

Massachusetts Bar Discipline

History, Practice,
and Procedure

The Board of Bar Overseers
of the Supreme Judicial Court

**MASSACHUSETTS BAR DISCIPLINE:
HISTORY, PRACTICE, AND PROCEDURE**

BOARD OF BAR OVERSEERS

The purpose of this treatise, *Massachusetts Bar Discipline: History, Practice, and Procedure*, is to make the law and procedure related to bar discipline more accessible and understandable to the bench, the bar, and the public. We encourage all interested persons to use it. This book, however, is not a codification of the law, nor is it a predictive guide to the development of the common law of bar discipline.

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Massachusetts Bar Discipline: History, Practice, and Procedure

**The Board of Bar Overseers
of the Supreme Judicial Court**

The Board of Bar Overseers of the Supreme Judicial Court
2018

The Board of Bar Overseers of the Supreme Judicial Court
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Dedication

This treatise is dedicated to Michael Fredrickson, who served as General Counsel to the Board of Bar Overseers from 1989 until his retirement in 2017. His institutional knowledge became a mainstay for board members who, as volunteers, often sought his guidance. Mike led the Office of General Counsel with intelligence, wit, and humility. This treatise represents an effort to continue and honor his legacy.

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Preface

While there have been several publications describing the bar discipline process for violations of the *Massachusetts Rules of Professional Conduct*, no work has described that process in great detail while also analyzing the related sanctions. The Office of General Counsel compiled, and the Supreme Judicial Court published, the case law of bar discipline in the Massachusetts Attorney Disciplinary Reports which, for a long time were only available in print. Individual cases are available online; still, even if one had access to all the reports, it would be time-consuming and difficult to research issues or legal principles, to say nothing about the procedural nuances of practice before the Board of Bar Overseers.

The treatise seeks to fill this gap and make the practice more accessible to participants and observers by referencing, in a single volume, materials that had not previously been collected and analyzed. We begin with an overview of the history of bar discipline in the Commonwealth, followed by a discussion of the participants in, and structure of, the disciplinary process. Part II takes the reader through the steps of a typical bar discipline case from the initial complaint through the hearing. Part III discusses in detail some typical misconduct, including that related to competence, confidentiality, safekeeping of trust property, and advertising—and the sanctions typically imposed for it. This is followed by a discussion in Part IV of conduct that may aggravate or mitigate the presumptive sanction. Lastly, Part V discusses the post-hearing process as well as reciprocal discipline, resignations, duties after suspension or disbarment, reinstatement, and registration. While this volume is not a dissertation on legal ethics per se, it addresses the Rules of Professional Conduct as they arise in bar discipline.

In addition, the treatise provides practice tips and other guidance to the parties and their counsel. This book is intended to be a history, a scholarly treatise, and a practice guide. We hope that we have succeeded in this endeavor.

The Board of Bar Overseers

Acknowledgments

The Board of Bar Overseers wishes to acknowledge the efforts of the many people who have brought this treatise project to fruition. Mike Fredrickson was the initial drafter in 2011. It readily became apparent that the project's magnitude would require many hands. The lion's share of the credit goes to Boston College Law Professor Paul Tremblay for researching, organizing, and drafting this treatise. Several employees of the Board of Bar Overseers and the Office of Bar Counsel also participated in the drafting and editing process, including: Jeffrey Woolf, Paul Rezendes, Nancy Kaufman, and Connie Vecchione.

Any work of this scope requires and benefits from outside commentators and editors. To oversee the drafting and editing, the Board established a Treatise Committee, which has included: Erik Lund, David Mackey, W. Lee Dunham, Mary Strother, Regina Roman, Erin Higgins, April English, and Assistant General Counsel Jeffrey D. Woolf and Paul M. Rezendes. Current General Counsel Joseph Berman chaired the committee from the time he joined the board in 2017 through final publication. To insure balance and comprehensiveness, drafts of the chapters were sent to members of the bar and to the Office of the Bar Counsel. The authors received helpful comments from the following lawyers: Thomas R. Kiley, from Cosgrove, Eisenberg & Kiley, P.C.; Timothy J. Dacey, Gary M. Ronan, Richard J. Rosensweig, Thomas J. Sartory, and Richard M. Zielinski, all from Goulston & Storrs; George Berman from Peabody & Arnold; Thomas F. Maffei and Debra Squires-Lee (now a superior court judge) from Sherin & Lodgen; and Donna Patalano, a former board chair and formerly of the Suffolk County District Attorney's Office. From the Office of the Bar Counsel, the authors received helpful comments from First Assistants Dorothy Anderson and John W. Marshall; Assistant Bar Counsel Richard Abati, Linda Bauer, Robert Daniszewski, Pamela Harbeson, and Anne Kaufman (former ACAP director); and attorney-investigator Michelle Yu. Finally, Paul Tremblay wishes to acknowledge the research assistance of the following Boston College Law School students who helped him over several years of this project: Colin Brady, Ha Young Chung, Erica Fernandes, Shawn Murray, and Rachelle Rubinow.

PART I

Introduction

CHAPTER ONE

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 to remove a lawyer from the office of attorney at law was usually brought by a county bar association acting in a voluntary capacity¹ in the Superior Court under Mass. Gen. Laws ch. 159 § 39. By statute, the attorney's appeal from any adverse judgment lies with the Supreme Judicial Court (SJC).

By at least the beginning of the twentieth century, the SJC 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 book than the essential principles of bar discipline laid down in the Court's early jurisprudence.

The Court decided early on that removing an attorney from the bar was not a punishment but an action taken to preserve "the purity of the courts."⁴ Removal acknowledges that a "due regard to the dignity and decency of the court

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* *Matter of Keenan*, 287 Mass. 577, 192 N.E. 65 (1934).

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

³ *See, e.g.,* *Matter of Carver*, 224 Mass. 169, 170, 112 N.E. 877 (1916).

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

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 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 suggested much of what became the current standard for assessing petitions for bar reinstatement. In all important respects, bar discipline was conducted in such a framework until the mid-1970s.

In 1970, the American Bar Association (ABA) published the report of its Special Committee on Evaluation of Disciplinary Enforcement, known as the Clark

⁵ *Id.*

⁶ *Matter of Randall*, 93 Mass. (11 Allen) 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”).

⁸ *Matter of 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 (ABA) recommends, that charges against a lawyer be established by clear and convincing evidence. In 2005, the Massachusetts Bar Association (MBA) 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 2008, 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 *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 applied to bar discipline proceedings, but see SJC Rule 4:01 § 1. 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).

Committee after its head, former United States Supreme Court Justice Tom Clark.¹⁴ After undertaking the first nationwide examination of lawyer disciplinary procedures in the United States, the Clark Committee 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 Committee’s report, the ABA adopted its *Model Rules for Lawyer Disciplinary Enforcement*. Model Rule 8, intended to address the problem of financing bar discipline activities, provided as follows:

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 delegate this function.

On May 15, 1970, the Massachusetts Bar Association (MBA) petitioned the SJC to adopt 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 to establish the Clients’ Security Board (CSB), which would be supported by the same funding.

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

¹⁵ *Id.* at xiv.

¹⁶ *Id.*

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’s article offers a fascinating glimpse into the Court’s deliberations on the matter.

Most county bar associations supported the petition, but the Boston Bar Association (BBA) and the Civil Liberties Union of Massachusetts (CLUM) strenuously opposed it. While the petition was still pending, the justices adopted the ABA's *Model 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 concentrating 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 CLUM expressed 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 R. 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 Herbert Wilkins relates, the Court was initially inclined, by a vote of four to three, to adopt the unification proposal, the Court later determined not to do so.²¹ It is Justice Wilkins's 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, effective on September 1, 1974, concerning bar discipline and clients' security protection.²² Unification was rejected. A nine-member Board of Bar Overseers (BBO) and a seven-member CSB 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

¹⁸ See MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT Rule 3:22 [hereinafter SJC Rule], 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.

²¹ *Id.*

²² See *Matter of McInerney*, 389 Mass. 528, 530 n.5, 451 N.E.2d 401, 403 n.5 (1993) (describing the 1974 action).

by then the BBO was fully operational, and no one suggested revisiting the unification issue.²³

The procedural rules Justice Cutter originally recommended and that the Court adopted constituted a rule-bound set of procedures that departed from the loose notions of procedural due process that the Court had previously invoked. Those 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 SJC 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 the BBO's and the Court's review of hearing committee findings.²⁴ The BBO responded by proposing, and the Court adopted, an amendment that squarely provided that the Court would uphold the subsidiary facts the BBO found "if supported by substantial evidence."²⁵ In addition, the 1978 amendment empowered the BBO 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 (emphasis added).

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 BBO departed from the Administrative Procedure Act in rejecting the "substantial deference" standard administrative agencies used 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 credibility.²⁷ In any event, it is now clear beyond cavil that a hearing committee's credibility determinations are sacrosanct and cannot be set aside unless wildly wrong or self-contradictory.²⁸

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 SJC Rule 4:01 § 8(6).

²⁶ *Id.*, now at SJC Rule 4:01 § 8(5).

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 BBO 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,

Since 1978, three major sets of amendments have been made to SJC Rule 4:01 and the BBO's own administrative rules. The first group of changes came hard on the heels of a 1992 federal district court decision striking down a Florida rule that prohibited complainants from making public the allegations or even the existence of grievances filed against lawyers.²⁹ Justice Wilkins, then chair of the Court's rules committee, asked the BBO 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, which generally conducted disciplinary proceedings in secret until after hearing and review by the full BBO, to join the thirty-two other states that opened the process to the public upon the filing of formal charges. The BBO responded by recommending, and the Court subsequently adopted, fairly sweeping changes to the procedural rules, the more important of which included:

- Proceedings became public upon the filing of formal charges.
- The BBO was permitted to recruit and deploy laypersons to serve on hearing committees.³⁰
- Two available private sanctions—the informal admonition and private reprimand—were merged into a single form of private discipline called admonition.
- The former public censure, which only the Court could impose, was replaced by the public reprimand, which the BBO imposes.
- Complainants and witnesses were granted absolute immunity for giving testimony and communicating with the BBO and bar counsel.
- The BBO and bar counsel were given discretion to make public disclosures regarding the pendency, subject matter, and status of an investigation in certain circumstances.

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*). *Cf.* *Matter of Strauss*, 479 Mass. 294, 298–99, 33 Mass. Att'y Disc. R. ____ (2018) (reiterating the “irreconcilable inconsistency” standard of review). 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 BBO itself has had laypersons among its twelve members since 1978, and it typically has four lay members.)

A BRIEF HISTORY OF BAR DISCIPLINE IN MASSACHUSETTS

- Respondents who fail to cooperate with bar counsel's investigation would be administratively suspended until they did.
- Bar counsel was granted authority to close meritless grievances unilaterally so long as complainants could review the closing upon appeal to a single BBO member.

The second group of changes to Rule 4:01 was effective July 1, 1997, and included the following major amendments:

- Imposing administrative suspension for failure to respond to a subpoena and other defaults.
- Adding a special hearing officer as a sole adjudicator at the discretion of the BBO chair.
- Creating the disability inactive status and new proceedings to determine incapacity.
- Implementing major changes to the procedure to follow after disbarment, suspension, resignation, or transfer to disability inactive status.
- Reinstating lawyers suspended from practice for a year or less without the need for a hearing.
- Allowing lawyers suspended for more than a year to file a petition for reinstatement three months before the reinstatement eligibility date.

The third group of major rules changes occurred effective September 1, 2009, following recommendations by a task force of the MBA³¹ as well as an evaluation by ABA representatives.³² The principal changes included:

- Replacing 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 BBO unless the BBO chair found another venue convenient for the parties and witnesses.
- Permitting the use of probation or diversion in place of traditional discipline where appropriate.
- Giving the bar counsel further authority not to entertain frivolous complaints.

³¹ REPORT OF THE MBA TASK FORCE ON LAWYER DISCIPLINE, *supra* note 10.

³² AMERICAN BAR ASSOCIATION, *Report on the Lawyer Regulation System of Massachusetts* (2005).

INTRODUCTION

- Allowing lawyers to contest an admonition at a private, expedited hearing before a single BBO member, with any appeals limited to BBO review, not the Court.
- Amending the BBO's rules to allow respondents additional discovery in formal proceedings.

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

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

CHAPTER TWO

The Actors in and the Structure of the Massachusetts Disciplinary System

I. INTRODUCTION

The Massachusetts disciplinary processes include several different participants and entities, each of which has a defined role in regulating Massachusetts attorneys and protecting consumers of legal services. This chapter introduces the following participants and describes their respective roles and responsibilities:

Board of Bar Overseers (BBO): has primary responsibility for administering the system of lawyer discipline in Massachusetts. It appoints hearing committees or hearing officers consisting of volunteers (lawyers and laypersons) to hear and make recommendations to the board in contested disputes about lawyer discipline. The BBO also hears appeals and recommends (and sometimes imposes) discipline.

BBO Hearing Officers: hear and make recommendations to the board in contested discipline cases, usually in committees of three. Sometimes a single “special hearing officer” is assigned to a case. For simplicity, this chapter will refer to “hearing committees,” which includes special hearing officers.

Office of the General Counsel of the BBO (OGC or, specifically, the General Counsel): provides legal advice and guidance to the BBO and hearing officers.

Office of the Bar Counsel (OBC or, specifically, the bar counsel): investigates and prosecutes lawyers accused of misconduct.

The Attorney and Consumer Assistance Program (ACAP): a division of the OBC that in some matters handles initial case intake, as well as referral of more serious matters for investigation and possible prosecution.

Supreme Judicial Court (SJC): is responsible for approving recommendations for suspension or disbarment and deciding appeals involving lesser sanctions, usually through single justices but sometimes as a full court.

This chapter also describes the following important ancillary organizations:

Clients' Security Board (CSB): manages and distributes monies in the Clients' Security Fund to victims who lost money because of the dishonest conduct of a bar member acting as an attorney or fiduciary.

Board of Bar Examiners (BBE): oversees applicant admission to the Massachusetts bar, including deciding questions of moral fitness.

Lawyers Concerned for Lawyers (LCL): assists attorneys and others in the profession who are impaired in their ability to function as a result of personal, mental health, addiction, or medical problems.

Law Office Management Assistance Project (LOMAP): assists Massachusetts attorneys in establishing responsible and effective office practices.

Massachusetts IOLTA Committee: advises attorneys with respect to the receipt, safeguarding, accounting, and distribution of client funds.

This chapter also offers a schematic of how the Massachusetts disciplinary processes are structured and how the actors' work fits together.

II. THE PARTICIPANTS IN THE DISCIPLINARY PROCESS

A. Board of Bar Overseers

The BBO is a volunteer body appointed by the SJC under authority established by SJC Rule 4:01. Traditionally, the BBO has twelve members: four laypersons (including, usually, a doctor) and eight attorneys.¹ The BBO includes a chair and a vice-chair, who have special responsibilities, described in the following paragraphs. The BBO administers and oversees the entire disciplinary process, but it is separate from (if often confused with) the OBC. In essence, the OBC prosecutes lawyers, while the BBO serves as the tribunal that decides disputed matters surrounding discipline. While the BBO does appoint the bar counsel with the approval of the SJC and approves the hiring of the OBC lawyers, the 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 BBO then serves as the reviewing body

¹The SJC Rules do not fix the size of the board: "The Board shall consist of such number of members as the court shall determine from time to time." MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT, Rule 4:01 § 5(1) [hereinafter SJC Rule].

(either as a full board or in panels of three members each) to hear and decide objections to reports from hearing committees and to review hearing reports where there has been no objection to determine whether the board will adopt the committee's findings, conclusions, and recommendation for discipline. Some BBO decisions are binding and final (for example, public reprimands, if no further appeal occurs). BBO decisions that are not final must be reviewed by a single SJC justice. The distinction is that the BBO may issue public reprimands on its own and approve or reject proposed admonitions, but the SJC must enter more serious discipline, such as suspension and disbarment orders. The BBO 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 BBO member will sit as part of a hearing committee.

BBO members have the authority to issue hearing subpoenas at the request of the OBC or a respondent.² The chair of the BBO (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 prehearing motion for a protective order, for issue preclusion, or to stay or defer prosecution, or if a respondent files a motion to dismiss, the BBO chair or a designee must rule on those matters.³ In addition, BBO members periodically are assigned "duty review" for a given week. Duty review involves, among other tasks, issuing subpoenas when a party requests, approving a charging memorandum if the OBC decides to proceed with discipline, approving admonitions, and reviewing complainant objections after the OBC has decided to close a grievance without disciplinary proceedings.

The SJC appoints BBO members, who serve staggered terms of four years each. BBO members may be reappointed for one more four-year term;⁴ that term limit does not bar reappointment after the member has been off the BBO for at least one year. The Court's consistent practice since at least the 1990s, however, has been to decline requests for appointment to a second four-year term except for lay members of the BBO.

Finally, the BBO has established 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.

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

³ See RULES OF THE BOARD OF BAR OVERSEERS §§ 3.18(a)(2), 3.18(b) [hereinafter BBO Rules].

⁴ SJC Rule 4:01 § 5(2).

(The Rules Committee traditionally includes at least one nonvoting representative of the OBC.) The Hearing Officer Committee is responsible for recruiting, selecting, and training hearing officers. The Technology Committee supervises the board's efforts to modernize and maintain its technology systems.

B. BBO Hearing Officers

The BBO 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 BBO appoints such individuals to serve as hearing officers for three-year terms, renewable once. Later chapters describe the hearing process and the powers and responsibilities of hearing officers. In 2017, the BBO had a roster of 141 hearing officers, of whom 40 were not attorneys.

C. Office of the General Counsel of the BBO

The OGC serves as the in-house counsel to the BBO and advises and assists the volunteer hearing officers on behalf of the board. In fiscal 2018, the OGC consisted of four attorneys—a general counsel and three assistant general counsels, along with two administrative staff members. The OGC is responsible for advising the BBO, which is its client, and, on the board's behalf, the hearing officers. OGC lawyers attend hearings and BBO meetings, assist in drafting hearing decisions and memoranda, research legal matters to assist the BBO and the hearing officers to decide disputes, and otherwise ensure that the processes operate according to the SJC's and the BBO's rules. The OGC also serves the BBO's administrative needs by scheduling matters, distributing notices, and maintaining case records.

The OGC is entirely different and separate from the OBC and 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 a professional liability insurance policy that covers the defense of disciplinary grievances. Depending on the circumstances, the attorneys the General Counsel locates may offer legal services to the respondent at a reduced fee or on a pro bono basis.

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

D. Office of Bar Counsel: The Bar Counsel

The OBC, established by SJC Rule 4:01 § 7, functions independently of the BBO, despite much popular misconception. 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 BBO 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 a staff of assistants who are the lawyers who carry out the responsibilities of the office. In 2017, the office included the bar counsel, twenty-one assistant bar counsels, 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 the BBO 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, nonbinding advice to attorneys on ethical problems and provides continuing legal education training for attorneys.

E. Attorney and Consumer Assistance Program

The OBC receives and investigates complaints about lawyers, some of which are relatively minor or do not involve professional misconduct. To resolve such complaints, streamline the OBC’s work, and offer prompt assistance to complainants, the OBC created ACAP in 1999. ACAP, an office within the OBC, initially addresses the overwhelming majority of complaints about a lawyer. ACAP staff may contact both the complainant and the lawyer to determine whether the complaint can be resolved through some informal action. If so, no

⁶ SJC Rule 4:01 § 7(1). The only exceptions to that authority are allegations of misconduct against bar counsel or one of her assistants or against a member of the board or its staff, which the board investigates itself. *See* BBO Rules § 5.6(c)(2).

⁷ SJC Rule 4:01 § 5(3)(b).

⁸ *Id.*

⁹ *Articles*, MASSACHUSETTS BOARD OF BAR OVERSEERS, <https://www.massbbo.org/Ethics> (last visited May 1, 2018).

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. Chapter 5 discusses the ACAP process in more detail.

F. Supreme Judicial Court: Single Justices

The Massachusetts Supreme Judicial Court has ultimate authority over lawyer discipline in the Commonwealth and has well-defined duties in matters involving individual lawyers and their discipline. The SJC has administrative oversight of the BBO, appoints BBO members, and approves the appointment of the bar counsel, who serves at the pleasure of the SJC. But more directly relevant, the SJC plays a central role in disciplining 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, even if the respondent lawyer and the OBC agree with the sanction the BBO proposes.¹⁰ Typically, that approval process goes through a single justice assigned to hear the matter. The single justice may or may not accept the disposition the parties agreed upon. Second, in all cases where the parties do not agree with the BBO's proposed sanction, the SJC hears the case, initially by a single justice.¹¹ The single justice has the discretion to 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 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 discusses the specifics of these review procedures.

¹⁰ SJC Rule 4:01 § 8(6).

¹¹ *Id.* The rule does not state that a single justice will review the matters, but such is the Court's practice.

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 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, 471 Mass. 1303 (March 9, 2015, eff. April 1, 2015).

III. PARTICIPANTS ANCILLARY TO THE DISCIPLINARY PROCESS

A. Clients' Security Board

The CSB is a separate administrative agency that has indirect relevance to the Massachusetts disciplinary process and hence to this book's subject matter. It uses funding from the registration fees lawyers admitted in the state pay to reimburse clients and other victims who have lost money as the result of defalcations by members of the bar acting as lawyers or fiduciaries, including misappropriation, embezzlement, or conversion of money or property, but not for damages caused by legal malpractice.¹⁴ 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.¹⁵

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 discusses the work of the CSB in more detail.

B. Board of Bar Examiners

The BBE is different and separate from its similarly sounding agency, the 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.

¹⁴ SJC Rule 4:04 § 1.

¹⁵ Clients' Security Board, MASSACHUSETTS BOARD OF BAR OVERSEERS, <https://www.massbbo.org/ClientsSecurityBoard> (last visited May 1, 2018).

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. First, some respondents end up before the BBO because they submitted false or improper materials to the BBE in their application to the Massachusetts bar.¹⁶ Second, other respondents receive BBO sanctions that include submitting to a BBE review of their character and rehabilitation before they can resume practicing law in the state.¹⁷ While the SJC appoints the BBE members and approves its rules, the BBE itself was created by the legislature, not the SJC.¹⁸

C. Lawyers Concerned for Lawyers

The 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. The 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. The 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.¹⁹ The organization's funding comes primarily from a portion of the registration fees the BBO collects each year from Massachusetts lawyers.²⁰ The LCL offers all of its services confidentially and free of charge.²¹

The LCL plays a critical role in the disciplinary process. When the BBO or the SJC determines that a lawyer's misconduct is the result of an impairment or similar difficulty that the LCL might help address, the resulting sanction order may include a requirement that the respondent seek assistance from the LCL. At least forty disciplinary reports between 1999 and 2017, inclusive, included some reference to the LCL.

¹⁶ 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).

¹⁷ See, e.g., *Matter of Resnick*, 26 Mass. Att'y Disc. R. 544 (2010).

¹⁸ See MASS. GEN. LAWS ch. 221 § 35.

¹⁹ *About Us*, LAWYERS CONCERNED FOR LAWYERS, <http://www.lclma.org/about/who-we-are/#sthash.JD8TNe7L.dpuf> (last visited May 1, 2018).

²⁰ In 2015, the LCL received 7.5% of the annual registration fees the BBO collected. In FY 2013, its operating revenue was approximately \$1.25 million.

²¹ The LCL assures users of strict confidentiality. *Confidentiality*, LAWYERS CONCERNED FOR LAWYERS, <http://www.lclma.org/about/confidentiality/> (last visited May 1, 2018). In addition, Rule 1.6(d) of the *Rules of Professional Conduct* deems any participant in the LCL (or any similar organization) to be a client for purposes of confidentiality protection.

D. Law Office Management Assistance Program

LOMAP is a program within the LCL. LOMAP's mission is to educate lawyers about law office management and to assist individual lawyers establish effective office practices. It provides training classes, individual consultations, and many resources on its website.²² All of its services are free of charge.

As with the 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 attributed to a lawyer's 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 maintaining the right to practice. From 2006 through 2017, at least forty-seven disciplinary reports have referenced LOMAP.

E. Massachusetts IOLTA Committee

The Supreme Judicial Court created the Interest on Lawyers Trust Account (IOLTA) program in 1985. The committee consists of nine members of the bar who are appointed by the SJC. The funds deposited in a pooled IOLTA account pay the interest to the committee and funds legal services to the disadvantaged and projects that improve the administration of justice. The committee conducts training programs for attorneys and banks, publishes educational materials on the safekeeping property rules, works with the BBO staff to ensure that attorneys have adequate procedures for the handling of client funds, and ensures that attorneys fill out the required information under the IOLTA section of the registration materials.

²² *About, MASSACHUSETTS LAW OFFICE MANAGEMENT ASSISTANCE PROGRAM*, <http://masslomap.org/about/> (last visited March 6, 2018).

CHAPTER THREE

The Structure of the Disciplinary Process

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

1. **The Office of the Bar Counsel (OBC) begins investigation.** Under the provisions of Supreme Judicial Court (SJC) Rule 4:01 § 7, the OBC is responsible for investigating complaints of attorney misconduct, as well as questions of misconduct that come to the OBC's attention in the absence of a complaint, such as through news media or court decisions.
2. **The Attorney and Consumer Assistance Program (ACAP) reviews and investigates.** ACAP is the intake division of the OBC. It attempts to identify and resolve minor complaints against attorneys without docketing them as formal OBC complaints. Traditionally, ACAP can resolve about 85% of the matters it receives without opening formal complaints. 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 the OBC to trigger an investigation for possible prosecution.
3. **Formal investigation initiated.** If ACAP does not resolve the matter, or if it involves allegations of serious misconduct but the complainant takes no further action, ACAP may refer the matter to the OBC for investigation. Upon determining that a matter should be investigated, the OBC notifies the attorney in writing of the complaint.
4. **Respondent replies, and the OBC investigates further.** The attorney is required to respond to the OBC's letter stating that an investigation has commenced and asking the attorney to cooperate in the OBC's investigation. Failure to do so may constitute a separate act of

misconduct and can result in immediate administrative suspension.¹ Upon receiving the respondent's answer, the OBC determines 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 the OBC's office and give a recorded statement under oath.²

5. **The OBC recommends a disposition.** What happens next depends on the outcome of the OBC's investigation. Note that, generally, the complainant has no role or voice in this process.³ Moreover, the OBC is not required to terminate an investigation because a complainant wishes to withdraw the complaint or because the parties have settled the underlying matter.⁴

After the OBC investigates the matter, it recommends a disposition, which, in most instances, requires a Board of Bar Overseers (BBO) member's review and approval or modification. The OBC's recommendation may include the following actions:

- *Closing:* The complaint may be closed for the following reasons: The rules of professional conduct were not violated, the violation did not warrant discipline, it occurred more than six years earlier, or no violation could be proven. Sometimes a file is closed with a warning to the respondent to employ better practices, such as better communications with clients.⁵
- *Deferment:* The OBC can, with the approval of the BBO or the SJC, defer a matter where the material allegations are substantially similar to those in a pending civil, criminal, or

¹ MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT r. 4:01 § 3 [herein-after SJC Rule].

² SJC Rule 4:01 § 22.

³ A complainant may request that the BBO review an OBC decision not to prosecute a matter. The BBO's decision, however, is final, with no right on the part of the complainant to seek court review of the decision. Chapter 4, Section II(B) discusses the rights of the complainant in more detail.

⁴ SJC Rule 4:01 § 10.

⁵ SJC Rule 4:01 § 8(1)(a).

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.

- *Diversion:* The OBC can recommend diversion to an alternative educational, remedial, or rehabilitative program as an option for resolving a complaint. This requires an agreement between the OBC and the respondent and is memorialized in a formal diversion agreement, which the BBO approves or modifies.⁷
- *Admonition:* Upon approval by a BBO member, the OBC may impose an admonition, or warning, for relatively minor disciplinary violations.⁸ If so, the identity of the attorney receiving the admonition is not made public. Except when an admonition is imposed by agreement, the administration of an admonition is a unilateral act by the OBC after BBO review and approval.⁹ If an attorney seeks to contest the admonition, the attorney must file timely objections with the BBO and request a hearing. The matter is then assigned to a special hearing officer (SHO) and proceeds under a separate rule for expedited hearings.¹⁰ The proceedings are confidential.¹¹
- *The BBO accepts stipulations for public discipline:* If the attorney and the OBC agree that a violation warranting public discipline has occurred and they also agree on a sanction, they can submit a stipulation, or condition, to the BBO for approval before or after filing formal disciplinary charges. The submission includes 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

⁶ RULES OF THE BOARD OF BAR OVERSEERS § 2.13 [hereinafter BBO Rules]; SJC Rule 4:01 § 11.

⁷ SJC Rule 4:01 § 8(1).

⁸ BBO Rules § 2.11; SJC Rule 4:01 §§ 8(1)(c)(i), 8(2).

⁹ SJC Rule 4:01 §§ 8(1)(c)(i), 8(2)(c).

¹⁰ BBO Rules §§ 2.11, 2.12; SJC Rule 4:01 §§ 8(2)(c), 8(4).

¹¹ BBO Rules § 2.12(2); SJC Rule 4:01 § 8(4).

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 BBO issues the public reprimand.¹³ Since only the Court can suspend or disbar a lawyer, if the agreement is for 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

- *Rejected stipulations:* If the BBO votes to reject a stipulation, this vote is a preliminary determination, and the BBO states its reasons for its initial rejection.¹⁵ The parties are then given an opportunity to brief the issues, and thereafter the BBO issues a final vote in which, if rejecting the stipulation, it states the reasons for its rejection and determines the appropriate recommended disposition. Stipulations are either binding on the parties or “collapsible,” meaning not binding.¹⁶ If a binding stipulation is rejected, the matter is decided by the single justice, with the BBO advocating its recommended disposition and the parties their stipulated disposition.¹⁷ If the BBO rejects a collapsible stipulation, the parties can amend their pleadings and the matter is then scheduled for a disciplinary hearing before a BBO hearing committee.¹⁸
- *Commencement of formal proceedings:* If the matter is not otherwise disposed of and, in the OBC’s judgment, warrants public discipline, the OBC requests approval from a BBO member to submit a proposed draft petition for discipline to commence formal disciplinary proceedings.¹⁹ The BBO does not need to approve a petition arising from a conviction in which the Court remanded the matter to the BBO under SJC Rule 4:01 § 12(4).

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

¹³ SJC Rule 4:01 § 8(1)(c).

¹⁴ *Id.*

¹⁵ BBO Rules § 3.19(e); SJC Rule 4:01 § 8(3).

¹⁶ BBO Rules § 3.19(e).

¹⁷ *Id.*

¹⁸ BBO Rules §§ 3.19(d), (e); SJC Rule 4:01 § 8(3)(c).

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

6. Respondent served with petition for discipline. A petition for discipline arises in one of three contexts:

- After the OBC's investigation, under BBO Rules § 3.13(a)(2), including reciprocal discipline in another jurisdiction under SJC Rule 4:01 § 8(16).
- Following the respondent's conviction of a serious crime, under BBO Rules § 3.13(a)(1).
- When the parties stipulate to a disposition and accompany their stipulation with a petition for discipline.

Formal disciplinary proceedings commence with the OBC filing an approved petition for discipline with the BBO.²⁰ The petition must be sufficiently clear and specific to inform the respondent attorney of the charges of alleged misconduct and must enumerate the specific rules of professional conduct the respondent is alleged to have violated.²¹ The matter is later tried before a hearing committee, hearing panel, or SHO appointed for that purpose.²² They and the BBO cannot recommend or impose discipline for violating a rule that was not charged in the petition for discipline.²³ If several separate charges of unethical conduct are 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

The petition for discipline is served upon the respondent with an accompanying cover letter informing the respondent that an answer must be filed with the BBO, with a copy served upon the OBC, within twenty days.²⁶ The respondent is also informed 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

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

²¹ BBO Rules § 3.14; SJC Rule 4:01 § 8(3)(a).

²² SJC 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 BBO to determine the sanction.)

suspension,²⁷ and that the BBO's general counsel will assist the respondent in obtaining counsel, on a pro bono basis, if necessary.

- 7. Respondent answers.** 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. Facts alleged 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 the respondent files no answer within the time limit established by the SJC Rules, the BBO promptly issues a notice of default, notifying 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 the OBC requests a hearing on matters in aggravation, the BBO will then consider the matter of disposition on the basis of the admitted charges. The BBO may order the respondent and the OBC 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 BBO chair may order the default removed and permit the respondent to file an answer to the petition for discipline.³³

- 8. Respondent may submit a motion 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 delay, or stay, the proceedings. Given that a BBO member reviews each petition for discipline before

²⁷ SJC Rule 4:01 § 8(3)(a).

²⁸ BBO Rules § 3.15(a)(1); SJC Rule 4:01 § 8(3)(a).

²⁹ BBO Rules § 3.15(d).

³⁰ BBO Rules § 3.15(f).

³¹ SJC Rule 4:01 § 8(3)(a).

³² BBO Rules § 3.15(a).

³³ BBO Rules § 3.15(h).

it can be docketed and served on a respondent, motions to dismiss are rarely, if ever, granted. The BBO chair, or a BBO member that the chair designates, decides the respondent's motion to dismiss.³⁴

9. **The OBC and respondent exchange discovery.** Within twenty days following the filing of an answer, the OBC and the respondent must exchange the names and addresses of all persons having knowledge of facts relevant to the proceedings. In addition, within thirty days of filing of an answer, the OBC and the respondent may make reasonable requests for nonprivileged information and evidence relevant to the charges or the respondent, and the OBC and the respondent shall, within ten days, comply with these requests.³⁵ There are no express provisions for interrogatories, requests for production, or requests for admissions. Discovery of work product is not permitted.
10. **Depositions approved.** Discovery depositions are allowed only upon satisfaction of a high standard of substantial need and require advance BBO approval.³⁶ However, testimonial depositions of witnesses who are unavailable to attend a hearing may be taken under less stringent standards.³⁷
11. **Case assigned to a hearing committee.** After a petition and answer have been filed with the BBO, the BBO assigns the case to a hearing committee or an SHO. 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 that area.³⁸ If a case arises from a conviction, it is assigned to a hearing panel consisting of three members of the BBO.
12. **Prehearing conference scheduled.** In discipline cases, a prehearing conference is scheduled to expedite the orderly presentation of the

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.

evidence and testimony at the hearing and may address such issues as discovery, the exchange of exhibits, limits on the number of witnesses, scheduling of motions (including motions for protective orders, motions to preclude issues, and motions in limine), and 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 prehearing conference is usually conducted by the hearing committee chair; other committee members may attend—this is optional but welcome—and telephone participation is acceptable. The OBC, the respondent, and the respondent’s counsel, if any, must attend the prehearing conference. The prehearing conference sets the schedule for all prehearing events, such as motions, and finalizes the hearing dates. Dates are set for the parties to exchange their proposed list of 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 then memorialized in a Prehearing Conference Order, the template for which is provided to the parties before the prehearing conference.

13. **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, the respondent is referred to the BBO’s general counsel, who will, if requested, try to find counsel willing to undertake the representation on a pro bono or reduced-fee basis.
14. **Prehearing motions are heard.** 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

³⁹ BBO Rules § 3.23(a).

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 BBO.⁴⁰

15. **The OBC and respondent agree to stipulations.** Before the hearing, the OBC 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 BBO, or the SJC. The hearing committee has the authority to conduct a hearing or an inquiry to satisfy itself as to the accuracy of the factual stipulation.

16. **Exhibits agreed upon.** As part of the prehearing order, the parties are required to exchange, and to attempt to agree upon, proposed exhibits. 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 why. Exhibits offered for limited purposes must be so designated. The originals of the agreed exhibits are filed with the BBO; copies of the agreed exhibits are provided to the hearing committee members several days before the first hearing date.⁴¹

17. **Hearing subpoenas requested.** Unlike in superior court or federal district court, the parties cannot issue their own subpoenas. The parties must request hearing subpoenas in advance, including subpoenas *duces tecum*; the BBO prepares and issues the subpoenas.⁴²

18. **Disciplinary hearing conduct.** As noted in Step 11, “Case Assigned to a 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, a three-person hearing panel composed of BBO members hears it. Regardless, an assistant general counsel is present at the hearing to provide legal advice on behalf of the BBO to the committee, panel, or SHO and to handle the exhibits, of which the BBO takes custody.

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

⁴¹ BBO Rules §§ 3.25, 3.40.

⁴² BBO Rules §§ 4.5(a)–(c); SJC Rule 4:01 § 22.

A hearing may proceed in the absence of one committee or panel member. The absent member may participate fully in all committee deliberations so long as the hearing transcript is available to the absent member.⁴³ Hearings are generally conducted in accordance with the provisions of Massachusetts General Laws Chapter 30A pertaining to adjudicatory hearings (the Massachusetts Administrative Procedure Act), except where otherwise inconsistent with the BBO Rules.⁴⁴

The respondent must attend the disciplinary hearing. A respondent who fails to appear 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. The committee, panel members, or SHO 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.

19. Burden of proof and presentation of the evidence. The OBC 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. The OBC must “initiate the presentation of evidence”; the OBC opens first and closes last.⁴⁷ Both parties have the right to present evidence, cross-examine, object, argue, and 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

20. Witnesses and transcripts. All witnesses are sworn and give testimony under oath, which is transcribed by a court reporter. For hearings conducted at the BBO’s hearing room, it is possible for a witness to testify by video conferencing or similar technology, but the notary public who swears in the witness must be with the witness to verify his

⁴³ BBO Rules § 3.7(c).

⁴⁴ BBO Rules § 3.2.

⁴⁵ SJC Rule 4:01 § 3(2).

⁴⁶ BBO Rules §§ 3.30, 4.5(d).

⁴⁷ BBO Rules § 3.28.

⁴⁸ BBO Rules § 3.29.

⁴⁹ *Id.*

⁵⁰ BBO Rules § 3.40.

or her identity. The transcripts are part of the record.⁵¹ A respondent may obtain a copy of the transcript from the court reporter for a fee.⁵²

21. **Evidence submitted after the hearing ends.** Before the close of a hearing, the hearing committee, panel, or SHO can, in its discretion, agree to accept additional evidence at a later date, but no later than than ten days before the filing and service of the posthearing 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 BBO, at its discretion.⁵⁴
22. **Posthearing submissions.** Within thirty days after receiving the last hearing transcript, the parties must file their briefs and proposed findings of facts and requests for conclusions of law (together referred to as the PFCs).⁵⁵ The preferred PFC format is similar to the statement of facts in 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. PFCs, factors in aggravation and mitigation, and sanctions should cite supporting case law. BBO Rules § 3.44 sets forth the specific requirements for the content and format of the PFCs.
23. **Hearing report filed.** 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 recommended sanction. The committee, the panel, or the SHO exercise authority as an independent fact-finder; the assigned assistant general counsel supports 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 reaches its decisions, the assistant general counsel prepares a draft report for consideration. Once the report is finalized, it is filed with the BBO, served on the parties, and becomes

⁵¹ BBO Rules §§ 3.33, 3.36.

⁵² BBO Rules § 3.35.

⁵³ BBO Rules § 3.31.

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

⁵⁵ BBO Rules § 3.43.

part of the record.⁵⁶ The contents of the report are specified by BBO Rules § 3.47.

24. **BBO reviews the hearing report (with no appeal).** While either party may appeal the findings, conclusions, or sanction recommendation, the BBO automatically reviews the hearing report even without an appeal. If the BBO makes a preliminary determination not to affirm some or all of the hearing committee, hearing panel, or SHO decisions, it gives the parties appropriate notice and an opportunity to file briefs. The BBO may then proceed to take such action as it could have taken had an appeal been filed.⁵⁷
25. **BBO reviews 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 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 BBO permission. A party who does not file a brief on appeal is deemed to have waived all objections. The BBO may extend these deadlines.⁵⁸ Section 3.51 of the BBO Rules specifies the contents and form of the brief. Oral argument is granted only if requested, and a party who does not file a brief waives its right to request oral argument.⁵⁹

On appeal, the BBO reviews 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 BBO 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 BBO may adopt or modify the recommendation of the hearing committee, hearing panel, or SHO. Whenever the

⁵⁶ BBO Rules §§ 3.46, 3.48, 3.49.

⁵⁷ BBO Rules § 3.52.

⁵⁸ BBO Rules § 3.50(a).

⁵⁹ BBO Rules §§ 3.50(a)–(b).

BBO modifies the findings or recommendations, it must state its reasons in its vote or in a separate memorandum.⁶⁰

The BBO may decide to conclude the proceedings with an admonition (which is private) or with a public reprimand of the respondent. If so, the BBO 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 BBO and the OBC 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 that has been concluded by admonition, the BBO or the OBC may disclose that an admonition was imposed.⁶² The admonition is also subject to limited disclosure under SJC 4:01 § 20(2).

26. **Further proceedings: appealing a dismissal, admonition, or public reprimand.** If either the respondent or the OBC does not accept the BBO's determination to conclude a matter by dismissal, admonition, or public reprimand, the aggrieved party can demand that the BBO file an Information with the Court. The demand must be in writing and filed with the BBO within twenty days after the date of service of the BBO's vote and memorandum. This time limit cannot be extended.⁶³
27. **Further proceedings: the BBO recommends suspension or disbarment.** Only the Court can suspend or disbar a lawyer. Therefore, if the BBO decides to conclude the matter with suspension or disbarment (or if the respondent or the OBC files a written demand for the filing of an Information; see the preceding paragraph), the BBO files an Information in the single justice session of the Court (called the Supreme Judicial Court for Suffolk County), together with the entire record of its proceedings.⁶⁴
28. **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, before rendering a decision,

⁶⁰ BBO Rules § 3.53; SJC Rule 4:01 § 8(5).

⁶¹ BBO Rules § 3.56(a).

⁶² BBO Rules § 3.56(c); SJC Rule 4:01 § 8(5).

⁶³ BBO Rules § 3.57(a).

⁶⁴ BBO Rules § 3.58; SJC Rule 4:01 § 8(6).

the single justice schedules a hearing where the OBC and the respondent appear and argue. Alternatively, the single justice may remand the matter to the BBO or report it to the full bench. The subsidiary facts the BBO found, and contained in its report filed with the Information, must be upheld if supported by substantial evidence.⁶⁵

29. **Appealing the single justice decision.** Appealing the decision of a single justice in a bar discipline case proceeds under SJC 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 BBO 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 full Court may direct the appeal to proceed in the regular course, in which case the parties are permitted to file full briefs in conformance with the Rules of Appellate Procedure and the case is 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

⁶⁵ SJC Rule 4:01 § 8(6).

⁶⁶ SJC Rule 2:23(a).

⁶⁷ SJC Rule 2:23(b).

⁶⁸ SJC Rule 2:23(c).

without requesting a reply from the appellee to the Rule 2:23 preliminary memorandum.

30. **Resignation.** At any time during the disciplinary process after the OBC has begun an investigation, a lawyer under investigation may resign from the bar by submitting an affidavit of resignation.⁶⁹ Chapter 21, Section II(A) describes the resignation process in more detail. 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
31. **Temporary suspension.** If the OBC learns 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, the OBC can file a petition with the Court for the lawyer’s “immediate suspension” under SJC Rule 4:01 § 12A. The Court then gives notice to the respondent lawyer and schedules a hearing on whether to suspend the lawyer “as protection of the public.” A section 12A temporary suspension does not replace a disciplinary suspension, and the OBC is expected to file a petition for discipline under SJC Rule 4:01 § 8(3) within a reasonable time.⁷¹
32. **Administrative suspension.** If during the course of the OBC’s investigation, a respondent does not (or ceases to) cooperate with the OBC’s investigation, the OBC may, after notice to the lawyer of the consequences of such noncooperation, petition the Court for the respondent’s administrative suspension.⁷² If the respondent thereafter cooperates with the OBC’s investigation, the respondent can file an affidavit of compliance and request reinstatement.⁷³ In addition, the failure to cooperate with the OBC’s investigation can be separate grounds for bar discipline.⁷⁴

⁶⁹ SJC Rule 4:01 § 15; BBO Rules § 4.1.

⁷⁰ SJC Rule 4:01 § 18(2).

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

⁷² SJC Rule 4:01 §§ 3(1), 3(2).

⁷³ SJC Rule 4:01 § 3(3).

⁷⁴ MASS. R. PROF. C. 8.4(g).

33. **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) a 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 under OBC investigation admits to lack of capacity to practice law; or (3) a lawyer under OBC investigation alleges the inability 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 in Chapter 21, the mechanisms depend on whether the OBC or the lawyer disputes the allegation of disability.⁷⁶ Once placed on disability inactive status, a lawyer cannot practice law and, moreover, cannot petition for transfer 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 resume once the lawyer returns to active status.⁷⁸
34. **Petition for reinstatement.** As discussed in more detail in Chapter 23, a lawyer can be suspended from practicing law in Massachusetts anywhere from thirty days to indefinitely (which in Massachusetts means a minimum suspension of five years), to disbarment (which in Massachusetts means a minimum suspension of eight years).⁷⁹ To be reinstated after a suspension depends on the type and length of the suspension.
35. **Reinstatement from a six-month or less suspension.** A lawyer suspended for six months or less can be reinstated without a hearing by filing with the Court and serving upon the OBC an affidavit, the required contents of which are described in more detail in Chapter 23, Section II.⁸⁰

⁷⁵ SJC Rule 4:01 §§ 13(1)–13(3).

⁷⁶ SJC Rule 4:01 § 13(4).

⁷⁷ SJC Rule 4:01 § 13(6).

⁷⁸ SJC Rule 4:01 § 13(4)(f).

⁷⁹ SJC Rule 4:01 § 18.

⁸⁰ SJC Rule 4:01 § 18(1)(a).

36. **Reinstatement from a six-month to a year suspension.** 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

These “automatic reinstatements” come with two caveats under SJC Rule 4:01 § 18(1): First, automatic reinstatement is forfeited if the suspended lawyer fails to file the required affidavit within six months after the suspension period ends.⁸² Second, the Court may require a reinstatement hearing for a suspension of one year or less, a condition that is required for a suspension of more than one year (including an indefinite suspension or disbarment).

37. **Reinstatement from a suspension of more than one year.** A lawyer who has been suspended for more than a year (including 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 suspended for a shorter term, but where the Court required a reinstatement hearing.) SJC Rule 4:01 § 18(4) summarizes the required contents of the petition for reinstatement, which Chapter 23 discusses in more detail. The Court refers reinstatement petitions to the BBO, which convenes a hearing panel of three BBO members to hear the petition. The petitioner bears the burden of proving, by a preponderance of evidence, that he or she possesses (1) the moral qualifications and (2) the competency and learning in law required for admission to practice law in this Commonwealth, as well as (3) that resuming 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 BBO, which then acts upon it and submits its report to the Court. The findings and subsidiary facts the BBO finds are upheld if supported by substantial evidence.⁸³

⁸¹ SJC Rule 4:01 § 18(1)(b).

⁸² SJC Rule 4:01 §§ 18(1)(a)–(d).

⁸³ SJC Rule 4:01 § 18(5).

CHAPTER FOUR

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 (ABA) has published its model *Standards for Imposing Lawyer Sanctions*,¹ the Supreme Judicial Court (SJC) has traditionally not followed the ABA standards but has developed its own sanction standards. Part III, comprising Chapters 7 through 17, discusses various types of lawyer misconduct in more detail 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. Attorney and Consumer Assistance Program Informal Resolution

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

Almost every communication about a lawyer that the OBC receives starts with ACAP, which serves as the OBC's central intake system.² ACAP is staffed

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

² Anne Kaufmann, *Five Years of ACAP* (2004), <https://bbopublic.blob.core.windows.net/web/f/acap5.pdf> (last visited Feb. 7, 2018).

by assistant bar counsel and investigators, who, after receiving 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 the OBC 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 could lead to disciplinary action, ACAP's role ends. If ACAP receives a serious complaint in writing, the matter is opened as a formal complaint within the OBC for further investigation. If ACAP receives a serious complaint by telephone, ACAP sends the complainant a formal complaint form to complete and file.³ In fact, regardless of whether the complainant submits a written statement, if the claim is sufficiently troubling, the OBC investigates the matter.

If the inquiry involves a matter that ACAP can help resolve, ACAP attempts to resolve the complainant's concerns. For example, if the problem is that the lawyer does not respond to the client, ACAP may nudge the attorney with a telephone call to receive a response. Most of the time (although, remarkably, not all of the time), lawyers respond promptly to a phone call from the OBC, even if the lawyer has not been responsive to clients. If a lawyer fails to return a file, for example, ACAP advises the lawyer that Rule 1.16 of the *Massachusetts Rules of Professional Conduct* requires returning the appropriate papers to the client. Many conflicts between lawyers and clients can be resolved this way, and ACAP resolves the vast majority of inquiries it receives without opening a formal complaint.⁴ If ACAP resolves a matter, the lawyer avoids any formal complaint related to the matter (but the OBC maintains a record of the interaction for future reference). Chapter 5 discusses the ACAP process in more detail.

B. Dismissal

If ACAP does not resolve an inquiry, the OBC opens and docketed a complaint. Many complaints that the OBC opens and investigates result in closing

³ ACAP, https://www.massbbo.org/Who_We_Are_OBC_ACAP#OBC (last visited March 11, 2018) (“A complaint form will be sent immediately [to the person who has complained about the lawyer] where serious unethical conduct may be involved.”).

⁴ MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2015 [hereinafter BAR COUNSEL 2015 ANNUAL REPORT] at 3 (“ACAP resolved more than 91% of inquiries without referral for investigation” in fiscal year 2015).

the matter with no discipline, either public or private. The OBC will dismiss a complaint if it concludes it has no merit. For instance, a dissatisfied client may complain that the lawyer acted too slowly, obtained a bad result, or charged too much. On reviewing the facts alleged, the OBC may conclude that, despite the client's sincere feelings, the lawyer violated no rule. Other times, the OBC dismisses a complaint because the Board of Bar Overseers (BBO) lacks jurisdiction (for instance, disputes about whether a fee is owed) or because the matter is too old.⁵

Other times, the OBC closes or dismisses a complaint that alleges the lawyer violated a rule of professional conduct, but which the OBC concludes should be resolved in a different forum, at least at first. 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, the OBC may close the matter without filing charges and without extensive investigation if it appears that the trial judge is better suited to monitor and address the alleged misconduct. The OBC may, however, advise the complainant to notify the OBC if the court finds attorney misconduct.

A complainant has the right to request that the BBO review the OBC's decision to close a matter with no formal charge or resolution.⁶ If the BBO receives such a review request, the OBC makes the file available to a BBO member for examination. The attorney who conducted the investigation and made the recommendation to close the file is also available for further questions. Complainant requests for this kind of review are not uncommon, and while it is rare for a BBO member to reverse the OBC's decision not to pursue a matter, it does occasionally happen.⁷ If the BBO member upholds the decision to close the matter, the complainant has no further right to challenge the decision.⁸

In many instances, the OBC dismisses an inquiry that otherwise may have some merit after the complainant's concerns have been informally resolved. Cases may also be closed as a result of an agreement between the OBC and the lawyer

⁵ See RULES OF THE BOARD OF BAR OVERSEERS § 2.1(b)(1) [hereinafter BBO Rules] ("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).

⁶ See BBO Rules § 2.8(a)(1).

⁷ See BAR COUNSEL 2015 ANNUAL REPORT, *supra* note 4, at 5 (OBC declined to open an investigation in 210 complaints filed in fiscal year 2015; 79 of those complainants sought BBO review; the reviewing BBO member confirmed the OBC's decision in all of those reviews).

⁸ See *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.").

as to remedial measures. This process is known as diversion and is discussed in the following section.

C. Diversion / Probation

For matters involving comparatively minor misconduct that might otherwise warrant discipline, the OBC may determine that the attorney is best suited for its Diversion Program. According to the OBC'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.⁹

The Diversion Program may refer the attorney to a lawyer assistance program, such as Lawyers Concerned for Lawyers (LCL),¹⁰ the Massachusetts Law Office Management Assistance Program (LOMAP),¹¹ or the OBC's monthly program on maintaining client trust accounts. Lawyers may also be referred to other forms of support, including trust account monitoring or psychological help. The attorney and the OBC enter into a written agreement containing the stipulated facts and the terms of the diversion, and the OBC 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, the OBC may reopen the disciplinary matter and pursue formal discipline. In such cases, the alleged violations, but not the facts of what occurred, would be at issue. Chapter 2 discusses the LCL and LOMAP in more detail.

⁹ Board of Bar Overseers, *Diversion Program Policy Statement*, <https://bbopublic.blob.core.windows.net/web/f/divpolicy.pdf> (last visited March 16, 2018).

¹⁰ See LAWYERS CONCERNED FOR LAWYERS, <http://www.lclma.org/> (last visited Feb. 7, 2018). As described on that website, the 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."

¹¹ See LAW OFFICE MANAGEMENT ASSISTANCE PROJECT, <http://masslomap.org/> (last visited Feb. 7, 2018). LOMAP, which is part of the 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."

Separate from the Diversion Program, the SJC and the BBO can also put the lawyer on probation, such as with a stayed suspension, in lieu of removing an attorney from practice.¹² Section F(3) discusses stayed suspensions in more detail.

D. Admonition

If ACAP or the Diversion Program does not resolve the complaint against a lawyer, or the complaint is not appropriate for them, the OBC 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.”¹³ It results when the lawyer has committed misconduct that violates the *Massachusetts Rules of Professional Conduct*, but causes little or no harm and otherwise does not evidence bad faith on the part of the respondent.

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 BBO as an aggravating factor in determining discipline for an unrelated later offense, the OBC may still take it into account in making future prosecutorial decisions.

* * *

Any discipline, including a nonpublic admonition, likely must be disclosed to the lawyer’s insurance carrier. If not, the lawyer’s policy may not cover any future incidents. All discipline must also be disclosed to any jurisdiction where the attorney is licensed to practice.

Summaries of admonitions are published in the *Massachusetts Disciplinary Reports* (the published volumes containing all reported disciplinary matters, organized by year) and on the BBO website, but do not identify the respondent by

¹² See, e.g., Matter of Rosencranz, 27 Mass. Att’y Disc. R. 754 (2011) (cooperation with the LCL); Matter of Betts, 26 Mass. Att’y Disc. R. 44 (2010) (twelve-month suspension, six months stayed, with conditions including abstinence from drugs and alcohol and reports from the LCL). See also Matter of O’Neill, 30 Mass. Att’y Disc. R. 289 (2014) (rejecting a proposed stayed suspension).

¹³ ABA STANDARDS *supra* note 1, at § 2.6.

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 annulled and the complaint dismissed.¹⁴ While the admonition is in effect, it serves as an aggravating factor should the lawyer face later disciplinary proceedings. When applying for or renewing a professional liability policy, the lawyer will likely have to report the admonition to the insurance company. In addition, the admonition may need to be reported to any other jurisdiction in which the lawyer is licensed to practice and possibly to any court to which the lawyer seeks *pro hac vice* status (practicing temporarily in a state in which the lawyer is not licensed).¹⁵

Examples of Admonition Sanction Standards

Neglecting a client matter: An admonition is generally appropriate when the lawyer fails to act with reasonable diligence in representing a client or otherwise neglects a legal matter, and the lawyer's misconduct causes little or no actual or potential injury to the client.¹⁶

Mishandling client funds: An admonition is given if the lawyer 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.¹⁷

Conflicts of interest: An admonition is given if the lawyer engages in a conflict of interest not motivated by self-interest and causing little to no harm to the affected client or clients.¹⁸

¹⁴ BBO Rules § 4.3(a).

¹⁵ 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.

¹⁶ *Matter of Kane*, 13 Mass. Att'y Disc. R. 321 (1997).

¹⁷ "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, 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).

¹⁸ *Matter of 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).

Admonitions are a 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 twenty-six lawyers in fiscal year 2015,¹⁹ twenty-two lawyers in fiscal year 2014,²⁰ and nineteen lawyers in fiscal year 2013.²¹

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:

1. First, and most widely noticed, the BBO publishes in the state’s leading legal newspaper, the *Massachusetts Lawyers Weekly*, the lawyer’s name along with the full BBO report describing the misconduct the lawyer committed and the BBO’s reason for imposing the sanction. Many lawyers read this newspaper regularly, so the discipline is likely to become known within the attorney’s professional community.
2. 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 website, and in the hard copy of the *Massachusetts Attorney Discipline Reports*. It is also distributed to newspapers, including the lawyer’s hometown daily or weekly.
3. Finally, the discipline becomes part of the BBO’s public record of the attorney and appears in the lawyer’s information on the BBO website.

The difference to a lawyer’s practice between an admonition and a public reprimand can be significant. Only the OBC, the BBO, the client, and the lawyer

¹⁹ BAR COUNSEL 2015 ANNUAL REPORT, *supra* note 4, at 15.

²⁰ MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2014, at 15 [hereinafter “BAR COUNSEL 2014 ANNUAL REPORT”].

²¹ MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2013, at 15 [hereinafter “BAR COUNSEL 2013 ANNUAL REPORT”].

²² ABA STANDARDS, *supra* note 1, at § 2.5.

Practice Tip

The BBO website includes a lawyer's history of public discipline, regardless of when imposed, with disciplinary reports since 1999.

Examples of Public Reprimand Sanction Standards

Neglecting a client matter: A public reprimand is generally appropriate when a lawyer fails to act with reasonable diligence in representing a client or otherwise neglects a legal matter, and the lawyer's misconduct causes serious injury or potentially serious injury to a client.²³

Mishandling client funds: A public reprimand is given if the lawyer 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 the OBC.²⁴

Conflict of interest entailing some risk of harm: A public reprimand is given if the lawyer engages in an obvious conflict of interest that risks some harm to a client or clients, but does not cause substantial harm.²⁵

²³ *Kane*, 13 Mass. Att'y Disc. R. at 327–28.

²⁴ "Unintentional, careless use of clients' funds should be disciplined by public censure." *Schoepfer*, 426 Mass. 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).

²⁵ *See Matter of Carnahan*, 449 Mass. 1003, 1004–05 (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).

know the identity of the lawyer who receives a private admonition, so the lawyer's practice may proceed without disruption after an admonition.²⁶ The public reprimand, while probably unknown to clients, will become known in the lawyer's working community and may cause the lawyer considerable embarrassment or injure the lawyer's professional reputation. As with admonitions, the fact that a lawyer has received a reprimand likely must be reported to the lawyer's insurance carrier as well as to other bars or courts in which the lawyer is admitted or seeks admission. It is, therefore, a 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, 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.²⁷ The BBO imposed public reprimands on sixteen lawyers in fiscal year 2015,²⁸ eighteen lawyers in fiscal year 2014,²⁹ and thirty-two lawyers in fiscal year 2013.³⁰

F. Suspension

1. *Suspensions Generally*

When a lawyer has committed serious misconduct, with significant actual or potential harm to others, the SJC may suspend the lawyer from practice for a specified period of time, or even indefinitely (equal to a five-year minimum loss of license); this is the most serious sanction short of disbarment. While the BBO may recommend suspending a lawyer, only the SJC may impose this sanction. A suspension removes the lawyer from the practice of law but permits the attorney to resume practice after the suspension ends and the SJC reinstates the lawyer.³¹

²⁶ If the bar counsel commences a public proceeding against a lawyer and that proceeding results in an admonition, the bar counsel will "claw back" and eliminate any public references to the lawyer's name and the proceedings beyond the admonition report.

²⁷ Between 1999 and 2013, more than 290 lawyers received public reprimands in Massachusetts, according to a Westlaw search.

²⁸ BAR COUNSEL 2015 ANNUAL REPORT, *supra* note 4, at 15.

²⁹ BAR COUNSEL 2014 ANNUAL REPORT, *supra* note 20, at 15.

³⁰ BAR COUNSEL 2013 ANNUAL REPORT, *supra* note 21, at 15.

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

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 thirty days.³² The SJC has occasionally imposed suspensions longer than three years and, as noted earlier, the SJC has often suspended lawyers indefinitely, that is, for the minimum five years.³³

The following subsections discuss and compare several discrete types of suspensions. All suspensions, though, regardless of type, share certain qualities and 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 suspension's effective date. This aspect of the 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 SJC enters the order, the lawyer must, within fourteen days, complete all of the steps necessary to cease practice, including closing Interest on Lawyers Trust Accounts (IOLTA) and other trust accounts and returning fee advances. Seven days later, which means within twenty-one days after the order has been entered, the lawyer must file with the OBC an affidavit certifying completion of the steps necessary to suspend practice. Most suspensions take effect within thirty days after the SJC order imposing the sanction, so the lawyer has a short time in which to notify clients, arrange for replacement counsel, and wrap up all active matters.³⁵

At the end of the suspension, the lawyer may seek reinstatement. As described in the following pages, sometimes the reinstatement is without a hearing, unless the OBC objects; in other instances it requires a petition and proceedings before the BBO, along with SJC approval.

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, *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 SJC Rule 4:01 § 17.

³⁵ A lawyer subject to a temporary suspension, which is an interim suspension pending the completion of disciplinary proceedings, must accomplish the steps within fourteen days. Section F(5) discusses temporary suspensions in more detail.)

During the suspension period, 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 another jurisdiction, given the prevalence of reciprocal discipline, the lawyer's license in the other state may well be affected by the Massachusetts suspension. (Chapter 20 discusses reciprocal discipline in more detail.) The suspended lawyer may not work as a paralegal or legal assistant during the suspension period and may not be hired *in any capacity* by, or volunteer for, a lawyer or a law firm, absent leave of the SJC.³⁶ Therefore, a suspended lawyer cannot even work as a receptionist, secretary, or custodian in a law office or for a lawyer.³⁷

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 and affects the reinstatement process for the suspended lawyer. According to SJC Rule 4:01 § 18, the Massachusetts reinstatement guidelines operate as follows:

- *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”³⁸ by filing an affidavit with the SJC and the OBC 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 is reinstated automatically ten days after filing the affidavit, unless the OBC files an objection with the SJC. If the OBC files such an objection, the Court holds a hearing, typically before a single justice, to determine whether a formal petition for reinstatement and an accompanying hearing is necessary.³⁹ If the lawyer fails to submit the affidavit

³⁶ SJC 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.

³⁷ Depending on the circumstances, a lawyer might be permitted to perform the duties of a mediator during the suspension period. *See* Matter of Bott, 462 Mass. 430, 439 (2012) (mediation sometimes qualifies as practicing law).

³⁸ SJC Rule 4:01 § 18(1)(a).

³⁹ *Id.* at § 18(1)(c).

within six months of the end of the suspension, the lawyer 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."⁴⁰ If the lawyer's suspension is more than six months but less than one year and one day, the lawyer can be reinstated only after successfully completing the Multi-State Professional Responsibility Examination (MPRE), which is administered by the Law School Admission Council on behalf of the National Conference of Bar Examiners every April, August, and November.⁴¹ Successful completion of the MPRE is defined in the Commonwealth as obtaining a score of eighty-five or more.⁴² The lawyer must file the same affidavit as described in the previous paragraph with the SJC and the OBC in addition to successfully completing the MPRE.⁴³ The same procedures apply to submitting the affidavit and the automatic reinstatement as described in the previous guideline. Because of this added requirement, some disciplinary dispositions deliberately add one day to a six-month suspension to require that the respondent pass the MPRE.⁴⁴

⁴⁰ Matter of Donaldson, 27 Mass. Att'y Disc. R. 221, 227 (2011).

⁴¹ SJC Rule 4:01 § 18(1)(b).

⁴² See Board of Bar Examiners, *Petition for Admission to the Massachusetts Bar by Transfer of Uniform Bar Examination Score*, <https://www.mass.gov/how-to/petition-for-admission-to-the-massachusetts-bar-by-transfer-of-uniform-bar-examination-score> (last visited March 15, 2018).

⁴³ SJC Rule 4:01 § 18(1)(b). It is worth noting that prior to January 2000, suspensions longer than six months required a petition for reinstatement. Section 18 of SJC 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."

⁴⁴ 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 nonlawyer employee, commingling of trust account, and false statements to insurance adjuster; suspension for six months and one day imposed).

Practice Tip

Because the MPRE is offered only three times per year, a lawyer must 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 the OBC for an extension in which to apply for automatic reinstatement.

- *More than one year:* A lawyer suspended for more than one year must petition the SJC for reinstatement, and the BBO conducts a hearing on the petition. The lawyer may not submit the petition earlier than three months prior to the suspension expiration date. The petition must include assertions similar to those described in the previous guidelines for the affidavits required for automatic reinstatements, including completing the MPRE. Chapter 23 provides a full description of the reinstatement process. Because of this significant additional requirement, many disciplinary decisions add one day to a one-year suspension, triggering the reinstatement petition process.⁴⁵

The year-and-a-day suspension has a very clear message. It indicates the Court's view that the lawyer needs to prove sufficient trustworthiness and knowledge to resume the practice of law. Two suspension reports exemplify the BBO's and the Court's use of this sanction. In *Matter of Hopwood*,⁴⁶ despite numerous violations, including a failure to cooperate with the OBC, 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

⁴⁵ 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 the OBC; respondent's ultimate cooperation with the OBC persuades single justice to allow respondent to petition for reinstatement three months prior to the expiration of the 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 the OBC, yields suspension for a year and a day with the 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").

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

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*,⁴⁷ the single justice accepted the BBO’s recommended discipline of an attorney who negligently 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”⁴⁸

Recap of the Reinstatement Requirements

Suspensions of six months or less: Reinstatement effectively automatic, unless the OBC objects to affidavit.

Suspensions of six months to one year: Reinstatement effectively automatic, if the attorney confirms successful completion of the MPRE, unless the OBC objects to the affidavit.

Suspensions of more than one year: Reinstatement requires successfully completing the MPRE, a petition to the SJC, and a BBO hearing.

Every term suspension longer than one year requires the filing of a reinstatement petition. For more serious misconduct, lawyers may receive lengthy term suspensions, including two or three years. The longest suspension term in the disciplinary reports is four years,⁴⁹ although this is rare.

In addition to the reinstatement provisions in SJC Rule 4:01, the SJC sometimes requires an attorney to petition for reinstatement even though the suspension is shorter than one year and one day. For instance, in *Matter of Kolofolias*,⁵⁰ the respondent, while on disability inactive status, engaged in paralegal work without the Court’s permission. The parties’ stipulation provided for a suspension of six months and one day, but the single justice required that reinstatement be

⁴⁷ 28 Mass. Att’y Disc. R. 712 (2012).

⁴⁸ 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 the year-and-one-day suspension. *Matter of Pudlo*, 31 Mass. Att’y Disc. R. 537 (2015).

⁴⁹ 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).

⁵⁰ 25 Mass. Att’y Disc. R. 334, 335 (2009).

Practice Tip

A lawyer may, and typically will, file a petition for reinstatement three months before the suspension expires. Even with that advance filing, a term suspension of 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.

subject to a formal petition proceeding. In *Matter of Krabbenhoft*,⁵¹ for misconduct including neglect, intentional misrepresentation to a client, failure to cooperate with the OBC, 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*,⁵² the respondent was suspended for six months for misconduct in two matters, including misrepresentations to the client, but was required to petition for reinstatement.

The SJC occasionally imposes other conditions that a lawyer must meet before reinstatement. For instance, in *Matter of Johnson*,⁵³ the respondent received a three-month suspension for lack of diligent and competent representation. The reinstatement was conditioned on attending the Massachusetts Continuing Legal Education (MCLE) program *How to Make Money and Stay Out of Trouble*, maintaining legal malpractice insurance for at least two years after reinstatement, and undergoing an evaluation at LOMAP.

The SJC imposed a term suspension on forty-five lawyers in fiscal year 2016,⁵⁴ thirty-five lawyers in fiscal year 2015,⁵⁵ and forty-four lawyers in fiscal year 2014.⁵⁶ In each year, term suspension was the most common form of discipline imposed.

⁵¹ 23 Mass. Att’y Disc. R. 362, 383 (2007).

⁵² 20 Mass. Att’y Disc. R. 27, 39 (2004).

⁵³ 26 Mass. Att’y Disc. R. 276 (2010).

⁵⁴ MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2016, at 14 [hereinafter BAR COUNSEL 2016 ANNUAL REPORT].

⁵⁵ BAR COUNSEL 2015 ANNUAL REPORT, *supra* note 4, at 15

⁵⁶ BAR COUNSEL 2014 ANNUAL REPORT, *supra* note 20, at 15.

Examples of Term Suspension Sanction Standards

Neglecting a client matter: A “term suspension is appropriate for a pattern of neglect resulting in serious harm.”⁵⁷

Mishandling client funds: “The intentional use of clients’ funds normally calls for ‘a term suspension of appropriate length.’”⁵⁸

Presenting false testimony: A term suspension of twenty-seven months was appropriate for misconduct that included the attorney’s making “false statements under oath to one or more courts.”⁵⁹

3. Stayed Suspensions

In recent years, the disciplinary reports have shown an increase in an unusual form of discipline—a term suspension whose term is stayed. In this type of suspension, the lawyer does not lose the right to practice, or loses that right for a shorter period than the suspension term would have indicated, and it is akin to a suspended sentence in criminal law. Two examples demonstrate how the “stayed suspensions” work. In *Matter of Kydd*,⁶⁰ the lawyer was disciplined for lack of competence and failure to cooperate with the OBC. The single justice imposed a three-month suspension, with conditions, but stayed the ban on the lawyer’s practice for one year. The effect was that the lawyer had to comply with the imposed conditions for a period of a year. If the lawyer did so, the “suspension” would be over, with no interruption in the law practice. If the lawyer did not comply with the conditions, the three-month suspension would go into effect. 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 appropriately sanctioned by a public reprimand.”

⁵⁷ *Matter of Espinosa*, 28 Mass. Att’y Disc. R. 307 (2012) (citing *Matter of Kane*, 13 Mass. Att’y Disc. R. 321 (1997)).

⁵⁸ *Matter of Schoepfer*, 426 Mass. 183, 187 (1997) (quoting *Matter of the Discipline of an Attorney*, 392 Mass. 827, 836 (1984)).

⁵⁹ *Matter of Diviacchi*, 475 Mass. 1013, 1020 (2016).

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

mand.”⁶¹ 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*, in which the lawyer was convicted of engaging in domestic violence and violating abuse-prevention orders.⁶² The BBO recommended a six-month suspension, which was 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].”⁶³ 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: any material breach of the probation terms would result, in addition to a full six-month suspension, in surrendering the right to the automatic reinstatement that accompanies a six-month suspension under SJC Rule 4:01.

Most of the disciplinary reports involving suspension where the SJC refers the lawyer to LOMAP have been stayed suspensions, with LOMAP referral serving as a condition of probation.⁶⁴

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.⁶⁵

⁶¹ *Id.* at 345.

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

⁶³ *Id.* at 364.

⁶⁴ *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).

⁶⁵ In *Matter of O’Neill*, 30 Mass. Att’y Disc. R. 289 (2014) (Board Memorandum), the BBO 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.)

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 lasts a minimum of five years, as this subsection discusses. At least a hundred Massachusetts lawyers received indefinite suspensions between 1999 and 2017.⁶⁶

Indefinite suspension is an apparent effort to impose serious discipline but without disbarment. For example, while the SJC has not articulated an accepted 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.⁶⁷ 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.”⁶⁸ Several reports applying the *Schoepfer* standard result in an indefinite suspension instead of 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*⁶⁹ and *Matter of Ragan*⁷⁰ the respondent lawyer in each case misused client funds, had prior discipline for that misconduct, and made restitution. Each lawyer received an indefinite suspension.

Practice Tip

Because the BBO 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.

⁶⁶ Westlaw search, February 4, 2017.

⁶⁷ 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).

⁶⁸ *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 (1991) (explaining the difference between the two sanctions).

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

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

Some of the reports involving an indefinite suspension result from reciprocal discipline, discussed in more detail in Chapter 20. 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.⁷¹

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.”⁷²

Examples of Indefinite Suspension Sanction Standards

Mishandling client funds: The accepted 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.”⁷³ Indefinite suspension typically occurs when restitution has been made, and disbarment when it has not. 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.⁷⁴

The SJC imposed indefinite suspensions on eight lawyers in fiscal year 2016,⁷⁵ seven lawyers in fiscal year 2015,⁷⁶ and four lawyers in fiscal year 2014.⁷⁷ In each such year, the indefinite suspension was the least frequent form of discipline imposed.

⁷¹ 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).

⁷² SJC Rule 4:01 § 18(2)(b).

⁷³ *Matter of Schoepfer*, 426 Mass. 183, 187 (1997) (citing *Matter of the Discipline of an Attorney*, 392 Mass. 827, 836 (1984)).

⁷⁴ 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. 221 (2015) (real estate fraud).

⁷⁵ BAR COUNSEL 2016 ANNUAL REPORT, *supra* note 54, at 14.

⁷⁶ BAR COUNSEL 2015 ANNUAL REPORT, *supra* note 4, at 15.

⁷⁷ BAR COUNSEL 2014 ANNUAL REPORT, *supra* note 20, at 15.

5. *Temporary Suspensions*

SJC Rule 4:01 refers several times to the concept of a “temporary suspension,”⁷⁸ even though the rule does not define the term. BBO 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”⁷⁹ Under section 12A, if the OBC 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 current or forthcoming OBC disciplinary proceeding against the lawyer.⁸⁰ 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.”⁸¹

The SJC has concluded that, at the hearing on the order to show cause, the standard is essentially the same as that applicable to the issuance of a preliminary injunction, with protecting the public interest replacing the concept of irreparable harm.⁸² Unlike all other forms of suspension, which usually take effect thirty days after the order is entered, the temporary suspension takes effect immediately.⁸³ However, as with all other suspensions, once the order is entered, the lawyer has fourteen days to provide the requisite notices to clients and others, as described in Section II(F)(1), “Suspensions Generally,” and to resign or withdraw from appointments.⁸⁴ The temporary suspension typically remains in effect until the disciplinary process arrives at some other conclusion or produces a different order.⁸⁵

In addition to this process, upon conviction of a “serious” crime, a lawyer must show cause why a temporary suspension should not be ordered. In that instance, the OBC need not show threat of substantial harm to clients or that the lawyer’s whereabouts are unknown.⁸⁶

⁷⁸ See, e.g., SJC Rule 4:01 §§ 17(1)–17(6).

⁷⁹ SJC Rule 4:01 § 12A.

⁸⁰ *Matter of Kenney*, 399 Mass. 431, 437 (1987).

⁸¹ SJC Rule 4:01 § 12A.

⁸² *Matter of Ellis*, 425 Mass. 332, 13 Mass. Att’y Disc. R. 181 (1997) (referring to a § 12A suspension as a “temporary suspension”).

⁸³ SJC Rule 4:01 § 17(3).

⁸⁴ SJC Rule 4:01 § 17(1).

⁸⁵ 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 was complete.

⁸⁶ SJC Rule 4:01 § 12.

Practice Tips

An indictment on felony charges may serve as a factor demonstrating that a lawyer “poses a threat of substantial harm to clients or potential clients.”⁸⁷

* * *

In some instances, accepting a temporary suspension serves a respondent’s interests, especially if the lawyer is not practicing law at the time. If the lawyer ultimately receives a term suspension for the misconduct the OBC is investigating, that term begins running at the time the temporary suspension is imposed, assuming full compliance with the terms of suspension, including filing an affidavit of compliance with the Court and the OBC. Therefore, the time the OBC spent obtaining the term suspension “counts” 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 in the previous subsection, is an “administrative suspension.” This sanction is 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 a hearing. It can arise in two contexts.

First, and most commonly, the BBO seeks administrative suspension of a lawyer who fails to pay bar registration fees and complete registration duties in a given year. The BBO requires every registered lawyer to complete an annual registration statement and pay a registration fee by an identified deadline. Failure to pay results in a note that a late fee will be assessed after fifteen days. Lawyers who still fail to pay are notified that nonpayment will lead to a petition for suspension being filed.⁸⁸ The BBO then files a petition for administrative suspension with the SJC based on the lawyer’s failure to register or 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 practicing law.

⁸⁷ Matter of Ellis, 425 Mass. 332, 13 Mass. Att’y Disc. R. 181 (1997).

⁸⁸ SJC Rule 4:03 § 2.

Practice Tip

Many administrative suspensions for failure to register occur because the lawyer fails to notify the BBO's registration department of office or e-mail address changes and thus fails to receive notice to register. The BBO notifies the OBC of the administratively suspended lawyer's request for reinstatement, in case the OBC 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 continued to practice because he or she was unaware of the suspension, reinstatement is more easily obtained.

Second, the OBC seeks an administrative suspension when a lawyer fails to cooperate with an OBC investigation. Under SJC Rule 4:01 § 3, failure to comply with a validly issued subpoena, to respond to the OBC's or BBO's requests for information made in the course of processing a complaint for discipline, or to file an answer in such a proceeding or appear at a hearing before a hearing committee will result in the OBC's seeking an administrative suspension as described in the previous subsection.

Both forms of administrative suspension require the lawyer to cease practicing law, but an administrative suspension does not immediately require a lawyer to close shop. An OBC 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.⁸⁹

⁸⁹ Roger Geller & Susan Strauss Weisberg, *Dues and Don'ts* (2002), <https://bbopublic.blob.core.windows.net/web/f/dues.pdf> (last visited March 16, 2018).

A lawyer who has been administratively suspended must therefore cease practice immediately, but need not formally withdraw appearances or terminate any client relationships unless the administrative suspension lasts at least thirty days. Obviously, the lawyer must scramble to find coverage for any active matters that require legal attention during the suspension. As with any other suspended lawyer, the administratively suspended lawyer may not practice as a legal assistant or paralegal without leave of the Court.⁹⁰

How the administrative suspension ends depends 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 reinstatement fee. An affidavit must be filed with the BBO explaining compliance with the obligations the lawyer failed to meet that led to the suspension.⁹¹ 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 BBO 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 the OBC for investigation of unauthorized practice while suspended or other issues the suspension and reinstatement raised.

If the administrative suspension resulted instead from a failure to cooperate with the OBC'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 how well the lawyer cooperates.

As discussed in Chapters 14 and 22, many lawyers find themselves in even more serious trouble if they continue to practice after administrative suspension.

G. Disbarment

The most serious discipline is disbarment, imposed when the misconduct is so grave that the lawyer forfeits the privilege to practice law in Massachusetts for a minimum of eight years. As with suspensions, the SJC imposes disbarment, not the BBO. Unlike other states,⁹² Massachusetts's disciplinary process does not

⁹⁰ SJC Rule 4:01 §§ 17(7), 18(3). Because an attorney may not request leave of the 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.

⁹¹ SJC Rule 4:03 § 3. In 2017, the late fee was \$50 and the reinstatement fee was \$100.

⁹² *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").

provide for permanent disbarment.⁹³ In Massachusetts, SJC Rule 4:01 permits a disbarred attorney to apply for reinstatement eight years after the disbarment order.⁹⁴ (The disbarred lawyer may submit an application for reinstatement three months before the end of the eight-year limit.⁹⁵) The procedures previously described for implementing a 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 thirty days from the date of the SJC's ruling, and the lawyer must complete all requirements within fourteen days after the order date. Within seven days thereafter, the disbarred lawyer must file an affidavit with the BBO describing the steps taken to close the law practice.⁹⁶

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 disbarment.⁹⁷ 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.’”⁹⁸ 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.⁹⁹ Disbarment is the recognized sanction for conviction of a serious crime within the practice of law.¹⁰⁰ Chapter 23 discusses the standards and procedures governing reinstatement.

At least 175 Massachusetts lawyers have been disbarred between 1999 and 2017, not counting the many lawyers who resigned in the face of possible dis-

⁹³ *Matter of Hiss*, 368 Mass. 447, 1 Mass. Att'y Disc. R. 122 (1975).

⁹⁴ SJC Rule 4:01 § 18(2)(a).

⁹⁵ *Id.*

⁹⁶ SJC Rule 4:01 § 17.

⁹⁷ *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 the OBC, and his misuse of client funds, warranted disbarment).

⁹⁸ *Matter of McBride*, 449 Mass. 154, 163 (2007) (quoting *Matter of Schoepfer*, 426 Mass. 183, 187 (1997)).

⁹⁹ *See, e.g., Matter of Dasent*, 446 Mass. 1010, 1012–13, 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).

¹⁰⁰ *Matter of Otis*, 438 Mass. 1016, 1017, 19 Mass. Att'y Disc. R. 344 (2003); *Matter of Concemi*, 422 Mass. 326, 330, 12 Mass. Att'y Disc. R. 63, 69 (1996).

barment. The SJC disbarred twenty-three lawyers in fiscal year 2016,¹⁰¹ fifteen lawyers in fiscal year 2015,¹⁰² and nineteen lawyers in fiscal year 2014,¹⁰³ including lawyers disbarred after submitting disciplinary resignations.

Examples of Disbarment Sanction Standards

Neglecting a client matter: Even the most severe neglect of client matters does not result in disbarment. Significant neglect combined with other misconduct may result in disbarment.¹⁰⁴

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.’”¹⁰⁵ The SJC imposes disbarment when restitution has not been made or where other violations or aggravating factors are present.¹⁰⁶

Conviction of a “serious crime”: “Disbarment is the ‘usual and presumptive sanction’ for conviction of a serious crime.”¹⁰⁷ A “serious crime” is defined in SJC Rule 4:01 § 12(3).

H. Disciplinary Resignation

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

¹⁰¹ BAR COUNSEL 2016 ANNUAL REPORT, *supra* note 54, at 14.

¹⁰² BAR COUNSEL 2015 ANNUAL REPORT, *supra* note 4, at 15.

¹⁰³ BAR COUNSEL 2014 ANNUAL REPORT, *supra* note 20, at 15.

¹⁰⁴ *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 the OBC, and his misuse of client funds, warranted disbarment).

¹⁰⁵ Matter of McBride, 449 Mass. 154, 163 (2007) (quoting Matter of Schoepfer, 426 Mass. 183, 187 (1997)).

¹⁰⁶ *See, e.g.*, Matter of Dasent, 446 Mass. 1010, 1012–13, 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).

¹⁰⁷ *Otis*, 438 Mass. at 1017 (quoting Matter of Concemi, 422 Mass. 326, 330 (1996)).

1. *Voluntary Resignations*

A lawyer who is in good standing and not the subject of a disciplinary investigation may resign from the practice of law by submitting a request to the BBO. After determining that the resignation is not related to a forthcoming OBC investigation, the BBO forwards the resignation request to the SJC, which will allow it. To become an attorney again after resigning, the former lawyer may have to retake the bar examination and satisfy all other admissions requirements.¹⁰⁸ This kind of “normal, voluntary” resignation has no disciplinary implications whatsoever. It almost never occurs, since most lawyers who no longer wish to practice simply retire, which eliminates the need to retake the bar exam in order to resume practice. To become active again, the retired lawyer pays the fees for the years in retirement.¹⁰⁹

2. *Disciplinary Resignations*

An entirely different process applies if a lawyer is the subject of an OBC investigation, or is in the middle of disciplinary proceedings, and wishes to resign. SJC Rule 4:01 establishes a process for these resignations.¹¹⁰ In order to resign, the lawyer must submit an affidavit to the BBO with several components, including conceding that the resignation is voluntary and not the subject of coercion or duress, as well as a statement that the allegations are warranted, or at least that they can be proven:

¹⁰⁸ The process for a good-standing resignation, as described in an unpublished BBO statement, is 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.

¹⁰⁹ The process for retirement is as follows:

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.

¹¹⁰ SJC Rule 4:01 § 15.

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.¹¹¹

The BBO acts on the affidavit of resignation, after which the matter goes to the SJC. After the Court accepts the resignation, the lawyer may still be disbarred, as an order accepting the resignation and disbarring the lawyer sometimes (but not always) is entered as a result.¹¹² In either event, the lawyer is prohibited from practicing in the same manner as any disbarred attorney and may not seek reinstatement any sooner than if disbarred, that is, for eight years. Still, some lawyers prefer a resignation leading to a disbarment order over an involuntary disbarment order.

Resignation has other advantages for the disciplinary process as a whole. As one single justice wrote, “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 BBO and the Court the time and expense of lengthy disciplinary proceedings.”¹¹³ The fact that a resignation offers a lawyer some advantages is demonstrated by the fact that on at least two occasions the OBC has attempted to prevent a lawyer from resigning at the last minute to avoid a disbarment, efforts that did not succeed.¹¹⁴

Practice Tip

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

¹¹¹ *Id.*

¹¹² 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).

¹¹³ *Matter of Oates*, 5 Mass. Att’y Disc. R. 274, 277 (1986).

¹¹⁴ *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), the OBC supported an attorney’s request to resign, but the SJC refused the lawyer’s request.

The SJC accepted disciplinary resignations without using the word disbarment from three lawyers in fiscal year 2016,¹¹⁵ ten lawyers in fiscal year 2015,¹¹⁶ and three lawyers in fiscal year 2014.¹¹⁷

III. MITIGATING AND AGGRAVATING FACTORS

The sanctions described in the preceding sections 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.”¹¹⁸ 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.”¹¹⁹ In assessing the appropriate level of discipline, the BBO and the SJC must also consider factors that mitigate, and those that aggravate, the misconduct the lawyer committed. A lawyer may receive a lesser sanction compared to another lawyer who engaged in the same misconduct if there are significant mitigating factors, and, correspondingly, that lawyer may receive a more severe sanction if aggravating factors are present. Chapter 18 discusses mitigating and aggravating factors in more detail.

IV. DISABILITY INACTIVE STATUS

While not a disciplinary sanction based upon misconduct, the SJC may impose disability inactive status upon a lawyer who lacks the mental or physical capacity to maintain the practice of law. If a court has declared a lawyer incompetent or in need of a guardian, the SJC enters an order transferring the lawyer to disability inactive status.¹²⁰ If no such adjudication has occurred, but the OBC learns of facts showing such incapacity (including, at times, from the lawyer), the OBC may initiate formal proceedings to transfer the lawyer to disability inactive status.¹²¹ The lawyer assigned such status may later petition to be reinstated.¹²² Chapter 21 discusses disability inactive status in more detail.

¹¹⁵ BAR COUNSEL 2016 ANNUAL REPORT, *supra* note 54, at 14.

¹¹⁶ BAR COUNSEL 2015 ANNUAL REPORT, *supra* note 4, at 15.

¹¹⁷ BAR COUNSEL 2014 ANNUAL REPORT, *supra* note 20, at 15.

¹¹⁸ *Matter of Balliro*, 453 Mass. 75, 85, 25 Mass. Att’y Disc. R. 31 (2009) (quoting *Matter of Finn*, 433 Mass. 418, 423 (2001)).

¹¹⁹ *Matter of Hurley*, 418 Mass. 649, 655 (1994).

¹²⁰ SJC Rule 4:01 § 13(1).

¹²¹ *Id.* at § 13(4).

¹²² *Id.* at § 13 (6).

PART II

The Disciplinary Process

CHAPTER FIVE

Complaints, Attorney and Consumer Assistance Program, Investigation, and Stipulations

This chapter outlines and describes the disciplinary process, from a complainant's initial contact, through the Office of the Bar Counsel (OBC) investigation, to resolution through informal measures or stipulations. Chapter 6 covers the procedures for matters that are not resolved by informal resolution or by stipulation, including the rules, standards, and practices for evidentiary hearings.

I. THE COMPLAINT

The disciplinary process starts when someone or something comes to the attention of disciplinary personnel. This section explains how this intake operates. The process starts with the OBC, not with the Board of Bar Overseers (BBO) or the Supreme Judicial Court (SJC). A potential matter may come to the attention of the OBC in several ways:

- A telephone call or a letter to the OBC
- A formal written complaint to the OBC
- 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 Interest on Lawyers Trust Accounts (IOLTA) account
- The OBC becoming aware of misconduct through a newspaper article or a court decision
- Receipt of a notice of a bounced check on an IOLTA account, based upon the required reporting by an IOLTA account bank

(Chapter 14 discusses the dishonored check notification policy in more detail.)

- Self-reporting by the attorney

Any one of these, or information from any source about possible misconduct, can cause the OBC to take steps, which are described later in this section.

Most complaints come from a person—often a client, sometimes an opposing party or lawyer, or even a judge who has observed the lawyer—writing a letter or calling the OBC to register a grievance. The complainant may also use an official complaint form, entitled Request for Investigation.¹ (The BBO does not have an e-mail address through which to send a grievance electronically and does not currently accept e-mail complaints.) The OBC does not accept anonymous complaints unless the complaint contains clear evidence of serious misconduct on which to base an investigation. However, if a judge makes a report, the OBC protects the identity of the complaining judge where possible, unless the judge has already advised the lawyer or given permission to disclose the judge’s identity.

When the OBC receives a telephone call, letter, or complaint form, it refers the matter to the Attorney and Consumer Assistance Program (ACAP) within the OBC, unless the matter is serious enough to warrant immediate attention. When ACAP reviews a telephone complaint, if no resolution is possible, or if it determines that a formal investigation is appropriate, ACAP provides the complainant with a complaint form to complete. If ACAP receives a letter or written complaint and it is unable to resolve the matter, or it concerns a serious issue, the complaint is referred for formal investigation and logged in as a formal case on the OBC’s docket. Even if the complainant does not submit an official OBC complaint form, the OBC may initiate a formal disciplinary investigation against the lawyer on its own, if warranted.

All complaints submitted to the BBO or to the OBC “shall be confidential and absolutely privileged,”² although no authority prevents complainants from disclosing that they submitted a complaint or revealing the contents of the complaint. The person making the complaint is immune from any civil liability for statements made in the complaint (but not for statements made outside of that process, including sharing the complaint with others³). According to the OBC

¹ A copy of the form appears on the BBO website, <https://bbopublic.blob.core.windows.net/web/f/Confidential-Application.pdf> (last visited May 14, 2018).

² SUPREME JUDICIAL COURT, RULE 4:01 § 9(1) [hereinafter SJC Rule].

³ *Id.* See also *Bar Counsel v. Farber*, 464 Mass. 784 (2013) (complainant’s immunity remains even though the disciplinary proceedings become public).

website, the “confidential” part of that commitment means 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.”⁴ The OBC ordinarily discloses the complainant’s name and the content of the complaint to the respondent lawyer, and after that the lawyer may disclose otherwise confidential information, if necessary, in defense.⁵

The SJC Rules describe some narrow exceptions to the OBC’s confidentiality duty except as otherwise provided in the Rules. The OBC may disclose the pendency and the status of its investigation (which presumably includes the identity of the respondent lawyer) in the following circumstances:

- If the lawyer consents
- If the investigation has been triggered by the lawyer’s conviction for a “serious crime”⁶
- If the underlying allegations have become generally known
- If a person or organization needs to be notified in order to protect the public, the administration of justice, or the legal profession.⁷

After a petition for public discipline is filed, the allegations in that petition become public.

Finally, some administrative and disciplinary actions commence without an outside complaint. If a lawyer fails to comply with the annual registration and renewal procedures, as well as reminders regarding expiration of applicable grace periods, the BBO will proceed to seek the lawyer’s administrative suspension. If a lawyer overdraws an IOLTA account or an individual trust account and a check is dishonored for insufficient funds, a bank approved by the IOLTA committee is required to notify the OBC.⁸ Since overdrawing a client trust account indicates some trust account record-keeping issues, the OBC automatically opens an investigation. The OBC also acts proactively if a lawyer pays bar dues from the IOLTA account.

⁴ *Filing a Complaint Against an Attorney*, MASSACHUSETTS BOARD OF BAR OVERSEERS, <https://www.massbbo.org/Complaints#how> (last visited Feb. 8, 2018).

⁵ See MASS. R. PROF. C. 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”).

⁶ See SJC Rule 4:01 § 12(3), discussed in Chapter 4.

⁷ SJC Rule 4:01 §§ 20(2)(a)–(d). See Rule 4.01 § 12A.

⁸ MASS. R. PROF. C. 1.15(h)(1).

The OBC reports the nature of the complaints it receives annually in a public report that appears on the OBC website.⁹ An earlier article from the bar counsel reported that “[w]ithout fail, domestic relations cases generate the most complaints,”¹⁰ and that pattern has remained consistent.¹¹ 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.¹² Of the reasons why people contact the OBC, the most common complaints, by far, concern neglect and competence, followed by fee issues.

II. THE ATTORNEY AND CONSUMER ASSISTANCE PROGRAM

Almost all complaints to the OBC, whether written or telephonic, are assigned initially to ACAP. The OBC created ACAP in 1999, after years of concern that the office was overwhelmed with its caseload.¹³ ACAP has been successful in resolving most of the complaints against lawyers and in separating out those that need serious disciplinary attention. A 2016 report stated that ACAP resolved 86% of the matters it received without needing to initiate any formal disciplinary proceedings.¹⁴

The ACAP intake process works as follows: The ACAP staff (consisting of attorneys and investigators experienced in bar discipline) respond to all telephone complaints and are assigned the written complaints deemed appropriate for ACAP resolution. The assigned ACAP staff person first hears from the complainant, usually a client of the lawyer but sometimes someone different, such as a criminal defendant’s parent or companion, or a relative who has agreed to

⁹ *Annual Reports*, MASSACHUSETTS BOARD OF BAR OVERSEERS, <https://www.massbbo.org/Reports> (last visited Feb. 8, 2018).

¹⁰ Anne Kaufmann, *Five Years of ACAP* (2004), <https://bbopublic.blob.core.windows.net/web/f/acap5.pdf> (last visited Feb. 7, 2018). (“Five years in a row, family law concerns constituted more than 15% of all matters screened by ACAP.”).

¹¹ The OBC annual reports for 2012 through 2016 list domestic relations as the most common practice area generating complaints about lawyer misconduct.

¹² See Kaufman, *supra* note 10. The recent annual OBC reports confirm that list of practice areas.

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

¹⁴ See MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2016, at 3. Cf. Daniel C. Crane, *The Future for Lawyer Discipline* (2005), <https://bbopublic.blob.core.windows.net/web/f/future.pdf> (last visited Feb. 8, 2018) (in 2005, ACAP resolved 75% of its matters without formal discipline).

pay for an individual's legal fees, or the opposing client or counsel. The ACAP staff person first explores the underlying story and the reasons for the complaint. ACAP ascertains 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 the OBC 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 appropriate for ACAP intervention, the ACAP staff provides the complainant with reasons why the complaint does not constitute a rules violation or otherwise does not fit within the OBC's purview. The complainant does not have to accept this determination, however, and has the right to submit a written complaint for the OBC's review.
- If the OBC believes the complaint is valid, it is docketed for further investigation, which may include diversion.
- If the OBC agrees that the matter should not be investigated further, the complainant is informed and provided with an explanation in writing. The complainant also receives notice of the right to request a review of the OBC's decision to take no action, as described in Section V. In these instances, the lawyer complained about receives no notice from ACAP or the OBC.

At the other end of the spectrum are complaints that ACAP determines, from the facts alleged, to warrant formal OBC investigation. 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 is asked to submit the complaint in writing (either by letter or using the OBC complaint form),¹⁵ and the matter is referred directly to the OBC staff who investigate and prosecute lawyers. ACAP's role is concluded once it makes that referral.

The vast majority of calls fall somewhere in the middle, 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 ascertains the complainant's allegations and contacts the lawyer (typically by telephone) regarding a mediation-type process in an attempt to

¹⁵ *Filing a Complaint Against an Attorney*, MASSACHUSETTS BOARD OF BAR OVERSEERS, <https://www.massbbo.org/Complaints> (last visited Feb. 8, 2018).

resolve the complaint. ACAP has access to any publicly available court dockets and pleadings, so its staff may review court or agency records to help understand what possibly led to the complaint. ACAP may also request that the lawyer or the complainant provide documents to establish the facts in question.

Once ACAP has a fuller understanding of the facts underlying the complaint and the lawyer's version of the events, it may seek to broker a resolution that satisfies both parties. Some dispute categories readily lend themselves to this kind of mediated resolution. For instance, if a client calls ACAP because a lawyer has not provided the case file to a successor counsel, a telephone call to the lawyer often results in the file being delivered. Or if the client has not yet received the proceeds from a personal injury matter settled a few months prior, ACAP might be able to explain the payment delay, such as an unresolved lien, to the client's satisfaction. 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,¹⁶ sometimes a complainant's objection to the fee amount will include 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 to correct the mistake, forgive the fee, or return the attorney's fees, without any further action against the lawyer.

As previously noted, ACAP resolves the vast majority of complaints the OBC receives. While ACAP keeps an electronic record of the complaint and its resolution for internal use, when it resolves a matter this way, no formal complaint exists on the attorney's BBO record.

III. THE OFFICE OF BAR COUNSEL INVESTIGATION

In the small proportion of matters that the OBC receives where ACAP feels a formal complaint is merited, 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, if received, to be docketed and assigned to an assistant bar counsel. When the OBC receives the complaint, it investigates the underlying facts and claims. *Commencing an investigation is not the same thing as filing disciplinary charges against a lawyer.* The "filing of charges"

¹⁶ If a dispute about fees does not rest on a claim of a "clearly excessive fee" in violation of SJC Rule 1.5(a), or a claim of dishonesty in billing in violation of SJC Rules 8.4(c) and 8.4(h), the matter is not properly before the OBC. Instead, ACAP urges the parties to seek the aid of the Massachusetts Bar Association Legal Fee Arbitration Board or go to small claims court.)

refers to a “petition for discipline,” whereby the OBC, with the approval of the BBO, institutes formal proceedings to impose public discipline.¹⁷ The OBC must, through its investigation, be satisfied that charges are warranted before filing charges. That investigation process can take time.¹⁸ In most cases, the OBC investigation does not lead to disciplinary charges being filed.

The OBC investigation process develops as follows:

1. The complainant’s filing of the written request for investigation causes the OBC to docket the matter and initiate an investigation. The BBO Rules require the OBC to “forward to the Respondent a request for a statement of the Respondent’s position”¹⁹ That notification includes the nature of the complaint and the name and address of the complainant (unless the OBC has good cause not to disclose that information). The BBO Rules do not state that the OBC must share the actual complaint form with the respondent, but the OBC’s practice is to forward the written complaint to the respondent, unless it comes from a judge who prefers that the respondent not know the identity of the judge who notified the OBC. When a judge is the complainant, the file is typically opened as a “Bar Counsel” file; the same is true when the OBC opens the matter on its own initiative. Otherwise, the file is opened in the name of the complainant.
2. The respondent has twenty days to reply to the OBC’s notice. As every practitioner manual or article about this topic emphasizes, a lawyer who receives such a notice from the OBC must take it seriously and respond within the time permitted (which may include an extension upon request).²⁰ Not only is it good strategic judgment to

¹⁷ SJC Rule 4:01 § 7(2)(c).

¹⁸ 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 start 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 13, at 23. The process seems to be much more efficient now. According to the 2014 OBC report, “For the first time Bar Counsel ended the fiscal year with no files over two years old that are not in petition or deferred. Only four lawyers had files over eighteen 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.

¹⁹ RULES OF THE BOARD OF BAR OVERSEERS, § 2.6 [hereinafter BBO Rules].

²⁰ See, e.g., James S. Bolan, *The Disciplinary Process*, in ETHICAL LAWYERING IN MASSACHUSETTS, Chapter 1 (Mass. Cont. Legal Educ.) (2009); Ronald F. Kehoe, *How to Settle Cases with the Office of Bar Counsel*, in PRACTICING BEFORE THE BBO 269, 270 (Mass. Cont. Legal Educ.) (1994).

treat such a development with the respect it deserves, but failure to respond to a request for information from the OBC may itself be the basis for discipline, above and beyond the grounds on which the underlying complaint was filed.²¹ The response at this stage is different from the answer the respondent must file to a petition for discipline if formal disciplinary proceedings commence. 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 provides an original and a copy of the response, with the copy intended for the complainant. The complaining party has the opportunity to read the lawyer's response to the OBC's notice and to comment on it.

The respondent may answer by e-mail, attaching scanned copies of the response and any attachments. While not a requirement, it is good practice for a respondent or respondent's counsel to number the pages of the response and to use Bates numbers²² on the response and the supporting documents.

Whether a respondent should retain counsel at this stage is a matter of 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,²³ and those biases may distort a lawyer's judgment about how to respond to claims of misconduct. Also, the lawyer's response to the OBC waives any right the respondent may have under the privilege against self-incrimination relating to any admissions made in that response.²⁴ If a respondent would like to be represented by counsel

²¹ SJC Rule 4:01 § 3(1)(b).

²² Bates numbering is the process most law firms use to assign successive numbers to the pages of a collection of documents.

²³ 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).

²⁴ 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).

but cannot afford it, the BBO's Office of the General Counsel will attempt to assist the respondent in obtaining pro bono representation.²⁵ Many professional liability insurance policies cover the cost of counsel to respond to bar discipline proceedings, or some amount toward it, and a respondent would be well served to review the insurance policy, if there is one, both to obtain defense counsel and to provide the requisite notice of the claim to ensure coverage.

3. After receiving the respondent's position and response to the allegations, the OBC may need to investigate further, especially if it has reason to believe that it may recommend that the BBO initiate proceedings for public discipline. The OBC may use investigatory subpoenas to explore the underlying facts of the dispute. The BBO Rules permit the OBC to request that the BBO (through any BBO 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" (emphasis added).²⁶ The BBO regularly issues such subpoenas when the OBC requests them.

The subpoena will require that the witness appear before the OBC at a specified time and place, with the requested papers or items. While Massachusetts and federal civil practice both permit a "documents only" subpoena,²⁷ that option is not available in OBC investigations. However, if an OBC subpoena requests only documents, the OBC may advise the subpoenaed witness that appearance is unnecessary as long as the witness provides the subpoenaed documents in a timely manner and with an affidavit authenticating the documents. If a meeting does occur, the respondent has no 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.²⁸ If the OBC records the

²⁵ BBO Rules § 3.4(d).

²⁶ BBO Rules § 4.4(a).

²⁷ *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.")

²⁸ *See* Mass. R. Civ. P. 30(b), (c).

meeting resulting from the subpoena, it will supply a copy of the recording to the respondent prior to a hearing on a petition for discipline. Otherwise, the OBC has no obligation to share the product of this meeting with the respondent. The BBO Rules require that the OBC shall “maintain the absolute confidentiality of the investigation,” including the information obtained pursuant to its subpoena.²⁹

If financial misconduct is a potential issue, the OBC can, and will, demand that the respondent provide records that all lawyers are required to maintain by the *Massachusetts Rules of Professional Conduct* Rule 1.15³⁰ and subpoena all relevant financial records directly from the appropriate banks or other financial institutions. The OBC 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 files. In addition, the OBC may speak to opposing counsel, clients, or any other persons having relevant information. The confidentiality requirements of the OBC’s investigation do not preclude such investigations; however, the OBC advises persons and institutions that it contacts that its investigation is confidential, and the OBC requests that the contacted person or organization honor that confidentiality.

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

IV. RESOLUTION BY AGREEMENT AFTER INVESTIGATION COMPLETE

After the OBC completes its investigation, the office determines how to proceed. If the investigation does not provide the OBC with good cause to seek some form of discipline, the OBC closes the matter and informs the respondent and the complainant. The complainant has the review rights described in the next section. The OBC may also “close the matter after adjustment, informal conference, or reference to and completion of diversion to an educational, remedial,

²⁹ BBO Rules § 4.7(a).

³⁰ MASS. R. PROF. C. 1.15(f)(1) (itemizing documentation required of all trust accounts).

or rehabilitation program.”³¹ That closing usually comes through an agreement with the respondent, but may conclude with a warning to a respondent or suggestions on how to seek help or avoid future problems. The parties may agree to any satisfactory diversionary or remedial arrangement, but quite often the lawyer agrees to participate in a program offered by Lawyers Concerned for Lawyers (LCL),³² the Massachusetts organization that assists lawyers “who are experiencing any level of impairment in their ability to function as a result of personal, mental health, addiction or medical problems,”³³ or the Law Office Management Assistance Program (LOMAP),³⁴ 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.”³⁵

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

If the OBC determines that some formal discipline is warranted, it informs the respondent and invites the lawyer to agree to the recommended discipline. If the respondent disagrees with the proposed sanction, and if further negotiations about that topic are fruitless, then the OBC proceeds with formal discipline proceedings, as described in the next chapter. If the respondent and the OBC agree about the facts and the appropriate public discipline, then the OBC prepares and serves a petition for discipline and serves it on the respondent. If the proposed sanction is an admonition, the OBC recommends that the BBO impose an admonition and, with the respondent’s agreement, sends the lawyer a notification of the admonition, including a summary of the basis of the charges. Chapter 6 discusses the procedures if the respondent does not consent to the admonition.

If the parties agree that the proposed sanction be some form of public discipline, the matter proceeds as follows:³⁶ Bar counsel prepares a petition for

³¹ BBO Rules § 2.7(2).

³² See LAWYERS CONCERNED FOR LAWYERS, <http://www.lclma.org/> (last visited Feb. 7, 2018).

³³ *Id.*

³⁴ See LAW OFFICE MANAGEMENT ASSISTANCE PROJECT, <http://masslomap.org/> (last visited Feb. 7, 2018).

³⁵ *Id.*

³⁶ See BBO Rules §§ 3.19(d), (e) for the description of this process.

discipline, and the respondent files an answer and stipulation, also signed by bar counsel, admitting certain charges (or agreeing they could be proved by a preponderance of the evidence) 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 BBO reject the agreement, such reservation must be made at this time. After the answer/stipulation is filed, the matter is referred directly to the BBO, along with a description of the joint recommendation for discipline.³⁷ Where the agreement is for a public reprimand, and if the BBO agrees with the joint recommendation, it orders the public reprimand.³⁸ If the agreement is for a suspension or disbarment, and the BBO agrees with the joint recommendation, the BBO files a pleading with the SJC known as an Information, which moves the proceedings from the BBO to the SJC. The BBO 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.

If the BBO rejects the parties' joint recommendation, it must specify its reasons for doing so and notify the parties. This rejection constitutes a preliminary determination. The parties then have fourteen days from that notice to file briefs arguing for acceptance of the joint proposal.³⁹ If the BBO remains unpersuaded, then one of two avenues 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, as discussed in Chapter 6. If neither party has reserved that right, the matter proceeds to the SJC for the appropriate disposition.

As a practical matter, the respondent's best opportunity to negotiate an agreed-upon resolution with the OBC is before the petition for discipline is filed. Unlike civil cases where the plaintiffs conduct discovery to learn more about the strengths and weaknesses of their case, the OBC already knows the case before the petition for discipline is filed. If the respondent has a defense or mitigating factor, that evidence should be presented to the OBC in the course of the investigation in an effort to negotiate the best possible resolution at that time. A respondent should not expect the OBC to agree to a disposition that is below the sanctions range for that misconduct. (Part III discusses the typical sanctions for different types of misconduct in more detail.)

If the respondent agrees to a sanction recommendation that is appropriate for the agreed misconduct, the OBC may, in some circumstances, be willing to

³⁷ BBO Rules § 2.8(c).

³⁸ *Id.* § 3.19(d).

³⁹ *Id.* § 3.19(e).

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 practicing law, the lawyer should consider a temporary suspension under SJC Rule 4:01 § 12A. (Chapter 4 discusses temporary suspensions under this rule.) The understanding is that when the disciplinary sanction takes effect, it is retroactive to the effective date of the temporary suspension. The BBO and the SJC have approved such agreements in the past, assuming timely compliance by the respondent with the terms of the suspension or disbarment.⁴⁰

As an alternative to filing an answer and stipulation along with the OBC's petition for discipline, a respondent who has committed serious misconduct may choose to submit an affidavit of resignation. As discussed in Chapter 4, a respondent who resigns cannot apply for reinstatement for at least eight years. As noted in the previous paragraph, the resignation may be retroactive to the date of a temporary suspension; otherwise, SJC Rule 4:01, §§ 15 and 17(1) afford the respondent with fourteen days to close the lawyer's practice.

V. COMPLAINANT'S RIGHT TO REVIEW

As noted in Section II, if the OBC decides to close a request for investigation without any discipline, the complaining party is entitled to have the BBO review that decision. When the OBC decides not to prepare a petition for discipline, it sends the complainant a notice, as required by SJC 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[.]"⁴¹ The BBO Rules require that the complainant apply for such review within fourteen days of receiving the OBC's notice.⁴²

⁴⁰ *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).

⁴¹ SJC Rule 4:01 § 3(1)(b).

⁴² BBO Rules § 2.10(1)(A).

According to the OBC's experiences in recent years, in the vast majority of cases in which the OBC decided to close a file, the complainant did not seek BBO review. When the complainant requests a review, the OBC submits the file to a reviewing BBO member, and the reviewing BBO member may adopt, reject, or modify the OBC's decision.⁴³ In recent years, the reviewing BBO member has rarely overruled or modified the OBC's decision not to pursue discipline.

A complainant who is not satisfied with the OBC's decision not to pursue discipline may have other remedies against the respondent, including a malpractice action or a fee arbitration board. The OBC advises the complainant of such alternative avenues when appropriate. However, a complainant has no standing to seek to compel the OBC to investigate or prosecute a case.⁴⁴

⁴³ 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 apply. Section 2.8 outlines the procedures by which a BBO member reviews the OBC's recommendations generally.

⁴⁴ *Binns v. Board of Bar Overseers*, 369 Mass. 975 (1976); *Matter of a Request for an Investigation of an Attorney*, 449 Mass. 1013 (2007).

CHAPTER SIX

Proceedings Before the Board of Bar Overseers

I. INTRODUCTION

The chapter explains the adjudicatory process before the Board of Bar Overseers (BBO). It describes the steps leading up to a disciplinary hearing, the hearing itself, and the hearing committee's or officer's resulting written report to the BBO. The end of the chapter discusses the somewhat different procedures in disciplinary hearings for criminal convictions, expedited hearings to review imposing an admonition, and reinstatements.

II. THE PETITION FOR DISCIPLINE

A. Filing

After the Office of Bar Counsel (OBC) decides to institute disciplinary proceedings against an attorney—including a Supreme Judicial Court (SJC) referral to the BBO after a lawyer is convicted of a crime¹—and, where required, the BBO has approved the matter for prosecution,² it files a petition for discipline with the BBO. The petition must specify the charges of the attorney's alleged misconduct³ and include a caption listing the bar counsel as the petitioner and

¹ See MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT r. 4:01 §§ 12(4), (5) [hereinafter SJC Rule]. Section 12(4) states that the SJC shall refer to the BBO any conviction involving a “serious crime” for which an order to show cause why the lawyer should not be immediately suspended was issued. Section 12(5) permits the SJC to refer to the BBO any other conviction. Chapter 4, Section II(F)(5) discusses the immediate suspension process after a conviction for a serious crime.

² After investigation, if the OBC determines that there is a basis for public discipline, and the OBC and the respondent have not agreed on a disposition, the matter is presented to a BBO member for approval for prosecution. SJC Rule 4:01 §§ 8(1)(c), (3); RULES OF THE BOARD OF BAR OVERSEERS § 2.7(3) [hereinafter BBO Rules]. 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). Chapter 4, Section II(F)(5) discusses this discipline process.

³ BBO Rules § 3.14(b).

the attorney as the respondent.⁴ The geographic area in which the respondent practices and the filing year determine the filing number. The petition is signed by an assistant bar counsel.

The petition typically includes one or more counts, each of which alleges, in numbered paragraphs, the details concerning the transactions or activities regarding the alleged misconduct, identifies the relevant dates and names of individuals or organizations, and includes, where appropriate, the client or clients the alleged misconduct affected. The petition must identify the grounds for discipline, including the *Rules of Professional Conduct* or other rules⁵ that the OBC claims the respondent violated. The petition also typically includes, after the counts, the full text of the cited rules, omitting the comments. See Appendix A for a sample, fictitious Petition for Discipline.

You Should Know

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

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

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

⁴ BBO Rules § 4.14(a).

⁵ As indicated elsewhere, SJC Rule 4:01 § 3 identifies the grounds for professional discipline, which include both violations of the *Massachusetts Rules of Professional Conduct* set forth in SJC Rule 3:07 and violations of the rules governing the legal profession set forth in Chapter 4 of the SJC Rules.

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

⁷ BBO Rules § 3.4(c).

When served, the petition must include a Notice to Respondent Accompanying Petition for Discipline from the BBO informing the respondent of the responsibilities upon receiving the petition,⁸ including the following items:

1. A notice that the respondent must file an answer within twenty days from receipt of the petition for discipline, 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 assertions in the petition that are not denied in the answer will be deemed admitted.
3. Advice to the respondent that failure without good cause to file a timely answer will itself be deemed both as an act of professional misconduct and also as grounds for administrative suspension pursuant to SJC Rule 4:01 § 3(2).⁹

See Appendix B for a sample fictitious Notice to Respondent Accompanying Petition for Discipline.

III. ANSWER OF THE RESPONDENT; FILING AND SERVICE

A. When to File the Answer

After service by the OBC, the respondent has twenty days from the date of service to file an answer to the petition for discipline with the BBO and to serve the answer on the bar counsel.¹⁰ Filing the answer is complete when the BBO receives the document.¹¹ Failure to file the answer on time will result, according to the BBO Rules, in each allegation of the complaint being deemed admitted, as described in the previous section. If the respondent has good cause for filing the answer later than twenty days after receipt, a motion may be filed with the chair of the BBO requesting an extension. Section IV discusses the procedure for filing and serving motions.

If the respondent fails to file either an answer or a motion for an extension of time, the BBO “promptly” notifies the respondent that the allegations on the petition are deemed admitted and the opportunity to present mitigating evidence

⁸ *Id.* at §§ 3.15(a)(1)–(3).

⁹ See Chapter 4, Section (II)(F)(6) for a discussion of administrative suspensions.

¹⁰ SJC Rule 4:01 § 21.

¹¹ BBO Rules § 3.3.

Practice Tips

In calculating the time when the respondent's answer is due, the period runs from the date the petition is mailed. The BBO 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 enforced, as it might be in some contentious civil litigation contexts. In fact, when an answer is not filed by the expected deadline, the BBO informs 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. Such requests are routinely granted if made in good faith. If granted, the parties prepare a joint motion, or the OBC will not oppose respondent's motion to the BBO for the extension.

is 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 are allowed if the respondent has a reasonable explanation for failing to meet the filing deadline.

If the respondent defaults and does not successfully file a motion for relief from the default, the BBO notifies the respondent that the allegations in the petition are deemed admitted and that the opportunity to present mitigating evidence is waived. Unless the OBC requests a hearing on matters in aggravation, in which the respondent may participate and offer evidence, the BBO considers the matter on the basis of the admitted allegations. If the BBO orders

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.

¹³ BBO Rules § 3.15(g).

¹⁴ *Id.* at § 3.15(h).

the parties to submit briefs, the respondent may submit a brief on any contested issue, even after defaulting.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 of insufficient information on which to admit or deny the assertion.¹⁷ The answer must also state in concise fashion any facts and law the respondent relies on in defense. A general denial (simply stating “denied”) is not permitted. In addition, if the respondent intends to assert any mitigating facts, these must be alleged in the answer. Failure to allege such facts will waive the right to present evidence of those facts.

Practice Tip

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

* * *

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

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

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.

¹⁸ BBO Rules § 3.15(d).

The answer must be signed by the pro se respondent or by the 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

See Appendix C for a sample fictitious Answer to Petition for Discipline.

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 (OGC) of the BBO will assist the respondent to locate pro bono 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 provide some degree of coverage for representation to defend against disciplinary charges.

IV. MOTIONS BEFORE FILING AN ANSWER

Before filing an answer, a respondent may file a motion to extend the time to answer, if the respondent has good cause for such a request. Unlike proceedings governed by the *Rules of Civil Procedure*, a respondent has no right under the BBO 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

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 MASS. R. PROF. C. § 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. R. PROF. C. 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).

answered the petition.²¹ A respondent who files a prehearing motion to dismiss should accompany that motion with a motion to stay the proceedings, as the filing of a motion to dismiss does not by itself extend the time to file an answer.²²

The BBO Rules include general provisions for filing motions.²³ Those rules do not describe the procedure for a motion to extend the time to answer, but the BBO's practice is as follows: The respondent must file the motion with the BBO, with a copy to the assistant bar counsel. The motion must provide specific facts supporting the extension request, and the facts must be included in an affidavit signed under the penalties of perjury. The BBO chair rules on the motion without a hearing. In practice, most such motions have the OBC's assent, after the parties have discussed the respondent's need for more time.

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

V. SELECTION OF THE HEARING COMMITTEE OR THE SPECIAL HEARING OFFICER

After the respondent files an answer, the BBO assigns the matter to a hearing committee or, on occasion, a special hearing officer (SHO).²⁵ The process for selecting the committee or the SHO is as follows:²⁶

1. The BBO, through the OGC, elicits from the OBC and the respondent or respondent's counsel estimates of the likely length of the hearing and the complexity of the issues.

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 § 3.15(d).

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 BBO assigns a hearing panel, which consists of members of the BBO, and is distinguished from the *hearing committee* described in the text.

²⁶ For a description of this process, see Board of Bar Overseers Policies and Practices ¶ 9 (2011), BOARD OF BAR OVERSEERS, <https://www.massbbo.org/Files?fileName=bbopolicy.pdf> (last visited March 20, 2018).

2. With that knowledge, the general counsel's staff ordinarily appoints a hearing committee, consisting of three volunteer hearing committee members, one of whom is typically a layperson. The chair will always be a lawyer who has served on at least one previous hearing committee.
3. The timing of the likely hearings and the scheduling needs influence which volunteers are assigned to a committee as well as the hearing's location.
4. In unusual circumstances, typically because a matter is expected to be extremely complex and lengthy, the OGC staff assigns the matter to an SHO, a single volunteer attorney who conducts the proceedings alone.

For the purposes of the following discussion of the processes leading up to and through the hearing, this chapter will refer to a hearing committee rather than repeatedly referring to a hearing committee or an SHO. The SHO handles everything that the hearing committee can.²⁷

VI. DISCOVERY

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

A. Required Document and Information Production

Within twenty 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 thirty 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 ten days. The rule also provides that, with the approval of the hearing committee chair, a party may obtain information other than that just described. There is no provision for interrogatories, requests for production, or requests for admissions.²⁹

²⁷ BBO Rules § 3.19(a).

²⁸ *Id.* at § 3.17(a). The rule does not require disclosure of e-mail 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." "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

Practice Tip

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

B. Medical Records

In cases where a respondent’s physical or mental status is at issue (typically as an argument in mitigation), the rules require the respondent to provide the OBC with detailed disclosures about any such condition and any medical or similar records related to it.³⁰ The deadline for those disclosures is set at the mandatory prehearing conference described in Section VIII. A respondent whose medical condition is at issue must do the following:

1. Identify and disclose in writing to the OBC the nature of every condition the respondent claims may have affected professional conduct or is otherwise at 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.

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).

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).

3. For each such condition, produce all hospital, medical, psychiatric psychological, counseling, and other records and reports in the respondent's possession and control.
4. Sign releases that permit the OBC or its agents to obtain all medical records from the identified providers relating to the conditions at issue.³²

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 of other infirmity[.]”³³ A respondent or the OBC may seek permission from the BBO for such a testimony-preserving purpose either before³⁴ or after³⁵ formal proceedings have commenced. 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 is 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 to take such a discovery deposition is much rarer, and the burden on the applicant is significantly higher.

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.

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

³⁴ BBO Rules § 4.10(a). For a deposition of an unavailable witness before proceedings start, the BBO chair or 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 BBO chair, the 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).

Practice Tip

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

The BBO allows a witness who is unable to appear in-person to testify by videoconference, reducing some concerns about a witness’s unavailability. When a hearing witness 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.

To obtain permission to conduct a testimonial deposition of an unavailable witness before a hearing committee has been assigned, the party must file a written notice and application to the BBO 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 twenty-one days prior to the hearing date.³⁸ The application to conduct a deposition must identify the reasons for taking the deposition; the deponent’s name and address; 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.³⁹ The rules permit a deposition to be taken before the BBO chair or designee, a member of the hearing committee, any notary public, or any other disinterested person authorized to administer oaths.⁴⁰

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.

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 BBO 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 deposition's scope.⁴³ If necessary (meaning that the witness refuses to voluntarily attend the deposition), the BBO chair will issue a subpoena to the deponent requiring attendance and the production of any documents covered by the order. Once the subpoena is issued, the requesting party must arrange for the subpoena to be served on the witness and (unless the subpoenaed witness is a lawyer) must follow the procedures for service of a summons in Massachusetts courts (which is different from the procedure for service of a subpoena).⁴⁴ If a testimonial deposition is sought after a hearing committee has been assigned, it may enter the same orders and take the same actions as the board chair.⁴⁵

If a party needs to subpoena a witness from another jurisdiction to appear at a deposition, that party must first seek permission from the hearing committee or officer.⁴⁶ If permission is granted, the BBO chair requests that the disciplinary board or entity in the jurisdiction in which the deposition is to be taken issue an appropriate subpoena.⁴⁷ If that entity cannot, or declines to, issue the requested subpoena, the party must petition the SJC pursuant to Mass. Gen. Laws ch. 223A, § 10 to issue a "letter rogatory," or a formal written request.⁴⁸

The deposition proceeds as in civil litigation settings, with the deponent's testimony taken under oath, and with the opportunity for deponent's counsel to

⁴¹ BBO Rules § 4.11(a).

⁴² *Id.* at § 4.11(b).

⁴³ *Id.* at § 4.11(c).

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 § 4.11(c).

⁴⁶ BBO Rules § 4.5B(a).

⁴⁷ BBO Rules § 4.5B(b).

⁴⁸ 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 BBO "may issue a subpoena" to compel the attendance of witnesses and production of documents, but only after the issuance of the subpoena "has been duly approved under the law of the other jurisdiction").

Practice Tip

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

examine the witness after the direct testimony.⁴⁹ 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,⁵⁰ 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.”⁵¹ If a party elects to take the deposition before a member of the hearing committee, the presiding person rules on objections when they are made.⁵²

After the deposition is concluded, the deponent has the opportunity to read and sign the transcript as well as to make changes “in form or substance” to the transcript.⁵³ The notarial officer enters these changes on the deposition, along with the deponent’s reasons for the changes.⁵⁴ If the deponent fails or refuses to sign the transcript, the deposition may be used as though it had been signed. After the transcript is signed or the time for signing has passed, the notarial officer distributes the deposition. For depositions taken after formal proceedings start and to secure the testimony of an unavailable witness, the notarial officer must certify the deposition and deliver it to the BBO, which files the original and provides

⁴⁹ BBO Rules §§ 4.11, 4.13.

⁵⁰ 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 seasonable objection thereto is made at the taking of the deposition.

⁵¹ BBO Rules § 4.14(a).

⁵² *Id.* at § 4.14(b).

⁵³ *Id.* at § 4.13(a).

⁵⁴ *Id.* The rules do not establish a time limit during which the deponent must sign the deposition. The parties must agree upon that schedule.)

a copy to each party and member of the hearing committee.⁵⁵ For all other depositions, the officer must give notice to the parties of the transcript's availability, and any party or the deponent may then obtain a copy from the officer by paying a fee for the copy.⁵⁶

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 is delivered to members of the hearing committee prior to the hearing.) When offered, the recorded testimony is treated as though the deponent were present at the hearing and testifying.⁵⁷

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 start of the hearing.⁵⁸ Any such motion must be filed with the BBO at least ten 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.⁵⁹ A party wishing to respond to the motion must file a response within seven days of the date of *service*, not *receipt*, of the motion.⁶⁰ 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.⁶¹ Except for motions to dismiss or for issue preclusion, the chair of the hearing committee decides all motions, and all are decided without a hearing or oral argument.⁶²

⁵⁵ *Id.* at § 4.13(b)(1).

⁵⁶ *Id.* at § 4.13(b)(2). The BBO Rules offer no way for a party or deponent to obtain a copy of the transcript without payment.

⁵⁷ *Id.* at § 4.15.

⁵⁸ BBO Rules § 3.18 sets forth the procedure for motions filed after an answer.

⁵⁹ BBO Rules §§ 3.9, 3.10.

⁶⁰ This procedure differs from the typical civil litigation arrangement. *Cf.* Mass. R. Civ. P. 6(d), 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 seasonable objection thereto is made at the taking of the deposition.

⁶¹ BBO Rules § 3.18(a)(3).

⁶² *Id.* at §§ 3.18(a)(4), (5).

Motions to dismiss the petition or the charges must be heard by the BBO chair or a BBO member the chair designates; motions to preclude issues must be heard by the chair or the chair's designee, which can be another BBO member or the hearing committee chair.⁶³

A party may not immediately appeal an unfavorable ruling on a motion, except for the allowance of a motion to dismiss or rulings that the moving party alleges exceed the jurisdiction or the authority of the hearing committee. For all other motion rulings, the dissatisfied party must reserve any review until after the hearing report is issued.⁶⁴

VIII. MANDATORY PREHEARING CONFERENCE

A prehearing conference is required before a disciplinary hearing. The conference is typically scheduled at the time the BBO notifies the parties of the hearing dates and the appointment of the hearing committee. The date for the conference is chosen without input from the parties. The purpose of the prehearing conference is for the chair to:

- Set dates for the parties to exchange witness lists, expert witness disclosures, and proposed exhibits; to file final witness lists and agreed exhibits; any stipulations of the parties; lists of objected-to exhibits; deadlines for filing motions; and deadlines for requesting hearing subpoenas
- Issue orders to refine the issues in dispute
- Resolve any remaining discovery matters
- Identify evidence the parties are submitting for their cases in chief and eliminate unnecessary witnesses
- Address any other matters that will result in “the prompt and orderly conduct and disposition of the proceeding”⁶⁵

The parties and their counsel must attend the prehearing conference and must have authority to make commitments about the matters to be addressed.⁶⁶ The conference establishes any revised hearing dates. The parties assist in arranging the hearing date or dates.

⁶³ *Id.* at §§ 3.18(b)1, 3.18(c).

⁶⁴ *Id.* at § 3.18(a)(7).

⁶⁵ *Id.* at § 3.23(b).

⁶⁶ BBO Rules § 3.23 outlines the mandatory prehearing conference requirements.

You Should Know

BBO policy prohibits the hearing committee from engaging in or encouraging settlement discussions.⁶⁷ Notwithstanding that policy, the 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 is set down in writing and presented to the BBO for its approval, and the committee is discharged.⁶⁸ 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 to identify and resolve any disputes about the documentary evidence being offered during the hearing. Prior to the disciplinary hearing, each party must identify all documents being offered through the party's case in chief or matters in aggravation. Parties must raise any objection to those documents during the exhibit exchange set up by the prehearing order issued as a result of the conference. The Prehearing Conference Order requires "prefiling" all agreed exhibits within an identified period of time. Lists of disputed exhibits, with reasons for the objections, must also be filed. Absent good cause, failure to object to a proposed exhibit precludes the party from objecting to the admission of the exhibit at the hearing.⁶⁹ Also absent good cause, a party may be precluded from calling any witness or introducing any exhibit, except for rebuttal, that is not disclosed pursuant to the prehearing order.⁷⁰

The prehearing conference also addresses the disclosure of medical records and releases to medical providers for those records by a respondent who has

⁶⁷ BBO Policies and Practices ¶ 10, MASSACHUSETTS BOARD OF BAR OVERSEERS, <https://bbopublic.blob.core.windows.net/web/f/bbopolicy.pdf> ("The [B]oard prohibits [hearing] panel members from encouraging Bar Counsel and the respondent to settle matters assigned to a hearing.") (last visited Feb. 9, 2018).

⁶⁸ Chapter 5 discusses stipulations and the process by which the BBO and, if necessary, the SJC review the agreement.

⁶⁹ BBO Rules § 3.23(b)(6).

⁷⁰ *Id.*

placed a medical or other condition as an issue in the proceeding, as discussed in Section VI(B).

The rulings of the hearing committee chair presiding at the prehearing conference control the remainder of the proceeding, unless the BBO chair modifies any such rulings.⁷¹ Except for certain motions concerning amendments to pleadings and protective orders, rulings on motions cannot be appealed or reviewed prior to the issuance of the hearing report.⁷²

After completing the prehearing conference, the hearing committee chair serves the parties with a Prehearing Conference Order that describes all the matters covered during the conference. See Appendix F for a sample, fictitious Prehearing Conference Order.

IX. THE HEARING

A. An Overview of the Disciplinary Hearing

If the matter is not resolved after the prehearing conference, the parties proceed to a hearing before the hearing committee. The usual location for all hearings is the BBO office in Boston, but hearings may take place at other locations, such as Dartmouth, Springfield, or Worcester, based on convenience for the parties, the committee members, and the witnesses.⁷³ The BBO'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 is open to the public (including news media and television cameras) and is subject to any protective orders the BBO or the SJC issues.⁷⁴ The committee chair attempts to accommodate the schedules of the parties and their counsel, but at the same time is rigorous in ensuring that the hearing takes place in a time-sensitive manner.

The BBO must give the parties at least fifteen days' notice of the hearing.⁷⁵ That notice must advise the respondent that failure to appear at the hearing is

⁷¹ BBO 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.

⁷² BBO Rules § 3.18(a)(7). Presumably, one could try a discretionary appeal to the single justice under MASS. GEN. LAWS ch. 211 § 3.

⁷³ BBO Rules at § 3.20.

⁷⁴ *Id.* at § 3.22(c).

⁷⁵ SJC Rule 4:01 § 8(3)(b).

deemed an act of professional misconduct and may be grounds for administrative suspension.⁷⁶ In practice, because the hearing notice is in the BBO letter advising the parties of the prehearing conference date and the appointment of the hearing committee, 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 hearing continuance is required if a hearing committee member is absent, as long as a quorum of the hearing committee is present. The absent member may participate fully in all committee deliberations so long as that person has the transcript of the missed proceedings.⁷⁷

Generally, the OBC 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.⁷⁸

When the hearing starts, and before the assistant bar counsel calls the first witness, the hearing committee chair accepts into evidence all exhibits that the parties have agreed are admissible. (The parties should formally move them into evidence.) Each exhibit received during the hearing receives an identifying number or letter, and some exhibits may be admitted for a limited purpose.

B. Opening Statements

At the discretion of the hearing committee chair, the parties may make brief opening statements at the start of the hearing.⁷⁹ Those statements must refer to facts and must not include argument. The bar counsel's opening statement typically does not request a particular sanction, which it reserves for the closing argument or posthearing brief. The respondent may defer making an opening statement until after the bar counsel has completed the main part of its case.

⁷⁶ BBO Rules § 3.21. Chapter 4, Section II(F)(6) discusses administrative suspensions.

⁷⁷ BBO Rules at § 3.7(c).

⁷⁸ *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, *cert. denied*, 524 U.S. 919 (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).

⁷⁹ The BBO Rules do not expressly allow for opening statements, but this paragraph describes the typical practice.

C. Subpoenas to Witnesses

The procedure for using subpoenas in discipline proceedings 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 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 BBO or the hearing committee.⁸⁰ The committee chair and any BBO member have authority in Massachusetts to issue a hearing subpoena.⁸¹ As noted in the discussion of depositions in Section VI(C), once the subpoena is issued, the requesting party 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* in Massachusetts courts (which is different from the procedure for service of a subpoena).⁸²

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.⁸³

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 this fashion without the parties reviewing the evidence in advance.

⁸⁰ BBO Rules § 4.5(a). Typically, the prehearing order sets a deadline for submission of subpoena requests two weeks before the start of hearings. In the ordinary course, a BBO member acts on these. Parties may, however, ask the hearing committee chair to issue a subpoena, which might be necessary in pressing circumstances. The OBC 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* SJC Rule 4:01 § 3(2). A hearing subpoena is more likely when the OBC seeks to compel the production of documents.

⁸¹ SJC Rule 4:01 § 22; BBO Rules § 4.5.

⁸² 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*.

⁸³ BBO Rules at § 4.5(d).

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 to cross-examine. Redirect and recross examinations may be permitted at the discretion of the hearing committee chair. On occasion, witnesses testify by Skype or similar videoconferencing arrangement. More rarely, and typically only with 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 remotely, the proponent of the testimony must arrange for the oath to be administered at the witness's location.

E. Bar Counsel's Case in Chief

As noted previously, the OBC 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."⁸⁴ The OBC's case in chief will consist of witnesses, documentary evidence, stipulations, and admissions in the pleadings. As discussed in Section I, the OBC may also rely on issue preclusion to establish one or more elements of the case in chief.

F. Respondent's Presentation

After the OBC presents the case in chief, the respondent presents evidence in defense and evidence that supports any claim of mitigation raised in the answer to petition for discipline. If the respondent did not include a claim of mitigation in the answer, the respondent may not offer mitigating evidence at the hearing. A request to amend an answer at the hearing to permit mitigating evidence is left to the discretion of the hearing committee.⁸⁵ As noted in Section IX(A), the respondent bears the burden of proof on all claims of mitigation. Chapter 18 discusses mitigation factors in more detail.

⁸⁴ *Matter of Budnitz*, 425 Mass. 1018, 1018 n.1, 13 Mass. Att'y Disc. R. 62, 63 n.1 (1997), citing *Matter of Mayberry*, 295 Mass. 155, 167 (1936).

⁸⁵ *See Matter of Patch*, 466 Mass. 1016, 1018, 29 Mass. Att'y Disc. R. 523, 527 (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).

G. Expert Witnesses

The parties may, and on rare occasions must, rely upon expert witnesses in disciplinary hearings. The BBO's policy memorandum 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.⁸⁶

Just as in Massachusetts trial courts, expert testimony regarding the meaning of the *Rules of Professional Conduct* or 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 BBO, and ultimately the Court to determine.⁸⁷ Where, by contrast, a matter in dispute concerns the standard of care, expert testimony is permitted and is often essential. For example, in a disciplinary hearing involving an assertion that a lawyer charged or collected an excessive fee, the hearing committee must make findings about "the

⁸⁶ BBO Policies and Practices ¶ 12.

⁸⁷ *Matter of Diviacchi*, 475 Mass. 1013, 1020 (2016) (expert testimony is not necessary to determine whether an attorney has violated the rules of professional conduct). See *Matter of Crossen*, 450 Mass. 533, 570, 24 Mass. Att'y Disc. R. 122, 168 (2008), (quoting *Fishman v. Brooks*, 396 Mass. 643, 650 (1986) ("[e]xpert testimony concerning the fact of an ethical violation is not appropriate' in bar discipline proceedings because the fact-finder does not need assistance understanding and applying the ethical rules"). 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,'" *Matter of Discipline of Attorney*, 442 Mass. 660, 669, 20 Mass. Att'y Disc. R. 585, 595 (2004), and who are permitted to bring some of their expertise to bear in reaching their conclusions. See MASS. GEN. LAWS ch. 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").

fee customarily charged in the locality for similar legal services,”⁸⁸ among other factors. On occasion, expert testimony is necessary to establish the customary charge for the legal services provided.

When a party discloses its intention to rely on expert testimony, the hearing committee requires 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*.⁸⁹ The timing and content of expert disclosures is governed by the rules concerning the prehearing conference and the prehearing order that results from it.⁹⁰

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 that the hearing committee members may 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 Procedure Act permits such reliance.⁹¹

H. Objections

A party may object to evidence on the grounds that the testimony or document should not be admitted. In ruling on such objections, the hearing committee chair does not apply the law of admissibility of evidence in the trial courts. Instead, “[i]n any proceeding the admissibility of evidence shall be governed by the

⁸⁸ MASS. R. PROF. C. 1.5; *Matter of Fordham*, 423 Mass. 481, 12 Mass. Att’y Disc. R. 161 (1996). See also Chapter 11, Section II.

⁸⁹ 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.

⁹⁰ See BBO Rules § 3.23(b)(6)(a) See Appendix F for a sample, fictitious Prehearing Conference Order.

⁹¹ See note 87 *supra*.

Rules of Evidence observed in adjudicatory proceedings under Chapter 30A of the General Laws (State Administrative Procedure).⁹² 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.⁹³

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.”⁹⁴ 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.⁹⁵ Any hearsay, such as that contained in documents, must satisfy foundation requirements—that is, the fact-finder must be satisfied that the evidence is what it purports to be.⁹⁶

Practice Tip

A hearing committee ordinarily accepts 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.”⁹⁷

⁹² BBO Rules § 3.39.

⁹³ MASS. GEN. LAWS ch. 30A § 11(2).

⁹⁴ 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.

⁹⁵ 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).

⁹⁶ Rooney, *supra* note 94, at 4.

⁹⁷ 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”); SJC Rule 4:01 § 8(6) (subsidiary facts found by the board will be upheld if supported by substantial evidence).

- *Privilege:* As noted earlier in this section, the law governing privileges applies in disciplinary proceedings just as in court. A well-founded objection to a question on the grounds 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.”⁹⁸ Compelling a lawyer to produce documents required by law or by the SJC Rules to be maintained as part of practice responsibilities does not qualify as an invasion of that privilege, according to the “required records” exception to the privilege.⁹⁹ 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.”¹⁰⁰ This principle applies to proceedings before the BBO.¹⁰¹

- *Leading questions:* 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.¹⁰²

One issue that arises in disciplinary hearings concerns the respondent’s counsel using leading questions when examining the respondent after the OBC has called the respondent 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

⁹⁸ *Matter of Kenney*, 399 Mass. 431, 437, 5 Mass. Att’y Disc. R. 167, 188 (1987) (citing *Spevack v. Klein*, 385 U.S. 511, 514 (1967) (plurality opinion)).

⁹⁹ *Id.* (relying on the “required records” exception announced in *Stornanti v. Commonwealth*, 389 Mass. 518 (1983)).

¹⁰⁰ *Labor Relations Commission v. Fall River Educators’ Ass’n*, 382 Mass. 465, 471 (1981).

¹⁰¹ *See Matter of Boxer*, 14 Mass. Att’y Disc. R. 74, 79 (1998) (Board Memorandum).

¹⁰² No report or decision arising from a BBO proceeding has stated the “hostile witness” principle, but it is a practice the SJC supported in court matters. *See, e.g., Commonwealth v. Jones*, 319 Mass. 228 (1946).

respondent's testimony is sufficiently persuasive when elicited through leading questions is a strategic matter for respondent's counsel to evaluate.

- *Unauthenticated documents:* This objection is rare in disciplinary proceeding hearings. Exhibits must 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 rules on the objection when the exhibit is offered into evidence at the hearing. A party may object on any ground, including authenticity, to any document the other party offers that was not part of the prehearing exchange and reviewed in advance by the objecting party.¹⁰³

I. Issue Preclusion

When appropriate, the OBC may introduce factual findings from other civil or criminal adjudications to prove facts necessary for its case in chief. This use of collateral estoppel is also known as "issue preclusion" when previously established findings satisfy the OBC'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."¹⁰⁴ As the Court noted, "The offensive use of collateral estoppel is a generally accepted practice in American courts."¹⁰⁵ "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.'"¹⁰⁶ The BBO has wide discretion in permitting the use of collateral estoppel in this manner. The OBC may use such prior findings to establish both misconduct charges as well as any claims of aggravation.

To utilize issue preclusion/collateral estoppel, the OBC must present a motion to the BBO, which the BBO chair or a BBO member the chair designates must decide.¹⁰⁷

¹⁰³ *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).

¹⁰⁴ Bar Counsel v. Board of Bar Overseers, 420 Mass. 6, 10, 11 Mass. Att'y Disc. R. 291 (1995).

¹⁰⁵ *Id.* at 9.

¹⁰⁶ Matter of Cohen, 435 Mass. 7, 15, 17 Mass. Att'y Disc. R. 129, 143 (2001) (quoting Miles v. Aetna Cas. & Sur. Co., 412 Mass. 424, 427 (1992)).

¹⁰⁷ BBO Rules § 3.18.

J. Closing Argument

Practice Tips for Counsel in Disciplinary Hearings

Experienced hearing committee members report that some practices and habits by lawyers during disciplinary hearings serve their client well, while others are not effective. Those who regularly hear these matters offer the following suggestions:

- 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 relaxed standard for admissibility of evidence at an administrative hearing, the BBO Rules, 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 posttrial briefs to address issues and questions the hearing committee members raise 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.

After each party rests its case, the hearing committee hears closing arguments, first from the respondent, and then from the OBC.¹⁰⁸ (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.”¹⁰⁹ In practice, the hearing committee may schedule a different date for hearing closing arguments if the hearing testimony does not conclude until the end of that day. Unlike the opening statement, the closing argument includes reasoned argument based upon the evidence presented at the hearing, but may not rely on a party’s or counsel’s personal opinion or on something not in evidence at the hearing.

The closing argument is different from, and precedes, the parties’ filing of posthearing briefs, as discussed in Section XI. At closing argument, the hearing committee members may ask questions of counsel or the party making the argument. The question of an appropriate sanction is often a topic during the closing argument.

K. The Role of the BBO General Counsel in the Hearing

At each disciplinary hearing, an assistant general counsel (AGC) from the OGC attends the proceeding. The OGC is counsel to the BBO and has no responsibility for the outcome of a hearing or for any factual or credibility findings. The AGC’s role 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.”¹¹⁰ The AGC does not question witnesses or engage in discussions with parties or their counsel. At the end of the hearing and after all posthearing briefs are filed, the AGC drafts the report of the hearing committee, which the committee must approve.

X. TRANSCRIPT OF THE PROCEEDING

An official reporter transcribes all hearings, including argument by counsel and other discussion, unless the parties agree otherwise with the approval of

¹⁰⁸ If the only matter at issue is one of mitigation, then the respondent has the burden of proof and the order of closing arguments is reversed.

¹⁰⁹ BBO Rules § 3.42.

¹¹⁰ BBO Policies and Practices ¶ 11.

the hearing committee. After the hearing closes, the official reporter prepares a transcript of the proceedings and supplies that transcript to the BBO; the parties may obtain a copy of the transcript at their own expense. Any corrections to the transcript must be made no later than ten days prior to the due date for the posthearing briefs.¹¹¹

Practice Tip

The BBO Rules state that a respondent purchasing a transcript is discretionary, not mandatory. In practice, a respondent must arrange to purchase the transcript because the posthearing briefs must cite the pages of the transcript. No fee waiver procedure exists for counsel who cannot afford to purchase the transcript.¹¹²

XI. POSTHEARING BRIEFS

Within thirty days after the BBO receives the final transcript of the hearing, each party may file proposed findings of fact, proposed rulings of law, and a posthearing brief.¹¹³ It is not unusual for the parties to agree to request an extension of the thirty-day deadline. Parties typically file a pleading containing proposed findings of fact and conclusions of law as well as arguments addressing questions of law and the appropriate sanction. The argument should normally include:

- A concise statement of the case
- A discussion or statement of the evidence the filing party relied on, with specific reference to the pages of the record or exhibits where such evidence appears
- Proposed findings and conclusions, together with the reasons and authorities supporting them¹¹⁴

Hearing committee members report that the most useful briefs are concise, treat the evidence fairly and honestly, cite the record for all evidentiary references

¹¹¹ BBO Rules § 3.34.

¹¹² In 2017, a transcript of one full-day hearing would cost approximately \$500–\$600.

¹¹³ BBO Rules § 3.43.

¹¹⁴ *Id.* at §§ 3.44(a)(1), (2).

and assertions, and address directly the contested factual and legal issues that the hearing committee has to decide.

The respondent must file the brief and proposed findings and rulings with the BBO and serve copies of each to the other party and to each hearing committee member either by mail or in-person delivery. Service is complete upon in-person delivery or upon deposit in the United States mail.¹¹⁵ Each pleading must include a certificate of service identifying the method and date of service.

Practice Tip

The posthearing brief is an important document. Well-written proposed findings of fact, rulings of law, and a proposed sanction recommendation, with accurate citations to the record and case law, 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 the briefs, the committee deliberates, and then an AGC typically drafts the hearing committee report. Before and while drafting the report, the AGC elicits comments from the committee. The hearing committee must “promptly” submit its report to the BBO¹¹⁶ and exercises full responsibility for the substance of the final report. The committee report must include the following:¹¹⁷

1. A concise statement of the case
2. A citation for each disciplinary rule the respondent violated
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
4. The committee's findings of fact

¹¹⁵ *Id.* at § 3.10.

¹¹⁶ *Id.* at § 3.46.

¹¹⁷ *Id.* at § 3.47.

5. Its conclusions of law
6. Its recommended disposition of the petition

Together with a transcript and record of the proceedings, the committee sends the report to the BBO, with copies sent to the parties. The BBO has ultimate responsibility to decide the matter, including a decision whether to file an Information transferring the matter to the SJC. Chapter 19 discusses the posthearing processes after the hearing committee submits its report to the BBO.

XIII. SPECIAL HEARING PROCEDURES

A. Disciplinary Hearings Before an SHO

As noted in Section V, on occasion an SHO presides over a disciplinary hearing instead of a hearing committee. All of the procedures described previously apply with equal force to hearings conducted before an SHO.

B. Disciplinary Hearings Following a Criminal Conviction

A lawyer convicted of a crime must report that conviction to the OBC within ten days.¹¹⁸ If the crime for which the lawyer was convicted constitutes a “serious crime,” as defined in the SJC Rules,¹¹⁹ the lawyer will be “suspended immediately” after a show cause hearing, although the matter will also be referred for investigation and the institution of formal disciplinary proceedings.¹²⁰ “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.¹²¹

A disciplinary hearing on a petition based on a lawyer’s criminal conviction follows the procedures previously described, with one exception: The hearing is conducted by a hearing *panel* made up of BBO members, not a hearing committee. A hearing panel typically includes one BBO member who is not a lawyer.¹²²

¹¹⁸ SJC 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 BBO and to the SJC. *Id.* at § 12(7).

¹¹⁹ *Id.* at § 12(3).

¹²⁰ SJC Rule 4:01 § 12(4).

¹²¹ SJC Rule 4:01 § 12(1).

¹²² BBO Policies and Practices ¶ 9.

The panel's deliberation is subject to the SJC's presumptive sanctions following a conviction. For a felony conviction, the typical sanction is disbarment¹²³ or, when there are special mitigating circumstances, indefinite suspension.¹²⁴ A misdemeanor that qualifies as a "serious crime" warrants a suspension.¹²⁵ Other misdemeanors warrant at least a public reprimand.¹²⁶

The principle of issue preclusion described in Section IX(I) 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."¹²⁷ A panel and the BBO may not make findings that are inconsistent with the conviction.¹²⁸

C. Reinstatement Hearings

As with hearings based upon a criminal conviction, hearings on a petition for reinstatement are also heard by a hearing panel of board members and not a hearing committee.¹²⁹ Reinstatement hearings proceed differently from disciplinary hearings in other ways. Chapter 23 discusses the reinstatement process in detail, including the hearing process.

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.¹³⁰ The expedited hearing must be assigned to an SHO and must be held within thirty days after the respondent makes the demand for review. An expedited hearing has three possible outcomes: (1) the admonition may be vacated, (2) the admonition may be upheld, or (3) the hearing officer may determine that a more substantial sanction is appropriate and recommend that the matter be remanded for formal disciplinary proceedings.

¹²³ *Matter of Otis*, 438 Mass. 1016, 1017, 19 Mass. Att'y Disc. R. 344, 345 (2003).

¹²⁴ *Matter of Concemi*, 422 Mass. 326, 330 n.4, 12 Mass. Att'y Disc. R. 63, 69 n.4 (1996).

¹²⁵ *Matter of Eberle*, 26 Mass. Att'y Disc. R. 150 (2010); *Matter of Fraser*, 25 Mass. Att'y Disc. R. 217 (2009).

¹²⁶ *Matter of Coyle*, 30 Mass. Att'y Disc. R. 79 (2014).

¹²⁷ SJC Rule 4:01 § 12(2).

¹²⁸ *Matter of Concemi*, 422 Mass. 326, 328–29, 12 Mass. Att'y Disc. R. 63, 67 (1996).

¹²⁹ BBO Policies and Practices ¶ 9.

¹³⁰ SJC Rule 4:01 § 20; BBO Rules § 2.12.

The procedures for an expedited hearing differ from those previously discussed in the following ways:

- No prehearing conference is held.¹³¹ In lieu of such a conference, the notice of hearing the OGC prepares must include deadlines for the following:
 - Parties' exchange of witness lists and exhibits they intend to use during their cases in chief as well as a date for objections
 - Parties' objections to any exhibits or witnesses as well as for any supplemental designation of witnesses or objections
 - Filing with the BBO a final witness and exhibit list, final objections, and any stipulations¹³²
- The hearing is closed to the public because the identities of respondents who receive admonitions is not made public. If, after the hearing, the SHO recommends remanding the matter for formal proceedings, the matter becomes public when the petition for discipline is filed.¹³³
- The parties do not file posthearing briefs or findings of fact and conclusions of law, except for good cause shown.¹³⁴

In all other respects, an expedited hearing proceeds in the same way as other disciplinary hearings.

¹³¹ BBO Rules § 2.12(2)(e).

¹³² BBO Rules § 2.12(2)(d).

¹³³ BBO Rules § 3.22(b).

¹³⁴ BBO Rules § 2.12(2)(g).

PART III

Misconduct and Typical Sanctions

CHAPTER SEVEN

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 clients. Failure to provide competent and diligent representation violates the *Massachusetts Rules of Professional Conduct* and may lead to discipline. These 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 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.
- 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 in Chapter 9, Sections II(a) and II(B), and Chapter 13, Sections I–III, these five rules together establish a collection of related duties that warrant treatment together. This chapter describes the nature of the respective duties and the level of discipline a lawyer who violates those duties might expect to face.

A lawyer who performs less-than-competent service for a client (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 book does not address those civil claims and their substantive or procedural requirements, but other helpful resources exist that do so.¹ This chapter instead addresses the disciplinary consequences of a lawyer's breach of duties related to competence and diligence.

II. THE NATURE OF THE LAWYER'S RESPONSIBILITIES REGARDING COMPETENCE

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.

* * *

¹ 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 1.2 (cont'd.)

(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” is 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 1.0(k), defining *reasonable* and *reasonably*. While no reported Massachusetts opinion has employed that phrase, there is no question that this standard governs a lawyer’s performance.²

The comments to Rule 1.1 confirm that the duty of competence is usually that of “a general practitioner.”³ No overarching definition of *competence* exists within Massachusetts law. An American Bar Association (ABA) task force sought to catalog the lawyering skills with which “a well-trained generalist should be familiar before assuming ultimate responsibility for a client.”⁴ The task force’s MacCrate Report offered lawyers a list of necessary skills for effective law practice.⁵

² That same phrase appears in the Terminology section of the *ABA Model Rules of Professional Conduct*. See ABA MODEL RULES OF PROF’L CONDUCT Rule 1.0(h) (2013).

³ MASS. R. PROF. C. 1.1 cmt. [1]. 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).

⁴ 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).

⁵ *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;

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.”⁶ The timing of the client’s need for services is another factor that a lawyer may take into account in determining whether the services meet the competence standard.⁷ A lawyer need not be familiar with the area of law at the outset of the attorney–client relationship if the lawyer obtains training in the relevant field.⁸ That training, however, cannot be at the client’s expense. While a lawyer may learn the substantive law as part of the client’s paid representation, the overall fee charged the client must be reasonable.⁹ If the lawyer does not have the competence to provide the legal services a client needs despite studying, the matter may still be accepted if the lawyer associates with another lawyer who has the experience and expertise.¹⁰ The lawyer must reasonably believe that the association will aid in the representation and must obtain the client’s consent.¹¹

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 (SJC) has held that a lawyer owes a client “a reasonable degree of care and skill in the performance of legal duties.”¹² 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

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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.

⁶ MASS. R. PROF. C. 1.1 comment [5].

⁷ MASS. R. PROF. C. 1.1 comment [3].

⁸ MASS. R. PROF. C. 1.1 comments [2], [4].

⁹ *Matter of Fordham*, 423 Mass. 481, 12 Mass. Att’y Disc. R. 161 (1996), *cert. denied* 519 U.S. 1149 (1997).

¹⁰ MASS. R. PROF. C. 1.1 comment [2].

¹¹ MASS. R. PROF. C. 1.1 comment [6].

¹² *Pongonis v. Saab*, 396 Mass. 1005, 1006 (1985).

judgment.”¹³ 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 the one Rule 1.1 imposes. 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 1.1.¹⁴

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).¹⁵ 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.¹⁶

¹³ *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).

¹⁴ 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).

¹⁵ See MASS. R. PROF. C. 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).

¹⁶ 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, introduced in 2009 by the SJC as a pilot program. See *Limited Assistance Representation*, <http://www.mass.gov/courts/programs/legal-assistance/lar-gen.html> (last visited May 8, 2018).

Massachusetts is one of the few jurisdictions in the country¹⁷ 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.”¹⁸

Many reported disciplinary decisions show sanctions imposed for failure to provide competent service.¹⁹ 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.

¹⁷ The other jurisdictions are Connecticut, District of Columbia, Maryland, Michigan, and South Dakota. See *MCLE Information by Jurisdiction*, AMERICAN.ORG, http://www.americanbar.org/publications_cle/mandatory_cle/mcle_states.html (last visited May 8, 2018). Massachusetts does require newly admitted lawyers to complete a Practicing with Professionalism course within eighteen months of their admission. See MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT Rule 3:16 [hereinafter SJC Rule].

¹⁸ MASS. R. PROF. C. 1.1 comment [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).

¹⁹ 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 Feeny*, 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 (1987) (failure to associate with a lawyer who had the experience the respondent lawyer lacked).

B. Sanctions for Violating 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. A diligent attorney who tries hard and attends to affairs but makes a mistake will likely not receive discipline (although the lawyer may be sued for malpractice and may have to forfeit, or not collect, fees). Perhaps because of the scarcity of discipline based solely on Rule 1.1, neither the Board of Bar Overseers (BBO) nor the SJC has articulated a presumptive sanction for misconduct related to lack of competence. As discussed in Section III, the BBO has articulated guidelines for misconduct involving the closely related problem of neglect.

You Should Know

The Office of the Bar Counsel (OBC) has investigated client claims that a lawyer provided less-than-competent service even if the client has civil remedies available, such as a legal malpractice action, or even if the client has successfully availed himself of those remedies.²⁰

The OBC may defer investigating a complaint until after the civil matter is resolved. If the OBC has not done so on its own, a lawyer who has been sued for legal malpractice, and who is the subject of an OBC disciplinary investigation 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.²¹

Every reported disciplinary matter involving Rule 1.1 also included other misconduct. However, in some reported cases, the Rule 1.1 violation predominated. In *Matter of Bongiovi*,²² a lawyer received a public reprimand for

²⁰ 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).

²¹ SJC Rule 4:01 § 11 (authorizing the BBO or the Court to defer on motion by a respondent; ordinarily, no deferral occurs).

²² 20 Mass. Att’y Disc. R. 50 (2004).

“inadequate preparation and incompetent representation” in handling a probate 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*,²³ the respondent received a public reprimand for neglecting to file suit after settlement efforts were unsuccessful. His prior admonition contributed to the sanction being public rather than private discipline. In *Matter of Thompson*,²⁴ the respondent abandoned the law practice and neglected numerous pending client matters, as well as failed to communicate with clients and protect their interests. The lawyer also committed numerous Interest on Lawyers Trust Accounts (IOLTA) accounting violations and failed to cooperate with the OBC’s investigation. Thompson was suspended for a year and a day.²⁵

Most other matters primarily involving Rule 1.1 have resulted in admonitions. In Ad. 05-01,²⁶ a lawyer received an admonition for making serious mistakes in handling the client’s immigration matter. In Ad. 00-21,²⁷ the lawyer admitted to “a serious error of judgment” involving a real estate closing and received an admonition. And in Ad. 00-04,²⁸ a lawyer advised a client who believed 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 described but also included an additional item of misconduct, such as signing a document dishonestly to cover up a mistake²⁹ or misusing an impounded court document when the lawyer did not know the rules of court.³⁰

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

²³ 27 Mass. Att’y Disc. R. 551 (2011).

²⁴ 16 Mass. Att’y Disc. R. 390 (2000).

²⁵ 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).

²⁶ 21 Mass. Att’y Disc. R. 664 (2005).

²⁷ 16 Mass. Att’y Disc. R. 480 (2000).

²⁸ 16 Mass. Atty 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 and Family Court; admonition).

²⁹ Ad. 04-37, 20 Mass. Att’y Disc. R. 728 (2004) (signing a person’s affidavit after failing to have it signed properly).

³⁰ Ad. 00-38, 16 Mass. Att’y Disc. R. 506 (2000).

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

Neglecting 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 [3] 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 1.3.³¹ That lack of diligence almost always constitutes less-than-competent representation and, therefore, usually violates Rule 1.1 as well. A review of Massachusetts disciplinary reports shows that lack of diligence is, in fact, a serious problem for many Massachusetts lawyers.³² Because the disciplinary reports and court opinions tend to employ the term *neglect* to refer to lack of diligence, this chapter uses that term as well.

No reported Massachusetts disciplinary decisions offer 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 violates Rule 1.1 or 1.3. If a lawyer promises to write a demand letter by Friday but neglects to do so—simply forgetting—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, the statute of limitations

³¹ The predecessor to the *Massachusetts Rules of Professional Conduct*, the *Code of Professional Responsibility* expressly referred to neglect. Former Disciplinary Rule 6-101(A)(3) stated, "A lawyer shall not . . . (3) Neglect a legal matter entrusted to him."

³² A Westlaw search shows that between 1999 and 2017 more than seven hundred disciplinary reports cited Rule 1.3 as a basis for the attorney's discipline. More than half of those reports also cited Rule 1.1.)

expires, and the client loses rights, that neglect obviously violates 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,³³ but every instance of reported and disciplined neglect fits that description. Neglect is a serious matter. Clients entrust their affairs to lawyers and often pay handsomely for the lawyer's promise to pursue the clients' interests. A lawyer who makes that promise and fails to attend to a client's matter violates a central commitment of the legal profession. Most often, neglect causes direct harm to clients and to their legal interests, even if the neglect is unintentional.³⁴

While a single instance of neglect may lead to discipline,³⁵ an isolated neglect of a matter, with minimal or no risk of harm to a client, has not resulted in discipline.³⁶ Most reported disciplinary cases involve a pattern of neglect.³⁷

³³ The ABA's Ethics Committee offered the following description of *neglect*:

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).

³⁴ 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.”

³⁵ 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).

³⁶ Authorities from other jurisdictions that, 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”).

³⁷ 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)

You Should Know

The fact that a client has discharged a lawyer in a matter pending in court does not relieve the lawyer of duties if the court does not allow the lawyer to withdraw from the pending action.³⁸ 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*,³⁹ emphasized the severity of the problem. The specific neglect in *Kane* was the lawyer's failure to file available posttrial motions on behalf of an incarcerated client. *Kane* is noteworthy because in that opinion the BBO enunciated important new "guidelines for discipline in cases involving neglect or failure of zealous representation," after finding that "existing sanctions for neglect are inadequate."⁴⁰ The *Kane* guidelines are discussed in the following section. *Kane* did not attempt to define neglect or to limit its scope.⁴¹

(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*, 26 Mass. Att'y Disc. R. 272 (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).

³⁸ 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 representing client, as client was retained in the firm's name).

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

⁴⁰ *Id.* at 326.

⁴¹ 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 sixty open client files); *Matter of Chambers*, 421 Mass. 256 (1995) (failing to pursue client's appeal led to appeal not being docketed until after client had served his entire sentence); *Matter of Garabedian*, 415 Mass. 77, 9 Mass. Att'y Disc. R. 121 (1993) (failure to file personal injury action within the statute of limitations).

B. Discipline for Violating Rule 1.3

In *Matter of Kane*,⁴² the BBO announced new guidelines that increased the sanctions for incompetence and neglect. As described by the bar counsel at the time, the new standards established the following 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.⁴³

Since 1998, the BBO and the SJC have followed the guidelines *Kane* established.⁴⁴ The following sections describe selected, but typical, examples of discipline imposed in matters involving neglect.

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

⁴³ Arnold R. Rosenfeld, *New Standards Clamp Down on Incompetence and Neglect*, BOARD OF BAR OVERSEERS (Jan. 1998), <https://bbopublic.blob.core.windows.net/web/f/neglect.pdf> (last visited May 8, 2018).

⁴⁴ See *Matter of Shaughnessy*, 442 Mass. 1012, 1014, 20 Mass. Att'y Disc. R. 482, 486 (2004) (six-month suspension for multiple pre-Kane 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.").

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 the 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*,⁴⁵ 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 of substantial factors in aggravation” were also present. The BBO 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.”⁴⁶ Applying the *Kane* standards and the factors in aggravation, the single justice ordered the lawyer disbarred.

Another example of lawyer neglect resulting in disbarment is *Matter of Marshall*.⁴⁷ 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 the OBC’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*,⁴⁸ 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 may be warranted.

⁴⁵ 28 Mass. Att’y Disc. R. 307 (2012).

⁴⁶ *Id.* at 307, 322, 323 (quoting *Matter of Ulin*, 18 Mass. Att’y Disc. R. 549, 555 (2002)).

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

⁴⁸ 18 Mass. Att’y Disc. R. 549, 555 (2002).

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.”⁴⁹

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 imposing suspensions where previously an admonition or public reprimand would have resulted as well as ramping up the length of suspensions.⁵⁰

You Should Know

A review of decisions of single justices based on neglect since *Kane* shows term suspensions ranging from two months (with the suspension suspended)⁵¹ to two years,⁵² with most of the suspensions being four to six months.⁵³

⁴⁹ *Matter of Ulin*, 18 Mass. Att’y Disc. R. 549 (2002).

⁵⁰ See *Matter of Shaughnessy*, 442 Mass. 1012, 1014, 20 Mass. Att’y Disc. R. 482–85 (2004).

⁵¹ See, e.g., *Matter of Long*, 24 Mass. Att’y Disc. R. 435 (2008).

⁵² See, e.g., *Matter of Ozulumba*, 23 Mass. Att’y Disc. R. 515 (2007).

⁵³ 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; there were also multiple factors in aggravation, including the clients’ vulnerability.

An apt example of a suspension for serious neglect is *Matter of Barrat*.⁵⁴ In *Barrat*, the attorney neglected two separate client matters and misrepresented the facts to one of the clients in an effort to hide the 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 BBO. The BBO had rejected the respondent's plea for a public reprimand, given the seriousness of the neglect, but it also rejected the OBC'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*,⁵⁵ the lawyer was suspended for six months for neglecting several matters but also for proffering forged or backdated documents to a court to cover mistakes. This lawyer also suffered from serious depression, and that mitigating factor influenced the single justice in the decision to limit the suspension to six months, with conditions.⁵⁶

A closer case was *Matter of Kydd*,⁵⁷ in which the lawyer neglected one probate estate matter and misrepresented the activity status to an estate beneficiary. 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 and deceit. The justice opted to maintain the three-month suspension but stayed the suspension for one year with conditions. In *Matter of O'Reilly*,⁵⁸ the respondent neglected a client matter and repeatedly lied to the client about the 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.

In *Matter of Lansky*,⁵⁹ a lawyer neglected two probate estate matters and engaged in a conflict of interest, causing substantial injury to the beneficiaries

⁵⁴ 20 Mass. Att'y Disc. R. 27 (2004).

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

⁵⁶ See also *Matter of Krabbenhof*, 23 Mass. Att'y Disc. R. 362 (2007) (analogized to *Matter of Barrat*, 20 Mass. Att'y Disc. R. 27 (2004); 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).

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

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

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

of the estates. The respondent argued that the neglect, which was 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 BBO 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*,⁶⁰ the lawyer neglected a litigation matter, which resulted in the client's claims being dismissed. The insurer made the client whole. In *Matter of Kirby*,⁶¹ 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.⁶²

You Should Know

As seen in *Berkland* and numerous other cases,⁶³ violations of Rules 1.1, 1.2(a), 1.3, and 1.4 often occur 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)).

⁶⁰ 26 Mass. Att'y Disc. R. 40 (2010).

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

⁶² 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).

⁶³ 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).

Sometimes attorneys receive public reprimands in circumstances where the facts suggest a more serious sanction. For instance, in *Matter of Gleason*,⁶⁴ a lawyer neglected a client matter, causing significant harm (redressed by the liability insurer), engaged in an improper fee agreement, requested that the client settle the malpractice claim without the protections of Rule 1.8(h), and failed to supervise staff on the matter. The BBO adopted a proposed stipulation of the parties to a public reprimand.

Practice Tip

Misconduct that would warrant a public reprimand under the *Kane* standard may lead to suspension if the lawyer misrepresents facts or circumstances to cover up neglect, or fails to cooperate with the OBC.⁶⁵

4. Admonition

Under the *Kane* standards, a violation of Rule 1.3 results in an admonition if “the lawyer’s misconduct causes little or no actual or potential injury to a client or others.”⁶⁶ Many such examples exist in the disciplinary reports.⁶⁷ For instance, in Ad. 12-04,⁶⁸ the lawyer neglected a probate estate matter for nearly two years and received an admonition for that misconduct despite having a previous admonition for similar misconduct nine years earlier. In Ad. 13-02,⁶⁹ the lawyer received an admonition after twice permitting a civil action to be dismissed because of failure to take some action in the case. The lawyer had no prior discipline and fully cooperated both with the OBC and with the resulting malpractice claim.

⁶⁴ 28 Mass. Att’y Disc. R. 352 (2010).

⁶⁵ 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).

⁶⁶ *Kane*, 13 Mass. Att’y Disc. R. at 327.

⁶⁷ A Westlaw search generates at least 190 admonition reports between 1999 and 2017 where the primary misconduct involves neglect of a client matter.

⁶⁸ 28 Mass. Att’y Disc. R. 919 (2012).

⁶⁹ 29 Mass. Att’y Disc. R. 697 (2013).

Similar admonitions appeared under the predecessor to Rule 1.3. In Ad. 99-67,⁷⁰ the attorney, representing an incarcerated convicted criminal defendant, failed to visit the client in jail, in violation of DR 6-101(A)(2) and (A)(3); the lawyer received an admonition with conditions. In Ad. 99-71,⁷¹ the lawyer's actions and inadequate supervision of an associate created a long delay in resolving title questions on a real estate closing; the violation of DR 6-101(A)(2) and (A)(3) led to an admonition.

5. *Diversion*

In some instances where an admonition would otherwise be the appropriate sanction for a respondent's neglect or lack of diligence, the OBC instead may enter into a diversion agreement with the respondent. Diversion "to an alternative educational, remedial, or rehabilitative program" as a substitute to formal discipline is authorized under SJC Rule 4:01.⁷² These appear to be instances where the OBC believes it is better for the lawyer to receive supervision or guidance (for example, how to maintain a tickler 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;**

⁷⁰ 15 Mass. Att'y Disc. R. 775 (1999).

⁷¹ 15 Mass. Att'y Disc. R. 783 (1999).

⁷² SJC Rule 4:01 § 8(1)(b). For a discussion of diversion, see Chapter 4, Section II(C).

RULE 1.4 (cont'd.)

- (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. The OBC reports that a lawyer's failure to stay in contact with a client is the most common complaint the office receives. While few discipline decisions involve solely Rule 1.4 violations, ignoring a client often goes hand in hand with neglect or lack of competence. A lawyer has a duty, both as a fiduciary and under the *Massachusetts Rules of Professional Conduct*, to maintain adequate communication with a client. Rule 1.4 must be understood to complement 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."⁷³

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, may lead to discipline.⁷⁴ Often, the failure

⁷³ MASS. R. PROF. C. 1.2(a).

⁷⁴ 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).

to maintain contact with a client while neglecting the client's matter serves as the basis for discipline in Massachusetts.⁷⁵

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.

* * *

Clients must be informed if their lawyer suffers from a mental condition that impairs the lawyer's ability to adequately represent clients.⁷⁶

While most serious violations of Rule 1.4 also qualify as neglect of a client matter in violation of Rule 1.3, the two rules are not equal. A lawyer may pursue a client's matter diligently 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.⁷⁷ 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.

⁷⁵ A Westlaw search shows more than 550 reported disciplinary matters between 1999 and 2017 where Rule 1.4 is a source of the lawyer's misconduct. Of those reports, close to five hundred also involve 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) that a divorce judgment required); 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).

⁷⁶ *Matter of Gallagher*, 29 Mass. Att'y Disc. R. 275 (2013).

⁷⁷ *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 QDRO preparation outside the scope of her engagement).

B. Discipline for Violating Rule 1.4

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*,⁷⁸ the respondent received a public reprimand for violation of this duty. The lawyer advised a client about a possible claim against a lender. The client understood that the lawyer was providing representation on that matter and believed the lawyer would file suit. The lawyer understood the role as merely advising the client but did not make the limited nature of the relationship sufficiently clear to the client. After the statute of limitations expired without the lawyer filing suit, the lawyer received a public reprimand. In *Matter of Brandt*,⁷⁹ 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."⁸⁰ The lawyer received a public reprimand.

At least twenty-five admonitions since 1999 have primarily involved Rule 1.4. Examples of the kinds of mistakes that have led to such an admonition include the following:

- In Ad. 12-10,⁸¹ a lawyer repeatedly failed to respond to inquiries from a client and did not respond promptly to OBC inquiries.
- In Ad. 10-17,⁸² a lawyer did not follow up adequately with a divorce client about whether the lawyer would prepare a Qualified Domestic Relations Order (QDRO), and by the time the parties resolved that issue the ex-husband had spent most of the assets. The BBO report

⁷⁸ 26 Mass. Att'y Disc. R. 284 (2010).

⁷⁹ 26 Mass. Att'y Disc. R. 59 (2010).

⁸⁰ 26 Mass. Att'y Disc. R. at 59.

⁸¹ 28 Mass. Att'y Disc. R. 928 (2012).

⁸² 26 Mass. Att'y Disc. R. 792 (2010).

concluded that the lawyer had not acted less than competently, but the failure to keep the client apprised of the limit of the lawyer's responsibilities was a breach of duties.

- In Ad. 09-07,⁸³ a lawyer representing a tenant failed to apprise the 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 BBO concluded that the counterclaim was not meritorious, but the lawyer had failed in the duty to keep a client informed.
- In Ad. 03-42,⁸⁴ 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 incarcerated, and by not visiting them in person he failed to maintain adequate communication with them.

Practice Tips

A lawyer's duty to communicate with a client continues even if the client fails to pay the legal fees owed for the lawyer's work.⁸⁵ The proper remedy is to withdraw, not to refuse to communicate.

* * *

Appellate criminal defense lawyers are required by Committee for Public Counsel Services (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 Rules 1.4(a) and (b) and may lead to discipline.⁸⁶ Although the CPCS policy applies only to appointed counsel, privately retained counsel are well-advised to follow the policy as well.

⁸³ 25 Mass. Att'y Disc. R. 666 (2009).

⁸⁴ 19 Mass. Att'y Disc. R. 598 (2003).

⁸⁵ Ad. 06-45, 22 Mass. Att'y Disc. R. 950 (2006).

⁸⁶ *See, e.g.*, Ad. 99-74, 15 Mass. Att'y Disc. R. 789 (1999).

Generally, lying to clients to cover up a failure to keep them informed about matters results in public discipline.⁸⁷ Where the lawyer's false report did not cause harm to the client, the resulting discipline was usually an admonition.⁸⁸

V. ADDITIONAL CONSIDERATIONS FOR MATTERS INVOLVING ALLEGATIONS OF LACK OF COMPETENCE, NEGLIGENCE 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 the OBC asserts that a lawyer's conduct 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.⁸⁹ For BBO disciplinary purposes, one can reasonably read Rules 1.1, 1.2, 1.3, and 1.4 as collectively imposing an equivalent standard.

Violating 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 cases.⁹⁰ 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 familiar with the practice area in question.⁹¹

⁸⁷ See, e.g., *Matter of Bixby*, 17 Mass. Att'y Disc. R. 81 (2001) (lawyer publicly reprimanded for intentionally misrepresenting to client that the case was still pending when the lawyer had dismissed the case; in mitigation, the case may not have been viable).

⁸⁸ 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).

⁸⁹ 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.").

⁹⁰ See MASS. R. PROF. C., Scope, comment [6]; see, e.g., *Fishman*, 396 Mass. at 649; *Sullivan v. Birmingham*, 11 Mass. App. Ct. 359, 369 (1981) (the ethics rules "provide standards of professional conduct of attorneys and not grounds for civil liability").

⁹¹ 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[?]").

In any 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.⁹² Also, the SJC has stated that expert testimony is ordinarily not required in disciplinary matters to establish a standard of care.⁹³ But in those disputes where the parties disagree about the nature of the standard of care, the BBO process permits expert testimony, at the discretion of the hearing panel or officer.⁹⁴ If the lawyer's actions evidence a clear failure to meet the ordinary standards of good practice, the hearing panel or officer typically denies an offer of expert testimony.⁹⁵ Chapter 6, Section IX(G) discusses the role of an expert witness in a disciplinary hearing.

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, show 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 the OBC, violate the standards of competence, diligence, or client communication.

⁹² See *Matter of Crossen*, 450 Mass. 533, 570, 24 Mass. Att'y Disc. R. 122, 168 (2008).

⁹³ *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).

⁹⁴ *BBO Policies and Practices* ¶ 12, MASSACHUSETTS BOARD OF BAR OVERSEERS, <https://bbopublic.blob.core.windows.net/web/f/bbopolicy.pdf> (last visited May 8, 2018):

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.

⁹⁵ See *Crossen*, 450 Mass. at 570, 24 Mass. Att'y Disc. R. at 168; *Matter of Buckley*, 2 Mass. Att'y Disc. R. 24, 25 (1980).

CHAPTER EIGHT

Confidentiality (Rules 1.6 and 1.9(c))

I. INTRODUCTION

A lawyer must protect the information received while representing clients. The instructions in Rule 1.6 of the *Massachusetts Rules of Professional Conduct* to a lawyer are simple and clear: “A lawyer shall not reveal confidential information relating to client representation unless the client gives informed consent”¹ or one of seven exceptions applies.² That obligation continues after the representation ends. According to the American Bar Association (ABA) *Model Rules of Professional Conduct* 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.³ 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 are severe, as discussed below.

II. THE NATURE OF THE CONFIDENTIALITY DUTY AND SANCTIONS FOR VIOLATING 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).

¹ MASS. R. PROF. C. 1.6(a).

² MASS. R. PROF. C. 1.6(a), (b), discussed in Section IV.

³ The Massachusetts version of the ABA MODEL RULES OF PROF'L CONDUCT r. 1.9(c)(1), barring the use of former client information, omits a qualifying phrase from the *Model Rules* counterpart. The latter declares an exception for information “generally known.” The absence of that phrase in the Massachusetts rule probably results from the 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.

RULE 1.6: CONFIDENTIALITY OF INFORMATION (*cont'd.*)

(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 Rule 8.3 must reveal, such information:

- (1) to prevent reasonably certain death or substantial bodily harm, or to prevent the wrongful execution or incarceration of another;
- (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

RULE 1.6 (cont'd.)

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 (d) 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 Rule 1.6

While the scope of the Massachusetts version of Rule 1.6 is narrower than in most other jurisdictions, and less strict than that described in ABA 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 Rule 1.6 omits the qualifier "confidential," and so literally covers more information than the Massachusetts rule.⁴)

According to Massachusetts Rule 1.6, "Confidential information" consists of information gained during or relating to the representation of a client, whatever

⁴ ABA MODEL RULES OF PROF'L CONDUCT r. 1.6(a). Most jurisdictions have adopted the language of the *Model Rules* 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

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,”⁵ 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.”⁶ 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.

A lawyer must not only avoid revealing protected information related to the representation but must also take precautions to avoid inadvertently disclosing information. Any lawyer who employs e-mail 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.⁷ Comment [18] to Massachusetts 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 matter (including sharing sensitive documents).⁸ Under ordinary circumstances, the use of unencrypted e-mail and cloud computing, each commonly used by lawyers in their daily practices, is adequate,⁹ but a lawyer must offer more secure avenues when appropriate and necessary.¹⁰

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

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 comment [c(i)] (AM. LAW INST. 2000).

⁵ MASS. R. PROF. C. 1.6 comment [3A].

⁶ *Id.*

⁷ See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 17-477-R (revised May 22, 2017).

⁸ MASS. R. PROF. C. 1.6 comment [8]. Note that the Massachusetts version of comment [8], which also includes comment [8A], is more developed than the ABA’s version, interpreting the identical language of Rule 1.6(c).

⁹ 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).

¹⁰ ABA Op. 17-477-R, *supra* note 7.

treat the person so assisted as a client for the purposes of this Rule.”¹¹ Participants must keep the confidences of assisted persons, even if those persons are not technically their “clients.” Section IV discusses the exceptions to this ethical duty.

B. Confidentiality and the Attorney-Client Privilege Distinguished

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 or 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 (SJC) describes 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 communications were made in confidence; and (3) the privilege has not been waived.¹²

A communication between a lawyer and a client concerning the legal matter for which the lawyer has been retained is not privileged if that conversation takes place in the presence of an unnecessary third party.¹³ The privilege may be waived if proper precautions are not taken to protect against inadvertent disclosure.¹⁴ Information that an attorney obtains during the course of representation other than through a confidential client communication is not privileged, although it may be covered by Rule 1.6.

The doctrine surrounding the attorney-client privilege is extensive and intricate, and is not a central component of this book, especially since the evidentiary doctrine has little direct relevance to disciplinary matters.¹⁵ 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.*,¹⁶ a lawyer revealed otherwise confidential client

¹¹ MASS. R. PROF. C. 1.6(d). The ABA *Model Rules* do not include such a provision.

¹² *In re Grand Jury Investigation*, 453 Mass. 453, 456 (2009).

¹³ *Comm’r of Revenue v. Comcast Corp.*, 453 Mass. 293, 306 (2009).

¹⁴ *Hoy v. Morris*, 79 Mass. (13 Gray) 519 (1859).

¹⁵ 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).

¹⁶ 424 Mass. 109 (1997).

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.¹⁷ His disclosure worked; it prevented the crime. However, it also led to his client's arrest on a charge of attempted arson, for which the client was indicted. When the district attorney subpoenaed the lawyer to testify at trial about the matters that the lawyer had reported to the police, the lawyer claimed that his testimony was inadmissible because of 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."¹⁸ 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.¹⁹

C. Discipline for Revealing Confidences Under Rule 1.6

1. Disbarment

While no Massachusetts lawyer 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*,²⁰ a young lawyer disclosed confidential information of a criminal defendant client—the

¹⁷ That exception continues to exist under the *Rules of Professional Conduct* in a greatly expanded form. Section IV discusses the exceptions to the basic duties established by Rule 1.6.

¹⁸ 424 Mass. at 115.

¹⁹ 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* note 12. In the latter matter, involving a client's threats against a judge that the lawyer disclosed, the Court made that finding explicit. 453 Mass. at 458-59.

²⁰ 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.

location of a safety deposit box—to prosecutors in order to reach funds in the box to pay for investigative expenses and counsel fees. The lawyer also misrepresented these actions to the client, but the primary misdeed was revealing his client’s secrets in order to obtain money. He was disbarred.

In *Matter of Johnson*,²¹ an experienced lawyer was disbarred after posting confidential client information on her website, in an effort to publicize what she believed were false claims of sexual abuse. Much of the material posted was impounded by a court order, which the respondent ignored. The respondent also refused to remove website material about a client until the client withdrew a complaint made to the Office of the Bar Counsel (OBC). This combination of misconduct led to her disbarment.

Another lawyer, in what the single justice described as “an unfortunate case,” was disbarred after misusing client funds, neglecting the client’s Interest on Lawyers Trust Account (IOLTA), mismanaging client affairs, and, when suing the client for fees allegedly due, disclosing more confidential facts than necessary to establish the claim or defense under Rule 1.6(b)(5).²² That unwarranted disclosure of confidential client information contributed to the disbarment, but apparently played a relatively minor role.

2. *Suspension*

No Massachusetts lawyer 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.²³

²¹ 450 Mass. 165, 22 Mass. Att’y Disc. R. 403 (2006).

²² *Matter of O’Malley*, 26 Mass. Att’y Disc. R. 462 (2010).

²³ *Matter of Delaney*, 21 Mass. Att’y Disc. R. 166 (2005).

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*,²⁴ 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 non-responsive. The respondent filed a motion to withdraw his appearance, disclosing in the motion more client information than was necessary to support the motion.²⁵ That breach of client confidentiality, along with considerable additional misconduct,²⁶ led to the suspension. Similarly, in *Matter of Hilson*,²⁷ a lawyer was suspended indefinitely for multiple instances of misconduct involving the 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” given his need to defend himself, but the SJC agreed with the Board of Bar Overseers (BBO) that “the standard is more than ‘appropriate’; disclosures must be ‘necessary.’”²⁸

A lawyer was also suspended for his *failure* to reveal client confidences pursuant to Rule 1.6(b)(3). As noted previously, 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*,²⁹ 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 failing to disclose the client’s fraud (misleading the administrative body at the same time by the evidence and arguments), the respondent violated both Rule 1.6 and Rule 4.1 and was suspended for six months and a day.

²⁴ 26 Mass. Att’y Disc. R. 295 (2010).

²⁵ *Id.*

²⁶ 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.

²⁷ 448 Mass. 603, 23 Mass. Att’y Disc. R. 265 (2007).

²⁸ 448 Mass. at 610, n.5 (citing Canon 4, DR 4-101(C)(4)).

²⁹ 20 Mass. Att’y Disc. R. 212 (2004).

Practice Tip

Lawyers must tread a fine line when communicating with the 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 in Section II(C)(4), most such errors result in an admonition. One suggested strategy is for counsel to file a motion disclosing minimal facts and then to prepare a separate supporting *in camera* affidavit for the court to review, without disclosing it to opposing counsel or making it part of the record.³⁰

3. Public Reprimand

Lawyers have received a public reprimand for revealing clients' confidential information. In *Matter of Bulger*,³¹ 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, the attorney continued to communicate with the administrator without permission, providing updates on the investigation. The BBO adopted the hearing committee's recommendation of a public reprimand. The BBO 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 committee still to be wholly unaware of the impropriety of his

³⁰ See Massachusetts Bar Association Ethics Op. 96-3 (1996). 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.

³¹ 29 Mass. Att'y Disc. R. 65 (2013).

misconduct.”The BBO dismissed the respondent’s argument that he was unsure who his client was during this time as “willful blindness.”³²

Several lawyers have received public reprimands for misusing client information belonging to a *former* client. Section III discusses the cases and sanctions reported under Rule 1.9(c), the rule governing safekeeping of former client confidences.

4. *Admonition*

The typical sanction for violating Rule 1.6 without other misconduct or aggravating circumstances is an admonition.³³ The disciplinary reports show how a lawyer with a disagreement with a client might improperly reveal confidential client information. The lawyers who have done so, and whose complaints did not include separate misconduct, have typically received admonitions. (Lawyers who reveal information about a former client under such circumstances also receive admonitions, as described in Section III.) 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. 11-21,³⁴ the lawyer, in his motion to withdraw from representation in a family court matter, attached e-mails between the lawyer and the client to establish the breakdown of the relationship. The lawyer also disclosed the specific fees the client owed, which the BBO deemed not necessary and a breach of the lawyer’s confidentiality duty. In an earlier decision, PR 92-34,³⁵ the OBC recommended a public reprimand for a lawyer who made a similarly poor decision, but the BBO imposed what was then called a private reprimand, the equivalent to an admonition today. In that case, the client sent letters to the *Geraldo Rivera* television show and 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 BBO

³² *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).

³³ *Bulger*, 29 Mass. Att’y Disc. R. at 66.

³⁴ 27 Mass. Att’y Disc. R. 972 (2011).

³⁵ 8 Mass. Att’y Disc. R. 328 (1992).

concluded that the lawyer had violated his duties under the disciplinary rule in place at the time.³⁶

Other examples exist where the lawyer and the client had some disagreement, and the lawyer revealed more than necessary in response to the client's claims. For instance, in Ad. 09-18,³⁷ a client posted comments on an Internet bulletin board criticizing the tax assistance the lawyer had provided and the lawyer's fee. The lawyer responded with a post denying the client's claims and disclosing the client's substance abuse issues along with other confidential information. And, in Ad. 07-35,³⁸ a client authorized the lawyer to charge the lawyer's fee to a credit card but later disputed the claim with the 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 unnecessary to establishing the claim for legal fees. The BBO concluded that such disclosure violated Rule 1.6(a).

In another admonition matter, Ad. 06-24,³⁹ the lawyer was disciplined after disclosing 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, leading her to confront him with the information. Because information from a prospective client has the same protection as that from a current client, the lawyer's actions violated Rule 1.6.⁴⁰

A disciplinary matter arising under the predecessor to Rule 1.6 involved lawyers using information from one client's case to substantially assist another client's affairs, at little (but some) harm to the client whose information the lawyers exploited. In *Matter of Discipline of Two Attorneys*,⁴¹ the lawyers representing the buyers of a parcel of real estate 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

³⁶ *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.

³⁷ 25 Mass. Att'y Disc. R. 685 (2009).

³⁸ 23 Mass. Att'y Disc. R. 1015 (2007).

³⁹ 22 Mass. Att'y Disc. R. 901 (2006).

⁴⁰ That same misconduct would violate Rule 1.18 of the ABA *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.

⁴¹ 421 Mass. 619, 12 Mass. Att'y Disc. R. 580 (1996).

the seller, to pay off their judgment-creditor client. In addition to the conflict of interest, the SJC agreed with the BBO 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.”⁴²

In one reported matter, a single justice, after concluding that a lawyer had violated the predecessor to Rule 1.6, declined to impose discipline. In *Matter of an Attorney*,⁴³ the client discharged the attorney representing his personal injury claim after they disagreed about the relevance to his claim of the client’s attending a police academy. After the client returned with his father, a police officer, and used police resources to photocopy parts of the file, the attorney wrote to the police chief detailing the encounter and revealing the client’s plans to use the police lab for his personal business. The OBC sought an admonition for this disclosure. The single justice concluded that the lawyer’s actions violated DR 4-101, 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 public disputes with clients through social media not only risk sanctions for violating 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 see that dispute appearing prominently in search-engine results.

⁴² 421 Mass. at 622–23, 12 Mass. Att’y Disc. R. at 586.

⁴³ 18 Mass. Att’y Disc. R. 588 (2002).

III. THE NATURE OF THE CONFIDENTIALITY DUTY TO FORMER CLIENTS AND SANCTIONS FOR VIOLATING THE DUTY

RULE 1.9(c): 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)

Practice Tip

A lawyer may properly oppose a former client in a later matter that is not substantially related to the earlier representation. Even if permitted to oppose a former client, the lawyer may not reveal or use information that was learned from the client in the first matter, unless that information is generally known.⁴⁴

Lawyers on occasion have been disciplined for using or disclosing client information after representation has ended. Some of these disciplinary matters are discussed in Chapter 10, Section III(A) concerning successive conflicts of interest. No lawyer has been disbarred or suspended solely for misusing former

⁴⁴ The ABA *Model Rules* includes the exception noted in the Practice Tip for “generally known” matters. That same exception appears in comment [8] in the Massachusetts version of Rule 1.9(c), presumably because if a fact is “generally known,” it is not “confidential.”

client confidences in violation of Rule 1.9(c), although several lawyers have received admonitions or public reprimands.

1. *Public Reprimand*

Lawyers have been publicly reprimanded on occasion for disclosing former clients' information. In *Matter of Hochberg*,⁴⁵ 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 the former client's new lawyer sent, the respondent sought to attack the former client's credibility 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 misusing the former client's confidences against him.

In *Matter of Horrigan*,⁴⁶ a case discussed in Chapter 10, the lawyer violated Rule 1.9(a) and then more seriously violated Rule 1.9(c), receiving a public reprimand for that misconduct. After representing 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.

In *Matter of Acharya*,⁴⁷ a lawyer whose former client sought relief from an order by claiming that the respondent provided ineffective assistance of counsel defended herself 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 disclosing 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

⁴⁵ 17 Mass. Att'y Disc. R. 304 (2001).

⁴⁶ 26 Mass. Att'y Disc. R. 250 (2010).

⁴⁷ 26 Mass. Att'y Disc. R. 4 (2010).

the former client. In Ad. 09-08,⁴⁸ the lawyer's misconduct was based solely on Rule 1.9(c). The respondent, while working as a lawyer for a company, learned valuable information there. After she left the company and established a business competing with her former client, she used the information about the former client to its disadvantage. Similarly, in Ad. 09-13,⁴⁹ a lawyer assisted a former client's wife in a divorce action against the former client by submitting an affidavit listing some of the former client's faults, revealing confidential information. And in Ad. 08-09,⁵⁰ the lawyer offered his client, as examples for their use in their own cases, copies of previous clients' divorce pleadings, thereby revealing those former clients' confidential information.⁵¹

IV. EXCEPTIONS TO THE DUTY OF CONFIDENTIALITY

A lawyer who reveals a 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 certain instances, a lawyer is required to reveal some information that otherwise qualifies as confidential under Rule 1.6. A lawyer has permission, or a duty, to disclose otherwise-confidential information in the following circumstances:

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 communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”⁵²

⁴⁸ 25 Mass. Att’y Disc. R. 667 (2009).

⁴⁹ 25 Mass. Att’y Disc. R. 676 (2009).

⁵⁰ 24 Mass. Att’y Disc. R. 856 (2008).

⁵¹ The discipline in Ad. 08-09 demonstrates that client information available in a court file open to the public does not refute that the material is protected as “confidential” under Rules 1.6(a) and 1.9(c).

⁵² MASS. R. PROF. C. 1.0(f).

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 client's express objection, 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 Rules* are different from the above provisions in some minor ways. The *Model Rules* contract 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.⁵³ The Massachusetts rule adds "other significant interests" to the property and financial interests that the *Model Rules'* exceptions cover. 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 Rules*, 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.

A lawyer's discretion to disclose information to prevent a fraudulent act that would 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 in Chapter 12.

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

⁵³ Cf. ABA MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(1), (2).

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 faces discipline, so lawyers must employ this discretionary exception 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 OBC that it has received a “request for investigation” (a “complaint”) about the lawyer’s conduct. As described in Chapter 5, the OBC, upon receiving 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 the OBC about the facts alleged in the complaint. In the response to the OBC, the lawyer must consider the ramifications of communicating confidential or privileged information to the agency. Similarly, if the disciplinary matter proceeds to a formal charge being filed, the lawyer must consider the scope of permissible disclosures in the course of responses 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.⁵⁴ 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.⁵⁵ The same exception appears explicitly in the Massachusetts version of Rule 1.6(b)(5). The lawyer

⁵⁴ *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.”); Commonwealth v. Silva, 455 Mass. 503, 529 (2009).

⁵⁵ *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 nonclient 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).

may reveal only such otherwise-privileged or otherwise-confidential information as is reasonably necessary to address the accusation. Revealing more than necessary may itself lead to discipline.⁵⁶

4. *To comply with other law:* Rule 1.6(b)(6) states a principle that should be obvious: If an outstanding legal obligation or court order requires that a lawyer disclose matters that qualify as confidential client information, the lawyer has permission to comply with the other law. Note that this provision is discretionary. It implies that a lawyer may choose not to comply with the other law, but the lawyer would then be violating that other law, which itself may create problems for lawyers under the *Massachusetts Rules of Professional Conduct*.

Practice Tip

If the lawyer has a good-faith question about the duty to comply with a subpoena or other court order that would involve disclosing confidential client information, the attorney 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 lawyers reveal some client information and face discipline if they fail to do so.

⁵⁶ See, e.g., Ad. 99-52, 15 Mass. Att’y Disc. R. 746 (1999); Ad. 99-42, 15 Mass. Att’y Disc. R. 726 (1999); Ad. 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); Ad. 06-16, 22 Mass. Att’y Disc. R. 884 (2006); Ad. 07-06, 23 Mass. Att’y Disc. R. 909 (2007); Ad. 07-35, 23 Mass. Att’y Disc. R. 1013 (2007); Matter of Acharya, 26 Mass. Att’y Disc. R. 4 (2010).

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 a client intends to engage in, or has engaged in, perjury or similar fraud on a tribunal, even if those steps involve revealing confidential information otherwise protected by Rule 1.6.⁵⁷ Section II discusses the perjury questions in its consideration of Rule 3.3.
7. *To avoid assisting in a fraud:* As noted in Sections II and III, 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 obstructing 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” (emphasis added).⁵⁸ Much common law from other states,⁵⁹ as well as the *Restatement of the Law Governing Lawyers*,⁶⁰ interprets the lawyer’s duty, when obtaining evidence of a crime regarding a pending proceeding, 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 violates Rule 3.4 by violating the duties under applicable obstruction of justice statutes.

⁵⁷ See, e.g., *Commonwealth v. Mitchell*, 438 Mass. 535 (2003). MASS. R. PROF. C. 3.3 does offer special procedures for responding to intended perjury of a criminal defendant. See Rule 3.3(e).

⁵⁸ MASS. R. PROF. C. 3.4(a).

⁵⁹ 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, 403–07 (2015).

⁶⁰ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §119 (AM. LAW INST. 2000).

CHAPTER NINE

Allocation of Roles and Authority in the Attorney-Client Relationship (Rules 1.2, 1.4, 1.13, and 1.14)

I. INTRODUCTION

In the course of representing a client, a lawyer is confronted with countless decisions, from what to work on at any moment and choosing the most effective legal strategy to recommending to a client whether to accept a settlement offer or proceed to trial. Some of those decisions are at the lawyer's discretion and based on good judgment, others are the client's responsibility, and some the lawyer and client make jointly. Typically, questions regarding allocation of responsibility do not lead to the kind of misconduct that results in discipline, or even a disciplinary complaint. Sometimes, however, a lawyer misreads or misunderstands the applicable laws governing the proper sharing of decision-making and, as a result, may engage in misconduct.

This chapter reviews the relevant law and describes four rules of the *Massachusetts Rules of Professional Conduct*—Rules 1.2, 1.4, 1.13, and 1.14—that address the lawyer's and client's responsibilities. It identifies the basic purpose 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 DECISION-MAKING FOR A CLIENT AND SANCTIONS FOR RELATED MISCONDUCT

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

RULE 1.2 (cont'd.)

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

RULE 1.4: COMMUNICATION (*cont'd.*)

(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.

Rules 1.2 and 1.4 together establish a lawyer's duties regarding shared responsibility with clients for the lawyer's legal work and decisions about it.

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.”¹ 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.² At the same time, a lawyer may not assist a client in activity that is criminal or fraudulent, even if that is how the client chooses to proceed.³

Placing 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”⁴ The rule specifies certain decisions that the client must make and that the lawyer may not make unilaterally: whether to accept a settlement offer in a matter and, in criminal proceedings,

¹ *Burt v. Gahan*, 351 Mass. 340, 342 (1966).

² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 20–22 (AM. LAW INST. 2000) [hereinafter RESTATEMENT].

³ MASS. R. PROF. C. 1.2(d) (1998); MASS. CODE OF PROF. RESP. DR 7-102(A)(6), (7) (1969); RESTATEMENT § 23(1). The limitations on assisting in criminal or fraudulent conduct are discussed in Chapter 13.

⁴ MASS. R. PROF. C. 1.2(a).

whether to enter a plea; whether to waive a jury trial; and whether the client will testify.⁵ By listing those discrete decisions as belonging to the client, Rule 1.2(a) implies that a lawyer may exercise discretion regarding other decisions in the course of the representation, although some that are not mentioned (such as whether to appeal an adverse judgment) remain with the client.⁶ 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.”⁷ Rule 1.4, however, establishes that a lawyer must keep a client informed about developments in a matter, implying that a lawyer may not make critical choices for a client without ensuring that the client understands and accepts the implications of those choices.⁸

The lesson of Rules 1.2 and 1.4, therefore, is that lawyers must collaborate with clients in all substantial decision-making as a case progresses, even if the decisions are not those listed in Rule 1.2. While some common law malpractice cases hold that a lawyer should confer with clients on important decisions,⁹ the Board of Bar Overseers (BBO) has never disciplined a lawyer where the sole misconduct was failing to confer with a client. By contrast, a lawyer’s failure to keep a client informed has frequently led to formal discipline, particularly where, along with other misconduct, the lawyer failed to communicate about significant developments in the case such as dismissal for noncompliance with discovery.¹⁰

A lawyer must refuse, however, to help a client if the objective constitutes 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.

Rule 1.2(d) forbids lawyers from counseling clients in a way that assists or encourages the clients to engage in criminal or fraudulent actions. Lawyers are

⁵ *Id.*

⁶ RESTATEMENT § 22(1).

⁷ MASS. R. PROF. C. 1.2, comment [2].

⁸ See MASS. R. PROF. C. 1.4(a), (b); see also RESTATEMENT § 20.

⁹ 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 settlement opportunities); *Fishman v. Brooks*, 396 Mass. 643 (1985) (enunciating standard of care).

¹⁰ 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).

not forbidden, though, from advising clients about the limits of the law and explaining the consequences of violating the law. Understandably, the dividing line between counseling a client to commit a crime and explaining the implications of engaging in that criminal action (which may include the likelihood of detection and the punishment should detection occur) is a slippery one. But the line exists.¹¹ Lawyers have permission to perform the latter kind of counseling; they do not have permission to perform the former, and they 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 a 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 noncriminal and nonfraudulent actions that may be inconsistent with a law or legal obligation, including violating regulatory mandates (e.g., copyright infringement) or tortious conduct, even if doing so encourages that activity.¹² Of course, a lawyer may (and most often should) properly engage the client in moral conversation about the wisdom of such activity.¹³

A lawyer may also limit the scope of the client's representation in some circumstances, with the client's informed consent. 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 would normally be part of the 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 the scope of the representation to selected 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).¹⁴ The most common example of this kind of limited representation is "unbundled" legal services, discussed in Chapter 7 on competence.¹⁵

¹¹ 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).

¹² See MASS. R. PROF. C. 1.2 comment [9].

¹³ See MASS. R. PROF. C. 2.1.

¹⁴ The SJC allows attorneys to provide limited assistance representation in the trial courts under certain conditions. See *Supreme Judicial Court Order Regarding Limited Assistance Representation*, MASS.GOV, <https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-order-regarding-limited-assistance> (last visited May 10, 2018).

¹⁵ "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.

B. Discipline for Violating Rule 1.2(a) and (c)

1. Disbarment

The Supreme Judicial Court (SJC) has disbarred lawyers for misconduct related to making significant legal decisions without client authority and then misrepresenting the status of matters to clients or others. Each case, however, included multiple instances of misconduct. No lawyer has been disbarred in Massachusetts solely for violating Rule 1.2. For instance, in *Matter of Cobb*,¹⁶ a lawyer was disbarred for serious misconduct involving three separate clients, one instance of which involved accepting a settlement offer after the client had repeatedly refused to authorize the settlement figure. The lawyer later falsely claimed to have proof of authority to settle the case. And, in *Matter of McBride*,¹⁷ a lawyer was disbarred for multiple instances of misconduct, including settling a lawsuit without client permission and then mishandling the resulting proceeds.¹⁸

*Matter of Marani*¹⁹ offers an instructive basis for understanding 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 sustained in a motor vehicle accident. The attorney settled the claim without informing the client by entering an amount of money in a release the client had previously signed and then 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 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.²⁰

¹⁶ 445 Mass. 452, 21 Mass. Att'y Disc. R. 93 (2005).

¹⁷ 449 Mass. 154, 23 Mass. Att'y Disc. R. 443 (2007).

¹⁸ 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 separate matters, misappropriated more than \$200,000 in real estate funds he held in escrow).

¹⁹ 14 Mass. Att'y Disc. R. 464 (1998).

²⁰ 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).

Other lawyers have been disbarred for misconduct involving an apparent 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)).²¹ Other lawyers have been disbarred for misconduct involving Rule 1.2 when they egregiously neglected client matters and caused the clients significant harm.²² Those types of misconduct are discussed in Chapter 7.

2. Suspension

Settling a client’s case without authority frequently results in the lawyer’s suspension. An apt example is *Matter of Traficonte*.²³ There, the respondent settled a class action without client consent and proceeded to mislead the named plaintiffs about the settlement status, including the lawyer’s substantial attorney fee award. The hearing report, which the single justice adopted 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 misled the client after doing so. The single justice rejected a public reprimand because the lawyer’s actions harmed the clients and because the misconduct involved a conflict of interest (due to the fees available) and misrepresentation.²⁴

You Should Know

Lawyers who settle litigation matters without client permission—particularly to ensure the lawyer’s contingent fee—will likely receive term suspensions, with longer terms imposed when the lawyer misrepresents the nature of the misconduct.

²¹ 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).

²² 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).

²³ 22 Mass. Att’y Disc. R. 747 (2006).

²⁴ 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

Other lawyers have been suspended for settling matters without client authority. In *Matter of Buck*,²⁵ a lawyer was suspended for one year for conduct similar to that in *Traficante*. In *Buck*, the lawyer settled a personal injury case without client authority and without sufficient medical evidence to warrant a settlement. He then instructed his secretary to forge his clients' signatures on the settlement check. The single justice rejected the parties' stipulated agreement for a three-month suspension and imposed a one-year suspension.²⁶

In *Matter of Chancellor*,²⁷ the lawyer was suspended indefinitely after settling a client's matter without client permission in order to receive a contingent fee. The attorney settled the client's claim without consulting the client about the settlement amount or obtaining the client's consent, and then used the client's share of the settlement and continually misrepresented matters to the client. The lawyer also mishandled his Interest on Lawyers Trust Accounts (IOLTA) and lied to the Office of the Bar Counsel investigation, factors that contributed to his more serious discipline.

In *Matter of King*,²⁸ 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 new counsel, the new counsel repeatedly informed the former attorney of the discharge and requested the client's file. Instead of sending the client's file to the new counsel, the former attorney filed suit on behalf of the client without informing the client or obtaining consent. In the second matter, the attorney was discharged after the client retained new counsel but the former attorney failed to withdraw. He then 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, is *Matter of Leone*.²⁹ The respondent was suspended for one year for misrepresenting to the court and to opposing counsel that she had authority

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).

²⁵ 22 Mass. Att'y Disc. R. 121 (2006).

²⁶ The lawyer offered evidence of several mitigating factors, which may account for the three-month suspension stipulation.

²⁷ 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).

²⁸ 23 Mass. Att'y Disc. R. 352 (2007).

²⁹ 19 Mass. Att'y Disc. R. 236 (2003).

to settle a case, violating 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 and gave 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 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 the bar counsel during its investigation. Those latter elements likely accounted for the serious suspension.

A lawyer can also be suspended for violations of Rule 1.2 that do not involve failing to obtain client authorization of a settlement. In *Matter of Bozzotto*,³⁰ the respondent engaged in multiple violations of Rule 1.2(a) (along with Rules 1.1, 1.3, and 1.4) by not keeping an organizational client (a labor union) informed about 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 failing to cooperate with the bar counsel’s investigation (leading to an administrative suspension), then practiced law unauthorized while on suspension, and failed to participate in the disciplinary proceedings.

3. *Public Reprimand*

Whether lawyers receive a public reprimand or a term suspension may depend on whether they were acting in their own interests when proceeding without client permission and the extent of the resulting harm. For instance, in *Matter of Malaguti*,³¹ an attorney handled real estate closings for a company that itself served as an agent for lenders. The lawyer failed to attend two closings and to advise the clients that he was not attending. The board treated the limited representation as one that required client consent, which the lawyer did not obtain. The lawyer also paid insufficient attention to the documents, causing some harm to at least one client.

You Should Know

Lawyers who act without proper client authority but without selfish or evil intentions, and whose clients do not suffer substantial harm, may receive a public reprimand rather than a suspension.

³⁰ 27 Mass. Att’y Disc. R. 58 (2011).

³¹ 27 Mass. Att’y Disc. R. 566 (2011).

In *Matter of Blake*,³² an attorney violated Rule 1.2 by continuing to prosecute an action over the client's objection. The client was administratrix of her sister and brother's estate; the attorney and client disagreed whether three bank accounts left in the siblings' names were joint accounts. The client opposed filing an action in the Probate and Family Court to determine how the court should treat the accounts; instead, the client instructed her lawyer to file tax returns, which the attorney did not do. This violation of Rule 1.2 also led to violating Rule 1.5, as the lawyer charged substantial, and unnecessary, fees for the resulting years of litigation.

In *Matter of Weiss*,³³ an attorney received a public reprimand for violating Rule 1.2(a) by settling a case for \$500 without the 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, nor did he obtain the client's consent to settle the claim. The client ultimately was not harmed, as he 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 Multi-State Professional Responsibility Examination (MPRE) within a year; if not, the sanction would instead be a one-month suspension.

In *Matter of Mason*,³⁴ an attorney received a public reprimand for withdrawing an objection in Bankruptcy Court without consulting the client, violating DR 7-101(A)(1), (2), and (3).³⁵ 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 the 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.³⁶

³² 26 Mass. Att'y Disc. R. 52 (2010).

³³ 22 Mass. Att'y Disc. R. 787 (2006).

³⁴ 17 Mass. Att'y Disc. R. 408 (2001).

³⁵ 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.

³⁶ 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).

4. *Admonition*

Lawyers who act without client consent with little or no harm to the client frequently receive admonitions. For example, in Ad. 99-22,³⁷ an attorney added unauthorized language to a mortgage, violating Rule 1.2(a). In an effort to protect some property after the client lost a lawsuit, the lawyer inserted language he thought would be useful into a mortgage, but about which he did not counsel his client. The client complained after circumstances later changed and the added language came to light. 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 Private Reprimand 92-30,³⁸ 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 the 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.

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.

In one case where the facts were seemingly even more egregious, the board also imposed an admonition. In Ad. 06-37,³⁹ an attorney violated Rule 1.2 while representing an incarcerated client. The attorney filed a tort complaint on behalf of his client but 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, a relatively new lawyer, made adequate restitution to the client, factors which may have influenced the board to admonish the lawyer privately rather than reprimand him publicly.

In these admonitions, the lawyers did not misrepresent their authority to others, and that factor seemed relevant to the sanction imposed.

³⁷ 15 Mass. Att'y Disc. R. 687 (1999).

³⁸ 8 Mass. Att'y Disc. R. 321 (1992). Private reprimands were the predecessor to what is now known as an admonition. Both are private disciplinary sanctions.

³⁹ 22 Mass. Att'y Disc. R. 897 (2006).

C. Discipline for Violating Rule 1.4

1. Disbarment

The SJC has disbarred lawyers for misconduct involving Rule 1.4 (Communication) 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 1.4.⁴⁰ Also, several Rule 1.4 disbarments relate to the respondents' serious neglect of client matters, which almost inevitably includes a failure to apprise clients of developments.⁴¹ Chapter 7 discusses Rule 1.4 violations in that context.

Some lawyers, however, have been disbarred for serious misconduct that mainly included failing to keep a client informed about a matter's status or failing to explain a matter adequately to the client. *Matter of Espinosa*⁴² is one such case. 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 for all three clients without adequately explaining to the clients the reason for his actions, violating Rule 1.4(a) and (b); the lawyer violated Rule 1.4 by failing to advise the mother about the status of the sons' petitions, which had been denied; he also failed to inform a different client about an immigration court hearing or to 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.

⁴⁰ 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).

⁴¹ See, e.g., *Matter of 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).

⁴² 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.

In *Matter of Mangano*,⁴³ 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 notifying 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 him disbarred.⁴⁴

2. Suspension

The disciplinary reports from 1999 through 2017 contain more than 150 suspension decisions involving Rule 1.4 violations, usually along with other rules. As discussed in Section II(C)(1) regarding disbarment, 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 results from misconduct in which Rule 1.4 played a more significant role. For instance, in *Matter of Grayer*,⁴⁵ 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 second 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 lawyer's primary failure was not keeping his clients apprised of how he was managing their cases.

Practice Tip

Lawyers sometimes act on their own without keeping their clients informed about their actions or obtaining client consent to the legal 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 receive lengthy suspensions.

⁴³ 28 Mass. Att'y Disc. R. 600 (2012).

⁴⁴ 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), *aff'd* 453 Mass. 1001, 25 Mass. Att'y Disc. R. 478 (2009).

⁴⁵ 23 Mass. Att'y Disc. R. 215 (2007).

In *Matter of Donovan*,⁴⁶ 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 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*,⁴⁷ an attorney failed to communicate the fee basis or rate 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 involved in an automobile accident who also wanted him to help them with estate planning. 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*

The disciplinary reports between 1999 and 2017 contain more than a hundred public reprimands involving violations of Rule 1.4, most of which included other wrongdoing. One public reprimand where Rule 1.4 played a more significant role was *Matter of Atwood*.⁴⁸ In *Atwood*, several different clients filed complaints with the bar counsel against an attorney after he charged fees that he never adequately explained to the clients. While his conduct violated Rule 1.5 (Fees), it also violated his duties under Rule 1.4. *Matter of Mancuso*⁴⁹ resulted in a public reprimand from essentially breaching communication duties. In *Mancuso*, the attorney knowingly gave his client an unreliable phone number (a cell phone

⁴⁶ 27 Mass. Att'y Disc. R. 229 (2011).

⁴⁷ 26 Mass. Att'y Disc. R. 427 (2010).

⁴⁸ 26 Mass. Att'y Disc. R. 12 (2010).

⁴⁹ 24 Mass. Att'y Disc. R. 465 (2008).

whose service was frequently cut off because of billing problems) and failed to reply to several letters from a client who was in prison.⁵⁰

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.

Several other public reprimand matters also involved a significant breach of the duties required by Rule 1.4. In *Matter of McGuirk*,⁵¹ a lawyer received a public reprimand after failing to respond to repeated inquiries by two separate clients as well as failing to advise a client about the effects of a guardianship proceeding. In *Matter of Pepe*,⁵² an attorney received a public reprimand for misconduct that included serious violations of Rule 1.4(a) and (b). The lawyer, representing a tenant in an eviction summary process proceeding, failed to respond to discovery and 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 of Doyle*,⁵³ 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, violating Rule 1.4. While the client suffered no harm (warranting perhaps an admonition, as discussed in the following section), the mishandling of the client's retainer contributed to the lawyer's public discipline.

4. Admonition

Lawyers have received admonitions for failing to maintain adequate communication with a client, absent serious harm to the clients. For instance, in

⁵⁰ 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 Kwiat*, 22 Mass. Att'y Disc. R. 434 (2006).

⁵¹ 26 Mass. Att'y Disc. R. 355 (2010).

⁵² 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).

⁵³ 26 Mass. Att'y Disc. R. 143 (2010).

Ad. 07-18,⁵⁴ an attorney violated Rule 1.4(a) and Rule 8.4(c). He was unable to immediately file his client’s complaint but falsely told 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. 06-39,⁵⁵ an attorney failed to promptly notify his client that her wrongful termination lawsuit had been dismissed, to respond in a timely fashion to his client’s inquiries, and to refile the suit. And in Ad. 99-74,⁵⁶ an attorney violated Rule 1.4(a) and (b) when he was appointed to represent a client in an appeal of his criminal convictions. The attorney neither met the client nor spoke with him before filing the appellate brief. Even after filing the brief, the attorney made no attempt to meet the client.

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, most often results in an admonition.

III. ALLOCATION OF DECISION-MAKING 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

⁵⁴ 23 Mass. Att’y Disc. R. 968 (2007).

⁵⁵ 22 Mass. Att’y Disc. R. 935 (2006).

⁵⁶ 15 Mass. Att’y Disc. R. 789 (1999).

RULE 1.13: ORGANIZATION AS CLIENT (*cont'd.*)

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.

RULE 1.13 (cont'd.)

(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 Decision-Making Principles Applied to Organizational Clients

1. Rule 1.13 Guidance on Representing Organizations

Rule 1.13 offers guidance on how to properly counsel organizational clients, such as corporations or limited liability companies (LLCs), and some lawyers have been disciplined for failing to conform to the dictates of Rule 1.13.⁵⁷

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 in the organization with whom a lawyer interacts is not the lawyer’s client, even if that person acts like the client and the lawyer treats that person as the client. The client is the organization.⁵⁸ In allocating decision-making 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 is clear (e.g., the organization’s CEO, vice president, or general counsel). In some less common instances, though, it is unclear who lawfully speaks for the client, especially,

⁵⁷ See, e.g., *Matter of Wise*, 433 Mass. 80, 16 Mass. Att’y Disc. R. 416 (2000).

⁵⁸ The same principle generally applies under the common law. See *Robertson v. Gaston Snow & Ely Bartlett*, 404 Mass. 515 (1989).

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 applicable corporate law and agency principles to discern whose directions to honor.⁵⁹

The other significant implication of Rule 1.13(a) is that a lawyer may not always and automatically 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 organization wishes. If the client’s constituent breaches an obligation to the organization and creates a likelihood of substantial harm to the client, the lawyer must approach the higher authority.⁶⁰ A lawyer who fails to determine what the organization itself chooses to do—where a reasonable lawyer would understand the need to seek some further confirmation—has violated the responsibility to the organizational client and Rules 1.2, 1.4, and 1.13. As of April 2018, no reported disciplinary decision has sanctioned a lawyer for making the wrong decision in such a setting.⁶¹

Nothing in Rule 1.13 relieves a lawyer of the responsibility to honor Rule 1.2(d) to refrain from assisting in conduct that is criminal or fraudulent. Rule 1.13(b) adds a further obligation to a lawyer representing an organization, in stating:

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

⁵⁹ 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).

⁶⁰ MASS. R. PROF. C. 1.13(b). Sometimes substantive law, apart from the rules of professional conduct, imposes additional duties to report potential wrongdoing. *See, e.g.*, SEC Rule 205, 17 C.F.R., Ch. II, Pt. 205 (2003) (implementing the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745).

⁶¹ In other jurisdictions, lawyers have occasionally 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).

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* upon discovering that the organizational constituents are engaging in conduct that either violates a legal obligation to the organization (e.g., embezzlement) or violates law applicable to the organization (e.g., pollution), if either of those actions is likely to cause substantial harm to the organization and is related to the representation. Typically, the lawyer must counsel the constituent about ceasing or rectifying the improper action and (if that does not solve the problem) then 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 Rule 1.6 would not otherwise permit such reporting.⁶²

2. *The Constituent/Client Distinction*

The most common ethical challenge for the lawyer representing an organization (and especially a close corporation) is maintaining the distinction between the organization's constituents—the managers, employees, and others with whom the lawyer works daily—and the client itself, which is the entity. Constituents frequently make the common mistake of believing that the company lawyer serves as *their* lawyer.⁶³ While the lawyer may look to the constituents to act as “the client,” they are not the lawyer's client in any personal 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.

Lawyers representing an organization, therefore, must be vigilant in assessing whether the employee or agent with whom they are speaking understands

⁶² MASS. R. PROF. C. 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.”

⁶³ *See, e.g.,* Robertson v. Gaston Snow & Ely Bartlett, 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.”).

that they are not that person's individual lawyer, and the lawyer 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 preventing an inadvertent attorney-client relationship.⁶⁴ This is particularly important in situations involving close corporations. Under the common law, even though there may not be an attorney-client relationship between the lawyer and the individual shareholders, the lawyer still owes a fiduciary duty to minority shareholders (derivative of the fiduciary duty that shareholders in close corporations owe to each other). Thus, in *Baker v. Wilmer, Cutler, Pickering, Hale & Dorr*,⁶⁵ the appeals court reversed the dismissal of a case against a law firm where the allegations in the complaint set out sufficient facts to assert a claim that the lawyers had aided majority shareholders in freezing out minority shareholders.

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 discussed in the *Bulger* matter in the following subsection.

B. Discipline for Violating Rule 1.13

While Rule 1.13 presents subtle and complicated issues for lawyers representing organizations, few lawyers have been disciplined for violating that rule. In one reported disciplinary case, *Matter of Wise*,⁶⁶ the attorney was suspended for six months for misconduct arising from representing 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

⁶⁴ See Peter A. Joy & Kevin C. McMunigal, *Corporate Miranda Warnings*, 25 A.B.A. CRIM. JUST. 47 (Summer 2010); *United States v. Ruele*, 583 F.3d 600, 604 n.3 (9th Cir. 2009).

⁶⁵ 91 Mass. App. Ct. 835 (2017).

⁶⁶ 433 Mass. 80, 16 Mass. Att'y Disc. R. 416 (2000).

that their removal from the board was unlawful and, therefore, they still spoke for the nonprofit. Because the lawyer's action occurred before the *Massachusetts Rules of Professional Conduct* was adopted, the SJC concluded that Rule 1.13 did not apply, but it implied that the lawyer's actions may have breached duties under that rule if it had been in effect.⁶⁷ 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, revealing client confidences, and contact with a party represented by counsel.⁶⁸ *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*,⁶⁹ the respondent received a public reprimand after he continued to communicate confidential client information to a former constituent of the government agency for which the respondent worked as general counsel. The former constituent was the head of the agency and 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 his client's identity, 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 decision-making about the client's matters. Sometimes, however, clients suffer from impairments that hamper their ability to participate meaningfully in their legal matters. Rule 1.14 addresses the lawyer's responsibilities in such settings, and few lawyers have been disciplined in Massachusetts for misconduct related to violating Rule 1.14.

⁶⁷ *Id.* 433 Mass. at 85–86.

⁶⁸ The Court said that the duty of a lawyer facing such a dispute about control of an organization is to "remain neutral." *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.*

⁶⁹ 29 Mass. Att'y Disc. R. 65 (2013).

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity 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 cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action in connection with the representation, including consulting with individuals or entities that have the 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 decision-making authority between a lawyer and the 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 commitment to client autonomy that Rules 1.2 and 1.4 establish remain operative. But if the client is unable to participate meaningfully in the legal matter because of a disability or limitation, or if that ability is substantially compromised, the lawyer's responsibilities change. The lawyer must remain committed to respecting the client's autonomy while at the same time compensating for the client's decision-making limitations and protecting the client's interests

from substantial harm.⁷⁰ Therefore, Rules 1.2 and 1.4 apply differently when the client has some form of diminished capacity.

Rule 1.14 offers lawyers some guidance about how to proceed with a client with diminished capacity. That limited capacity may result from developmental disability, mental illness, or young age, as when a lawyer is 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 the rule grants:

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 representation⁷¹

Before a lawyer may lawfully take "reasonably necessary protective action" on behalf of a client, the lawyer 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 the lawyer treat the client with diminished capacity any differently than another client.

The text of Rule 1.14 does not help a lawyer determine when it is appropriate to take some protective action, but its comments refer to such factors as:

[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.⁷²

⁷⁰ MASS. R. PROF. C. 1.14 comment [1].

⁷¹ MASS. R. PROF. C. 1.14(b).

⁷² *Id.* at comment [6].

Lawyers must rely upon their own discretionary judgments, usually without the aid of a professional, to conclude that a client's actions are not merely idiosyncratic but manifest some impaired reasoning capacity.⁷³ 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 action, including consulting an expert, is one of the things that would otherwise violate the lawyer's duties with unimpaired clients, but which the rule permits after the attorney has formed a reasonable belief about the need for it.

If the lawyer, either through consulting others or relying on personal judgment, determines that the client does indeed have diminished capacity and faces the risks of harm described in the rule, the lawyer may seek or recommend that a surrogate decision-maker be appointed, such as a guardian or conservator, or take other measures aimed at protecting the client's interests. Comment [7] to Rule 1.14 offers the following choices, each available at the lawyer's discretion:

The attorney may:

- (i) advocate the client's expressed preferences regarding the issue;
- (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.⁷⁴

The role of a lawyer acting in a protective capacity for a client with diminished capacity with no appointed surrogate is clear: The lawyer must exercise discretion using the "substituted judgment" standard and not a "best interests"

⁷³ The criteria upon which a lawyer may act pursuant to Rule 1.14 resemble those applicable to appointing a conservator for an impaired person. *See* MASS. GEN. LAWS ch. 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").

⁷⁴ *Id.* at comment [7].

standard.⁷⁵ 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. The lawyer's actions ought to represent the least restrictive alternative available.⁷⁶

Many lawyers have been disciplined for mistreating clients with diminished capacity,⁷⁷ but few decisions, described in the following section, have sanctioned a lawyer for misapplying or misunderstanding the duties under Rule 1.14. That Rule 1.14 operates primarily in a defensive manner might explain the scarcity of such discipline. It serves to justify lawyer actions that would normally be improper, such as discussing private matters with third parties or making decisions contrary to the client's instructions.⁷⁸

B. Discipline for Violating Rule 1.14

As noted, few lawyers have been disciplined for misconduct in which Rule 1.14 played an important role. In *Matter of Eskenas*,⁷⁹ the respondent represented a frail nursing home resident in a divorce against her husband. While the lawyer properly recognized his need for a substitute decision-maker 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 filing 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*,⁸⁰ the respondent was suspended for a year and a day for misconduct involving failure to respect

⁷⁵ 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, 729–32, 746–47, 752–54 (1977).

⁷⁶ 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., MASS. GEN. LAWS ch. 190B § 5-407(b)(8) (conservator statute).

⁷⁷ See, e.g., *Matter of Clooney*, 403 Mass. 654 (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).

⁷⁸ 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).

⁷⁹ 30 Mass. Att’y Disc. R. 130 (2014).

⁸⁰ 460 Mass. 1012, 27 Mass. Att’y Disc. R. 895 (2011).

his disabled elderly client's wishes. The reported decisions on his discipline and his unsuccessful reinstatement efforts do not describe the facts of his misconduct or the rules he violated, but unpublished (and public) BBO documents show that he failed to comply with Rule 1.14.

In *Matter of Zinni*,⁸¹ the respondent received a public reprimand after following 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 as well as 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. In *Matter of Robin*⁸² and *Matter of Ward*,⁸³ the respondents together represented a woman with diminished capacity and, following her wishes and instructions, assisted her in pursuing several frivolous court filings. The attorneys' reliance on Rule 1.14 as a defense was unsuccessful.⁸⁴

In Ad. 17-06,⁸⁵ counsel for an elderly woman viewed his client retaining a new lawyer and transferring funds to a family member as evidence of that family member exercising undue influence over the client. The lawyer, conferring with the client's daughter (who objected to the funds transfer) instead of the client, advised the daughter to move all remaining client funds into his trust account. He also refused to cooperate with successor counsel. After the respondent learned that his client had indeed authorized the initial actions, he immediately returned all client funds and provided successor counsel with his papers. He received an admonition for inappropriately applying the guidance of Rule 1.14.

⁸¹ 31 Mass. Att'y Disc. R. 722 (2015).

⁸² SJC No. BD-2016-120 (Nov. 23, 2016), 32 Mass. Att'y Disc. R. ____ (2016) (three-month suspension, stayed).

⁸³ P.R. No. 2016-16 (Nov. 3, 2016), 32 Mass. Att'y Disc. R. ____ (2016) (public reprimand).

⁸⁴ In neither *Robin* nor *Ward* did the discipline report cite Rule 1.14.

⁸⁵ 33 Mass. Att'y Disc. R. ____ (2017).

CHAPTER TEN

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 client representation. A lawyer is a fiduciary who must put the client's interests first and must not accept or continue representation if the work for one client interferes with the lawyer's duties on behalf of another client. A lawyer may not represent a client whose interests are adverse to another current client unless both clients consent. Sometimes even the clients' consent is not sufficient to permit such opposition.

A lawyer's conflict-of-interest responsibilities are among the most common, and complex, ethical issues that arise in a lawyer's work. Most large law firms appoint one lawyer or a committee 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 the frequency, conflicts of interest are not the most common example of lawyer misconduct the Massachusetts disciplinary system addresses.¹ Perhaps because other remedies often exist for a lawyer engaging in conduct amounting to a conflict of interest—including, in litigation matters, 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 disciplinary matter. But engaging in a conflict without informed consent is misconduct that subjects a lawyer to discipline.

Conflicts of interest appear in two quite different forms. First, a lawyer may not proceed in the face of a *concurrent conflict of interest*. A *concurrent conflict* means

¹ According to the annual reports of the Office of the Bar Counsel, the most common disciplinary matters involve neglect and mishandling of trust accounts. See MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2015 (2015) at 7 (Table 3); MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT, ANNUAL REPORT TO THE SUPREME JUDICIAL COURT, FISCAL YEAR 2014 (2014) at 7 (Table 3).

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 the law firm did for a former client. The following sections discuss these more fully.

This chapter discusses concurrent conflicts, successive conflicts, and the principles governing charges of conflicts among lawyers, as set out in the *Massachusetts Rules of Professional Conduct*, Rules 1.7, 1.8, 1.9(a) and (b), and 1.10. The discussion provides examples using decisions and reports from the Board of Bar Overseers (BBO) and the Supreme Judicial Court (SJC) and describes the typical or expected sanctions that accompany various manifestations of conflicts of interest.

II. THE RULES GOVERNING CONCURRENT CONFLICTS OF INTEREST

A. Concurrent Conflicts Under Rule 1.7

Massachusetts regulates concurrent conflicts through 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 specific instances of that conflict, primarily but not only concerning conflicts between attorney and client.

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.**

RULE 1.7 (cont'd.)

(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*

Rule 1.7 proscribes a lawyer's representation in two types of concurrent conflict settings.² A concurrent conflict of interest exists if "the representation of one client will be *directly adverse* to another client,"³ 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"(emphasis added).⁴ 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 in Section II(A)(2).

Rule 1.7 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 conflicts can arise in innumerable ways. Lawyers have many resources available to help them understand the intricate and sometimes confusing nuances involved in concurrent

² The language of Rule 1.7 in the *Massachusetts Rules of Professional Conduct* is different from the language of Rule 1.7 in the *ABA Model Rules of Professional Conduct*, but its message is exactly the same.

³ MASS. R. PROF. C. 1.7(a)(1).

⁴ MASS. R. PROF. C. 1.7(a)(2).

conflicts.⁵ However, Section II(B) provides 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 aligned;
- They accept representation of a new client whose claim is directly adverse to the lawyer's or the law firm's existing client;
- The new client's claims affect a personal or family interest, leading the lawyer to possibly downplay advocating for the 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

If a lawyer discovers that representing one client triggers a conflict of interest, the lawyer may have to end that representation, although the lawyer can explore the possibility of obtaining consent from the affected client or clients. Rule 1.7(b) permits a lawyer to continue representing a client notwithstanding a concurrent conflict under the following four conditions:

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 representing opposing parties in the same litigation or matter.
4. Each affected client gives consent, confirmed in writing, after being informed of the material risks of and alternatives to continued representation.⁶

⁵ See GILDA TUONI RUSSELL, MASSACHUSETTS PROFESSIONAL RESPONSIBILITY, Chapters 7, 8, and 10 (2003) (addressing Rules 1.7, 1.8, and 1.10); GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING, Chapters 10, 11, and 12 (3rd ed. Supp. 2004, 2008).

⁶ MASS. R. PROF. C. 1.7(b)(1)–(4); see also Rules 1.0(c) and 1.0(f).

This means that if, in the lawyer's professional judgment, the conflict will not impair the legal work for the client, and the lawyer's judgment is objectively reasonable, the lawyer may explain the nature of the conflict to the client, including the risks and benefits the client faces in continuing 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.⁷ If the lawyer cannot reveal facts related to a different client necessary to have an informed discussion, the lawyer may not seek consent to the conflict.

Practice Tip

The affected client or clients may consent to many concurrent conflicts of interest, but the lawyer must document carefully both the fact of the consent and the risks involved in case a disagreement later arises. The informed consent discussion must be confirmed in a writing to the client and indicate all the considerations the lawyer addressed. 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 is impossible and the conflict cannot be consented to.

B. Discipline for Concurrent Conflicts Under Rule 1.7

In 2002, the BBO articulated general standards for imposing discipline for conflicts of interest. 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 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.⁸

⁷ MASS. R. PROF. C. 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.

⁸ 18 Mass. Att'y Disc. R. 640, 655-56 (2002) (citations omitted).

That description corresponds, generally, to the actual discipline imposed in both BBO and SJC decisions.

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*⁹ and *Matter of McDonald*,¹⁰ no lawyer has ever been disbarred solely for engaging in a conflict of interest.¹¹

2. *Suspension*

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.¹² In *Pike*, the lawyer was suspended for six months for representing both a tenant and landlord in the lease of a commercial rental unit. The attorney recommended the unit to the tenant client with the intention of earning a commission from the landlord client, and then encouraged the landlord to increase the rent to cover his brokerage fee. The attorney never disclosed to the tenant client his fiduciary duty to the landlord or that he had a personal financial interest in the transaction terms. The SJC concluded that more than a token suspension was appropriate, given that the lawyer “acted deliberately for his own benefit

⁹ 25 Mass. Att’y Disc. R. at 139 (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).”

¹⁰ 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 converting client funds and conflict of interest); *Matter of Clark*, 21 Mass. Att’y Disc. R. 87 (2005) (disbarment after converting client funds and improper business transaction with client).

¹¹ This result differs from the standards for presumptive discipline articulated by the American Bar Association (ABA). The *ABA 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” ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 4.31(a) (1986, 1992) (hereinafter ABA STANDARDS).

¹² *Matter of Pike*, 408 Mass. 740, 6 Mass. Att’y Disc. R. 256 (1990). *Pike* is a matter arising under the former *Massachusetts Code of Professional Responsibility*, and the Court found that the lawyer had violated Canon 1, DR 1-102 (A)(4) and (6).

and in disregard of his client's interests," and that the client had suffered prejudice as a result.¹³

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.

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*,¹⁴ a lawyer representing a nonprofit corporation colluded with 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 ensure payment of his legal fees. The SJC rejected the BBO's recommendation for a public reprimand and concluded that the lawyer's actions warranted a six-month suspension from practice, partly because the attorney displayed a "vengeful attitude" and the multiple violations were "motivated by selfishness and anger." Similarly, in *Matter of Lupo*,¹⁵ the Court imposed an indefinite suspension for the lawyer's multiple conflicts of interest with 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."¹⁶

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.¹⁷ The sanctions in Massachusetts

¹³ *Pike*, 408 Mass. at 745, 6 Mass. Att'y Disc. R. at 261.

¹⁴ 433 Mass. 80, 16 Mass. Att'y Disc. R. 416 (2000). The *Wise* matter appears in the discussion of representing organizational clients in Chapter 9, Section III(B)(2).

¹⁵ 447 Mass. 345, 22 Mass. Att'y Disc. R. 513 (2006).

¹⁶ *Id.* 447 Mass. at 359–60, 22 Mass. Att'y Disc. R. at 531.

¹⁷ *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 representing 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 allowing the buyer of lots to direct

for conflicts of interest without those other factors may be less severe than in other jurisdictions.¹⁸

3. *Public Reprimand*

As noted earlier, in Massachusetts “public discipline will be imposed if harm results from an *obvious conflict*” (emphasis added).¹⁹ While BBO decisions and SJC opinions do not expressly define “obvious,” several examples of such conflicts leading to public reprimands provide an understanding of that term. In *Matter of Carnahan*, for instance, where the SJC full-bench decision employed the “obvious” characterization, the lawyer agreed on behalf of one client to accept representation of an elderly, disabled man whose interests conflicted with those of the first client. The lawyer’s work for the second client benefited the first client, and neither client gave informed consent to the representation.²⁰

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.²¹

The *Carnahan* court cited the following examples of conflicts of interest warranting a public reprimand: *Matter of Manelis*²² (attorney drafted new will for

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).

¹⁸ The reported suspension cases in Massachusetts show sanctions that are less than the *ABA Standards* recommend. The *ABA Standards* describe the criterion for imposing 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.

ABA STANDARDS, *supra* note 11, at § 4.32.

¹⁹ *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)).

²⁰ *Carnahan*, 449 Mass. at 1004–05. The bar counsel sought a six-month suspension for Carnahan, but the SJC concluded that his misconduct warranted a public reprimand.

²¹ See *Matter of Martinian*, 26 Mass. Att’y Disc. R. 342 (2010) (discussed later in this section in the text accompanying note 25).

²² 18 Mass. Att’y Disc. R. 375 (2002).

father at request of beneficiary son without discussing matter separately with father and without conducting reasonable investigation into father's competency); *Matter of Reynolds*²³ (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*²⁴ (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, a divorcing couple who divide 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*,²⁵ where the lawyer prepared the separation agreement on behalf of both spouses and prepared and signed both of their financial statements. After the respondent submitted the various pleadings, the Probate and Family Court rejected the lawyer's attempt to appear on behalf of both 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 1.1.²⁶

4. 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 BBO has noted,

²³ 15 Mass. Att'y Disc. R. 497 (1999).

²⁴ 7 Mass. Att'y Disc. R. 93 (1991).

²⁵ 26 Mass. Att'y Disc. R. 342 (2010).

²⁶ The ABA standard for conflicts of interest imposes a public reprimand more readily than the reported decisions in Massachusetts demonstrate. 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.

ABA STANDARDS, *supra* note 11, 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.)

“In 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.”²⁷ The reported decisions correspond to the BBO’s description.

You Should Know

A lawyer who engages in a conflict of interest without causing actual harm to a client will typically receive an admonition.

For example, in Ad. 05-11,²⁸ the BBO 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. 08-11,²⁹ the BBO 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 in the firm’s conflict-detection database. The BBO 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,³⁰ the BBO admonished the individual lawyers. The BBO also noted that, once the conflict was disclosed, the lawyers refused one of the clients’ demand that they withdraw from litigation in which she had an adverse interest. Despite that added factor beyond the original conflict, the BBO still imposed only an admonition.

In Ad. 11-04,³¹ 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

²⁷ Ad. 02-13, 18 Mass. Att’y Disc. R. 640 (2002).

²⁸ 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.

²⁹ 24 Mass. Att’y Disc. R. 861 (2008).

³⁰ In some states, the disciplinary authorities may impose sanctions on law firms. *See, e.g.*, N.J. RULES OF PROF’L CONDUCT Rule 5.1(a); N.Y. RULES OF PROF’L CONDUCT Rule 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 R. 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.

³¹ 27 Mass. Att’y Disc. R. 930 (2011).

the implications of her father's mistake. The BBO 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 estate's probate, but the lawyer ultimately forgave her fees, so the client suffered little financial damage.

In Ad. 07-14,³² 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 5% 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. 10-18,³³ a lawyer violated Rule 1.7(a) while she and her partner were representing cotrustees 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 was also admonished for violating 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 effectively covers a subset of the Rule 1.7 concerns and offers more specific guidance to a lawyer facing certain types of concurrent conflicts of interest, primarily as between lawyer and client.

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;**

³² 23 Mass. Att'y Disc. R. 959 (2007).

³³ 26 Mass. Att'y Disc. R. 794 (2010).

**RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS:
SPECIFIC RULES (*cont'd.*)**

- (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, parent, or 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;

RULE 1.8 (cont'd.)

- (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 the advice of 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 offers guidance to lawyers:

- Who wish to engage in a business transaction with a client (which is not prohibited, even if it is perilous)³⁴
- With potentially famous clients who wish to pay the lawyer by offering some intellectual property rights to the client's story³⁵
- Writing wills or similar estate planning documents where the lawyer or a family member will be a beneficiary³⁶
- Who wish to advance living expenses or similar aid to a litigation client³⁷
- Whose work for one client is paid for by a third party³⁸
- Representing several clients who wish to engage in an aggregate settlement of their claims³⁹
- Who wish to limit liability by an agreement with the client waiving prospectively any malpractice claims against the lawyer⁴⁰

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.⁴¹ 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 that the lawyer’s parent, child, sibling, or spouse represents, subject to the informed consent provisions previously discussed.

One may see how each of these Rule 1.8 examples generates a potential conflict covered by Rule 1.7(a)(2). Each setting finds the lawyer having some interests or incentives that are not entirely congruent with the client’s. 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 Rule 1.8 provisions cannot be waived by a client’s informed consent.⁴²

³⁴ MASS. R. PROF. C. 1.8(a).

³⁵ MASS. R. PROF. C. 1.8(d).

³⁶ MASS. R. PROF. C. 1.8(c).

³⁷ MASS. R. PROF. C. 1.8(e).

³⁸ MASS. R. PROF. C. 1.8(f).

³⁹ MASS. R. PROF. C. 1.8(g).

⁴⁰ MASS. R. PROF. C. 1.8(h).

⁴¹ See MASS. R. PROF. C. 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).

⁴² Only the provisions of MASS. R. PROF. C. 1.8(b), (f), and (g) permit conduct requiring client informed consent, and always with other conditions.

D. Discipline for Concurrent Conflicts Under Rule 1.8

1. Disbarment

The BBO has not recommended, nor has the SJC imposed, disbarment for violating Rule 1.8, except when combined with other rules violations. For instance, in *Matter of Azzam*,⁴³ the SJC disbarred an attorney after his felony conviction for sharing client's personal financial data with service providers. His use of confidential client information for his own benefit violated Rule 1.8(b).⁴⁴

Practice Tip

The two most common troubles that lawyers encounter with Rule 1.8 are engaging in improper business transactions with a client⁴⁵ and providing improper financial assistance to a client.⁴⁶

2. Suspension

The SJC has imposed term suspensions on lawyers whose conduct violated Rule 1.8. In *Matter of Duggan*,⁴⁷ 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 Rule 1.8 notice or fairness requirements. The clients later sued the lawyer and obtained an order undoing the transactions.⁴⁸ In *Matter of Glynn*,⁴⁹ 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*,⁵⁰ the SJC accepted a stipulation for a suspension of a year and a day after the respondent arranged and prepared mortgage documents to

⁴³ 26 Mass. Att'y Disc. R. 18 (2010).

⁴⁴ 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).

⁴⁵ Since 1999, at least thirty-five lawyers have been disciplined for violating Rule 1.8(a).

⁴⁶ Since 1999, at least fifteen lawyers have been disciplined for violating Rule 1.8(e).

⁴⁷ 22 Mass. Att'y Disc. R. 305 (2006).

⁴⁸ *Duggan v. Gonsalves*, 65 Mass. App. Ct. 250 (2005).

⁴⁹ 21 Mass. Att'y Disc. R. 282 (2005).

⁵⁰ 29 Mass. Att'y Disc. R. 11 (2013).

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.

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 with term suspensions. "Sanctions for Rule 1.8 violations include substantial term suspensions that can range well over one year."⁵¹

In *Matter of Lupo*,⁵² discussed in Section II(B)(2) in the context of Rule 1.7, the lawyer was suspended indefinitely for engaging in "a transaction . . . when the terms were not fair to [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*,⁵³ the lawyer was suspended for three years for inducing trustee clients to loan him \$50,000 on terms unfavorable to the trust.⁵⁴

3. Public Reprimand

A lawyer violating 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*,⁵⁵ the BBO imposed, by stipulation, a public reprimand of a lawyer who, seemingly with some reluctance, wrote a will for a nonrelative client in which he received a large bequest. In *Matter of*

⁵¹ *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 discussed in Sections II(D)(3) and (4). *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).

⁵² 447 Mass. 345, 22 Mass. Att'y Disc. R. 513 (2006).

⁵³ 9 Mass. Att'y Disc. R. 110 (1993).

⁵⁴ *See also* *Matter of Moran*, 27 Mass. Att'y Disc. R. 612 (2011) (two-month suspension for violating 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)).

⁵⁵ 20 Mass. Att'y Disc. R. 3 (2004).

Field (bequest to the respondent's spouse),⁵⁶ *Matter of Toner* (bequest to respondent, his wife, and his children),⁵⁷ and *Matter of Filosa* (bequest to lawyer as remainder-person of a will),⁵⁸ the BBO imposed the public reprimand sanction for similar conduct.

Practice Tip

A lawyer who includes himself or a relative in an estate plan created for a client will typically receive a public reprimand, absent other misconduct. The reprimand typically results regardless of how long the lawyer or the family has known the client or how much past work the lawyer has done for the client; 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.⁵⁹

In *Matter of Lathrop*,⁶⁰ 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 reasonable opportunity to 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 BBO 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

⁵⁶ 20 Mass. Att’y Disc. R. 140 (2004).

⁵⁷ 16 Mass. Att’y Disc. R. 394 (2000).

⁵⁸ 24 Mass. Att’y Disc. R. 273 (2008).

⁵⁹ 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 resulted despite the attorney and his wife knowing the testatrix for many decades, maintaining a close relationship with her, and frequently socializing and spending all major holidays together).

⁶⁰ 24 Mass. Att’y Disc. R. 420 (2008).

immediate family had a substantial personal financial interest without full disclosure and consent from the client.⁶¹

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*,⁶² 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 BBO also considered that the attorney had neglected the matter and had failed to act with competence. The BBO found mitigating circumstances (the respondent's stressful divorce) and implied that but for that mitigation the respondent would have been suspended.⁶³

4. Admonitions

Admonitions are common in Massachusetts for violating 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. 08-19,⁶⁴ 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 did not give the client adequate opportunity to seek the advice of independent counsel. Similarly, in Ad. 09-09,⁶⁵ 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 the client opportunity to consult independent counsel. The client was satisfied with the terms, however. In each instance, the BBO deemed admonition an adequate sanction for the lawyer's misconduct.

⁶¹ 9 Mass. Att'y Disc. R. 99 (1993).

⁶² 20 Mass. Att'y Disc. R. 60 (2004).

⁶³ 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).

⁶⁴ 24 Mass. Att'y Disc. R. 897 (2008).

⁶⁵ 25 Mass. Att'y Disc. R. 668 (2009).

In Ad. 01-51,⁶⁶ a lawyer misused a client's confidences to the client's detriment and to the benefit of a second client, in violation of Rule 1.8(b). The respondent lawyer, the trustee of two trusts, withheld distribution to one trust's beneficiary 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. 09-16,⁶⁷ the lawyer violated Rule 1.8(e) when he loaned a client \$7,500 for living expenses while he was representing the client's personal injury suit in which the claims were pending. After settlement of the claims, the lawyer repaid himself from the client's settlement proceeds. Similarly, in Ad. 06-12,⁶⁸ a lawyer violated the same rule by cosigning a loan for the client's benefit while the client's personal injury case was pending. The lawyer had no prior history of discipline.

In Ad. 04-44,⁶⁹ the respondent violated Rule 1.8(f), which prohibits a lawyer from accepting payment from a third party under circumstances that might affect the lawyer's independent professional judgment. An insurer regularly referred its insureds with potential Social Security Disability Insurance (SSDI) claims to the lawyer for representation on those claims, 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 BBO imposed an admonition, finding that the one client whose matter was before the BBO suffered no harm.

In Ad. 10-12,⁷⁰ a lawyer received an admonition for violating Rule 1.8(j) (now Rule 1.8(i)) after negotiating 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 BBO concluded that the lawyer violated then Rule 1.8(j) by acquiring an interest in the litigation's subject matter. The reported admonition summary does not indicate that the client suffered harm.

⁶⁶ 17 Mass. Att'y Disc. R. 757 (2001).

⁶⁷ 25 Mass. Att'y Disc. R. 682 (2009).

⁶⁸ 22 Mass. Att'y Disc. R. 877 (2006).

⁶⁹ 20 Mass. Att'y Disc. R. 743 (2004).

⁷⁰ 26 Mass. Att'y Disc. R. 782 (2010).

E. Concurrent Conflicts Triggered by Lawyers in the Same Firm or Sharing Office Space

Lawyers who share office space must take special care to avoid triggering inadvertent concurrent conflicts of interest. Rule 1.10 establishes the general principle that lawyers in a law firm are treated as one lawyer for purposes of conflicts of interest; the conflicts of one attorney are imputed to all others in the firm.⁷¹

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.

⁷¹ One exception not attributed to other firm members was triggered by the lawyer’s relative representing the adverse party, per Rule 1.7 comment [11].

RULE 1.10 (*cont'd.*)

(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 new 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

**RULE 1.10: IMPUTED DISQUALIFICATION: GENERAL RULE
(cont'd.)**

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.**

In conventional law firms, partnerships with partners and employee associates, or professional corporations with shareholders and employee associates, the rule of imputation 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: Private lawyers assigned by the Committee of Public Counsel Services (CPCS, the Massachusetts version of the public defender) through its Private Counsel Division to represent indigent criminal defendants are not deemed CPCS members.⁷² 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.”⁷³

For the many lawyers who share office space, the critical question is whether those lawyers constitute a law firm, resulting in imputed conflicts. The general understanding is that, absent an agreement to operate as one law firm, or actual operations that treat the lawyers as if they practice as one firm, lawyers simply sharing office space do not need to be treated as one firm. Lawyers who share

⁷² MASS. R. PROF. C. 1.10(a).

⁷³ MASS. R. PROF. C. 1.10 comment [3].

an office suite and operate distinct law practices do not need to check with each other for the conflicts discussed in this chapter. 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 deemed ‘associated in a firm’ if they share information and staff or if they hold themselves out as a firm.”⁷⁴ Employing a common receptionist who has access to client information, therefore, presents, at a minimum, a complication for lawyers who share office space.

One SJC decision 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.”⁷⁵

The risk of being treated as one firm for conflicts purposes is worrisome.⁷⁶ Space-sharing is one of the most common “traps for the unwary” about which ethics advisors warn practicing attorneys to be particularly vigilant.⁷⁷

⁷⁴ ABA, ANNOTATED MODEL RULES OF PROF'L CONDUCT, 199 (8th ed. 2015) (citing *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)).

⁷⁵ *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 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 comment [e] (AM. LAW INST. 2000), hereinafter RESTATEMENT.

⁷⁶ For a discussion of the concern when a lawyer has “of counsel” status with more than one firm, see Nancy Kaufman, *The Of Counsel Relationship* (2000), MASSACHUSETTS BOARD OF BAR OVERSEERS, <https://bbopublic.blob.core.windows.net/web/f/ofcounsel.pdf> (last visited May 1, 2018).

⁷⁷ 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 bar counsel has advised Massachusetts lawyers about the risks of sharing office space. See Daniel C.

III. THE RULES GOVERNING SUCCESSIVE CONFLICTS OF INTEREST

A. Successive Conflicts Under Rules 1.9 and 1.10

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.⁷⁸

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.

(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.**

Crane & John W. Marshall, *Space-Sharers Beware!* (2000), MASSACHUSETTS BOARD OF BAR OVERSEERS, <https://bbopublic.blob.core.windows.net/web/f/space.pdf> (last visited May 1, 2018). 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.

⁷⁸ The Massachusetts version of Rule 1.9(a) is identical to the ABA's *Model Rules* version.

RULE 1.9 (cont'd.)

(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.**

The full text of Rule 1.10 appears in Section II(E), in connection with the discussion of concurrent conflicts.

Rule 1.9 is consistent with Massachusetts common law developed before the adoption of the rule.⁷⁹ 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.⁸⁰ The substantial relationship test serves as a substitute for determining when a lawyer would 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.⁸¹

Rule 1.9 covers three aspects of former client representation. First, Rule 1.9(a) prohibits a lawyer from later opposing the 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 without consent on a substantially related matter, if the

⁷⁹ 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).

⁸⁰ *Id.*

⁸¹ *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)).

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) generally 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.

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 of Professional Conduct*. Take special care to understand the Massachusetts versions, especially if you were trained in law school using the *Model Rules*.

Rule 1.9 concerns are far more likely to arise in the context of motions to disqualify in litigation matters than in a BBO disciplinary process. A typical example of the successive conflicts worry Rule 1.9 addresses is the case of *O'Donnell v. Robert Half International, Inc.*⁸² In this action against an employment-placement firm in which several employees alleged 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 preparing small parts 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 the 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, discussed later in this section). The federal district court judge held that because the associate formerly represented the defendant but now

⁸² 641 F. Supp. 2d 84, 87 (D. Mass. 2009).

represents the plaintiff (by virtue of working for the plaintiff's firm), the plaintiff's firm had created an impermissible conflict of interest. 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 client while at the defendant's firm.⁸³ 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 1.10.⁸⁴ 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.⁸⁵

As noted previously, successive conflicts matters do not appear often in the disciplinary reports, most likely because they are addressed through motions to disqualify. While it is not uncommon for former clients, not understanding the implications of Rule 1.9, to complain to the BBO that the former lawyers are now opposing them and therefore betraying a duty to them, most of those complaints arise from proper actions by the respondent lawyer, and the 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 discussed in Section III(B).

As with concurrent conflicts covered by Rule 1.7, and as seen in the discussion 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,⁸⁶ per Rule 1.10(a). The previous discussion about imputed

⁸³ *Id.* at 89. Mass. Rule 1.9 comment [6] establishes a rebuttable presumption that a lawyer learned relevant information during a prior representation.

⁸⁴ *Id.* at 88. Mass. 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 in Section III(B) below.

⁸⁵ *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).

⁸⁶ Note that if a lawyer did obtain informed consent from a previous client to oppose that client in a new, substantially related matter (an unlikely scenario), the new representation would likely trigger a *Rule 1.7 concurrent conflicts* issue for the new client. The lawyer may need to obtain informed

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 the 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 proceed only if it screens the “personally disqualified” lawyer who moved. That screening opportunity is narrower than that permitted under the *ABA Model Rules*.⁸⁷ 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 Rules 1.9(a) and 1.9(b)

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 essentially focuses on former client confidences; the reported disciplinary decisions regarding misuse of confidences, in violation of Rule 1.6, are less uncommon (see Chapter 8). But few of those decisions or opinions rely on Rule 1.9.⁸⁸ In some cases, though, lawyers have been disciplined for conflicts of interest involving former clients.

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 § 132.

⁸⁷ Under *ABA 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.

⁸⁸ The 2002 treatise on Massachusetts ethics and discipline, TUONI, *supra* note 5, cites no discipline examples in its discussion of Rule 1.9, except a series of disciplinary actions taken against lawyers for violating Rule 1.6 or its predecessor in the *Code of Professional Responsibility*. See *id.* at 9-30 to 9-33.)

You Should Know

The SJC has stated that violating the successive conflict rules, without a finding that the lawyer was motivated by self-interest, should result in an admonition.⁸⁹

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*,⁹⁰ 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 being suspended from practice. The examples involve multiple 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*,⁹¹ the respondent, practicing in Georgia without being 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 man's wife relevant to the wife's immigration proceedings the respondent had handled."⁹² The respondent was suspended for six months and a day for this and other misconduct.

In *Matter of Wise*,⁹³ the respondent lawyer received a six-month suspension for 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 against the interests of the current (and allegedly unfaithful) board members, after he had

⁸⁹ *Matter of Discipline of an Attorney*, 449 Mass. 1001, 1002 (2007) (rescript).

⁹⁰ 20 Mass. Att'y Disc. R. 381 (2004).

⁹¹ 28 Mass. Att'y Disc. R. 3 (2012).

⁹² *Id.* at 6.

⁹³ 433 Mass. 80, 16 Mass. Att'y Disc. R. 416 (2000).

been dismissed as counsel by the latter managers. The actions in *Wise* occurred before the adoption of Rule 1.9, and neither the BBO nor the SJC refers to the lawyer's conflicts as "former client" conflicts, but they were precisely that. The lawyer was also suspended for violating the rules against contact with a represented party and for disclosing confidential information without adequate client consent.

3. *Public Reprimand*

At least one serious violation of Rule 1.9 involved betraying a former client, resulting in a public reprimand for the lawyer, although that decision also included a separate instance of misconduct on a different matter and a history of prior discipline. In *Matter of Lederman*,⁹⁴ the respondent lawyer represented four siblings in a litigated dispute with a fifth sibling over the proceeds of a trust established under their mother's will. After the lawyer's initial strategy failed to produce the hoped-for results, 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*,⁹⁵ 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 recognized the conflict and withdrew the same day. He later shared with the wife the husband's medical records, obtained during the previous representation, although neither the wife nor 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*,⁹⁶ 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 authorized his firm to remain as counsel for the driver of the second car. Later, the respondent represented one of the original

⁹⁴ 22 Mass. Att'y Disc. R. 462 (2006).

⁹⁵ 26 Mass. Att'y Disc. R. 250 (2010) (also discussed in Chapter 8, Section III(A)(1)).

⁹⁶ 18 Mass. Att'y Disc. R. 455 (2002).

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, an aggravating factor was the respondent's previous admonition for mishandling client funds.

In *Matter of Glassman*,⁹⁷ 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 failing to withdraw from representing the remaining clients after being discharged by one passenger.

4. Admonition

In a 2007 SJC opinion, a lawyer who violated Rule 1.9(a) or (b) received an admonition, even though the affected former client suffered some harm. In *Matter of Discipline of an Attorney*,⁹⁸ 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 mortgage. The hearing committee found that the lawyer's betrayal of his former client's interests "caused financial and physical harm to the father."⁹⁹ The SJC agreed with the BBO that the proper sanction was an admonition and not, as the bar counsel requested, 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.¹⁰⁰ This opinion may seem inconsistent with *Matter of Lederman*, previously discussed in Section III(B)(3) 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 as an aggravating factor.

⁹⁷ 25 Mass. Att'y Disc. R. 224 (2009).

⁹⁸ 449 Mass. 1001, 24 Mass. Att'y Disc. R. 786 (2007).

⁹⁹ 449 Mass. at 1001, 24 Mass. Att'y Disc. R. at 786.

¹⁰⁰ 449 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. 05-38,¹⁰¹ two lawyers (a principal and an associate) initially represented a driver and two passengers injured in a motor vehicle accident. In contrast with *Glassman*, it initially appeared that the passengers had no claim against the 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 resolve 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 in Section II, 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, 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 what has come to be known as the “hot potato” doctrine,¹⁰² forbidding a lawyer from abandoning a client prior to accepting a new client in order to exploit the less restrictive former client conflicts rule.¹⁰³

In Massachusetts, the SJC has never expressly adopted the “hot potato” doctrine.¹⁰⁴ A 2016 Court decision did not resolve whether Massachusetts would follow the rest of the country in forbidding such a maneuver. In *Bryan Corp. v.*

¹⁰¹ 21 Mass. Att’y Disc. R. 756 (2005).

¹⁰² The phrase was coined in *Picker Int’l v. Varian Assocs.*, 670 F. Supp. 1363, 1365–66 (N.D. Ohio 1987).

¹⁰³ 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 § 132 comment [c] and Reporter’s Note to comment [c] (2000).

¹⁰⁴ See Paul Lannon & Jeffrey D. Wolf, *When Clients Clash: Abrano, Hot Potato and the Duty of Loyalty*, 60 BOSTON BAR J. 4 (2016).

Abrano,¹⁰⁵ the SJC disqualified a law firm for violating Rule 1.7 in representing a company in a litigation matter. After a dispute among the family members making up the management, the formerly controlling constituents asked the law firm 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 a current conflict existed, the Court declared that it need not reach the “hot potato” question.¹⁰⁶ The Court, however, strongly emphasized a lawyer’s duty of loyalty to an existing client when considering representing another client that would create, or is likely to create, a conflict with the existing client, stating that “rule 1.7 encompasses a lawyer’s duty to anticipate potential conflicts and, where appropriate, decline representation.”¹⁰⁷

D. Discipline for Conflicts Under Rule 1.10

Because Rule 1.10 operates to attribute 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 derived from the direct misconduct under those rules. For example, in *Matter of Schwartz*,¹⁰⁸ discussed in Section III(B)(3), under Rule 1.9, the lawyer’s misconduct involved a conflict of interest of his firm. Likewise, the associate in Ad. 05-38, discussed in Section III(B)(4), who took over representing the passengers after discharging the driver as a client, violated Rule 1.10(a).

In Ad. 08-11,¹⁰⁹ 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.

¹⁰⁵ 474 Mass. 504 (2016).

¹⁰⁶ 475 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.”

¹⁰⁷ 475 Mass. at 512.

¹⁰⁸ 18 Mass. Att’y Disc. R. 455 (2002).

¹⁰⁹ 24 Mass. Att’y Disc. R. 860 (2008).

CHAPTER ELEVEN

Other People's Money (Rules 1.5 and 1.15)

I. INTRODUCTION

Among the reasons for which lawyers get in trouble and end up before the Board of Bar Overseers (BBO), misconduct involving money is one of the most common and often the most serious. A review of BBO and Supreme Judicial Court (SJC) disciplinary decisions from the past quarter century reveals close to a thousand reported cases involving misconduct related to client funds or lawyer's fees. This chapter provides a general discussion of the obligations lawyers assume regarding money and property as well as the kinds of sanctions that accompany this kind of misconduct.

This topic contains two related but separate 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, and 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. 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 they 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 third parties.

II. THE RULES GOVERNING LAWYER'S FEES

Rule 1.5 of the *Massachusetts Rules of Professional Conduct* governs, along with some state statutes and common law, the area of lawyer's fees and payment for legal services.

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

RULE 1.5: FEES (*cont'd.*)

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 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

RULE 1.5 (cont'd.)

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 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 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

RULE 1.5: FEES (*cont'd.*)

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)(1)–(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, and it lists eight nonexclusive factors that help determine this. 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 takes), the client's demands and particular needs (including the matter's urgency), and, significantly, whether the fee is fixed or contingent.¹ 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 Section II(C)(2). The rule also prohibits a lawyer from "collect[ing] an unreasonable amount for expenses."²

Massachusetts requires that all fee arrangements and 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,"³ or in a single-meeting consultation, or when the engagement is for a total fee not exceeding \$500.⁴ The writing requirement, defined in 2012, is different from the practice in most jurisdictions,⁵ and the client's signature is not required unless the arrangement is for a contingent fee. Including the scope of the representation is not only required by the rule but is essential for both parties' understanding of what the lawyer will and will not address during the representation. Recall that Rule 1.2(c) requires the client's informed consent if the representation objectives 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 in Section III(A).

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

¹ MASS. R. PROF. C. 1.5(a)(1)–(8).

² MASS. R. PROF. C. 1.5(a).

³ MASS. R. PROF. C. 1.5(b)(1).

⁴ MASS. R. PROF. C. 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.").

⁵ The American Bar Association's *Model Rules*, which most jurisdictions follow, states that the fee basis shall be communicated "preferably in writing." See AMERICAN BAR ASSOCIATION MODEL RULES OF PROF'L CONDUCT r. 1.5(b).

a lawyer who does not practice in the primary lawyer's firm (i.e., a referral fee), even if the referring lawyer does nothing more than refer the matter.⁶ The rules in most jurisdictions, however, state that a lawyer may not pay a referring lawyer a fee unless the latter lawyer works on the matter or accepts responsibility for the representation, and even then the fee must be divided proportionately.⁷ 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, the client consents to the joint participation in writing, and the total fee charged to the client is reasonable.

While a discussion of Rule 1.5 as it pertains to contingent-fee agreements is beyond the scope of this book, the Office of the Bar Counsel (the bar counsel) has written several articles on fee agreements in general and contingent-fee agreements in particular, which are available on the Bar Counsel website.⁸

Other topics of interest to lawyers arising from Rule 1.5 concern payments in kind and measures lawyers take to secure future payments. These issues are discussed in Section II(C)(4), along with a more in-depth discussion of the requirements of a reasonable fee and a proper contingent fee.

B. Discipline for Violating Rule 1.5

1. Disbarment

A lawyer's intentionally charging or collecting fees for work not actually performed may be viewed as equivalent to misappropriation, or theft, of a client's funds. The presumptive, or accepted, sanction for misappropriating client money is disbarment or indefinite suspension.⁹ Ordinarily, however, the disciplinary reports do not treat charging a client a clearly excessive fee in the same way as misappropriating client funds or property.

⁶ MASS R. PROF. C. 1.5(e).

⁷ See ABA MODEL RULES OF PROF'L CONDUCT r. 1.5(e).

⁸ See, e.g., Nancy E. Kaufman & Constance V. Vecchione, *The Ethics of Charging and Collecting Fees*, BOARD OF BAR OVERSEERS (Nov. 2015), <https://bbopublic.blob.core.windows.net/web/f/ethicsfees.pdf>; Constance V. Vecchione, *FAQs: Mass. R. Prof. C. 1.5(b) and Written Fee Arrangements*, BOARD OF BAR OVERSEERS (April 2013), [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); Constance V. Vecchione, *Write It Up, Write It Down: Amendments to Mass. R. Prof. C. 1.5 Require Fee Arrangements to Be in Writing*, BOARD OF BAR OVERSEERS (Nov. 2012), <https://bbopublic.blob.core.windows.net/web/f/WriteItUp.pdf>; Constance V. Vecchione, *Fees and Feasibility: Amendments to Mass. R. Prof. C. 1.5 on Fees*, BOARD OF BAR OVERSEERS (March 2011), <https://bbopublic.blob.core.windows.net/web/f/Fees2011.pdf>.

⁹ Matter of Schoepfer, 426 Mass. 183, 185–88 & n.2, 13 Mass. Att'y Disc. R. 679 (1997).

You Should Know

In *Matter of Schoepfer*, the SJC established the following presumptive sanctions for misappropriating client funds, which an excessive fee might represent:

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.¹⁰

In *Matter of Goldstone*,¹¹ the attorney charged and collected an excessive fee from his client, a national retailer, by intentionally and in bad faith charging fees he was not entitled to. The corporation sued the lawyer for breach of contract and won a judgment against him.¹² 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.”¹³ In *Matter of Smith*,¹⁴ decided soon after *Goldstone*, an attorney filed an affidavit of resignation after the bar counsel accused him of charging his client excessive fees. The attorney billed an elderly widowed client \$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 intentionally misappropriating client funds the lawyers held, *Goldstone* and *Smith* represent disciplinary matters where the bad-faith charging of an excessive fee led to disbarment.¹⁵

¹⁰ 426 Mass. at 185–88 & n.2 (citing *Matter of the Discipline of an Attorney*, 392 Mass. 827, 836–37 (1984)).

¹¹ 445 Mass. 551, 21 Mass. Att’y Disc. R. 288 (2005).

¹² 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 the fees were reasonable).

¹³ 455 Mass. at 566.

¹⁴ 21 Mass. Att’y Disc. R. 609 (2005).

¹⁵ In *Matter of Pomeroy*, 26 Mass. Att’y Disc. R. 515 (2010), an elderly client retained the respondent to liquidate several bank accounts and turn the proceeds over to him. The lawyer converted

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 refunds the excess fees and the client suffers little harm, the lawyer may receive an admonition. Disbarment has not been imposed for solely violating Rule 1.5.

On other occasions, lawyers have been disbarred for charging excessive fees, although always with other serious misconduct. In *Matter of Pepyne*,¹⁶ the single justice accepted the respondent's resignation after reviewing six separate instances of misconduct, several of which involved the lawyer imposing liens or accepting fees he was not entitled to. He also neglected matters, was held in contempt of court, and was convicted of an unrelated crime. In *Matter of O'Connor*,¹⁷ the single justice disbarred a lawyer for collecting a higher fee in a worker's compensation matter than the settlement provided for and misleading his client about

You Should Know

There is a difference between a *clearly excessive* fee and an *illegal* fee. An illegal fee is one that is not allowed under the contractual or regulatory terms by 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 matter¹⁸ and a criminal defense matter,¹⁹ among others.

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*, 26 Mass. Att'y Disc. R. 515 (2010).

¹⁶ 26 Mass. Att'y Disc. R. 502 (2010).

¹⁷ 26 Mass. Att'y Disc. R. 458 (2010).

¹⁸ *Id.*

¹⁹ *Matter of Serpa*, 30 Mass. Att'y Disc. R. 358 (2014).

the true fee. He also engaged in separate misconduct where he neglected a matter and lied to his client about his carelessness.

2. *Suspension*

Lawyers suspended for violating Rule 1.5 have typically overcharged a client intentionally, with some misrepresentation about the fee. For instance, in *Matter of Beaulieu*,²⁰ an attorney was suspended for four years and had to make restitution before applying 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 *Matter of Murphy*,²¹ a report that may interest private firm lawyers, an attorney was suspended for a year and a day for knowingly spending more time on client matters than necessary in order to increase his billable hours. The attorney, an associate in a law firm, earned an annual salary with a bonus tied to his billings. The attorney billed his clients extra hours for tasks that should have been delegated to less senior lawyers and for tasks that were duplicated and billed by others in his firm.²²

In *Matter of Rafferty*,²³ the single justice gave the lawyer a four-month suspension, with reinstatement conditioned on passing the Multi-State Professional Responsibility Examination (MPRE) and making restitution, after he intentionally complied with his wealthy and overzealous client's questionable instructions, excessively litigated her matter, and collected \$700,000 in fees from her. 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 requests, the single justice determined that his sanction should be higher than the presumptive sanction (a public reprimand) for charging excessive fees.

²⁰ 29 Mass. Att'y Disc. R. 33 (2013).

²¹ 28 Mass. Att'y Disc. R. 643 (2012).

²² The misconduct present in *Matter of Murphy* has been, by many accounts, a 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 Associate 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).

²³ 26 Mass. Att'y Disc. R. 538 (2010).

In *Matter of Beatrice*,²⁴ 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*,²⁵ 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.²⁶

3. Public Reprimand

“[T]he typical sanction for charging an excessive fee is a public reprimand.”²⁷ Many lawyers have received public reprimands for violating Rule 1.5, either after charging an hourly fee or involving a contingent-fee arrangement. The most prominent SJC treatment for an excessive fee has been *Matter of Fordham*,²⁸ discussed in more detail in Section II(C)(1). In *Fordham*, the SJC imposed a public reprimand on the lawyer for charging his unsophisticated client a clearly excessive fee (despite providing high-quality, successful legal services and 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*,²⁹ 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*,³⁰ an attorney received a public reprimand because the fees she charged

²⁴ 14 Mass. Att’y Disc. R. 56 (1998).

²⁵ 31 Mass. Att’y Disc. R. 374 (2015).

²⁶ 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).

²⁷ *Matter of Rafferty*, 26 Mass. Att’y Disc. R. 538, 541 (2010). The ABA discipline standards apply a more flexible approach. Those standards recommend varying sanctions for “unreasonable or improper fees,” depending on the lawyer’s mental state and the harm caused to the client. See ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS §§ 7.0–7.4 (2012).

²⁸ 423 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 the bar counsel has stipulated to public reprimands in cases where lawyers 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).

²⁹ 28 Mass. Att’y Disc. R. 450 (2012).

³⁰ 28 Mass. Att’y Disc. R. 850 (2012).

and collected were disproportionate to the size and value of the estate she worked on. The attorney charged \$22,500 for work on an estate that had net real estate proceeds of less than \$98,000, something the BBO concluded was clearly excessive under the circumstances.

Lawyers who failed to document a contingent fee in writing usually received admonitions, as discussed in Section II(B)(4). In some instances, the lawyers received public reprimands, but in each case the lawyer also committed other misconduct. (Indeed, in each case, the bar counsel seemingly discovered the absence of a written agreement because of the separate misconduct.) For example, in *Matter of Carroll*,³¹ 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*,³² the attorney ignored a previous lawyer's claim to a share of the contingent-fee proceeds and also failed to prepare a written contingent-fee agreement. In *Matter of Faria*,³³ the lawyer received a public reprimand after entering into an oral contingent-fee agreement, neglecting the matter, and causing the client's case to be dismissed. He had previously received an admonition for neglect, including missing a statute of limitations.³⁴

4. Admonition

Occasionally, lawyers who charged excessive fees or otherwise violated Rule 1.5 received only an admonition. The admonitions tend to appear where the misconduct was unintentional and the client suffered little or no harm. For example, in Ad. 00-78,³⁵ the respondent charged his client, an elderly woman for whom he was 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. 09-02,³⁶ an attorney failed to execute a

³¹ 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 misconduct 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 entering into a contingent-fee agreement without a written fee agreement, among other violations).

³² 26 Mass. Att'y Disc. R. 281 (2010).

³³ 25 Mass. Att'y Disc. R. 201 (2009).

³⁴ *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).

³⁵ 16 Mass. Att'y Disc. R. 563 (2000).

³⁶ 25 Mass. Att'y Disc. R. 655 (2009).

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.³⁷ In Ad. 06-02,³⁸ the attorney charged his client for unnecessary and redundant services, and he made restitution for the fees he was not entitled to. In Ad. 04-05,³⁹ the attorney received an admonition after calculating his contingent fee on personal injury protection benefits that were not contingent. 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.⁴⁰

In Ad. 99-58,⁴¹ a lawyer received an admonition for failing to disclose to a client that he had received a referral fee, in violation of DR 2-107(A)(1), the predecessor to Rule 1.5(e). The lawyer had referred a matter and received a contingent fee, but both he and the lawyer to whom he referred the matter failed to inform the client.

In *Matter of the Discipline of an Attorney*,⁴² the SJC declined to admonish a lawyer for including in his contingent-fee agreement a provision stating that if the attorney were discharged prior to concluding the representation, the attorney would be compensated for the fair value of his services or one-third of any settlement offer made at the time of discharge, whichever was greater. Because this specific provision could result in fees 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 ver-

³⁷ 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). Cf. Ad. 00-12, 16 Mass. Att'y Disc. R. 467 (2000) (admonition solely for failure to have contingent-fee agreement in writing).

³⁸ 22 Mass. Att'y Disc. R. 848 (2006).

³⁹ 20 Mass. Att'y Disc. R. 668 (2004).

⁴⁰ 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).

⁴¹ Ad. 99-58, 15 Mass. Att'y Disc. R. 759 (1999).

⁴² 451 Mass. 131, 24 Mass. Att'y Disc. R. 824 (2008).

sions 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 promptly notify his client about receiving funds payable to the client.

C. Other Fee Issues

1. *Determining Whether a Fee Is Clearly Excessive*

No formula exists for determining whether a lawyer's fee is "clearly excessive." 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*,⁴³ described earlier in Section II(B)(3), as a benchmark for that assessment. In *Fordham*, an experienced and well-respected member of the Massachusetts bar with no history of previous discipline received a public reprimand for charging an excessive fee to his client, a young man he defended against a criminal charge of driving under the influence (DUI). The lawyer attained the client's acquittal, and the parties stipulated that the lawyer had worked diligently every hour he billed and had billed the client 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 also criticized the lawyer for charging his client for time spent learning an area of 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.'"⁴⁴

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 legal education if that extra effort results in an excessive fee. In fact, however, most discipline for violating Rule 1.5, aside from contingent-fee matters, stems from lawyers charging fees for work they never performed or performed poorly.

⁴³ 423 Mass. 481, 12 Mass. Att'y Disc. R. 161 (1996) (public reprimand), *cert. denied*, 519 U.S. 1149 (1997).

⁴⁴ 423 Mass. at 490 (quoting *Matter of the Estate of Larson*, 103 Wash. 2d 517, 531, 694 P.2d 1051 (1985)).

2. *Contingent Fees*

Rule 1.5(c) addresses the specifics of contingent fees. Details about the logistics of charging and collecting a reasonable contingent fee are beyond the scope of this book, but useful resources exist for Massachusetts lawyers who charge contingent fees.⁴⁵ Rules 1.5(c) and (f), and comments [3] and [3A]–[3D], set forth the requirements for contingent-fee agreements in Massachusetts. With few exceptions, a lawyer who charges a contingent fee in Massachusetts must sign a written agreement with the client. The agreement must contain several mandated provisions:

- 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 are deducted
- Whether the lawyer or the client is responsible for litigation 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.⁴⁶ If the agreement is silent, the successor lawyer is responsible for the previous lawyer's fees.

The revised Massachusetts rule offers lawyers two templates for a contingent-fee agreement: Form A, which has standard default provisions, and Form B, which offers various provisions from which the lawyer may choose. 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.”⁴⁷ In *Matter of Diviacchi*,⁴⁸ the lawyer was suspended for twenty-seven months for using a nonconforming contingent-fee agreement and not explaining its terms to the client, among other misconduct.

⁴⁵ See, e.g., Timothy Dacey III, *Fee Agreements*, in *ETHICAL LAWYERING IN MASSACHUSETTS*, Chapter 5 (James Boland ed. 2009 and 2015 Supp.); Kaufman & Vecchione, *supra* note 8.

⁴⁶ In 2009, the SJC sought comments on how to allocate the responsibility for paying the discharged lawyer in a successful contingent-fee matter, responding to an issue the SJC decided a few years before. See *Malonis v. Harrington*, 442 Mass. 692 (2004).

⁴⁷ MASS R. PROF. C. 1.5(f)(3).

⁴⁸ 475 Mass. 1013 (2016).

Several SJC decisions articulated the principles to apply when a client discharges a contingent-fee lawyer before the matter's final resolution. In *Salem Realty Co. v. Matera*,⁴⁹ 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 reasonable value of the work produced. In *Malonis v. Harrington*,⁵⁰ the SJC decided that the successor lawyer was responsible for paying the discharged lawyer's fees. That decision triggered the revision to Rule 1.5 addressing the question of who pays the discharged lawyer. In *Liss v. Studeny*,⁵¹ 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 is no *quantum meruit* recovery under contingent-fee agreements when the contingency has not occurred, i.e., when the client has not obtained a recovery.⁵²

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.⁵³ 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 receives adequate notice of the change, the changes are reasonable, and the fee agreement provides for rate increases.⁵⁴ In some circumstances, a material change to an existing contract

⁴⁹ 10 Mass. App. Ct. 571 (1980), *aff'd* 384 Mass. 803 (1981).

⁵⁰ 442 Mass. 692 (2004).

⁵¹ 450 Mass. 473 (2008).

⁵² 450 Mass. at 480–81. 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.

⁵³ MASS R. PROF. C. 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.”).

⁵⁴ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18(1)(a) (AM. LAW INST. 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) (AM. LAW INST. 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).

might qualify as a business transaction between a lawyer and a client, triggering the requirements of Rule 1.8(a).⁵⁵ For example, in *Matter of Weisman*,⁵⁶ an attorney renegotiated the fee agreement with his organizational client in the middle of the representation in a manner that the hearing committee found was neither fair nor 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 for mishandling the fees received, he was suspended for one year.

4. *Payment in Kind and Liens for Fees*

Lawyers typically receive 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 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).”⁵⁷ 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.”⁵⁸

⁵⁵ 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, 139–40, 24 Mass. Att’y Disc. R. 824, 832–35 (2008)), amendments to the fee agreement might fall within that rule. *See* Kaufman & Vecchione, *supra* note 8, 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. C. 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 give informed consent in writing.”). While this advice from the 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 a client, or that the bar counsel would consider it as such. *See also* *Matter of Murray*, 24 Mass. Att’y Disc. R. 483 (2008) (respondent charged with violating Rule 1.8(a) after demanding changes to a contingent-fee agreement; the hearing committee and the BBO rejected that count).

⁵⁶ 30 Mass. Att’y Disc. R. 440 (2014).

⁵⁷ Kaufman & Vecchione, *supra* note 8, at 7.

⁵⁸ 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.”).

In some settings, accepting property as a fee qualifies as a business transaction between the lawyer and the client, triggering the strict requirements of Rule 1.8(a).⁵⁹ One common example of an attorney's fee being subject to Rule 1.8(a) is when a lawyer accepts as the fee stock in a corporate client.⁶⁰ Lawyers may accept such an equity interest in the client as the fee,⁶¹ 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 of transfer, not later when the stock's value may be different from what the parties had earlier predicted.⁶² Chapter 10, Section (II)(D) discusses the sanctions for violating Rule 1.8.

If a client fails to pay the legal fees owed for the work 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 the *General Laws of Massachusetts*,⁶³ a device sometimes known as an "attorney's lien"⁶⁴ or a "charging lien."⁶⁵ If the relationship ends with the lawyer 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."⁶⁶ A lawyer may not withhold a client's papers and other materials in order to collect a fee,⁶⁷ but in a matter that is not a contingent-fee case, the lawyer may properly withhold work product for which the client has not yet paid the lawyer,⁶⁸ except when doing so "would prejudice the client unfairly."⁶⁹

⁵⁹ 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.

⁶⁰ 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).

⁶¹ *Rubin v. Murray*, 79 Mass. App. Ct. 64 (2011).

⁶² *Id.* at 75.

⁶³ MASS. GEN. LAWS ch. 221, § 50 (2018).

⁶⁴ See, e.g., *Matter of King*, 23 Mass. Att'y Disc. R. 352 (2007).

⁶⁵ See, e.g., *Boswell v. Zephyr Lines, Inc.*, 414 Mass. 241, 244 (1993).

⁶⁶ *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).

⁶⁷ MASS. R. PROF. C. 1.16(e).

⁶⁸ *Kaufman & Vecchione*, *supra* note 8, at 7; see MASS. R. PROF. C. 1.16(e)(4) and (6).

⁶⁹ MASS. R. PROF. C. 1.16(e)(7).

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, the bar counsel’s Attorney and Consumer Assistance Program resolves these matters without formal proceedings, with the attorney inevitably returning the file to the former client.

In 2018, the SJC added Rule 1.15A to the *Rules of Professional Conduct*.⁷⁰ It contains detailed instructions regarding the handling of files on closed matters. Rule 1.15A 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 terminating representation. Lawyers may maintain files electronically. Rule 1.15A(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.” The reader is advised to consult the rule and its commentary.

III. THE RULES GOVERNING HOLDING AND SAFEKEEPING PROPERTY

Rule 1.15 of the *Massachusetts Rules of Professional Conduct* govern how lawyers manage the funds they receive from clients or other persons as part of their legal representation.

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**

⁷⁰ MASS. R. PROF. C. r. 1.15A (2018).

RULE 1.15 (cont'd.)

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 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.

RULE 1.15: SAFEKEEPING PROPERTY (*cont'd.*)

(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.

(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

RULE 1.15 (cont'd.)

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 property is 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

RULE 1.15: SAFEKEEPING PROPERTY (*cont'd.*)

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

RULE 1.15 (*cont'd.*)

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.

F. *Account documentation:* For each trust account, the lawyer shall retain contemporaneous records of transactions

RULE 1.15: SAFEKEEPING PROPERTY (*cont'd.*)

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

RULE 1.15 (cont'd.)

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 S.J.C. 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;

RULE 1.15: SAFEKEEPING PROPERTY (*cont'd.*)

- (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.

RULE 1.15 (cont'd.)

- (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 the fees a lawyer may charge a client is how the lawyer manages the funds received from clients or other persons as part of the representation. The

lawyer often holds funds that are prepayment for the attorney's fees; sometimes the funds are proceeds from the representation, such as real estate payments held pending a 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, the nature of the lawyer's role in accepting funds does not matter—the same principles apply in safeguarding those funds.⁷¹ 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 Rule 1.15 record-keeping requirements or simply fail to comply with some of the provisions. A disturbingly high incidence of both intentional and negligent misuse of funds held for others also exists. These kinds of misconduct are common and typically result in serious discipline, as discussed in Section III(B).

Before addressing the requirements of Rule 1.15 generally, this section will highlight one important distinction relating to the previous discussion of attorney's fees. When a client pays a sum to a lawyer at the start of representation, that money is usually called a "retainer," but that term covers two different concepts, and lawyers and clients must understand the distinctions between the two. Most often, the retainer a client pays represents an advance for attorney's fees that have not yet been earned but likely will be in the future. That deposit, the typical understanding of the term *retainer*,⁷² 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, the lawyer must return them to the client if not earned. Nonrefundable advance fee payments are not permitted in Massachusetts.⁷³

On occasion, a client pays a lawyer money not as a deposit toward future fees but as compensation for the lawyer's availability and willingness to forgo other lucrative work. That payment, known in Massachusetts as a *classic retainer*,⁷⁴ belongs to the lawyer when paid and need not (and in fact may not) be held as

⁷¹ It is true, however, as discussed in Section III(B)(2), suspensions under Rule 1.15, that a lawyer who misappropriates third-party funds may receive lesser discipline than a lawyer who misappropriates client funds.

⁷² *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 45, at § 5.10.5; CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 9.2.2, 505–06 (1986).

⁷³ *Matter of Zak*, 476 Mass. 1034, 1040 (2017).

⁷⁴ *Sharif*, 459 Mass. at 568.

property of another or placed in the lawyer's trust account.⁷⁵ Lawyers sometimes confuse the two retainer versions, at considerable peril. Any lawyer charging a classic retainer must show 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* refers to the advance fee that must be held in trust and not the *classic* retainer, unless the context indicates otherwise.

Rule 1.15 provides detailed guidance regarding funds a lawyer holds for another, with two essential and unwavering messages—the lawyer must always separate the funds held for another from the lawyer's personal or business funds, and the lawyer must account scrupulously for the funds held in trust. The procedural and documentary requirements of Rule 1.15 aim to achieve those two ends. As with the discussion of contingent fees in Section II(C)(2), this section does not provide the detailed mechanisms for how a lawyer manages funds, which other resources cover well.⁷⁶ This section addresses the following issues that practicing lawyers must understand in order to avoid mistakes:

Withdrawing earned fees from trust accounts: A lawyer who earns fees that will be paid out of trust account funds (whether a retainer or funds received as payment on a litigated claim) faces an important judgment call.⁷⁷ The “no-commingling” rule prohibits a lawyer from keeping the earned fees in the client trust account. But if the lawyer withdraws the fee from the trust account immediately after earning it, or after the check clears, a client may later claim, and perhaps correctly, that some of the money withdrawn was not earned and, therefore, the lawyer misappropriated client funds. Rule 1.15 recognizes this dilemma and provides guidance in Rule 1.15(b)(2)(ii), which 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

⁷⁵ *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)).

⁷⁶ See, e.g., JAYNE B. TYRRELL & STEPHEN M. CASEY, *MANAGING CLIENTS’ FUNDS AND AVOIDING ETHICAL PROBLEMS* (Mass. IOLTA Committee 2018); Daniel C. Crane, *Records for Other People’s Money*, BOARD OF BAR OVERSEERS (Oct. 2003), <http://www.mass.gov/obcbbo/money.htm>.

⁷⁷ 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*, BOARD OF BAR OVERSEERS (Jan. 2005), <https://bbopublic.blob.core.windows.net/web/f/cost.pdf>.

client will dispute the lawyer's withdrawal, then the lawyer must promptly withdraw the funds.

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."⁷⁸ 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."⁷⁹ The lawyer will be hard-pressed to explain withdrawing funds due while not concurrently making a distribution to the client, as this rule requires. Accordingly, the lawyer ought to render a full accounting under Rule 1.15(d)(1) and distribute the funds due to the client and the lawyer 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.⁸⁰ The funds must remain in the trust account as long as the lawyer knows that a dispute regarding ownership of the funds exists. 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 a right to those funds, unless the lawyer is certain that the funds the third party claims "belonged to and were earmarked for" that third party.⁸¹ "[A]n attorney is not required to serve as a collection agent for [a third party],"⁸² 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 is resolved.⁸³

Interest on Lawyers Trust Accounts (IOLTA): Massachusetts lawyers holding funds for clients or other persons must hold those funds in one of two different accounts:

- For funds that are either small amounts or to be held for a short time, the lawyer must establish an IOLTA account.⁸⁴ This is because the

⁷⁸ MASS. R. PROF. C. 1.15(d).

⁷⁹ MASS. R. PROF. C. 1.15(c).

⁸⁰ MASS. R. PROF. C. 1.15(b)(2)(ii).

⁸¹ *Frontier Enterprises, Inc. v. Anchor Company of Marblehead, Inc.*, 404 Mass. 506, 513 (1989).

⁸² *Id.* (quoting *Blue Cross of Mass., Inc. v. Travaline*, 398 Mass. 582, 590 (1986)).

⁸³ *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).

⁸⁴ MASS. R. PROF. C. 1.15(e)(6)(i) refers to this as a "pooled account ('IOLTA account')."

transaction costs of creating a separate interest-bearing account for those funds outweigh any benefit of doing so.

- For funds that are large or to be held for a longer period of time, Rule 1.15(e)(6)(ii) requires that the lawyer establish a separate interest-bearing account so that the funds held in trust earn interest for the client.

IOLTA accounts pool all of the short-term or small deposits so that the aggregated funds earn interest. That interest, according to the IOLTA guidelines, is used for legal services and other access-to-justice purposes.⁸⁵ It is a breach of a lawyer's duty to the client to deposit non-nominal amounts of client funds for more than a short period of time if the funds can generate interest for the client, unless the client consents to that strategy.⁸⁶

Client trust account management: For both IOLTA and conventional interest-bearing accounts, a Massachusetts lawyer must follow strict protocols to meticulously account 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 the account, the bank notifies the BBO and the lawyer at the same time.

Flat fees: The only exception to the requirement that a lawyer hold in a trust account payments from clients that have not yet been earned is for flat fees, according to language the SJC added 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 matter, or for a particular discrete component of legal services, whether relatively simple and of short duration, or complex and protracted."⁸⁷

⁸⁵ *IOLTA Guidelines*, MASSACHUSETTS IOLTA, <https://www.maiolta.org/for-attorneys> (last visited Feb. 23, 2018). The IOLTA program in Massachusetts has funded a significant amount of legal services and supported other important initiatives. At its peak, the Massachusetts IOLTA program generated \$31,000,000 in funds for those purposes. In fiscal year 2015, the program generated \$6,442,000.

⁸⁶ 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."

⁸⁷ MASS. R. PROF. C. 1.15 comment [2A].

An attorney may deposit a flat fee directly into the operating account. If the lawyer chooses to deposit a flat fee into the trust account instead, all trust account provisions apply. Also, if the client ends the representation before the lawyer has performed all the work for which the flat fee was paid, the lawyer must return to the client any unearned portion of that fee.⁸⁸

Mishandling of other people's funds has been a persistent source of trouble for lawyers and has caused many to face BBO disciplinary proceedings. More than 750 reported disciplinary decisions between 1999 and 2017 refer to Rule 1.15. More than 120 such reports refer to Rule 1.5. The bar counsel reports receiving more than 300 complaints a year involving fee disputes.⁸⁹ The following section provides typical examples of violations leading to discipline and how the bar counsel, the BBO, and the SJC imposed sanctions for this type of misconduct.

B. Discipline for Violating Rule 1.15

Rule 1.15 has been the basis for hundreds of disciplinary matters in Massachusetts in recent years. The SJC, along with the BBO, has offered reliable guidance about the appropriate sanction for mishandling funds held for another. In 1997, in *Matter of Schoepfer*,⁹⁰ the SJC confirmed the standards expressed in its 1984 decision, *Matter of Discipline of an Attorney*⁹¹ (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.⁹²

An inadvertent misuse of funds held for others with some deprivation to the owner of the funds warrants a term suspension,⁹³ as does intentional misuse without

⁸⁸ *Id.* Comment 2A addresses everything described in the paragraph in the text.

⁸⁹ Kaufman & Vecchione, *supra* note 8, at 1.

⁹⁰ 426 Mass. 183, 13 Mass. Att'y Disc. R. 679 (1997).

⁹¹ 392 Mass. 827, 4 Mass. Att'y Disc. R. 155 (1984).

⁹² 426 Mass. at 187 (quoting *Three Attorneys*, 392 Mass. at 836).

⁹³ *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").

deprivation or intent to deprive.⁹⁴ An unintentional misappropriation of funds without any deprivation to the funds' owners typically leads to a public reprimand.⁹⁵ Commingling alone, without deprivation, results in an admonition.⁹⁶ 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."⁹⁷

1. Disbarment

The several disbarments on record for violating a lawyer's duties under Rule 1.15 typically include 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 other misconduct is present or where restitution has not been made. Disbarments also typically include a violation of Rule 8.4(c), prohibiting "conduct involving dishonesty, fraud, deceit or misrepresentation."⁹⁸ An apt example is *Matter of Pasterczyk*,⁹⁹ in which the single justice disbarred the respondent for intentionally misusing 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 on 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 the bar counsel's involvement. In *Matter of Dasent*,¹⁰⁰ the SJC disbarred a lawyer who commingled and misappropriated the 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.

⁹⁴ *Matter of Guerrero*, 31 Mass. Att'y Disc. R. 31 MADR 242 (2015) (six-month suspension, with conditions).

⁹⁵ *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)).

⁹⁶ *See, e.g.*, Ad. 07-44, 23 Mass. Att'y Disc. R. 1036 (2007).

⁹⁷ *Matter of Watt*, 430 Mass. 232, 236 (1999).

⁹⁸ MASS. R. PROF. C. 8.4(c). Between 1999 and 2017, at least seventy-five disbarment judgments based upon misuse and deprivation of funds have referred to Rule 8.4(c).

⁹⁹ 29 Mass. Att'y Disc. R. 507 (2013).

¹⁰⁰ 446 Mass. 1010, 22 Mass. Att'y Disc. R. 173 (2006).

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.”¹⁰¹ “Whether a respondent has made restitution is a factor in choosing between disbarment and indefinite suspension.”¹⁰²

Several comparable examples exist in the disciplinary reports. In *Matter of McBride*,¹⁰³ 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 account, without justification or the client’s knowledge. 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 lack of honesty during the disciplinary process justified the more serious sanction. In *Matter of Donaldson*,¹⁰⁴ the respondent paid himself \$17,000 from an IOLTA account without the client’s permission or other justification and misled the client about the terms of his representation. The misappropriation of the client’s money alone, according to the single justice, merited disbarment, and his other misconduct only confirmed the appropriateness of that sanction.¹⁰⁵

¹⁰¹ *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. 31 (2015).

¹⁰² *Matter of Nwogu*, 32 Mass. Att’y Disc. R. ____, BD 2016-060 (Nov. 16, 2016).

¹⁰³ 449 Mass. 154, 23 Mass. Att’y Disc. R. 443 (2007).

¹⁰⁴ 28 Mass. Att’y Disc. R. 221 (2012).

¹⁰⁵ 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 the bar counsel); *Matter of Sardeson*, 23 Mass. Att’y Disc. R. 635 (2007) (same); *Matter of Dragon*, 440 Mass. 1023, 1023–24, 19 Mass. Att’y Disc. R. 121 (2003) (included lack of candor to the 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).

A single justice concluded that a lawyer's addiction does not necessarily serve as the basis for a lesser sanction than disbarment. In *Matter of Clifford*,¹⁰⁶ the attorney used his client trust account 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, warranted disbarment.¹⁰⁷ In *Matter of Collins*,¹⁰⁸ 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.¹⁰⁹

2. Suspension

Most often, based on the *Schoepfer* standard, a lawyer who intentionally misappropriates client funds with deprivation to the client will receive an indefinite suspension and not disbarment, if restitution is voluntarily made. As previously noted, the more serious sanction of disbarment results when restitution is not made or some additional factor is present.¹¹⁰

¹⁰⁶ 26 Mass. Att'y Disc. R. 74 (2010).

¹⁰⁷ 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 was still disbarred, as alcoholism was found not to be "but for" cause of wrongdoing). Cf. *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 the 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).

¹⁰⁸ 455 Mass. 1020, 26 Mass. Att'y Disc. R. 102 (2010) (on its specific facts, indefinite suspension).

¹⁰⁹ 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); *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).

¹¹⁰ 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 restitution of 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)).

You Should Know

The typical sanction for intentionally misappropriating client funds with deprivation to the client is disbarment or an indefinite suspension, absent other misconduct. If the attorney voluntarily makes restitution, the sanction is typically an indefinite suspension. By contrast, a lawyer who misappropriates funds while not engaged in practicing law typically receives a term suspension. Unintentional misuse of client funds that leads to deprivation typically warrants a term suspension.

Many examples of indefinite suspensions for intentional misuse of client funds with deprivation exist. For example, in *Matter of Schoepfer*,¹¹¹ the Court imposed an indefinite suspension for a lawyer intentionally misappropriating client funds. In *Matter of Thalheimer*,¹¹² an attorney intentionally misappropriated IOLTA funds to pay off 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 BBO'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*,¹¹³ the lawyer mismanaged his IOLTA account, leading to commingling his money with his clients' and some loss of his clients' funds. In choosing between disbarment and indefinite suspension, the single justice deferred to the BBO's recommendation of suspension, even though the lawyer had not made full restitution. 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*,¹¹⁴ 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

¹¹¹ 426 Mass. 183, 13 Mass. Att'y Disc. R. 679 (1997).

¹¹² 24 Mass. Att'y Disc. R. 684 (2008).

¹¹³ 24 Mass. Att'y Disc. R. 1 (2008).

¹¹⁴ 444 Mass 1002, 21 Mass. Att'y Disc. R. 355 (2005).

sanction than is usual and presumptive.”¹¹⁵ In *Matter of Haese*,¹¹⁶ the respondent was disbarred, despite making restitution, because of the seriousness of his misconduct.

Departures from the *Schoepfer* presumptive discipline are rare. As *Schoepfer* itself noted, the recognized standards may not apply where the lawyer’s disability, or similar mitigating circumstance, warrants a lesser sanction.¹¹⁷ One such example is *Matter of Guidry*,¹¹⁸ where a single justice imposed a thirty-month suspension, which the parties proposed 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.¹¹⁹ For instance, in *Matter of Dodd*,¹²⁰ 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. The respondent made restitution, and 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 standard sanction.

The Court has distinguished between misappropriating client funds while in the role of counsel and misappropriation of third-party funds outside the

¹¹⁵ 444 Mass. at 1003. For a sampling of other indefinite suspension matters similar to those described in the text, *see, e.g.*, *Matter of Eleeey*, 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).

¹¹⁶ 468 Mass 1002, 30 Mass. Att’y Disc. R. 196 (2014).

¹¹⁷ *Schoepfer*, 426 Mass. at 188 (“If a disability caused a lawyer’s conduct, the discipline should be moderated.”).

¹¹⁸ 15 Mass. Att’y Disc. R. 255 (1999).

¹¹⁹ 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), *aff’d*, 452 Mass. 1010, 24 Mass. Att’y Disc. R. 380 (2008) (indefinite suspension).

¹²⁰ 21 Mass. Att’y Disc. R. 196 (2005).

practice of law, imposing a greater disciplinary sanction for the former. As the SJC has written:

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.¹²¹

In *Matter of Barrett*,¹²² the respondent, acting as CEO of a company in which he was the majority stockholder but not its counsel, converted company funds for his own use. The SJC imposed a two-year suspension. In *Matter of Hilson*,¹²³ the respondent was indefinitely suspended for converting third-party funds held while representing 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.”¹²⁴

Misuse of funds the client paid in advance for fees is different from misuse of purely client-owned funds, as the lawyer has a reasonable expectation of earning the retainer.¹²⁵ In *Matter of Sharif*,¹²⁶ 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,

¹²¹ *Matter of Hilson*, 448 Mass. 603, 619, 23 Mass. Att’y Disc. R. 269, 288 (2007).

¹²² 447 Mass. 453, 464–65, 22 Mass. Att’y Disc. R. 58 (2006).

¹²³ 448 Mass. 603, 23 Mass. Att’y Disc. R. 265 (2007).

¹²⁴ 448 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 converting 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) (eighteen-month suspension for two incidents of stealing cash from employer; restitution paid).

¹²⁵ *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).

¹²⁶ 459 Mass. 558, 27 Mass. Att’y Disc. R. 809 (2011).

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."¹²⁷

Misuse of client funds that is not intentional but that leads to deprivation warrants a term suspension. As the SJC 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."¹²⁸ 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 resulted 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, suspensions in other situations comparable to those in *Jackman*.¹²⁹

The burden of proof to establish facts in disciplinary proceedings typically rests with the bar counsel. But a respondent bears the burden of proof to establish lack of intentional misconduct when funds received in cash are unaccounted

¹²⁷ 459 Mass. at 566–67 (quoting *Schoepfer*).

¹²⁸ *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).

¹²⁹ 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).

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.”¹³⁰

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 demonstrating immediate good-faith efforts to correct any mistake involving deprivation of client funds.¹³¹

3. Public Reprimand

Lawyers presumptively receive public reprimands for mishandling funds held in trust when the misconduct results from negligence and the client suffers no deprivation.¹³² The disciplinary reports are filled with such examples. For instance, in *Matter of Molle*,¹³³ 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 BBO determined that his actions were negligent and his clients suffered no deprivation. Similarly, in *Matter of Barnes*,¹³⁴ the attorney, who through 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*,¹³⁵ the attorney, again as a result of careless bookkeeping, commingled personal funds with

¹³⁰ *Murray*, 455 Mass. at 887–88.

¹³¹ 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).

¹³² *Matter of Jackman*, 444 Mass. 1013, 1014, 21 Mass. Att’y Disc. R. 349 (2005).

¹³³ 25 Mass. Att’y Disc. R. 390 (2009).

¹³⁴ 18 Mass. Att’y Disc. R. 64 (2002).

¹³⁵ 17 Mass. Att’y Disc. R. 299 (2001).

client funds over an extended period of time, resulting in negligent misuse of client funds but without deprivation to client. The attorney made full restitution and received a public reprimand.¹³⁶

You Should Know

The typical sanction for a lawyer who negligently misappropriates client funds with no deprivation to the client, or for a lawyer who mismanages a trust account, is a public reprimand.

In *Matter of Franchitto*,¹³⁷ 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

Admonitions are common for lawyers who commingle client funds with their own funds. Between 1999 and 2017, the bar counsel has issued at least 150 admonitions citing Rule 1.15 as a basis for the discipline.¹³⁸ The most common reports document commingling of personal and client funds.¹³⁹ Other lawyers violated the rule by failing to promptly notify clients when they received settlement funds.¹⁴⁰ For example, in Ad. 04-34,¹⁴¹ the attorney received an admonition

¹³⁶ 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).

¹³⁷ 448 Mass. 1007, 23 Mass. Att'y Disc. R. 162 (2007).

¹³⁸ Westlaw search, July 27, 2013 (153 admonition reports citing Rule 1.15).

¹³⁹ The Westlaw search shows eighty-nine reports between 1999 and 2017 referring both to Rule 1.15 and commingling.

¹⁴⁰ *See, e.g.*, Ad. 04-34, 20 Mass. Att'y Disc. R. 723 (2004).

¹⁴¹ 20 Mass. Att'y Disc. R. 723 (2004). *See also* Ad. 05-34, 21 Mass. Att'y Disc. R. 746 (2005). Of the fifty-three lawyers admonished for failing to notify a client about receipt of funds, none has received an admonition under Rule 1.15 since 2007.

after he processed a settlement check through a personal account, rather than a trust account, with no harm to the client. Several lawyers received admonitions after a bank dishonored a client trust account check for insufficient funds. For example, in Ad. 10-01,¹⁴² the lawyer's commingling of funds led to the bounced check, but with no harm to a client. In Ad. 07-44,¹⁴³ the lawyer, who seldom held client funds in trust, mistakenly used her IOLTA account for ordinary expenses, instead of her business checking account, leading to a dishonored check.

In general, most of the admonitions in this area result from the lawyer's record-keeping mistake but without misuse of client funds. For example, in Ad. 01-66,¹⁴⁴ the attorney failed to promptly withdraw his fee on contingent cases as well as to keep careful track of the fees he had withdrawn, which caused an IOLTA check to be returned for insufficient funds. In Ad. 10-12,¹⁴⁵ the lawyer, who represented lenders on real estate closing matters, on several occasions recorded the closing documents in the Registry of Deeds before verifying that the funds for the closing were in his IOLTA account. As noted, the disciplinary reports contain many similar examples.

You Should Know

Under the *Schoepfer/Three Attorneys* standards, commingling of client funds without misuse or deprivation warrants an admonition. As noted previously, if that commingling resulted from faulty record-keeping practices, the recent trend is to impose a public reprimand.

The disciplinary reports show that, between 2010 and 2017, every instance of a trust account check returned for insufficient funds has led to a public reprimand or worse, but those numbers are misleading. Many of those insufficient-fund matters result in "diversion agreements," where the bar counsel defers disciplinary charges if the respondent cooperates by rectifying any trust account

¹⁴² 26 Mass. Att'y Disc. R. 761 (2010).

¹⁴³ 23 Mass. Att'y Disc. R. 1036 (2007).

¹⁴⁴ 17 Mass. Att'y Disc. R. 787 (2001).

¹⁴⁵ 26 Mass. Att'y Disc. R. 782 (2010).

errors.¹⁴⁶ Those without diversion agreements, or those who fail to honor such agreements, face more serious charges. As a result, historically, most Rule 1.15 violations have led to public reprimands, showing a trend away from admonitions in this area.¹⁴⁷

¹⁴⁶ For a discussion of diversion agreements, see Chapter 4.

¹⁴⁷ Of the 355 reported cases citing Rule 1.15 between 2007 and July 2017, only 15 were admonitions.)

CHAPTER TWELVE

Candor to the Court and Third Parties (Rules 3.3, 4.1(a), 8.4(c))

I. INTRODUCTION

In Massachusetts, lawyers who find themselves in the disciplinary process often end up there because they have lied, deceived, or were otherwise not fully honest when representing clients (and, on occasion, outside of representation). The disciplinary reports are filled with examples of such 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. Some dissemble to further their own ends. This chapter discusses the rules that govern candor and honesty, reviews the discipline imposed for violating 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 in the *Massachusetts 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), which broadly prohibits deception and dishonesty by a lawyer. This chapter discusses these rules 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

RULE 3.3 (cont'd.)

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

RULE 3.3: CANDOR TOWARD THE TRIBUNAL (*cont'd.*)

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 components, that understanding serves as a nicely crystallized, if narrow, description of the rule. Simply stated, a lawyer cannot lie to a tribunal, knowingly offer testimony that 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,¹ offer evidence that the lawyer knows is false, or fail to correct

¹ MASS. R. PROF. C. 3.3(a)(1) (2015).

false material evidence or the attorney's own misstatement of material fact or law.² If the lawyer learns that a person (either the client or another person) intends to offer or has offered false evidence, the lawyer "shall take reasonable remedial measures,"³ which may include disclosure of the falsehood to the tribunal.⁴ A lawyer may refuse to offer evidence that the lawyer "reasonably believes is false."⁵ When the proposed perjury is by a defendant in a criminal proceeding, the rule indicates a different process.⁶

Statements that are theoretically true but that are intentionally misleading generally violate Rule 3.3.⁷ 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).⁸ "[H]alf-truths may be as actionable as whole lies."⁹

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 facts if not asked),¹⁰ 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."¹¹ According to a Massachusetts Bar Association ethics opinion, the duty to disclose adverse authority applies even if the authority is factually

² *Id.* at 3.3(a)(3).

³ *Id.* at 3.3(b).

⁴ *Id.* at 3.3(a)(3), (b).

⁵ *Id.* at 3.3(a)(3).

⁶ *Id.* at 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." MASS. R. PROF. C. 3.3(e)(2). The lawyer may not actively elicit the false testimony and may not refer to it in closing argument or elsewhere. MASS. R. PROF. C. 3.3(e)(3).

⁷ *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. 511 (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 the respondent made were not sufficiently false to violate Rule 3.3 but did violate Rule 8.4(c).

⁸ *Matter of Pemstein*, 16 Mass. Att'y Disc. R. 339, 348 (2000).

⁹ *Kannavos v. Annino*, 356 Mass. 42, 48 (1969).

¹⁰ MASS. R. PROF. C. 3.3(d) (2015).

¹¹ *Id.* at 3.3(a)(2).

distinguishable from the matter before the tribunal and continues until the tribunal renders its decision.¹²

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 the previous Massachusetts disciplinary code imposed, which limited that obligation to revealing nonprivileged material.¹³ The duties Rule 3.3 establishes apply when the attorney “knows” that the evidence is false. Actual knowledge is required, but it may be inferred from the circumstances.¹⁴

The question of what a lawyer should *do* when aware of a client’s, a witness’s, or a third party’s untruthful testimony has perplexed practitioners and commentators for decades.¹⁵ For purposes of cataloging the treatment of Rule 3.3 violations in the disciplinary process, the path is much more straightforward. A lawyer must not use evidence known to be false and must prevent the client from using it. 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 Violating Rule 3.3

The usual sanction in Massachusetts for making a false statement or presenting false evidence to a tribunal is now a term suspension, one year for a lawyer presenting false evidence or making false statements, but not under oath, and two years for a lawyer making false statements under oath. The Supreme Judicial

¹² Massachusetts Bar Association Ethics 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 the former disciplinary rule.

¹³ See MASS. CODE OF PROF. RESP. DR 7-102(B)(1) (1969).

¹⁴ Matter of Angwafo, *supra* note 7, 453 Mass. at 34. 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)).

¹⁵ 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.

Court (SJC) has stated that “the presumptive sanction is a one-year suspension” for “cases involving misrepresentations to a tribunal.”¹⁶ It has also stated, “Where an attorney has made false statements under oath, the presumptive sanction is a two-year suspension from the practice of law,”¹⁷ because “an attorney who lies under oath engages in ‘qualitatively different’ misconduct from an attorney who makes false statements and presents false evidence.”¹⁸

Practice Tips

Lawyers who lie almost always get in serious trouble if 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, the more serious the sanction. Lesser sanctions have applied when the lawyers lie in their private matters, such as during their own divorce proceedings.

* * *

Lying before a tribunal, the misconduct Rule 3.3 covers, is more serious than lying outside of a tribunal to a client or a third party (such as in a negotiation), which Rule 4.1 covers.

In rare circumstances, a lawyer has received either a public reprimand or an admonition for misconduct stemming from Rule 3.3, but those dispositions tend to be exceptions, as explained in the Sections II(B)(3) and (4).

¹⁶ *Matter of Goodman*, 22 Mass. Att’y Disc. R. 352, 365 (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).

¹⁷ *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, 767–69, 14 Mass. Att’y Disc. R. 699 (1998) (two-year suspension for false testimony in court, filing false affidavits, and issuing misleading opinion letters signed under oath with forged notarization).

¹⁸ *Matter of Shaw*, 427 Mass. at 769 (quoting *Matter of Budnitz*, 425 Mass. 1018, 1019, 13 Mass. Att’y Disc. R. 62 (1997)).

1. Disbarment

An attorney giving false testimony under oath may be disbarred, but only in egregious circumstances, typically those involving other misconduct or aggravating factors.¹⁹ In *Matter of Bailey*,²⁰ for example, the lawyer was disbarred in part because of his false testimony regarding the handling of a client's property, but also for misappropriating that property and improper ex parte contacts with a judge. There, the SJC wrote that an attorney's false testimony "under oath, by itself, can justify disbarment."²¹ 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*,²² 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 for obstructing justice, the SJC concluded that the felony conviction warranted disbarment, the presumptive discipline for such convictions.²³

¹⁹ 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*, *supra* note 18. 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, which the SJC uses, between false statements under oath and false statements not under oath.

²⁰ 439 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).

²¹ *Matter of Bailey*, 439 Mass. 134, 149, 151, 19 Mass. Att'y Disc. R. 12 (2003).

²² 455 Mass. 722, 26 Mass. Att'y Disc. R. 178 (2010).

²³ See also *Matter of Kelly*, 26 Mass. Att'y Disc. R. 282 (2010) (disbarment after felony conviction on twenty counts, including forging 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, 19 Mass. Att'y Disc. R. 141 (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 defendant's true identity and that his arrest had been part of an undercover investigation. *Id.* 439 Mass. 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 335–36.

2. *Suspension*

Most Rule 3.3 violations result in some form of suspension. As previously noted, the usual sanction for making false statements to a tribunal is a one-year suspension, unless the false statement is made under oath, and then the sanction is a two-year suspension. In *Matter of Sousa*,²⁴ the respondent was suspended for two years after she testified falsely in court against her client. She had previously 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 or less culpable than that for which the typical sanction applies. Other examples of that disposition exist.²⁵

You Should Know

According to the SJC, the accepted sanction for making a deliberate misrepresentation to a court is a one-year suspension.²⁶ But “[w]here an attorney has made false statements under oath, the presumptive sanction is a two-year suspension from the practice of law.”²⁷

* * *

Some cases involving counsel filing false affidavits without false oral testimony have resulted in a one-year suspension instead of a two-year suspension.²⁸

²⁴ 25 Mass. Att’y Disc. R. 557, 566 (2009).

²⁵ 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, 14 Mass. Att’y Disc. R. 699 (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 contingent fee in a criminal case, aggravated by testifying falsely to hearing committee).

²⁶ *Matter of Slavitt*, 22 Mass. Att’y Disc. R. 720 (2006), *modified on appeal*, 449 Mass. 25, 23 Mass. Att’y Disc. R. 662 (2007); *Matter of Macero*, 27 Mass. Att’y Disc. R. 554 (2011) (presumptive sanction is a one-year suspension).

²⁷ *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)).

²⁸ *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

Some lawyers who offer testimony or evidence under oath have been suspended for longer periods than the usual sanction. For instance, in *Matter of O'Donnell*,²⁹ the attorney was suspended indefinitely for false testimony under oath, combined with misuse of client funds. In *Matter of Foley*,³⁰ 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; most of these involved statements made not on behalf of a client but as a witness³¹ 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 of a lawyer who is representing a client in the proceedings of a tribunal.”³²) In *Matter of Finnerty*,³³ the respondent was suspended for six months after he intentionally misrepresented to the Probate and Family Court (under penalties of perjury³⁴) 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 his former wife’s supportive statements), the Court stated that “we are satisfied that this disposition is consistent with the sanctions imposed in other cases.”³⁵ In *Matter of Angwafo*,³⁶ the respondent was suspended for one month for misstating

in light of lack of materiality). *But see* *Matter of Diviacchi*, 475 Mass. 1013, 32 Mass. Att’y Disc. R. ____ (2016) (twenty-seven-month suspension standard after the respondent filed a false complaint signed under oath, then relied on the false statements in arguments to the Court, and for other misconduct).

²⁹ 23 Mass. Att’y Disc. R. 508 (2007).

³⁰ 439 Mass. 324, 19 Mass. Att’y Disc. R. 141 (2003).

³¹ *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).

³² MASS. R. PROF. C. 3.3 comment [1]. *See also infra* discussion accompanying note 93.

³³ 418 Mass. 821, 10 Mass. Att’y Disc. R. 86 (1994).

³⁴ The Court noted that the false financial statement the respondent submitted 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.” *Id.* 418 Mass. at 828.

³⁵ *Id.* 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.

³⁶ 453 Mass. 28, 25 Mass. Att’y Disc. R. 8.

financial and other matters in a Probate and Family Court proceeding. She suffered from extreme domestic violence, amounting to “terror” at the time.³⁷ In *Matter of Leahy*,³⁸ 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.”³⁹ The respondent’s lack of financial motive justified a shorter suspension. In *Matter of Vinci*,⁴⁰ 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.⁴¹

In *Matter of Balliro*,⁴² an attorney was suspended for six months for making false statements to a Tennessee prosecutor and the police as well as giving 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 Board of Bar Overseers (BBO) accepted the hearing committee’s

³⁷ 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* at Section IV(A).

³⁸ 28 Mass. Att’y Disc. R. 529 (2012).

³⁹ 28 Mass. Att’y Disc. R. at 537 (citing *Matter of Ring*, 427 Mass. 186, 14 Mass. Att’y Disc. R. 651 (1998) (three months); *Matter of Kersey*, 432 Mass. 1020, 16 Mass. Att’y Disc. R. 238 (2000) (three months); *Matter of Finnerty*, 418 Mass. 821, 10 Mass. Att’y Disc. R. 86 (1994) (six months); *Matter of Kilkenny*, 26 Mass. Att’y Disc. R. 288 (2010) (five months)).

⁴⁰ 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).

⁴¹ 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).

⁴² 25 Mass. Att’y Disc. R. 31 (2009).

recommendation of a public reprimand, the SJC disagreed and imposed the six-month suspension.⁴³

If a lawyer, in the role of counsel, makes misrepresentations to the tribunal not under oath, the sanction that has been the norm for many years is a one-year suspension. For instance, in 1993, in *Matter of McCarthy*,⁴⁴ 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*,⁴⁵ the attorney was also suspended for one year for actively misrepresenting the terms of a real estate transaction in a divorce proceeding to both opposing counsel and 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.⁴⁶

In 2003, the SJC suggested stiffer penalties for misrepresentation. In *Matter of Griffith*,⁴⁷ after imposing a one-year suspension on a respondent who had assisted his client in preparing 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.⁴⁸

⁴³ The Court acknowledged the following conflict 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, 18 Mass. Att’y Disc. R. 271 (2002) (attorney suspended for two months after conviction of misdemeanor arising from violent assault on estranged wife).” *Id.* See also *Matter of Angwafo*, 453 Mass. 28, 25 Mass. Att’y Disc. R. 8 (2009) (one-month suspension for false statements resulting from severe domestic abuse).

⁴⁴ 416 Mass. 423, 9 Mass. Att’y Disc. R. 225 (1993). At the time, a one-year suspension required a reinstatement hearing.

⁴⁵ 413 Mass. 416, 8 Mass. Att’y Disc. R. 167 (1992).

⁴⁶ 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).

⁴⁷ 440 Mass. 500, 20 Mass. Att’y Disc. R. 174 (2003).

⁴⁸ 440 Mass. at 509 (citing *Matter of Finnerty*, 418 Mass. 821, 10 Mass. Att’y Disc. R. 86 (1994)).

Since the *Griffith* decision, however, the few cases with sanctions for misrepresentation not under oath that have been longer than the standard one-year suspension typically included other misconduct. In *Matter of Ozulumba*,⁴⁹ 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*,⁵⁰ an attorney incurred an eighteen-month suspension 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 had also engaged in an impermissible business relationship with the client. In *Matter of Carchidi*,⁵¹ the attorney was suspended for thirty months after filing a false accounting with the Probate and Family Court and intentionally misstating the fees he charged the estate, but he had also mismanaged the client accounts and been suspended twice for similar misconduct involving mismanaging client funds.⁵² In *Matter of Munroe*,⁵³ an attorney was suspended for two years and six months for filing false accountings and false pleadings plus several other separate instances of misconduct. Most recently, in *Matter of Moran*,⁵⁴ in which the lawyer had filed a false probate accounting under oath to mask his fees, but also paid himself clearly excessive fees and engaged in other misconduct, the full bench of the SJC increased the nine-month suspension imposed by the single justice to fifteen months.

In matters where the misrepresentations were either less material or less intentionally deceitful, the Rule 3.3 violations resulted in shorter suspensions. For instance, in *Matter of MacDonald*,⁵⁵ a newly admitted lawyer was suspended

⁴⁹ 23 Mass. Att’y Disc. R. 515 (2007).

⁵⁰ 20 Mass. Att’y Disc. R. 220 (2004).

⁵¹ 29 Mass. Att’y Disc. R. 111 (2013). The report implies that the accounting filed with the court was *not* made under oath.

⁵² For similar violations of Rule 3.3 where the attorney filed a false account in Probate and Family 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 and Family Court, saying that he had distributed funds to a beneficiary’s estate when no such distributions were made).

⁵³ 26 Mass. Att’y Disc. R. 385 (2010).

⁵⁴ 479 Mass. 1016 (2018).

⁵⁵ 23 Mass. Att’y Disc. R. 411 (2007).

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 that at issue in *Matter of Long*,⁵⁶ 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, altered documents and made false statements on more than one occasion, warranting a longer suspension than in *Long*.

More recently, in *Matter of Macero*,⁵⁷ the single justice adopted the board memorandum, which declined to recommend a suspension greater than one year, citing *Neitlich* and *McCarthy* for the "presumptive sanction" of a "one-year suspension."⁵⁸ In *Macero*, the respondent had failed to pay an appeals court docketing fee on time, which resulted in the appeal being dismissed. She then 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 did not refer to the Court's warning in *Griffith* regarding possible stiffer sanctions.

A lawyer who forges the signature of an absent individual to an otherwise truthful document or statement may receive a shorter suspension or, as seen in the following subsection, a public reprimand (the recognized minimum sanction for that misconduct), or even an admonition. In *Matter of Molloy*,⁵⁹ 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 the Office of the Bar Counsel about the event, which increased his sanction.

3. *Public Reprimand*

On occasion, the sanction for signing another's name to an otherwise truthful document is a public reprimand. In *Matter of Colella*,⁶⁰ an attorney received a public 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 violation of Rules 3.3(a)(1) and 8.4(c).

⁵⁶ 16 Mass. Att'y Disc. R. 250 (1999).

⁵⁷ 27 Mass. Att'y Disc. R. 554 (2011).

⁵⁸ *Id.*

⁵⁹ 19 Mass. Att'y Disc. R. 302 (2003).

⁶⁰ 22 Mass. Att'y Disc. R. 155 (2006).

You Should Know

The 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.

In *Matter of Cross*,⁶¹ 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 she did not seek to rely on it, her misrepresentation was not material.

No other public reprimands or censures appear in the disciplinary reports for violating Rule 3.3 or its predecessor, DR 7-102(A).

4. *Admonition*

Few lawyers who have violated Rule 3.3 have received admonitions. In Ad. No. 15-02,⁶² 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; the supervisor relieved him of that task and pursued it 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), and received an admonition. In Ad. No. 06-41,⁶³ the respondent signed an affidavit for a witness without her knowledge and filed it in court in support of a motion for a continuance. The witness was aware of the affidavit and had approved its generally accurate contents, but had not authorized the attorney to sign her name. 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 in the previous subsection.

⁶¹ 15 Mass. Att'y Disc. R. 157 (1999).

⁶² 31 Mass. Att'y Disc. R. 747 (2015). The supervisor stipulated to a term suspension. *Matter of Newman*, 31 Mass. Att'y Disc. R. 482 (2015).

⁶³ 22 Mass. Att'y Disc. R. 960 (2006).

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. No. 00-24,⁶⁴ a lawyer sought an ex parte real estate attachment and, in doing so, 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 violating Rule 3.3 or its predecessor.

III. THE NATURE OF THE LAWYER'S RESPONSIBILITIES REGARDING CANDOR OUTSIDE OF THE TRIBUNAL SETTING

Rule 4.1(a) prohibits a lawyer from making a material misstatement of fact or law to a third person when representing a client. Lawyers understand Rule 4.1(a) to be the out-of-court counterpart to Rule 3.3.

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

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 may not lie to or deceive others about material facts or legal principles when representing a client. In very limited circumstances, Rule 4.1(a) 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 non-material representation, or an assertion that is not factual, such as an opinion. Comment [2] 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

⁶⁴ 16 Mass. Att'y Disc. R. 484 (2000).

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.⁶⁵

Commentators agree that this language means that a lawyer engaged in a negotiation may affirmatively misstate the client's "bottom line" and limits of the negotiating authority.⁶⁶ (Of course, most experienced lawyers understand that, even if permitted by the rules, flat-out misstatements to other lawyers or parties are almost always strategic and reputational mistakes.)

As with Rule 3.3,⁶⁷ 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."⁶⁸ 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 4.1(a).⁶⁹ Also, a lawyer making false or deceptive statements may also be subject to sanction under Rule 8.4(c), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation."⁷⁰

⁶⁵ MASS. R. PROF. C. 4.1 comment [2] (2015).

⁶⁶ 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).

⁶⁷ See *supra* discussion accompanying notes 1–14.

⁶⁸ MASS. R. PROF. C. 4.1 comment [1].

⁶⁹ *Matter of O'Toole*, 31 Mass. Att'y Disc. R. 511 (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).

⁷⁰ MASS. R. PROF. C. 8.4(c) (2015). See *Matter of Lee*, 25 Mass. Att'y Disc. R. 355 (2009) (attorney who misrepresented terms while acting as a real estate broker found to have violated Rule 8.4(c) term suspension, aggravated by prior misconduct). See also discussion of Rule 8.4(c) *infra* Section IV.

In some jurisdictions, 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) in Section IV of this chapter. Even if a jurisdiction permits civil rights and similar testing, a lawyer cannot use “excessively intrusive investigative techniques” and claim doing so as a private tester. In *Matter of Crossen*,⁷¹ the SJC held that such conduct violated Rules 4.1(a) and 8.4(c) and, on those facts, warranted disbarment.

B. Discipline for Violating Rule 4.1

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.⁷² Moreover, several lawyers have been disbarred for such misconduct when combined with other serious misconduct. For example, in *Matter of Pepyne*,⁷³ an attorney was disbarred after multiple instances of misconduct. One of these occurred after a client, a plaintiff in a 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 deceased client’s family. In *Matter of Siciliano*,⁷⁴ the attorney agreed to settlement of a malpractice lawsuit after his clients refused to settle. He forged their names to a release, sent the release to the defendant’s counsel, and then misappropriated the funds after receiving them. In *Matter of Hoffman*,⁷⁵ 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 the bar counsel.

⁷¹ 450 Mass. 533, 555–68, 24 Mass. Att’y Disc. R. 122, 149–65 (2008).

⁷² 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 statements 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 for making false statements to a federally insured bank). A third lawyer was indefinitely suspended 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).

⁷³ 26 Mass. Att’y Disc. R. 502 (2010).

⁷⁴ 23 Mass. Att’y Disc. R. 654 (2007).

⁷⁵ 23 Mass. Att’y Disc. R. 301 (2007).

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.

Lawyers who misuse funds belonging to others and then misrepresent the facts in order to avoid detection or to mislead others are disbarred for those multiple rule violations, including Rule 4.1(a).⁷⁶

2. *Suspension*

The sanction for lawyers who misrepresent facts in order to deceive others and cause them harm is often a term suspension. While the full bench of the SJC has not stated a presumptive sanction for misrepresentations under Rule 4.1(a), a single-justice decision 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.⁷⁷ Nevertheless, lawyers have incurred suspensions for periods longer than one year for violating Rule 4.1(a). In *Matter of Friery*,⁷⁸ an attorney was suspended for two years for misrepresenting her professional credentials, 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 clients or 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 the respondent repeated them or allowed them to be repeated, and the number of people who heard or repeated the misrepresentation.

⁷⁶ 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).

⁷⁷ *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.”).

⁷⁸ 28 Mass. Att’y Disc. R. 337 (2012).

You Should Know

Lawyers have received lengthy suspensions for making intentionally false statements outside of court settings, especially in real estate transactions.

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*,⁷⁹ 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*,⁸⁰ 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 orchestrating the scheme.⁸¹ Other lawyers involved in fraudulent real estate transactions have received similar suspensions, with the length of the suspension seemingly determined by the respondent lawyer's level of responsibility and the number of transactions affected by misrepresentations.⁸²

In *Matter of Goodman*,⁸³ the single justice imposed a one-year suspension, with a reinstatement petition and hearing required,⁸⁴ for what he termed the respondent's "brazen" misrepresentations while representing clients in personal

⁷⁹ 27 Mass. Att'y Disc. R. 1 (2011).

⁸⁰ 26 Mass. Att'y Disc. R. 229 (2010).

⁸¹ 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 as well as a fourth loan for the benefit of another lawyer. The respondent was charged under Rule 8.4, however, not Rule 4.1.

⁸² 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).

⁸³ 22 Mass. Att'y Disc. R. 352 (2006).

⁸⁴ The single justice permitted the lawyer to file a reinstatement petition after nine months of suspension. This is now the current rule. See MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT r. 4:01, § 18(2) [hereinafter SJC Rule] (effective Sept. 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.

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 his client's death to the insurer and implied that the plaintiff was alive. By comparison, in *Matter of Mulvey*,⁸⁵ an attorney received a six-month suspension for knowingly providing misleading, deceptive, and false information to a third party in order to obtain funding for his client—funding that would not have been advanced had the lawyer communicated accurate information. The relatively short suspension is likely due to the fact there was only one transaction and the lawyer made full restitution to the third party.

In *Matter of Ghitelman*,⁸⁶ the lawyer was suspended for a year and a day after she fabricated immigration documents that she had failed to file, and which she then provided to successor counsel to cover her neglect. Her misconduct was aggravated by prior discipline, implying that this increased her sanction. In *Matter of Robbins*,⁸⁷ 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.⁸⁸ The attorney's total suspension was increased to eighteen months for also commingling client funds.

The shortest suspension for misconduct related to Rule 4.1(a) or its predecessor occurred in *Matter of Connolly*.⁸⁹ 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. The statement misrepresented that his client had paid \$5,700 in points to the bank so that the client could fraudulently be reimbursed 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*,⁹⁰ the respondent received a public

⁸⁵ 25 Mass. Att'y Disc. R. 398 (2009).

⁸⁶ 20 Mass. Att'y Disc. R. 162 (2004).

⁸⁷ 17 Mass. Att'y Disc. R. 480 (2001).

⁸⁸ 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).

⁸⁹ 11 Mass. Att'y Disc. R. 43 (1995).

⁹⁰ 27 Mass. Att'y Disc. R. 249 (2011).

reprimand for making 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 violating 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 mitigating factors exist. In *Matter of an Attorney*,⁹¹ the lawyer wrote a letter to opposing counsel in a divorce case seeking an advance on marital assets to purchase a house, without mentioning 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 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*,⁹² the SJC imposed 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), but not Rule 4.1(a), for this misconduct.

IV. THE NATURE OF THE LAWYER'S RESPONSIBILITIES REGARDING DECEPTION GENERALLY

Rule 8.4(c) broadly prohibits deception by lawyers and must be read in tandem with the treatment of deception under Rules 3.3(e) and 4.1(a), each of which, as noted in previous sections, permits some attorney deception in identified limited circumstances.⁹³ Rule 8.4(c) applies to lawyers acting within or outside the role

⁹¹ Ad. No. 07-33, 23 Mass. Att'y Disc. R. 1012 (2007).

⁹² Ad. No. 08-02, 451 Mass. 131, 24 Mass. Att'y Disc. R. 824 (2008).

⁹³ MASS. R. PROF. C. 3.3(e) permits a lawyer to participate, in limited circumstances, in presenting false evidence by a criminal defendant. *See supra* note 32 and accompanying text. Rule 4.1(a) and its comments permit a lawyer to misstate authority and other nonmaterial facts in negotiation.

of attorney, unlike Rules 3.3 and 4.1, which apply to a lawyer acting on behalf of a client.⁹⁴ Section IV(C) addresses specific areas in which Massachusetts lawyers should consider Rule 8.4(c).

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) prohibits four separate types of misconduct: dishonesty, fraud, deceit, and misrepresentation. The disciplinary reports often reference these four items collectively, but the type of wrongdoing may affect the sanction given. For example, in *Matter of Angwafo*,⁹⁵ 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).”⁹⁶ To qualify as fraud or misrepresentation, the misconduct must be intentional,⁹⁷ but reliance is not necessary.⁹⁸ No disciplinary report or SJC opinion

See supra note 66 and accompanying text. Neither of those authorities is undermined by the blanket prohibitions in Rule 8.4 against lawyer deception or dishonesty.

⁹⁴ MASS. R. PROF. C. 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 client representation. *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. 609 (2015) (personal child support matter); *Matter of 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.

⁹⁵ 453 Mass. 28, 25 Mass. Att’y Disc. R. (2009).

⁹⁶ 453 Mass. at 37–38.

⁹⁷ *See* MASS. R. PROF. C. 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 Rules 8.4 or 4.1; his intentional misrepresentations violated Rule 8.4(c).

⁹⁸ *See* *Matter of Hutton*, 31 Mass. Att’y Disc. R. 313 (2015) (“Our cases have not construed rule 8.4(c) to require a showing of detrimental reliance.”).

has used the term *dishonesty* as a direct basis for discipline,⁹⁹ but other jurisdictions have disciplined attorneys for dishonesty that did not amount to fraud, deceit, or misrepresentation.¹⁰⁰

B. Discipline for Violating Rule 8.4(c)

The Massachusetts disciplinary reports include more than five hundred disciplinary matters since 1999 where Rule 8.4(c) played a role in the disposition.

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.¹⁰¹ Also, cases involving intentional misuse of funds are often charged under both Rule 1.15 and Rule 8.4(c).¹⁰²

1. Disbarment

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 standard discipline for a felony conviction while in the course of practicing law is disbarment or, in some instances, indefinite

⁹⁹ 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. 511 (2015).

¹⁰⁰ 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, 1142–43 (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).

¹⁰¹ 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).

¹⁰² See, e.g., *Matter of Strauss*, 479 Mass. Att’y Disc. R. 294, 33 Mass. Att’y Disc. R. ___ (2018).

suspension.¹⁰³ For instance, in *Matter of Ciapciak*,¹⁰⁴ an attorney was disbarred after he pleaded guilty to several counts of mail fraud and filing false tax returns after defrauding his client, an insurance company, of substantial funds. In *Matter of Castelluccio*,¹⁰⁵ an attorney was disbarred for violating 8.4(c) when he misappropriated a law firm's funds for his personal use and intentionally concealed his misappropriation by falsifying office records. In *Matter of Ricci*,¹⁰⁶ 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*,¹⁰⁷ the single justice disbarred an attorney who had devised a "scheme to defraud insurers by submitting false, inflated, and backdated 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*,¹⁰⁸ discussed in Section III(A) as well as other chapters in this book,¹⁰⁹ 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), and in some cases received lengthy suspensions. For instance, in *Matter of Lupo*,¹¹⁰ 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, "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

¹⁰³ *Matter of Patch*, 466 Mass. 1016, 1018, 29 Mass. Att'y Disc. R. 522 (2013).

¹⁰⁴ 25 Mass. Att'y Disc. R. 116 (2009).

¹⁰⁵ 23 Mass. Att'y Disc. R. 62 (2007).

¹⁰⁶ 20 Mass. Att'y Disc. R. 460 (2004).

¹⁰⁷ 5 Mass. Att'y Disc. R. 75 (1988).

¹⁰⁸ 450 Mass. 533, 24 Mass. Att'y Disc. R. 122 (2008).

¹⁰⁹ 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).

¹¹⁰ 447 Mass. 345, 22 Mass. Att'y Disc. R. 513 (2006).

from his misdeeds at the expense of clients. We therefore conclude that an indefinite suspension is appropriate.”

In *Matter of Voros*,¹¹¹ the lawyer was suspended indefinitely after he fraudulently persuaded his client to enter into a joint venture concerning a real estate purchase. The attorney intentionally misrepresented to his client the joint venture’s future profitability 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*,¹¹² the respondent 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*,¹¹³ 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 convinced his secretary to notarize the false signature. The board compared this misconduct to *Matter of Jacobson*,¹¹⁴ 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*,¹¹⁵ an attorney was suspended for six months after he retyped the last page of a severance agreement with his employer, significantly altering the document, including a provision that paid him an \$850,000 bonus. 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*,¹¹⁶ an attorney was suspended for one year after he failed to disclose in his petition for admission to the Massachusetts bar prior charges for illegally possessing a Class D substance and for operating a vehicle with a suspended license. In *Matter of Soufflas*,¹¹⁷ an attorney was suspended for six months after he inflated his résumé and altered his law school transcript. In

¹¹¹ 11 Mass. Att’y Disc. R. 287 (1995).

¹¹² 20 Mass. Att’y Disc. R. 207 (2004).

¹¹³ 10 Mass. Att’y Disc. R. 141 (1994).

¹¹⁴ 7 Mass. Att’y Disc. R. 123 (1991).

¹¹⁵ 25 Mass. Att’y Disc. R. 121 (2009).

¹¹⁶ 26 Mass. Att’y Disc. R. 44 (2010).

¹¹⁷ 22 Mass. Att’y Disc. R. 739 (2006).

Matter of Days,¹¹⁸ an attorney was suspended for two months for failing to notify the board that her professional liability insurance had lapsed and for continuing to represent indigent criminal defendants in violation of her agreement with the Committee for Public Counsel Services (CPCS) to maintain insurance. During the period she was uninsured, the attorney falsely certified in her Attorney Annual Registration Statement that she had insurance. In *Matter of Walckner*,¹¹⁹ a lawyer who was a former police officer was suspended for five months because he intentionally omitted from his bar application the fact that he had been twice disciplined as a police officer. The single justice rejected the respondent's claim that he misunderstood the application question and also rejected the assertion that the lawyer's prior reporting of misconduct by a former superior police officer was mitigating.

3. Public Reprimand

Usually, misconduct "involving dishonesty, fraud, deceit or misrepresentation" in violation of Rule 8.4(c) leads to serious discipline for the lawyer, most likely a suspension. But some instances of dishonesty or deceit have resulted in a public reprimand, where the misrepresentation or deception involved less serious matters. For example, in *Matter of Cross*,¹²⁰ the lawyer received a public reprimand by stipulation for making intentional, but nonmaterial, misrepresentations in a return of service; she admitted her misconduct and later did not seek to rely upon the document, thus further mitigating its effect. In *Matter of Weitz*,¹²¹ the lawyer received a public reprimand for notarizing signatures he had not witnessed, relying instead on the client's representations that they were authentic (when they were not). And in *Matter of Cowin*,¹²² 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*,¹²³ an attorney received a public reprimand, by stipulation, for failing to affirmatively disclose to a participant in a real estate closing that

¹¹⁸ 30 Mass. Att'y Disc. R. 89 (2012); *see also* *Matter of Powers*, 26 Mass. Att'y Disc. R. 518 (2010) (attorney's violation of Rule 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).

¹¹⁹ 34 Mass. Att'y Disc. R. ___, SJC No. BD-2017-081 (2018) (March 27, 2018) (collecting cases).

¹²⁰ 15 Mass. Att'y Disc. R. 157 (1999). *Cross* was mentioned in the discussion of Rule 3.3 in Section II(B)(3).

¹²¹ 10 Mass. Att'y Disc. R. 286 (1994).

¹²² 2 Mass. Att'y Disc. R. 48 (1981), is discussed *supra* at note 59 and the related text. It is probably no longer good law.

¹²³ 23 Mass. Att'y Disc. R. 25 (2007).

the HUD-1 statement his client signed was inaccurate and misrepresented the facts. In *Matter of Lederman*,¹²⁴ 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 requested information from the wife's former mortgage company, knowing that the company would infer that the attorney was representing the wife in an estate-planning matter. The attorney neither had the wife's permission to send the letter to the mortgage company, nor did the attorney send the wife a copy of 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*,¹²⁵ a lawyer, acting as a real estate broker, received a public reprimand for misrepresentations made while negotiating a sale of a home, violating Rule 8.4(c).

4. Admonition

Similar to the treatment of Rule 4.1(a) violations, a lawyer who misrepresents 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. No. 12-08,¹²⁶ 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. No. 07-27,¹²⁷ 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. No. 08-12,¹²⁸ an attorney submitted documents to the Internal Revenue Service and the Department of Revenue 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. A hearing committee recommended a public reprimand, but the board reduced it to an admonition, based on the lack of harm and the fact that the deception occurred outside of the practice of law.

¹²⁴ 22 Mass. Att'y Disc. R. 462 (2006).

¹²⁵ 27 Mass. Att'y Disc. R. 249 (2011).

¹²⁶ 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 notarizing 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).

¹²⁷ 23 Mass. Att'y Disc. R. 987 (2007).

¹²⁸ 24 Mass. Att'y Disc. R. 876 (2008).

Practice Tip

Busy lawyers, or lawyers with busy clients, are sometimes 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 discipline.

C. Some Special Considerations Involving Rule 8.4(c)

While both Rule 3.3 and Rule 4.1 refer to a lawyer's professional activities, the requirements of Rule 8.4 apply also to conduct outside of the attorney's professional employment.¹²⁹ A lawyer may be disciplined 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 *Matter of Lee*,¹³⁰ 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*,¹³¹ the lawyer was suspended for two years for multiple instances of misconduct while acting as a corporate officer.

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 scope of those rules. Under Rule 3.3(e)(2), a criminal defense lawyer, in some limited circumstances, may not prevent the introduction of limited false evidence at trial. Rule 4.1(a) permits some limited deception of others as to nonmaterial representations. 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.

¹²⁹ See MASS. R. PROF. C. 8.4 comment [1] (2015); AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (7th ed. 2011) [hereinafter ANNOTATED MODEL RULES] (“like the other provisions of Rule 8.4, encompasses conduct outside the realm of the practice of law”).

¹³⁰ 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.

¹³¹ 447 Mass. 453, 22 Mass. Att’y Disc. R. 58 (2006).

Some well-intended, but deceptive, activities lawyers engage in raise perplexing questions about the meaning of Rule 8.4(c) for Massachusetts law practice. One concerns the use of undercover agents, or testers, to ferret out wrongdoing. Another is ghostwriting pleadings for pro se litigants to assist them without assuming a more formal representation capacity.

Testing and undercover ruses: Clients may ask lawyers to assist in investigating 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,¹³² but a federal district court judge, in *Leysock v. Forest Laboratories, Inc.*,¹³³ the district court dismissed a complaint as a sanction for violating Rules 4.1(a) and 8.4(c) 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 cases outside of Massachusetts permitted proper investigative testing,¹³⁴ but the action here far exceeded any such allowable, limited deception.¹³⁵

¹³² Two prominent SJC 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 is not favorable toward private ruses outside of the law-enforcement context, see 450 Mass. at 566, language from its companion case *Curry* is more ambiguous. See note 137, *infra*.

¹³³ 2017 WL 1591833 at *1 (D. Mass., May 25, 2017) (Saylor, J.).

¹³⁴ Citing cases from outside of Massachusetts, 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. . . . [an] exception 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.

¹³⁵ *Id.*, slip op. at 15–23.

While some courts or commentators outside of the Commonwealth have concluded that such activity violates Rule 8.4(c),¹³⁶ some states that have addressed the question have condoned private testers.¹³⁷ *Leysock* assumed that the SJC might accept the use of testers to uncover housing discrimination or trademark infringement as well as within the law-enforcement context so long as appropriate safeguards are in place.¹³⁸

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).¹³⁹ 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 Association (ABA) has reversed its position on the issue. After concluding in an informal

¹³⁶ 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.

¹³⁷ *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 129, at Rule 8.4(c).

¹³⁸ 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 citing a case outside of Massachusetts that held that the use of investigators posing as customers violates no ethical rules when seeking to “ferret out discrimination in housing” or “uncover . . . trademark infringement,” 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.”).

¹³⁹ See, e.g., *Duran v. Carris*, 238 F.3d 1268, 1272–73 (10th Cir. 2001); *Laremont-Lopez v. Southeastern 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); Massachusetts Bar Association Ethics Op. 98-1 (1998).

1978 ethics opinion that the practice was deceptive and troublesome,¹⁴⁰ the ABA issued a formal opinion in 2007 concluding that the practice of ghostwriting generally presents no ethical problems at all.¹⁴¹

The SJC now permits limited assistance representation (LAR), 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.¹⁴² 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.¹⁴³

All of the Massachusetts trial courts implemented some form of LAR in their courts.¹⁴⁴

¹⁴⁰ ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1414 (1978).

¹⁴¹ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007).

¹⁴² See *Supreme Judicial Court Order Regarding Limited Assistance Representation*, <https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-order-regarding-limited-assistance> (last visited Feb. 26, 2018).

¹⁴³ *Id.* The standing order is clear that a lawyer may not make a limited appearance in court without completing a training session. The order is not clear that a lawyer must have completed that training session in order to ghostwrite pleadings.

¹⁴⁴ See *Limited Assistance Representation*, <https://www.mass.gov/service-details/limited-assistance-representation> (last visited April 3, 2018).

CHAPTER THIRTEEN

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.¹ In both litigation and transactional matters, a lawyer's duty is to advance the client's interests as best as possible, limited only by the bounds of the law, ethics, and the client's instructions. While lawyers occasionally fail to act zealously or with adequate diligence, such as when overwhelmed or experiencing a conflict of interest,² 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 a goal. This chapter discusses the guidance in the *Massachusetts Rules of Professional Conduct* that address a lawyer's zealous advocacy.

This chapter does not address misrepresentation to and fraud on a tribunal, actions that often arise from a lawyer's overzealousness. It covers rules that prohibit a lawyer from proceeding in ways that, while perhaps beneficial to a client, are unfair to another person, party, or lawful process. The rules discussed here establish boundaries for the lawyer's zeal. At times, lawyers exceed those boundaries, leading to discipline. 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 of representing a client. For each topic, different rules apply and different sanctions are imposed.

¹ Massachusetts is one of the few states that retained the sentence in Rule 1.3 stressing the duty of zeal after the American Bar Association (ABA) eliminated it in its *Model Rule* version. *Compare* MASS. R. PROF. C. 1.3 ("The lawyer should represent a client zealously within the bounds of the law.") *with* ABA MODEL RULES OF PROF'L CONDUCT r. 1.3 (omitting that sentence).

² See discussion of "The Nature of the Lawyer's Responsibilities Regarding Diligence," in Chapter 7, Section III, and "Problems of Conflicts of Interest," in Chapter 10.

II. RULES GOVERNING THE SCOPE OF REPRESENTATION AND PERMISSIBLE CLAIMS

Rules 1.2(d) and 3.1 address the limits and restrictions of legal conduct in representing clients.

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 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. The Scope of Rules 1.2(d) and 3.1

There are some ways in which a lawyer simply may not help a client, no matter how insistent the client is. Two separate rules establish some outer boundaries—although hardly crystal-clear limits—on the services a lawyer may provide to a client. The first is Rule 1.2(d), which says:

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 the client in a proceeding if there is no good-faith basis, in law or in fact, for the assertions the lawyer would make. Lawyers may not pursue frivolous claims for a client, 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 Violating Rules 1.2(d) and 3.1

1. Disbarment

Massachusetts lawyers typically are not disbarred for pursuing frivolous claims or for assisting with client fraud, unless the lawyer's actions lead to a felony conviction, for which the standard sanction is disbarment.³ For instance, in *Matter of Kelly*,⁴ the respondent was convicted of twenty felony counts, including forging documents, intimidating witnesses, larceny over \$250, and disrupting court proceedings. His conduct involved interfering 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

³ *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.

⁴ 26 Mass. Att'y Disc. R. 282 (2010).

of disbarment.⁵ Similarly, in *Matter of Lonardo*,⁶ the respondent agreed to disbarment after he was convicted of conspiracy to commit automobile insurance fraud.

You Should Know

Generally, a Rule 1.2(d) violation, where the lawyer assists a client with a criminal or fraudulent claim, results 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.

In *Matter of Cobb*,⁷ 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 8.2.⁸ The Supreme Judicial Court (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 his clients, that he is utterly unfit to practice law. The only appropriate sanction is disbarment.”⁹

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*,¹⁰ along with its companion case, *Matter of Curry*.¹¹ In *Crossen*, the client believed that unjust and unwarranted decisions were 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 a secret recording of conversations with the clerk. The lawyer used the recordings to threaten the former clerk with bar discipline proceedings. The SJC,

⁵ 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 was disbarred only after he failed to honor his suspension. *See id.*

⁶ 25 Mass. Att’y Disc. R. 360 (2009).

⁷ 445 Mass. 452, 21 Mass. Att’y Disc. R. 93 (2005).

⁸ MASS. R. PROF. C. 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”

⁹ 445 Mass. at 480.

¹⁰ 450 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*.

¹¹ 450 Mass. 503 (2008).

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,’”¹² 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 sanction.¹³

Practice Tip

The respondents in both *Crossen* and *Curry* were disbarred for their overzealous tactics. The third active participant and respondent in the consolidated petition was suspended for three years, with four of the eleven Board of Bar Overseers (BBO) members voting for a substantially shorter suspension.¹⁴ That respondent persuaded the board that “he participated only in the planning, and not the execution, of the [intolerable] venture.”¹⁵

2. Suspension

Lawyers who represent their clients’ interests by engaging in fraud are often suspended. Several of these suspensions involved active fraud by the lawyer on a tribunal (including assisting in perjury), which is discussed in Chapter 12.¹⁶ But other lawyers have been suspended for violations that primarily involved a breach of the duties Rule 1.2(d) imposes. For instance, the lawyer in *Matter of Buck*¹⁷ assisted his client in selling stolen videotapes, including creating a Delaware corporation to use in the scheme. The single justice ordered an indefinite

¹² *Crossen*, 450 Mass. at 563 (quoting *United States v. Cooper*, 872 F.2d 1, 3 (1st Cir. 1989)).

¹³ *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.

¹⁴ *Matter of Donahue*, 22 Mass. Att’y Disc. R. 193 (2006).

¹⁵ 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.

¹⁶ *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).

¹⁷ 27 Mass. Att’y Disc. R. 92 (2011).

suspension. The lawyer also made false statements to the Office of the Bar Counsel, which contributed to his severe sanction. By comparison, in *Matter of Phillips*,¹⁸ 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 returned all legal fees; the resulting lack of financial harm to the parties affected the suspension length.

Several reported suspensions involved lawyers participating in real estate transactions where they presented documents at the closings that were not entirely accurate, typically to mislead the lenders.¹⁹ The suspension term in these matters generally corresponded to the experience and responsibility of the lawyer involved and whether the lawyer was convicted of a crime. In *Matter of Alberino*,²⁰ an experienced practitioner was suspended for eighteen months for participating 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*,²¹ 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*,²² 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, twenty-four 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*,²³ 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* is likely due to

¹⁸ 24 Mass. Att'y Disc. R. 547 (2008).

¹⁹ These cases seem to have emerged from the lawyers' participation in what was, before the housing crash of 2008–2009, 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).

²⁰ 27 Mass. Att'y Disc. R. 1 (2011).

²¹ 26 Mass. Att'y Disc. R. 229 (2010).

²² 24 Mass. Att'y Disc. R. 605 (2008) (stipulation to nine-month suspension).

²³ 25 Mass. Att'y Disc. R. 486 (2009).

the latter's playing a less leading role in the schemes than the former, although both cases arose from stipulations.²⁴

Lawyers have been suspended for pursuing claims without sufficient justification with aggravating circumstances. In *Matter of Cohen*,²⁵ 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 applying issue preclusion based on several contempt judgments the various courts issued.

Several lawyers have been suspended for making baseless and vindictive accusations against judges, misconduct that also violated Rule 8.2. In *Matter of Kurker*,²⁶ the respondent was suspended for a year and a day after he made repeated, baseless allegations that various state judges and opposing counsel were conspiring against him. The attorney filed two civil actions in United States District Court against judges and lawyers. He did not contact any potential witnesses or investigate the basis for his allegations, and he had no evidence or personal knowledge of a reasonable basis for making any of the allegations against the judges or attorneys.²⁷ In *Matter of Harrington*,²⁸ 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*,²⁹ the single justice suspended a respondent whom the Court had sanctioned under the *General Laws of Massachusetts*

²⁴ 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, nonequity partner); *Matter of Concemi*, 422 Mass. 326 (1996) (disbarment of solo practitioner in same types of transactions as *Nickerson, id.*); *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 336-37.

²⁵ 435 Mass. 7, 17 Mass. Att'y Disc. R. 129 (2001).

²⁶ 18 Mass. Att'y Disc. R. 353 (2002).

²⁷ *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).

²⁸ 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."

²⁹ 25 Mass. Att'y Disc. R. 461 (2009).

(Mass. Gen. Laws ch. 231, § 6F), which authorizes awarding 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 violated Rule 3.1. The single justice noted that, while most sanctions for violating Rule 3.1 are public reprimands, the suspension in this case was warranted because of the respondent’s inability to accept the judgment that his lawsuit was frivolous, lack of insight about the nature of his misconduct, and failure to appreciate the abusive (and ultimately self-defeating) nature of his behavior in this matter.

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,”³⁰ many court-ordered sanctions under Mass. Gen. Laws ch. 231, § 6F 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 in Chapter 12.³¹ By contrast, a public reprimand is a common sanction for filing groundless pleadings or pursuing frivolous claims that violate Rule 3.1. The single justice in *O’Leary*, discussed in the previous paragraph, noted that, as of 2009, many Rule 3.1 violations had resulted in a public reprimand (formerly called a “public censure”), citing *Matter of Landers*,³² *Matter of Weissman*,³³ and *Matter of*

³⁰ *Id.*

³¹ See Chapter 12. In *Matter of Baghdady*, 25 Mass. Att’y Disc. R. 26 (2009), the respondent received a public reprimand for violating Rule 1.2(d), but the fraud the lawyer participated in involved court pleadings and a deposition, and so more aptly qualifies as a Rule 3.3 violation.

³² 24 Mass. Att’y Disc. R. 416 (2008) (among a number of other disciplinary violations, attorney made frivolous allegations in a pleading).

³³ 22 Mass. Att’y Disc. R. 790 (2006) (attorney sought execution and filing for lien against client in amount over what was due to her, without checking what was due).

Dittami.³⁴ The justice also noted that other such violations had resulted in admonitions, discussed in the following subsection.

4. Admonition

No lawyer has received an admonition for violating Rule 1.2(d) by assisting a client in a crime or fraud.³⁵ Some lawyers have received admonitions for violating Rule 3.1. One such instructive admonition is Ad. 00-53,³⁶ in which a husband in an unfriendly divorce matter asked the respondent to file a motion for relief from judgment. The respondent warned his client that he had scant legitimate basis to do so and that the court might order the husband to pay his wife's counsel fees. On the husband's insistence, 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 related matters Ad. 02-09³⁷ and Ad. 02-11,³⁸ 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 GOVERNING LIMITS ON LITIGATION TACTICS

Rules 3.2, 3.4, 3.5, and 4.4 discuss various aspects of litigation tactics, including expediting litigation (and not using delaying tactics for a strategic advantage), and not obstructing the opposing party's access to witnesses or to potential evidence, including documents or other materials. Also included in this discussion is the prohibition against ex parte contacts with judges and jurors, not seeking to influence them, and not engaging in disruptive behavior, whether inside the courtroom or outside.

³⁴ 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 Mass. Gen. Laws ch. 231, § 6F). *See also* Matter of Dillon, 28 Mass. Atty Disc. R. 212 (2012) (attorney received a public reprimand after filing, with no support, a 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).

³⁵ *See* Matter of Connell, 31 Mass. Atty Disc. R. 84 (2015) (noting this fact).

³⁶ 16 Mass. Atty Disc. R. 530 (2000).

³⁷ 18 Mass. Atty Disc. R. 619 (2002).

³⁸ 18 Mass. Atty Disc. R. 629 (2002).

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 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**

RULE 3.4 (cont'd.)

(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;
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
 - (4) the communication is initiated by the lawyer 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.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS (*cont'd.*)

(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

The *Rules of Professional Conduct* and Massachusetts common and statutory law impose other limitations on a lawyer's efforts to obtain what a client wants 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 subsection addresses the limits on certain litigation tactics. The following subsection discusses limits on contact with others and Rule 3.4 subsections (g) and (f).

Lawyers, and especially litigators, act strategically to accomplish their goals. Sometimes those strategies call for tactics that the other parties would find unfair and that may be 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 in a client's interest to delay matters, and this rule, despite the ending clause, prohibits a lawyer's bad-faith strategy to delay purely for the sake of delay. As comment [1] to the rule explains:

Although there will be occasions 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* (emphasis added).³⁹

³⁹ MASS. R. PROF. C. 3.1 comment [1].

Rule 3.4 lists several other ways in which a lawyer may not seek to gain an advantage for a client. Lawyers may not “unlawfully” obstruct another party’s access to evidence, alter, destroy, or falsify evidence, disobey the orders of a tribunal, or make frivolous arguments or offers of evidence.⁴⁰ Rule 3.4 prohibits some lawyer contact with, or payments to, witnesses, and those restrictions are addressed in Section IV. Finally, Rule 3.4 includes two provisions that are not self-evident and that 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.”⁴¹ 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.*” 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 exists . . . (emphasis added).⁴²

Second, Rule 3.4(i) articulates one further constraint on a lawyer’s advocacy efforts, even if the tactic would benefit 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.”⁴³ Lawyers may engage in “legitimate advocacy” when the factors just

⁴⁰ MASS. R. PROF. C. 3.4(a)–(e).

⁴¹ 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.

⁴² Massachusetts Bar Association Ethics Op. 83-2 (1983) (interpreting DR 7-105(A)).

⁴³ The ABA amended its Rule 8.4 in 2016 to include a similar prohibition. MODEL RULES OF PROF’L CONDUCT r. 8.4(g). The Massachusetts rule confines this to prohibiting expressing or manifesting bias to lawyers appearing before a tribunal, whereas the Model Rule includes lawyers in all representative capacities.

listed are in issue in the proceeding.⁴⁴ The BBO and the SJC have never disciplined a lawyer for violating 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), which covers contact with jurors, and expanded counsel's contact rights after a trial has ended. That amendment created ambiguities in light of the Court's long-standing, common law principles established in *Commonwealth v. Fidler*.⁴⁵ In *Commonwealth v. Moore*,⁴⁶ the Court sought to resolve any conflicts and adopted another revision to Rule 3.5(c), which went into effect in 2017.⁴⁷

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 to use methods of obtaining evidence that violate the legal rights of such a person."⁴⁸ 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.⁴⁹ For example, in *Matter of Ebitz*,⁵⁰ 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 the lawyer read them? Should the lawyer tell the other lawyer about the mistake? That call is much more difficult, and Rule 4.4(b) addresses that question in a limited way. The rule requires the recipient of inadvertently sent material to "promptly notify the sender."⁵¹ The rule says nothing more about the lawyer's duties. In Massachusetts, an inadvertent disclosure does not automatically waive the attorney-client privilege; the privilege may or may

⁴⁴ MASS. R. PROF. C. 3.4(i).

⁴⁵ 377 Mass. 192 (1979).

⁴⁶ 474 Mass. 541 (2016).

⁴⁷ The nuances of the *Fidler* and *Moore* issues are beyond the scope of this book. In brief, *Moore* concluded that the 2015 amendment to Rule 3.5(c) overruled *Fidler* in requiring 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 after July 1, 2015, the amendment's effective date. *Moore*, 474 Mass. at 553–54.

⁴⁸ MASS. R. PROF. C. 4.4(a).

⁴⁹ See *Matter of Barnes*, 25 Mass. Att'y Disc. R. 52 (2009).

⁵⁰ 8 Mass. Att'y Disc. R. 77 (1992).

⁵¹ MASS. R. PROF. C. 4.4(b).

not be waived, depending on the level of care the party or the lawyer takes,⁵² and a lawyer must proceed with caution when receiving an otherwise privileged document apparently sent in error.⁵³

B. Discipline for Violating Rules 3.2, 3.4, 3.5, and 4.4

By themselves, violations of any of these rules have not resulted in severe discipline in Massachusetts. This is not necessarily true, however, when a lawyer violates multiple rules.

1. Disbarment

No lawyer has been disbarred solely for violating Rule 3.2 or 3.5, although occasionally those rules appear within a long list of rules a lawyer who has been disbarred has violated.⁵⁴ Some lawyers have been disbarred for engaging in misconduct in violation of Rule 3.4, and 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 bar counsel during its investigation, each of which reflects disobedience of “an obligation under the rules of a tribunal.”⁵⁵

Many lawyers have been disbarred for perpetrating a fraud on the court, violating several rules, including Rule 3.4. For example, in *Matter of Finnerty*,⁵⁶ an attorney represented a witness called to appear before a federal grand jury that was hearing claims involving James “Whitey” Bulger. On the attorney’s advice,

⁵² See *Matter of the Reorganization of Electric Mutual Liability Ins. Co. Ltd. (Bermuda)*, 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”). Cf. *Hoy v. Morris*, 79 Mass. (13 Gray) 519 (1859) (privilege waived as reasonable steps not taken to prevent attorney-client conversation from being overheard).

⁵³ Lawyers who wish to use the inadvertently disclosed document find support from the Massachusetts Bar Association Committee on Professional Ethics. See MBA Ethics 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*. The value of this opinion, rendered before Massachusetts adopted MASS. R. PROF. C. 4.4(b) in 2015, is questionable but untested.

⁵⁴ See, e.g., *Matter of Friedman*, 22 Mass. Att’y Disc. R. 326 (2006).

⁵⁵ MASS. R. PROF. C. 3.4(c). For examples of that misconduct, see, e.g., *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).

⁵⁶ 24 Mass. Att’y Disc. R. 278 (2008).

You Should Know

According to the SJC, the “standard” sanction for repeatedly violating court orders is “at least a suspension.”⁵⁷ 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 client representation.

a witness lied to the grand jury, and the attorney was disbarred for that misconduct. In *Matter of Terzian*,⁵⁸ an attorney was disbarred after he was convicted on one count of attempting to procure perjury and on another count of intimidating a witness in a court proceeding. (The presumptive sanction for a felony conviction is disbarment, as noted in Chapter 12.⁵⁹) Similarly, in *Matter of Jones*,⁶⁰ an attorney used false evidence in court. An attorney, representing a client in bankruptcy court, failed to present his client’s claim within the permissible time. The attorney supported his motion for an extension with a forged affidavit from his client, not knowing 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.

A lawyer has been disbarred for, among other misconduct, engaging in fraud within BBO proceedings. In *Matter of Geller*,⁶¹ an attorney falsely denied to the bar counsel that he had represented a certain client. The attorney also provided fabricated letters to the bar counsel that incorrectly documented a refund to the client on an earlier date, in addition to providing other fabricated documents. He was disbarred for this and other misconduct, including converting 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

⁵⁷ *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).

⁵⁸ 21 Mass. Att’y Disc. R. 647 (2005); see also *Commonwealth v. Terzian*, 61 Mass. App. Ct. 739 (2004) (the underlying criminal matter).

⁵⁹ See *supra* Chapter 12, Section(II)(B)(1), note 23 and *supra* note 4.

⁶⁰ 16 Mass. Att’y Disc. R. 282 (2000).

⁶¹ 23 Mass. Att’y Disc. R. 182 (2007).

successful, 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 client representation.

Reports involving Rule 3.2 as the primary misconduct are rare. One lawyer was suspended for violating Rule 3.2 by not diligently pursuing his client's cases. In *Matter of Brooks*,⁶² 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 the bar counsel, led to his suspension for a year and a day. No other reported Massachusetts disciplinary decision involves primarily violating Rule 3.2.⁶³

A single justice has written that "for [violation of court orders,] the standard sanction is at least a suspension."⁶⁴ The reports do not disagree with that description, but examples are not plentiful. Aside from instances of falsified evidence—misbehavior that violates Rules 3.4(c) and 3.3 and is covered elsewhere in this book—only a handful of the Rule 3.4 violations for wrongdoing in court, including violating court orders, have led to suspensions. Two reports are illustrative.

In *Matter of Alexander*,⁶⁵ 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 a document from the court and the plaintiff that supported the plaintiff's reinstatement claim and also filed a misleading affidavit implying facts that were untrue. The respondent's actions were intended to retaliate against the employee for filing the discrimination claim. After federal court proceedings established those facts, along with a punitive damage award against the respondent, the BBO recommended, and a single justice imposed, the suspension.

In *Matter of Goodman*,⁶⁶ 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

⁶² 26 Mass. Att'y Disc. R. 61 (2010).

⁶³ 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.

⁶⁴ *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).

⁶⁵ 23 Mass. Att'y Disc. R. 9 (2007).

⁶⁶ 22 Mass. Att'y Disc. R. 352 (2006).

alter a medical report to omit reference to the client's death. The staff refused to comply, 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 excessive dishonesty in representing clients led to term suspensions include *Matter of Gross*,⁶⁷ *Matter of Foley*,⁶⁸ and *Matter of Griffith*.⁶⁹ In *Gross*, the respondent pursued a defense of alibi and mistaken identification in a criminal case by having someone impersonate the defendant at counsel table, hoping the victim would misidentify him. The scheme unraveled after a continuance was granted, and 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 illegally possessing a handgun. Before the defense could be employed, the putative defendant-client 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."⁷⁰

In *Griffith*, the respondent represented the estate of a man in a lawsuit alleging misconduct by city police. 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 referred 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

⁶⁷ 435 Mass. 455, 16 Mass. Att'y Disc. R. 214 (2001).

⁶⁸ 439 Mass. 324, 19 Mass. Att'y Disc. R. 141 (2003).

⁶⁹ 440 Mass. 500, 20 Mass. Att'y Disc. R. 174 (2003).

⁷⁰ 439 Mass. at 336. *Foley* served as an example of violating the rules against presenting false testimony, *see supra* notes 3 and 16.

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.⁷¹

Compare those reports to *Matter of Diamond*,⁷² where an attorney was suspended for three months for using inappropriate and offensive language in open court⁷³ and for using in court a confidential Criminal Offender Record Information report it appears the lawyer was not entitled to.

While many lawyers have been suspended for misconduct that included violating Rule 3.4(c), which covers disobeying an obligation under the rules of a tribunal, many 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.⁷⁴ 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 mishandling the underlying client work. For instance, in *Matter of Munroe*,⁷⁵ an attorney was suspended for two and a 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 Rule 3.4(c). The attorney also obstructed the estate's court-appointed special administrator 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 the bar counsel. In *Matter of McGuirk*,⁷⁶ the attorney was suspended for a year and a day after failing to make court-ordered accountings on matters for which the lawyer served as a fiduciary. In *Matter of Quinn*,⁷⁷ the lawyer was suspended

⁷¹ *Griffith* served as an example of violating the rules against presenting false testimony. See *Griffith*, 440 Mass. 500.

⁷² 16 Mass. Att'y Disc. R. 100 (2000).

⁷³ The lawyer said to the lawyer representing the other party, "If you want discovery, you're going to get discovery up the ass." *Id.*

⁷⁴ 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.

⁷⁵ 26 Mass. Att'y Disc. R. 385 (2010).

⁷⁶ 29 Mass. Att'y Disc. R. 449 (2013).

⁷⁷ 12 Mass. Att'y Disc. R. 463 (1996).

for three months for failing to comply with orders of the Probate and Family Court to file an inventory and account, resulting in a contempt judgment and two arrests on *capias* warrants.

On occasion, lawyers violate Rule 3.4(c) in the context of personal litigation (often in their own divorce proceedings), not while representing a client. While those lawyers are, as one justice wrote, “not entitled to a free pass” because of the personal or private nature of the dispute,⁷⁸ the sanction for personal misconduct tends to be less severe than misconduct in client representation. In *Matter of Cullen*,⁷⁹ for instance, a lawyer failed to comply with a probation order after being found guilty of assault and battery. That failure constituted a violation of Rule 3.4(c) and led to a six-month suspension (with four of the six months stayed). In *Matter of Vinci*,⁸⁰ an attorney was suspended for nine months after filing inaccurate financial statements with the Probate and Family Court in his own divorce proceeding. Similarly, in *Matter of Leahy*,⁸¹ a lawyer was suspended for two months for failing 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.⁸² A review of the disciplinary reports shows several other examples of lawyers receiving short suspensions after failing to comply with orders related to their own personal criminal conduct or domestic relations dispute,⁸³ while others have received public reprimands, as described in Section III(B)(3).⁸⁴

Occasionally, lawyers have been suspended 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*,⁸⁵ the respondent was suspended for two years for improper ex parte contact with a judge on a pending matter,

⁷⁸ *Matter of Leahy*, 28 Mass. Att’y Disc. R. 529 (2012).

⁷⁹ 28 Mass. Att’y Disc. R. 165 (2012).

⁸⁰ 23 Mass. Att’y Disc. R. 742 (2009).

⁸¹ 28 Mass. Att’y Disc. R. 529 (2012).

⁸² The single justice compared this respondent’s actions to the following examples: *Matter of Kilkenny*, 26 Mass. Att’y Disc. R. 288, 290 (2010) (five-month suspension); *Matter of Angwafo*, 453 Mass. 28, 37, 39 (2009) (one-month suspension); *Matter of Kersey*, 432 Mass. 1020 (2000) (three-month suspension); *Matter of Ring*, 427 Mass. 186, 186 (1998) (three-month suspension); *Matter of Finnerty*, 418 Mass. 821, 830 (1994) (six-month suspension).

⁸³ See sources cited *supra* notes 79–82.

⁸⁴ See *infra* notes 99–100.

⁸⁵ 24 Mass. Att’y Disc. R. 431 (2008).

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 received a public reprimand a few years earlier for a different violation of Rule 3.5.⁸⁶ Another instance of improper ex parte contact with a judge led to a three-month suspension, with one justice dissenting. In *Matter of Orfanello*,⁸⁷ 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 lunch meeting's true purpose, but the SJC disagreed. Justice Nolan dissented on the sanction to apply, 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 the bar counsel and the respondent.⁸⁸

A third case involves a lawyer's disruptive tactics and disrespectful behavior in the courtroom in violation of Rule 3.5(c). In *Matter of Wilson*,⁸⁹ the lawyer was suspended for a year and a day after multiple instances of misconduct, one of which netted him a ninety-day sentence for criminal contempt. As noted in the next subsection, he was previously reprimanded (but not suspended) for an ex parte communication with a judge.

3. Public Reprimand

Public reprimands are less common than suspensions for misconduct that affects the fairness of judicial or administrative proceedings. However, some lawyers have received public reprimands, presumably because their conduct was less egregious than the examples previously discussed. Two instances involved inappropriate contact with a judge or hearing officer. In *Matter of Sydney*,⁹⁰ an attorney served as a state representative for a town that had a matter pending before a state agency. In violation of Rules 3.5(a) and (b), the attorney wrote a letter, encouraging a particular outcome, to the administrative law judge who was to rule on

⁸⁶ *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").

⁸⁷ 411 Mass. 551, 7 Mass. Att'y Disc. R. 220 (1992).

⁸⁸ 411 Mass. at 558. The respondent at the time served as the executive secretary to the administrative justice of the superior court.

⁸⁹ 32 Mass. Att'y Disc. R. ____, 2016 WL 6696062 (2016).

⁹⁰ 17 Mass. Att'y Disc. R. 556 (2001).

a pending motion to dismiss. (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*,⁹¹ an attorney received a public censure for violating DR 7-110(B) after sending a letter to a judge, without copying counsel for the other party, complaining about an opposing party and commenting 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.”⁹² The single justice ordered a public censure.

Similarly, in *Matter of Ryan*,⁹³ a district attorney was publicly censured for violating DR 7-110(B) after speaking with a judge before whom a defendant (not prosecuted by the respondent’s office) was scheduled for sentencing on a gambling conviction. A congressman had asked the attorney to talk to the judge about showing the client some leniency.

Some lawyers have received a public reprimand for misconduct in court other than misrepresentation. In *Matter of Reisman*,⁹⁴ a lawyer advised his client that it was acceptable for the client to “scrub” a computer hard drive, notwithstanding a discovery order that required preserving the computer’s electronic files. The lawyer’s advice was more inept than malicious, but his conduct warranted the reprimand. In *Matter of Nelson*,⁹⁵ 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 codefendants. The attorney asserted his personal knowledge of the facts in issue and vouched for the credibility of witnesses. And, as noted in Section III(B)(2), in *Matter of Lipis*⁹⁶ a lawyer received a public reprimand for his obscenity-laden tirade in court.

In *Matter of Campbell*,⁹⁷ 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 Probate and Family Court. The lawyer’s mental health issues were a mitigating factor, and that mitigation led to a lesser sanction.⁹⁸

⁹¹ 17 Mass. Att’y Disc. R. 608 (2001).

⁹² 17 Mass. Att’y Disc. R. at 619.

⁹³ 6 Mass. Att’y Disc. R. 275 (1990).

⁹⁴ 29 Mass. Att’y Disc. R. 556 (2013).

⁹⁵ 25 Mass. Att’y Disc. R. 413 (2009).

⁹⁶ 18 Mass. Att’y Disc. R. 369 (2002) (discussed *supra* note 86).

⁹⁷ 24 Mass. Att’y Disc. R. 86 (2008).

⁹⁸ *Cf.* *Matter of Quinn*, 12 Mass. Att’y Disc. R. 463 (1996) (three-month suspension for similar misconduct, discussed *supra* note 77).

Other public reprimands resulting from violating Rule 3.4 occurred in the lawyers' personal matters. In both *Matter of Sanchez*⁹⁹ and *Matter of Silva*,¹⁰⁰ a Probate and Family Court judge held each lawyer in contempt 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 violating Rule 4.4(a). For example, in *Matter of Melican*,¹⁰¹ the respondent tried to exploit salacious materials he had learned about an opposing party, 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*,¹⁰² the respondent received a public reprimand for violating Rule 4.4 after obtaining information from a witness that impaired her rights against self-incrimination.

4. Admonition

In at least one instance, PR 87-23,¹⁰³ a lawyer received private discipline for failing to expedite his client's case. In representing a client 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 admonitions, but none in the mid-2010s. In Ad. 00-60,¹⁰⁴ 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).¹⁰⁵ In Ad. 06-16,¹⁰⁶ the prosecutor in a criminal jury trial had 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 vouching for the credibility of the prosecution's evidence, characterizing himself as the "thirteenth juror" (referring to his past experience as an altar boy), and asking the defendant to comment on another witness's credibility.

⁹⁹ 24 Mass. Att'y Disc. R. 86 (2008).

¹⁰⁰ 22 Mass. Att'y Disc. R. 710 (2006).

¹⁰¹ 26 Mass. Att'y Disc. R. 364 (2006).

¹⁰² 25 Mass. Att'y Disc. R. 52 (2006).

¹⁰³ 5 Mass. Att'y Disc. R. 515 (1987).

¹⁰⁴ Ad. No. 00-60, 16 Mass. Att'y Disc. R. 540 (2000).

¹⁰⁵ 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).

¹⁰⁶ 22 Mass. Att'y Disc. R. 884 (2006).

In Ad. 97-106,¹⁰⁷ an attorney sent a letter to a client’s business competitor stating, “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. 01-02,¹⁰⁸ 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. 14-14,¹⁰⁹ the respondent instructed her client, 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 GOVERNING LIMITATIONS ON CONTACT WITH OTHERS

Rules 3.4(f) and (g), and Rules 4.2 and 4.3 address fairness to opposing counsel and their clients, as well as to unrepresented persons who are not parties.

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**

¹⁰⁷ 13 Mass. Att’y Disc. R. 1054 (1997).

¹⁰⁸ 17 Mass. Att’y Disc. R. 657 (2001).

¹⁰⁹ 30 Mass. Att’y Disc. R. 505 (2014).

RULE 3.4 (cont'd.)

- (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.

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. The Scope of Rules 3.4(f) and (g), 4.2, and 4.3

The Massachusetts rules also prohibit certain kinds of contact with individuals as part of a lawyer's representation of a client. Those restrictions appear in three types of contexts.

First, two parts of Rule 3.4 limit a lawyer's contact with individuals who have 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 narrow set of circumstances involving a client's relatives or agents.¹¹⁰ Also, 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 lawyers have occasionally 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 other person does not suffice. This rule is easily understood in the context of contact with individuals but is much more challenging to apply when contact is with agents or employees of organizations. Until 2002, a lawyer could not communicate about the subject matter of a representation with any employee or agent of an organization that was represented by counsel.¹¹¹ However, after deciding the *Messing* case¹¹² in 2002, the SJC amended the comments to Rule 4.2. Both actions expanded considerably the kinds of corporate constituents a lawyer can speak to about the representation's subject matter. 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."¹¹³ The Court established a less restrictive standard to apply going forward. 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.¹¹⁴

¹¹⁰ 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." MASS. R. PROF. C. 3.4(f).

¹¹¹ 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.,* *Ruszczyk 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.

¹¹² *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 436 Mass. 347 (2002).

¹¹³ *Messing*, 436 Mass. at 354 (quoting the Superior Court judge who had imposed sanctions on the plaintiff firm in that case).

¹¹⁴ MASS. R. PROF. C. 4.2 comment [7].

The prohibition does not apply if the person the lawyer wants to contact is a *former* employee or agent, even if that person fits one of the categories specified in the comment.¹¹⁵ And 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.¹¹⁶

One other aspect of the current treatment of organizational constituents deserves note. If the organization in question is a governmental agency, constitutional principles 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.¹¹⁷ As discussed in the following subsections, Massachusetts lawyers have occasionally faced discipline for violating Rule 4.2.

The third limitation regarding 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 conflict with those of the lawyer's client, other than the advice to secure counsel.

That latter part of Rule 4.3 may cause confusion in certain Massachusetts 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.¹¹⁸ Lawyers representing clients in those settings regularly employ legal arguments and cite legal

¹¹⁵ See *Clark v. Beverly Health & Rehabilitation Services, Inc.*, 440 Mass. 270 (2003).

¹¹⁶ *Id.* at 279 (“[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.”).

¹¹⁷ MASS. R. PROF. C. 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 & Prof'l Responsibility, Formal Op. 97-408 n.9 (1997) (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 comment [b]. (AM. LAW INST. 2000).

¹¹⁸ 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, <https://www.mass.gov/service-details/access-to-justice-initiative> (last visited April 12, 2018).

authority when speaking with unrepresented opposing parties in an effort to settle or expedite the legal proceedings. Rule 4.3 appears to permit such negotiation and does not violate the rule 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.

The Office of the Bar Counsel, however, interprets Rule 4.3 far more restrictively. Relying on slightly different language from the comment as it read before 2015, the 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. The 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 permit pressuring the unrepresented adversary by describing the probable legal consequences of the actions the lawyer plans to take.¹¹⁹

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," the bar counsel's stance creates a hazard for Massachusetts lawyers.¹²⁰ However, in the years since the article was published, no Massachusetts lawyer has been disciplined for predicting what a court would do or for describing the expected legal consequences to an unrepresented person.¹²¹ Several lawyers have been disciplined for inappropriate contact with unrepresented persons, but few of those cases involve negotiation with a pro se litigant.

¹¹⁹ Nancy Kaufman, *Can We Talk: Communicating with Unrepresented Persons*, MASSACHUSETTS LAWYERS WEEKLY, Nov. 17, 2003.

¹²⁰ One of this book's contributors 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, Dec. 15, 2003.

¹²¹ In one instance, a lawyer misstated the law during a negotiation and pressured an unrepresented person to pay a judgment he did not owe; the lawyer received a public reprimand. See *Matter of Monaco*, 22 Mass. Att'y Disc. R. 571 (2006) (discussed in Section IV(B)(3)).

B. Discipline for Violating Rules 3.4(f) and (g), 4.2, and 4.3

1. Disbarment

On occasion, lawyers have been disbarred for flagrant misconduct related to 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*,¹²² 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*,¹²³ after a client reported him to the bar counsel for settling a matter without authority and for 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.

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.

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*,¹²⁴ leading to a suspension of a year and a day. In *Bianco*, a newly admitted lawyer assisted a more experienced attorney in defending a hospital in a sexual harassment lawsuit that a woman employee filed against the hospital. The employee telephoned the respondent at her home, and the respondent talked to the plaintiff about the case on at least eighty occasions without disclosing that contact to the hospital,

¹²² 23 Mass. Att'y Disc. R. 309 (2007).

¹²³ 25 Mass. Att'y Disc. R. 523 (2009).

¹²⁴ 21 Mass. Att'y Disc. R. 46 (2005).

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 primarily violating Rule 4.2. In *Matter of Watts*,¹²⁵ 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, as the administratrix of a client's estate, failed to maintain a complete set of bank statements and to produce records that the beneficiary's attorney requested. She sent a letter directly to the beneficiary, 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*,¹²⁶ the single justice ordered an indefinite suspension for multiple counts of misconduct, including violating the predecessor to Rule 4.3. A receiver overseeing an investment company's assets instructed the attorney he worked with to communicate 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*,¹²⁷ 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 discussed the management of her financial affairs and her interest in the property. In *Matter of Allen*,¹²⁸ the attorney communicated with another party on several occasions, 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.

¹²⁵ 21 Mass. Att'y Disc. R. 654 (2005).

¹²⁶ 18 Mass. Att'y Disc. R. 229 (2002).

¹²⁷ 21 Mass. Att'y Disc. R. 366 (2005).

¹²⁸ 5 Mass. Att'y Disc. R. 4 (1988).

Several lawyers have received public reprimands for violating Rule 4.3 or its predecessor. One notable example of a pure violation of Rule 4.3 is *Matter of Barnes*.¹²⁹ In *Barnes*, an attorney represented a man whom a woman had charged with domestic assault and battery, kidnapping, and threatening to commit a crime. The two individuals reconciled, and the attorney agreed to meet with the couple together before 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*,¹³⁰ an attorney received a public reprimand for 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 corporation's former officer. At court, the respondent incorrectly advised the former officer about his obligation to pay the corporation's judgment and altered court papers to include the person's name.

Two other reported matters resulted in public reprimands for offering legal advice to an unrepresented person. In *Matter of Fischbach*,¹³¹ after representing a married couple as their tax lawyer, an attorney decided to represent only the husband after the couple separated. The attorney then offered advice to the wife without instructing 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*,¹³² the attorney represented a client, a principal in a corporation, in several different matters, including possible purchases of real estate and soft-drink manufacturing. 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, 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 97-38,¹³³ an attorney received an admonition after he negotiated an agreement in which his client would give 20% of any recovery to his principal witness. In PR 88-26,¹³⁴ an attorney received a

¹²⁹ 25 Mass. Att'y Disc. R. 52 (2009).

¹³⁰ 22 Mass. Att'y Disc. R. 571 (2006).

¹³¹ 18 Mass. Att'y Disc. R. 190 (2002).

¹³² 11 Mass. Att'y Disc. R. 162 (1995).

¹³³ 13 Mass. Att'y Disc. R. 929 (1997).

¹³⁴ 4 Mass. Att'y Disc. R. 465 (1988).

private reprimand for allowing witnesses to be compensated with a percentage of the settlements obtained in lawsuits. The attorney routinely employed expert witnesses on behalf of his clients and compensated 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. 03-16,¹³⁵ 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. 02-32,¹³⁶ 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 lawyer-tenant not to communicate directly with the trustee. The landlord's interests were not harmed in any significant way, if at all.

In Ad. 02-33,¹³⁷ 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 attorney met with the mother and prepared a document for her to sign, without consent of the mother's attorney. And in Ad. 01-36,¹³⁸ an attorney discussed legal matters with a former employee whom his client had sued for breach of an employment noncompetition and nondisclosure 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 attorney 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.¹³⁹

The board has issued few admonitions for violating Rule 4.3 and instead imposed more serious discipline when a lawyer advised an unrepresented person

¹³⁵ 19 Mass. Att'y Disc. R. 549 (2003).

¹³⁶ 18 Mass. Att'y Disc. R. 691 (2002).

¹³⁷ 18 Mass. Att'y Disc. R. 693 (2002).

¹³⁸ 17 Mass. Att'y Disc. R. 724 (2001).

¹³⁹ 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).

with interests different from the lawyer's client. In Ad. 10-03,¹⁴⁰ the lawyer received only an admonition for misconduct that resembled that described in *Matter of Levine* that led to a public reprimand. In that matter, the lawyer represented a daughter seeking to transfer the mother's house into the daughter's name. Throughout the lawyer's drafts of and negotiation about the agreement, the lawyer never explained to the mother that he was not representing her, and he failed to advise her to seek her own counsel.

¹⁴⁰ 26 Mass. Att'y Disc. R. 763 (2010).

CHAPTER FOURTEEN

Law Practice Management (Rule 1.17 and 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 must carefully oversee the work of others who assist in their practices. The *Massachusetts Rules of Professional Conduct* enforce these principles by limiting the role that nonlawyers may play in operating law firms, by prohibiting nonlawyers from owning an interest in law firms or directing a lawyer's legal practice, and by prohibiting a lawyer from assisting in the unauthorized practice of law. The rules also limit how a lawyer may sell an ongoing business that 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 these rules establish, they face possible discipline. The number of cases involving these issues is relatively small, and most of those involve violating Rule 5.3, which addresses a lawyer's staff supervision, and Rule 5.5, which forbids a lawyer from assisting in the unauthorized practice of law. This chapter briefly describes the various rules 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

A lawyer may, under appropriate circumstances, sell a private law practice, with appropriate safeguards to protect the interests of the clients. Rule 1.17 imposes the requirements for selling 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, lawyers may sell or transfer all or part of their 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, and the transferring lawyer must notify each client. Clients may choose not to transfer their representation to the new lawyer, but their agreement is presumed if they do not object within ninety days. While the fees charged clients may not increase because of the sale, a purchaser may insist that any transferred clients pay the same fees that the purchaser typically charged its clients before the sale.

The Massachusetts rule is different from the American Bar Association (ABA) Model Rule, and the two “Reserved” sections of the Massachusetts rule reflect the unwillingness of the Supreme Judicial Court (SJC) to accept two central provisions of the ABA’s standard. Unlike in Massachusetts, the ABA’s Model 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 a 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 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.

The Massachusetts version diverges from the ABA Model Rule in one other respect. 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.”¹

Practice Tip

Lawyers who lose their licenses to practice because of disbarment or suspension might be permitted to sell their portfolio. An ethics opinion from the Maine Board of Bar Overseers concludes that Rule 1.17 permits a sale in such circumstances.² No Massachusetts report or opinion forbids the practice. The disbarred lawyer selling a practice might not be able to receive payment from the purchaser of the 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, or hourly fees earned but not collected, before the disbarment was effective.³

B. Discipline for Violating Rule 1.17

Although Massachusetts treats this area of the legal business differently from the rest of the country, no issue has ever arisen regarding Rule 1.17, no court has ever addressed it, the Board of Bar Overseers (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

Massachusetts Rules 5.1 through 5.3 explain the respective responsibilities of supervising and subordinate lawyers working in law firms or organizations.

¹ RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* 696 § 1.17 (2012–2013 ed.).

² 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).

³ In Massachusetts, a referral fee is earned when the referral is made. (This is contrary to the rule in most states.) If the fee was earned while the lawyer was not disbarred, the lawyer may accept the fee.

**RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS,
AND SUPERVISORY LAWYERS**

- (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 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 of nonlawyers who assist lawyers in providing legal services.

Rule 5.1, while stating obvious principles, describes important duties of lawyers who supervise other lawyers. Rule 5.1(a) requires that those lawyers who manage a law practice establish systems and policies to ensure that the lawyers and staff comply with their ethical duties. A managing lawyer who neglects to

do so faces discipline.⁴ Rule 5.1(b) holds that a lawyer who supervises another lawyer shall take reasonable steps to ensure that the supervised lawyer acts ethically. And, finally, Rule 5.1(c) imposes responsibility on a supervising lawyer for the 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.⁵ Unless one of those two circumstances exists, a manager or supervisor may not be subject to discipline for a junior or supervised lawyer’s misconduct.

Rule 5.1 addresses only 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 be responsible in any civil action based upon a junior lawyer’s misconduct, and those issues are beyond the scope of this book.⁶

Rule 5.2 addresses the responsibilities of the supervised, or junior, lawyer. It first says that a junior lawyer may not escape discipline for misconduct the lawyer’s supervisor directed or ordered. Sensibly, a lawyer may not defend against a charge of violating a rule by asserting that it was done at the request of a supervisor. The second part of Rule 5.2 is of some passing interest to lawyers in firms but has never affected a junior lawyer in Massachusetts.⁷ Rule 5.2(b) states that a subordinate lawyer is not subject to discipline if acting “in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” If the “reasonable resolution” ends up violating a disciplinary rule, the supervisor, and not the subordinate, faces 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.⁸ The disciplinary reports show that when a

⁴ See, e.g., *Matter of Foley*, 26 Mass. Att’y Disc. R. 199 (2010) (suspension).

⁵ MASS. R. PROF. C. 5.1(c)(2).

⁶ As comment [7] 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).

⁷ 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), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467910.

⁸ 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.

supervisor and a supervisee engage in related misconduct, the supervisor typically receives more serious discipline.⁹

Rule 5.3 essentially replicates the responsibilities set out for managers, partners, and supervisors under Rule 5.1, but it applies them to lawyers who supervise paralegals, support staff, and other nonlawyers who work in law offices. The role of nonlawyer assistants becomes most interesting when we consider the question of the unauthorized practice of law and the limits of what a nonlawyer may do without violating that principle. To continue the themes of Rules 5.1 through 5.3, this chapter discusses the unauthorized practice of law in Section IV in considering Rule 5.4 alongside Rule 5.7.

B. Discipline for Violating Rules 5.1, 5.2, and 5.3

In Massachusetts, violations of the rules regarding supervisors and supervisees has never resulted in a disbarment or a suspension unless combined with other rules violations.

1. Disbarment

No lawyer has been disbarred principally for violating a rule governing law practice management and supervising subordinate lawyers. On at least one occasion, the SJC accepted a disciplinary resignation after the lawyer was charged with misconduct related to Rule 5.3. In *Matter of Babchuck*,¹⁰ the lawyer and his assistant mismanaged his Interest on Lawyers Trust Accounts (IOLTA), leading to a lack of client funds. His failure to train and supervise the assistant violated Rule 5.3.

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'").

⁹ For example, *compare* *Matter of Newman*, 31 Mass. Att'y Disc. R. 482 (2015) (four-month suspension for filing an appellate brief relying on a 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. 747 (2015) (admonition for the associate, who, on the employer's instructions, did not withdraw the false statement, which he had believed to be true when he made it).

¹⁰ 26 Mass. Att'y Disc. R. 20 (2010) (resignation but no order of disbarment).

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 lawyers obviously need not reproduce all of the work others perform under their supervision, lawyers must have in place systems to ensure that the work is done correctly. A lawyer cannot defend against a misconduct charge by saying that the lawyer being supervised made the mistakes.¹¹

2. Suspension

Lawyers have been suspended after they failed to supervise support staff who mishandled client matters. In *Matter of Goldberg*,¹² 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 a certified public accountant would monitor his financial record-keeping. The attorney's secretary, who was in charge of reviewing and balancing his business and IOLTA accounts, embezzled money from closing funds. Not only did the lawyer fail to supervise the secretary's work, but he also neglected to conduct a background check, which would have disclosed that she had lost her previous employment for similar misconduct.¹³ In *Matter of Heartquist*,¹⁴ the respondent failed to supervise an employee who embezzled client funds. The board memorandum compared the embezzlement cases that warranted a suspension with those that warranted a public reprimand and concluded that the respondent's lack of adequate office systems, along with other misconduct, justified a suspension of six months and a day.

Other lawyers have been suspended while failing to prevent, or even encouraging, unethical practices by support staff. For instance, in *Matter of Goodman*,¹⁵ the respondent was suspended for one year, with a reinstatement hearing required, after instructing his staff, on multiple occasions, not to reveal a client's

¹¹ See, e.g., *Matter of Abelson*, 24 Mass. Att'y Disc. R. 1 (2008).

¹² 23 Mass. Att'y Disc. R. 191 (2007).

¹³ 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).

¹⁴ 29 Mass. Att'y Disc. R. 332 (2013).

¹⁵ 22 Mass. Att'y Disc. R. 352 (2006).

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.

death to an insurance company. He also directed his staff to alter a medical report to omit a sentence that referred to the client's death. The primary basis for his suspension was his dishonesty, but involving 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 did not result in harm or was not a pattern of misconduct. For example, in *Matter of Hopper*,¹⁶ 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*,¹⁷ 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.¹⁸

¹⁶ 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).

¹⁷ 25 Mass. Att'y Disc. R. 355 (2009).

¹⁸ 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 was undetected by respondent's accountant and title insurer).

Other reports show a public reprimand for lawyers who failed to supervise subordinate lawyers in their law firm. In *Matter of Baron*,¹⁹ 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*,²⁰ the board also accepted a stipulation for a public reprimand after the respondent failed to supervise his lawyer son in properly maintaining the firm's trust account. In both matters, the respondents had prior discipline, but in neither instance did a client suffer deprivation. In the 1993 case *Matter of Jerome*,²¹ the lawyer received a public reprimand after he entrusted all responsibility for record-keeping 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 from lienholders. The same misconduct, with the same level of consequences, would most likely result in a term suspension today.

4. Admonition

Admonitions are a common sanction for sloppy office procedures or supervision. For instance, in Ad. 10-19,²² an attorney received an admonition for failing to ensure 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. 07-20,²³ 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. 06-18,²⁴ an attorney assigned a paralegal to send a check from 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. 05-10,²⁵ the respondent did not review the final draft of a will his secretary had prepared. The secretary had mistakenly inserted the attorney's name in the will, making the attorney a beneficiary, contrary to the *Rules of Professional Conduct*.

¹⁹ 17 Mass. Att'y Disc. R. 62 (2001).

²⁰ 12 Mass. Att'y Disc. R. 348 (1996).

²¹ 9 Mass. Att'y Disc. R. 176 (1993).

²² 26 Mass. Att'y Disc. R. 797 (2010).

²³ 23 Mass. Att'y Disc. R. 973 (2007).

²⁴ 22 Mass. Att'y Disc. R. 887 (2006).

²⁵ 21 Mass. Att'y Disc. R. 712 (2005).

Other examples exist of admonitions involving violations of Rule 5.3. For instance, in Ad. 05-26,²⁶ two attorneys, partners in a two-person law firm, each received an admonition after their paralegal made errors regarding the logistics of a real estate closing. The firm did not have an adequate system in place to supervise the paralegal. In Ad. 05-18,²⁷ 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 included in a brief the respondent submitted but had never read. And in Ad. 03-06,²⁸ an attorney overseeing a closing did not supervise a paralegal who improperly recorded a mortgage before all of the proper funds had cleared.

Although not formally charged as violations of Rules 5.1 and 5.3, in Ad. 05-38²⁹ the supervising lawyer and an associate in his firm both received admonitions for handling a motor vehicle accident case where there were conflicts in representing both the driver and the passenger of one vehicle (where the supervising attorney attempted to remedy the conflict by discharging the driver as a client).

IV. THE NATURE OF THE LAWYER'S RESPONSIBILITIES REGARDING UNAUTHORIZED PRACTICE OF LAW WITHIN A LAW PRACTICE

As the practice of law becomes more nationwide—and international—the issues of the unauthorized practice of law are assuming increasing proportions. Rule 5.5 covers a number of the relevant issues.

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.

²⁶ 21 Mass. Att'y Disc. R. 726 (2005).

²⁷ 21 Mass. Att'y Disc. R. 8 (2005).

²⁸ 19 Mass. Att'y Disc. R. 529 (2003).

²⁹ 21 Mass. Att'y Disc. R. 756 (2005).

**RULE 5.5: UNAUTHORIZED PRACTICE OF LAW;
MULTIJURISDICTIONAL PRACTICE OF LAW (*cont'd.*)**

(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
- (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 or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, 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

RULE 5.5 (cont'd.)

(2) are services that the lawyer is authorized to provide by federal law or other law or Rule of this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be 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.

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 crime³⁰ and may be regulated by a court.³¹ Since the *Massachusetts Rules of Professional Conduct* apply to lawyers admitted to practice in the state, the prohibition on the unauthorized practice of law (known often as UPL) has little direct relevance to the topics in this book, since Massachusetts lawyers are typically authorized to practice law in this state.³² But the UPL topic is significant for Massachusetts lawyers in three ways, which Rule 5.5 addresses.

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

³⁰ MASS. GEN. LAWS ch. 221, § 41. Note that inactive lawyers may provide pro bono services in limited circumstances, as described in Chapter 24. See Chapter 24, Section II(A)(6).

³¹ See, e.g., *Mass. Conveyancers Ass'n, 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); and *The Real Estate Bar Ass'n for Massachusetts, Inc. v. Nat'l Real Estate Info. Servs., Inc.*, 459 Mass. 512 (2011) (addressing certain issues on what does or does not constitute the practice of law in the real estate closing industry).

³² According to MASS. R. PROF. C. 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 services in the jurisdiction.” MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT r. 4:01 § 1 [hereinafter SJC Rule] 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.

the lessons of Rule 5.3 discussed earlier, a lawyer who helps or permits nonlawyers to practice law violates this rule and is subject to discipline.³³ The most common example of this misconduct is when a lawyer irresponsibly delegates important lawyering tasks to a staff member.³⁴ This worry also arises when a lawyer assists a layperson 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,³⁵ and the bar counsel has followed that guidance with its own warnings to lawyers about the need to exercise care in participating in closings overseen by corporations not authorized to practice law.³⁶ The following discussion briefly addresses the question of what qualifies as “the practice of law.”

The prohibition against assisting in UPL has special relevance to a lawyer who employs a disbarred or suspended lawyer to serve as a paralegal. One might think that a disbarred or suspended lawyer effectively becomes a layperson and may be hired, as with any nonlawyer, to assist a licensed lawyer in a practice. That assumption is wrong, with one exception. An SJC rule limits a suspended or disbarred lawyer’s activity as a paralegal. 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.³⁷

³³ See, e.g., *Matter of Hrones*, 457 Mass. 844, 26 Mass. Att’y Disc. R. 252 (2010).

³⁴ 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 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 nonlawyers’ work.

³⁵ See *Real Estate Bar Ass’n for Massachusetts, Inc. v. Nat’l Real Estate Info. Servs.*, 459 Mass. 512, 521–22 (2011); *Real Estate Bar Ass’n for Massachusetts v. Nat’l Real Estate Info. Servs.*, 608 F.3d 110 (1st Cir. 2010).

³⁶ Bruce T. Eisenhut, *Bearing Witness: REBA v. NREIS and Witness-Only Closings* (May 2013), <https://www.massbbo.org/Files?fileName=bearingwitness.pdf> (last visited April 13, 2018).

³⁷ SJC Rule 4:01 § 17(7).

The exception this refers to 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, period of time set forth in the rule.³⁸

Practice Tip

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, except the person may be employed as a paralegal if the Court has so allowed.³⁹

Practice of law after suspension: Second, lawyers suspended from practice who continue to offer legal services or to hold themselves out as lawyers also violate Rule 5.5.⁴⁰ 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.⁴¹

Multijurisdictional practice: The third aspect of Rule 5.5—“multijurisdictional practice,” or MJP—is of great interest to practicing lawyers as a practical

³⁸ 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.

³⁹ However, in *Matter of Bott*, 462 Mass. 430, 28 Mass. Att’y Disc. R. 54 (2012), the Court remanded the case to a single justice to decide whether a lawyer who resigned as a disciplinary sanction might be allowed to act as a mediator and, if so, under what conditions.

⁴⁰ 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).

⁴¹ See SJC Rule 4:01 §17(8) (imposing further reinstatement delays for lawyers who practice with a suspended license).

matter but has less apparent relevance in the disciplinary process and, therefore, is only briefly discussed in this book. 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. Out-of-state lawyers who engage in activity beyond what Rule 5.5(c) permits may face discipline in their home states for violating the limits Massachusetts imposes and may face discipline in Massachusetts. 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.⁴²

Briefly, Rule 5.5(c) 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,⁴³ (2) when a court permits an appearance under a *pro hac vice* arrangement,⁴⁴ 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 the lawyer’s own jurisdiction.⁴⁵ These categories, taken directly from the ABA’s Model Rule 5.5, have been the subject of considerable attention and commentary in the literature, and practitioners interested in the scope of this freedom to practice across state lines may find ample guidance elsewhere.⁴⁶

One other aspect of Rule 5.5’s coverage warrants mention. Often, a lawyer from outside Massachusetts will move to the Commonwealth in order

⁴² An authoritative piece on the *Model Rules of Professional Conduct* does not even list discipline in its review of remedies for violating Rule 5.5. See ROTUNDA & DZIENKOWSKI, *supra* note 1, 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).

⁴³ MASS. R. PROF. C. 5.5(c)(1).

⁴⁴ MASS. R. PROF. C. 5.5(c)(2).

⁴⁵ MASS. R. PROF. C. 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).

⁴⁶ 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 the ABA established 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).

to work in-house at a national corporation or government agency, offering advice to that organizational client while living 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 the lawyer is providing legal services in-house to an “employer or its organizational affiliates.” Rule 5.5(e) imposes the additional requirement that the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction. The exception to Rule 5.5(d) is appearances in court, which remain off-limits to non-Massachusetts lawyers except through the usual *pro hac vice* application.⁴⁷ 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.⁴⁸ Additionally, any such lawyer must register with the bar as an in-house counsel.⁴⁹

A Massachusetts lawyer considering a representation in another state must check that state’s version of Rule 5.5 and other applicable rules to determine whether the representation is permitted. Massachusetts lawyers have occasionally been disciplined for handling cases in another state in violation of the other state’s rules.⁵⁰

Practice Tip

In 1998, the California Supreme Court concluded that a New York law firm must forfeit substantial legal fees incurred when working in California for a California client because its lawyers were not licensed to practice law in California.⁵¹ 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.

⁴⁷ 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*).

⁴⁸ 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).

⁴⁹ See SJC Rule 4:02 § 9. See also Chapter 24, Part II(A)(5).

⁵⁰ 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).

⁵¹ *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998).

Defining the practice of law: Whether an attorney or a non-attorney has engaged in UPL often depends on whether the activities the individual performed qualify as “the practice of law.” If they do, the person has violated the state statute and the lawyer has violated Rule 5.5. If not, the activity is 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*,⁵² 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.⁵³

⁵² *Real Estate Bar Ass’n for Massachusetts, Inc. v. Nat’l Real Estate Info. Servs.*, 459 Mass. 512 (2011).

⁵³ 459 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 the First Circuit posed, 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).

That standard is about the best that any court could craft. Lawyers who contemplate assisting nonlawyers with activities that come close to practicing law must exercise careful judgment to discern whether the work fits inside or outside of this somewhat fluid definition. For purposes of discipline, few, if any, Massachusetts lawyers have been sanctioned for guessing incorrectly about the standard. In the discipline cases involving a violation of Rule 5.5(a), there has typically been little or no question that the activity in question was plainly the practice of law.

Practice Tip

Conduct that would not be viewed as UPL when performed by a layperson may be deemed the practice of law when performed by a suspended or disbarred attorney.⁵⁴

B. Discipline for Violating Rule 5.5

While the most common instances in Massachusetts of UPL are the former lawyer who continues to practice after being suspended or disbarred and the lawyer who assists a non-lawyer in the practice of law, there are other variations on this theme. The sanctions are usually very severe.

1. Disbarment

Several lawyers have been disbarred for violations involving Rule 5.5. Some disbarment judgments arose when a lawyer continued to practice during an administrative suspension;⁵⁵ some disbarment orders followed when a lawyer assisted 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*,⁵⁶ the attorney associated with a non-attorney who was a convicted felon and a “jailhouse

⁵⁴ See *Matter of Bott*, 462 Mass. 430, 28 Mass. Att’y Disc. R. 54 (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 22, Section III(C).

⁵⁵ 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).

⁵⁶ 6 Mass. Att’y Disc. R. 118 (1990).

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*

The most common discipline for violating Rule 5.5 has been a term suspension. A common report involves a lawyer who continues to practice law after being administratively suspended. Several of those lawyers have been suspended for six months or six months and a day.⁵⁷ If the lawyers committed misconduct while practicing law during the administrative suspension, the resulting sanction has been greater. For instance, in *Matter of Linnehan*,⁵⁸ the attorney continued to practice law, including appearing in court multiple times, and failed to advise his clients, the courts, or other parties of his administrative suspension. The attorney was suspended for eighteen months. Other lawyers, as seen in Sections IV(B)(3) and IV(B)(4) that follow, have received public reprimands, or even admonitions, for this misconduct, so the facts and circumstances of a lawyer who practices while under administrative suspension play a crucial role in determining the level of discipline.

You Should Know

Continuing to practice law knowingly after receiving 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.

⁵⁷ 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), *aff’d* 464 Mass. 1021, 29 Mass. Att’y Disc. R. 292 (2013) (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 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).

⁵⁸ 26 Mass. Att’y Disc. R. 310 (2010).

The other common source of suspensions in this area is when an attorney permits a nonlawyer to conduct activities without supervision. Of course, in these situations, something usually goes wrong (hence the bar counsel's attention to the problem), so the suspensions typically include some representational misconduct in addition to failing to supervise the employee. A recent example is *Matter of Hrones*.⁵⁹ In *Hrones*, an attorney was under the mistaken belief that his paralegal was authorized to practice before the Massachusetts Commission Against Discrimination (MCAD) and assisted the paralegal while he effectively operated an MCAD practice under the attorney's name. The board determined that the attorney's misconduct did not simply violate 5.3(b), where the attorney failed to supervise the paralegal, but, coupled with the paralegal's considerable responsibilities, constituted assisting in the unauthorized practice of law. The attorney was suspended for a year and a day.⁶⁰ In *Matter of Jackman*,⁶¹ the attorney created a law partnership with a nonlawyer and shared fees with him. The nonlawyer also commingled and misappropriated client funds. The SJC equated that misconduct to negligent misuse of client funds with deprivation and imposed a two-year suspension (rejecting the single justice's sanction of a three-year suspension, with the third year suspended for two years),⁶² followed by a practice limitation upon reinstatement (representing only criminal defendants in district court).

Practice Tip

The most common reason for a lawyer's administrative suspension is the failure to register and pay annual fees. If the BBO does not have the lawyer's current address, the chances increase that the lawyer will fail to meet those obligations. The BBO's rule requiring every lawyer to provide an e-mail address should limit this kind of mistake.⁶³

⁵⁹ 457 Mass. 844, 26 Mass. Att'y Disc. R. 252 (2010).

⁶⁰ See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 comment [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).

⁶¹ 444 Mass. 1013, 21 Mass. Att'y Disc. R. 349 (2005).

⁶² 29 Mass. Att'y Disc. R. 263 (2004).

⁶³ See Chapter 4 for a discussion of administrative suspensions. A lawyer administratively suspended for failing to receive notice from the BBO can typically be reinstated by paying the fees due along with an affidavit explaining the lawyer's circumstances.

In *Matter of Burns*,⁶⁴ an attorney was suspended for six months after he hired and actively used a disbarred lawyer in his criminal defense practice. He treated the disbarred attorney as a paralegal but did not supervise the employee's work. The report does not claim that the disbarred attorney provided standard service. By contrast, in *Matter of Dash*,⁶⁵ the lawyer not only named his law firm after his paralegal, but he left her unsupervised to essentially practice law. The nonlawyer also commingled her funds with the firm's IOLTA 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*,⁶⁶ the respondent was suspended for six months after assisting a lawyer who had been suspended from practicing law. The respondent 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 in continuing 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 closings as the properly licensed lawyer needed to complete the transactions.

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 accompanied that violation.

In *Matter of Vasa*,⁶⁷ following *Matter of O'Neill*,⁶⁸ the single justice suspended the lawyer for three months for assisting a nonlawyer with activities within the respondent's law firm that qualified as practicing law.

⁶⁴ 16 Mass. Att'y Disc. R. 35 (2000).

⁶⁵ 22 Mass. Att'y Disc. R. 179 (2006).

⁶⁶ 18 Mass. Att'y Disc. R. 363 (2002).

⁶⁷ 32 Mass. Att'y Disc. R. ____, 2016 WL 7493931 (2016).

⁶⁸ 30 Mass. Att'y Disc. R. 297 (2014).

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.⁶⁹ The report does not indicate whether the lawyer offered any substandard services to his Ohio clients.⁷⁰

3. *Public Reprimand*

Since 1999, few lawyers who have violated Rule 5.5 have received public reprimands, except when the violation occurred while the lawyer practiced during an administrative suspension.⁷¹ In *Matter of Hutton*,⁷² the respondent, misled by his partner, allowed a suspended lawyer to return to the firm to work on client matters. The hearing committee found his misconduct to be less egregious than other cases of assisting with UPL and recommended a public reprimand, which the board imposed.⁷³

In *Matter of Gillespie*,⁷⁴ an attorney received a public reprimand after she continued to practice law despite her administrative suspension for nonpayment of bar dues, in violation of Rule 5.5(a). Unlike the lawyers who received term suspensions for that misconduct (see Sections IV(B)(1) and IV(B)(2)), this respondent reasonably believed that her then-partner had paid her registration fees. 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."⁷⁵ Despite the board's assertion, however, some lawyers whose conduct fits that description have received admonitions,⁷⁶ as discussed in Section IV(B)(4).

⁶⁹ 29 Mass. Att'y Disc. R. 554 (2013). The lawyer also failed to report a conviction to the bar counsel.

⁷⁰ 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).

⁷¹ Cf. *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).

⁷² 31 Mass. Att'y Disc. R. 313 (2015).

⁷³ 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).

⁷⁴ 26 Mass. Att'y Disc. R. 223 (2010).

⁷⁵ *Id.* at 224. 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).

⁷⁶ 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).

In *Matter of McSwiggan*,⁷⁷ a lawyer was publicly reprimanded for practicing law while administratively suspended 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 being administratively suspended, misconduct that presumptively warrants a public reprimand, according to a 2010 disciplinary decision.⁷⁸ The admonitions appear both before⁷⁹ and after⁸⁰ that case. None of the later admonitions has addressed the presumptive standard, but each of the admonitions involved a lawyer's innocent mistake.

On occasion, the board has admonished a lawyer for practicing, in a limited way, in another jurisdiction without a license. For instance, in Ad. 99-13,⁸¹ the attorney received an admonition after he appeared 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 that involved making harassing telephone calls in the middle of the night to an attorney with whom he had a family-related dispute. In Ad. 99-43,⁸² the attorney had registered as a retired lawyer in Massachusetts, yet appeared in probate court on behalf of several relatives in a will contest.

V. REGULATING THE LAWYER-NONLAWYER RELATIONSHIP WHEN DELIVERING LEGAL SERVICES

Rules 5.4 and 5.7 address the relationship between lawyers and nonlawyers in providing legal services. They also address the form of the entity through which a lawyer may or may not provide legal services.

⁷⁷ 29 Mass. Att'y Disc. R. 454 (2013).

⁷⁸ *Matter of Gillespie*, 26 Mass. Att'y Disc. R. 223 (2010).

⁷⁹ *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).

⁸⁰ *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).

⁸¹ 15 Mass. Att'y Disc. R. 668 (1999).

⁸² 15 Mass. Att'y Disc. R. 729 (1999).

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a non-lawyer, 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 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.

(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;

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER
(*cont'd.*)

- (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 delivering 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 rules is 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 lawyers' independent professional judgment. 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 limit most forms of multidisciplinary practice (often called MDP), where lawyers and other professionals jointly own and operate a full-service firm offering complementary products to clients with multiple needs. The legal profession has been debating whether to change that fundamental restriction on MDP, but any such efforts have thus far failed.⁸³

No lawyer in Massachusetts has been disciplined for engaging in an MDP. A handful of lawyers have been disciplined for sharing legal fees with nonlawyers, as discussed in the following section. Those cases serve as the only reported Massachusetts discipline under Rule 5.4.

Rule 5.7 complements Rule 5.4 and establishes procedures to follow when a lawyer offers clients "ancillary services" that are not legal services. Typical examples include title insurance, consulting services, or real estate appraisals. While a true MDP is not permitted in Massachusetts, a lawyer or law firm may offer such nonlegal services to customers as long as the lawyer or law firm honors the limitations of Rule 5.4 regarding the ownership interests of and fee payments to the nonlawyers. If a lawyer chooses to offer both legal services and ancillary nonlegal services, Rule 5.7 establishes protocols the lawyer must follow to ensure that clients and customers understand what parts of the services qualify for the ethical protections that legal services have 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.⁸⁴

B. Discipline for Violating Rules 5.4 and 5.7

Four lawyers have been disciplined since 1999 for violating Rule 5.4, all for sharing legal fees with nonlawyers. In *Matter of Hale*,⁸⁵ the attorney received a public reprimand for agreeing to pay his paralegal 25% of the legal fees received

⁸³ For one example of the ongoing efforts within the ABA to permit some limited form of multidisciplinary practice, see AMERICAN BAR ASSOCIATION, DISCUSSION DRAFT FOR COMMENT: ALTERNATIVE LAW PRACTICE STRUCTURES 6 (Dec. 2, 2011).

⁸⁴ Boston Bar Association, Op. 2002-B, BOSTONBAR.ORG, <http://www.bostonbar.org/sc/ethics/Ethics2002-B.PDF>.

⁸⁵ 20 Mass. Att'y Disc. R. 201 (2004).

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. 08-04,⁸⁶ the lawyer received an admonition for agreeing to pay his office manager 33% of all his legal fees as her salary. In Ad. No. 99-31,⁸⁷ the lawyer paid a referral fee to a nonlawyer and also mismanaged his IOLTA account. In *Matter of Zak*,⁸⁸ the lawyer was disbarred for multiple rules violations, including dividing legal fees with a nonlawyer business partner and paying finder's fees of \$1,000 and \$1,500 each to several nonlawyers for referring clients to him. And in *Matter of Shalom*,⁸⁹ the lawyer was suspended indefinitely for multiple instances of misconduct, including paying a finder's fee to a nonlawyer in return for a referral.⁹⁰

Only two Massachusetts lawyers have been disciplined, both receiving admonitions for misconduct involving Rule 5.7, when they provided ancillary services to customers without making clear that the activities were not legal services. In Ad. 03-30,⁹¹ 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. 03-02,⁹² the attorney received an admonition for failing to inform his clients that his brokerage services in a real estate closing were not legal services.

VI. THE NATURE OF THE LAWYER'S RESPONSIBILITIES REGARDING RESTRICTIONS ON THE RIGHT TO PRACTICE

Rule 5.6 prohibits a lawyer from entering into any agreement that restricts the lawyer's right to practice in the future. This means a law firm cannot impose restrictive covenants on lawyers. It is considered to be in the best interests of the clients and affords them the right to choose their own counsel.

⁸⁶ 24 Mass. Att'y Disc. R. 848 (2008).

⁸⁷ 15 Mass. Att'y Disc. R. 708 (1999).

⁸⁸ 476 Mass. 1034 (2018).

⁸⁹ 19 Mass. Att'y Disc. R. 389 (2003).

⁹⁰ See also *Matter of Jackman*, 444 Mass. 1013, 21 Mass. Att'y Disc. R. 349 (2005), noted in the discussion of Rule 5.5 in Section IV. 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.

⁹¹ 19 Mass. Att'y Disc. R. 573 (2003).

⁹² 19 Mass. Att'y Disc. R. 520 (2003).

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.

A. The Lessons of Rule 5.6

Rule 5.6 prohibits restrictive covenants in employment agreements or in settlement terms and restates previous Massachusetts law.⁹³ 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.”⁹⁴

Rule 5.6 has seldom been the source of discipline in Massachusetts.⁹⁵ Its relevance has been more apparent in disputes about partners’ departures 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 partnership agreement provisions that limited the practices of lawyers who leave the firm.⁹⁶ 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.⁹⁷

⁹³ See DR 2-108.

⁹⁴ *Meehan v. Shaughnessy*, 404 Mass. 419, 431 (1989).

⁹⁵ In *Matter of Traficonte*, 22 Mass. Att’y Disc. R. 747 (2006), 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.

⁹⁶ See, e.g., *Meehan v. Shaughnessy*, *id.* at 93; *Pettingell v. Morrison, Mahoney & Miller*, 426 Mass. 253, 256 (1997); *Eisenstein v. David G. Conlin, P.C.*, 444 Mass. 258, 262–63 (2005); *Pierce v. Morrison Mahoney LLP*, 452 Mass. 718 (2008).

⁹⁷ 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”).

CHAPTER FIFTEEN

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 commercially advertising their services, but in the 1970s and 1980s U.S. Supreme Court decisions, relying on the First Amendment rights of lawyers and associational rights of clients, began to open up the commercial marketing world for attorneys. However, many restrictions still apply that lawyers need to understand. While Massachusetts lawyers have not often been disciplined for violating rules regulating advertising and solicitation, lawyers have occasionally 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

Regulating lawyers' efforts to obtain clients appears in Rules 7.1 through 7.5. Those rules permit lawyers to liberally advertise, 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 mislead, and not pressure any prospective client. This section briefly reviews the five rules, without extensively discussing the regulatory details.¹

¹ 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 (James S. Bolan ed., 4th ed., 2015 and 2018 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*, *MASSACHUSETTS BOARD OF BAR OVERSEERS* (Sept. 2016), <https://bbopublic.blob.core.windows.net/web/f/advertising.pdf>

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.

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.

(last visited April 2, 2018); Sarah A. Chambers, *Pick Me! Pick Me! Pick Me! (An Advertising and Solicitation Update)*, MASSACHUSETTS BOARD OF BAR OVERSEERS (March 2005), <https://bbopublic.blob.core.windows.net/web/£/pickme.pdf> (last visited April 2, 2018).

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 as 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.

RULE 7.5: FIRM NAMES AND LETTERHEADS (*cont'd.*)

(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 establishes a high standard of truthfulness for a lawyer’s communications. It requires lawyers to ensure that communications about their practices or skills are not misleading to prospective clients.² 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 7.1.³

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 this chapter discusses.

Practice Tip

Lawyers are permitted to publicize prior successes in their marketing campaigns but must exercise special care to be accurate in describing 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.

² In *Matter of Zak*, 476 Mass. 1034, 1038, 33 Mass. Att’y Disc. R. ___, ___ (2017), the SJC, in disbarring 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.”

³ Ad. No. 03-47, 19 Mass. Att’y Disc. R. 609 (2003).

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's name must be on any such advertising⁴ and the lawyer may not pay or otherwise reward anyone for recommending the lawyer's services,⁵ except for such understandable items as payment for the cost of advertising or for a lawyer referral service.⁶

Advertising means marketing to a broad audience and not targeting 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,⁷ 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 they imply that the lawyer will obtain certain results for a client.⁸

Practice Tip

Social media counts.⁹ Anything you say about your practice on social media sites may qualify as advertising and, therefore, must conform to the rules.

⁴ MASS. R. PROF. C. 7.2(c).

⁵ MASS. R. PROF. C. 7.2(b). *See* Matter of Zak, 476 Mass. at 1038, 33 Mass. Att'y Disc. R. at ____ (sharing fees with a nonlawyer agent to locate clients violated this Rule; respondent disbarred).

⁶ MASS. R. PROF. C. 7.2(b)(1), (2).

⁷ *See* Kasten, *supra* note 1, at 42. *See also* Matter of Saletan, 29 Mass. Att'y Disc. R. 574 (2013) (inactive lawyer's identification as counsel on LinkedIn page violated Rule 7.1).

⁸ *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"); Conn. Informal Op. 01-07 (2001) (expressing that worry). *Cf.* Rule 7.1, comment [3].

⁹ *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 (Jan. 1, 2014) (Florida Bar Board of Governors "authorized a committee to explore preparing an opinion on lawyers using the business networking site LinkedIn").

C. The Lessons of Rule 7.3

The most extensive business-generating regulation applies to solicitation, which is governed by Rule 7.3. Comment [1] 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.”¹⁰ 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;¹¹ may not solicit *for a fee* if the prospective client is vulnerable and cannot exercise reasonable judgment;¹² and may not solicit *for a fee* by telephone, e-mail, real-time electronic communication, or in-person communication, except for certain relatives of the lawyer, prior clients, and business or organizational representatives, including a nonprofit.¹³

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 but may not communicate with them directly by telephone, e-mail, real-time electronic communication, or in person, unless the individual is related to the lawyer, is a former client, is an organization, or is engaged in a business.

Practice Tip

Be especially careful about soliciting business by telephone, e-mail, 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

¹⁰ MASS. R. PROF. C. 7.3 comment [1].

¹¹ MASS. R. PROF. C. 7.3(b)(1).

¹² MASS. R. PROF. C. 7.3(b)(3).

¹³ MASS. R. PROF. C. 7.3(a)(1)–(4).

or misleading.¹⁴ If wishing to claim “certification” in a specific legal area, the lawyer must identify the certifying organization and explain (if true) that the organization is not a governmental body.¹⁵ 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 the lawyer simply claims to concentrate in or limit the practice to that area, the lawyer is held to a higher standard of care.¹⁶ That consequence has meaning for the lawyer facing a civil claim of malpractice but seldom, if ever, affects a disciplinary proceeding.¹⁷ Lawyers have occasionally faced discipline for misconduct implicating Rule 7.4, including earlier versions of this limitation.¹⁸

E. The Lessons of Rule 7.5

Rule 7.5 governs the name a lawyer may use for a law firm or practice.¹⁹ The rule restricts the options available to lawyers in a 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.²⁰ A Massachusetts law firm may use its name

¹⁴ MASS. R. PROF. C. 7.4(b).

¹⁵ MASS. R. PROF. C. 7.4(c).

¹⁶ MASS. R. PROF. C. 7.4(b). The American Bar Association’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. Carpenter*, 830 P.2d 646, 651–52 (Wash. 1992) (noting the principle but not applying it); R. MALLEN & J. SMITH, *LEGAL MALPRACTICE* § 15.4 (5th ed. 2000).

¹⁷ No reported Massachusetts malpractice case has relied upon Rule 7.4(b), and as of May 1, 2018, no disciplinary case in the Commonwealth has cited that provision.

¹⁸ *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 self 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).

¹⁹ *See also* MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT r. 3:06 § 2(c) [hereinafter SJC Rule] (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”).

²⁰ MASS. R. PROF. C. 7.5 comment [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 include only current, retired, or deceased law firm members.

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.²¹

Rule 7.5 becomes challenging in two settings.²² 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 do not operate as a single firm.

In Formal Op. 90-357,²³ the American Bar Association’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 junior non-partner lawyer, regularly employed by the firm.” The Office of the Bar Council 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.²⁴

Based on the same reasoning, lawyers who share office space but who do not operate as a single law firm may not use 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,

²¹ 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).

²² See *Chambers*, *supra* note 1.

²³ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 90-357 (1990).

²⁴ Nancy Kaufman, *The Of Counsel Relationship*, MASSACHUSETTS BOARD OF BAR OVERSEERS (Oct. 2000), <https://bbopublic.blob.core.windows.net/web/f/ofcounsel.pdf> (last visited May 4, 2018). 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).

“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.²⁵

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.²⁶

On occasion, lawyers receive discipline for violating Rule 7.5 because of the trade name chosen, although typically the discipline arises in conjunction with other, more significant misconduct.²⁷ At least one attorney, however, has been publicly reprimanded for using misleading trade names, with no other misconduct.²⁸

²⁵ MASS. R. PROF. C. 7.5 comment [2].

²⁶ Daniel C. Crane & John W. Marshall, *Space-Sharers, Beware!*, MASSACHUSETTS BOARD OF BAR OVERSEERS (Jan. 2000), <https://bbopublic.blob.core.windows.net/web/f/space.pdf> (last visited May 4, 2018).

²⁷ 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).

²⁸ Matter of Zachery, 23 Mass. Att’y Disc. R. 792 (2007) (using the name of a lawyer who was not part of the law firm).

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 and conflicts of interest. Chapter 10 discusses the issues surrounding sharing office space and a receptionist.

III. DISCIPLINE FOR VIOLATING RULES 7.1 THROUGH 7.5

This section reviews the discipline imposed on Massachusetts lawyers for violating the rules governing marketing and solicitation. The review proceeds without separate treatments of each respective rule, as the decisions are few and, therefore, can be treated collectively. The most common sanction for violating the bar's marketing rules has been an admonition, but occasionally 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.

A. Disbarment

No lawyer in Massachusetts has ever been disbarred solely for breaking the rules about marketing legal services or violating the duties these rules impose. On occasion, the Supreme Judicial Court (SJC) has included a marketing violation among other misconduct in a disbarment decision,²⁹ but the sanction for getting into trouble in this area is always less severe than losing one's license.

²⁹ See, e.g., *Matter of Zak*, 476 Mass. 1034, 33 Mass. Att'y Disc. R. ____ (2017) (noting the lawyer's lack of understanding of the "seriousness of his misconduct with respect to the [false] radio

B. Suspension

No Massachusetts lawyer has been suspended primarily for a 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 licensed, and that combination of missteps has led to suspensions. For instance, in *Matter of Saletan*,³⁰ the respondent was suspended for six months and a day for practicing law while he was in retired/inactive status. The attorney's letterhead used the term *Esquire*, and his LinkedIn page and résumé claimed he was an attorney. And in *Matter of Airewele*,³¹ 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."³²

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 their services,³³ no Massachusetts lawyer has been suspended for violating the rules governing advertising and solicitation.

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. 372 (2015) (along with serious misappropriation of funds, practice of law in Florida without a license there, with a misleading firm name; disbarment); *Matter of Duerr*, 21 Mass. Att'y Disc. R. 212 (2005) (along with other misconduct, the respondent distributed business cards while administratively suspended, in violation of Rule 7.1); *Matter of Kaigler*, 6 Mass. Att'y Disc. R. 158 (1990) (among much misconduct, including converting client property, the respondent offered free legal services in return for referrals, in violation of DR 2-103(E), the predecessor to Rule 7.2(b)); *Matter of Flak*, 6 Mass. Att'y Disc. R. 118 (1990) (disbarment for serious misconduct, including, as one count, falsely holding himself out as a specialist in federal parole postconviction relief).

³⁰ 29 Mass. Att'y Disc. R. 574 (2013).

³¹ 28 Mass. Att'y Disc. R. 3 (2012).

³² For similar suspensions combined with unauthorized practice, see *Matter of Larkowich*, 31 Mass. Att'y Disc. R. 387, 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).

³³ *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) (converting client funds, assisting criminal conduct, and paying 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).

C. Public Reprimand

Many lawyers have received public reprimands for misconduct related to marketing 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*,³⁴ 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, violating DR 2-103(D), the predecessor to Rule 7.3(a).³⁵ In *Matter of Gordon*,³⁶ the respondent solicited a defendant after the man was arraigned for driving while under the influence. The attorney approached the defendant and his mother in the courthouse hallway to solicit their business and offered to charge a discounted rate. The attorney also sent a letter on the same day offering his legal services and improperly implied that he had contacts in the district attorney's office that could be useful. In *Matter of Mannion*,³⁷ an attorney appeared at a jail to offer representation to an inmate for \$5,000. The disciplinary reports also contain other examples of a public reprimand for in-person solicitation.³⁸

Outside of direct solicitation, few disciplinary matters involving primarily marketing have led to public reprimands. In *Matter of Zachery*,³⁹ mentioned in Section II(E), note 28, an attorney used misleading stationery that identified her practice as a law partnership called "Williams & Zachery." The respondent listed two other attorneys as "of counsel" without any affiliation to or authorization

³⁴ 11 Mass. Att'y Disc. R. 51 (1995).

³⁵ Because the defendant whom the lawyer solicited already had counsel, the board cited 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 Chapter 13 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 Chapter 13, Section IV.

³⁶ 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).

³⁷ 12 Mass. Att'y Disc. R. 265 (1996). In aggravation, the hearing committee found that the lawyer intentionally lied about his actions during the Board of Bar Overseers proceedings.

³⁸ 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).

³⁹ 23 Mass. Att'y Disc. R. 792 (2007).

from them. All of the other public reprimands involving violations of Rules 7.1 through 7.5 have involved other, separate misconduct.⁴⁰

D. Admonition

Most disciplinary matters involving improper marketing lead to admonitions if the matters are not resolved informally through the bar counsel's Attorney and Consumer Assistance Program. Lawyers who make mistakes about describing their practices or their status can probably expect an admonition at most, absent any significant harm to others or some special element of irresponsibility. For example, in Ad. 06-07,⁴¹ the attorney, a sole practitioner, identified his law practice in his letterhead as his name "& Associates." In Ad. 00-23,⁴² 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. 96-41,⁴³ the respondent advertised in the yellow pages as a multiservice domestic relations center made up 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 attending a continuing legal education course designated by the bar counsel.

Several lawyers have received admonitions or private reprimands for improper listings on their stationery and letterhead. In Ad. 96-12,⁴⁴ 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 86-19,⁴⁵ the attorney's law office included on firm letterhead the name of an attorney the firm had

⁴⁰ *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 using his name in misleading advertising; also assisted with unauthorized practice).

⁴¹ 22 Mass. Att'y Disc. R. 856 (2006). *See also* Ad. No. 05-05, 21 Mass. Att'y Disc. R. 672 (2005) (lawyer in solo practice used a firm name that falsely implied he employed associates or worked with partners, in violation of Rule 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).

⁴² 16 Mass. Att'y Disc. R. 482 (2000).

⁴³ 12 Mass. Att'y Disc. R. 667 (1996).

⁴⁴ 12 Mass. Att'y Disc. R. 617 (1996).

⁴⁵ 5 Mass. Att'y Disc. R. 452 (1986).

hoped to hire, but had not. In PR 87-8,⁴⁶ the lawyer listed a nonlawyer on his stationery without designating her actual status.

In two of these matters involving improper stationery or letterhead, the respondents received an admonition for practicing law without a license and marketing themselves as a lawyer. (As noted in Section III, a similar type of misconduct resulted in term suspensions for two lawyers.⁴⁷) In Ad. 98-22,⁴⁸ the attorney, one month before she was admitted to the Massachusetts bar, filed a petition in court on behalf of a client in which she identified herself as an attorney. Her stationery also identified her as a member of the bar. In Ad. 99-43,⁴⁹ the attorney with a “retired” status identified herself as a member of the bar on her letterhead, without noting her retired status. She also represented clients and made appearances in at least two Probate and Family 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. 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 in Section III(C), would typically result in a public reprimand. In each case, however, the solicitation effort was less egregious than those encountered previously. For example, in Ad. 05-25,⁵⁰ an inexperienced lawyer approached a disabled woman in a nursing home to convince her to retain him, but only after receiving a telephone call from her son. In Ad. 99-17,⁵¹ 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.” The bar counsel concluded that this tactic circumvented the rules prohibiting personal solicitation. In PR 93-1,⁵² the respondent attorney sent solicitation letters to prospective clients, which were not labeled as advertising as required by the rules in effect at that time. And in PR 93-35,⁵³ the attorney sent a letter to an individual three days after the wife’s death—the day of her funeral—expressing condolences and offering legal assistance if needed. The

⁴⁶ 5 Mass. Att’y Disc. R. 490 (1987).

⁴⁷ See *Matter of Saletan*, 29 Mass. Att’y Disc. R. 574 (2013), and *Matter of Airewele*, 28 Mass. Att’y Disc. R. 3 (2012), discussed in Section III(B).

⁴⁸ 14 Mass. Att’y Disc. R. 845 (1998).

⁴⁹ 15 Mass. Att’y Disc. R. 729 (1999).

⁵⁰ 21 Mass. Att’y Disc. R. 724 (2005).

⁵¹ 15 Mass. Att’y Disc. R. 678 (1999).

⁵² 9 Mass. Att’y Disc. R. 355 (1993).

⁵³ 9 Mass. Att’y Disc. R. 416 (1993).

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. 09-12,⁵⁴ the attorney claimed to be a specialist in immigration law despite having represented only 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 him to provide inadequate advice to his client.

IV. SPECIAL CONSIDERATIONS FOR USING SOCIAL MEDIA

Lawyers, and not only tech-savvy bar members, use social media all the time. While this book cannot address in depth all of the complicated ethical issues that arise when legal practices use the Internet, the cloud, and social media sites,⁵⁵ a few important points deserve mention:

- *Websites qualify as advertising:* Your law practice’s website is a form of advertising, so everything on the site must comply with Rule 7.2.⁵⁶ Assertions on the site that are not true may subject you to discipline.⁵⁷
- *Social networking sites qualify as advertising:* If you belong to LinkedIn or Facebook, your profile descriptions may qualify as advertising.⁵⁸
- *E-mails are written correspondence:* An e-mail qualifies as a “written communication” under Rule 7.3(c), which regulates certain written solicitations to persons in need of legal services.
- *Tweets may also qualify as written correspondence:* If you use Twitter and send tweets, those messages may qualify as “written communication” under Rule 7.3(c), as previously described in Section II(C).

⁵⁴ 25 Mass. Att’y Disc. R. 674 (2009).

⁵⁵ 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).

⁵⁶ See Constance V. Vecchione, *Tangled Web: Advertising, Solicitation, Ethics, and the Internet*, MASSACHUSETTS BOARD OF BAR OVERSEERS (Jan. 1999), <https://bbopublic.blob.core.windows.net/web/f/web.pdf> (last visited May 4, 2018); Matter of Barros, 29 Mass. Att’y Disc. R. 27 (2013).

⁵⁷ See e.g., *Barros*, 29 Mass. Att’y Disc. R. 27 (2013); Ad. 03-47, 19 Mass. Att’y Disc. R. 609 (2003) (admonition for misleading statements on website about bar membership).

⁵⁸ Kasten, *supra* note 1.

- *Real-time electronic communications are considered in-person communications:* Live chats and other communications with prospective clients in real time can constitute in-person solicitation. Those interactions can also form attorney-client obligations.⁵⁹
- *Be cautious about the unauthorized practice of law:* Chapter 14 discussed the limitations imposed upon a Massachusetts attorney who provides legal services outside of the jurisdiction to which the attorney 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 ensure that any prospective client is one to whom you are permitted to offer help under Rule 5.5.
- *Use disclaimers:* Your e-mail 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 inadvertently creating an attorney-client relationship.⁶⁰ Review your LinkedIn, Facebook, or similar social media presences to determine whether a similar disclaimer might be necessary to ensure that visitors and readers do not misunderstand your intentions.⁶¹
- *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 7.2.⁶² And if you pay someone to endorse your practice, you are likely violating Rule 7.2(b).
- *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 advocate on behalf of a client, you may have created a conflict of interest or undercut your competence on behalf of that client.⁶³
- *Social media is discoverable:* This last message is best directed to your clients, but worth keeping in mind as you conduct your practice.

⁵⁹ See Paul R. Tremblay, *Forming Involuntary Client Relationships*, 52 BOSTON B.J. 12 (Feb. 2008) (describing the risks of offering advice during casual conversations).

⁶⁰ *Id.*

⁶¹ 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).

⁶² Op. 09-10, S.C. Bar. Eth. Adv. Comm., 2009 WL 6850298 (2009).

⁶³ 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).

CHAPTER SIXTEEN

Prosecutor Duties

(Rules 3.8, 4.2, and 8.4(c))

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” (emphasis added).¹ While prosecutors may (and usually do) perform zealously, they must temper their zeal with a concern for the defendant’s rights. “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”² A lawyer acting in that role who fails to honor that responsibility may receive discipline and may be sanctioned by a court. The lawyer’s improper actions may also result in any conviction obtained being reversed. While these consequences may happen from time to time, professional discipline of a lawyer serving as a prosecutor in Massachusetts has been rare, as this chapter explains.

II. THE NATURE OF THE PROSECUTOR’S SPECIAL RESPONSIBILITIES

Rule 3.8 of the *Massachusetts Rules of Professional Conduct* fleshes out the notion that a prosecutor has a special duty as a minister of justice. It articulates limits on and obligations concerning charging decisions, interactions with criminal defendants and their counsel, plea bargains, discovery, publicity, and the wrongly convicted that do not apply to criminal defense counsel or civil practitioners.

¹ *Commonwealth v. Smith*, 387 Mass. 900, 905 (1983). This special duty may apply to all government lawyers. See Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991).

² MASS. R. PROF. C. 3.8 comment [1].

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 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;**

RULE 3.8 (cont'd.)

(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.

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR
(*cont'd.*)

(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 Supreme Judicial Court (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 ABA Model Rule 3.8, outlines the following requirements for prosecutors, which are summarized here, but the complexities of which require careful attention.³

- *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,⁴ but the duty of a prosecutor to honor that law is clear. No Massachusetts lawyer has ever been disciplined for violating this duty.

³ The substantive law governing the duties of prosecutors is vast and intricate, implicating critical rights of defendants and complex constitutional doctrine. This chapter only touches upon the most pertinent ethical duties. For a more in-depth discussion of this area, *see, e.g.*, R. MICHAEL CASSIDY, PROSECUTORIAL 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.).

⁴ *See, e.g.*, *Com. v. Perkins*, 464 Mass. 92 (2013).

- *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.”⁵ 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 the judicial review exception to the ban on seeking pretrial waivers of important rights.⁶
- *Duty to disclose exculpatory evidence:* Rule 3.8(d) augments an obligation that the Due Process Clause of the United States Constitution imposes.⁷ 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.⁸ The contours of this fundamental constitutional obligation are complex and the subject of considerable dispute; those complexities are beyond the scope of this book.⁹
- *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 nonapplicability of the attorney–client privilege to certain aspects of a criminal defense lawyer’s communications with clients engaged in criminal enterprises.¹⁰

⁵ MASS. R. PROF. C. 3.8(c).

⁶ Cf. ABA MODEL RULES OF PROF’L CONDUCT r. 3.8(c) (identical to the Massachusetts rule except for the absence of the “unless” clause).

⁷ 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).

⁸ MASS. R. PROF. C. 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. Disclosure is required when the information tends to negate guilt or mitigates the offense without regard to the anticipated impact of the information.”

⁹ 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).

¹⁰ 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).

The Massachusetts provision, which is stricter than 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.¹¹

- *Duties toward the wrongly convicted:* Rules 3.8(i) and (j) describe the prosecutor’s ethical duties towards those who present evidence that they have been wrongly convicted. Rule 3.8(k) protects the prosecutor who attempts to comply with those obligations in good faith by exercising independent professional judgment, even if that judgment later proves erroneous.

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.¹² At least one commentator has asserted that this ban is more important for a prosecutor than for other lawyers.¹³

B. Discipline for Violating Rule 3.8

Only a handful of reported Massachusetts disciplinary decisions involve Rule 3.8. In *Matter of Nelson*,¹⁴ 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 Board of Bar Overseers (BBO) accepted the parties’ stipulation to a public reprimand.

¹¹ MASS. R. PROF. C. 3.8(e)(1), (2). The ABA’s Model Rule 3.8(e) omits the requirement of prior judicial approval.

¹² See MASS. R. PROF. C. 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.

¹³ See Cavell, *supra* note 3, at § 18.6.1 (“[P]rosecutors 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”).

¹⁴ 25 Mass. Att’y Disc. R. 413 (2009).

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.

In Ad. 00-60,¹⁵ 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 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 laxer standard. In Ad. 80-18,¹⁶ the prosecutor made an improper closing argument that relied upon his personal opinions and knowledge of the case and referred to matters the evidence did not support. 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 one, as bar counsel had requested. 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.¹⁷

III. THE LIMITS ON THE PROSECUTOR’S CONTACT WITH REPRESENTED PERSONS

Rule 4.2 protects represented parties from opposing counsel’s overbearing conduct by requiring the consent of counsel to any communication with the client by opposing counsel. It presents special problems for prosecutors.

¹⁵ 16 Mass. Att’y Disc. R. 540, 540 (2000).

¹⁶ 2 Mass. Att’y Disc. R. 110 (1980).

¹⁷ The former private reprimand sanction was a permanent part of a respondent’s record, unlike today’s admonition, which is vacated after eight years without further discipline. See Chapter 4, Part II(D). That difference might account for a seemingly more lax treatment of the misconduct.

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, which limits a lawyer's contact with a represented person, receives in-depth treatment in Chapter 13. It deserves separate consideration here because applying the rule's limitations to prosecutors has been a controversial topic in the past few decades. While the rule sensibly forbids a lawyer to communicate, directly or through others, with a person represented by counsel regarding the subject matter the attorney seeks to discuss, enforcing it 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 have lawyers.

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 contacting a suspect who has a lawyer may only do so in one of two situations. The first is if the investigation and communication concern a *different* subject matter from that for which the suspect has counsel. That issue has been the subject of some reported decisions, although not in Massachusetts.¹⁸ Because often the investigation concerns matters for which the suspect does not yet know he is a suspect, the prosecutor may

¹⁸ *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").

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 does not work for the prosecutor.¹⁹

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 is "authorized by law" to investigate crimes through covert means.²⁰ If that were so, the ban would not apply. Whether a prosecutor has such authority is much disputed across the country, although the issue has not been addressed in Massachusetts or the First Circuit.²¹ A noteworthy Second Circuit opinion in 1988, *United States v. Hammad*, 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.²²

Most courts have followed the *Hammad* principle,²³ but the controversy it created led the federal government to seek to exempt federal prosecutors from state ethics laws, efforts that in the end were unsuccessful.²⁴ The question of the scope of the "authorized by law" exception remains open for Massachusetts prosecutors.

¹⁹ *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990) (using the term "house counsel").

²⁰ A defendant has a separate Sixth Amendment right not to be questioned outside of 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 commence and before any indictment, so that constitutional right would not play a role in determining the propriety of the contact.

²¹ 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).

²² *Hammad*, 858 F.2d at 839, 840.

²³ See *United States v. Balter*, 91 F.3d 427 (3d Cir. 1995) (collecting cases).

²⁴ 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 21.

B. Discipline for Violating Rule 4.2

As of April 2018, no Massachusetts lawyer, as a prosecutor, has been disciplined for improper contact with a represented person,²⁵ and no reported decisions show a judge granting relief to a defendant for that reason.²⁶

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[.]

²⁵ In *Matter of Carbone*, SJC No. BD-2016-0105, 33 Mass. Att'y Disc. R. ____ (2017), a single justice disbarred an attorney on reciprocal proceedings (*see* Chapter 20) for misconduct of a Pennsylvania prosecutor. The misconduct included contacting a represented party, as well as speaking with impaired witnesses in violation of court order, mentioning matters not in evidence during closing argument, and engaging in threatening conduct toward defendants and defense counsel. The single justice emphasized that disbarment was appropriate for "repeated dishonest conduct, misrepresentation to the court and lack of respect for the court in his capacity as a prosecutor" that was "particularly harmful to the public's confidence in the legal system." It seems clear that the driver for the sanction was not primarily the communication with a represented party.

²⁶ *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

A. The Lessons of Rule 8.4(c) for Prosecutors

Chapter 12 addresses Rule 8.4(c), the provision prohibiting a lawyer from “engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation,”²⁷ but in one respect that rule warrants inclusion here. That discussion noted that lawyers sometimes use testers or undercover agents as part of client representation to investigate suspected wrongdoing. A prosecutor’s use of undercover informants literally involves “deceit” and “misrepresentation,” so the question 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 another state has concluded.²⁸

While neither the BBO nor any Massachusetts court has ever directly addressed that question, the SJC has strongly implied that it would not necessarily consider a prosecutor’s actions involving undercover agents a violation of Rule 8.4(c). In *Matter of Crossen*,²⁹ 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 that supported 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 with certain safeguards in place:

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.³⁰

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).

²⁷ See Chapter 12, Section IV.

²⁸ See *In re* Gatti, 8 P.3d 966 (Or. 2000) (concluding that prosecutors in Oregon violated Rule 8.4(c) with covert investigation using undercover agents). The state of Oregon later amended its rules to invalidate the effect of that decision.

²⁹ *Matter of Crossen*, 450 Mass. 533, 565–66, 24 Mass. Att’y Disc. R. 122, 161–63 (2008).

³⁰ 450 Mass. at 566, 24 Mass. Att’y Disc. R. at 164. In a companion case to *Crossen*, the SJC suggested, by negative implication, that it might 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, 214–16 (2008).

A judge of the Federal District Court of Massachusetts has read *Crossen* in this same approving way.³¹ Therefore, prosecutors in Massachusetts may feel confident that their investigative strategies involving undercover agents or impostors do not subject them to discipline under Rule 8.4(c).

B. Discipline for Violating Rule 8.4(c)

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 predecessor to Rule 8.4(c). In *Matter of Bloom*,³² in a matter the single justice labeled as “outrageous,” the respondent tried to trick two defendants into signing a false confession and also 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.

³¹ *Leysock v. Forest Labs., Inc.*, 2017 WL 1591833 (May 25, 2017) (Saylor, J.) (discussed in Chapter 12, Section IV(C)).

³² 9 Mass. Att’y Disc. R. 23 (1993). The single justice’s opinion does not cite DR 1-102(A)(4), or any rule, but the lawyer’s misconduct presumably implicated that rule.

CHAPTER SEVENTEEN

Special Advocacy Duties (Rules 3.6, 3.7, and 3.9)

I. INTRODUCTION

Chapter 13 discussed the provisions within the *Massachusetts Rules of Professional Conduct* that limit a lawyer's zealous advocacy tactics. This chapter covers Rules 3.6, 3.7, and 3.9, which also apply to the lawyer's role as an advocate.

II. THE NATURE OF THE LAWYER'S SPECIAL ADVOCACY DUTIES

This chapter 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 legal 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 rulemaking or policy-making capacity. The Board of Bar Overseers (BBO) and the Supreme Judicial Court (SJC) have seldom disciplined a lawyer for violating these three rules.

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;

RULE 3.6: TRIAL PUBLICITY (*cont'd.*)

- (4) the scheduling or result of any step in litigation;
- (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 the 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 contaminate the

finder of fact.¹ 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 clients' interests. Rule 3.6, in an effort to balance those two principles, expressly limits what lawyers may say in some settings but also permits lawyers to speak freely when the circumstances ought to permit such speech.

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.² For purposes of this book, therefore, the rule is not a significant player in the disciplinary world, and the discussion about it will be brief. The Office of the Bar Counsel has published a helpful guide for lawyers about the meaning of this rule, and interested readers would benefit from reviewing that column.³

Essentially, Rule 3.6 forbids a lawyer who participates or has participated in a matter from making any extrajudicial statement that the lawyer knows, or should know, "a reasonable person" might expect to be publicly communicated and that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."⁴ Lawyers, therefore, may not make statements to the media, including in social media,⁵ 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 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.⁶

In the most celebrated disciplinary matter involving Rule 3.6, a matter arising out of Nevada that reached the United States Supreme Court, the original

¹ Commonwealth v. Morales, 440 Mass. 536, 540–42 (2003).

² 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).

³ See Arnold R. Rosenfeld, *Spin Control and the Ethical Rules: When the Press Comes Knocking, Should You Be Talking?* (Dec. 1998), BOARD OF BAR OVERSEERS, <https://bbopublic.blob.core.windows.net/web/f/spin.pdf>.

⁴ MASS. R. PROF. C. 3.6(a).

⁵ See Michael E. Getnick, *Social Media: The Good, the Bad and the Ugly*, 81 N.Y. ST. B.J. 5, 5 (2009) (ABA Model Rule 3.6 applies equally to blogs and social networking sites just as it does to traditional media outlets).

⁶ MASS. R. PROF. C. 3.6 comment [5].

sanction for the lawyer's prejudicial statements was a private reprimand.⁷ One commentator expressed some dismay at the bar counsel's and the BBO's lack of attention 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 lawyers faced with the glare of media lights and cameras and the presence of reporters and recorders.⁸

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 Violating the Rule

On occasion, a lawyer representing a client in litigation has personal knowledge of matters in dispute in the litigation. For example, in a lawsuit for breach

⁷ *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.

⁸ GILDA TUONI RUSSELL, MASSACHUSETTS PROFESSIONAL RESPONSIBILITY § 36.04 (2003).

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 contract terms may be relevant to resolving the claims. If the lawyer serves as both trial counsel and a witness for the 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, a lawyer who is likely to be called as a witness in a trial should 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 jury trials. The rule offers three exceptions to the presumptive ban: (1) when the lawyer testifies about uncontested matters; (2) when the lawyer testifies about the nature and value of the legal services provided; and, most importantly, (3) when disqualifying the lawyer “would work substantial hardship on the client.”⁹

The rationales for this rule are several and not always consistent.¹⁰ Some claim that Rule 3.7 protects the opposing party who needs to cross-examine the testifying lawyer. This claim asserts that a party gains an advantage by having the lawyer serve as a witness, and the other side a disadvantage in attacking the lawyer who is 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 the duty as a witness to offer undistorted, truthful testimony and the 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 for the fact-finder to believe those and other facts. While all three considerations have force, the choice of which one justifies the rule matters, because the question of whether to permit a waiver of the rule calls 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 chooses. If the rule benefits 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.

⁹ MASS. R. PROF. C. 3.7(a)(1)–(3).

¹⁰ 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).

The SJC has agreed that the rule is primarily to prevent jury confusion¹¹ but also to protect the lawyer's client.¹² Courts are also concerned that opposing counsel may use Rule 3.7 strategically to disqualify a law firm, an approach 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), the predecessors to Rule 3.7, are far more common than lawyer discipline for violating the rules.¹³

Practice Tip

Lawyers who are disciplined for violating Rule 3.7 often choose to continue to represent a client rather than withdraw from representation in order 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*,¹⁴ the respondent was suspended for six months for multiple counts of misconduct, one of which was violating Rule 3.7(a). The attorney, who had begun a sexual relationship with a woman while representing her in a divorce action, accompanied the woman when she unlawfully occupied the marital home while the husband was out of the country. The attorney

¹¹ 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))).

¹² *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))).

¹³ At least twenty-five Massachusetts court decisions cataloged on Westlaw refer to Rule 3.7, and more than half of those involve a question of disqualifying a lawyer. More than twenty reported cases refer to DR 5-101(B) or 5-102(A). The superior court rules limit a lawyer's freedom to testify in a matter in which the lawyer serves as trial counsel, so this matter is more than an ethical rule. See MASS. SUPER. 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.").

¹⁴ 21 Mass. Att'y Disc. R. 391 (2005).

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*,¹⁵ the respondent represented a party at trial despite an obvious conflict of interest. He sought, unsuccessfully, to rely on Rule 3.7 in proposing that he did not have to withdraw as counsel until it was necessary for him to serve as a witness.

Other disciplinary matters arising from this kind of misconduct occurred under DR 5-101(B) and resulted in either a public or private reprimand. In *Matter of Carroll*,¹⁶ an attorney received a public reprimand for violating DR 5-101(B) when she represented her nephew in appointing him 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 ignored that she was an heir-at-law and, therefore, had a conflict of interest. And in *Matter of Hurley*,¹⁷ an attorney received a public reprimand for violating this obligation as well as facing 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 murder of a police officer. She accompanied her client to the police station, where two detectives interviewed him. When a detective later testified to a more damaging version of that interview at trial, the lawyer did not testify to impeach the detective. The board concluded that she should not have represented the client at the trial and in doing so violated DR 5-101(B).¹⁸

The remaining discipline for violating DR 5-101(B) or DR 5-102(A) has been private reprimands. In PR 90-39,¹⁹ 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 the lawyer would

¹⁵ 31 Mass. Att'y Disc. R. 722 (2015) (public reprimand).

¹⁶ 15 Mass. Att'y Disc. R. 105 (1999).

¹⁷ 17 Mass. Att'y Disc. R. 315 (2001).

¹⁸ The BBO opinion relied upon DR 5-102(A), which addressed the need to withdraw when a lawyer's testimony becomes necessary.

¹⁹ 7 Mass. Att'y Disc. R. 449 (1990).

have otherwise received a public reprimand. And in PR 88-19,²⁰ the attorney failed to withdraw from representing a client when he knew he would be called as a witness and also engaged in other misconduct, including attempting to acquire a waiver of liability for his malpractice from a former client.

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 occasionally advocate for those clients before legislative panels, regulatory agencies, and other rulemaking bodies, but not in an adjudicative function. Rule 3.9 addresses a lawyer's obligations in those settings and essentially has 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, Rule 3.9 confirms, more by implication than by direct language, that when advocating in a nonadjudicative proceeding a lawyer is not bound by many of the same restrictions that must be honored before a tribunal. The rule lists the obligations that the lawyer must honor, which are obvious: those that prohibit false evidence, obstructing justice, and seeking to influence decision-makers by unlawful means. A comment to Rule 3.9 clarifies that, in most settings, the restriction against ex parte contact with those before whom the lawyer advocates does not apply to nonadjudicative proceedings.²¹ The rule also confirms, again by implication, that a lawyer appearing in this role is *not* prohibited from making frivolous arguments.²² Rule 3.9 has not been the source of discipline in Massachusetts.

²⁰ 5 Mass. Att'y Disc. R. 560 (1988).

²¹ MASS. R. PROF. C. 3.9 comment [4].

²² ABA, ANNOTATED MODEL RULES OF PROF'L CONDUCT § 3.9 (8th ed. 2015).

PART IV

Mitigating and Aggravating Factors

CHAPTER EIGHTEEN

Mitigating and Aggravating Factors

I. INTRODUCTION

A lawyer who engages in misconduct that violates the *Massachusetts Rules of Professional Conduct* will receive an appropriate sanction, taking into account the nature of the misconduct and the factors described in Part III. The sanction imposed on 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 Board of Bar Overseers (BBO) and the Supreme Judicial Court (SJC) must, however, consider mitigating and aggravating factors in assessing the severity of the sanction imposed.² This chapter describes the factors that may mitigate a lawyer’s misconduct and, therefore, reduce the sanction, or aggravate it and increase the sanction.

This chapter first describes factors that may mitigate a sanction, along with those that, according to the SJC, should not be given significant mitigating weight. It then describes the considerations that may serve as aggravating factors. Finally, the chapter describes the necessary steps for maintaining the ability to introduce evidence of such factors in a disciplinary hearing.

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).

You Should Know

How successfully asserting a mitigating or aggravating factor affects the ultimate sanction depends on the circumstances of the lawyer's misconduct. Except with suspensions, a successful claim typically changes the sanction by one "step," that is, a presumptive admonition typically ends up as a public reprimand if aggravation is shown, while a presumptive public reprimand becomes an admonition if mitigation is proven. With suspensions, at times the aggravation or mitigation changes the suspension length; at other times a presumptive suspension may be stayed or turned 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 consider appropriate mitigating evidence if properly presented at a hearing, with the respondent bearing the burden of proving any mitigating factors.⁴ Not all explanations respondent lawyers offer will excuse or diminish their misconduct. This section reviews what the SJC has termed "typical" mitigating factors—the circumstances that will probably *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

A respondent who has committed misconduct and faces a disciplinary sanction must understand what facts, if proven, can lessen the likely sanction. Before

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 Goldberg*, 434 Mass. 1022, 1023, 17 Mass. Att'y Disc. R. 246 (2001) ("the mitigating circumstances warrant[] departure from the presumptive sanction").

⁴ *Matter of Dodd*, 21 Mass. Att'y Disc. R. 196, 209–10 (2005).

this chapter addresses that important topic, however, it first discusses considerations that the SJC has stated usually do not serve as mitigation.⁵

You Should Know

The SJC has used the term “typical” to describe mitigating factors that the Court ordinarily does not consider relevant or persuasive in reducing a sanction. As the following discussion shows, however, typical factors do play a role in determining the sanction at times, so respondents should raise them if a good-faith basis for doing so exists.

The SJC has identified certain “typical” mitigating factors that usually do not 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 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 [offered by the respondent] as “typical” mitigating circumstances’ that, while relevant, do not affect the presumptive sanction.”⁷

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)).

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)).

The Court then stated that “typical mitigating evidence generally [is] not given substantial weight.”⁸

The following typical mitigating considerations that the SJC or the board rejected as a basis for a lesser sanction 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 does not serve as mitigation because it is typical.¹¹ On occasion, though, a report cites a lawyer’s performance of pro bono services as a favorable factor 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

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), *aff’d*, 440 Mass. 1023, 19 Mass. Att’y Disc. R. 121 (2003).

¹¹ *See, e.g.*, *Matter of Dasent*, 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).

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 defense lawyer who regularly represented low-income defendants, but the single justice deemed that fact “typical.”

Cooperation with the 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, since respondents are required to cooperate with the bar counsel’s investigation, doing so does not entitle one to any extra credit.¹⁸

However, extraordinary cooperation with and assistance to the bar counsel may mitigate a presumptive sanction in some instances. In *Matter of Scola*, the attorney unintentionally mismanaged his Interest on Lawyers Trust Accounts (IOLTA), leading to his using some client funds to cover other client obligations. The hearing committee recommended a one-year suspension. The board imposed a public reprimand, relying on mitigating factors, including 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

¹⁴ See, e.g., *Matter of Osagiede*, 24 Mass. Att’y Disc. R. 523 (2008), *aff’d* 453 Mass. 1001, 25 Mass. Att’y Disc. R. 478 (2009) (devoting his practice to working 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).

¹⁶ 29 Mass. Att’y Disc. R. 65, 68 (2013).

¹⁷ 429 Mass. 1013, 1014 n.5, 15 Mass. Att’y Disc. R. 170, 172 (1999). See also Ad. 02-12, 18 Mass. Att’y Disc. R. 631 (2002).

¹⁸ See MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT r. 4:01 §§ 3(1) (b)–(d), (5) [hereinafter SJC Rule] (failure to cooperate is grounds for discipline).

¹⁹ 26 Mass. Att’y Disc. R. 568, 574 (2010).

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 Section III below shows, prior discipline usually serves 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 of the misconduct does not justify a departure from the standard discipline. For example, in *Matter of Dragon*,²³ the SJC rejected a lawyer’s claim 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 received criminal punishment for the same offense, or an argument that the attorney has otherwise received punishment for this 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 negatively affect a lawyer’s career, that harm is not treated as a mitigating factor. 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

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).

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 Nickerson*, 422 Mass. 333, 337, 12 Mass. Att’y Disc. R. 367, 375 (1996) (quoting *Matter of Keenan*, 314 Mass. 544, 547 (1943)).

²⁶ *Matter of Luongo*, 416 Mass. 308, 311, 9 Mass. Att’y Disc. R. 199, 203 (1993); see also *Matter of Dawkins*, 432 Mass. 1009, 1012 (2000) (rescript).

Absence of aggravating factors: The absence of factors in aggravation is not a basis for mitigating 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 does not give significant mitigating weight did not stop 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., generally deterring bar members, 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” for those mitigating factors that may reduce an otherwise appropriate sanction.²⁹ The principle underlying a special mitigating consideration is that it shows that the lawyer who committed misconduct acted unintentionally, 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 aggravating factor, such as harm, might not by itself be mitigating, but the attorney could use this to argue for a less severe sanction than that imposed for violating 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 for the circumstances.³⁰

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 (“[w]e emphasize the term ‘special,’ since it is apparent that ‘typical’ mitigating circumstances have not diverted the Justices from the imposition of disbarment or suspension”).

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).

Practice Tip

To serve as a special mitigating factor, the respondent lawyer must allege the favorable or ameliorating circumstances in the answer to the petition, provide proof by competent evidence at the hearing, and (perhaps most critically important) demonstrate that the factor is causally connected to the misconduct.

The categories of special mitigating factors are limited and do not always achieve the goal the respondent intended. But respondents need to understand them and incorporate them into a strategic defense plan. The following mitigation arguments have, on occasion, reduced a sanction from its presumptive, or typical, level to something more favorable for the respondent.

Inexperience: In appropriate circumstances, an inexperienced attorney's mistake may result in lesser discipline if the inexperience helps explain the lawyer's error. This factor typically carries the 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 commanded 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

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).

Self-reporting: A lawyer's proactive, voluntary report of misconduct to the bar counsel 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 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 the lawyer’s family is suffering from extraordinary stress or 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

³⁴ 448 Mass. 1007, 23 Mass. Att’y Disc. R. 162 (2007).

³⁵ 426 Mass. 183, 188, 13 Mass. Att’y Disc. R. 679 (1997).

³⁶ 21 Mass. Att’y Disc. R. 196, 209 (2005).

³⁷ 15 Mass. Att’y Disc. R. 255 (1999) (thirty-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).

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 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

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).

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, 446 (2004) (respondent's "depression and financial situation continued to deteriorate" despite treatment efforts; that condition served as mitigation).

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 the single justice imposed, it did not achieve the mitigation the respondent sought.⁴⁵

In *Matter of Balliro*,⁴⁶ a lawyer who falsely testified 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 for his intentional misconduct involving fabricating court documents. The single justice accepted that factor as it related to his neglect of client matters but did not credit that excuse.

Of course, a respondent who alleges psychological problems as a basis for mitigation must offer competent evidence of that condition at the hearing, usually including 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 circumstances such as depression might be less than compelling where it has been proven that the respondent engaged in intentional and systematic misconduct.⁴⁹

Addiction: Addiction is, of course, an illness, but that medical condition receives different treatment from other forms of mental or physical illness when raised as a factor in mitigation. The fact that a lawyer suffers from drug or alcohol addiction might serve as a mitigating factor, but the results of the cases addressing this factor are mixed. In *Matter of Sterritt*,⁵⁰ after a respondent neglected several matters, the single justice accepted a stipulated suspension for a year and a day. The report noted, in mitigation, that the neglect resulted from the attorney's severe alcoholism. His achieving sobriety after contact from the

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).

⁵⁰ 17 Mass. Att'y Disc. R. 542 (2001). See also *Matter of Morgan*, 17 Mass. Att'y Disc. R. 437 (2001) (year-and-a-day suspension for numerous instances of neglect; in mitigation, attorney treated for anxiety and severe depression).

bar counsel also served as a favorable fact. In *Matter of Epstein*,⁵¹ the lawyer's addiction to painkillers served as a mitigating factor to explain the misconduct.

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 client funds. His use of cocaine was rejected as a mitigating factor. In the more recent report of *Matter of Morgan*,⁵⁴ the attorney's alcoholism was not a mitigating factor because she had not sought treatment for it.

In both *Hull* and *Collins*, the Court emphasized the respondents' significant and successful rehabilitation efforts as favorable. Absent such efforts, addiction is unlikely to serve as a mitigating factor.

You Should Know

A respondent who relies on mental illness, including addiction, as a mitigating factor must establish, at a minimum, three things:

1. The condition asserted;
2. That the condition affected the actions constituting the misconduct; and
3. Successful treatment for the condition.

The respondent must be prepared to disclose all relevant medical records to the bar counsel.

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 (1990) (alcoholism, even if proven, should not serve as mitigation in cases of misappropriation of client funds).

⁵³ 6 Mass. Att'y Disc. R. 152, 153 (1990).

⁵⁴ 20 Mass. Att'y Disc. R. 428 (2004).

Restitution: Restitution to the person or organization a lawyer misappropriated funds from, or otherwise caused financial harm, is always helpful, because failure to make restitution is a well-accepted aggravating factor.⁵⁵ On some occasions, restitution is identified as a special mitigating factor,⁵⁶ but making restitution does not serve as a special mitigating factor if the restitution occurs because of a client complaint 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 the bar counsel’s involvement, served to justify a thirty-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]ecovery 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

⁵⁵ See *infra* Section III.

⁵⁶ See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT r. 10, Commentary (AM. BAR ASS’N 2002) (“timely good faith effort to make restitution or to rectify consequences” is considered as matter in mitigation); MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS § 9.3(d) (AM. BAR ASS’N 1992) [hereinafter MODEL STANDARDS] (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 (1991); *Matter of the Discipline of an Attorney (“Three Attorneys”)*, 392 Mass. 827, 836–37, 4 Mass. Att’y Disc. R. 155, 166–67 (1984); *Matter of Schoepfer*, 426 Mass. 183, 187–88, 13 Mass. Att’y Disc. R. 679, 685–86 (1997).

⁵⁹ 14 Mass. Att’y Disc. R. 74, 88 (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 MODEL STANDARDS, *supra* note 56, at § 9.4 (a) (“forced or compelled restitution” should not be considered as either aggravating or mitigating factor).

carrier does not likely qualify as a mitigating factor but it may affect the degree of harm the lawyer's misconduct caused.

Practice Tips

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 the bar counsel commenced the investigation in this case."

Regardless of the kind of harm the lawyer's misconduct 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 through compensation, no matter the source.

Delay in the disciplinary hearing process: Significant delay in the bar counsel's pursuit of the disciplinary process may be considered in mitigation, but only if the respondent can show the delay caused substantial prejudice. 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

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 undue delay did not succeed, the Court implied that the sanction imposed was mitigated by a substantial delay that interfered with his

⁶³ 22 Mass. Att'y Disc. R. 443 (2006).

⁶⁴ *Matter of Kerlinsky*, 406 Mass. 67, 76 n.8, 6 Mass. Att'y Disc. R. 172 (1989), *cert. denied*, 498 U.S. 1027 (1991).

⁶⁵ *Matter of Grossman*, 448 Mass. 151, 152, 23 Mass. Att'y Disc. R. 242, 244 (2007).

⁶⁶ 406 Mass. 67, 76 n.8 (1989), *cert. denied*, 498 U.S. 1027 (1991).

ability to obtain witness testimony. In *Matter of Perrone*,⁶⁷ the special hearing officer's report insisted that he did not apply mitigating factors in determining the sanction but did note the "unexplained" eight-year delay in the proceedings and the harm that delay caused the attorney's career. The report describes 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

If a delay in prosecuting a disciplinary matter makes it difficult for the respondent to obtain evidence or witnesses to assist with the defense, the respondent should bring that fact to the hearing committee's or hearing officer's attention, either as a basis for mitigation or as a factor in determining whether the bar counsel has met the burden of proof.⁷⁰

III. AGGRAVATING FACTORS

In determining an appropriate sanction for a lawyer who has committed misconduct, the board and the SJC consider aggravating circumstances, which, if present, contribute to a more serious level of discipline or diminish the effect

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), *aff'd*, 449 Mass. 154, 23 Mass. Att'y Disc. R. 443 (2007) (same).

⁷⁰ In a disciplinary proceeding that has been sealed and, therefore, cannot be cited, the board memorandum noted that the 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."

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 employs a “step” approach, where each successive instance of discipline leads to the next sanction level.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 of multiple counts of misconduct on a sanction. Just as it is proper to increase the sanction because of prior discipline, it is proper for a sanction based on the respondent’s 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

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).

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”).

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 failing 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 presenting 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 the intent to deceive.⁸⁰

Presenting false testimony at a disciplinary hearing or being untruthful to the bar counsel during its investigation is an aggravating factor, even though the 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 simply 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 facing criminal charges. In imposing a three-year suspension, the SJC noted as aggravating factors that the attorney’s conduct, which also appeared to be his common method of practice, included “calculated corruption” that “repeatedly reflect[ed] complete disregard, if not utter contempt, for the fundamental ethical obligations of an officer of the court” and involved his client in “premeditat[ed] and deliberate[ed]” misconduct. Similarly, in *Matter of Aufiero*,⁸⁴ the attorney received a two-

⁷⁷ 450 Mass. 533, 580, 24 Mass. Att’y Disc. R. 122, 179 (2008) (quoting the hearing report).

⁷⁸ 442 Mass. 285, 289–90, 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 Eisenhauer*, 426 Mass. 448, 455–56, 14 Mass. Att’y 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).

⁸⁴ 13 Mass. Att’y Disc. R. 6, 25 (1997).

year suspension after the board found that he deliberately continued his false statements “for years” after his initial attempts to cover up his actions.

A lawyer’s motive is also relevant in determining the appropriate sanction,⁸⁵ with a selfish motive being 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 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 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

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, 745–46, 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).

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 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. The choice between those two sanctions usually turns on whether the lawyer made efforts at restitution.⁹⁸ Failure to make restitution, therefore, serves 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 By this reasoning, failure to offer or to attempt restitution might be evidence that the attorney lacks appreciation for legal professional obligations or refuses to acknowledge the wrongfulness of the misconduct, another factor often cited in aggravation.¹⁰²

⁹⁴ 447 Mass. 345, 354, 22 Mass. Att’y Disc. R. 513 (2006).

⁹⁵ 16 Mass. Att’y Disc. R. 339, 345 (2000).

⁹⁶ 30 Mass. Att’y Disc. R. 155, 156 (2014). See also *Matter of Cammarano*, 29 Mass. Att’y Disc. R. 82 (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, 24 Mass. Att’y Disc. R. 122 (2008) (harm caused to a judicial clerk).

⁹⁸ *Matter of Schoepfer*, 426 Mass. 183, 187–88, 13 Mass. Att’y Disc. R. 679, 685–86 (1997).

⁹⁹ See *Matter of Bryan*, 411 Mass. 288, 292, 7 Mass. Att’y Disc. R. 24, 29 (1991).

¹⁰⁰ 29 Mass. Att’y Disc. R. 507, 519–20 (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, 125–26 (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); MODEL STANDARDS *supra* note 56, at § 9.22(g).

Experience in the field: Having a long career, even a discipline-free one, 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 was 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 lawyer’s long experience influencing the board. 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.

Failure to cooperate in the disciplinary process: Attorneys subject to discipline in Massachusetts are required to cooperate with the bar counsel’s investigation of complaints against them (or other attorneys), and failure to do so is itself an act of professional misconduct subject to discipline.¹⁰⁸ In addition, an attorney’s failure to cooperate with the bar counsel’s investigation is often cited as aggravating 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 include considering 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

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).

¹⁰⁸ SJC 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, 338–39, 19 Mass. Att’y Disc. R. 141, 158 (2003).

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 the persistence of misconduct after the bar counsel commences 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, respondents must allege the facts supporting mitigation in their answers (or, as often happens, in an amended answer). Otherwise, the lawyer is barred from offering such evidence.¹¹⁶ The *Rules of the Board of Bar Overseers* states 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

If the respondent alleges such facts, the board rules imply that the lawyer is also required to request a hearing on the mitigation claims. As noted, the board rules state that the respondent in the answer “may request that a hearing be held on the issue of mitigation.”¹¹⁸ The board permits respondents to offer at the hearing evidence of facts alleged in the answer relating to mitigation even if the respondent did not expressly request a hearing on the mitigation issue. If the

¹¹² *Matter of Griffith*, 440 Mass. 500, 508–10, 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 RULES OF THE BOARD OF BAR OVERSEERS § 3.15(f), BOARD OF BAR OVERSEERS, <https://bbopublic.blob.core.windows.net/web/f/BBORules.pdf>.

¹¹⁸ *Id.*

respondent admits the facts alleged in the petition but includes claims of mitigation in the answer, the hearing then addresses only those mitigation matters (along with any aggravating factors the bar counsel raises).¹¹⁹

In *Matter of Patch*,¹²⁰ the SJC refused to consider the respondent's psychological condition as mitigation because he did not include it 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 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 the bar counsel ordinarily permits a respondent to file an amended answer if done at a time that does not cause prejudice to the proceedings. A respondent who fails to allege mitigating facts in the original answer should consider seeking leave to file an amended answer if the respondent later realizes that mitigation should be raised.¹²³

2. Evidentiary Requirements

A respondent who chooses to present evidence in mitigation has the burden of proof to establish the facts supporting a departure from the standard discipline. The respondent must prove both the facts on which the mitigation claim is based and the causal connection between that evidence and the misconduct. For example, in defending against a claim of lack of diligence, failure to maintain proper communications, or poor record-keeping (none of which includes intentional misconduct), a respondent's alcoholism or drug addiction can account for the missteps and serve as mitigation. Some lawyers have failed

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). Compare *Matter of D'Amato*, 29 Mass. Att'y Disc. R. 159 (2013) (discussed in the text).

¹²³ For a discussion of the process for filing a motion to file an amended answer, see Chapter 6.

to establish that relationship. For instance, in *Matter of (John Arthur) Johnson*,¹²⁴ the lawyer had misappropriated client funds and alleged both a family tragedy and his alcoholism as factors in mitigation. The single justice concluded that those claims did not account for the misconduct and, therefore, did not serve as mitigating factors.¹²⁵ At other times, respondents sought to introduce evidence of a psychological or medical condition to explain the misconduct but failed to offer reliable evidence proving the condition's existence, and, as a result, their efforts to establish mitigation failed.¹²⁶

While the hearing committee must decide the facts regarding possible mitigation, 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 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 nor the BBO rules governing the disciplinary process explicitly address the bar counsel's responsibilities for alleging aggravating circumstances.

¹²⁴ 444 Mass. 1002, 21 Mass. Att'y Disc. R. 355 (2005).

¹²⁵ See also *Matter of (Gale Rosalyn) Johnson*, 452 Mass. 1010, 1011 (2008) (rescript) ("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," SJC Rule 4:01 § 8(5), and the power of the single justice to review whether the board's findings are supported by substantial evidence, SJC Rule 4:01 § (6), and to review de novo the board's recommendation concerning the sanction. *Matter of the Discipline of an Attorney*, 448 Mass. 819, 829–30 (2007).

In practice, the bar counsel often includes in the petition for discipline facts in aggravation, except prior discipline. Typically, however, the aggravating factors arise either from the respondent's disciplinary history and are, 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, or experience). As a result, in contrast to respondents' efforts to pursue mitigation claims, no disciplinary report appears in which the 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, on basic fairness principles, the bar counsel may not introduce a new issue about which the respondent has no knowledge or is unable to confront.

PART V

The Posthearing Process

CHAPTER NINETEEN

Posthearing Review

I. INTRODUCTION

Chapter 6 described the process by which the Board of Bar Overseers (BBO), through hearing committees, special hearing officers, or hearing panels, conducts adjudicatory hearings to determine whether a respondent lawyer has committed misconduct and, if so, what sanction should result. The fact-finder's resulting report is informed by the posthearing briefs the parties submit. The board must adopt or amend the findings and conclusions in the committee, officer, or panel's report. 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 are entered. The board reviews every disciplinary hearing report, even if no appeal is made; some reports are further reviewed by a single justice of the Supreme Judicial Court (SJC), and the full SJC reviews some of the resulting orders. This chapter describes each of the processes and offers 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 hearing

¹ For the sake of convenience, the discussion here refers 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, this chapter expressly notes those differences.

committee's findings and recommendation, 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 reviews de novo the recommended sanction, although in practice the board gives some deference to the hearing committee's recommendation. 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 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 impose, 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

² RULES OF THE BOARD OF BAR OVERSEERS § 3.53 [hereinafter BBO Rules]; 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"), and see *Matter of Strauss*, 479 Mass. 294, 298–99, 33 Mass. Att'y Disc. R. ____ (2018) (reiterating the "sole judge" and "irreconcilable inconsistency" standards of review).

³ BBO Rules § 3.53.

⁴ MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT r. 4:01 § 8(6) [hereinafter SJC Rule].

⁵ MASS. GEN. LAWS ch. 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, 96 (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*, 27 Mass. Att'y Disc. R. 92, 97 (2011) (quoting *Matter of Jackman*, 444 Mass. 1013, 1013 (2005)).

deference but, as noted, on occasion orders a sanction different from the board recommendation.⁹

III. THE REVIEW PROCESS WHEN NEITHER PARTY APPEALS

As described in Chapter 6, after the adjudicatory proceedings close, the hearing committee must issue its hearing report.¹⁰ If neither party files an objection to that report, it does not mean that the committee's decision is final. The board must review every hearing report even if no appeal is made.¹¹ If no appeal is filed within twenty days of the report being served on the parties, the board reviews the matter.¹² Initially, the parties need do nothing except await the board's decision. Whether or not an appeal is filed, 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 it 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 issues its own memorandum after its review. In many instances where neither party appeals, the board adopts 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 votes 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 a pleading known as an Information with the clerk of the SJC for Suffolk County,¹⁵ because only the SJC may impose those sanctions.¹⁶ Section VI describes the procedure that follows the filing of an Information.

⁹ See *supra* notes 6–7.

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, and see *supra*, note 2.

¹⁴ BBO Rules § 3.56(a).

¹⁵ BBO Rules § 3.58.

¹⁶ SJC Rule 4:01 §§ 5(3)(g), 8(6).

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 had appealed. The board cannot, and will not, unilaterally change a hearing committee decision without giving the parties the opportunity to be heard.

Where 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 the board rejects their stipulation, it is void. Such a stipulation is referred to as “collapsible.” If the stipulation is collapsible, and the board does not obtain a more satisfactory stipulation from the parties, the board rejects the proposal. In that situation, the Office of the Bar Counsel then pursues formal disciplinary proceedings. In other instances, the parties agree that the stipulation is binding as to the facts and disciplinary violations, even if the board rejects the stipulated sanction (a “noncollapsible” or “binding” stipulation). If the board rejects a binding stipulation, it will then recommend or impose its own sanction based on the facts agreed to by the parties. To the respondent, the strategic advantage of a non-collapsible stipulation is that bar counsel will not oppose the respondent before the board or the single justice.¹⁹ The disadvantage is that neither the respondent nor bar counsel may challenge the agreed-upon facts, and the ultimate sanction is left to the board or the Supreme Judicial Court.

IV. THE REVIEW PROCESS WHEN A PARTY APPEALS

A. The Procedural Steps for Appeal to the Board

A party seeking to appeal the hearing committee report’s findings, conclusions, or proposed sanction must take the following steps to participate in the board’s review of the report.²⁰ (Remember, the board always reviews the report on its own and it allows briefing if it does not accept an unappealed report; the

¹⁷ BBO Rules § 3.52.

¹⁸ Note that the BBO Rule 3.52 process described previously, where the board does not affirm a hearing report, is different from when the parties propose a disposition by stipulation to the board. For further discussion of the stipulation process, see Chapter 5, Section IV.

¹⁹ See *Matter of Ring*, 427 Mass. 186 (1998) (the 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). Cf. *Matter of Neitlich*, 413 Mass. 416 (1992) (respondent unsuccessfully sought to circumvent a stipulation with the bar counsel accepting findings of a hearing committee).

²⁰ The procedure described here is established in BBO Rules § 3.50.

steps described here allow the dissatisfied party to participate in that review process at the outset and to persuade the board before it forms an opinion on the matter 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 deadline, and all briefing deadlines described here, 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 hearing committee's findings and recommendations must act promptly to prepare not just a simple notice of appeal, but a full brief, within twenty days of receiving the committee report. The board generally allows 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 is 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 has the discretion to proceed without a hearing, but typically when a party requests oral argument, the board allows it.

²¹ BBO Rules § 3.50(a).

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” (emphasis added). BBO Rules § 3.50(a). The board has never imposed a shorter deadline on a party.

²³ BBO Rules § 3.50(a).

²⁴ *Id.* See also the board's new policy concerning appellate briefs, <https://bbopublic.blob.core.windows.net/web/f/bbopolicy.pdf> (last visited May 17, 2018).

²⁵ BBO Rules § 3.50(b).

5. If neither party files a brief within twenty days of service of the committee report, the parties will have waived the opportunity to participate at that stage 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 hears the matter as a full board.²⁷
7. If a party requests oral argument (and if the board grants the request), the board schedules a hearing. Otherwise, the board reviews the full record and the briefs and issues its vote, and typically, a memorandum of decision. While the board has the discretion to remand the matter to the hearing committee for further evidence, it seldom does so.

B. The Content and Form of the Briefs

A brief filed by an appealing party must include the following:²⁸

- A short statement of the case
- A summary of the basic position of the party filing the brief
- The grounds on which the appeal rests
- Argument in support of the appeal, with references to the record and to legal authority

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 the 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.

A record appendix or other supporting documents are not required because the board has all the exhibits and the transcripts available to the hearing committee. The BBO Rules impose no page limit but the board has adopted a policy

²⁶ BBO Rules § 3.50(c). *But see* § 3.52, discussed in Section III.

²⁷ BBO Rules § 3.50(d). Rule 3.50(d) permits the board to assign the appeal to a three-member panel, but that is not the board's practice.

²⁸ BBO Rules § 3.51(a).

expressing its preference that briefs not exceed thirty pages. The web address where this policy can be found is noted in the previous section.

If a party disagrees with the proposed sanction, the brief must explain the basis for that disagreement and may 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 twenty-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 sufficiently describes it.²⁹

C. The Board's Action on Appeal

After considering the appeal, the board typically issues 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 serves its vote and memorandum 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 SJC for Suffolk County.³¹

V. APPEAL FROM THE BOARD DECISION

If the parties accept the final report and disposition of the board, then either (1) an admonition, a public reprimand, or a dismissal goes into effect through the service of the board's vote and memorandum,³² or (2) the board files an Information to obtain the SJC's approval of a suspension or disbarment.³³

A party who disagrees with the board's recommendation of an admonition, a public reprimand, or a dismissal must seek SJC review of that decision. Otherwise, the decision is 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 that the board file an Information with the SJC.³⁴ That twenty-day time limit is jurisdictional; neither the board nor the

²⁹ BBO Rules § 3.51(b).

³⁰ BBO Rules § 3.56(a).

³¹ BBO Rules § 3.58.

³² BBO Rules §§ 3.55, 3.56(a).

³³ BBO Rules § 3.58.

³⁴ BBO Rules § 3.57(a).

SJC may enlarge the time for filing the demand.³⁵ Upon receipt of the demand, the board files the Information.

After board review, a proposed suspension or disbarment requires no further action by a party at the board level because the board is required to file an Information with the SJC, after which the dissatisfied party, if any, has the opportunity to present its objections to the Court.

VI. THE INFORMATION AND THE PROCEEDING FOLLOWING ITS FILING

Because the SJC has the exclusive authority to impose a suspension or disbarment, the Court reviews every proposed disposition involving those sanctions. The SJC also reviews any other disposition where a party has requested review of the board recommendation. In each instance, the SJC review process begins with the Information document.³⁶ The Information is a pleading that the board presents to the SJC.

A. Filing of an Information

The Information 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 the steps of the proceedings before the board, with dates and references to the record, including the proposed sanction the board approved as well as the costs the board incurred in conducting the proceedings.

Accompanying the Information is “the entire record of [the] proceedings” before the board.³⁷ This 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 party briefs, and the

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 method for calculating 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).

³⁷ BBO Rules § 3.58.

board vote and memorandum, if any. The board files all of this material with the clerk of the SJC for Suffolk County. In doing so, the board notifies the parties of this filing by serving them with a copy of the Information. An example of an Information is appended as Appendix G. The SJC clerk then docket the matter using a special cover sheet designed for discipline cases. An example of the clerk's cover sheet is appended 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 SJC review through the filing of an Information. If a respondent who has received an admonition from the bar counsel that the board has accepted 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 discussed in Section VII of this chapter.

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,³⁸ and a hearing date is set before the single justice. The parties file no further pleadings at this stage and simply await a hearing date.³⁹

The single justice, who has the board-level briefs, may offer the parties the opportunity for oral argument. On occasion, before or after the hearing, one or both parties can submit additional briefs to the court, either their own motion or upon the single justice's request. After the oral argument, the justice either issues a decision or reserves and reports the case to the full SJC for hearing. The single justice may accept the board's recommendation,⁴⁰ reject it and order a different

³⁸ SJC Rule 4:01 § 1(2).

³⁹ 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 accommodate the parties' scheduling needs.

⁴⁰ See, e.g., *Matter of Manoff*, 29 Mass. Att'y Disc. R. 421 (2013) (accepting board's recommendation of public reprimand).

Practice Tips

The clerk for the SJC of 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 nevertheless receives notice of the hearing and may attend and argue. That strategy is hardly recommended. At each successive stage of the proceeding, obtaining a reversal of factual findings becomes more difficult. Also, if a respondent failed to participate in the board proceedings, the single justice will not have a brief in support of the respondent's position, unless the single justice allows such a filing.

sanction or disposition,⁴¹ or remand the matter for further proceedings at the board level.⁴² 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.⁴³

2. *Appeal from the Single Justice Decision*

A party dissatisfied with the single justice's decision (including the bar counsel, the respondent, or the board) may request a full-bench review.⁴⁴ To expedite appeals, the SJC in 2009 issued a standing order (Order Establishing

⁴¹ 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).

⁴² 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).

⁴³ SJC Rule 4:01 § 8(6).

⁴⁴ By comparison, a party in a civil action dissatisfied with the appeals court decision 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.

a Modified Procedure for Appeals in Bar Discipline Cases) governing such appeals. That standing order was replaced in 2015 with SJC Rule 2:23,⁴⁵ which 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 single justice's order*. That filing does not stay the order the single justice issued. The appellant then prepares a record appendix containing copies of all relevant papers that were before the single justice, including, at a minimum:

- Hearing committee report
- Appeal panel report, if any
- Board memorandum
- 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 share the cost of producing the joint record appendix.

Practice Tip

While not addressed in SJC Rule 2:23, parties with good cause may request to supplement the record with material not available before the single justice. While uncommon and not favored, this strategy has succeeded on occasion.

The appellant must also prepare a “preliminary memorandum,” not more than twenty pages double-spaced, with a summary of the argument, supported by citations. In that memorandum, the appellant must demonstrate one or more of the following:

- There has been an error of law or abuse of discretion by the single justice.
- The decision is not supported by substantial evidence.
- The sanction is markedly disparate from the sanctions imposed in other cases involving similar circumstances.
- The decision, for other reasons, will result in a substantial injustice.

⁴⁵ SJC Rule 2:23, effective April 1, 2015. The only difference between the standing order and the new rule is that SJC 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 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 must also serve those papers on the other party to the appeal. The appellee may file a responsive memorandum of the same length as the appellant’s, but only if the Court requests and within twenty days of that request. The appellee who files such a responsive memorandum 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 the court rarely holds a hearing. 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 the principal briefs filed in ordinary appeals, which may be as long as fifty pages.⁴⁶ Reply briefs have the same twenty-page limit as required by the standing order.⁴⁷

VII. REVIEW OF AN ADMONITION THROUGH AN EXPEDITED HEARING

The procedures described in the previous section apply to reviews of all discipline the board imposed or recommended, except, in some instances, for admonitions, which at times trigger a separate review procedure. (The preceding procedures also do not apply in the same way to reviews of board recommendations after hearing a petition for reinstatement. See Chapter 23 for a discussion of reinstatement procedures.)

If the board recommends an admonition after a full hearing and a hearing committee report, that sanction is reviewed under the procedures described in the previous section. By contrast, if the admonition sanction results from the bar counsel’s recommendation and board approval *prior to a petition for discipline being filed*, a different procedure applies. That procedure is known as an expedited hearing.⁴⁸ There is no SJC review of the results of an expedited hearing; an admonition or dismissal resulting from that process, or an order referring the matter to full and formal disciplinary proceedings, is final.

⁴⁶ MASS. R. APP. P. 16(h).

⁴⁷ *Id.*

⁴⁸ SJC Rule 4:01 § 8(4); BBO Rules §§ 2.11–2.12.

You Should Know

The expedited hearing process has rarely been used. The Office of the Bar Counsel reports that, through the middle of 2017, only four such hearings have occurred. In three such cases, the matters were heard within thirty days.

The procedure for an expedited hearing is as follows:

1. After the bar counsel serves the respondent with the admonition (which, in effect, imposes the sanction), the respondent who seeks review of that sanction must, *within fourteen days of the service of the admonition*, file a written demand with the bar counsel that the admonition be vacated and a hearing provided. That deadline is jurisdictional, meaning that the bar counsel or the board cannot extend it, even for good cause.⁴⁹ The written demand must include a “statement of objections” to the factual allegations and the rule violations listed in the admonition, detailing the reasons why the admonition must be rejected and any facts to consider in mitigation.⁵⁰ Failure to identify mitigating factors in the demand pleading prohibits the respondent from offering any such evidence at the hearing.
2. Upon receiving the demand to vacate the admonition, the bar counsel files its admonition summary with the board, along with the respondent’s demand. The board then assigns a special hearing officer (not a hearing committee) to conduct an expedited hearing on the matter. That hearing takes place within thirty days of the bar counsel filing the papers with the board. A later hearing date may be set by agreement or on motion, “for good cause shown.”⁵¹
3. Prior to the expedited hearing, the parties must exchange witness lists, proposed exhibits, and objections, as well as agreed-upon exhibits and

⁴⁹ BBO Rules § 2.12(1). The BBO Rules state that “service [on the respondent] is complete upon mailing,” but a party’s filing occurs on the board’s receipt of the paper to be filed. BBO Rules §§ 3.3, 3.4(c). Therefore, the respondent must ensure that the board receives the written demand no later than fourteen days after the date of the admonition’s service.

⁵⁰ BBO Rules § 2.12(1).

⁵¹ 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 thirty days, but the board interprets it to require that the hearing occur within thirty days.

stipulations, all by dates specified in the notice of hearing. There is no mandatory prehearing conference procedure.⁵² The hearing officer then conducts the hearing in the same way as a disciplinary hearing, described in Chapter 6, except for the following differences.

4. The proceedings and the record are confidential. At the conclusion of the hearing, the parties do not file briefs or requests for findings of fact or conclusions of law.⁵³ The hearing officer issues a report in the same way as a hearing committee after a conventional disciplinary hearing.⁵⁴ The report may recommend dismissal or an admonition, or it may conclude that some discipline more severe than an admonition is warranted and recommend referring the matter for full disciplinary proceedings.⁵⁵
5. A party dissatisfied with the hearing officer's report and recommendation may file an appeal brief, as described previously for disciplinary hearings, but the matter will be decided on the papers.⁵⁶
6. The board's decision after that review (including the decision to refer the matter for full disciplinary proceedings, which proceedings would be subject to the normal path of review) is final. No party may demand that the board file an Information in order to obtain SJC review.⁵⁷

⁵² BBO Rules §§ 2.12(d) (notice of hearing to set dates for the exchange of exhibits, witness lists, etc.), 3.23(a)(1) (excepting expedited hearings from the prehearing conference requirement).

⁵³ BBO Rules §§ 2.12(2)(a), (d), (g).

⁵⁴ SJC Rule 4:01 § 8(4)(a).

⁵⁵ SJC Rule 4:01 § 8(4)(a).

⁵⁶ SJC Rule 4:01 § 8(4)(b). *See* Section IV, *supra*.

⁵⁷ SJC Rule 4:01 § 8(4)(b).

PART VI

Disciplinary Procedures Not Requiring an Evidentiary Hearing

CHAPTER TWENTY

Reciprocal Discipline

I. INTRODUCTION

Many lawyers in Massachusetts are bar members in 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. When lawyers are disciplined in another jurisdiction in which they are licensed to practice law,¹ Massachusetts usually responds reciprocally. This chapter addresses how reciprocity works in the Commonwealth and what lawyers should know about the process. Reciprocal discipline is common in Massachusetts.

II. REPORTING SANCTIONS TO THE BOARD OF BAR OVERSEERS

The Supreme Judicial Court (SJC) rules require every Massachusetts lawyer to report any sanction received from another disciplinary authority or from any tribunal to the Board of Bar Overseers (BBO) and the Office of the Bar Counsel within ten days of the sanction being imposed. Rule 4:01 § 16(6) of the *Massachusetts Rules and Orders of the Supreme Judicial Court* addresses this as follows.

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).

SECTION 16. RECIPROCAL DISCIPLINE

* * *

(6) 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 denied admission to the bar of another jurisdiction, other than for failing the bar examination, must also notify the board and the bar counsel within ten days of the order being issued.³

Failure to report the sanction may serve as an independent basis for discipline.⁴ An important advantage to a lawyer complying with this obligation is that the bar counsel will almost certainly learn of the discipline, either from public reports or through the American Bar Association (ABA) National Lawyer Regulatory Data Bank, a clearinghouse of discipline that the bar counsel regularly monitors.⁵ Once the bar counsel learns of discipline in another jurisdiction, the reciprocal discipline process commences. If the sanction from the other jurisdiction is a suspension, the lawyer typically requests that the Massa-

² MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT r. 4:01 § 16(6) [hereinafter SJC Rule].

³ *Id.* at § 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 full bench of the SJC later overruled the *Burnbaum* suspension sanction and ordered the lawyer disbarred. Matter of Burnbaum, 466 Mass. 1024 (2013).

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.” *National Lawyer Regulatory Data Bank*, AMERICANBAR.ORG, http://www.americanbar.org/groups/professional_responsibility/services/databank.html (last visited May 18, 2018). 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”).

chusetts reciprocal discipline order be issued *nunc pro tunc*, retroactive to the original sanction date in the other jurisdiction.⁶ A lawyer who fails to report the discipline may forfeit the opportunity to obtain *nunc pro tunc* treatment of the Massachusetts discipline.⁷

Practice Tip

Lawyers suspended in another state will typically want the Massachusetts discipline to operate *nunc pro tunc*, to avoid extending the local suspension period due to the reciprocity process. Therefore, lawyers should promptly report a suspension to the board and the bar counsel as well as consider limiting their Massachusetts practice after receiving the other state's suspension order. A retroactive reciprocal suspension order in Massachusetts is easier to accommodate if lawyers act suspended once they report the out-of-state suspension.

III. OUT-OF-STATE DISCIPLINE: PROCEDURES AND STANDARDS

Discipline imposed on a Massachusetts lawyer by another state bar triggers a response by the bar counsel, which differs depending on the sanction level the lawyer receives. This section reviews the process and the differences in the responses based on the discipline imposed.

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 start 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, 652 (2007) (SJC upheld single justice's refusal to make the respondent's suspension retroactive because respondent failed to notify the board and the 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 SJC Rule 4:01 § 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 the bar counsel has notice of that nonpublic sanction, it treats 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, with possible later consequences. If the lawyer is disciplined in the future, the other jurisdiction's private discipline will serve as an aggravating factor, along with the lawyer's failure to report that sanction.

The SJC rules do not allow a Massachusetts lawyer to challenge the validity of an out-of-state private sanction.

B. Public Reprimand

Upon receiving an order from another jurisdiction imposing a public reprimand or its equivalent on a Massachusetts lawyer, the bar counsel notifies the board and the clerk of the SJC. The order is then filed and made public, the same as a public reprimand issued by the board or the Court,⁹ and remains on the lawyer's public record like any other public reprimand.

The SJC rules do not expressly allow a Massachusetts lawyer to challenge the validity of an out-of-state public reprimand.

C. Suspension or Disbarment

Suspensions and disbarments entered in another state are usually treated with similar reciprocal discipline in Massachusetts.

⁸ SJC Rule 4:01 § 16(6).

⁹ SJC Rule 4:01 § 16(4).

1. Procedure for Reciprocal Discipline Involving Suspension or Disbarment

When the bar counsel learns that another jurisdiction has suspended or disbarred a Massachusetts lawyer, it obtains a certified copy of that order (unless the lawyer has properly self-reported and already filed a certified copy of the order with the bar counsel and the board). The bar counsel then submits the certified copy to the clerk of the SJC, along with a petition for reciprocal discipline.

Upon receiving that disciplinary order, the Court issues its own order directing the lawyer to inform the Court, *within thirty days from service of the notice*, of any claim or argument why the Court should not impose identical discipline in Massachusetts.¹⁰ The bar counsel is required to serve this order and notice on the lawyer, which includes delivering a copy of the other jurisdiction’s order.¹¹

If the lawyer does not respond within thirty days, the Court almost always imposes the same suspension or disbarment order in Massachusetts as the other jurisdiction imposed, unless the bar counsel files a pleading with the Court requesting a different sanction. While the SJC rules do not expressly authorize such a filing by the bar counsel, the Court permits it.¹² The Court holds a hearing on the matter, typically before a single justice, before issuing its reciprocal discipline order, unless the parties waive a hearing and agree to an order’s entry.

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 longer than in the first jurisdiction, given the time it takes to process the Massachusetts sanction, *unless* the Massachusetts suspension order is made retroactive to the date of the out-of-state order.

2. 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

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 the bar counsel’s attempt to impose a stricter sanction).

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 imposing discipline in Massachusetts is unwarranted.¹⁴ The judgment of the other jurisdiction carries great, 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

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 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 orders the same discipline as the other jurisdiction:

¹³ SJC Rule 4:01 § 16(3).

¹⁴ *Id.* at § 16(1)(b).

¹⁵ *Id.* at § 16(3).

¹⁶ *Matter of Bailey*, 439 Mass. 134, 136, 19 Mass. Att’y Disc. R. 12, 15 (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, 7 Mass. Att’y Disc. R. 181 (1991).

¹⁸ 411 Mass. at 437, 7 Mass. at 182–83.

¹⁹ 411 Mass. at 450, 7 Mass. at 196.

²⁰ 411 Mass. at 449, 7 Mass. at 175.

²¹ 411 Mass. at 450, 7 Mass. at 196.

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 held that “Rule 4:01, s. 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

If the respondent or the bar counsel can demonstrate that identical discipline would be unfair or inappropriate, then the single justice performs 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 equals, exceeds, or falls short of the discipline imposed in another jurisdiction.”²⁶ As with all

²² SJC Rule § 16(3). The use of the word *may* in the quoted language of the SJC rule is not how the rule is applied. 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, 241–42 (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 756.

²⁴ *Matter of Burnbaum*, 466 Mass. 1024, 1025, 29 Mass. Att’y Disc. R. 72 (2013) (quoting *Matter of Steinberg*, 448 Mass. 1024, 1025, 23 Mass. Att’y Disc. R. 689, 691 (2007); *Matter of Watt*, 430 Mass. 232, 234, 15 Mass. Att’y Disc. R. 624, 626–27 (1999)).

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, 59 (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).

discipline cases, any single justice decision is 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 in some cases greater or lesser sanctions than the original sanction were imposed. Occasionally, the bar counsel supports a lesser sanction. For example, in *Matter of Amaral*,²⁹ the bar counsel argued that the respondent should only receive an indefinite suspension for conduct that led to disbarment in Rhode Island, and the single justice agreed. In *Matter of Watt*, the Court imposed a more severe sanction than the foreign jurisdiction ordered. 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, arguing that the Rhode Island discipline was inadequate, sought an indefinite suspension.³¹ A single justice ordered a two-year suspension and the bar counsel appealed. The SJC affirmed the two-year term suspension.³² The Court confirmed that, while deference is ordinarily shown to other courts' decisions 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 considers the jurisprudence of the other jurisdiction, in comparison to 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 on a lawyer who had been convicted of insurance fraud. After much consideration of the lawyer's misconduct in com-

²⁷ See SJC Rule 2:23 (2015). Until April 1, 2015, SJC Rule 2:23 existed as the SJC's Order Establishing a Modified Procedure for Appeals in Bar Discipline Cases (2009) (see discussion in Chapter 19, Section VI(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, 625 (1999).

³¹ 430 Mass. at 234, 15 Mass. at 626.

³² 430 Mass. at 236, 15 Mass. at 628–29.

³³ 430 Mass. at 234, 15 Mass. at 626.

³⁴ 430 Mass. at 236, 15 Mass. at 629.

³⁵ 23 Mass. Att'y Disc. R. 232 (2007).

parison to previous Massachusetts discipline reports, the single justice imposed a one-year suspension, retroactive to the date of the lawyer's 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 six-month suspension in New Hampshire, with the suspension stayed on certain conditions. A single justice issued an order for reciprocal discipline but stayed the order, providing that the respondent comply 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 failing to report that sanction to the bar counsel or the board led to 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

³⁶ *Id.* note 3 at 237–38.

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 *See* Tunney, 28 Mass. Att'y Disc. R. at 866 (*supra* note 12), 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).

Practice Tip

Reciprocal discipline adheres to a weak presumption of matching the foreign jurisdiction's sanction. But, as the reports show, the bar counsel at times argues for a stiffer sanction, and the respondent sometimes argues for less severe discipline; the Court will 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

D. Disciplinary Resignations

As described in Chapter 21, a lawyer may resign during disciplinary proceedings or investigation, and that resignation has vastly different implications than a lawyer in good standing leaving law through a nondisciplinary resignation.⁴³ If a lawyer submits a disciplinary resignation in another jurisdiction, that action has a reciprocal effect in Massachusetts.

SJC Rule 4:01 § 16(1) makes clear that the Court will issue the same notice to show cause, described previously in Section III(C), 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 gives conclusive effect to the other jurisdiction's judgment in the case of a resignation, especially in jurisdictions where the lawyer need not admit the truth of the allegations against him as a condition of resigning.⁴⁵ In a 2009 opinion of the full SJC, the Court answered those questions.

⁴² *Matter of Pudlo*, 460 Mass. 400, 404, 27 Mass. Att'y Disc. R. 736, 745 (2011) (citations omitted) (quoting *Matter of Alter*, 389 Mass. 153, 156, 3 Mass. Att'y Disc. R. 3, 8 (1983); *Matter of Crossen*, 450 Mass. 533, 574, 24 Mass. Att'y Disc. R. 122, 172 (2008); *Matter of the Discipline of an Attorney*, 392 Mass. 827, 837, 4 Mass. Att'y Disc. R. 155, 166 (1984) ("Three Attorneys").

⁴³ Chapter 21, 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 or that sufficient evidence exists of those facts. *See* SJC Rule 4:01 § 15(1)(c). Not every jurisdiction requires lawyers to make such an admission.

In *Matter of Ngoben*,⁴⁶ the bar counsel sought a reciprocal disbarment order after a lawyer had resigned from practicing law in Connecticut, without admitting to misconduct. The lawyer contended that he resigned not to evade a sanction but to avoid the expense and hardship of contesting discipline in Connecticut while he was living in South Africa. After carefully reviewing the language and the underlying purposes of SJC Rule 4:01 § 16, the SJC held that “[A]n attorney who voluntarily resigns from the bar of another jurisdiction while disciplinary proceedings are pending against him or her is subject to reciprocal discipline in the Commonwealth . . . whether or not there has been a finding or admission of misconduct in the other jurisdiction.”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

The Court concluded that the resignation was a form of discipline that supported reciprocal proceedings, noting other states’ similar conclusions.⁴⁹ A lawyer who resigns from another state bar and who faces reciprocal discipline in

⁴⁶ 453 Mass. 233, 237, 25 Mass. Att’y Disc. R. 415 (2009).

⁴⁷ 453 Mass. at 241, 25 Mass. Att’y Disc. R. at 426–27.

⁴⁸ *Id.* at 243, 25 Mass. Att’y Disc. R. at 429 (quoting *Matter of Lebbos*, 423 Mass. 753, 755, 12 Mass. Att’y Disc. R. 237, 241 (1996)).

⁴⁹ *Id.* at 237–38, 25 Mass. Att’y Disc. R. at 422–23. The Court cited *In re Richardson*, 692 A.2d 427, 430–32 (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 the 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).

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 tribunal imposing a disciplinary sanction of suspension or disbarment 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 pursuant to lawful bar disciplinary authority, such as a federal court,⁵² qualify as a disciplinary sanction that triggers reciprocity.⁵³ All the procedures are the same, including the respondent lawyer's obligation to report the tribunal's order to the bar counsel and 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 the bar counsel.⁵⁴ A sanction order from a federal or state trial court, other than one that suspends the lawyer from practice before it, does not receive reciprocal treatment by the bar counsel or the BBO. The attorney must report case-management sanction orders, 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 the state bars or the District of Columbia typically employ, the presumptive replication of the foreign discipline cannot operate the same

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*, Section II, note 6).

⁵² See, e.g., *Matter of Zeno*, 23 Mass. Att’y Disc. R. 794 (2007).

⁵³ *Ellis v. Dep’t of Indus. Accidents*, 463 Mass. 541, 551 (2012) (state statute that ostensibly authorized 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).

way. Few reported reciprocal discipline cases involve courts or administrative tribunals, but the following principles appear to be well founded:

- Whenever a lawyer is disciplined by a court or tribunal, the lawyer must report that discipline to the board and the bar counsel.⁵⁵ As previously noted, however, not every sanction by a court or agency constitutes “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 a trial court’s order imposing a sanction of costs and attorney’s fees on a lawyer for violating the tribunal’s rules, 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 under *Massachusetts General Laws* awarding fees and costs because of frivolous positions asserted in a civil matter.⁵⁹ The misconduct underlying those sanctions might, however, serve as the basis for nonreciprocal discipline against the lawyer.⁶⁰
- If the court suspends a lawyer from practice, the presumption that the SJC will impose identical discipline still applies. For instance, in *Matter of Zeno*,⁶¹ the United States District Court for the District of Puerto Rico suspended the respondent for three months for engaging in improper behavior during a criminal case in that court. The single

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; MASS. GEN. LAWS ch. 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 Mass. Gen. Laws ch. 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).

justice, noting the deference required to another jurisdiction's decisions, ordered an identical three-month suspension. The single justice took 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 suspended from practice in Massachusetts due to reciprocal discipline is eligible for reinstatement under the same rules as other suspended lawyers in Massachusetts.⁶³ However, reinstatement from reciprocal discipline is likely to be conditioned on reinstatement in the other jurisdiction.⁶⁴ For a full discussion of the reinstatement process, see Chapter 23.

⁶² *Id.* at 797 (quoting *Matter of Kersey*, 444 Mass. 65, 70, 21 Mass. Att'y Disc. R. 369 (2005), citing *Matter of Lebbos*, 423 Mass. 753, 754–55).

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. 298, 2015 WL 3551159 (2015); *Matter of Tunney*, 28 Mass. Att'y Disc. R. 857 (2012).

CHAPTER TWENTY-ONE

Resignation and Disability Inactive Status

I. INTRODUCTION

A lawyer may lose the right to practice by means other than by a sanction based on a stipulation to, or formal findings after a hearing on, charges of misconduct. These include (1) resigning while under disciplinary investigation, (2) being required to stop practicing because the lawyer is no longer physically or mentally capable of practicing law, (3) being disbarred by consent, and (4) being temporarily or administratively suspended. Temporary and administrative suspensions are discussed in Chapter 4, Sections II(F)(5) and (6). Disbarment by consent, provided for in SJC Rule 4:01 § 8(7), is rarely invoked because disbarments by agreement are typically handled by a stipulation for discipline. See Chapter 5, Section IV. This chapter reviews the procedures for resignation while under disciplinary investigation and for assignment to disability inactive status.

II. RESIGNING WHILE UNDER DISCIPLINARY INVESTIGATION

An attorney's resignation from the bar while under disciplinary investigation is not a unilateral act. Bar counsel may object, and the board has the power to recommend that the resignation not be accepted or that its acceptance be on terms the resigning attorney has not proposed. The following sections discuss how an attorney under disciplinary investigation must proceed to obtain the benefits of a resignation as compared to a contested disciplinary adjudication.

A. Process of Resigning While Under Disciplinary Investigation

Chapter 4, Section II, briefly describes how a lawyer being investigated by the Office of the Bar Counsel can voluntarily resign and thereby end the investigation and the disciplinary process.¹ Once the bar counsel opens an investigation

¹ Of course, as noted in Chapter 4, a lawyer may resign at any time for any reason. If the lawyer resigns while under investigation, however, special steps must be taken, and the resignation has a different effect than a nondisciplinary resignation.

on a lawyer, that lawyer may not resign from practice in the Commonwealth while that investigation or the resulting disciplinary proceedings are pending without admitting to misconduct or that sufficient evidence exists that could prove such misconduct at a hearing. To resign during pending disciplinary proceedings, a lawyer must file an affidavit with the board stating the desire to resign. The affidavit must include the following statements:²

- That the resignation is “freely and voluntarily rendered,” not the result of coercion or duress, and that the lawyer understands the implications of resigning
- That the lawyer is aware of a pending investigation regarding alleged misconduct, the nature of which must be specifically set forth
- That the material facts, or identified portions of those material facts, on which the complaint against the lawyer is based are true or can be proved by a preponderance of the evidence³
- That the lawyer waives the right to the disciplinary hearing otherwise provided under SJC Rule 4:01

Practice Tip

Because a lawyer must admit to certain facts in an affidavit to resign during disciplinary proceedings, some counsel advise that a lawyer facing discipline should instead not respond to the investigation but 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 allows the respondent to avoid any affirmative statement on record admitting to any facts.

² MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT r. 4:01 § 15(1)(a) [hereinafter SJC Rule].

³ A lawyer need not admit that the misconduct occurred, only that it can be proved. To get the bar counsel’s consent, a lawyer typically has to agree not to contest the facts in any admission or reinstatement proceeding, whether or not the lawyer admits to the facts, or instead agree that the 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 the lawyer 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, 1023–24, 29 Mass. Att’y Disc. R. 292 (2013); *Matter of Greenidge*, 30 Mass. Att’y Disc. R. 174 (2014).

Note the implications of this affidavit. A lawyer is not permitted to resign during the bar counsel's investigation or during the disciplinary proceedings after a petition for discipline is filed, without admitting to some of the misconduct or that sufficient evidence exists that could prove such misconduct at a hearing.

Under the applicable rules,⁵ the respondent lawyer must file the affidavit with the board. Upon receipt, the board serves that request and affidavit on the bar counsel, who, *within seven days of receipt*, must file a recommendation and the reasons for the recommendation with the board.⁶ The bar counsel must serve that document on the respondent. A board member may extend the seven-day period for good cause. In a typical case, however, the respondent negotiates the specifics of the affidavit of resignation with the bar counsel before filing. As a result, the board usually receives a complete packet from the bar counsel indicating the bar counsel's assent to the resignation.

Having received the affidavit and the 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 ordered would be to present witnesses and evidence and, therefore, would follow the procedures described in Chapter 6, in practice the board decides the matter on the papers. Otherwise, a hearing defeats the point of the resignation—permitting the attorney to withdraw from practice without a hearing or without stipulating to all or most of the charges the bar counsel presents.

Occasionally, the bar counsel objects to the proposed resignation,⁸ although, as just noted, it usually supports the lawyer's offer to resign and assists the

⁵ SJC Rule 4:01 § 15; RULES OF THE BOARD OF BAR OVERSEERS § 4.1 [hereinafter BBO Rules]. 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.

⁸ The 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 because the resignation was tendered after the board had filed an Information recommending disbarment.

The bar counsel may object if the resigning attorney fails 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, the bar counsel might argue that the respondent must admit to more. A primary reason for such a demand is the bar counsel's desire to establish misconduct for the purpose of any reinstatement proceedings, should the lawyer seek readmission after the mandatory eight-year

lawyer by assembling and presenting a complete resignation “package” to the board.

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 orders 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 the bar counsel might recommend them, is typically acknowledged in affidavits that result from negotiation with the bar counsel, and the resigning attorney usually has the opportunity to address the board concerning their propriety.

If the board receives an affidavit that complies with SJC Rule 4:01 § 15(2), it submits the affidavit to the SJC either recommending the resignation or providing

waiting period. *See* Chapter 23, 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 the 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, 371–72 (1987) (both the board and the bar counsel recommended accepting the resignation; the 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 the 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 the tendered resignation, contrary to all of the parties’ recommendations. A reader’s inference is that the single justice was displeased with the respondent’s actions after the 1986 favorable order.

¹² *See* text accompanying note 13, *infra*, and Chapter 4.

an alternative recommendation.¹³ The board will recommend that the affidavit be accepted and the attorney disbarred if the matters admitted would warrant disbarment. If the matters admitted warrant public discipline up to and including indefinite suspension, the board will recommend that the affidavit be accepted as a disciplinary sanction.¹⁴

Practice Tip

The board's records show that it has rejected few resignations lawyers have offered. However, the SJC and board rules allow the board to recommend rejecting the resignation 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 the bar counsel, where possible, so that the resignation goes before the board and the Court as an agreed disposition. While this strategy does not guarantee acceptance of the resignation, it makes it more likely.

B. Effect of Resigning 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 the bar counsel or the board has occasionally sought to block such resignations,¹⁵ suggests that resignation offers some advantages to the respondent relative to a disbarment order. In *Matter of Orme*,¹⁶ the single justice 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

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 The board's policy concerning its recommendation can be found on its website, <https://bbopublic.blob.core.windows.net/web/f/bbopolicy.pdf> (last visited May 21, 2018).

¹⁵ See, e.g., *Matter of Lee*, 3 Mass. Att'y Disc. R. 129 (1983) (board objection); *Matter of Orme*, 27 Mass. Att'y Disc. R. 677 (2011) (bar counsel objection).

¹⁶ 27 Mass. Att'y Disc. R. 677 (2011).

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.”¹⁷

In *Orme*, the 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 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 the single justice articulated in *Orme*, disbarment following a hearing and the board’s filing of an Information and resignation have some identical consequences. Still, some practical differences exist beyond preserving the lawyer’s “modicum of dignity” and saving the board and the Court’s time. The lawyer who resigns under an affidavit acknowledging that the charges are provable arguably avoids issue preclusion in related civil or administrative proceedings as well as transcripts of testimony and counsel statements that potential opponents in civil, criminal, or related administrative proceedings might find useful. Further, using an affidavit of resignation gives the lawyer some control over what record of misconduct will exist in the event the lawyer later seeks reinstatement.

Not every accepted resignation includes an order of disbarment, because not every resignation is for conduct that warrants disbarment.¹⁸ On occasion,

¹⁷ *Id.* (quoting *Matter of Oates*, 5 Mass. Att’y Disc. R. 274, 277 (1986)).

¹⁸ *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).

a lawyer facing even lesser suspension chooses to resign and be done with practicing law. The resulting order is “resignation as a disciplinary sanction” but not resignation with disbarment. Lawyers whose order of resignation is not accompanied by disbarment, despite the advantages the omission of the “disbarment” label offers, nevertheless face the same practice restrictions as a disbarred lawyer and are required to petition for reinstatement, and only after an eight-year period. For the most part—except with respect to the contents of the record of discipline in any subsequent reinstatement proceedings—there is no substantive disciplinary difference.

III. DISABILITY INACTIVE STATUS

A lawyer who loses the ability to practice law due to 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 the requirements of a suspended lawyer. The transfer to disability inactive status may be effected voluntarily or involuntarily.

A. Involuntary or Stipulated Assignment to Disability Inactive Status

Lawyers may encounter or present a claim for transfer to disability inactive status in three ways: (1) after receiving an order from a separate source relating to incompetence or incapacity, (2) when claiming in a disciplinary proceeding the inability to assist in their own defense, and (3) when the bar counsel proves the respondents’ incapacity and the SJC enters an order transferring them to that status.¹⁹

1. *Adjudication of Incompetence*

If a court declares a lawyer to be incompetent or commits a lawyer to a hospital or facility for the mentally ill, or if the lawyer is placed on disability inactive status by a different jurisdiction, any such determination will lead to an order

¹⁹ 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 is removed from the rolls of active lawyers and is 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.” SJC Rule 4:02 § 4(b). This action does not, however, suspend or terminate any pending disciplinary investigation or charges.

transferring the lawyer to disability inactive status.²⁰ The SJC, once it has “proper proof” of the order relied upon, “shall enter an order transferring the lawyer to disability inactive status.”²¹ The lawyer’s due process rights would, in an appropriate circumstance, permit a challenge to the “proper proof” of the facts as required by SJC Rule 4:01 § 13(1) to be submitted to the SJC.²²

2. *Inability to Assist in Defense*

SJC Rule 4:01 § 13(3) states that, in the course of a disciplinary proceeding, if a lawyer alleges the inability to assist in the defense due to mental or physical incapacity, the lawyer is “immediately” transferred to disability inactive status until further order of the SJC. The rule requires the 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 enters the order. If the bar counsel contests the respondent lawyer’s allegation—meaning that the bar counsel challenges whether the lawyer is as incapacitated as claimed—an expedited adjudicatory hearing occurs, as described in the next section. SJC Rule 4:01 § 13(3) operates as follows:

- During a disciplinary proceeding, the respondent claims to have a disability that precludes the respondent from assisting with the defense.
- If the bar counsel does not object and the SJC accepts the claim, the Court orders the lawyer transferred to disability inactive status, and the disciplinary proceedings cease until the lawyer is reinstated from that status.
- If the bar counsel objects to the claim that the lawyer is unable to assist in the defense, a hearing takes place, as described in the next section, 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, 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 respondent-lawyer from

²⁰ SJC Rule 4:01 § 13(1).

²¹ *Id.*

²² 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.”).

the practice of law pending final disposition of the [underlying disciplinary] matter.”²³ If that underlying proceeding does not result in suspension or disbarment, the lawyer may then resume practice.

A respondent who seeks to invoke § 13(3) must satisfy the *Dusky* standards of incompetence to stand trial:²⁴

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.”²⁵

3. *Petition to Determine Incapacity*

This subsection describes the procedure for the involuntary transfer of an attorney to disability inactive status. The expedited hearing process has not yet occurred in practice,²⁶ but this discussion explains how it would work.

Practice Tips

Disability inactive status is almost always achieved by agreement. No reported decisions address the procedure under SJC Rule 4:01 § 13(4). The Court has, however, determined the sufficiency of a claim of incapacity, such as in *Matter of Puglia*, discussed in Section III(A)(2).²⁷

* * *

Separate from the process described here, under SJC Rule 4:01 § 12A the bar counsel may, if appropriate, seek a temporary suspension of an attorney who presents an immediate threat to clients.²⁸

²³ SJC Rule 4:01 § 13(4)(f).

²⁴ *Dusky v. United States*, 362 U.S. 402 (1960).

²⁵ *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).

²⁶ Cf. *Matter of Dwyer-Jones*, 470 Mass. 582, 31 Mass. Att’y Disc. R. 167 (2015) (Court imposes reciprocal disability inactive status based upon an order from another jurisdiction without a separate hearing in Massachusetts).

²⁷ See *Matter of Puglia*, 14 Mass. Att’y Disc. R. 581 (1998).

²⁸ See Chapter 4, Section II(F)(5).

Proceedings for transfer to disability inactive status most commonly occur when the bar counsel investigates a claim that a lawyer has lost the ability to function adequately as a lawyer. Typically, this issue arises after the bar counsel has 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 legal functioning. If that happens, the bar counsel must seek permission from the board to file a petition alleging that the lawyer is incapable of maintaining a legal practice.²⁹

Upon the board's approval, the bar counsel files a petition the same as it does when seeking to impose discipline for misconduct.³⁰ The matter is assigned to a hearing committee, special hearing officer, or panel of the board the same as other disciplinary proceedings and proceeds in the usual fashion, with two exceptions. First, unlike in disciplinary hearings, the board may appoint a lawyer to represent the respondent lawyer if the respondent does not have representation.³¹ Second, the rules expressly state that the hearing committee "may require the examination of the respondent-lawyer by qualified medical experts designated by them."³² The standard that the hearing committee, the board, and the SJC apply 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.³³ No report or SJC decision has interpreted that phrase.

The resulting order effects 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 in Section III(D), below) or the length of the intervals between successive petitions for reinstatement. The default provision allows an attorney on disability inactive status to petition for reinstatement to active status "once a year or at such intervals as this court may direct"³⁴

The board publishes a notice of the lawyer's transfer to disability inactive status "in the same manner as a disciplinary sanction imposed under section 8 of

²⁹ SJC Rule 4:01 § 13(2).

³⁰ SJC Rule 4:01 § 13(4)(a). See Chapter 6 for a discussion of adjudicatory proceedings.

³¹ SJC Rule 4:01 § 13(4)(c).

³² 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.* at § 13(4)(f).

³³ SJC Rule 4:01 §§ 13(2), (4)(e).

³⁴ SJC Rule 4:01 §13(6)(b).

[SJC Rule 4:01] is published.”³⁵ Notwithstanding that quoted language, the SJC does not include any of the facts or arguments involved in the matter in its single justice reports ordering the transfer, 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.”³⁶

B. Effect of Disability Inactive Status

A lawyer who is placed on disability inactive status may not practice law until reinstated. The status is tantamount to a suspension for an unstated term, and a lawyer, or a lawyer’s representative, must take all the steps required in a disciplinary suspension. 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.³⁷ Chapter 22 discusses the limits on the activities of a suspended or disbarred lawyer.

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, SJC Rule 4:01 § 14 provides for appointing a lawyer to serve as a “commissioner” to manage the inactive lawyer’s practice and to protect the interests of the lawyer’s clients.³⁸ The appointed commissioner may inventory the files and take whatever actions may be necessary to effect the transition to new counsel. The inactive lawyer pays the commissioner’s reasonable expenses and, if appropriate, reasonable compensation unless the Court orders otherwise.³⁹ The commissioner may not reveal any information contained in the lawyer’s files without client consent.⁴⁰

³⁵ SJC Rule 4:01 §13(5).

³⁶ *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.

³⁷ *See* Matter of Koloflias, 25 Mass. Att’y Disc. R. 334 (2009) (disabled inactive attorney worked as a paralegal; term suspension of six months and one day imposed).

³⁸ A commissioner may be appointed in other circumstances as well. *See* SJC Rule 4:01 § 14(1) (authorizing such appointment when a lawyer disappears or dies).

³⁹ SJC Rule 4:01 § 14(1).

⁴⁰ SJC Rule 4:01 § 14(2).

D. Reinstatement from Disability Inactive Status

A lawyer transferred to disability inactive status may seek reinstatement the same way as any lawyer subject to a suspension, with some important qualifications. The general discussion of reinstatement in Chapter 23 applies to these reinstatements. This section addresses the 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 is entitled to petition for transfer to active status once a year.⁴¹ That requirement means that, absent a different Court-ordered interval, the lawyer must wait one year from the date of the transfer before seeking reinstatement. (A transfer order based on 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 is vacated or withdrawn.) The lawyer seeks reinstatement by filing a petition with the SJC, as described in Chapter 23. The board may retain an expert or experts to examine the lawyer and advise the board as to the lawyer's current fitness.⁴² In addition, the lawyer seeking reinstatement must affirmatively disclose the identity of all medical and psychological providers consulted since the time of the transfer as well as provide written consent to the Court and the bar counsel for release of all information related to the disability.⁴³

In the reinstatement proceeding, the lawyer has the burden of establishing two separate elements: (1) that the medical and physical condition does not adversely affect the lawyer's ability to practice law, and (2) that the lawyer possesses the competency and learning required for admission to practice.⁴⁴ Therefore, a lawyer whose incapacity has been remedied and who has recovered from a disabling condition may still be denied reinstatement if unable to prove the learning and skills necessary to competently practice law.

In *Matter of Dodge*,⁴⁵ the petitioner sought reinstatement after being placed on disability inactive status because of major depressive episodes that interfered significantly with his ability to serve his clients and manage his practice.⁴⁶ At the

⁴¹ SJC Rule 4:01 § 13(6)(b). The order from the Court may designate a different time frame. *Id.*

⁴² SJC Rule 4:01 § 13(6)(c).

⁴³ SJC Rule 4:01 § 13(7).

⁴⁴ SJC Rule 4:01 § 13(6)(e).

⁴⁵ 31 Mass. Att'y Disc. R. 157 (2015).

⁴⁶ 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.

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*,⁴⁷ the respondent had been placed on inactive disability status in 2014 after suffering from severe anxiety and depression. In 2015, she petitioned for reinstatement, but the hearing panel denied her petition. The panel determined that the petitioner had met the burden of showing 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 is transferred to disability inactive status because of an external order, such as a judicial determination of incapacity or transfer to disability inactive status from a different jurisdiction, and if that external order is removed or vacated, the Court may, after its own hearing and without referral to the board, immediately reinstate the lawyer.⁴⁸

⁴⁷ SJC No. BD-2014-009 (Jul. 27, 2016), 32 Mass. Att’y Disc. R. ____ (2016).

⁴⁸ SJC Rule 4:01 § 13(6)(d). *See* *Matter of Dwyer-Jones*, 470 Mass. 582, 589, 31 Mass. Att’y Disc. R. 167, 175 (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”).

PART VII

After Suspension or Disbarment

CHAPTER TWENTY-TWO

Duties and Restrictions After Suspension or Disbarment

I. INTRODUCTION

This chapter reviews the requirements a lawyer must meet after receiving 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 practicing law for some defined or undefined period of time. This chapter addresses the steps a lawyer must follow to end an ongoing practice and the activities the lawyer may, and may not, engage in during the period of time while practice is forbidden (as discussed generally in Chapter 4). For ease of discussion, this chapter refers to the lawyer who cannot practice as a “suspended lawyer,” including both disbarred and suspended lawyers. Chapter 23 discusses the process of reinstating a law license.

II. REQUIRED STEPS AFTER AN ORDER TO CEASE PRACTICE

A. Required Steps in All Instances

A lawyer who must cease practice because of a disciplinary resignation or an order of suspension, disbarment, or transfer to disability inactive status must follow a series of steps to terminate an active practice.

Practice Tip

A suspended lawyer who practices within a firm will likely find the transition to nonpractice easier on clients than a sole practitioner. In most instances, a client's relationship is effectively with the law firm rather than the individual lawyer, so in a firm setting other lawyers may continue representing the client, 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 Others*

When the Supreme Judicial Court (SJC) enters an order restricting a lawyer's practice (except for temporary suspensions; see Section II(B)) it typically becomes effective thirty days after the order is entered.² The suspended lawyer is authorized to practice law in a limited fashion during those thirty days (and may

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

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.").

² The suspended lawyer may request an extension of the thirty-day period from the SJC if the lawyer needs more time to accomplish 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).

not accept any new matters) but must cease all practice at the end of the thirty days. The thirty-day period gives the lawyer time to complete the necessary steps 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.

Within *fourteen days* from the date the order is entered, the lawyer must complete the following, with every notice sent by certified mail, return receipt requested:⁴

1. Provide a notice (the “client notice”) to each active client, ward, heir, and beneficiary,⁵ stating that the lawyer has resigned or has been disbarred, suspended, temporarily suspended, or transferred to disability inactive status, with the effective date of the exclusion. The notice must state 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 in a format approved by the Board of Bar Overseers (BBO), or in a manner substantially similar to that template. (See Appendix I for a sample Notice of Disbarment to Client.)

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. 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 is referred to here as the “other

⁴ MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT r. 4:01 § 17(1) [hereinafter SJC Rule]. The fourteen-day period consists of calendar days, not business days, and runs from the date the order is entered, not the date the order notice is received.

⁵ The word *beneficiary* refers to any person for whom the lawyer serves as a fiduciary at the time of the order. See RULES OF THE BOARD OF BAR OVERSEERS § 4.17(a) [hereinafter BBO Rules].

⁶ SJC Rule 4:01 § 17(1)(c).

⁷ SJC Rule 4:01 § 17(1)(d).

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” is largely apparent. In transactional matters, the excluded lawyer should include all counsel and parties to the transaction. The other counsel notice must also be sent in a board-approved format or in a manner substantially similar to that template.⁸ (See Appendix I for samples of other counsel notice templates.)

3. 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 notices as well as the client’s residential address.⁹ (See Appendix I for a sample Notification of Disbarment to Court, Agency, or Tribunal.)
4. 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; 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 (See Appendix I for a sample Notice to Ward, Heir, or Beneficiary of Resignation as Fiduciary and a sample Resignation as Fiduciary.)
5. Close all Interest on Lawyers Trust Accounts (IOLTA) as well as any other trust or fiduciary account, and disburse the client and fiduciary funds appropriately.¹¹
6. Refund all fees held by the suspended lawyer but not yet earned.¹² 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.

⁸ See BBO Rules § 4.17(b).

⁹ SJC Rule 4:01 § 17(1)(a).

¹⁰ SJC Rule 4:01 § 17(1)(b). This rule 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 goes to the court, so the ward is 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.

¹¹ SJC Rule 4:01 § 17(1)(g).

¹² SJC Rule 4:01 § 17(1)(f).

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, 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, the lawyer may request permission from the SJC to continue in that role. The SJC has often granted such permission.

7. Make available to each client in a pending matter the files and papers in the lawyer's possession to which the client is entitled.¹³
8. Accept no new matters, even if the lawyer is confident of accomplishing the client's goals before the suspension is effective.¹⁴

Practice Tip

Suspended lawyers may not accept new matters during the thirty-day wind-down period but may, and often must, continue to represent ongoing clients during the transition month. The lawyers may bill clients for that work and may pay themselves 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.

¹³ SJC Rule 4:01 § 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." This rule 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.

¹⁴ SJC Rule 4:01 § 17(3).

2. *Within Twenty-One Days: Compliance Affidavit and Reports*

Within *twenty-one days* from the date the order is entered, the lawyer must do the following:

1. File with the Office of the Bar Counsel an affidavit certifying that the lawyer has complied with all of the requirements that needed to be completed at the end of the fourteen-day period, as described in the Section II(A)(1).
2. Append to that affidavit the following items:
 - A copy of the client notice, other party notice, tribunal withdrawal notice, and fiduciary resignation notice, along with the names and addresses of each recipient of any such notice and 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.) The bar counsel must maintain the confidentiality of the client names, unless otherwise ordered by the SJC.¹⁵
 - A schedule showing the location, title, and account number of any IOLTA, client, trust, or other fiduciary accounts the lawyer held as of the entry date of the exclusion order.¹⁶
 - A separate schedule tracking the previous schedule, showing the disposition of all fiduciary and client funds identified in the previous schedule.¹⁷
 - A list of every other jurisdiction in which the lawyer is admitted to practice (to facilitate the bar counsel's giving notice of the Massachusetts sanction to other jurisdictions).¹⁸
 - A residential or other street address (not a post office box) where the lawyer may receive communications from the bar counsel, the board, or the Court.¹⁹
3. File with the clerk of the SJC for Suffolk County a copy of the affidavit filed with the 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.²⁰

¹⁵ SJC Rule 4:01 § 17(5)(a).

¹⁶ SJC Rule 4:01 § 17(5)(b).

¹⁷ SJC Rule 4:01 § 17(5)(c).

¹⁸ SJC Rule 4:01 § 17(5)(e). See Chapter 20 for a discussion of reciprocal discipline.

¹⁹ SJC Rule 4:01 § 17(5)(f).

²⁰ SJC Rule 4:01 § 17(6).

3. *Other Steps After Entry of the Order*

In addition to the steps the suspended lawyer must take within fourteen and 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.²¹ The Court appoints a commissioner—always an attorney—when it concludes that the excluded lawyer lacks the capacity or the responsibility to provide the necessary notices and protections when a practice ends on such short notice.²² The suspended lawyer is responsible for paying for the commissioner's time, unless the Court orders otherwise.

You Should Know

A commissioner appointed by the SJC under SJC Rule 4:01 § 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 clients' interests.

After receiving 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 practiced.²³ This step serves to increase the likelihood of the courts learning that the lawyer will soon have no right to practice.

B. Required Steps in a Temporary Suspension

As discussed in Chapter 4,²⁴ SJC Rule 4:01 refers to the concept of a “temporary suspension,”²⁵ even though the rule does not define that term. SJC opinions use this term to refer to an immediate suspension, under SJC Rule 4:01 § 12A, of a lawyer who “poses a threat of substantial harm to clients or potential

²¹ SJC Rule 4:01 § 17(2).

²² *See, e.g.*, Matter of Hodgdon, 26 Mass. Att’y Disc. R. 247 (2010) (disbarment; SJC appoints second commissioner).

²³ SJC Rule 4:01 § 17(4).

²⁴ *See* Chapter 4, Section II(F)(5).

²⁵ *See, e.g.*, SJC Rule 4:01 §§ 17(1)–(6).

clients, or [whose] whereabouts are unknown,”²⁶ or, under SJC Rule 4:01 § 12, to a lawyer convicted of a “serious crime.”²⁷ Under Sections 12 and 12A, a lawyer may be immediately suspended pending final disposition of the disciplinary proceeding that the bar counsel commenced against the lawyer or will commence within a reasonable time.²⁸

For present purposes, the noteworthy requirement of a temporary suspension is that it *takes effect immediately*.²⁹ In contrast to other suspension orders discussed in this chapter, this order gives the lawyer no advance time during which to wrap up a practice. The lawyer’s right to practice ceases when the SJC enters the suspension order. However, the lawyer will have had considerable warning that the SJC might enter such an order. Under both Sections 12 and 12A, the Court issues an order to show cause why the attorney should not be immediately suspended from practice.³⁰

The temporarily suspended lawyer must still comply with every requirement described in the preceding sections concerning notices, withdrawals, and account closings within the same fourteen- and twenty-one-day time periods. The critical difference is that the lawyer may not practice for thirty days while wrapping up legal 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. The suspended lawyer must nevertheless act immediately to inform clients that they must find other lawyers to manage all ongoing activity and who may appear at court hearings.

²⁶ SJC Rule 4:01 § 12A.

²⁷ *Id.* at §§ 12(3), (4).

²⁸ *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).

²⁹ SJC Rule 4:01 § 17(3) (“[o]rders imposing temporary suspension shall be immediate and forthwith”).

³⁰ SJC Rule 4:01 §§ 12(4), 12A.

C. Required Steps in an Administrative Suspension

A lawyer may receive an administrative suspension for failure to comply with registration renewal requirements³¹ or for failure to cooperate with the bar counsel during an investigation.³² As described more fully in Chapter 4,³³ an administratively suspended lawyer has thirty days to resolve the administrative difficulties (that is, cooperate with the bar counsel or fix the registration lapse); the lawyer may continue to practice during this time. After that thirty-day period, the administratively suspended lawyer must take all the steps described in the previous sections.

The SJC rules addressing administrative suspensions may be read to treat a suspension based on noncooperation as having immediate effect, and a suspension based on registration lapse as having delayed effect. Those rules state that a noncooperation suspension “shall be effective forthwith upon entry of the suspension order,”³⁴ and the language regarding registration lapses omits the “forthwith” language.³⁵ 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.”³⁶

D. Consequences of Failure to Comply with the Required Steps After an Order to Cease Practice

The suspended lawyer must comply with the requirements described in the previous sections within the time limits. Because the suspended lawyer must certify compliance through the affidavit filed with the bar counsel and the SJC, any failure to meet the required deadlines will be apparent. Missing a deadline by more than a few days constitutes a serious problem for the lawyer when later

³¹ SJC Rule 4:03 § 2.

³² SJC Rule 4:01 § 3(2).

³³ For a discussion of administrative suspensions generally, see Chapter 4, Section II(F)(6).

³⁴ SJC Rule 4:01 § 3(3).

³⁵ SJC Rule 4:03 § 3.

³⁶ 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 SJC Rule 4:01 § 17(4) appears to be a misprint, with the Court most likely intending to refer to SJC Rule 4:01 § 17(3), which permits the lawyer to practice for thirty days after entry of the suspension order.

seeking reinstatement.³⁷ Even if the reinstatement qualifies as “automatic” under the SJC rule (which ordinarily includes suspensions of not more than a year³⁸), 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”³⁹ A lawyer who misses the deadlines without obtaining an extension cannot submit such an affidavit.

Practice Tip

If a suspended lawyer needs more time to complete the required steps after suspension, the lawyer should request the bar counsel’s agreement to an extension of time.

A lawyer who fails to satisfy the required steps and who continues to practice, or who continues to serve as a fiduciary without the SJC’s permission, will likely be held in contempt,⁴⁰ as discussed in Section III(B). The lawyer’s suspension term will normally increase as a result of failing to comply with the suspension order. SJC Rule 4:01 § 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.”⁴¹ The lawyer’s failure to comply is also considered in any later reinstatement proceeding.

³⁷ See Chapter 23 for a discussion of the reinstatement process.

³⁸ SJC Rule 4:01 § 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, 29 Mass. Att’y Disc. R. 291 (2013); *Matter of Cullen*, 26 Mass. Att’y Disc. R. 123 (2010). See also Chapter 23.

³⁹ SJC Rule 4:01 §§ 18(1)(a), (b).

⁴⁰ 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.

⁴¹ SJC Rule 4:01 § 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.” *Johnson*, 28 Mass. Att’y Disc. R. 487. Until recently, SJC Rule 4:01 § 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 SJC Rule 4:01 § 17(8), effective until 2009. The current version of that section allows for a more flexible determination of the added sanction.

III. ACTIVITIES NOT PERMITTED DURING THE SUSPENSION

A. 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, do the following:

- Engage in legal or paralegal work; or
- Work for, volunteer for, or assist a lawyer or law firm in any way.⁴²

Serving as an assistant or paralegal, a suspended lawyer might be a valuable asset to a sole practitioner or law firm, given the expertise and experience, but SJC Rule 4:01 § 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 if the employer engages in the practice of law. As the bar counsel has written, a suspended lawyer “can’t be employed as a janitor” in a law practice.⁴³

A suspended lawyer may file a motion with the SJC for permission to engage in employment as a paralegal (or in another capacity in a law office, such as an office manager or secretary), but only after the following time periods:

- After a term suspension expires (but before formal reinstatement); or
- After four years of an indefinite suspension; or
- After seven years of a disbarment order or a disciplinary resignation.⁴⁴

A lawyer prohibited from practice because of disability inactive status may not seek permission from the Court to perform paralegal services, at least not according to SJC Rule 4:01 § 18.

A lawyer is not automatically permitted to work as a paralegal or within a law practice in any capacity, even after the suspension period expires; the lawyer 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

⁴² SJC Rule 4:01 § 17(7).

⁴³ Hope Viner Samborn, *Disbarred—but Not Barred from Work*, ABA JOURNAL (June 2007), http://www.abajournal.com/magazine/article/disbarred_but_not_barred_from_work/ (quoting Bar Counsel Constance V. Vecchione).

⁴⁴ SJC Rule 4:01 § 18(3) (not listing disability inactive status among the exceptions).

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.”⁴⁵

In *Thalheimer*, the respondent, who had been indefinitely suspended for misusing client funds and representing clients with conflicting interests, sought permission to serve as a paralegal for her son, a solo practitioner. The single justice denied the request, unpersuaded that the son would provide sufficient oversight to protect the public interest in light of the reasons for the suspension.⁴⁶

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 qualified 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,”⁴⁷ and several lawyers have been denied reinstatement for failure to prove this.⁴⁸ A single justice has described service as a paralegal as a “good step” in preparing for reinstatement.⁴⁹

* * *

Suspended lawyers should attend continuing legal education classes and engage in similar professional development activities. Nothing prevents a suspended lawyer from actively *studying* law; the lawyer is only forbidden from *practicing* law.

⁴⁵ *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)).

⁴⁶ On her second attempt to obtain permission, Thalheimer succeeded. *Matter of Thalheimer*, 29 Mass. Att’y Disc. R. 259 (2013).

⁴⁷ SJC Rule 4:01 § 18(5).

⁴⁸ *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).

⁴⁹ *Matter of Sullivan*, 25 Mass. Att’y Disc. R. 578 (2009).

In *Matter of Wynn*,⁵⁰ the single justice allowed a suspended lawyer to serve as a paralegal with conditions, including reports from the law firm about the supervision of the paralegal's work.

B. 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 have the original suspension period extended or be denied reinstatement. SJC Rule 4:01 § 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.”⁵¹ For a lawyer assigned to disability inactive status, violating the ban will result in the lawyer being temporarily suspended pending the outcome of disciplinary proceedings, which the bar counsel shall commence.⁵²

When the bar counsel learns that an excluded lawyer has engaged in banned activity, it files a petition for contempt with the SJC. In *Matter of McBride*,⁵³ a disbarred lawyer, while engaged in practicing law, also forged a check, for which he pled guilty. On the bar counsel's petition for contempt, the single justice held the lawyer in contempt and added eight years to the disbarment period, relying on SJC Rule 4:01 § 17(8). In *Matter of Shanahan*,⁵⁴ discussed in Section III(C) with regard to an excluded lawyer practicing law, 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. The bar counsel filed a petition for contempt, seeking to add eight to ten years to his disqualification period before the lawyer could apply for reinstatement. After concluding that the respondent's actions constituted the practice of law, the single justice issued a contempt order and added three additional years to the original eight-year disbarment period.⁵⁵

⁵⁰ 15 Mass. Att'y Disc. R. 643 (1999).

⁵¹ See *supra* note 41 (discussing the recent amendment to SJC Rule 4:01 § 17(8)). For one example of a lawyer being held in contempt and the suspension length increased, see *Matter of Johnson*, 28 Mass. Att'y Disc. R. 487 (2012).

⁵² SJC Rule 4:01 § 17(8).

⁵³ 29 Mass. Att'y Disc. R. 440 (2013).

⁵⁴ 26 Mass. Att'y Disc. R. 583 (2010).

⁵⁵ See also *Johnson*, 28 Mass. Att'y Disc. R. 487; *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 SJC Rule 4:01 § 17(8)).

C. Nature of the Restrictions on Practice

It is clear that an excluded lawyer may not serve as a lawyer for a client, as a paralegal, or in any other capacity for a lawyer or law firm during the exclusion period without explicit SJC permission. Questions have arisen, however, about whether certain activities that nonlawyers may engage in are also off limits to the excluded lawyer. Three SJC decisions have addressed this 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. The bar counsel filed a petition for contempt, claiming that the respondent was practicing law. The respondent argued that because nonlawyers may lawfully engage in the work he was doing, he could not be violating the disbarment order prohibiting him from practicing 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.”⁵⁶ 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.’”⁵⁷ The respondent was held in contempt, but his added sanction (three additional years before he was permitted to seek reinstatement) was less than that imposed upon an excluded lawyer who directly practiced law.⁵⁸

Suspended lawyers who represent themselves in court proceedings do not qualify as practicing law. In *Matter of Ellis*,⁵⁹ the respondent had been disbarred

⁵⁶ *Shanahan*, 26 Mass. Att’y Disc. R. 582, 587 (2010) (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)).

⁵⁷ *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)).

⁵⁸ *Cf.* *Matter of McBride*, 29 Mass. Att’y Disc. R. 440 (2013).

⁵⁹ 24 Mass. Att’y Disc. R. 258 (2008).

Practice Tips

A suspended lawyer must take special care to avoid employment that relies upon the judgments lawyers typically make, even if nonlawyers are permitted to perform that work. It is especially important to avoid employment in fields that are close to the work performed before the lawyer lost his or her 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 practicing law,⁶⁰ any such relaxation does *not* likely apply to the suspended lawyer. Suspended lawyers should not infer that they 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

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. The bar counsel filed a petition for contempt, arguing that the fees were accrued while working in a partnership with his brother, so the respondent was actually representing the partnership in court. The single justice

⁶⁰ See, e.g., *Real Estate Bar Ass'n v. Nat'l Real Estate Info. Servs., 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. L. 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, 181–83, 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).

concluded that, because his brother had assigned to the respondent all rights to the claim 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*,⁶² a lawyer who had resigned as a disciplinary sanction affirmatively petitioned the SJC for permission to serve as a mediator while suspended from practicing law. The single justice reserved and reported the case to the full Court, which addressed whether mediation is an activity, like the zoning and permitting advice in *Shanahan*, that is covered by the SJC Rule 4:01 § 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 [*Uniform Rules on Dispute Resolution*].”⁶³ Whether an 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.⁶⁴

The Court also noted the difference between “facilitative” mediation (which does not call on the mediator to exercise professional judgment as a lawyer) and “evaluative” mediation (where a mediator evaluates the merits of the case and may offer an opinion about its worth).⁶⁵ The latter is more likely to qualify as the practice of law; the former is less likely.

⁶² 462 Mass. 430, 28 Mass. Att’y Disc. R. 51 (2012).

⁶³ 462 Mass. at 434 (citing *Uniform Rules on Dispute Resolution*, SJC Rule 1:18, as amended, 442 Mass. 1301 (2005)).

⁶⁴ 462 Mass. at 438.

⁶⁵ 462 Mass. at 438–39.

The Court in *Bott* remanded the matter for more fact-finding regarding the lawyer's plans. The single justice later allowed the petition and allowed the lawyer to serve as a mediator, with several conditions, including that he only engage in "facilitative" mediation.⁶⁶

IV. CONCLUSION

A suspension of a license to practice law is a serious matter, both for the lawyer and, especially so, for the lawyer's clients. The SJC has established the protocols and requirements described here to ensure a responsible transition from active practice to closed operation. The requirements are detailed and time-consuming but must be satisfied. It is crucial for a suspended lawyer to carefully follow the SJC guidelines and to seek assistance or extensions when needing more time to complete the process. The most important responsibility is ensuring that each client is attended to and cared for, so that the lawyer's suspension compromises no client matters.

A lawyer who has been suspended, either for a definite term or indefinitely, should also anticipate and prepare for the later reinstatement petition. The lawyer should not engage in any activities that might be considered practicing law and should not work for any lawyer in any capacity without express permission of the Court. At the same time, the suspended lawyer should actively stay abreast of the law and attend seminars and continuing legal education programs.

⁶⁶ Matter of Bott, 28 Mass. Att'y Disc. R. 51 (2012).

CHAPTER TWENTY-THREE

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 the reinstatement process, which is demanding and requires careful thought and preparation.

How a lawyer returns to practicing law after having the license to practice revoked depends on the nature of the conduct that caused the suspension, the lawyer's interim conduct, and the suspension's length. This chapter addresses reinstatement following (1) suspension for one year or less, (2) a term suspension for more than one year, and (3) an indefinite suspension, disbarment, or disciplinary resignation. The chapter also explains the procedure for a contested reinstatement hearing.

Practice Tip

No reinstatement is automatic. Occasionally, the Supreme Judicial Court (SJC) has referred to the most routine reinstatement process after a short suspension as “automatic,”¹ but every reinstatement requires an SJC order upon an application by the suspended lawyer. The Office of the Bar Counsel may oppose any application if the circumstances warrant.

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).

II. REINSTATEMENT PROCEDURES AND PROTOCOLS

Depending on the length of an attorney's suspension from the practice of law, the attorney must meet certain criteria to be reinstated. Under the SJC rules, these are stratified for the following term lengths: six months or less; between six months and one day up to and including one year; and a year and a day or more.²

A. Routine Reinstatement: Suspensions of One Year or Less

In general, a lawyer who has been suspended for any length of time must petition for reinstatement before being readmitted to practice. For shorter suspensions, though, the SJC rules permit a streamlined process without the need for a formal petition. The rules differ depending on the length of the suspension: six months or less, or six months and one day to one year.

1. *Reinstatement After Suspensions of Six Months or Less*

A lawyer who is suspended for six months or less is entitled to routine reinstatement, unless the suspension order requires petitioning for reinstatement, as short suspension orders occasionally do.³ The routine reinstatement occurs after the respondent files an affidavit of compliance with the SJC and the bar counsel representing compliance with every requirement of the suspension order, unless the bar counsel objects within ten days of the affidavit filing. SJC Rule 4:01 § 18(1)(a) describes the contents 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,

² Prior to a change in the SJC rules in 1998, a suspension of any length required a reinstatement hearing. Thus, it can be misleading to rely on older cases to suggest that a one-year suspension without a reinstatement hearing is an appropriate sanction for certain misconduct. *See, e.g.*, *Matter of Neitlich*, 413 Mass. 416, 8 Mass. Att'y Disc. R. 167 (1992); *Matter of McCarthy*, 416 Mass. 423, 9 Mass. Att'y Disc. R. 225 (1993).

³ *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 Multi-State Professional Responsibility Examination); *Matter of Collins*, 25 Mass. Att'y Disc. R. 132 (2009) (six-month suspension with an order to petition for reinstatement).

and (iii) has repaid the Clients' Security Board any funds awarded on account of the lawyer's misconduct.⁴

The lawyer may file the affidavit the day after the term suspension is served.⁵ If the bar counsel objects within ten days, a hearing before the single justice occurs, as described in Section II(A)(3). Otherwise, the Court enters an order reinstating the lawyer after ten days. If, however, the lawyer files the affidavit more than six months after the suspension ends, the reinstatement requires a petition.⁶

Practice Tip

A lawyer who prepares an affidavit seeking routine reinstatement should confer with the bar counsel before serving the affidavit and request that the bar counsel notify the Court immediately in writing that the lawyer does not object to the reinstatement. Bar counsel regularly accommodates such requests.

2. Reinstatement After Suspensions Between Six Months and One Year

For suspensions of more than six months but not more than one year, the same reinstatement process applies as for less than six months, but the lawyer's affidavit must address an additional requirement. SJC Rule 4:01 § 18(1)(b) requires that the suspended lawyer also certify that the lawyer "has taken the Multi-State Professional Responsibility Examination during the period of suspension and received a passing grade as established by the Board of Bar Examiners."⁷

As with suspensions of six months or less, the suspended lawyer is reinstated automatically after ten days unless the bar counsel objects, or unless the

⁴ MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT r. 4:01 § 18(1)(a) [hereinafter SJC Rule].

⁵ Neither the SJC nor the BBO rules explicitly establish the date after which the lawyer may file an affidavit. The SJC rule states that the suspended lawyer who is 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 been suspended for a term exceeding one year is explicitly permitted to file the petition for reinstatement three months before the end of the specified term. SJC Rule 4:01 § 18(2)(c). A fair reading of the rules as a whole is that for suspensions of one year or less the lawyer may not file the compliance affidavit until after serving the full term of the suspension.

⁶ SJC Rule 4:01 § 18(1)(d).

⁷ *Id.* at § 18(1)(b).

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 an affidavit within the required six-month period may file a petition to submit the affidavit late, if the lawyer has good cause for missing the deadline. With no good cause for the late filing, the lawyer must file a petition for reinstatement, the same as for lawyers suspended for more than one year. 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 for requesting routine reinstatement.

3. Bar Counsel's Objection to a Routine Reinstatement

When the Office of the Bar Counsel receives the suspended lawyer's affidavit, it has ten days to file with the Court and serve on the respondent an objection to the reinstatement.⁸ Bar counsel objects when aware of facts that raise concerns

Practice Tip

Because SJC Rule 4:01 § 18(1)(c) permits the 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 this option in declining to impose a longer suspension that would automatically require a reinstatement hearing.⁹ 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.

⁸ *Id.* at § 18(1)(c).

⁹ *Matter of Gustafson*, 28 Mass. Att'y Disc. R. 397, 402 (2012), *aff'd* 464 Mass. 1021, 29 Mass. Att'y Disc. R. 292 (2013). *See also* *Matter of Greenidge*, 30 Mass. Att'y Disc. R. 174, 193 (2014) (same justice noting the bar counsel's ability to prevent an automatic suspension if there are concerns).

about the respondent's return to practice, and where bar counsel 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 requires a petition. If not, it permits the reinstatement.

When the bar counsel objects, the procedure is as follows: When the SJC receives the bar counsel's objection, it assigns the matter to a single justice. The Court schedules a hearing on short notice to address the question of a reinstatement hearing. If the single justice concludes that routine reinstatement is not appropriate, the respondent follows the petition process described in the following subsection.

B. Reinstatement After Suspensions of More than One Year

You Should Know

An SJC order suspending a lawyer for a period of more than one year does not mean that the lawyer presumptively returns to practice at the end of the time period. 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 of fitness to return to practice. And even when the lawyer satisfies that burden, the reinstatement process potentially adds months to the length of the ordered suspension.

* * *

For reinstatement purposes, an indefinite suspension is the equivalent of a five-year suspension. A disbarment order is equivalent to an eight-year suspension. A lawyer who is subject to either order type may petition early, i.e., three months prior to the end of the respective period before filing a reinstatement petition, although the reinstatement hearing will not be held until after the suspension period ends.

An order suspending a lawyer from practice for a fixed term implies that, at the end of the term, the lawyer can petition 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 of Bar Overseers (BBO) and the Court of reinstatement. That process begins when the lawyer files a petition for reinstatement and a questionnaire. A hearing, usually before a panel of three board members, then follows. The board then reviews the panel's recommendation and, ultimately, the SJC reviews the board's recommendation. Only the Court may order a lawyer reinstated.

1. Petition for Reinstatement

The first step in the reinstatement process is to file a petition for reinstatement. A lawyer may file this petition with the clerk of the SJC for Suffolk County as early as three months prior to the end of the suspension and, at the same time, file a reinstatement questionnaire with the board and the bar counsel, as described in Section II(B)(2). The petition must state the following seven elements:¹⁰

1. Whether the lawyer has complied with all the terms and conditions of the order imposing the suspension
2. Whether the lawyer has paid any costs the Court assessed to defray the expenses of the disciplinary process, as permitted by SJC Rule 4:01 § 23¹¹
3. The extent to which the lawyer has made restitution to, or otherwise made whole, all clients or others injured by the misconduct
4. Whether the lawyer has repaid the Clients' Security Board (CSB) any funds it awarded because of the misconduct
5. That the lawyer has taken and passed the Multi-State Professional Responsibility Examination (MPRE) after the order of suspension was entered
6. That the lawyer has posted with the board any bond the board may have required as a condition of reinstatement¹²
7. That the lawyer has filed with the board and served upon the bar counsel copies of the petition and the completed questionnaire required by the board under its rules

¹⁰ SJC Rule 4:01 §§ 18(4)(a)–(g).

¹¹ SJC Rule 4:01 § 23.

¹² Under SJC Rule 4:01 § 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.

Practice Tips

The SJC rule requires the suspended lawyer to state whether the lawyer has complied with the listed conditions. A lawyer who reports in the affidavit that the listed conditions have not yet been fulfilled will not be reinstated, except in the most unusual circumstances.¹³

* * *

A lawyer preparing a petition and its two-part questionnaire should share the documents with the bar counsel before filing the petition in order to learn from the bar counsel whether the office has any concerns about the petition or the questionnaire. Bar counsel's advance opinion may help the lawyer improve the filing or defer filing until all concerns are addressed and remedied. A lawyer who loses a reinstatement hearing must wait a year before filing a new petition, unless the Court otherwise allows. A lawyer who realizes that a reinstatement petition is likely to fail should consider seeking leave to withdraw it without prejudice. The lawyer may then reapply within twelve months (or less, if permitted by the SJC) and after having cured whatever defects or shortcomings that might have otherwise led to a denial of the petition.

2. *Two-Part Reinstatement Questionnaire*

Along with the petition for reinstatement, the lawyer must also complete two parts of a lengthy questionnaire, included as appendices to the BBO rules.¹⁴ The lawyer must sign both questionnaire parts under the penalties of perjury. Part I of the questionnaire must be filed with the board and the bar counsel (but not with the Court) and is a public document that is part of the record of the open reinstatement hearing process. Part II of the questionnaire is filed only

¹³ 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).

¹⁴ RULES OF THE BOARD OF BAR OVERSEERS § 3.63, Appendix [hereinafter BBO Rules], available at <https://bbopublic.blob.core.windows.net/web/f/BBORules.pdf>.

with the bar counsel and no part of it is made public, except as ordered during the reinstatement hearing.

Part I requires the petitioner to describe any activities in detail since the suspension began, including all steps taken to develop the competence and “learning in law”¹⁵ necessary to resume practice. The petitioner must also describe any involvement in other legal proceedings since the suspension as well as the petitioner’s plans for practice after reinstatement, including identifying mentors and monitors. It includes a “Personal Statement” in which the lawyer can advocate the case for reinstatement. The lawyer must also provide three references, two of whom must be members of the Massachusetts bar.

Practice Tip

Part I of the reinstatement questionnaire is a critical advocacy document. It should persuade the reader 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 and accuracy are the most critical qualities of this submission. Treating this document with less than due care may signal to the board and the Court that the lawyer cannot yet be trusted with the affairs of clients. The members of the hearing panel pay special attention to how the petitioner describes the earlier misconduct, accepts responsibility for it, and communicates remorse. It does not help the lawyer to try to relitigate the underlying misconduct findings.

Part II of the reinstatement questionnaire collects data and information not always appropriate for public attention, but which are nevertheless essential for persuading the board and the Court that the lawyer may return to practice without being “detrimental to the integrity and standing of the bar, the administration of justice or the public interest.”¹⁶ It is filed only with the bar counsel, who maintains it as a confidential document, except if any of the information is offered

¹⁵ SJC Rule 4:01 § 18(5).

¹⁶ *Id.*

in evidence at the hearing and without being impounded. (Some hearing panels ask to see Part II, however.) Part II of the questionnaire reviews, in considerable detail, the lawyer's complete financial status, including documentation, tax returns, and releases to ensure complete transparency. It also asks for information and documents that describe the status of the lawyer's physical and mental health as well as any disabling condition or circumstances, 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 which should, in the interest of full disclosure, be brought to the attention of the Board of Bar Overseers in considering your petition for reinstatement."¹⁷

Practice Tips

Part II of the reinstatement questionnaire is not filed with the board and, therefore, not automatically provided to the hearing panel. Most hearing panels, however, inquire about this submission at a prehearing conference or order that Part II be included as a hearing exhibit. The panel also knows of its contents to the extent the bar counsel or petitioner seeks to introduce information from it. If offered as an exhibit, Part II of the questionnaire is usually ordered to be impounded.

* * *

A lawyer seeking reinstatement need not complete the "Additional Statement" section in Part II of the reinstatement questionnaire. It is not the place to repeat what the lawyer included in the "Personal Statement" in Part I. It is a useful place to identify anything, helpful or not-so-helpful, not covered in either of the two questionnaire parts. It is better to address an unfavorable fact or development here than to hope that the bar counsel or the board never learns of it.

¹⁷ The reinstatement questionnaire is Appendix 1 to the BBO Rules.

The BBO 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.”¹⁸ In practice, the parties and the board do not permit public dissemination of the petitioner’s personal financial or medical information unless the facts in dispute at the hearing make such disclosure necessary. If offered as an exhibit, Part II of the questionnaire is usually ordered to be impounded.

3. *Filing the Petition for Reinstatement*

A suspended lawyer seeking reinstatement must file documents in three places, along with a “deposit.” The petition itself is filed with the clerk of the SJC for Suffolk County.¹⁹ At the same time, the lawyer must file *four copies* of Part I of the reinstatement questionnaire with the board, and the originals of Parts I and II with bar counsel.²⁰ The lawyer must also provide a \$500 deposit with the board “for costs” of the reinstatement proceedings.²¹ The board holds that sum to apply to any payment order requiring the lawyer to pay the costs of the reinstatement hearing.²²

Practice Tip

If the costs of the reinstatement proceedings are less than the \$500, the petitioner is entitled to receive the balance from the board after the reinstatement process ends.

4. *Proceedings Upon Filing of a Petition for Reinstatement*

Within three days of receiving the petition, the clerk of the SJC transmits the petition to the board. The board then assigns a date for the hearing to take place after the suspension order expires and, in any event, no earlier than sixty days after the board receives the petition from the Court.²³ Therefore, if the lawyer files the petition three months before the suspension expires (as the rules permit), no hearing can take place for at least three months, until the term suspension ends. If the lawyer files the petition after the suspension expiration date, the hearing will not take place for at least sixty more days.

¹⁸ BBO Rules § 3.63.

¹⁹ SJC Rule 4:01 § 18(4).

²⁰ BBO Rules § 3.62.

²¹ BBO Rules § 3.64.

²² BBO Rules § 3.66; SJC Rule 4:01 § 18(6).

²³ SJC Rule 4:01 § 18(5).

At least two weeks before the hearing date, the board must publish the notice of the reinstatement petition filing 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 law office.²⁴ While the rule does not require it, the board also gives notice to the CSB.

The board may hear the petition itself or assign it to a hearing committee, a special hearing officer, or a panel of the board.²⁵ In practice, the board assigns the matter to a panel of three board members. A hearing is held in the same way as a disciplinary hearing (described in Chapter 6), except that the petitioner has the burden of proof in establishing the qualifications for reinstatement. The hearing panel transmits its findings and recommendations to the board, which the board reviews and either accepts or revises. The board then files its findings and recommendations with the SJC. The Court, through a single justice (the same single justice who imposed the suspension or disbarment order), either allows the petition for reinstatement or holds a hearing on the matter. If a petitioner is dissatisfied with the single justice’s order, the petitioner may appeal to the full bench of the SJC, as outlined in SJC Rule 2:23, described in Chapter 19, Section VI(B)(2).

III. REQUIREMENTS FOR REINSTATEMENT

There is quite a bit of case law elucidating the requirements for reinstatement, as described in SJC Rule 4:01 § 18(5). The following subsections address them in detail.

A. Standard for Reinstatement

A disbarred lawyer or a suspended lawyer required to petition for reinstatement bears the burden of showing that reinstatement is warranted. The standard the petitioner must prove at the reinstatement hearing is 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

²⁴ BBO Rules § 3.67.

²⁵ SJC Rule 4:01 § 18(5).

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.”²⁶

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.’”²⁷

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.”²⁸ “The impact of a reinstatement on public confidence in the bar and in the administration of justice is a substantial concern.”²⁹

The panel must also look at the petitioner’s compliance with any conditions imposed at the time of the suspension or disbarment order, including restitution. An application for reinstatement that lacks either full repayment, or at least a concerted effort at restitution and a realistic plan for paying the remainder, would have little, if any, chances of success.³⁰

²⁶ *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)).

²⁷ *Matter of Daniels*, 442 Mass. 1037, 1038, 20 Mass. Att’y Disc. R. 120, 122–23 (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)).

²⁸ *Matter of Gordon*, 385 Mass. 48, 53, 3 Mass. Att’y Disc. R. 69, 73 (1982).

²⁹ *Matter of Waitz*, 416 Mass. 298, 307, 9 Mass. Att’y Disc. R. 336, 345 (1993).

³⁰ 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

B. Burden on the Petitioner, Likelihood of Reinstatement

The SJC has stated that the petitioner bears a “*heavy burden* of establishing her present qualifications for readmission” (emphasis added).³¹ 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,”³² and that the misconduct “continue[s] to be evidence of his lack of moral character . . . when he petition[s] for reinstatement.”³³

Lawyers have been denied reinstatement after serving a term suspension for failing to satisfy one or more of the foregoing requirements. For instance, in *Matter of Weiss*,³⁴ the petitioner, who had been suspended for one year and a day in 2011,³⁵ was denied reinstatement in 2016, after his third petition for reinstatement, because he failed to persuade the hearing panel or the Court that he had “attained a sufficient understanding of the basis for his discipline to support true rehabilitation.”³⁶ In *Matter of Shaughnessy*,³⁷ the lawyer had been suspended for six months and one day for neglect.³⁸ 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 while under suspension.³⁹ 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 lawyer may not be reinstated after a term suspension has ended. In *Matter of Wong*,⁴⁰ the SJC suspended the lawyer for three years, retroactive to 1993, after a conviction in New Hampshire for receiving stolen property. In 1995, before the three years had expired, the lawyer

to a finding that reinstatement would be in the interests of the bar and the public”), *Matter of Sullivan*, 25 Mass. Att’y Disc. R. 578, 585, 586 (2009) (failure to have a plan on reinstatement as a factor in denying it). *See also supra* note 14.

³¹ *Matter of Fletcher*, 466 Mass. 1018, 1020, 29 Mass. Att’y Disc. R. 259 (2013).

³² *Matter of Dawkins*, 432 Mass. 1009, 1010–11, 16 Mass. Att’y Disc. R. 94, 95 (2000) (citations omitted).

³³ *Id.*

³⁴ 474 Mass. 1001 (2016).

³⁵ *Matter of Weiss*, 460 Mass. 1012 (2011).

³⁶ 474 Mass. at 1002.

³⁷ 456 Mass. 1021, 26 Mass. Att’y Disc. R. 601 (2010).

³⁸ *Matter of Shaughnessy*, 442 Mass. 1012, 20 Mass. Att’y Disc. R. 482 (2004).

³⁹ *Matter of Shaughnessy*, 446 Mass. 1013, 22 Mass. Att’y Disc. R. 674 (2006).

⁴⁰ 11 Mass. Att’y Disc. R. 308 (1995).

petitioned for reinstatement. Although the board's hearing panel recommended reinstatement, the board and the single justice refused his request.⁴¹ The lawyer then reapplied for reinstatement in 1998, with less success with the hearing panel. The panel recommended that his petition be denied, concluding that, even though he had served five years after a three-year suspension, the evidence presented at the hearing about his moral qualifications and his learning in law was "sketchy" and "weak."⁴² The board and a single justice agreed. The full SJC reversed the finding of the board and the single justice regarding the petitioner's moral character (see Section III(C)(2)), 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 in persuading the board and the Court to permit them to return to practice. The majority of the reports in which a lawyer who had been indefinitely suspended or been disbarred sought reinstatement show the Court denying reinstatement. Besides not acknowledging responsibility for the original misconduct and its gravity,⁴³ the other major hurdle for reinstatement in this context is the length of time the lawyer had been away from the law, making proof of adequate learning in law difficult. For instance, in *Matter of Sullivan*,⁴⁴ the lawyer sought reinstatement five years after an indefinite suspension and nine years after last practicing 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*,⁴⁵ 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."⁴⁶ Her claim of having read and studied legal materials was

⁴¹ Those facts appear in *Matter of Wong*, 442 Mass. 1016 n.1, 20 Mass. Att'y Disc. R. 540, 542 (2004).

⁴² 442 Mass. at 1016, 20 Mass. Att'y Disc. R. at 542.

⁴³ 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 was convicted cited as evidence against her); *Matter of Shyavitz*, 26 Mass. Att'y Disc. R. 612 (2010) (reinstatement denied, but moral character shown by accepting responsibility); *Matter of Estrene*, 22 Mass. Att'y Disc. R. 313 (2006) (lawyer reinstated after thirty-month suspension; accepting responsibility helped prove his moral character).

⁴⁴ 25 Mass. Att'y Disc. R. 578, 585–86 (2009).

⁴⁵ 466 Mass. 1018, 1020, 29 Mass. Att'y Disc. R. 259 (2013).

⁴⁶ 466 Mass. at 1020.

not sufficient to show that she had sufficient learning in law to be trusted with client matters.

On occasion a disbarred lawyer achieves reinstatement. The most noteworthy case of reinstatement after disbarment in the Commonwealth is *Matter of Hiss*.⁴⁷ In *Hiss*, the petitioner was disbarred in 1952 after a perjury conviction following his highly publicized testimony before the House Un-American Activities Committee during the “red scare” hearings of the 1940s and 1950s. 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 (emphasis in original).⁴⁸

Finding that otherwise the petitioner had proven his qualifications, the Court granted the petition for reinstatement.⁴⁹

Practice Tip

While *Matter of Hiss* shows that a lawyer’s refusal to accept responsibility for misconduct does not necessarily prevent the lawyer’s reinstatement, as a practical matter, a lawyer who fails to demonstrate contrition or to accept responsibility has a much harder time persuading the board and the Court to permit the lawyer to resume practicing law.

⁴⁷ *Matter of Hiss*, 368 Mass. 447, 1 Mass. Att’y Disc. R. 122 (1975).

⁴⁸ 368 Mass. at 457, 1 Mass. Att’y Disc. R. at 132.

⁴⁹ In another highly publicized case at the time, William J. Cintolo was disbarred following his conviction in federal court for obstruction of justice. *Matter of Cintolo*, 6 Mass. Att’y Disc. R. 54 (1990). He was reinstated effective July 1, 1995. 10 Mass. Att’y Disc. R. 40 (1994). At the time, disbarment carried a sanction of only five years, instead of eight years as it has since 1998.

C. Proof of Facts in Support of Reinstatement

A suspended lawyer seeking reinstatement must prepare carefully and thoroughly for the reinstatement hearing, and understand both the evidence and strategies that are persuasive and those that are self-defeating and ineffective. Experienced practitioners offer the following suggestions when developing a reinstatement strategy after a suspension.

1. *Carefully Preparing the Reinstatement Questionnaire*

The petitioner's statements in the reinstatement questionnaire drive the case's theory in the reinstatement hearing. A suspended lawyer should, if at all possible, retain experienced counsel to assist in preparing the questionnaire, as it serves as a petitioner's critical set of statements, under oath, establishing the arguments to be used in the hearing. The questionnaire must acknowledge the misconduct that led to the suspension, communicate credible and genuine remorse for the misconduct, and convincingly describe what has changed since the misconduct occurred and why the misconduct will not recur. It should also expressly address why reinstatement serves the public interest.

Practice Tips

Several Practice Tips in this book tout the advantages of a lawyer facing discipline retaining counsel for representation. That advice is never more important than in the reinstatement process, which is fraught with pitfalls that experienced counsel can help navigate.

* * *

A suspended lawyer who quickly files a petition and submits a reinstatement questionnaire before completing every necessary step to achieve reinstatement should consider either withdrawing the petition or negotiating with the bar counsel to defer action on the matter. This way the suspended lawyer can arrange affairs to present the best case to the hearing panel through an amended petition. As noted previously, it is always beneficial to share the proposed petition with the bar counsel before filing.

2. *Develop a Reinstatement Strategy That Accounts for All Required Elements*

A 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 SJC Rule 4:01 § 18(5). Those factors include: (1) the petitioner possesses sufficient moral character, despite the prior misconduct, (2) the petitioner is competent to return to practice, (3) the petitioner has sufficient learning in law, and (4) resuming the practice of law is not detrimental to the bar and serves the public interest. The fact that the petitioner has served the allotted suspension time is not sufficient.⁵⁰ The presumption is that the petitioner is, in fact, not entitled to return after completing the suspension; the 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.⁵¹ Petitioners must persuade the panel that they are no longer unfit. To do so, they bear the "difficult burden"⁵² of proving each of the identified elements.

Each element presents important strategic opportunities for a petitioner. Experienced practitioners suggest the following:

- *Proving sufficient moral character:* The petitioner must account, if reasonably possible, for the fact, treated as established for the reinstatement proceedings, that the petitioner engaged in misconduct in the past and has improved in some identifiable way to warrant being trusted to represent clients again. The strategic reinstatement plan should include the following considerations, depending on the facts of the 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 made. But "sincere remorse, standing alone, does not equal reform."⁵³
 - If the petitioner stipulated to certain findings or entered into an agreed-upon stipulation during the disciplinary proceedings, at the reinstatement hearing the petitioner cannot claim never engaging in the misconduct and only stipulating to the charges to avoid the

⁵⁰ "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).

⁵¹ See *Matter of Dawkins*, 432 Mass. 1009, 1010–11, 16 Mass. Att'y Disc. R. 94, 95 (2000) (rescript).

⁵² *Matter of Corben*, 31 Mass. Att'y Disc. R. 92 (2015).

⁵³ *Id.* at 97.

risks of the hearing process. The stipulation and the resulting sanction mean that, for reinstatement purposes, the misconduct occurred.⁵⁴

- The petitioner must also demonstrate having changed and how, and may call witnesses or submit affidavits from witnesses, whether lay or professional. Supporters may write letters to the board, which are typically considered.
- A witness who testifies about the petitioner's good moral character must be prepared to answer questions about the petitioner's engagement in misconduct and to reconcile the present favorable opinion with the facts from the lawyer's past. It is essential that the witnesses fully understand the nature of the misconduct in which the petitioner engaged and how the petitioner has changed.
- The bar counsel or the hearing panel may ask the witnesses to relate how the petitioner described the misconduct to them, and the witnesses' understanding of the basis for the suspension and why it occurred.
- The bar counsel may invite individuals 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, the bar counsel may explore evidence about the petitioner's stance and allegations in that litigation.⁵⁵
- While never sufficient, it is almost always useful for the petitioner to show, with competent evidence beyond simply the petitioner's own testimony, engaging in volunteer, charitable activities throughout the suspension period and not only in the months before the reinstatement effort.⁵⁶

⁵⁴ A petitioner cannot lie about the 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).

⁵⁵ See, e.g., *Matter of Harrington*, 27 Mass. Att'y Disc. R. 432 (2011) (petitioner suspended for making baseless, insulting accusations against the judge who presided over his personal divorce; on his petition for reinstatement, the board took notice of the continued pursuit of his claims through civil lawsuits and appeals).

⁵⁶ "A petitioner's moral character can be illustrated by charitable activities, volunteer activities, commitment to family, or community work." *Matter of Sullivan*, 25 Mass. Att'y Disc. R. 578, 583 (2009). In *Matter of Wong*, 442 Mass. 1016, 1018, 20 Mass. Att'y Disc. R. 540, 543-44 (2004),

- Misstatements or failure to disclose all matters on the reinstatement questionnaire always reflect poorly on the petitioner’s moral character and may be a basis for the panel recommending against reinstatement.⁵⁷

Often a petitioner’s misconduct was related to a medical condition, including psychological distress or drugs or alcohol addiction. In such instances, a reinstatement strategy must persuade the panel with competent evidence that the condition is under control and the petitioner is unlikely to reoffend.⁵⁸ The following strategies might aid such a petitioner:

- As a practical matter, a petitioner who suffered from a medical difficulty or substance abuse 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 nonexpert sponsor from an Alcoholics Anonymous-type program who has worked closely with the petitioner 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 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 remains in recovery. Lawyers Concerned for Lawyers can usually assist with sobriety monitoring.
- *Proving competence:* SJC Rule 4:01 § 18(5) requires the petitioner to prove “competency” to practice law. This is different from, although

under the section captioned “moral qualifications,” the Court noted that the petitioner had been “active in his church community and supportive of his sons’ group activities, particularly the activities stressing social responsibility. He has undertaken community-oriented activities with an attitude that evidences a sensitivity beyond himself and a respect for others. He has, in short, established the self-reform necessary to make him a ‘person proper to be held out by the court to the public as trustworthy.’”

⁵⁷ See, e.g., Matter of Weekes, 31 Mass. Att’y Disc. R. 678 (2015).

⁵⁸ An example of this having been done well is Matter of Ostrovitz, 31 Mass. Att’y Disc. R. 486 (2015).

connected to, the “learning in law,” discussed in the next item. This factor is 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 mismanaging a practice must demonstrate through specific, concrete strategies the capability to maintain a well-managed law office. The petitioner should expect direct questions from the bar counsel or hearing panel members about the specific requirements of Rule 1.15 of the *Massachusetts Rules of Professional Conduct*, governing client trust accounts and similar law office management topics. The petitioner should be articulate in explaining how a law firm engages in three-way reconciliation of its trust account.⁵⁹
 - How a petitioner manages the reinstatement process itself can reflect directly on competence as a lawyer. Presenting a well-written, error-free, well-organized, and professional reinstatement effort will help persuade the hearing panel of the lawyer’s skill.⁶⁰
 - Showing a high level of competence as a lawyer presuspension will also help a petitioner meet the burden of 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 an anomaly and not likely to recur is important.
 - A petitioner who offers proof of a well-developed support network and a plan to practice if reinstated has a better chance of achieving reinstatement than one with a limited network or no support. A reliable and respected “practice mentor” for the petitioner can make an important difference.
- *Proving learning in the law*: Related to the requirement of competence is demonstrating sufficient “learning in law.”⁶¹ Because a suspended or disbarred lawyer may not practice during the suspension period, even

⁵⁹ See, e.g., Matter of Ostrovitz, 31 Mass. Att’y Disc. R. 486 (2015) (reinstatement allowed after panel “favorably impressed” with petitioner’s familiarity with three-way reconciliation required by Rule 1.15). See MASS. R. PROF. C. 1.15(f)(1)(E).

⁶⁰ 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).

⁶¹ SJC Rule 4:01 § 18(5).

as a paralegal, and may only act as a paralegal after the suspension period has ended, upon a successful petition to the Court,⁶² it can be a challenge to satisfy this element with evidence demonstrating acquired learning. Some petitioners have faltered in their reinstatement efforts on this element,⁶³ but many others have satisfactorily proven such learning.⁶⁴ 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 continuing legal education courses will be unpersuasive compared to focusing on intended practice areas.
- Evidence of mastery in a field of law prior to the suspension can help to support the required showing, including evidence that the petitioner mentored others. The longer the suspension, however, the more evidence of continuing study is 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.⁶⁵
- At the reinstatement hearing, a petitioner may expect specific questions about developments in the substantive or procedural law in the practice areas as well as about developments in the rules governing professional conduct. The petitioner's testimony about following such developments carefully is not enough; the petitioner must affirmatively demonstrate expertise and should prepare for direct questions. If the sanction was for mishandling fiduciary funds, the petitioner should be prepared to explain the record-keeping requirements for such funds.

⁶² See discussion in Chapter 22, Section III.

⁶³ 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).

⁶⁴ 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.")

⁶⁵ See, e.g., *Matter of Gibson*, 32 Mass. Att'y Disc. R. ____, 2016 WL 7493937 (2016); *Owens*, *supra* at note 64.

- If possible, a petitioner should seek permission from the SJC to work or volunteer as a paralegal after the suspension term ends and before petitioning for reinstatement.⁶⁶ Particularly when there has been a long-term suspension, a petitioner will fare better in proving learning in the law by having worked as a paralegal (with SJC permission) before seeking to be reinstated as a lawyer.⁶⁷
- *Proving that reinstatement serves the public interest:* Reinstatement reports regularly address the “public interest prong”⁶⁸ of the reinstatement requirements under SJC Rule 4:01 § 18(5). The petitioner must show with persuasive evidence that the 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 public.”⁶⁹ “Consideration of the public welfare, not [a petitioner’s] private interest, dominates in considering the reinstatement of a [suspended] applicant.”⁷⁰

In most reinstatement reports, the public interest factor follows closely from, and often incorporates, the factors previously described—petitioners who have demonstrated remorse, good moral character, competence, and learning in law typically do not have problems showing that reinstatement creates no problems for the public.⁷¹ 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, by demonstrating an appropriate service-oriented moral compass, will assist in arguing that the petitioner has met this component. Petitioners often produce supportive documents, letters, or affidavits

⁶⁶ For a discussion of that process, see Chapter 22, Section III.

⁶⁷ See, e.g., *Matter of Sullivan*, 25 Mass. Att’y Disc. R. 578, 587 (2009) (denying reinstatement; noting petitioner had not worked as a paralegal).

⁶⁸ See, e.g., *Matter of O’Sullivan*, 31 Mass. Att’y Disc. R. 498 (2015); *Matter of Pudlo*, 31 Mass. Att’y Disc. R. 537 (2015).

⁶⁹ *Matter of Gordon*, 385 Mass. 48, 53, 3 Mass. Att’y Disc. R. 69, 73 (1982).

⁷⁰ *Matter of Ellis*, 457 Mass. 413, 414, 26 Mass. Att’y Disc. R. 162, 164 (2010).

⁷¹ 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

from members of the community or former clients detailing the petitioner's activities and good character.⁷²

- If the petitioner's suspension order included any conditions, such as making restitution, the evidence at the hearing must show that these conditions were met. If the lawyer has made restitution, proof of that 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 highly unusual.⁷³
- A critical issue, and perhaps the decisive one, 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 of trivializing the underlying misconduct.⁷⁴
- If a petitioner has had a lengthy suspension, it would be advisable to work as a paralegal before petitioning for reinstatement and to have a practice mentor.⁷⁵

IV. REINSTATEMENT AFTER ADMINISTRATIVE SUSPENSION

The reinstatement process for administrative suspensions is typically different from disciplinary suspensions or disbarments. How the administrative suspension ends depends on how it arose. If the administrative suspension occurred

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's recommendation and ordered reinstatement.

⁷² 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.").

⁷³ See discussion *supra* note 27.

⁷⁴ See Matter of Shyavitz, 26 Mass. Att'y Disc. R. 612 (2010) (reconsidering and denying reinstatement because petitioner could not, if reinstated, be trusted to handle client funds).

⁷⁵ See, e.g., Matter of Sullivan, 25 Mass. Att'y Disc. R. 578, 587 (2009) (denying reinstatement; noting the petitioner had not worked as a paralegal and had not had a practice mentor if he were reinstated).

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.⁷⁶ The lawyer must also file an affidavit with the board confirming compliance with whatever obligations the lawyer failed to meet that led to the suspension.⁷⁷ 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.⁷⁸ In practice, however, reinstatement is typically automatic after the lawyer registers and pays all fees and the late assessment, assuming no other reason for discipline exists. While the administratively suspended lawyer is not permitted to practice during that suspension,⁷⁹ those suspended for failure to register typically do not learn of their suspension until weeks later. (Most failure-to-register suspensions result from the lawyer failing to notify the board of an address change.⁸⁰) Bar counsel customarily overlooks any intervening practice during the suspension period if the attorney responds immediately after the suspension is entered.⁸¹

If the administrative suspension resulted instead from failing to cooperate with the bar counsel's investigation of a disciplinary complaint, the same process applies, including the reinstatement fee and the affidavit. However, the Court may be more deliberate about reinstatement, depending on the quality of the lawyer's cooperation. To be reinstated, the lawyer must provide the information that the bar counsel requested within thirty days, unless the single justice can be persuaded that the bar counsel has no right to the information or that its substance has been provided. A lawyer who is administratively suspended for noncooper-

⁷⁶ In 2016, the late fee was \$50 and the fine was \$100. Those figures are, of course, subject to change.

⁷⁷ SJC Rule 4:03 § 3.

⁷⁸ The petition for reinstatement that the administratively suspended lawyer must file requires Court approval by the terms of SJC Rule 4:01.

⁷⁹ *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 reason to believe that a partner had paid her fees).

⁸⁰ In 2014, the board began to request an e-mail address from attorneys in addition to an office address. That development may lead to fewer failure-to-register suspensions in future years.

⁸¹ If the lawyer does not promptly address the lapse, however, discipline may result. *See, e.g.*, Gillespie, *supra* note 79 (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 practicing while administratively suspended; two prior admonitions served as aggravating factors).

ation and who is not reinstated within thirty days becomes subject to the requirements of a lawyer who has been suspended for disciplinary reasons.⁸²

One recent example shows that reinstatement in that setting may be prompt if the lawyer begins to cooperate. In Ad. 12-09,⁸³ the SJC ordered an 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 was issued on February 27, 2012. On March 8, 2012, the respondent met with the bar counsel and, on the following day, filed a written response to the grievance and returned the fees to the clients. On March 14, 2012, the respondent was reinstated.⁸⁴

⁸² SJC Rule 4:01 §§ 3(3) and 17.

⁸³ 28 Mass. Att’y Disc. R. 926 (2012).

⁸⁴ For other examples of administrative suspensions based upon failure to cooperate with the 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 a day after failure to cooperate and for the underlying misconduct of neglect; respondent never cooperated after the administrative suspension).

PART VIII

Special Obligations as a Licensed Professional

CHAPTER TWENTY-FOUR

Attorney Registration, Trust Accounts, and the Clients' Security Board

I. INTRODUCTION

This chapter covers several important administrative topics for 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 subject to the disciplinary jurisdiction of the Board of Bar Overseers (BBO). Next, the chapter outlines the requirements for establishing and maintaining trust accounts, including Interest on Lawyers Trust Accounts (IOLTA). Finally, the chapter reviews how the Clients' Security Board (CSB) operates.

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 by (1) taking and passing the Massachusetts bar examination or by obtaining recognition of their having passed a Uniform Bar Examination administered in another state, (2) "waiving in" by motion after being a member of the bar of another jurisdiction, or (3) special permission, given to bar members of another jurisdiction for a limited time while representing indigent clients through a nonprofit or law school program.

In all instances, individuals must also satisfy the Board of Bar Examiners (BBE) of their good moral character and they must pass the Multi-State Professional Responsibility Examination (MPRE).¹ Someone who is not a full bar member may also practice law in the Commonwealth under the following circumstances:

- As a certified law student
- As a member of an in-house counsel office
- Where a retired or an inactive member of the Massachusetts bar seeks to perform only certain pro bono legal services
- As a lawyer from another jurisdiction appearing *pro hac vice* in an identified court proceeding with the judge's permission

Massachusetts also permits a lawyer admitted to practice in a foreign country to practice law in a limited manner as a foreign legal consultant (FLC).

1. Admission Through 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. To sit for the MBE, an applicant (a) must have a bachelor's degree from a college or university or its equivalent² and (b) must have graduated from a law school accredited by the American Bar Association (ABA) or an institution that is "authorized by statute of the Commonwealth to grant the degree of bachelor of laws or juris doctor."³ 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.⁴ Graduates

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 has to show a passing score on the MPRE.

² MASSACHUSETTS RULES AND ORDERS OF THE SUPREME JUDICIAL COURT r. 3:01, at § 3.1.2 [hereinafter SJC Rule].

³ *Id.* at § 3.1.3.

⁴ SJC Rule 3:01 § 3.2. The BBE has articulated the criteria upon which it relies in making that determination, with different standards applying to common law and civil law countries. See RULES OF THE BOARD OF BAR EXAMINERS, RULE VI, *Foreign Law School Graduates* (2017) [hereinafter BBE Rules], available at <https://www.mass.gov/professional-conduct-rules/board-of-bar-examiners-rule-vi-foreign-law-school-graduates> (last visited April 26, 2018). 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 was not deemed equivalent to an accredited U.S. law school, despite his having an LL.M. from an accredited U.S. law school and bar admission in two other states).

from Canadian law schools that are recognized by the Law School Admissions Council are deemed to have graduated from an ABA-accredited U.S. law school.⁵

The Supreme Judicial Court (SJC) imposes several other requirements for MBE applicants, including the applicant's law school certifying the applicant's moral qualifications to be a lawyer, a petition signed by a licensed lawyer from a U.S. jurisdiction requesting permission for the applicant to take the examination, two letters of recommendation, and proof of a passing, scaled score of 85 or higher on the MPRE.⁶

Passing the MBE and the MPRE does not authorize applicants to become Massachusetts lawyers. Applicants must also satisfy the BBE that they have the requisite moral character to be entrusted with the responsibilities of the profession.⁷ Section II(B) of this chapter discusses the character and fitness requirement.

Under 2017 amendments to SJC Rule 3:01, an applicant for admission to the Massachusetts bar may, in effect, request that taking and passing the Uniform Bar Examination in another jurisdiction serve in lieu of taking and passing the MBE.⁸

2. *Admission on Motion*

An applicant for the Massachusetts bar may alternatively seek admission by "waiving in" on motion after being a member of the bar of the highest judicial court of another U.S. state, district, or territory⁹ 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 actively practiced for at least five of the seven years preceding the petition for admission on motion.¹² The BBE

⁵ BBE Rules VI.7.

⁶ SJC Rule 3:01 § 1.1. Those requirements are also described on the BBE website. *Seeking Admission to the Bar in Massachusetts*, MASSACHUSETTS BOARD OF BAR EXAMINERS, <http://www.mass.gov/courts/court-info/sjc/attorneys-bar-applicants/bbe/> (last visited April 26, 2018).

⁷ SJC Rule 3:01 § 5.1; BBE Rule V.1; MASS. GEN. LAWS ch. 221, § 37.

⁸ SJC Rule 3:01 § 1.2.

⁹ For convenience, the discussion uses the term *jurisdiction* to refer to a state, district, or territory as referenced in the SJC's rule.

¹⁰ SJC Rule 3:01 §§ 1.2, 6.

¹¹ *Id.* at § 6.2.

¹² *Id.* at § 6.1.1. In *Schomer v. Board of Bar Examiners*, 465 Mass. 55 (2013), the applicant, a member of the New Jersey bar, 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

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 time in another jurisdiction or in Canada must include with the petition 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 in each jurisdiction attesting that no charges are pending against the applicant.¹⁵

From 1997 through 2017, the SJC has denied admission on motion three times. In *Matter of Application for Admission to the Bar*, 443 Mass. 1010 (2005), an attorney who had failed the MBE then obtained admission in the District of Columbia was denied admission on motion because her legal experience was held to be insufficient. In *Matter of Corliss*, 424 Mass. 1005 (1997), the applicant, who graduated from a law school not accredited by the ABA and was admitted to practice in California, sought permission to take the limited bar examination then authorized for out-of-state lawyers seeking admission on motion. The application was denied because the applicant had not attended a qualifying law school.¹⁶ In *Yakab v. Board of Bar Examiners*, 448 Mass. 740 (2007), the SJC denied an

York had permitted the applicant to sit for the New York bar examination after his contract work and inferred from that fact that the practice was not “unauthorized.” 465 Mass. at 61. The applicant now appears as a Massachusetts lawyer on the BBO website.

¹³ This requirement, which appeared in an advisory on the BBE website entitled “Determining Whether You May Be Eligible for Admission on Motion,” *Schomer*, 465 Mass. at 56 n.2, is no longer on the BBE website, <https://www.mass.gov/service-details/learn-about-admission-by-motion-in-massachusetts> (last visited April 26, 2018).

¹⁴ *Schomer*, 465 Mass. at 56 n.2.

¹⁵ SJC Rule 3:01 § 1.3. These requirements are also described on the BBE website, at <https://www.mass.gov/how-to/petition-for-admission-by-motion> (last visited April 26, 2018).

¹⁶ At the time *Corliss* was decided, only graduation from an ABA-accredited law school qualified an attorney admitted in another U.S. jurisdiction for admission on motion. That requirement has now been changed to permit application by an attorney admitted in another U.S. jurisdiction who graduated from either an ABA-accredited law school or from a school authorized by state statute to grant the degree of bachelor of laws or juris doctor. See SJC Rule 3:01 § 6.1.4. In *Mitchell v. Board of Bar Examiners*, 452 Mass. 582 (2008), the Court allowed an attorney to seek admission on motion where that attorney had graduated from an online law school, limiting its holding to the facts, which included the applicant’s demonstration of academic achievement, the then-ongoing ABA re-evaluation of its accreditation standards, and the Court’s anticipated review of the admission-on-motion rule. See *Mitchell*, 452 Mass. at 586–89. The SJC has long allowed graduates of foreign law schools the opportunity to demonstrate that their foreign education was equivalent to that required for admission. See, e.g., SJC Rule 3:01 § 6.2 (as in effect in 1986); SJC Rule 3:01 § 6.1.4 (as in effect in 2010).

application for admission on motion submitted by a lawyer licensed in Ghana, because the applicant had not demonstrated that the legal education he received in Ghana was equivalent to that of an ABA-accredited law school.

3. *Limited Admission for Lawyers Working in Legal Assistance or Graduate Law School Programs*

SJC Rule 3:04 permits a lawyer admitted in another U.S. (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,”¹⁷ 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.¹⁸ 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 SJC 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.¹⁹

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 under this special arrangement, the law students assume all of the responsibilities and obligations of any practicing lawyer, and all of the standard ethical rules apply to the students’ representation of clients.²⁰

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).²¹ A senior law student may appear on behalf of the Commonwealth or its subdivisions or agencies in civil, probate, or criminal proceedings in district court, juvenile court, probate and family court, or housing court but not in the superior court or an appellate court unless special

¹⁷ SJC Rule 3:04 § 1.

¹⁸ *Id.*

¹⁹ SJC Rule 3:04 § 2.

²⁰ SJC Order Implementing Supreme Judicial Court Rule 3:03 (1986) §§ 3, 4 [hereinafter SJC Order 3:03]. A certified law student is 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).

²¹ SJC Rule 3:03 §§ 2, 8. For students enrolled in a part-time program, a “senior” student is one who is in the last year of the program, which ordinarily means the fourth year.

permission is obtained.²² 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.²³ A senior law student may appear on behalf of an indigent criminal defendant in district court, juvenile court, housing court, and the SJC and appeals court, but not in the superior court, unless special permission is obtained. A senior law student may represent an indigent party in a civil matter in district court, juvenile court, probate and family court, or housing court but not in the superior court or an appellate court unless special permission is obtained.²⁴ For civil or criminal indigent 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.²⁵ Finally, a senior law student may appear "on behalf of the Commonwealth or indigent parties before any administrative agency, provided such appearance is not inconsistent with its rules."²⁶ Permission for a senior law student to appear in criminal matters in the superior court, on behalf of either the Commonwealth or the defendant, is tightly circumscribed.²⁷

A second-year law student has more limited appearance rights. That law student may appear only in civil matters in those courts available to senior law students, and only if the law student is enrolled in a law school clinical program.²⁸ SJC Rule 3:03 § 7, by implication, denies a second-year student the right to appear on behalf of indigent persons before administrative agencies, but that restriction has limited effect, if any, given that state and federal administrative agencies generally permit nonlawyers to appear on behalf of parties in administrative hearings.²⁹

²² SJC Rule 3:03 §§ 1, 4, 5, 6.

²³ SJC Rule 3:03 § 1.

²⁴ SJC Rule 3:03 §§ 1, 5, 6.

²⁵ SJC Rule 3:03 § 1.

²⁶ SJC Rule 3:03 § 7.

²⁷ SJC Rule 3:03 § 4. A Superior Court judge may permit a qualified senior law student to practice on behalf of the Commonwealth or an indigent criminal defendant in selected reviews of convictions, sentences, and bail determinations.

²⁸ SJC Rule 3:03 § 8.

²⁹ 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) (U.S. Department of Labor under the Longshore and Harbor Workers' 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 SJC Rule 3:03 must do so “without compensation.”³⁰ That phrase does not prohibit the law students’ employers from paying them for their work on the matter; instead, it prohibits the law students from receiving a fee from the client.³¹

Any law student seeking to represent a client under SJC Rule 3:03 must be enrolled in, or have successfully completed, a course in evidence or trial practice.³² 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 the courtroom. 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.”³³ The prevailing practice of attorneys participating in client representation governed by SJC 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 SJC 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 results are announced, and if the graduate passes the bar, the certification continues for six months or until the individual is admitted to the bar, whichever is sooner.³⁴ 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.”³⁵

Any law student representing a client under SJC Rule 3:03 authorization must obtain the client’s informed consent to the student representation through a signed document that the student and the supervisor must file with the court or administrative agency where the matter is pending.³⁶

As noted above, SJC Rule 3:03 requires that any nongovernmental party that a law student represents be “indigent,” although the rule does not define that term. For nonprofit legal assistance organizations, the qualification typically tracks the income and asset limits generally applicable to the organization’s clients.

³⁰ SJC Rule 3:03 § 1.

³¹ SJC Order Implementing Supreme Judicial Court Rule 3:03, § 7 (1980, last amended 1986) (hereinafter Rule 3:03 Implementing Order).

³² SJC Rule 3:03 § 1.

³³ SJC Rule 3:03 § 2.

³⁴ SJC Rule 3:03 § 3.

³⁵ SJC Rule 3:03 § 9.

³⁶ Rule 3:03 Implementing Order, § 2.

5. *Practicing as In-House Counsel*

An attorney admitted to practice and in good standing in another jurisdiction or, in some circumstances, a foreign country, who is 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 lawyer’s employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission.”³⁷ This exception to the usual prohibition on unauthorized practice of law covers in-house counsel providing legal services to a single employer³⁸ but not to any other client, except in pro bono matters, as described in Section II(A)(6). A lawyer not admitted to the Massachusetts bar who practices as in-house counsel in Massachusetts under this exception must register with the BBO and pay the same registration fee as a licensed Massachusetts lawyer but does not receive a bar card.³⁹

Certain foreign lawyers may also practice law as in-house counsel in Massachusetts and offer legal services to an employer as just described⁴⁰ if the foreign lawyer 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.”⁴¹

The authority afforded to foreign lawyers to serve as in-house counsel for an employer is broader than that available under the version of Rule 5.5(d) in

³⁷ MASS. R. PROF. C. 5.5(d)(1) (2016); SJC Rule 4:02 § 9(b).

³⁸ 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).

³⁹ SJC Rule 4:02 § 9(a). Rule 4:02 § 9(a) does not by its terms explicitly limit its registration requirements to the kind of “systematic and continuous presence” allowed to in-house counsel under MASS. R. PROF. C. 5.5(d). Rather, it has a broad definition, “to engage in the practice of law as in-house counsel,” that sweeps up any legal services constituting the practice of law. *See* SJC Rule 4:02 § 9(b). Nevertheless, it seems likely that Rule 4:02 § 9 was intended to capture only in-house practice by a “systematic and continuous presence,” permitted under MASS. R. PROF. C. 5.5(d), but not to impose its registration requirements on in-house counsel admitted in another jurisdiction who conducts “temporary basis” representation as permitted under MASS. R. PROF. C. 5.5(c). “Temporary basis” representation is the practice of law, or the exception to Rule 5.5 would be unnecessary. The Rule 5.5(c) exception for such “one-off” representation applies to *any* attorney—in-house or otherwise—admitted in a state other than Massachusetts. There appears to be no substantial reason why in-house counsel practicing temporarily in Massachusetts under Rule 5.5(c) would have been singled out for a registration requirement while all other out-of-state lawyers practicing in Massachusetts under Rule 5.5(c) would avoid its financial and administrative costs.

⁴⁰ MASS. R. PROF. C. 5.5(d).

⁴¹ MASS. R. PROF. C. 5.5(e).

the ABA Model Rules, which limits the foreign lawyer's legal services authority to advising on matters of the law of that person's country.⁴² A comparable limitation applies in Massachusetts to FLCs, discussed in Section II(A)(8).

In-house counsel may not appear in court except with *pro hac vice* permission (described in Section II(A)(7)). SJC Rule 4:02 § 9(b) permits in-house counsel "to provide on behalf of a single organization (including, for attorneys admitted in a United States jurisdiction, a governmental entity) or its organizational affiliates, any legal services that constitute the practice of law." That blanket authorization, like that of Rule 5.5(d), both of which by their literal language would otherwise include court appearances, is limited by SJC 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," and by a similar exception to Rule 5.5(d)(1).⁴³

SJC Rule 4:02 § 9(b) permits 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 a licensed Massachusetts lawyer.

6. *Practicing in Limited Pro Bono Representation*

A Massachusetts lawyer with inactive or retired status (and, therefore, not ordinarily authorized to represent clients) may nevertheless offer legal services on a pro bono basis under an arrangement adopted by the SJC.⁴⁴ The lawyer must file a specially designated registration statement with the BBO, with no required registration fee, and then limit the practice to pro bono matters in association with an SJC-approved legal assistance organization.⁴⁵

⁴² Cf. MODEL. R. PROF. 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.

⁴³ 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 that the rule provides to licensed in-house counsel 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").

⁴⁴ SJC Rule 4:02 §§ 8(a), (b).

⁴⁵ SJC Rule 4:02 §§ 8(a), (b), (c).

7. *Appearing 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 not admitted to practice in Massachusetts can seek admittance in Massachusetts on a particular case or occasion, *pro hac vice*, if the attorney is a member in good standing of another state's bar, and the state in which the attorney is admitted grants similar *pro hac vice* privileges to Massachusetts bar members.⁴⁶ *Pro hac vice* admission is granted at the discretion of the Massachusetts court before which the out-of-state attorney seeks to appear.⁴⁷ Only individual attorneys, not law firms, can seek *pro hac vice* admission in Massachusetts.⁴⁸

To apply for *pro hac vice* admission, each attorney must fill out a registration form and pay a fee to the BBO.⁴⁹ In 2018, the fee to appear in the superior court, land court, or any appellate court was higher than the fee for all other courts.⁵⁰ The nonrefundable fee is not returned if the attorney is not admitted to practice *pro hac vice* in Massachusetts.⁵¹ The attorney must identify the court in which the attorney seeks *pro hac vice* admission, the party the attorney is to represent, and the case docket number, if available.⁵² For the attorney to appear in the matter, a member of the Massachusetts bar must present the attorney's motion for *pro hac vice* admission.⁵³

8. *Advising as a Foreign Legal Consultant*

Massachusetts has established a designation for lawyers admitted to practice in foreign countries who wish to advise clients in Massachusetts about foreign law.⁵⁴ An individual who "is a member in good standing of a recognized legal

⁴⁶ 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 *supra* note 9.

⁴⁷ *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).

⁴⁸ See SJC Rule 3:15 § 1.

⁴⁹ *Id.*

⁵⁰ *Board of Bar Overseers Registration Statement for Pro Hac Vice Attorneys*, BOARD OF BAR OVERSEERS, <https://bbopublic.blob.core.windows.net/web/f/prohacvice.pdf> (last visited April 27, 2018). As of April 2018, the fee for the former courts was \$301 per case; for all other courts, the fee was \$101 per case. SJC Rule 3:15 § 1. The rule contains exceptions for indigent clients.

⁵¹ The fee may be waived for pro bono representation. SJC Rule 3:15 § 1.

⁵² SJC Rule 3:15 § 1(b).

⁵³ SJC Rule 3:15 § 2.

⁵⁴ SJC Rule 3:05.

profession in a foreign country”⁵⁵ may apply to the SJC for a license as an 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) . . .”⁵⁶ The rule lists other more specific restrictions as well (including a ban on court appearances⁵⁷), 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 is bound by the *Massachusetts Rules of Professional Conduct*,⁵⁸ and the attorney-client privilege and work-product doctrines apply to the FLC’s communications the same as for a Massachusetts lawyer.⁵⁹ An FLC may work for a law firm and may become a partner, member, or equity owner of a law firm.⁶⁰

Recall that certain foreign lawyers may practice in Massachusetts as in-house counsel, as previously described in Section II(A)(5), without qualifying as FLCs and with no restrictions on the subject matter of the advice provided to their employers.

B. Character and Fitness Requirements

As noted at the beginning of the chapter, to become a member of the Massachusetts bar, applicants must obtain BBE approval as to their character and fitness to practice law.⁶¹ “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.”⁶² 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*,⁶³ *Matter of Panse*,⁶⁴ and *Matter of Britton*,⁶⁵ the SJC denied the applicants’ admission to the bar, emphasizing their failure to completely and accurately disclose required information in the bar applications and noting that

⁵⁵ *Id.* at § 1.2(a).

⁵⁶ *Id.* at § 5.1(e).

⁵⁷ *Id.* at § 5.1(a).

⁵⁸ *Id.* at § 6.1.

⁵⁹ *Id.* at § 6.3.

⁶⁰ *Id.* at §§ 6.2(b), (c).

⁶¹ MASS. GEN. LAWS ch. 221, § 37; SJC Rule 3:01 § 1.4.

⁶² BBE Rules V.1.

⁶³ 473 Mass. 1008 (2015).

⁶⁴ 473 Mass. 1001 (2015).

⁶⁵ 471 Mass. 1015 (2015).

candor with the BBE is essential. The applicants also had a history of litigiousness that was a factor in the decisions.⁶⁶

Some lawyers have gained admission by lying about or omitting reference to earlier misconduct or accusations of misconduct that would have caused the BBE concern, which perhaps would have denied the application or at least engaged in further investigation before acting on the application. When the application-related misconduct later came to light, the SJC did not revoke the attorney's license.⁶⁷ The solution on two occasions was a one-year suspension, with reinstatement conditioned on the lawyer obtaining a report from the BBE confirming that the lawyer now satisfied the character and fitness qualifications.⁶⁸

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 charges for drunk driving or an out-of-state conviction for drug possession has resulted in bar discipline; if the charges had been disclosed on the questionnaire, they probably would not have prevented admission.⁶⁹

Some applicants have gained admission to the Massachusetts bar despite being previously convicted of serious crimes. In *Matter of Prager*,⁷⁰ the applicant, a graduate of Bowdoin College and a Harvard graduate school, had been convicted in federal court of crimes involving distributing narcotics. He later graduated summa cum laude from the University of Maine Law School, clerked for the Maine Supreme Court, and worked as a law student for a legal aid program. On his application to the Massachusetts bar, the BBE recommended admission, finding that he was rehabilitated and possessed satisfactory moral character. The SJC invited the Office of the Bar Counsel to intervene, and that office opposed

⁶⁶ 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).

⁶⁷ See, e.g., *Matter of Voykhansky*, 24 Mass. Att'y Disc. R. 719, 723–24 (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).

⁶⁸ *Id.*; *Matter of Resnick*, 26 Mass. Att'y Disc. R. 544 (2010). As of April 26, 2018, neither Voykhansky (one-year suspension in 2008) nor Resnick (one-year suspension in 2010) had been reinstated.

⁶⁹ 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).

⁷⁰ 422 Mass. 86 (1996).

admission. The SJC denied the application in 1996⁷¹ but allowed admission in 2003.⁷² In another example, an applicant applied for admission to the Massachusetts bar after pleading guilty in Maryland to conspiracy to distribute marijuana, for which he received a one-year prison sentence.⁷³ After the applicant was denied admission in Florida because of his criminal history,⁷⁴ he successfully applied to the District of Columbia⁷⁵ and Massachusetts⁷⁶ bars. He ultimately succeeded in gaining admission in Florida, where he was later subject to discipline for misconduct.⁷⁷ 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.⁷⁸

C. Maintaining Membership in the Massachusetts Bar

This subsection discusses the registration and related activities required for an attorney to maintain good standing as a member of the Massachusetts bar, whether the attorney seeks to continue to practice or instead seeks to discontinue practice (except perhaps for the pro bono work discussed in previous subsections of this chapter) while remaining a member of the bar.

1. *Maintaining Good Standing for Permanent Members of the Massachusetts Bar*

Once admitted to practice in Massachusetts, an attorney must pay an annual registration fee determined by length of service and file an annual registration state-

⁷¹ 422 Mass. at 95.

⁷² <https://www.massbbo.org/AttorneyLookup?firstName=Harvey&lastName=Prager> (last visited May 24, 2018).

⁷³ *In re Kleppin*, 768 A.2d 1010, 1013 (D.C. 2001).

⁷⁴ *Id.* at 1013.

⁷⁵ *Id.* at 1018.

⁷⁶ As of 2018, attorney Kleppin appears on the rolls of Massachusetts lawyers, with a 2001 admission date.

⁷⁷ *Florida Bar v. Kleppin*, 2010 WL 6983305 (Fla. 2010) (admonition for misconduct involving asserting unsubstantiated claims and discovery infractions during litigation).

⁷⁸ 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 23, Section III(B)). Alger Hiss was disbarred in 1952 after conviction on two counts of perjury for false testimony before the House Un-American Activities Committee regarding Russian espionage. Despite Hiss's continued claims of innocence and refusal to acknowledge any wrongdoing, the SJC affirmed the board's recommendation to reinstate Hiss because of his long record of successful work after release from prison. *See also* *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).

ment. For a discussion of how an attorney may elect inactive status or resign (other than through the disciplinary process), see Section II(D). After admission to the bar, and unless the attorney is suspended and seeks reinstatement, a lawyer in Massachusetts need not establish, nor does the BBE or any agency assess, ongoing moral character or legal competence. Massachusetts does not impose any continuing legal education requirements.⁷⁹

The board identifies each attorney's annual registration renewal date.⁸⁰ To renew registration, lawyers must submit a form reporting admissions to practice in other jurisdictions, including federal courts and administrative agencies. The statement must also disclose whether they are in good standing in each such jurisdiction and, if not, explain the circumstances of that determination, identify IOLTA account information, or provide any exemption from the IOLTA account requirement,⁸¹ as well as disclose whether they have professional liability insurance.⁸² Massachusetts does not require that a lawyer have professional liability or malpractice insurance, but the BBO website publicly discloses whether a lawyer carries such insurance. Misrepresenting insurance coverage to the BBO may be a basis for discipline.⁸³

The registration submission must also include business and residential addresses as well as an e-mail address. The business address, including telephone number, is public. E-mail addresses may be shared with courts. The residential

⁷⁹ As of 2015, Massachusetts is one of only six jurisdictions (out of the fifty 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 *MCLE Information by Jurisdiction*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/cle/mandatory_cle/mcle_states.html (last visited May 24, 2018). Massachusetts does, however, require every new admittee to complete a one-day, in-person, mandatory Practicing with Professionalism course. SJC Rule 3:16.

⁸⁰ SJC Rule 4:02 § 1 (suggesting that the board establish a “system of staggered annual registrations”).

⁸¹ The on-line form the BBO's website provides to attorneys lists three bases for an IOLTA account exemption: (1) the lawyer is not practicing law in Massachusetts, (2) the lawyer practices law but is not in private practice (e.g., as a government or in-house lawyer) and does not receive client funds, or (3) some “other” explanation the lawyer provides.

⁸² SJC Rule 4:02 § 2(a).

⁸³ 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 CPCS); *Matter of Durodula*, 28 Mass. Att’y Disc. R. 267 (2012) (two-month suspension for falsely certifying to the BBO that he was covered by professional liability insurance and for accepting appointments from CPCS, knowing that he did not have insurance); *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) (year-and-a-day suspension for falsely claiming to CPCS and altering documents to show liability insurance coverage).

address remains confidential with the board and the bar counsel, unless the residential address is the same as the business address.⁸⁴

Since September 2016, all attorneys have been required to provide their annual registration statement online.⁸⁵

The lawyer must submit the BBO form along with a “periodic assessment,” or registration fee.⁸⁶ The fee structure provides a standard fee for most lawyers with active status, which is reduced for lawyers in practice for five or fewer years or for more than fifty years. Those fees cover the costs of the BBO, the bar counsel operations, the CSB, and Lawyers Concerned for Lawyers.⁸⁷ In addition to the standard required fee, the board includes a separate, voluntary annual fee in its assessment to support access to justice.⁸⁸ The requested fee includes that voluntary payment, so a lawyer must opt out if choosing not to contribute; opting out of the payment is confidential. An attorney who fails to file a registration statement and pay the required registration fee will be administratively suspended.⁸⁹

2. Maintaining Good Standing for Nonpermanent, Nonactive Members of the Massachusetts Bar

As previously described, attorneys may practice law in Massachusetts under a variety of circumstances, even if not an active full member of the bar. An FLC must register in the same manner as an active attorney, including paying a registration fee established by the board.⁹⁰ A retired attorney who wishes to represent clients on a pro bono basis must also file an annual registration statement, but does not pay fees.⁹¹ An inactive attorney registers the same as an active attorney, but pays a reduced fee.⁹² An attorney practicing with an out-of-state license

⁸⁴ 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.

⁸⁵ The board’s website contains a link to the announcement of this requirement and also to the registration pages, which require the registering lawyer to create an account. The announcement is available at <https://bbopublic.blob.core.windows.net/web/f/reg2016.pdf>. (last visited April 26, 2018). The registration pages can be accessed at <https://www.massbbo.org/AttorneyType> (last visited April 26, 2018).

⁸⁶ SJC Rule 4:03 § 1.

⁸⁷ *Id.* In fiscal year 2015, 78.36 percent of registration fees were allocated for BBO and bar counsel operations, 14.07 percent for CSB awards, and 7.57 percent for Lawyers Concerned for Lawyers expenses.

⁸⁸ SJC Rule 4:03 § 1(b). The funds contributed are paid to the IOLTA Committee. *See* Section III for a discussion of IOLTA funding.

⁸⁹ SJC Rule 4:02 § 3. For a description of administrative suspension, see Chapter 4, Section II(F)(6).

⁹⁰ SJC Rule 4:02 § 1(a) (an FLC is subject to the annual filing requirement and to SJC Rule 4:03, requiring payment of annual registration fees).

⁹¹ SJC Rule 4:02 § 8(b); 4:03 § 1(a).

⁹² SJC Rule 4:02 § 8(a); 4:02 § 4; 4:03 § 1(a).

pursuant to SJC Rule 3:04 (limited to indigent representation) must register the same as active bar members.⁹³

D. Electing to Resign, Retire, or Assume Inactive Status

1. Resigning or Retiring Other Than While Subject to Discipline

A lawyer may end membership in the bar in one of two ways (aside from disbarment or discipline-related resignation covered elsewhere in this book⁹⁴): the lawyer may *resign* or *retire*. These two choices have different consequences. A non-disciplinary resignation offers little, if any, advantage relative to retirement, as this section describes.

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 submits the request to the board, which then makes a recommendation to the SJC.⁹⁵ The board does not attend to resignation requests for six months, in case any disciplinary charges appear. The SJC then issues an order certifying that the attorney has resigned. A lawyer who has resigned but who then wishes to return to practicing law in Massachusetts probably must take and pass the bar examination and fulfill the other admission requirements.⁹⁶ While resigned (if not for disciplinary reasons), the former lawyer may work as a paralegal.

A retirement is a less final alternative. To retire from practice, a lawyer checks the “Retired” box on the annual registration form. While the lawyer pays no registration fees while retired, the retired lawyer must file registration statements for three years after retiring so that the bar counsel can locate the lawyer should any disciplinary matters arise.⁹⁷ 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 of retirement.⁹⁸ Also, a retired attorney (but not a resigned

⁹³ SJC Rule 3:04 § 1.

⁹⁴ See Chapter 21, Section II and Chapter 4, Section II(H).

⁹⁵ No rule addresses nondisciplinary resignation. A 1978 SJC standing order addresses “Non-disciplinary Voluntary Resignations,” but offers very little detail about the process. See Appendix J for a copy of the SJC Standing Order on Nondisciplinary Voluntary Resignations.

⁹⁶ The SJC standing order, *supra* note 95, 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.

⁹⁷ SJC Rule 4:02 § 5(a).

⁹⁸ SJC Rule 4:02 § 5(b).

attorney) may provide pro bono legal services in connection with an authorized legal assistance program⁹⁹ and may work as a paralegal.

2. *Electing Inactive Status*

A lawyer may temporarily cease practice by electing inactive status on the annual registration filing. An inactive attorney may not practice law but continues to register annually and pays a reduced registration fee.¹⁰⁰ Unlike a retired lawyer, who must pay the full registration fee for each year of retirement to resume practice, an inactive attorney may be authorized to practice by notifying the board and paying the registration fee for the year practice resumes.¹⁰¹ An inactive lawyer may work as a paralegal.

III. IOLTA AND OTHER TRUST ACCOUNT OBLIGATIONS AND COMPLIANCE

As described in Chapter 11, 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 time to warrant the administrative costs of a separate account, in an IOLTA account.¹⁰² Banks at which lawyers may establish an IOLTA account are required 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.¹⁰³ The IOLTA Committee distributes the funds to legal assistance and nonprofit organizations to improve the administration of justice and deliver civil legal services to low-income clients.¹⁰⁴

The IOLTA Committee publishes a careful, comprehensive manual instructing lawyers about every step of the IOLTA and trust account requirements.¹⁰⁵

⁹⁹ SJC Rule 4:02 §§ 5(a), 8(b). *See supra* Section II(A)(6).

¹⁰⁰ SJC Rule 4:02 § 4(a).

¹⁰¹ SJC Rule 4:02 § 4(b).

¹⁰² MASS. R. PROF. C. 1.15(e)(6) refers to this as a “pooled account (‘IOLTA account’).”

¹⁰³ MASS. R. PROF. C. 1.15(e)(3), (e)(6), (g)(2), and (g)(4); *IOLTA Guidelines*, MASSACHUSETTS IOLTA (2009), § B. The IOLTA Guidelines may be found on the IOLTA Committee's website: <https://maiolta.org/for-attorneys> (last visited April 27, 2018).

¹⁰⁴ Under MASS R. PROF. C. 1.15(g)(4)(i), 67 percent of IOLTA funding must be distributed to the Massachusetts Legal Assistance Corporation; the remaining 33 percent goes to other agencies or programs as the SJC orders.

¹⁰⁵ *See* Jayne B. Tyrrell and Stephen M. Casey, *Managing Clients' Funds and Avoiding Ethical Problems* (Client Funds Manual 2015), MASSACHUSETTS IOLTA (July 2015), <https://www.maiolta.org/for-attorneys> (last visited April 27, 2018).

Every practicing attorney should have that handbook and refer to it often. This chapter highlights some important considerations, but does not substitute for the handbook.

Every lawyer in Massachusetts must have an IOLTA account, individually or through a law firm, *unless* the lawyer is not engaged in private practice *and* does not hold client funds, or has other good cause.¹⁰⁶ Only those banks certified by the SJC's IOLTA Committee may receive trust funds in a designated IOLTA account.¹⁰⁷ To obtain certification, a bank must agree to pay interest at a minimum level, determined through a complicated formula.¹⁰⁸ Some select banks have agreed to pay interest at a higher rate, and the IOLTA Committee recognizes them as "Leadership Institutions."¹⁰⁹

The lawyer's requirements for any trust accounts, whether IOLTA or otherwise, are as follows:

- The name of any trust account must include some variation of "IOLTA Account," "client funds account," or the like.¹¹⁰ 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.¹¹¹

¹⁰⁶ No specific rules establish this principle, but it can be derived from the requirement that trust funds be held in trust accounts, and from the related rules that require that an IOLTA account be maintained for trust funds under certain circumstances, and the BBO's annual registration form so states. *See* MASS. R. PROF. C. 1.15(b)(1), 1.15(e)(6).

¹⁰⁷ The current version of the guidelines defines the "eligible financial institutions" into which trust funds may be deposited as, among other things, a financial institution that the IOLTA Committee has certified as being compliant with its guidelines. IOLTA Guidelines B, B(1)(c), <https://maiolta.org/for-attorneys> (last visited April 27, 2018).

¹⁰⁸ According to MASS. R. PROF. C. 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 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). *IOLTA Guidelines*, MASSACHUSETTS IOLTA, <https://www.maiolta.org/for-attorneys>. To be eligible for certification, a financial institution must have the characteristics described in section B of the IOLTA Guidelines. A list of financial institutions certified to hold IOLTA funds is available on the IOLTA Committee's website. *Approved IOLTA Depositories*, MASSACHUSETTS IOLTA, <https://www.maiolta.org/financial-institutions/approved-iolta-depositories> (last visited May 24, 2018).

¹⁰⁹ *Approved IOLTA Depositories*, MASSACHUSETTS IOLTA, <https://www.maiolta.org/financial-institutions/approved-iolta-depositories>.

¹¹⁰ MASS. R. PROF. C. 1.15(e)(2).

¹¹¹ MASS. R. PROF. C. 1.15(e)(3).

- While commingling a lawyer’s own funds with those held in trust is a serious breach of fiduciary duty,¹¹² some of the lawyer’s own funds may be deposited into the account to pay any required bank charges.¹¹³
- Once the lawyer deposits funds in a trust account, careful records of the funds and their movement must be kept. Mass. R. Prof. C. Rule 1.15(f) lists the specific requirements, including the following:
 - All funds in the account must be identified by the client or third person on whose behalf the funds are held. The lawyer must establish a separate account for the lawyer’s business funds.
 - The trust 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.¹¹⁴
 - Separate from the account check register, 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.
 - The account must be reconciled at least every sixty days, such that the bank statements, the individual client and bank ledgers, and the account register balance exactly. (This is known as the three-way reconciliation requirement.)
 - The accounts, records, and documentation required by Mass. R. Prof. C. Rule 1.15(f) may be maintained electronically, but, if so, the lawyer must be capable of producing a printed report of the records that the rule requires. Any records the rule requires must be maintained for six years after final distribution of the funds and the termination of representation.
 - Generally, a lawyer may only distribute funds on behalf of a client or third party for the purposes for which the funds were received.¹¹⁵

¹¹² As noted in Chapter 11, commingling funds alone, without deprivation, typically results 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); Ad. 02-27, 18 Mass. Att’y Disc. R. 682 (2002).

¹¹³ *See* MASS R. PROF. C. 1.15(b)(2)(i). *See also* IOLTA Guidelines B(2), *IOLTA Guidelines*, MASSACHUSETTS IOLTA, <https://www.maiolta.org/for-attorneys> (permitting deposits of lawyer funds into a trust account to maintain a required minimum balance).

¹¹⁴ MASS R. PROF. C. 1.15(e)(4).

¹¹⁵ Of course, the client might direct some other use of funds, delivered to the attorney by or for the client, for some purpose other than that for which it was received; the key notion is that the

The bank the lawyer uses must have an agreement with the board to report to the board any instance of a check being returned for insufficient funds.¹¹⁶ Therefore, if a lawyer writes a check on a trust account and the check is returned for insufficient funds, the board receives notice, causing the bar counsel to investigate. In practice, however, notices concerning dishonored trust account checks typically go directly to bar counsel.

IV. THE CLIENTS' SECURITY BOARD AND FUND

When the SJC created the BBO and the Office of the Bar Counsel in 1974 to centralize and unify lawyer discipline, it also created the CSB and the Clients' Security Fund. The CSB includes seven Massachusetts lawyers the Court appoints to serve as trustees of the fund. The fund's purpose is to discharge, as far as practicable and in a reasonable manner, the collective responsibility of Massachusetts bar members regarding losses caused to the public through bar member defalcations, thereby protecting the bar's reputation and integrity.

The CSB distributes funds to individuals who have suffered losses caused by defalcation by Massachusetts lawyers, acting either as attorneys or as fiduciaries.¹¹⁷ The CSB accepts claims 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."¹¹⁸ Any such fund payments "shall be a matter of grace, not right, and no client, beneficiary, employer, organization or other person shall have any right or interest in the Fund."¹¹⁹ Therefore, a CSB reimbursement claim that is denied may not be reviewed or appealed,¹²⁰ although the CSB will reconsider a decision if presented with new evidence or for other good cause. The fund is

money belongs to the client, not the attorney. Common sense and good discretion suggest that if the client (or third party) whose money the lawyer holds directs that it be used for some purpose other than that for which it was received, this should be documented carefully, and the attorney should be careful not to violate the rights that some other person might have in or to the money. A lawyer's ethical obligations concerning other people's money are discussed in Chapter 11.

¹¹⁶ MASS R. PROF. C. 1.15(h)(1).

¹¹⁷ SJC Rule 4:04 § 1.

¹¹⁸ *Clients' Security Board Rules, Rule 2(d)*, CLIENTS' SECURITY BOARD, http://www.mass.gov/ClientsSecurityBoard/rules_.html#2 (last visited May 24, 2018).

¹¹⁹ SJC Rule 4:05 § 1.

¹²⁰ 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.").

financed by a portion of the annual registration fees lawyers and FLCs pay and, to a minor extent, from monies recovered from defalcating lawyers or other parties responsible for the loss.¹²¹ In fiscal year 2013, the most recent year for which a report is available, the fund awarded close to \$3 million.¹²²

For an applicant to be eligible for an award, the loss must have occurred due to defalcation during client representation, 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 resigned from practice.¹²³ The CSB does not reimburse for losses caused by lawyer malpractice or other negligent practice, 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.¹²⁴ The application requires detailed information about the facts surrounding the loss, and all efforts the client or others have made to recover the funds from the lawyer, an insurer, or another source. The CSB sends a copy of the application to the attorney alleged to have caused the loss and asks the bar counsel for any information regarding the matter. If a viable claim against a third party exists, the CSB typically addresses the claim first and then, with an assignment of claims obtained from the injured party, pursues recovery from the third party. Once the CSB has a complete set of facts and documents, it either adjudicates the claim without a hearing or schedules a hearing on the matter. At any such hearing, which respondent attorney may attend, one or more CSB members serves as the hearing officer or panel. The claimant may be represented by counsel, but no lawyer for a claimant may accept a fee for representing a CSB claim. All such services must be provided on a pro bono basis.¹²⁵

¹²¹ See *supra* note 91 (describing the funding allocation to the CSB).

¹²² *Annual Report for Fiscal Year 2013*, CLIENTS' SECURITY BOARD, http://www.mass.gov/ClientsSecurityBoard/annual_reports.html (reporting awards totaling \$2,801,666) (last visited May 24, 2018). Annual reports for later years may be obtained by contacting the CSB.

¹²³ SJC Rule 4:05 § 2.

¹²⁴ *Claim Form* ["Confidential Application"], CLIENTS' SECURITY BOARD, http://www.mass.gov/ClientsSecurityBoard/Appli-Form-99_High.pdf (last visited April 27, 2018).

¹²⁵ See CSB Rules, Rule 9. *Clients' Security Board Rules*, CLIENTS' SECURITY BOARD, http://www.mass.gov/ClientsSecurityBoard/rules_.html#2 (last visited May 24, 2018).

The CSB makes awards based upon “fair, reasonable and consistent principles,”¹²⁶ including the following factors:

- Funds available to the CSB in light of the projected claims for that fiscal year and the total amount of losses caused by any one attorney
- Amount of the claimant’s loss as compared with those of other claimants
- Degree of hardship the claimant suffered as compared with that of other claimants
- Any negligence or conduct by the claimant that may have contributed to the loss¹²⁷

As a condition of any such award, a claimant must agree to cooperate with the CSB and any other source in obtaining payment for the loss from other sources and must agree to any appropriate assignment or subrogation agreements.¹²⁸ Unlike most other jurisdictions, and unlike the arrangement the *ABA Model Rules for Lawyers’ Funds for Client Protection* suggests,¹²⁹ Massachusetts does not impose a cap on the amount of any given award.

The board website publishes summaries of the board’s decisions, which include the respondent’s name but not the claimant’s. In determining whether to recommend reinstatement of a lawyer, the BBO takes into account whether the lawyer has reimbursed the CSB for any award granted to the lawyer’s clients;¹³⁰ the petition for reinstatement must include a statement whether the CSB has been reimbursed,¹³¹ and part one of the reinstatement questionnaire, question 3(D), asks about payments by the CSB and the date of the petitioner’s reimbursement to the CSB.¹³²

¹²⁶ SJC Rule 4:05 § 3.

¹²⁷ *Id.*

¹²⁸ SJC Rule 4:05 § 4.

¹²⁹ *Model Rules for Lawyers’ Funds for Client Protection—Rule 14(1)*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/rule14.html (last visited April 27, 2018).

¹³⁰ *Matter of McCarthy*, 23 Mass. Att’y Disc. R. 469, 470 (2007) (reinstatement denied; “principal” reason for denial was failure to make restitution).

¹³¹ SJC Rule 4:01 § 18(4)(d).

¹³² The reinstatement questionnaire appears as an appendix to the rules of the BBO, which may be found at <https://bbopublic.blob.core.windows.net/web/f/BBORules.pdf> (last visited April 27, 2018).

Appendices

APPENDIX A

Sample Petition for Discipline

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

BAR COUNSEL,

Petitioner

vs.

JOHN DOE, ESQ.¹

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).

¹ “Esq.” is not included if the attorney is not in good standing.

APPENDICES

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 the 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).

APPENDIX A

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.

APPENDICES

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).

APPENDIX A

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.

APPENDICES

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 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 \$5,000 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

APPENDICES

(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 B

**Sample Notice to Respondent Accompanying
Petition for Discipline**

October 10, 2017

PERSONAL AND CONFIDENTIAL

John Doe, Esq.
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 BBO Rule 3.5(e). A copy of each document must be served on the 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 SJC 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 the Bar Counsel, estimating the length of time necessary to present your defense.

Sincerely yours,

Joseph S. Berman
General Counsel

JSB/prt
Enclosures

APPENDIX C

Sample Answer to Petition for Discipline

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

BAR COUNSEL,

Petitioner

vs.

JOHN DOE, ESQ.

Respondent

B.B.O. File No. C8-67-5309

RESPONDENT'S ANSWER

Respondent John Doe, by his counsel, and pursuant to Rule 3.15 of the Rules of the Board of Bar Overseers, answers the Petition in this matter as follows. Mr. Doe also requests that he be heard on the issue of mitigation.

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.

ANSWER

Respondent admits that the Petition is purportedly brought by bar counsel pursuant to legal authority.

2. The respondent, John Doe, was admitted to practice in the Commonwealth of Massachusetts on December 23, 1999.

ANSWER

Admitted.

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).

ANSWER

Admitted.

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.

APPENDIX C

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 the 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 checkbooks from several bank accounts as well as a list of cases that he worked on between 2010 and 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.

APPENDICES

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.

APPENDIX C

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 personal 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 account to cover this deposit.

ANSWER

Denied. Respondent states that he was not aware that he did not have sufficient funds in his TD 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 \$5,000 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.

APPENDICES

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

Date: October 22, 2017

APPENDIX D

Form Stipulation for Discipline

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

BAR COUNSEL,

Petitioner

vs.

JOHN DOE, ESQ.,

Respondent

B.B.O. File No. C8-67-5309

**RESPONDENT'S [AMENDED]² 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, [OTHER JURISDICTION] 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

² If the stipulation is reached after an answer is filed, the stipulation will also serve as an amended answer.

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.] [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

APPENDIX D

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 that 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 CLIENTS:] 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,

APPENDICES

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

By:

John Doe, Esq.
BBO #987654

Assistant Bar Counsel
BBO # 987653

Date: _____

Date: _____

APPENDIX E

Form Affidavit of Resignation

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

AFFIDAVIT OF RESIGNATION BY JOHN DOE, ESQ.,³
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 SJC 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 a 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 website; 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.

³ "Esq." is not used if the attorney is not in good standing.

APPENDICES

4. I am aware that there is currently pending an investigation into allegations 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 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,

APPENDIX E

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, [ANY OTHER JURISDICTION], 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.

APPENDICES

Signed and sworn to under the penalties of perjury this ____ day of
December, 2017.

John Doe, Esq.

APPENDIX F

Sample Prehearing Conference Order

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

BAR COUNSEL,

Petitioner

vs.

JOHN DOE, ESQ.,

Respondent

B.B.O. File No. C8-67-5309
PREHEARING CONFERENCE
ORDER

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) 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, premarked, 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 four 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 that 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).

APPENDICES

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 26).

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 27).

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 28).

14. On September 11, 2018, the board served a copy of the board's vote and memorandum of decision (Tab 29).

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	\$3,041.53

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.

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: _____

TEL. 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

_____ NONPAYMENT OF REGISTRATION FEES

_____ OTHER (IOLTA VIOLATION)

RECOMMENDATION: _____

APPENDICES

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 or Disbarment
with Attached Form Notices**

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

Suffolk, ss.

No. BD-2018-001 U

In the Matter of

JOHN DOE

AFFIDAVIT OF COMPLIANCE

Pursuant to SJC 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 SJC 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

APPENDICES

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. 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.

APPENDIX I

Name: _____

Address: _____

Telephone: _____

Signed and sworn to under the penalties of perjury this _____ day of
_____, 2018.

John Doe

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

**NOTIFICATION OF DISBARMENT
TO COURT, AGENCY, OR TRIBUNAL**

TO: _____
Court, Agency, or Tribunal

Address

NAME OF CLIENT:

(case caption)

ADDRESS OF CLIENT:

(docket number)

Pursuant to SJC 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 that I have sent to my client(s), counsel of record, and those parties unrepresented by counsel.

DATE: _____ SIGNATURE: _____
John Doe

ADDRESS: _____

TELEPHONE: _____

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

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 SJC 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 that 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 Department of Veterans Affairs, the Social Security Administration, other government agencies, banks, boards of directors, and/or co-trustees.

This is not to be taken as an exhaustive list.

APPENDICES

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
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Place of
Residence: _____

NAME: _____
Place of
Residence: _____

NAME: _____
Place of
Residence: _____

(Attach additional sheets as needed.)

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

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 SJC 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: _____

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

**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 SJC 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: _____

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

NOTICE OF DISBARMENT TO CLIENT

TO: _____
CLIENT COURT

ADDRESS CASE CAPTION

DOCKET NUMBER

Pursuant to SJC 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: _____

APPENDICES

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: _____

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

**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 SJC 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: _____

APPENDICES

**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: _____

NAME: _____ NAME: _____

Address: _____ Address: _____

NAME: _____ NAME: _____

Address: _____ Address: _____

(Attach additional sheets as needed.)

APPENDIX I

II. ATTORNEYS AND UNREPRESENTED PARTIES

NAME: _____ NAME: _____

Address: _____ Address: _____

NAME: _____ NAME: _____

Address: _____ Address: _____

NAME: _____ NAME: _____

Address: _____ Address: _____

NAME: _____ NAME: _____

Address: _____ Address: _____

NAME: _____ NAME: _____

Address: _____ Address: _____

NAME: _____ NAME: _____

Address: _____ Address: _____

NAME: _____ NAME: _____

Address: _____ Address: _____

(Attach additional sheets as needed.)

APPENDICES

III. COURTS AND AGENCIES

NAME: _____ NAME: _____

Address: _____ Address: _____

NAME: _____ NAME: _____

Address: _____ Address: _____

NAME: _____ NAME: _____

Address: _____ Address: _____

NAME: _____ NAME: _____

Address: _____ Address: _____

NAME: _____ NAME: _____

Address: _____ Address: _____

NAME: _____ NAME: _____

Address: _____ Address: _____

NAME: _____ NAME: _____

Address: _____ Address: _____

(Attach additional sheets as needed.)

APPENDIX I

SCHEDULE OF BANK ACCOUNTS

LOCATION

TITLE

ACCOUNT NUMBER

(Attach additional sheets as needed.)

APPENDICES

SCHEDULE OF DISPOSITION OF CLIENT AND FIDUCIARY FUNDS

(Attach additional sheets as needed.)

APPENDIX J

**SJC Standing Order on Nondisciplinary
Voluntary Resignations**

STANDING ORDER CONCERNING NONDISCIPLINARY
VOLUNTARY RESIGNATIONS FROM THE BAR
OF MASSACHUSETTS ATTORNEYS

1. It is ORDERED that upon filing with the Clerk's Office of the Supreme Judicial Court for the County of Suffolk, and 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.

....

Entered: February 3, 2018

(Attach additional sheets as needed.)

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