

Hiding in Plain Sight: Disciplinary Rules You Need to Know That *Aren't* in the Rules of Professional Conduct

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Although most of the professional obligations of Massachusetts attorneys appear in the Massachusetts Rules of Professional Conduct, [Supreme Judicial Court Rule 3:07](#), a few additional requirements and prohibitions reside in [Supreme Judicial Court Rule 4:01](#), entitled “Bar Discipline.” These include a prohibition against lawyers hiring disbarred or suspended lawyers; a prohibition against lawyers bargaining with clients who have lodged a bar complaint against them for the withdrawal of the complaint or non-cooperation with bar counsel’s investigation, and requirements that lawyers report promptly criminal convictions and discipline in other jurisdictions to bar counsel. The occasions for application of these rules are relatively uncommon, but lawyers should be aware of them, as violations can lead to disciplinary charges or increase the sanctions imposed for violations of rules of professional conduct.

1. S.J.C. Rule 4:01, sec. 10: Don't Try to Make a Deal with a Complainant

In the event that a client files or threatens to file a complaint against a lawyer with the Office of Bar Counsel (“OBC”), the lawyer “shall not, as a condition of settlement, compromise or restitution, require the complainant to refrain from filing a complaint, to withdraw the complaint, or to fail to cooperate with the bar counsel.” For example, if a client files an OBC complaint alleging that a lawyer has not fully disbursed settlement funds to which the client is entitled, the lawyer may **not** condition the disbursement of the funds on the client’s withdrawal of the complaint or agreement not to cooperate with bar counsel's investigation. A lawyer under investigation may voluntarily disburse the funds to the client but must steer absolutely clear of seeking any kind of quid pro quo. The same would be true where a client complains that a lawyer has failed to refund an unearned fee, failed to complete work the lawyer agreed to do, or failed to hand over a client’s file.¹

Several lawyers have been sanctioned for violation of 4:01, section 10. In *Admonition No. 14-09*, a lawyer’s clients complained that he had failed to refund an unearned flat fee, after failing to file a bankruptcy petition that the clients had

¹ Even if a client attempts to withdraw a complaint against a lawyer, bar counsel may choose to continue the investigation, as bar counsel always has the authority to investigate the conduct of a lawyer which may violate the Rules of Professional Conduct. Board of Bar Overseers Rule 2.1(b)(2).

paid him to file. When the lawyer was notified by bar counsel of the clients' complaint, he contacted the clients directly and offered to refund the fee if the clients would withdraw the disciplinary complaint. The lawyer received an admonition for violating S.J.C. Rule 4:01, sec. 10, in addition to several rules of professional conduct. In *Admonition 01-60*, after being advised of a client's complaint against him, the lawyer sent the client's counsel a detailed settlement offer, that included a term requiring that the client's counsel "draft some mutually acceptable statement to the Board of Bar Overseers retracting his complaint against me, and that [the client's counsel] request that the file be expunged and destroyed in the interests of fairness." He too was sanctioned for violating S.J.C. Rule 4:01, section 10 and other rules.

The lesson from these cases is that, when confronting a client complaint, lawyers may perform any and all outstanding duties owed to the client, including refunding any unearned fees, turning over the client's file upon request; or completing work the lawyer agreed to do. But the lawyer must refrain from pursuing any *quid pro quo* involving any pending or potential disciplinary complaint.

2. S.J.C. Rule 4:01, sec 12(8): Lawyers Must Self-Report a Criminal Conviction within 10 Days

Within ten days of a lawyer's conviction of a crime, whether by verdict, judgment or plea, the lawyer is required to notify bar counsel of the conviction. Conviction is defined in 4:01 sec. 12 (1) and includes admissions to sufficient facts, and any guilty or *nolo contendere* plea that is accepted by the court, whether or not a sentence is imposed. Conviction for a misdemeanor does not necessarily lead to a disciplinary action, but all convictions must be reported to bar counsel.

The failure to report a conviction is a separate offense that could itself result in discipline or cost a lawyer the benefit of retroactivity. *Matter of Burnbaum*, 29 Mass. Att'y Disc. R. 72; 466 Mass 1024 (2013) is an illustrative case. Burnbaum was a member of the Massachusetts bar who, in 1999, pleaded guilty in Florida to possession of cocaine with intent to distribute and related charges. Later in 1999, he resigned from the Florida bar as a disciplinary sanction. Burnbaum failed to report either the conviction or the discipline to bar counsel. Had Burnbaum timely reported those occurrences to bar counsel, he would have in all likelihood served his Massachusetts sanction concurrently with his Florida term.

As a result of Burnbaum's failure to report, bar counsel did not learn of the conviction and discipline for more than a decade. After learning of it in 2011, bar counsel filed both a notice of conviction and petition for reciprocal discipline with the S.J.C. As a result of Burnbaum's failure to report, the Court ordered that his disbarment Massachusetts be effective immediately, declining to make the disbarment retroactive to 1999, the date of his disciplinary resignation in Florida.

3. S.J.C. Rule 4:01, sec. 16(6): Lawyers Must Promptly Report Out of State Discipline to Bar Counsel

Under Rule 4:01, sec. 16(6), lawyers who have been subject to any discipline or other curtailment of their right to practice in other jurisdictions must provide certified copies of the order of the other jurisdiction to the BBO and to bar counsel within ten days of the issuance of the order. As is true of criminal convictions, the failure to notify bar counsel of discipline in another jurisdiction could serve to increase the length of the suspension imposed in Massachusetts or prevent it from running concurrently with the other jurisdiction's suspension.

In *Matter of Grodt*, 28 Mass. Att'y Disc. R. 391 (2012) a lawyer lost the benefit of retroactivity by failing to report discipline in another jurisdiction to the BBO and bar counsel. In June 2010, for various misconduct in connection with civil litigation, Grodt was suspended in New Hampshire for three years, stayed on

conditions. When the respondent violated the conditions, the New Hampshire court, in December 2010, ordered an immediate interim suspension. It later imposed the original three-year suspension retroactive to December 2010.

Although the respondent did not report the New Hampshire discipline, bar counsel learned of it and, in October 2011, filed a petition for reciprocal discipline with the S.J.C. In June 2012, the Court suspended the respondent for three years effective immediately. The Order was not made retroactive to December 2010, the date of the interim suspension in New Hampshire, because the respondent had not reported the discipline. See also, *Matter of Sheridan*, 23 Mass. Att'y Disc. R. 647, 652 (2007) (no retroactivity where lawyer failed to notify bar counsel of suspension in New Hampshire); *Matter of Mangan*, 14 Mass. Att'y Discipline Rep. 454, 455 (1998) (no retroactivity where lawyer failed to notify bar counsel of suspension in Maine); *Matter of Luongo*, 14 Mass. Att'y Disc. R. 440, 441 (1998) (same).

4. S.J.C. Rule 4:01, sec. 17(7): Lawyers May Not Hire Suspended or Disbarred Lawyers

This rule provides that "...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.” To be clear, any capacity means **any** capacity and thus applies to paralegal, administrative, bookkeeping or other work, including work that does not involve the practice of law.

Because of the clear prohibition of 4:01, sec. 17(7), Massachusetts lawyers may not hire disbarred or suspended lawyers unless and until the person is duly reinstated to the practice of law. The only exception applies is where the disbarred or suspended lawyers had obtained permission from the S.J.C. to engaged in work as a paralegal under Rule 4:01, sec. 18(3). A suspended or disbarred lawyer may only petition the court for permission after the lawyer has served the term of suspension-- or if disbarred, seven years. Any lawyer or law firm considering hiring a suspended or disbarred lawyer to work as a paralegal should exercise the utmost care before making any decisions, and would be well-advised to first consult with bar counsel.

In *Matter of Hutton*, 31 Mass. Att’y Disc. R. 313 (2015), two lawyers hired a suspended lawyer who had previously been the owner of their firm. The suspended lawyer, who was not paid a salary, worked in an office separate from the firm’s main office. There he reviewed files, valued cases, determined demand

amounts and, using an assumed name to hide his identity, engaged in settlement negotiations with adjustors and communicated with clients about those negotiations. One of the two hiring lawyers was aware that hiring the suspended lawyer probably violated an S.J.C. rule, while the other relied on his partner's representation that it was permissible and that the Board had approved it.

In disciplinary proceedings against the hiring lawyers, the BBO rejected their argument that the suspended lawyer was not "engaged in the practice of law," and thus determined that the two lawyers had assisted in the unauthorized practice of law, in violation of Mass. R. Prof. C. 5.5(a). However, whether or not the suspended lawyer was engaged in the practice of law, the Board found that the hiring lawyers had unquestionably violated S.J.C. Rule 4:01, section 17(7). The lawyer who knew the employment was prohibited was suspended for three months, while the lawyer who had been misled received a public reprimand.

Matter of Beatrice, 14 Mass. Att'y Disc. R. 56 (1998) presents another cautionary tale. Acting out of pity, Beatrice hired "to do odd jobs and run errands" a suspended lawyer with whom he had shared office space. However, prior to the effective date of the suspension, Beatrice and the (not yet) suspended lawyer met with a former client about further representation. While Beatrice

declined to represent the former client, the suspended lawyer proceeded to do inept legal work on the client's behalf, with disastrous consequences to the client. In an effort to untangle the mess and cover up the suspended lawyer's role in representing the client, Beatrice engaged in serious violations of several disciplinary rules, in addition to S.J.C. Rule 4:01, section 7(7). He was suspended for two years.

The foregoing disciplinary rules are all straightforward, easy to follow, and perhaps even vaguely familiar to most practitioners. But they may escape notice by virtue of not being located within the comprehensive set of ethical standards set forth in the Massachusetts Rules of Professional Conduct. It is hoped that this article will serve as a reminder of where to look for these rules in the future, should the need ever arise.

In the meantime, lawyers are always encouraged to call bar counsel's Ethics Helpline for guidance on locating and interpreting the rules that may help resolve an immediate ethical dilemma. The Helpline is open on Mondays, Wednesdays, and Fridays from 2:00 to 4:00 p.m. Call us during those hours at (617) 728-8750.