

INFORMATION

To the Honorable Chief Justice and the Justices of the Supreme Judicial Court:

1. The Board of Bar Overseers brings to the attention of this Court, pursuant to Rule 4:01, Section 8(6), of the Rules of this Court, matters regarding the character and conduct of John Doe, Esquire, who was duly admitted to practice before the Courts of the Commonwealth on December 23, 1999. He was administratively suspended from the practice of law for failure to cooperate with bar counsel on November 7, 2017 and has not been reinstated.

I. Statement of Facts

2. The docket entries maintained by the Board of Bar Overseers are found at Tab 1.
3. The facts of this case are stated in the hearing committee report filed with the Board on March 23, 2018 (Tab 24).

II. Proceedings

4. Bar Counsel commenced disciplinary proceedings before the Board of Bar Overseers by filing and serving a petition for discipline on October 2, 2017 (Tab 2). On October 22, 2017, the respondent filed an answer to bar counsel's petition for discipline (Tab 3).
5. On November 10, 2017, bar counsel moved to deem certain allegations of the petition as admitted. (Tab 4).
6. On November 17, 2017, the respondent filed his opposition to bar counsel's motion. (Tab 5).

7. On November 21, 2017, the chair of the hearing committee granted bar counsel's motion in part and denied it in part. (Tab 6).

8. ...

9. Four days of hearing were held on February 20, 21, 22, and 23, 2018 (Tabs 22-24).

10. On March 23, 2018, the hearing committee filed its findings of fact, conclusions of law and recommendation for discipline (Tab 25).

11. On April 12, 2018, the respondent filed a brief on appeal from the hearing committee's findings and recommendation for discipline (Tab 25).

12. On May 2, 2018, bar counsel filed an opposition to the respondent's appeal from the hearing committee's findings and recommendation for discipline (Tab 26).

13. On September 10, 2018, the Board of Bar Overseers voted:

for the reasons stated in the memorandum attached to this vote, to recommend to the Supreme Judicial Court that Mr. Doe be disbarred.
(Tab 27).

14. On September 11, 2018, the board served a copy of the board's vote and memorandum of decision (Tab 28).

III. Costs

15. The following amounts were expended by the Board in furtherance of the disciplinary proceedings in this matter:

Stenographer	\$2,998.89
Photocopying	\$35.89
Mailing Costs	\$6.75
Total	\$3041.53

IV. Conclusion

The Board of Bar Overseers respectfully brings the foregoing to the attention of this Honorable Court for such action as the Court deems necessary. The record of these proceedings is annexed hereto and made a part hereof.

Respectfully submitted,

Joseph S. Berman
General Counsel

September 15, 2018

APPENDIX H
SAMPLE CLERK'S COVER SHEET

CLERK'S COVER SHEET BAR DISCIPLINE

CLERK

NAME OF BAR DISCIPLINE CASE: _____

DATE RECEIVED: _____

NAME OF BAR COUNSEL FILING MATTER: _____ **TEL. NO.** _____

RESPONDENT/LAWYER INFORMATION: NAME: _____
(Admit Name, if different) _____

BBO NO. _____

Date Admitted to Mass Bar _____

Other Jurisdictions admitted to practice _____

Current Mailing Address: _____

Telephone No./email: _____

Current Attorney for respondent/Lawyer: _____

NATURE OF BAR DISCIPLINE CASE

_____	Contempt Proceeding	_____	Conviction of Crime
_____	Disability Inactive	_____	Fraudulent conduct
_____	Misuse & Loss of Trust \$	_____	Misuse of Client's \$
_____	Misrepresentation to Court	_____	Neglect Client's Interest
_____	Sanction in Other Jurisdiction	_____	Administrative Suspension
_____	Non-payment of Registration Fees	_____	Other (IOLTA Violation)

Recommendation: _____

DISCIPLINE INFORMATION:

Initial Discipline Sought: _____ Immediate

Hearing Requested: _____

Date of Vote of Board: _____

Final Discipline Sought: _____

Other Information: _____

Public _____ **Impounded** _____ **Partially Impounded** _____

CLERK'S COMMENTS:

APPENDIX I
SAMPLE AFFIDAVIT OF COMPLIANCE WITH ORDER OF SUSPENSION OF DISBARMENT,
WITH ATTACHED FORM NOTICES

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

Suffolk, ss.

No. BD-2018-001

<p>In the Matter of</p> <p>JOHN DOE</p>

AFFIDAVIT OF COMPLIANCE

Pursuant to S.J.C. Rule 4:01, § 17(5), and Section 4.20 of the Rules of the Board of Bar Overseers, I hereby certify in connection with my disbarment by Order of the Supreme Judicial Court dated January 23, 2018 (“the Order”), as follows:

1. That I have fully complied with the provisions of the Order of the Supreme Judicial Court relative to disbarment, with S.J.C. Rule 4:01, and with the Rules of the Board of Bar Overseers; and

2. **Cross out inapplicable paragraph (A or B):**

A. That I have sent notice of my disbarment to each person who was my client, ward, heir, or beneficiary as of the entry date of the Order and to each attorney, court, and agency concerned with a case pending as of the entry date of the Order. I have attached hereto a copy of each form of notice, the names and addresses of the clients, wards, heirs, beneficiaries, attorneys, courts and agencies to which notices were sent, and all return receipts or returned mail received up to the date of this affidavits (supplemental affidavits will be filed covering subsequent return receipts and returned mail);

B. That I had no clients and held no fiduciary positions on the entry date of the Order.

3. That I have attached hereto:

(a) a copy of each form of notice, the names and addresses of the clients, wards, heirs, beneficiaries, attorneys, courts and agencies to which notices were sent, and all return receipts or returned mail received up to the date of this affidavit (supplemental affidavits will be filed covering subsequent return receipts and returned mail);

(b) a schedule showing the location, title and account number of every bank account designated as an IOLTA, client, trust, or other fiduciary account and of every account in which I hold or held any client, trust, or fiduciary funds on or after the entry date of the Order;

(c) a schedule describing the disposition of all client and fiduciary funds in my possession, custody, or control as of the entry date of the Order or thereafter;

(d) such proof of the proper distribution of such funds and the closing of such accounts as has been requested by the bar counsel, including copies of checks and other instruments; and

(e) a list of all other state, federal and administrative jurisdictions to which I am admitted to practice, whether active or inactive.

The residence or other street address where communications may hereafter be directed to me is as follows. I understand that this information is public.

Name: _____

Address: _____

Telephone: _____

Signed and sworn to under the penalties of perjury this _____ day of _____, 2018.

John Doe

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

**NOTIFICATION OF DISBARMENT
TO COURT, AGENCY, OR TRIBUNAL**

TO: _____
Court, Agency, or Tribunal

Address

(case caption)

(docket number)

NAME OF CLIENT:

ADDRESS OF CLIENT:

Pursuant to S.J.C. Rule 4:01, § 17, and Section 4.17 of the Rules of the Board of Bar Overseers for the Commonwealth of Massachusetts, you are hereby advised that I have been disbarred from further practice of the law in the Commonwealth of Massachusetts and consequently am unable to act as an attorney after January 23, 2018, the effective date of disbarment. Enclosed are copies of the notices of disbarment which I have sent to my client(s), counsel of record, and those parties unrepresented by counsel.

DATE: _____ SIGNATURE: _____

John Doe

ADDRESS: _____

TELEPHONE: _____

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

RESIGNATION AS FIDUCIARY

TO: * _____

CASE CAPTION: _____

DOCKET NUMBER: _____

Effective January 23, 2018, I have been disbarred from further practice of the law in the Commonwealth of Massachusetts. Therefore, pursuant to S.J.C. Rule 4:01, § 17 (1) (b), I must hereby resign, as of January 23, 2018, my appointment as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary in this matter. Enclosed are: (a) copies of the notices of disbarment which I have sent to the wards, heirs, or beneficiaries, and to other counsel, and (b) a complete list of the wards, heirs, or beneficiaries and their places of residence.

DATE: _____ SIGNATURE: _____
John Doe

ADDRESS: _____

TELEPHONE: _____

* Resignations are to be sent to all appropriate parties, depending on the attorney's particular fiduciary relationship. For example, if the attorney is guardian of a ward who resides in an institution or nursing home, this Resignation must be sent to the institution or nursing home. If the attorney is a court-appointed guardian or executor of an estate, this Resignation must be sent to the court. Counsel may also be required to send notice of resignation to the Veterans' Administration, the Social Security Administration, other government agencies, banks, boards of directors, and/or co-trustees.

LIST OF WARDS, BENEFICIARIES, OR HEIRS

NAME: _____
Place Of _____
Residence: _____

NAME: _____
Place Of _____
Residence: _____

NAME: _____
Place Of _____
Residence: _____

NAME: _____
Place Of _____
Residence: _____

NAME: _____
Place Of _____
Residence: _____

NAME: _____
Place Of _____
Residence: _____

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Place Of _____
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Place Of _____
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NAME: _____
Place Of _____
Residence: _____

NAME: _____
Place Of _____
Residence: _____

NAME: _____
Place Of _____
Residence: _____

NAME: _____
Place Of _____
Residence: _____

NAME: _____
Place Of _____
Residence: _____

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

NOTICE TO COUNSEL OF RESIGNATION AS FIDUCIARY

TO: _____
Counsel

Address

COURT: _____

CASE CAPTION: _____

DOCKET NUMBER: _____

Effective January 23, 2018, I have been disbarred from further practice of the law in the Commonwealth of Massachusetts, and am disqualified from continuing to practice law or to act in any fiduciary capacity after that date. Therefore, pursuant to S.J.C. Rule 4:01, § 17 (1) (b), I am resigning, as of January 23, 2018, my appointment as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary in this matter.

DATE: _____ SIGNATURE: _____
John Doe

ADDRESS: _____

TELEPHONE: _____

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

**NOTICE TO WARD, HEIR OR BENEFICIARY
OF RESIGNATION AS FIDUCIARY**

TO: _____
Ward, Heir, or Beneficiary

Address

COURT: _____

CASE CAPTION: _____

DOCKET NUMBER: _____

Effective January 23, 2018, I have been disbarred from further practice of the law in the Commonwealth of Massachusetts, and am disqualified from continuing to practice law or to act in any fiduciary capacity after that date. Therefore, pursuant to S.J.C. Rule 4:01, § 17 (1) (b), I am resigning immediately my appointment as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary in the above matter.

Under these circumstances, you should act promptly to substitute another fiduciary or to seek legal advice elsewhere.

DATE: _____ SIGNATURE: _____
John Doe

ADDRESS: _____

TELEPHONE: _____

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

NOTICE OF DISBARMENT TO CLIENT

TO:	_____	_____
	CLIENT	COURT
	_____	_____
	ADDRESS	CASE CAPTION
	_____	_____
		DOCKET NUMBER

Pursuant to S.J.C. Rule 4:01, § 17, and Section 4.17 of the Rules of the Board of Bar Overseers for the Commonwealth of Massachusetts, you are hereby advised that I have been disbarred from further practice of the law in the Commonwealth of Massachusetts and consequently am disqualified from acting as an attorney after January 23, 2018, the effective date of disbarment.

If you are not represented by co-counsel, you should act promptly to obtain other counsel to represent you further in the above matter. In addition, the following circumstances of this case will require immediate attention:

You have the right to have all papers, documents, and other materials that you supplied to me in this case returned to you, as well as the right to certain other documents in your file. These documents may be retrieved from:

NAME: _____

ADDRESS: _____

TELEPHONE: _____

You also have the right to a refund of any part of any fees and costs you paid in advance that have not been earned or expended.

You are further notified that I am required to close every IOLTA, client, trust, or other fiduciary account and properly disburse or otherwise transfer all client and fiduciary funds in my possession, custody, or control.

DATE: _____

SIGNATURE: _____
John Doe

ADDRESS: _____

TELEPHONE: _____

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

**NOTICE OF DISBARMENT
TO COUNSEL AND UNREPRESENTED PARTIES**

TO: _____
Counsel for (or party, if unrepresented by counsel)

Address

COURT: _____

CASE CAPTION: _____

DOCKET NUMBER: _____

CLIENT NAME: _____

Pursuant to S.J.C. Rule 4:01, § 17, and Section 4.17 of the Rules of the Board of Bar Overseers, you are hereby advised that I have been disbarred from the further practice of law in the Commonwealth of Massachusetts and consequently am disqualified from acting as an attorney after January 23, 2018, the effective date of disbarment.

DATE: _____ SIGNATURE: _____
John Doe

ADDRESS: _____

TELEPHONE: _____

**LIST OF NAMES AND ADDRESSES OF THE CLIENTS, WARDS, HEIRS,
BENEFICIARIES, ATTORNEYS, UNREPRESENTED PARTIES, COURTS AND
AGENCIES TO WHICH NOTICES WERE SENT**

I. CLIENTS, WARDS, HEIRS, AND BENEFICIARIES

NAME: _____	NAME: _____
Address: _____	Address: _____
_____	_____
NAME: _____	NAME: _____
Address: _____	Address: _____
_____	_____
NAME: _____	NAME: _____
Address: _____	Address: _____
_____	_____
NAME: _____	NAME: _____
Address: _____	Address: _____
_____	_____
NAME: _____	NAME: _____
Address: _____	Address: _____
_____	_____

II. ATTORNEYS AND UNREPRESENTED PARTIES

NAME: _____

Address: _____

NAME: _____

Address: _____

NAME: _____

Address: _____

NAME: _____

Address: _____

NAME: _____

Address: _____

NAME: _____

Address: _____

NAME: _____

Address: _____

NAME: _____

Address: _____

NAME: _____

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Address: _____

NAME: _____

Address: _____

NAME: _____

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NAME: _____

Address: _____

III. COURTS AND AGENCIES

NAME: _____

Address: _____

NAME: _____

Address: _____

NAME: _____

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SCHEDULE OF BANK ACCOUNTS

LOCATION

TITLE

ACCOUNT NUMBER

(Attach additional sheets as needed.)

SCHEDULE OF DISPOSITION OF CLIENT AND FIDUCIARY FUNDS

(Attach additional sheets as needed.)

(Attach additional sheets as needed.)

APPENDIX J
SJC STANDING ORDER ON
NON-DISCIPLINARY VOLUNTARY RESIGNATIONS

STANDING ORDER CONCERNING NON-DISCIPLINARY
VOLUNTARY RESIGNATIONS FROM THE BAR OF
MASSACHUSETTS ATTORNEYS

1. It is ORDERED that upon filing with the Clerks' Office of the Supreme Judicial Court for the County of Suffolk a vote of the Board of Bar Overseers approving the voluntary request of an attorney in good standing at the bar of the Commonwealth of Massachusetts that said attorney be allowed to resign from said bar, that said resignation be accepted forthwith as an administrative action and judgment shall be entered by the Clerk of the Supreme Judicial Court for the County of Suffolk immediately removing said attorney from the office of attorney at law in the courts of this Commonwealth, without prejudice to any request of the said attorney for readmission at a future date. Notice of the acceptance of said voluntary resignation shall be sent to the resigning attorney, the Board of Bar Overseers, the American Bar Association, the Clerk of the United States District Court for the District of Massachusetts, and any other interested parties.
2. A copy of this order shall be filed with the clerk of the Supreme Judicial Court for the County of Suffolk.

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Entered: February 3, 1978