Massachusetts Bar Discipline

History, Practice, and Procedure

SECOND EDITION

The Board of Bar Overseers
of the Supreme Judicial Court

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 is not, however, 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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SECOND EDITION

The Board of Bar Overseers
of the Supreme Judicial Court

2026

The Board of Bar Overseers of the Supreme Judicial Court
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This second edition of the treatise is dedicated to the hundreds of volunteers who have served as board members and hearing officers of the Board of Bar Overseers since its inception in 1974.

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Preface

While several publications have described the bar discipline process for violating 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.

This treatise seeks to fill the 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, advertising, and safekeeping of trust property, and the sanctions typically imposed. This is followed by a discussion in part IV of conduct that may aggravate or mitigate the presumptive sanction. Parts V through VIII discuss the posthearing 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, this 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.

Although published by the Board of Bar Overseers, this treatise is not intended as an authoritative statement of binding rules or interpretations. It is meant as a guide to the rules, caselaw, and practice. It is not binding.

The Board of Bar Overseers

Acknowledgments

First Edition

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.

Second Edition

The Board of Bar Overseers would like to thank the following people for their contributions updating the treatise: General Counsel Joseph S. Berman chaired the Treatise Committee, tasked with a series of revisions. The Treatise Com-

mittee included members of the bar Hon. Ernest L. Sarason Jr. (former board member), Paul Tremblay, Regina Roman (former board member), and R. Michael Cassidy (former board chair). The Treatise Committee also comprised the following from the BBO: Assistant General Counsel Erin Howard, Legal Assistant June R. Risk, Legal Program Paralegal N. Sidney Davis, Clients' Security Board General Counsel and Executive Director Linda G. Bauer, and Bar Counsel Richard C. Abati. Richard Abati wishes to acknowledge First Assistant Bar Counsel Joseph Makalusky and Assistant Bar Counsel Inez Canada, Robert M. Daniszewski, Pamela A. Harbeson, David A. Kluft, and Heather L. LaVigne, who collectively made substantive changes to part III of the treatise and reviewed several chapters from the Treatise Committee. The board thanks all of these individuals for their hard work on the second edition.

On the production side, grateful acknowledgment is made to production editor Lisa Zuniga, designer Terry McGrath, copyeditor Lea Gallant, proofreader Tanya Fox, and indexer Rich Genova.

PART I
INTRODUCTION

CHAPTER ONE

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 capacity[1] in the Superior Court under Massachusetts General Laws ch. 159 § 39.

By at least the beginning of the twentieth century, the Supreme Judicial Court (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 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 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

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, 486, 195 N.E. 495, 496 (1928).

3 *See, e.g.*, Matter of Carver, 224 Mass. 169, 171, 112 N.E. 877, 879 (1916) (holding that court's disciplinary power is not only statutory but inherent).

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

5 *Id.*

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

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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 Santosuosso*,[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 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

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7 *See, e.g.*, *Greenhood, supra* note 4, 168 Mass. at 184, 46 N.E. at 575. *See also* Bar Ass'n of City of Boston v. Scott, 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 *Cohen, supra* note 2, 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 In Bar Counsel v. Board of Bar Overseers, 420 Mass. 6, 1995-DDC-6916 (SJC 1995), the court determined that the usual rules of issue preclusion applied to bar discipline proceedings. Given that the standard of proof is a preponderance of the evidence, issue preclusion based on prior civil adjudications is more prevalent in Massachusetts than in states that require clear and convincing evidence to prove misconduct.

13 345 Mass. 342 (1963).

14 Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement (ABA 1992).

"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.[17]

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."[18] The MBA also sought to establish the Clients' Security Board (CSB), which would be supported by the same funding.

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15 *Id.* at xiv.

16 *Id.*

17 States where lawyers are required to pay their annual registration fees to the state bar associations are known as unified bars. A 2020–2022 survey conducted by the ABA stated that twenty-nine jurisdictions reported that they had a unified bar, as compared to eighteen jurisdictions that reported they did not. Four jurisdictions did not respond to the survey question. ABA Standing Committee on Public Protection in the Provision of Legal Services, *Survey of Lawyers' Funds for Client Protection 2020–2022*, 3 (2023).

18 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.[19]

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.[20]

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."[21]

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 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.[22] 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.[23] 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 by then the BBO and CSB were fully operational, and no one suggested revisiting the unification issue.[24]

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19 *See* Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 3:22, 359 Mass. 796 (1971).

20 *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); McDonald v. Longley, 4 F.4th 229 (5th Cir. 2021).

21 Wilkins, *supra* note 18, at 135.

22 *Id.*

23 *See* Matter of McInerney, 389 Mass. 528, 530 n.5, 451 N.E.2d 401, 403 n.5 (1993) (describing 1974 adoption of SJC Rule 4:01, which created present system of bar discipline); Indeck v. Clients' Security Bd., 450 Mass. 379, 879 N.E.2d 57 (2008) (describing court's adoption of SJC Rule 4:04 in 1974, which established Clients' Security Fund).

24 Wilkins, *supra* note 18, at 136. As it happened, the MBA's petition for unification of the bar was

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. The originally proposed 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.[25] 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."[26] 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" (emphasis added).[27]

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 substantial deference standard used in reviewing the credibility determinations of hearing officers in administrative proceedings under the Massachusetts Administrative Procedure Act (G.L. c. 30A, Sec. 14). 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.[28] 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.[29]

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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.

25 *See* Matter of Blais, 1978-DDC-107 at 5–6 (SJ 1978).

26 SJC Rule 4:01 § 8(6).

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

28 *See, e.g.*, Matter of Barrett, 447 Mass. 453, 463–65, 2006-DDC-3737 at 6–7 (SJC 2006).

29 *See, e.g.*, Matter of Wise, 433 Mass. 80, 2000-DDC-2685 (SJC 2000) (overruling BBO finding that conflicted with hearing committee's credibility determination); Matter of Hachey, 1995-DDC-1846 at 2 (SJ 1995) (same). *See also Barrett*, 447 Mass. at 460, 2006-DDC-3737 at 3–4 (SJC 2006) (hearing officers act like jury on issues of credibility, which may not be set aside "unless the finding was wholly inconsistent with another implicit finding") (quoting *Hachey*). *Cf.* Matter of Strauss, 479 Mass. 294, 298–99, 2018-DDC-5927 at 10–11 (SJC 2018) (reiterating "irreconcilable inconsistency" standard of review). In Matter of Hession, 2013-DDC-5186 (SJ 2013), the single justice

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.[30] 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.[31]
- 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.
- Respondents who failed 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:

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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," 2013-DDC-5186 at 14–15 n.7 (SJ 2013). 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.

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

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

- 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 board 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 MBA[32] as well as an evaluation by ABA representatives.[33] 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 board 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.
- 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).[34] 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 LCL later expanded its mission beyond providing mental health services to lawyers to include law office management services.

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32 Report of the MBA Task Force on Lawyer Discipline, *supra* note 10.
33 American Bar Association, *Report on the Lawyer Regulation System of Massachusetts* (2005).
34 BBO Rules § 3.4(d).

In 2012, the court adopted SJC Rule 3:16, effective September 1, 2013, requiring newly admitted lawyers to the Massachusetts bar to attend a course on practicing with professionalism within eighteen months of admission. This was the first time the court had imposed any mandatory continuing legal education requirements for Massachusetts lawyers. The professionalism course was designed to help new attorneys address issues that could generate complaints to the BBO, and subsequently evolved to better address newly admitted attorneys' needs. The court repealed SJC Rule 3:16 on August 14, 2024, after recognizing that the important topics covered in the course were being addressed in new ways.

On October 1, 2020, the court issued its opinion in *Matter of Olchowski*,[35] concerning the administration of Interest on Lawyers' Trust Accounts (IOLTA) in Massachusetts. The court held that client funds on deposit in IOLTA accounts whose owners cannot be identified do not fall within the statutory definition of "abandoned property" under Massachusetts General Laws ch. 200A, and therefore such funds should be remitted to the Massachusetts IOLTA Committee rather than escheated to the state treasury. The court directed that Mass. R. Prof. C. 1.15 be amended accordingly, including to require that banks notify the BBO when there is no activity in an IOLTA account for more than two years, and to provide for the transfer and disposition of unidentified funds. The BBO now posts the names of persons and entities whose funds, previously held by a Massachusetts attorney, are now in the possession of the IOLTA Committee.

[35] 485 Mass. 807, 153 N.E.3d 376, 2020-DDC-6675 (SJC 2020).

CHAPTER TWO

The Participants in the Disciplinary Process

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 BBO in contested disputes about lawyer discipline. The BBO also hears appeals and recommends (and sometimes imposes) discipline. In addition, the BBO collects annual registration fees from Massachusetts lawyers that are used to fund the disciplinary agencies and some of the ancillary organizations described below (such as the Clients' Security Board and Lawyers Concerned for Lawyers).

BBO Hearing Officers: hear and make recommendations to the BBO 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 include 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 whose funds were stolen due to 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 because of personal, mental health, addiction, or medical problems. Through its Law Office Management Assistance Project (LOMAP), LCL assists Massachusetts attorneys in establishing responsible and effective office practices.

Massachusetts Interest on Lawyers' Trust Accounts (IOLTA) Committee: advises attorneys with respect to the receipt, safeguarding, accounting, and distribution of client funds.

SJC Standing Committee on Lawyer Well-Being (2020–2026): planned and oversaw efforts to enhance the well-being of lawyers, judges, and law students in the Commonwealth.

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

II. The Required Participants

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 (also known as "public members," and usually including a doctor) and eight attorneys.[1] The BBO includes a chair and a vice-chair, who have special respon-

[1] The SJC Rules do not fix the size of the BBO: "The Board shall consist of such number of members as the court may determine from time to time." Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 4:01 § 5(1).

sibilities, 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 investigates and prosecutes lawyers, while the BBO serves as the tribunal that decides disputed matters surrounding discipline. While the BBO appoints the bar counsel with the approval of the SJC and approves the hiring of 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 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 for more serious discipline, such as suspension and disbarment orders, the SJC must render final decision. 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 pre-hearing motion for a protective order, for issue preclusion, or to stay or defer prosecution, or if a respondent files a motion to dismiss, the board 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

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 [hereinafter BBO Rules] § 3.18.

each. BBO members may be reappointed for one more four-year term; that term limit does not bar reappointment after the member has been off the BBO for at least one year.[4] 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. (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.

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 2024, the BBO had a roster of 134 hearing officers, of whom 38 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 BBO. The OGC is responsible for advising the BBO, which is its client, and, on the BBO's behalf, the hearing officers. The OGC general counsel and assistant general counsel 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 legal program attorney manages the OGC commissioner cases and serves as commissioner for appropriate matters as well as oversees the live streaming and remote components of disciplinary hearings. The OGC also serves the BBO's administrative needs by scheduling matters, distributing notices, and maintaining case records.

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[4] SJC Rule 4:01 § 5(2).

[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.

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. See BBO Rules § 3.4(d). 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.

D. Office of the Bar Counsel

The OBC, established by SJC Rule 4:01 § 7, functions independently of the BBO. 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 2024, the office included the bar counsel, twenty assistant bar counsel, and several investigators.

The chief bar counsel, known as "the bar counsel," is appointed by the BBO, with the approval of the SJC.[7] The bar counsel hires the assistant bar counsel with "the concurrence" of the BBO.[8]

In addition to its duties as investigator and prosecutor of discipline complaints, the OBC serves an educational role. 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

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

7 SJC Rule 4:01 § 5(3)(b).

8 *Id.*

9 *Articles on Ethics*, Massachusetts Board of Bar Overseers, https://www.massbbo.org/s/articles-on-ethics.

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 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 makes or approves the rules of professional conduct; the rules creating the BBO, OBC, and related entities; and the procedural rules for bar discipline. The SJC also 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

[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, 2009-DDC-4351 at 1 (SJC 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, 2010-DDC-4533 (SJC 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, 379, 2007-DDC-4068, 2007-DDC-4069 (SJC 2007) ("A single justice reserved and reported the cases to the full court").

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 19 discusses the specifics of these review procedures.

III. Ancillary Entities

A. Clients' Security Board

The CSB is a separate administrative agency whose work is closely related to the Massachusetts disciplinary process. It uses funding from the registration fees paid by Massachusetts lawyers to reimburse clients and other victims who have suffered financial losses when those losses were caused by the dishonest conduct of Massachusetts lawyers who have been suspended, disbarred, have resigned, or died. A reimbursable loss occurs when a member of the bar, while acting as a lawyer or a fiduciary, steals, embezzles, or misappropriates money or other property that rightfully or legally belongs to the client. There is no reimbursable loss when a client disputes the fee charged by the lawyer or alleges that the legal services were negligent, incompetent, or inadequate.[14]

The CSB consists of seven members of the Massachusetts bar who are appointed by the SJC to serve as public trustees of the Clients' Security Fund. The purpose of the Fund is to "discharge, as far as practicable and in a reasonable manner, the collective professional responsibility of the members of the Massachusetts bar for the actual losses caused by the theft of client funds or property by attorneys . . . ."[15] The CSB members serve as volunteers and receive no financial compensation for their time and efforts in performing their duties.

The CSB works in the same offices as the BBO and OBC but is not part of either agency, although they share some administrative functions. It is an independent entity overseeing the Clients' Security Fund. Chapter 24 discusses the work of the CSB in more detail.

B. Board of Bar Examiners

The BBE is different and separate from the similarly titled agency, the BBO. The BBE consists of five members appointed by the SJC to examine the character

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

14 *How the Fund Works*, Massachusetts Clients' Security Board, https://www.masscsb.org/about.

15 SJC Rule 4:04 § 1.

and fitness of all applicants to the bar of the Commonwealth. The BBE both oversees the administration of the bar examination and ensures that persons who apply to become lawyers in this state meet all of the qualifications necessary for that privilege, including investigating the moral character of all applicants. The BBE recommends applicants to the SJC for admission to the bar and may recommend that an applicant be denied admission to the bar.[16] The BBE's role intersects with the disciplinary process in two ways. First, some respondents are called before the BBO because they submitted false or improper materials to the BBE in their application to the Massachusetts bar.[17] 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.[18] While the SJC appoints the BBE members and approves its rules, the BBE itself was created by the legislature, not the SJC.[19]

C. Lawyers Concerned for Lawyers

Lawyers Concerned for Lawyers (LCL) is the Lawyer Assistance Program (LAP) in Massachusetts recognized by the American Bar Association (ABA).[20] LCL is an independent, nonprofit Massachusetts corporation, and its nonprofit status is also recognized federally under section 501(c)(3) of the Internal Revenue Code. Pursuant to SJC Rule 4:07, LCL's operations are funded by a portion of the registration fees the BBO collects each year from Massachusetts lawyers. SJC Rule 4:07 also establishes an Oversight Committee to monitor LCL's use of funds and requires LCL to report its activities annually to the committee. LCL also receives some private philanthropic donations.

LCL assists members of the Massachusetts legal community, including lawyers, judges, law students, and other legal professionals[21] by offering assessment and consultation services for addiction, substance use disorders, mental health

16 *BBE Services*, Massachusetts Board of Bar Examiners, https://www.mass.gov/orgs/massachusetts-board-of-bar-examiners#org-nav-services.

17 *See, e.g.*, Matter of Moore, 442 Mass. 285, 295, 812 N.E.2d 1197 (2004) (suspension for two years, rather than disbarment, was appropriate sanction for making materially false statements in application for admission to bar with intent to deceive); Matter of Betts, 2010-DDC-4596 (SJ 2010) (suspension for failure to disclose misdemeanor charges on petition for admission); Matter of Voykhansky, 2008-DDC-4278 (SJ 2008) (suspension after false claim of having obtained undergraduate degree before law school).

18 *See, e.g.*, Matter of Resnick, 2010-DDC-4652 (SJ 2010).

19 *See* Mass. Gen. Laws [hereinafter M.G.L.] ch. 221 §§ 35, 36.

20 According to the ABA, LAPs "provide confidential services and support to judges, lawyers and law students who are facing substance use disorders or mental health issues." *Directory of Lawyer Assistance Programs*, American Bar Association, https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/.

21 *See* SJC Rule 4:07 § 1.

concerns, well-being, and law practice management.[22] LCL also provides monitoring services for members of the legal community suffering from addiction or substance use disorders who may be required to demonstrate sobriety to a third party. LCL offers educational resources on its website and is available for presentations and training.[23]

The staff who conduct clinical assessments and consultations regarding addiction, substance use disorders, and mental health concerns are licensed professionals. LOMAP provides assistance with practice management, career challenges, and professionalism. Staff who provide practice management and nonclinical services are lawyers and other trained professionals. While lawyers may access either clinical or LOMAP services exclusive of the other, joint consultations are available and sometimes encouraged. LCL's services are free to members of the Massachusetts legal community.

For lawyers involved in the disciplinary process, LCL can play an important role. Lawyers who are under investigation by the OBC or are facing disciplinary action, as well as former lawyers seeking reinstatement, may elect to receive services voluntarily from LCL. *A lawyer who seeks services, even during the disciplinary process, enjoys the confidentiality of a legal client under Mass. R. Prof. C. 1.6(a) and 1.6(d).* If a lawyer believes LCL has information that will help support a claim of mitigation or is evidence supporting the lawyer's progress in addressing concerns underlying the lawyer's alleged misconduct, the lawyer may wish to sign a release waiving confidentiality to allow LCL to release information to the OBC.

When the BBO or the SJC determines that a lawyer's misconduct is the result of an impairment or deficiencies related to practice management, the BBO or the court may issue orders requiring a lawyer to consult with and follow the recommendations of LCL. These orders, which may be part of a diversion agreement, a disciplinary sanction, or a condition of reinstatement, may direct the lawyer to participate in monitoring. To ensure compliance, the OBC may require the lawyer to sign a release to permit LCL to disclose information concerning the lawyer's compliance with the order or conditions of an agreement. Still, in these instances LCL's disclosures are strictly limited by the terms of the release, and LCL is required to keep all other information confidential.

LCL provides services that cover the entire range of the legal community and its many needs. LCL, however, does not provide ongoing mental health treatment, legal advice, or legal representation. Because its services are designed to be temporary and highly confidential, LCL staff are not available to testify in

[22] *About Us*, Lawyers Concerned for Lawyers, https://www.lclma.org/about/.
[23] *See Home Page*, Lawyers Concerned for Lawyers, https://www.lclma.org/.

its client's matters, unless required by law, and LCL staff do not act as experts in disciplinary cases.

D. Massachusetts IOLTA Committee

The SJC created the IOLTA program in 1985. Originally voluntary, the SJC converted the IOLTA to a "comprehensive" program in 1990 and required all eligible lawyers to participate.[24] The committee consists of nine members of the bar who are appointed by the SJC pursuant to Mass. R. Prof. C. 1.15(e)(6). Each lawyer who has a law office in the Commonwealth and who holds trust funds is required to deposit such funds in either (1) a pooled account ("IOLTA account") for all trust funds that are nominal in amount or are to be held for a short period of time, or (2) an individual account, with the interest payable as directed by the client or third person on whose behalf the trust funds are held. The funds deposited in pooled IOLTA accounts generate interest that the committee uses to support civil legal aid programs that provide legal advice and help to people who cannot afford a lawyer and to fund projects that improve the administration of justice in the Commonwealth. The committee conducts training programs for attorneys and banks, publishes educational materials on the safekeeping of 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 lawyer registration materials.

E. SJC Standing Committee on Lawyer Well-Being (2020–2026)

In January 2020, the SJC established the Standing Committee on Lawyer Well-Being to plan and oversee efforts to enhance the well-being of lawyers, judges, and law students in the Commonwealth. The Standing Committee was charged with leading efforts to cultivate a "healthy workforce" within the legal profession. Its goals included implementing the recommendations in the final report of the 2019 SJC Steering Committee on Lawyer Well-Being. The Standing Committee partnered with the BBO, LCL, bar counsel, bar associations, legal service providers, legal employers, public agencies, private firms, law schools, and other organizations to enhance the well-being of the legal profession in the Commonwealth.[25] The SJC dissolved the Standing Committee in 2026.

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[24] *Massachusetts IOLTA Program Overview*, Massachusetts IOLTA Committee, https://www.maiolta.org/about-us.

[25] *History of the Committee*, Lawyer Well-Being, Massachusetts, https://lawyerwellbeingma.org/history-and-report.

CHAPTER THREE

Summary of the Steps 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. **A formal investigation is initiated.** If ACAP does not resolve the matter, or if the matter 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. **The 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 cooperate may constitute a separate act of misconduct and can result in immediate administrative suspension.[1]

[1] Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 4:01 § 3.

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, 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 OBC may close a complaint 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. When the OBC closes a file, it informs the complainant in writing of the reasons for the closing and the complainant's right to request review by a BBO member.[5]

   - *Deferment:* The OBC or a respondent can file with the BBO a motion for deferment of matters involving substantially similar material allegations to those of related pending civil, criminal, or administrative proceedings, or a bar disciplinary proceeding in another jurisdiction. However, the investigation or prosecution of complaints will not be deferred unless the board, in its discretion, or the court, for good cause shown, authorizes the deferment. Either the court or the board may

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); Rules of the Board of Bar Overseers [hereinafter BBO Rules] § 2.10(1)(A).

impose conditions on the deferment.[6] Alternatively, the OBC may close a file 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. Such a recommendation 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:* The OBC can recommend to the BBO that an admonition be imposed on a respondent for relatively minor disciplinary violations.[8] Upon approval by a BBO member, the OBC imposes the admonition by service on the attorney together with a summary of the basis for the admonition.[9] 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.[10] 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.[11] The proceedings are confidential.[12]

- *Joint recommendation 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 charges have been filed) and an answer and stipulation of the parties.[13] If the stipulation is approved, no hearing is required. If the agreement is for a public reprimand, the BBO issues the public reprimand.[14] Since only the court

6 SJC Rule 4:01 § 11; BBO Rules § 2.13.
7 SJC Rule 4:01 § 8(1)(b); BBO Rules § 2.7(2).
8 BBO Rules § 2.7(3)(A); SJC Rule 4:01 § 8(1)(c)(i).
9 BBO Rules § 2.11; SJC Rule 4:01 § 8(2)(b).
10 *Id.*
11 BBO Rules §§ 2.11, 2.12; SJC Rule 4:01 §§ 8(2)(c), 8(4).
12 BBO Rules § 2.12(2)(a).
13 BBO Rules §§ 2.7(3)(B), 2.8(c), 3.19(d); SJC Rule 4:01 §§ 8(1)(c)(iii), 8(3)(c).
14 BBO Rules § 3.19(d); SJC Rule 4:01 § 8(3)(c).

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."[15]

- *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.[16] 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.[17] If a binding stipulation is rejected, and either party objects to having formal proceedings concluded by dismissal, admonition, or public reprimand, or the BBO recommends that the respondent lawyer be suspended or disbarred, the BBO files an Information with the court. The matter is then decided by the single justice, with the BBO advocating its recommended disposition and the parties their stipulated disposition.[18] 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.[19]

- *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.[20] 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) and (5).

6. **The respondent is served with a 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).
   - Following the respondent's conviction of a crime, under BBO Rules § 3.13(a)(1).

15 BBO Rules § 3.19(d); SJC Rule 4:01 § 8(3)(c).
16 BBO Rules § 3.19(e).
17 *Id.*
18 *Id.*; SJC Rule 4:01 § 8(6); BBO Rules §§ 3.57, 3.58.
19 BBO Rules § 3.19(e); SJC Rule 4:01 § 8(3)(c).
20 BBO Rules §§ 2.7(3)(C), 2.8(b); SJC Rule 4:01 § 8(1)(c)(ii).

- 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.[21] 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.[22] The matter is later tried before a hearing committee, hearing panel, or SHO appointed for that purpose.[23] The trier and the BBO cannot recommend or impose discipline for violating a rule that was not charged in the petition for discipline.[24]

Although joinder is not expressly mentioned in the rules, the board has employed it routinely, and the court has accepted it—expressly in the case of joinder of claims,[25] and tacitly in the case of joinder of parties.[26] Therefore, if several separate charges of unethical conduct are pending against an attorney, those matters are typically brought in a single proceeding. In such a case, a recommendation for discipline based upon all of the charges is appropriate.[27] Related charges against more than one attorney are also routinely consolidated into a single proceeding.[28]

The petition for discipline is served upon the respondent with an accompanying notice from the board informing the respondent that an answer must be filed with the BBO, with a copy served upon the OBC, within twenty days.[29] The respondent is also informed that the allegations in the petition will be deemed admitted if no timely answer is filed, and that failure to file an answer can result in an administrative suspension.[30] The BBO's general counsel will assist the respondent in obtaining counsel, on a pro bono basis, if necessary.[31]

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21 BBO Rules § 3.13(a); SJC Rule 4:01 § 8(3)(a).
22 BBO Rules § 3.14; SJC Rule 4:01 § 8(3)(a).
23 SJC Rule 4:01 § 8(3)(b).
24 *See* Matter of Orfanello, 411 Mass. 551, 556, 1992-DDC-1180 at 7 (SJC 1992); Matter of Brower, 1979-DDC-183 at 3 (SJ 1979).
25 *See* Matter of Saab, 406 Mass. 315, 322–23, 1989-DDC-794 at 8–10 (SJC 1989).
26 *See* Matter of Pike, 408 Mass. 740, 744–45, n.4, 1990-DDC-952 at 5–6, n.4 (SJC 1990).
27 *See Saab, supra* note 25, 406 Mass. at 326–27, 1989-DDC-794 at 12–13 (SJC 1989).
28 *See, e.g.*, Matter of the Discipline of Two Attorneys, 421 Mass. 619 (1996); Matter of Crossen, 450 Mass. 533, 2008-DDC-6871 at 11 (SJC 2008); Matter of Foster & Others, 492 Mass. 724, 2023-DDC-6564, 2023-DDC-6565 (SJC 2023).
29 BBO Rules § 3.15(a).
30 *Id.*; SJC Rule 4:01 § 8(3)(a).
31 BBO Rules § 3.4(d).

7. **The respondent answers.** The respondent has twenty days to file an answer to the petition for discipline.[32] 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.[33]

   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.[34]

   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.[35] 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.[36] A respondent may, within twenty days after the notice of default, file a motion for relief from default. For good cause shown, the board chair may order the default removed and permit the respondent to file an answer to the petition for discipline.[37]

8. **The respondent may submit a motion to dismiss.** A respondent may file a motion to dismiss under BBO Rules § 3.18(b), but unlike such a motion in civil litigation, it does not delay, or stay, the proceedings. Given that a BBO member reviews each petition for discipline before it can be docketed and served on a respondent, motions to dismiss are rarely, if ever, granted. The board chair, or a BBO member that the chair designates, decides the respondent's motion to dismiss.[38]

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32 BBO Rules § 3.15(a)(1); SJC Rule 4:01 § 8(3)(a).
33 BBO Rules § 3.15(d).
34 BBO Rules § 3.15(f).
35 BBO Rules § 3.15(g); SJC Rule 4:01 § 8(3)(a).
36 BBO Rules § 3.15(g).
37 BBO Rules § 3.15(h).
38 BBO Rules §§ 3.18(b), (c)(1).

9. **The OBC and the 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.[39] There are no express provisions for interrogatories, requests for production, or requests for admissions. Discovery of work product is not permitted.

10. **Depositions are approved.** Discovery depositions are allowed only upon satisfaction of a high standard of substantial need and require advance BBO approval.[40] However, testimonial depositions of witnesses who are unavailable to attend a hearing may be taken under less stringent standards.[41]

11. **The case is 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 at the BBO office in Boston; however, the hearing committee chair may choose to hold the hearing remotely.[42] If a case arises from a conviction, it is assigned to a hearing panel consisting of three members of the BBO.

12. **A prehearing conference is scheduled.** In discipline cases, a prehearing conference is scheduled to expedite the orderly presentation of the 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

39 BBO Rules § 3.17(a).
40 BBO Rules § 4.9.
41 BBO Rules §§ 4.10, 4.11, 4.15.
42 See appendix F for a sample Prehearing Conference Order.

cause shown, a prehearing conference is not held prior to an expedited disciplinary hearing on appeal from an admonition.[43]

The prehearing conference is usually conducted by the hearing committee chair; other committee members are welcome but not required to attend, 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 lists 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 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.[44]

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.[45]

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 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.[46]

15. **The OBC and the respondent agree to stipulations.** Before the hearing, the OBC and the respondent may agree to certain facts that may affect the

[43] BBO Rules § 3.23(a).
[44] BBO Rules § 3.23(b).
[45] BBO Rules § 3.4(d).
[46] BBO Rules §§ 3.18(a)(1), 3.18(b), 3.18(c), 3.22, 5.12.

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 are 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 for the objection. 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.[47]

17. **Hearing subpoenas are 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.[48]

18. **Disciplinary hearing conduct.** As noted in Step 11, "The case is 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, which the BBO takes into custody.

    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.[49] Hearings are generally conducted in accordance with the provisions of Massachusetts General Laws ch. 30A pertaining to adjudicatory hearings (the Massachusetts Administrative Procedure Act), except where otherwise inconsistent with the BBO Rules.[50]

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47 BBO Rules §§ 3.23(b), 3.23(c), 3.25, 3.41.
48 BBO Rules §§ 4.4, 4.5; SJC Rule 4:01 § 22(1).
49 BBO Rules § 3.7(c).
50 BBO Rules § 3.2.

The respondent must attend the disciplinary hearing. A respondent who fails to appear may be administratively suspended from the practice of law.[51]

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.[52] 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.[53] Both parties have the right to present evidence, cross-examine, object, argue, and make appropriate motions.[54] Except as otherwise provided by the BBO Rules, admissibility is generally governed by the Massachusetts Administrative Procedure Act (ch. 30A).[55] The hearing committee, panel, or SHO rules on the admissibility of evidence.[56]

20. **Witnesses and transcripts.** All witnesses are sworn and give testimony under oath, and testimony 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 or her identity. The transcripts are part of the record.[57] A respondent may obtain a copy of the transcript from the court reporter for a fee.[58]

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 ten days before the filing and service of the posthearing briefs.[59] After the close of the

51 SJC Rule 4:01 § 3(2).
52 BBO Rules §§ 3.30, 4.5(d).
53 BBO Rules § 3.28.
54 BBO Rules §§ 3.29(a), (b).
55 BBO Rules § 3.2.
56 BBO Rules § 3.40.
57 BBO Rules §§ 3.33, 3.36.
58 BBO Rules § 3.35.
59 BBO Rules § 3.31.

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.[60]

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).[61] 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. **A hearing report is 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 exercises 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 part of the record.[62] 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 decision, 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.[63]

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60 BBO Rules §§ 3.59, 3.60, 3.61.
61 BBO Rules § 3.43.
62 BBO Rules §§ 3.46, 3.48, 3.49.
63 BBO Rules § 3.52.

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 it is the brief that must be filed within twenty days, not simply a "notice of appeal" as 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.[64] 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.[65]

    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 BBO modifies the findings or recommendations, it must state its reasons in its vote or in a separate memorandum.[66]

    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.[67] 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.[68] The admonition is also subject to limited disclosure under SJC Rule 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

64 BBO Rules §§ 3.50(a), (c).
65 BBO Rules §§ 3.50(b), (c).
66 BBO Rules § 3.53; SJC Rule 4:01 § 8(5).
67 BBO Rules § 3.56(a).
68 BBO Rules § 3.56(c).

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.[69]

27. **Further proceedings: the BBO recommends suspension or disbarment.** Only the court can suspend or disbar a lawyer. Therefore, if the BBO decides that a suspension or disbarment is appropriate (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.[70]

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, 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.[71]

29. **Appealing the single justice decision.** Appealing a 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.[72]

    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

69 BBO Rules § 3.57(a).
70 BBO Rules § 3.58; SJC Rule 4:01 § 8(6).
71 SJC Rule 4:01 § 8(6).
72 SJC Rule 2:23(a).

for other reasons the decision will result in a substantial injustice.[73] 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.[74] In almost all instances, the full court decides the matter on the record and the SJC Rule 2:23 preliminary memorandum of the appellant, rendering its decision with neither full briefing nor requesting a reply from the appellee to the SJC 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 reach an agreement with the OBC on the language of an affidavit of resignation, which is filed with the BBO along with a recommendation from the OBC as to whether the facts admitted would typically result in disbarment or a lesser public sanction. A lawyer under investigation may also file a request for resignation and an affidavit with the BBO and serve them on the OBC.[75] 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.[76]

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.[77]

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73 SJC Rule 2:23(b). The appellee does not submit a preliminary memorandum unless requested by the court.

74 SJC Rule 2:23(c).

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

76 SJC Rule 4:01 § 18(2).

77 *See* Matter of Ellis, 425 Mass. 332, 339, 1997-DDC-7070 at 11 (SJC 1997).

32. **Administrative suspension.** If during 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.[78] If the respondent thereafter cooperates with the OBC's investigation, the respondent can file an affidavit of compliance and request reinstatement.[79] In addition, the failure to cooperate with the OBC's investigation can be separate grounds for bar discipline.[80]

33. **Disability inactive status.** At any time during the disciplinary process (or separately from the process), 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, by court order placed under a guardianship or conservatorship, or been transferred to disability inactive status in another jurisdiction; (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 mental or physical incapacity.[81] 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.[82] 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.[83] Disability status stays, but does not terminate, any pending investigation or bar disciplinary proceedings, which may resume once the lawyer returns to active status.[84]

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

78 SJC Rule 4:01 §§ 3(1), 3(2).
79 SJC Rule 4:01 § 3(3).
80 Mass. R. Prof. C. 8.4(g).
81 SJC Rule 4:01 §§ 13(1)–(3).
82 SJC Rule 4:01 § 13(4).
83 SJC Rule 4:01 § 13(6).
84 SJC Rule 4:01 § 13(4)(f).

a minimum suspension of eight years).[85] The procedure to follow for reinstatement 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.[86]

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 Multistate Professional Responsibility Examination (MPRE) and complying with the terms for reinstatement from the shorter suspension.[87]

    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.[88] 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).[89]

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 "one year and one 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 they possess (1) the moral qualification and (2) the competency and learning in law

85 SJC Rule 4:01 § 18.
86 SJC Rule 4:01 § 18(1)(a).
87 SJC Rule 4:01 § 18(1)(b).
88 SJC Rule 4:01 § 18(1).
89 *See, e.g.*, Matter of Hashem, 2017-DDC-5756 (SJ 2017) (nine-month suspension with required reinstatement hearing pursuant to SJC Rule 4:01 § 18(4)).

required for admission to practice law in this Commonwealth. They must also prove 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.[90]

[90] SJC Rule 4:01 § 18(5).

CHAPTER FOUR

Discipline: Grounds and Types of Dispositions

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 each type of misconduct.

II. Types of Dispositions

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 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 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

[1] Annotated Standards for Imposing Lawyer Sanctions [hereinafter ABA Standards] (Am. Bar Ass'n, 2d ed., 2019).

[2] Anne Kaufman, *Writing and 'Rithmetic: Lessons from ACAP* (April 2002), https://bbopublic.massbbo.org/web/f/writing.pdf.

be distinguished from a *complaint* docketed when the OBC opens a formal investigation.

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 is not responding to the client, ACAP may encourage the lawyer to respond to the client. 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 1.15A 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 dockets a complaint. Many complaints that the OBC opens and investigates result in closing the matter with no discipline, either public or private. The OBC will dismiss a complaint if it concludes that 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

[3] The Office of Bar Counsel, Board of Bar Overseers, https://www.massbbo.org/s/who-we-are-obc-acap ("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 Bar Counsel of the Supreme Judicial Court, Annual Report to the Supreme Judicial Court, Fiscal Year 2024 [hereinafter Bar Counsel 2024 Annual Report], 8, https://www.massbbo.org/s/reports ("Of the 3,446 new complaints received, ACAP resolved more than 96 percent without referral for further investigation" in fiscal year 2024).

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. If the BBO member upholds the decision to close the matter, the complainant has no further right to challenge the decision.[7]

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 pursuant to an agreement between the OBC and the lawyer as to remedial measures. This process, known as diversion, 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.

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5 *See* Rules of the Board of Bar Overseers [hereinafter BBO Rules] § 2.1(b)(1) ("Bar Counsel need not investigate any complaint arising out of acts or omissions occurring more than six years prior to the date of the complaint"); Jerry Cohen, *Appropriate Dispositions in Cases of Lawyer Misconduct*, 82 Mass. L. Rev. 295, 296 (1997).

6 *See* BBO Rules §§ 2.10(1)(A) and (B).

7 *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").

The Diversion Program may refer the attorney to a lawyer assistance program, such as Lawyers Concerned for Lawyers (LCL),[8] LCL's Law Office Management Assistance Program (LOMAP),[9] 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, are at issue. Chapter 2 discusses LCL and LOMAP in more detail.

Separate from the Diversion Program, the SJC can also put the lawyer on probation, such as with a stayed suspension, in lieu of removing an attorney from practice.[10] 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 resolution by these bodies, 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 conduct of the lawyer improper, but does not limit the lawyer's right to practice."[11] 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.

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[8] *See About Us*, Lawyers Concerned for Lawyers, https://www.lclma.org/about/. As described on its website, LCL is an independent nonprofit Massachusetts corporation that provides "assessment and consultation for addiction, substance use disorders, mental health concerns, and law office management, which can often be negatively impacted by these conditions." LCL's services are free to students, lawyers, judges, and members of the legal community.

[9] *Id.* LOMAP, which is part of LCL, "assist[s] attorneys with technology, marketing, ethics, and practice management needs."

[10] *See, e.g.*, Matter of Rosencranz, 2011-DDC-4862 (SJ 2011) (six-month suspension, three months stayed, conditioned on cooperation with LCL and other requirements); Matter of Betts, 2010-DDC-4596 (SJ 2010) (twelve-month suspension, six months stayed, with conditions including abstention from drugs and alcohol and reports from LCL). *See also* Matter of O'Neill, 2014-DDC-5346 (SJ 2014) (three-month suspension imposed by court after BBO declined to recommend proposed six-month suspension, with three months stayed, as not supported by rationale for staying portion of suspension).

[11] ABA Standards, *supra* note 1, at § 2.6.

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 were published in the *Massachusetts Disciplinary Reports* until 2022 (the published volumes containing all reported disciplinary matters, organized by year) and are now on the BBO website, but do not identify the respondent by name. Admonitions remain on the lawyer's record at the BBO for eight years, but admonitions do not show up when a lawyer's name is searched on the BBO website. Again, they are anonymous. After eight years, if the lawyer remains free of any further misconduct and no complaints are pending, the admonition is vacated and the complaint dismissed.[12] While the admonition is in effect, it serves as an aggravating factor should the lawyer face additional 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 from which the lawyer seeks *pro hac vice* status (practicing temporarily in a state in which the lawyer is not licensed).[13]

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.[14]

12 BBO Rules § 4.3(a).

13 The question of whether a lawyer must report a vacated admonition on a *pro hac vice* application likely turns on the language of the particular application.

14 Matter of Kane, 1997-DDC-2261 at 7 (BBO 1997).

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.[15]

Conflicts of interest: An admonition is given if the lawyer engages in a conflict of interest not motivated by self-interest and causes little to no harm to the affected client or clients.[16]

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 sixteen lawyers in fiscal year 2024, twenty lawyers in fiscal year 2023, twenty-seven lawyers in fiscal year 2022, twenty-five lawyers in fiscal year 2021, thirty-six lawyers in fiscal year 2020, and twenty-seven lawyers in fiscal year 2019.[17]

E. Public Reprimand

A more serious form of discipline than an admonition, a public reprimand, is "a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice."[18] The discipline is "public" because it identifies the attorney by name. The sanction is brought to public attention in three ways:

1. 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 reasons for imposing the sanction. Many lawyers read this newspaper regularly, so the discipline is likely to become known within the attorney's professional community.

15 "Intentional commingling of clients' funds with those of an attorney should be disciplined by private reprimand." Matter of Schoepfer, 426 Mass. 183, 185 n.2, 187, 1997-DDC-2042 at 2 (SJC 1997) (quoting Matter of the Discipline of an Attorney, 392 Mass. 827, 836 (1984)). Many admonition reports involve such misconduct. *See, e.g.*, AD 10-01, 2010-ADM-4704 (BBO 2010); AD 09-19, 2009-ADM-4528 (BBO 2009); AD 07-44, 2007-ADM-4131 (BBO 2007).

16 Matter of the Discipline of an Attorney, 449 Mass. 1001, 1002 (2007). *See also* AD 11-04, 2011-ADM-4894 (BBO 2011); AD 10-19, 2010-ADM-4722 (BBO 2010); AD 10-18, 2010-ADM-4721 (BBO 2010); AD 08-11, 2008-ADM-4333 (BBO 2008).

17 Bar Counsel 2024 Annual Report, *supra* note 4, at 4 n.6; Massachusetts Office of Bar Counsel of the Supreme Judicial Court, Annual Report to the Supreme Judicial Court, Fiscal Year 2023 [hereinafter Bar Counsel 2023 Annual Report], 5.

18 ABA Standards, *supra* note 1, at § 2.5.

2. 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 and on the BBO website. It is also distributed to newspapers, including the lawyer's hometown daily or weekly.

3. The discipline becomes part of the BBO's public record of the attorney and appears in the lawyer's information on the BBO website.

Practice Tip

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

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 or others.[19]

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.[20]

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.[21]

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19 *Kane, supra* note 14, 1997-DDC-2261 at 7–8 (BBO 1997).

20 "Unintentional, careless use of clients' funds should be disciplined by public censure." *Schoepfer supra* note 15, 426 Mass. 183, 185 n.2, 187 (quoting Matter of the Discipline of an Attorney, 392 Mass. 827, 836). Some public reprimand reports show this kind of misconduct. *See, e.g.*, Matter of LaPre, 2010-DDC-4683 (BBO 2010) (attorney negligently misused client funds in his IOLTA account, which resulted in check he wrote to client being dishonored due to insufficient funds, but restored amount to his client from his personal funds as soon as he became aware of deprivation); Matter of McCabe, 2009-DDC-4506 (BBO 2009) (lawyer negligently maintained two separate IOLTA accounts, which resulted in bank not honoring check respondent had issued to client, but promptly issued replacement check to client to repair problem).

21 *See* Matter of Carnahan, 449 Mass. 1003, 1004–5, 2007-DDC-3929 at 2 (SJC 2007); Matter of Morrow, 2007-DDC-4081 (BBO 2007); Matter of Abbene, 2007-DDC-4083 (BBO 2007).

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 know the identity of the lawyer who receives a private admonition, so the lawyer's practice may proceed without disruption after an admonition.[22] The public reprimand, while likely 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 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.[23] The BBO imposed public reprimands on fourteen lawyers in fiscal year 2024, thirty-one lawyers in fiscal year 2023, twenty-seven lawyers in fiscal year 2022, sixteen lawyers in fiscal year 2021, eighteen lawyers in fiscal year 2020, and twenty-three lawyers in fiscal year 2019.[24]

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.[25]

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22 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 summary.

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

24 Bar Counsel 2024 Annual Report, *supra* note 4; Bar Counsel 2023 Annual Report, *supra* note 17.

25 The ABA describes the suspension sanction as follows:

> Suspension is the removal of a lawyer from the practice of law for a specified minimum period of time. Generally, suspension should be for a period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three

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.[26] 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.[27]

The following subsections discuss and compare several discrete types of suspensions. All suspensions, though, regardless of type, share certain qualities and responsibilities.[28] A suspension means that the lawyer must stop practicing law and inform all clients of the suspension and that they should attempt to locate substitute 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 the steps necessary to cease practice, including closing Interest on Lawyers' Trust Accounts (IOLTA) and other trust accounts and returning fee advances. The lawyer cannot accept any new retainers or cases. 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 period in which to notify clients, arrange for replacement counsel, return client files and unearned fees, and wrap up all active matters.[29]

At the end of the suspension, the lawyer may seek reinstatement. As described in the following sections, 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.

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

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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 all applicable discipline or disability orders and fitness to practice law.

ABA Standards, *supra* note 1, at § 2.3.

26 *See, e.g.*, Matter of Guinane, 2004-DDC-3453 (SJ 2004) (one-month suspension).

27 *See, e.g.*, Matter of Nagy, 2013-DDC-5109 (SJ 2013) (indefinite suspension based on reciprocal discipline); Matter of Eleey, 2012-DDC-5089 (SJ 2012) (indefinite suspension for misappropriation of client funds).

28 The descriptions in this paragraph come from Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 4:01 § 17.

29 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.

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.[30] Therefore, a suspended lawyer cannot even work as a receptionist, secretary, or custodian in a law office or for a lawyer.[31]

2. Term Suspensions

Most suspensions in Massachusetts are "term suspensions," with a defined length. 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" 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.[32] 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.[33] If the lawyer fails to submit the affidavit within six months of the end of the suspension, the lawyer must file a petition for reinstatement using the procedures described later in this section.[34]

  Suspensions for less than six months demonstrate the SJC's conclusion that the misconduct in question, while serious, does not reflect so badly on

30 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 suspension, to file a motion with the SJC for leave to work as a paralegal.
31 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, 430–31, 439, 2012-DDC-4920 at 1–4 (SJC 2012) (mediation sometimes constitutes practicing law such that suspended lawyer may engage in mediation only in certain circumstances and under specified conditions).
32 SJC Rule 4:01 § 18(1)(a).
33 SJC Rule 4:01 § 18(1)(c).
34 SJC Rule 4:01 § 18(1)(d).

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."[35] 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 Multistate 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.[36] Successful completion of the MPRE is defined in the Commonwealth as obtaining a score of eighty-five or higher.[37] 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.[38] 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.[39]

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.

35 Matter of Donaldson, 2011-DDC-4778 at 20 (SJ 2011).

36 SJC Rule 4:01 § 18(1)(b).

37 Petition for Admission by UBE Transfer, https://www.mass.gov/how-to/petition-for-admission-by-ube-transfer.

38 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."

39 *See, e.g.*, Matter of Firstenberger, 450 Mass. 1018, 1019, 2007-DDC-3930 (SJC 2007) (knowing and intentionally deceptive breach of arrangement with mortgagee; suspension for six months and one day imposed); Matter of Dash, 2006-DDC-3810 (SJ 2006) (failure to supervise nonlawyer employee, commingling of trust account, and false statements to insurance adjuster; suspension for six months and one day imposed).

- *More than one year:* A lawyer suspended for more than one year must petition the SJC for reinstatement, and the BBO 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 reinstatement, including passing 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.[40]

  The one-year-and-one-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 recommendation and the court's imposition of this sanction. In *Matter of Hopwood*,[41] despite numerous violations, including a failure to cooperate with the OBC, the BBO recommended a one-year suspension instead of the one year and one day recommended by the hearing officer, explaining that "[w]e do not impose the additional day recommended by the hearing officer because we do not believe that the respondent's misconduct is so grievous that he needs to demonstrate his fitness to resume the practice of law. The requirement that he take and pass the Multi-State [*sic*] Professional Responsibility Examination will help assure that he is cognizant of his ethical obligations in this respect." In *Matter of Pudlo*,[42] the single justice accepted the BBO's recommended one-year-and-one-day suspension 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 . . . ."[43]

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[40] *See, e.g.*, Matter of Cohen, 2010-DDC-4578 at 2 (SJ 2010) (one-year-and-one-day suspension for numerous "ethical lapses," including incompetence, failure to communicate, failure to refund money, and dishonesty with OBC; respondent's ultimate cooperation with OBC persuaded single justice to make the suspension retroactive by three months to when respondent started cooperating with bar counsel, and also allow respondent to petition for reinstatement three months prior to expiration of suspension); Matter of Ellsworth, 2013-DDC-5117 (SJ 2013) (failure to report felony conviction, plus repeated defaults and failure to cooperate with OBC, yielded suspension for one year and one day with condition that "the respondent was not permitted to petition for reinstatement to the practice of law in the Commonwealth until one year and one day after she filed a full and truthful affidavit of compliance").

[41] 2008-DDC-4217 at 5 (SJ 2008) (single justice imposed one-year suspension recommended by BBO).

[42] 2012-DDC-4985 at 10 (SJ 2012).

[43] *Id*. The attorney was later reinstated, but not until 2015, close to four years after the effective

Recap of the Reinstatement Requirements

Suspensions of six months or less: Reinstatement effectively automatic, unless the OBC objects to the affidavit or the attorney fails to file the required affidavit within six months after the original term suspension expired.

Suspensions of six months to one year: Reinstatement effectively automatic, if the attorney confirms receiving a passing grade on the MPRE, unless the OBC objects to the affidavit or the attorney fails to file the affidavit within six months after the original term suspension expired.

Suspensions of more than one year: Reinstatement requires passing 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, lengthy term suspensions may be imposed, including two or three years. The longest suspension term in the disciplinary reports is four years,[44] 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*,[45] the respondent, while on disability inactive status, engaged in paralegal work without the court's permission. The parties' stipulation recommended a suspension of six months and one day, with a required reinstatement hearing pursuant to SJC Rule 4:01 § 18. The BBO agreed, and the single justice ordered that reinstatement be subject to a formal petition proceeding. In *Matter of Krabbenhoft*,[46] 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 BBO recommended that the court impose a "six-month suspension, together with the requirement that the respondent petition for reinstatement in order to show that adequate steps have been taken to address these concerns." And in *Matter of Barrat*,[47] the respondent was suspended for six months for misconduct in two

date of the one-year-and-one-day suspension, and with conditions. Matter of Pudlo, 2015-REI-5423 (HP 2015).

[44] *See, e.g.*, Matter of Balser, 2016-DDC-5639 (SJ 2016); Matter of Beaulieu, 2013-DDC-5261 (SJ 2013).

[45] 2009-DDC-4480 (SJ 2009).

[46] 2007-DDC-4003 at 8 (SJ 2007).

[47] 2004-DDC-3478 at 4 (SJ 2004).

matters, including misrepresentations to the client, but was required to petition for reinstatement.

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.

When preparing a petition for reinstatement, the lawyer should use care to answer all the questions and have the required documentation.

Before filing a petition for reinstatement, the lawyer would be well-advised to meet with the assistant bar counsel handling the case to review the draft reinstatement petition for any issues that need to be addressed before filing.

The SJC occasionally imposes other conditions that a lawyer must meet before reinstatement. For instance, in *Matter of Johnson*,[48] the court imposed a three-month suspension for the respondent's lack of diligent and competent representation in two unrelated client matters. The reinstatement was conditioned on the respondent's 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 seventeen lawyers in fiscal year 2024, twenty lawyers in fiscal year 2023, nineteen lawyers in fiscal year 2022, thirty-six lawyers in fiscal year 2021, fifteen lawyers in fiscal year 2020, and thirty-seven lawyers in fiscal year 2019.[49]

Examples of Term Suspension Sanction Standards

Neglecting a client matter: A "term suspension is appropriate for a pattern of neglect resulting in serious harm."[50]

[48] 2010-DDC-4646 (SJ 2010).

[49] Bar Counsel 2024 Annual Report, *supra* note 4; Bar Counsel 2023 Annual Report, *supra* note 17. These statistics included indefinite suspensions as well as other term suspensions. The numbers of indefinite suspensions were not reported separately.

[50] *Kane, supra* note 19, 1997-DDC-2261 at 8 (BBO 1997).

Mishandling client funds: "The intentional use of clients' funds normally calls for 'a term suspension of appropriate length.'"[51]

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."[52]

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, akin to a suspended sentence in criminal law. Two examples demonstrate how the "stayed suspensions" work. In *Matter of Kydd*,[53] 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."[54] 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.[55] The hearing committee recommended a six-month suspension, suspended for two years. The BBO described this recommended sanction as "modest" and expressed concern that the sanction "fails to give adequate force to the need to treat violence in

51 *Schoepfer, supra* note 20, 426 Mass. 183, 187, 1997-DDC-2042 at 2 (SJC 1997) (quoting Matter of the Discipline of an Attorney, 392 Mass. 827, 836).
52 Matter of Diviacchi, 475 Mass. 1013, 1020, 2016-DDC-5707 at 11 (SJC 2016).
53 2009-DDC-4419 at 3 (SJ 2009).
54 *Id.* at 1.
55 2001-DDC-2954 (SJ 2001).

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the home as seriously as the court has indicated [in past decisions]."[56] The BBO recommended a six-month suspension, stayed for two years, subject to terms of probation. The court imposed the six-month suspension, with the last three months suspended for two years subject to the terms of probation set forth in the hearing committee report, and subject to a further condition that the BBO recommended: 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.[57]

Most of the disciplinary reports involving suspensions where the SJC refers the lawyer to LOMAP have been stayed suspensions, with LOMAP referral serving as a condition of probation.[58]

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.[59]

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.

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

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[56] *Id.* at 3.

[57] *Id.* at 1, 4; *In re* Gary M. Lee, SJC for Suffolk County, BD-1999–067, "Order of Term Suspension" (02/02/2001).

[58] *See, e.g.*, Matter of Brassard, 2013-DDC-5185 (SJ 2013); Matter of Brunelle, 2013-DDC-5187 (SJ 2013); Matter of Ellis, 2012-DDC-5024 at 2–3 (SJ 2012); Matter of Lagana, 2010-DDC-4644 at 2 (SJ 2010).

[59] In *O'Neill, supra* note 10, 2014-DDC-5346 at 4 (SJ 2014) (Board Memorandum), the BBO articulated its reasons for rejecting a stayed suspension recommendation from the parties:

> 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.

harm suffered by clients.[60] 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."[61] Several reports applying the *Schoepfer* standard resulted 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*[62] and *Matter of Ragan*[63] the respondent lawyer in each case misused client funds and made restitution. Each lawyer received an indefinite suspension.

Practice Tip

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

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.[64]

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."[65]

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60 *See, e.g.*, Matter of Gomez, 2003-DDC-3248 (SJ 2003) (lawyer abandoned his practice, leaving all clients to find other assistance); Matter of Mickiewicz, 2005-DDC-3628 (SJ 2005) (serious neglect of two client matters, failure to cooperate with OBC investigation, continuing to practice after administrative suspension, and default in BBO proceeding, aggravated by prior public reprimand for neglect).

61 *Schoepfer, supra* note 51, 426 Mass. 183, 187, 1997-DDC-2042 at 2 (SJC 1997) (citing Matter of the Discipline of an Attorney, 392 Mass. 827, 836); *see also* Matter of Bryan, 411 Mass. 288, 292, 1991-DDC-1173 at 6–7 (SJC 1991) (identifying factors supporting disbarment over indefinite suspension, including absence of restitution, failure to comply with temporary suspension order, repetitive wrongdoing, and absence of any substantial mitigation).

62 453 Mass. 1001, 2009-DDC-4352 (SJC 2009).

63 2007-DDC-4005 at 11 (SJ 2007).

64 *See, e.g.*, Matter of Amaral 2010-DDC-4592 (SJ 2010) (intentional misappropriation of client funds with full restitution). *Cf.* Matter of Ladas, 2001-DDC-2894 (SJ 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).

65 SJC Rule 4:01 § 18(2)(b).

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."[66] Indefinite suspension typically occurs when restitution has been made, and disbarment is imposed 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.[67]

5. Temporary Suspensions

SJC Rule 4:01 refers several times to the concept of a "temporary suspension,"[68] even though the rule does not define the term. This term refers 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 . . . ."[69] 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.[70] 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."[71]

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

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66 *Schoepfer, supra* note 61, 426 Mass. 183, 187, 1997-DDC-2042 at 2 (SJC 1997) (citing Matter of the Discipline of an Attorney, 392 Mass. 827, 836 (1984)).

67 *See* Matter of Curtis, 2001-DDC-2867 (SJ 2001) (commercial bribery convictions and failure to disclose pending criminal charges on his application for admission to bar); Matter of Gibson, 1999-DDC-2488 (SJ 1999) (conviction for falsifying student loan records); Matter of Greene, 2015-DDC-5454 at 9 (SJ 2015) (real estate fraud).

68 *See, e.g.*, SJC Rule 4:01 §§ 17(1), 17(3)–17(6), 17(8).

69 SJC Rule 4:01 § 12A.

70 Matter of Kenney, 399 Mass. 431, 437, 1987-DDC-599 at 26 (SJC 1987) (disciplinary proceedings, if not already begun, must be instituted within reasonable time following temporary suspension order).

71 SJC Rule 4:01 § 12A.

harm.[72] Unlike all other forms of suspension, which usually take effect thirty days after the order is entered, the temporary suspension takes effect immediately.[73] 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.[74] The temporary suspension typically remains in effect until the disciplinary process arrives at some other conclusion or produces a different order.[75]

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.[76]

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."[77]

* * *

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

72 Matter of Ellis, 425 Mass. 332, 334, 339, 1997-DDC-7070 at 3–4, 11 (SJC 1997) (referring to section 12A suspension as "temporary suspension").
73 SJC Rule 4:01 § 17(3).
74 SJC Rule 4:01 § 17(1).
75 In Matter of Eberle, 2009-DDC-4448 at 4 (SJ 2009) (single justice imposed four-month temporary suspension, that term having relationship to expected term suspension respondent was likely to receive after disciplinary process was complete).
76 SJC Rule 4:01 § 12.
77 Matter of Ellis, 425 Mass. 332, 340, 1997-DDC-7070 at 12–13 (SJC 1997).

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.[78] 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.

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. If the lawyer seeks reinstatement, 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 without good cause to comply with a validly issued subpoena, or to respond to the OBC's or BBO's requests for information made in the course of processing a complaint will result in the OBC's seeking an administrative suspension order from the court, as described in the previous subsection. In addition, a lawyer's failure to file an answer to a petition for discipline as required by SJC Rule 4:01 § 8(3) or to appear at a hearing before a hearing committee, special hearing officer, or panel of the BBO can also support a petition for administrative suspension filed by the OBC.[79]

Orders of administrative suspension are effective fourteen days after entry, un-

[78] SJC Rule 4:03 § 2.
[79] SJC Rule 4:01 § 3(2).

less otherwise ordered by the court.[80] After entry of the order, the lawyer cannot accept any new retainer or accept employment as a lawyer in a new case or matter, although the lawyer can wind up and complete matters that were pending on the entry date.[81] In addition, the BBO transmits copies of administrative suspension orders to the clerk of each court in the Commonwealth, state or federal, in which it has reason to believe the suspended lawyer has been engaged in practice.[82]

If the lawyer is not reinstated within fourteen days after entry of the administrative suspension order, the lawyer becomes subject to the notice, withdrawal, and other provisions of SJC Rule 4:01 § 17. So after fourteen days, the lawyer would need to file notices of withdrawal with every tribunal, resign all appointments as a fiduciary, and provide notice to all clients, counsel, and others, as required by SJC Rule 4:01 § 17(1)(a)–(d). If not reinstated within fourteen days, the lawyer must also return all client files, refund unearned fees, and close all IOLTA and client trust accounts, as set forth by SJC Rule 4:01 § 17(1)(e)–(g). Within twenty-one days after entry of the administrative suspension order, the lawyer also must file an affidavit of compliance with the OBC and the court, as required by SJC Rule 4:01 § 17(5) and 17(6).[83]

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 $50 late assessment), and paying a reinstatement fee of $100. An affidavit must be filed with the BBO stating the extent to which the lawyer has complied with the applicable provisions of SJC Rule 4:01 § 17.[84] 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.

80 SJC Rule 4:01 § 3(3).
81 *Id.*; SJC Rule 4:01 § 17(3).
82 SJC Rule 4:01 § 17(4).
83 SJC Rule 4:01 § 3(3).
84 SJC Rule 4:03 § 3.

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,[85] Massachusetts's disciplinary process does not provide for permanent disbarment.[86] In Massachusetts, SJC Rule 4:01 permits a disbarred attorney to apply for reinstatement eight years after the disbarment order.[87] (The disbarred lawyer may submit an application for reinstatement three months before the end of the eighth year.[88]) 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 nontemporary suspension, the effective date of a disbarment order is thirty days after entry, unless the court orders otherwise.[89] Within fourteen days from the entry date of the disbarment order, the lawyer must complete all the requirements of SJC Rule 4:01 § 17(1) as of the effective date of the order. Within twenty-one days after the entry of the disbarment order, the disbarred lawyer must file an affidavit with the BBO and the court describing the steps taken to close the law practice and provide a list of all other jurisdictions where the lawyer was admitted to practice as well as the disbarred lawyer's current address.[90]

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.[91] 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.'"[92] The SJC imposes disbarment when the facts surrounding

85 *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").

86 Matter of Hiss, 368 Mass. 447, 451–55, 1975-REI-019 at 4–7 (SJC 1975).

87 SJC Rule 4:01 § 18(2)(a).

88 *Id.*

89 SJC Rule 4:01 § 17(3).

90 SJC Rule 4:01 §§ 17(5) and 17(6).

91 *See, e.g.*, Matter of Espinosa, 2012-DDC-5022 at 11–14 (SJ 2012) (repeated neglect would warrant lengthy term suspension, but lawyer's misrepresentations to clients and to OBC, his misuse of client funds, and his prior discipline warranted disbarment).

92 Matter of McBride, 449 Mass. 154, 163, 2007-DDC-3919 at 6 (SJC 2007) (quoting *Schoepfer, supra* note 66, 426 Mass. 183, 187).

the lawyer's misappropriation of client funds are most serious, and where other aggravating factors are present, including failure to make restitution.[93] Disbarment is the recognized sanction for conviction of a serious crime within the practice of law.[94] 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 disbarment. The SJC disbarred fourteen lawyers in fiscal year 2024, thirteen lawyers in fiscal year 2023, eleven lawyers in fiscal year 2022, four lawyers in fiscal year 2021, thirteen lawyers in fiscal year 2020, and seventeen lawyers in fiscal year 2019,[95] 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.[96]

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.'"[97] The SJC imposes disbarment when restitution has not been made or where other violations or aggravating factors are present.[98]

Conviction of a "serious crime": "Disbarment is the 'usual and presumptive sanction' for conviction of a serious crime."[99] A "serious crime" is defined in SJC Rule 4:01 § 12(3).

93 *See, e.g.*, Matter of Dasent, 446 Mass. 1010, 1012–13, 2006-DDC-3738 at 2 (SJC 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).

94 Matter of Otis, 438 Mass. 1016, 1017, 2003-DDC-3241 at 1 (SJC 2003); Matter of Concemi, 422 Mass. 326, 329–30, 1996-DDC-1065 at 6–7 (SJC 1996).

95 Bar Counsel 2024 Annual Report, *supra* note 4; Bar Counsel 2023 Annual Report, *supra* note 17.

96 *See, e.g.*, *Espinosa, supra* note 91, 2012-DDC-5022 at 11–14 (SJ 2012) (repeated neglect would warrant lengthy term suspension, but lawyer's misrepresentations to clients and to OBC, his misuse of client funds, and prior discipline warranted disbarment).

97 *McBride, supra* note 92, 449 Mass. 154, 163, 2007-DDC-3919 at 6 (SJC 2007) (quoting *Schoepfer, supra* note 92, 426 Mass. 183, 187).

98 *See, e.g.*, *Dasent, supra* note 93, 446 Mass. 1010, 1012–13, 2006-DDC-3738 at 2 (SJC 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).

99 *Otis, supra* note 94, 438 Mass. at 1017 (quoting *Concemi, supra* note 94, 422 Mass. 326, 330).

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.

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.[100] 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 and satisfy other admission requirements to resume practice. To retire from practice, a lawyer checks the "retired" box on the annual registration form. The retired lawyer must file registration statements for three years after retiring so that the OBC can locate the lawyer should any disciplinary matters arise.[101] To become active again, the retired lawyer requests reinstatement and pays the fees for the years in retirement.[102] Also, a retired attorney (but not a resigned attorney) may provide pro bono legal services in connection with an authorized legal assistance program[103] and may work as a paralegal.

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.[104] In order to resign, the lawyer may reach an agreement with the OBC on the language of an affidavit of resignation, or may independently submit an affidavit to the BBO and serve it on the OBC. If the lawyer submits an affidavit pursuant to an agreement

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100 No rule addresses nondisciplinary resignations. A 1978 SJC standing order addresses "Nondisciplinary Voluntary Resignations," but offers very little detail about the process. The standing order does not state whether readmission includes retaking the bar examination.

101 SJC Rule 4:02 § 5(a).

102 SJC Rule 4:02 § 5(b).

103 SJC Rule 4:02 §§ 5(a), 8(b).

104 SJC Rule 4:01 § 15.

with the OBC, the affidavit is filed with the BBO along with a recommendation from the OBC (including information sufficient to explain the recommendation) as to whether the facts admitted would typically result in disbarment or in a lesser public sanction. If the lawyer submits the affidavit independently, the OBC has fourteen days to file a response.[105] In any event, the affidavit shall state that:

- The resignation is freely and voluntarily rendered; the lawyer is not being subjected to coercion or duress and is fully aware of the implications of submitting the resignation.
- The lawyer is aware that there is a currently pending investigation into allegations that the lawyer has been guilty of misconduct, the nature of which shall be specifically set forth.
- The lawyer acknowledges 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.
- The lawyer waives the right to hearing.[106]

The BBO may order the parties to provide further explanation or order any hearing or investigation that it deems appropriate. The BBO then votes to make a recommendation that the court reject the affidavit of resignation as submitted, accept the resignation and disbar the resigning attorney, or accept the resignation as a disciplinary sanction. The BBO then files its recommendation and the entire record of any hearing with the court.[107] The BBO will recommend that the court accept the resignation and disbar the attorney if the matters admitted, or matters that the attorney admits could be proved by a preponderance of the evidence, would warrant disbarment. The BBO will recommend that the court accept the resignation as a disciplinary sanction if the matters so admitted would warrant public discipline up to and including an indefinite suspension.[108]

If 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.[109] In either event, the lawyer is prohibited from

105 *Id.*

106 SJC Rule 4:01 §§ 15(1)(a)–(d).

107 SJC Rule 4:01 § 15(2); BBO Rules § 4.1.

108 Board of Bar Overseers Policies and Practices No. 17 (2025).

109 In most reported instances of a lawyer submitting an affidavit of resignation pursuant to SJC Rule 4:01 § 15, the SJC orders disbarment. *See, e.g.*, Matter of Lamond, 2010-DDC-4579 (SJ 2010); Matter of Gregson, 2008-DDC-4233 (SJ 2008). Occasionally though, the resignation itself serves as the sanction, and no order of disbarment appears. *See, e.g.*, Matter of Sohmer, 2009-DDC-4468

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."[110] 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.[111]

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.

The SJC accepted disciplinary resignations without entering disbarment orders from four lawyers in fiscal year 2024, two lawyers in fiscal year 2023, five lawyers in fiscal year 2022, five lawyers in fiscal year 2021, four lawyers in fiscal year 2020, and two lawyers in fiscal year 2019.[112]

(SJ 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, 2007-DDC-4026 (SJ 2007) (same).

110 Matter of Oates, 1986-DDC-612 at 4 (SJ 1986) (rejecting lawyer's affidavit of resignation, which was submitted long after OBC's investigation of charges had been concluded, and after BBO had already filed Information recommending disbarment after conclusion of BBO disciplinary proceedings).

111 Matter of Lee, 1983-DDC-384 (SJ 1983) (accepting respondent's resignation despite BBO's recommendation that it not do so); Matter of Orme, 2011-DDC-4781 (SJ 2011) (accepting respondent's resignation and ordering his disbarment as recommended by BBO, over OBC's request that resignation be rejected and respondent simply be disbarred). In Matter of Toscano, 1986-DDC-607 (SJ 1987), the OBC supported an attorney's request to resign, but the SJC refused the lawyer's request and ordered disbarment.

112 Bar Counsel 2024 Annual Report, *supra* note 4, at 20; Bar Counsel 2023 Annual Report, *supra* note 17.

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.'"[113] The SJC has also held that "we need not endeavor to find perfectly analogous cases, nor must we concern ourselves with anything less than marked disparity in the sanctions imposed."[114] 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.[115] 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.[116] The lawyer assigned such status may later petition to be reinstated.[117] Chapter 21 discusses disability inactive status in more detail.

113 Matter of Balliro, 453 Mass. 75, 85, 2009-DDC-4351 at 5 (SJC 2009) (quoting Matter of Finn, 433 Mass. 418, 423 (2001)).
114 Matter of Hurley, 418 Mass. 649, 655 (1994).
115 SJC Rule 4:01 § 13(1).
116 SJC Rule 4:01 § 13(4).
117 SJC Rule 4:01 § 13(6).

PART II
THE DISCIPLINARY PROCESS

CHAPTER FIVE

Complaints, Investigations, Stipulations, and the Attorney and Consumer Assistance Program

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 the intake operates. It 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 of these intake forms, or information from another source about possible misconduct, can cause the OBC to take the steps described later in this section.

Most complaints come from a person writing a letter or calling the OBC to register a grievance. The person is often a client, sometimes an opposing party or lawyer, or even a judge who has observed the lawyer. The complainant may use an official complaint form.[1] In late 2024, the OBC also began accepting electronic complaints via e-mail. 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 of the complaint or has given the OBC permission to disclose the judge's identity.

Unless the matter is serious enough to warrant immediate suspension (*see* SJC Rule 4:01 § 12A), the OBC, when it receives a telephone call, letter, or complaint form, refers the matter to the Attorney and Consumer Assistance Program (ACAP) within the OBC. 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 put their statement in writing. Even if the complainant does not submit an official OBC complaint form, the OBC still may initiate a formal disciplinary investigation against the lawyer, if warranted. If ACAP receives a letter or written complaint that supports a possible ethics violation and is unable to resolve the matter, or that concerns a serious issue, the complaint is referred for formal investigation and logged in as a formal case on the OBC's docket.

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

[1] A link to the complaint form appears on the BBO web page *Filing a Complaint Against an Attorney*, https://bbopublic.massbbo.org/web/f/Confidential-Application.pdf.

[2] Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 4:01 § 9(1).

process, including sharing the complaint with others).[3] According to the OBC 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 client information, if necessary, in defense.[5]

The SJC Rule describes some exceptions to the OBC's confidentiality duty. 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.

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

[4] *Filing a Complaint Against an Attorney*, Massachusetts Board of Bar Overseers, https://www.massbbo.org/Complaints#how.

[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). *See* SJC 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 BBO website.[9] For fiscal year 2023 (which ended on June 30, 2023), real estate was the most common practice area for complaints to the OBC, followed by divorce and commercial litigation.[10] Of the reasons people contact the OBC, the most common complaints, by far, concern negligence and lack of diligence, including failing to return phone calls or respond to texts or e-mails.

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 OBC was overwhelmed with its caseload.[11] ACAP has been successful in resolving most of the complaints against lawyers and in separating out those that need serious disciplinary attention. In fiscal year 2023, ACAP resolved 97% of the matters it received without needing to initiate any formal disciplinary proceedings.[12]

ACAP's intake process works as follows: ACAP staff (consisting of attorneys and investigators experienced in bar discipline) respond to all telephone complaints and are assigned those written complaints deemed appropriate for ACAP resolution. The ACAP staff member first explores the underlying narrative and the reasons for the complaint, and then ACAP ascertains the identity of the lawyer complained about.

The complaint can lead to one of three dispositions:

- If the complaint does not constitute misconduct or is not appropriate for ACAP/OBC intervention, the ACAP staff provides the complainant with reasons the complaint does not constitute a rules violation or otherwise does not fit within the OBC's purview. However, the complainant has the right to request a review of this determination, as described in section V of this chapter.
- If ACAP determines that the alleged facts of the complaint warrant

9 Massachusetts Office of Bar Counsel of the Supreme Judicial Court, Annual Report to the Supreme Judicial Court, Fiscal Year 2023 [hereinafter Bar Counsel 2023 Annual Report], https://www.massbbo.org/Reports.

10 *Id.*; *see also* Bar Counsel 2023 Annual Report, 10–11.

11 *See, e.g.*, Massachusetts Bar Association, Report of the MBA Task Force on Lawyer Discipline—Protecting the Public: Reforming the Disciplinary Process [hereinafter MBA Task Force], 13–14 (2005) (describing the history).

12 *See* Bar Counsel 2023 Annual Report, n. 10.

further inquiry, the OBC dockets it for further investigation, which may include diversion.

- After docketing, if the OBC determines that the matter should not be investigated further, the complainant is informed and provided with a written explanation. The complainant also receives notice of the right to request a review by the BBO of the OBC's decision to take no action, as described in section V of this chapter.

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),[13] 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 majority of determinations fall somewhere in the middle, where there is a plausible chance that ACAP's intervention might resolve the dispute without the need for a petition for discipline. 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 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 facilitate 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.

13 *Filing a Complaint Against an Attorney*, Massachusetts Board of Bar Overseers, https://www.massbbo.org/Complaints.

While ACAP does not resolve fee disputes,[14] sometimes a complainant's objection to the fee amount will involve 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 the Bar Counsel Investigation

In the small percentage 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 initial 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" refers to a petition for discipline, whereby the OBC, with the approval of the BBO, institutes formal proceedings to impose public discipline.[15] The OBC must, through its investigation, be satisfied that charges are warranted before filing charges. In most cases, the OBC investigation does not lead to disciplinary charges being filed.

The OBC investigation process develops as follows:

1. The BBO Rules require the OBC to "forward to the Respondent a request for a statement of the Respondent's position . . . ."[16] 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

[14] 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 Mass. R. Prof. C. Rules 8.4(c) and 8.4(h), presents ethical issues, which may be investigated by the OBC, in contrast with a simple dispute about fees. In the latter situation, ACAP urges the parties to seek the aid of the Massachusetts Bar Association Legal Fee Arbitration Board or go to small claims court.

[15] SJC Rule 4:01 § 7(2)(c).

[16] Rules of the Board of Bar Overseers [hereinafter BBO Rules] § 2.6.

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 requests 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).[17] Not only is it good strategic judgment to 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.[18] 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, typically in the form of a letter to the assistant bar counsel assigned to 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. It is good practice to attach relevant documents. The complaining party has the opportunity to read the lawyer's response and to comment on it.

   The respondent may answer by e-mail, attaching scanned copies of the response and any attachments. Pursuant to Mass. R. Prof. C. 1.6, confidentiality is waived if a lawyer must disclose confidential material in order to defend himself. For similar reasons, a client who alleges that a lawyer acted negligently or unethically waives the attorney-client privilege.[19]

   Most respondents will benefit from having objective, independent legal advice about the risks the lawyer might face before filing a statement

17 *See, e.g.*, James S. Bolan, *The Disciplinary Process*, in Ethical Lawyering in Massachusetts, Chapter 1 (Mass. Cont. Legal Educ.) (2023); 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).

18 SJC Rule 4:01 § 3(1)(b).

19 For waiver of attorney-client privilege in an attorney malpractice case, *see* Zabin v. Picciotto, 73 Mass. App. Ct. 141, 157–58 (2008).

of position. Every person is subject to pervasive and powerful self-serving biases,[20] 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.[21] If a respondent would like to be represented by counsel but cannot afford it, the BBO's Office of the General Counsel will attempt to assist the respondent in obtaining pro bono representation.[22] 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 their insurance policy, if they have 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 prior to a formal petition for discipline. 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).[23] 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,[24] that option is not available in OBC investigations.

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20 *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).

21 The Fifth Amendment privilege against self-incrimination may apply in disciplinary proceedings if some likelihood exists of criminal charges, but its assertion may trigger adverse inferences. *See* Matter of Boxer, 1998-DDC-2404 at 5–6 (SJ 1998) (proper to draw 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 privilege against self-incrimination in bar disciplinary proceedings); Matter of Kenney, 399 Mass. 431, 437 (1987) (same).

22 BBO Rules § 3.4(d).

23 BBO Rules § 4.4(a).

24 *See, e.g.*, Mass. R. Civ. P. 45(b), Reporter's Note (2015) ("the most significant change in Rule 45 as a result of this [2015 amendment] was the adoption for Massachusetts practice of a 'documents

However, if an OBC subpoena requests only documents, the OBC may advise the 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 witness meeting occurs, 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.[25] If the OBC records the 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.[26]

If financial misconduct is a potential issue, the OBC can, and typically will, demand that the respondent provide records that all lawyers are required to maintain by the *Massachusetts Rules of Professional Conduct* Rule 1.15[27] 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.

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only' subpoena directed to a non-party, a practice that has existed under Federal Rules of Civil Procedure since 1991").

25 *See* Mass. R. Civ. P. 30(b), (c).

26 BBO Rules § 4.7(a).

27 Mass. R. Prof. C. 1.15(f)(1) (itemizing documentation required of all trust accounts).

IV. Resolution by Agreement

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, or rehabilitation program."[28] 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),[29] the Massachusetts organization that assists lawyers who are unable to perform their legal duties due to personal, mental health, addiction, or medical issues. LCL also provides services to help lawyers manage their practices,[30] and "to assist attorneys with technology, marketing, ethics, and practice management needs."[31]

A resolution short of formal disciplinary charges may also (or alternatively) include an agreement to an "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 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, the OBC will proceed 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, the OBC will prepare a petition for discipline and serve it on the respondent. If the proposed sanction is an admonition, the OBC will recommend that the BBO impose an admonition and, with the respondent's agreement, send 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.

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28 BBO Rules § 2.7(2).

29 *See* Lawyers Concerned for Lawyers, http://www.lclma.org.

30 *Practice Management & Professionalism*, Lawyers Concerned for Lawyers, https://www.lclma.org/practice-management-professionalism.

31 *About Us*, Lawyers Concerned for Lawyers, https://www.lclma.org/about.

If the parties agree that the proposed sanction be some form of public discipline, the matter proceeds as follows:[32] Bar counsel prepares a petition for discipline, and the respondent files an answer and stipulation, also signed by bar counsel, admitting the facts and 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.[33] Where the agreement is for a public reprimand, and if the BBO agrees with the joint recommendation, it orders and imposes the public reprimand.[34] 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, or they may decide to accept the sanction preferred by the board.[35] 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 the alleged misconduct. (Part III discusses the typical sanctions for different types of misconduct in more detail.)

32 *See* BBO Rules §§ 3.19(d), (e) for the description of this process.
33 BBO Rules § 2.8(c).
34 BBO Rules § 3.19(d).
35 BBO Rules § 3.19(e).

If the respondent agrees to a sanction recommendation that is appropriate for the agreed misconduct, the OBC may, in some circumstances, agree to omit some 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.[36]

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 fourteen days to close the lawyer's practice.

V. Complainant's Right to Review

As noted in section II, if the OBC closes a request for investigation without any discipline, the complaining party is entitled to have the BBO review that decision. In that regard, the OBC 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."[37] The BBO Rules require that the complainant apply for such review within fourteen days of receiving the OBC's notice.[38]

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

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[36] *See*, *e.g.*, Matter of Pomeroy, 2010-DDC-4577 (SJ 2010) (affidavit of resignation, with disbarment retroactive to date of § 12A temporary suspension); Matter of Khoury, 2008-DDC-4181 at 2 (SJ 2008) (respondent defaulted; disbarment retroactive to date of compliance with § 12A suspension); Matter of Golden, 2007-DDC-3936 at 3 (SJ 2007) (stipulation to indefinite suspension accepted by court; retroactive to date of § 12A temporary suspension).

[37] SJC Rule 4:01 § 3(1)(b).

[38] BBO Rules § 2.10(1)(A).

modify the OBC's decision.[39] 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.[40] Once a board member affirms the OBC's decision to not investigate an attorney, the disciplinary matter is terminated. There is no further recourse.

[39] BBO Rules § 2.10 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.

[40] Picciotto v. Wright, et al., SJC-13644 (February 26, 2025); Gorbatova v. Semuels, 462 Mass. 1012 (2012); 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 investigation, and if the Office of the 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 crime[1]—and, where required, a BBO member has approved the matter for prosecution,[2] the OBC files a petition for discipline. The petition must specify the charges of the attorney's alleged misconduct[3] and include a caption listing the bar counsel as the petitioner and the attorney as the respondent.[4] The petition is signed by an

1 *See* Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 4:01 §§ 12(4), (5). 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 [hereinafter BBO Rules] § 2.7(3). No such approval is needed when the discipline results from the lawyer's conviction of a "serious crime," as provided for in SJC Rule 4:01 § 12(4). Chapter 4, section II(F)(5) discusses this discipline process.

3 BBO Rules § 3.14(b).

4 BBO Rules § 4.14(a).

assistant bar counsel. Once the petition is filed, the matter is no longer confidential. Up until the filing of the petition, bar counsel's investigation is confidential.

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 *Massachusetts Rules of Professional Conduct* or other rules[5] 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 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 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 hand, certified mail, return receipt requested, or 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.

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:

- 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.

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).
8 BBO Rules § 3.15(a).

- 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.
- 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 Notice to Respondent Accompanying Petition for Discipline.

III. Answer of the Respondent; Filing and Service

A. When to File the Answer

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 more than twenty days after receipt, a motion may be filed with the BBO's Office of the General Counsel (OGC) requesting an extension. Section IV discusses the procedure for filing and serving motions.

Practice Tips

In calculating the time when the respondent's answer is due, the period runs from the date the petition is mailed. If service is made other than by hand delivery, three days are added to the response time.[12] In practice, the 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 typically informs the respondent of the opportunity to file a motion to remove a default.

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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.
12 BBO Rules § 3.10.

If a respondent needs more time to answer the petition, the best practice is to contact the assistant bar counsel and request assent to 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.

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 in the petition are deemed admitted and the opportunity to present mitigating evidence 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 may be allowed when 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 the parties to submit briefs, the respondent may submit a brief on any contested issue, including disposition, 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 and may result in the answer being stricken. 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.

13 BBO Rules § 3.15(g).
14 BBO Rules § 3.15(h).
15 BBO Rules § 3.15(g).
16 BBO Rules § 3.15(d).
17 While the BBO Rules do not specifically allow such a response, it is an accepted practice when used appropriately.

Practice Tips

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.

* * *

It is critically important for the respondent to assert any defense in mitigation at the time the answer is filed. Failing to do so risks waiving mitigation. The defense should be pled with as much specificity as practical at this stage of the proceedings.

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.

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 answer to petition for discipline.

Practice Tip

Having the advice of counsel at the pleading stage (indeed, even earlier, during the investigation) can be critical to a respondent in the disciplinary process. If a respondent cannot afford counsel, the OGC of the BBO will assist the respondent to locate pro bono representation, although there is no right to counsel in disciplinary proceedings.[20] Many liability insurance policies provide some degree of coverage for representation to defend against disciplinary charges.

18 BBO Rules § 3.15(d).

19 BBO Rules § 4.24 allows for *pro hac vice* practice before the BBO by lawyers from out of state.

20 BBO Rules § 3.4(d); Matter of Gannett, 489 Mass. 1007, 2022-DDC-6403 at 5 (SJC 2022); Matter of Jones, 425 Mass. 1005, 1006, 1997-DDC-2235 at 6 (SJC 1997) (rescript).

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 answered the petition. 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.[21]

A motion for relief from default 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.[22] That motion must be accompanied by an affidavit demonstrating good cause for such relief, and the board chair decides the matter without a hearing.

In general, motion practice at the BBO is governed by BBO Rules § 3.18. The rules indicate which motions are heard by the board chair and which are reserved for the hearing committee or chair. They also provide guidance on filing and formatting requirements. The rules should be consulted prior to filing any motion or brief.

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).[23] The process for selecting the committee or the SHO is as follows:[24]

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.
2. With that knowledge, the general counsel's staff ordinarily appoints a hearing committee, consisting of three volunteer hearing committee

21 BBO Rules §§ 3.18(b)(1), (2).
22 BBO Rules §§ 3.15(g)–(h).
23 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.
24 For a description of this process, *see* Board of Bar Overseers Policies and Practices No. 9 (2025).

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.
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.[25]

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."[26] Within thirty days of the filing of an answer, each party may make a request to the other party for nonprivileged 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 of documents, or requests for admissions.[27]

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25 BBO Rules § 3.19(a).

26 BBO Rules § 3.17(a). The rule does not require disclosure of e-mail addresses of the persons identified.

27 *Id.* The rule permits "other material" beyond "non-privileged information and evidence relevant to the charges or the Respondent." In a 2014 appellate case, the Appeals Court noted that "[t]he Massachusetts work product doctrine . . . may be invoked to protect from discovery certain types of documents prepared by a party's attorney, or nonlawyer representative, in anticipation of litigation. . . . [Certain types of] work product may be subject to disclosure upon a showing of a substantial need for the material and that its equivalent cannot be obtained by other means." Cahaly v. Benistar Prop. Exch. Trust Co., Inc., 85 Mass. App. Ct. 418, 424–25 (2014) (internal citations omitted). *See also* Mass. R. Civ. P. 26(b)(3).

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.[28] 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:

- 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.[29]
- 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.
- For each such condition, produce all hospital, medical, psychiatric, psychological, counseling, and other records and reports in the respondent's possession and control.
- Sign releases that permit the OBC or its agents to obtain all medical records from the identified providers relating to the conditions at issue.[30]

[28] 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.

[29] *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, 2008-DDC-4149 at 2 (SJC 2008) (rescript).

[30] The use of the phrase "for each such condition" in section 3.23(b)(6)(b) in tandem with the requirement that the respondent "identify" the claimed mitigating physical or mental condition in-

C. Depositions

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

- A party may take the deposition upon oral examination of an "unavailable witness," defined in the rules as a witness "not subject to service of a subpoena or unable to attend a hearing due to age, illness or other infirmity."[31] A respondent or the OBC may seek permission from the BBO for such a testimony-preserving purpose either before[32] or after[33] 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."[34] Permission to take such a discovery deposition is much rarer, and the burden on the applicant is significantly higher.

Practice Tip

A party needing to take a deposition to preserve the relevant testimony of a witness who genuinely 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. Other procedures regarding remote testimony are addressed at the prehearing conference and in the prehearing order (discussed in section VIII).

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dicates that the respondent has a burden of identifying which doctors, treatments, records, etc., are pertinent to which claim of mitigating physical or mental status.

31 BBO Rules § 4.10(b).

32 BBO Rules § 4.10(a). For a deposition of an unavailable witness before proceedings start, the board chair or designee may grant permission if deemed "to be in the interest of justice."

33 BBO Rules § 4.10(b). The "interest of justice" factor is not explicitly identified in this rule, which states that such requests "shall be approved" by the board chair, the designee, or the hearing committee or officer.

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

To obtain permission to conduct a testimonial deposition of an unavailable witness before a hearing committee has been assigned, the party must file a written notice and application to the board chair or the chair's designee, seeking leave to take the deposition and (if applicable) to request the deponent to produce documents at the time of the deposition.[35] 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.[36] 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.[37] The rules permit a deposition to be taken before the board chair or designee, a member of the hearing committee, any notary public, or any other disinterested person authorized to administer oaths.[38]

The other party may object or otherwise respond to the request within seven days after service of the application.[39] After the time for objection has passed, the hearing committee or the board chair will either allow or deny the application.[40] 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.[41] If necessary (meaning that the witness refuses to voluntarily attend the deposition), the board 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).[42] If a testimonial deposition is sought after a hearing committee

35 BBO Rules § 4.11.

36 BBO Rules §§ 4.9(b), 4.10(b).

37 BBO Rules § 4.11(a).

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

39 BBO Rules § 4.11(a).

40 BBO Rules § 4.11(b).

41 BBO Rules § 4.11(c).

42 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.

has been assigned, it may enter the same orders and take the same actions as the board chair.[43]

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.[44] If permission is granted, the board chair requests that the disciplinary board or entity in the jurisdiction in which the deposition is to be taken issue an appropriate subpoena.[45] If that entity cannot issue the requested subpoena, or declines to, the party must petition the SJC pursuant to Mass. Gen. Laws ch. 223A, § 10 to issue a "letter rogatory," or a formal written request.[46]

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 examine the witness after the direct testimony.[47] 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,[48] 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."[49] 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.[50]

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.

43 BBO Rules § 4.11(c).
44 BBO Rules § 4.5B(a).
45 BBO Rules § 4.5B(b).
46 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").
47 BBO Rules §§ 4.11, 4.13.
48 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 [*sic*] objection thereto is made at the taking of the deposition.
49 BBO Rules § 4.14(a).
50 BBO Rules § 4.14(b).

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.[51] The notarial officer enters these changes on the deposition, along with the deponent's reasons for the changes.[52] 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 a copy to each party and member of the hearing committee.[53] 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.[54]

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 and testifying at the hearing.[55]

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.[56] Any such motion must be filed with the BBO at least ten days before the hearing, absent good cause for a later filing. Service may be made by mail, hand delivery or (effective with amendments to BBO Rules §§ 3.8 and 3.9 in December 2024) by e-mail.[57] 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.[58] If the motion is based on assertions of fact, the moving

51 BBO Rules § 4.13(a).

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

53 BBO Rules § 4.13(b)(1).

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

55 BBO Rules § 4.15.

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

57 BBO Rules §§ 3.8 and 3.9.

58 This procedure differs from the typical civil litigation arrangement. *Cf.* Mass. R. Civ. P. 6(d), which reads as follows:

> (d) Additional time after mail or electronic service. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other papers upon the party and

party must support the motion with an affidavit, unless the facts are established by the pleadings or an agreement between the parties.[59] BBO Rules § 3.18 designates which types of motions are heard by the board chair and which motions are heard by the hearing committee or hearing chair.

A. Motions to Dismiss

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.[60]

B. Motions for 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."[61] As the court noted, "The offensive use of collateral estoppel is a generally accepted practice in American courts."[62] In *Matter of Cohen*, the court stated that "[f]or 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.'"[63] The BBO has wide discretion in permitting the use of collateral estoppel in this manner.[64] The OBC may use such prior findings to establish both misconduct charges and any claims of aggravation.

To utilize issue preclusion/collateral estoppel, the OBC must present a motion to the BBO, which the board chair or a BBO member the chair designates must decide.[65]

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the notice or paper is served upon the party by mail, by e-mail pursuant to Rule 5(b)(1), or otherwise electronically, including through the Electronic Filing Service Provider pursuant to Rule 7(b) of the Massachusetts Rules of Electronic Filing, three (3) days shall be added to the prescribed period.

59 BBO Rules § 3.18(a)(3).

60 BBO Rules § 3.18(a)(7).

61 Bar Counsel v. Board of Bar Overseers, 420 Mass. 6, 10, 1995-DDC-6916 (SJC 1995).

62 *Board of Bar Overseers*, 420 Mass. at 9.

63 Matter of Cohen, 435 Mass. 7, 15, 2001-DDC-2683 at 4 (SJC 2001) (quoting Miles v. Aetna Cas. & Sur. Co., 412 Mass. 424, 427 (1992)).

64 For later BBO decisions on motions for issue preclusion, *see* Matter of Eliopoulos, C2-22-00272665, 2025-DDC-6749 (BBO 2025) and Matter of Bradley, C1-20-00263667, 2022-DDC-6676 (BBO 2022).

65 BBO Rules § 3.18.

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 posthearing 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.

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 and therefore may be sub-

ject to change depending on schedules. 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"[66]

The parties and their counsel must attend the prehearing conference and must have authority to make commitments about the matters to be addressed.[67] The conference establishes any revised hearing dates. The parties assist in arranging the hearing date or dates.

You Should Know

BBO policy prohibits the hearing committee from engaging in or encouraging settlement discussions.[68] 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 committee, 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.[69] While the conference is not intended for settlement discussion about the charges, it is intended to achieve stipulations about facts and documents.

66 BBO Rules § 3.23(b).

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

68 Board of Bar Overseers Policies and Practices No. 10 (2025) ("The board prohibits [hearing] panel members from encouraging bar counsel and the respondent to settle matters assigned to a hearing.").

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

An important purpose of the prehearing conference is to set up interim deadlines to identify and resolve any disputes about the documentary evidence that will be 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 a party from objecting to the admission of the exhibit at the hearing.[70] 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.[71]

The prehearing conference also addresses the disclosure of medical records and releases to medical providers for those records by a respondent who has 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 board chair modifies any such rulings.[72] 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.[73]

After completing the prehearing conference, the hearing committee chair serves the parties with a prehearing conference order, which describes all the matters covered during the conference. The order sets forth the schedule for exchange of information and exhibits prior to the actual hearing. It is a road map for prehearing procedures.

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

70 BBO Rules § 3.23(b)(6).
71 *Id.*
72 BBO Rules §§ 3.25, 3.26.
73 BBO Rules § 3.18(a)(7). Presumably, one could try a discretionary appeal to the single justice under Mass. Gen. Laws ch. 211 § 3.

is the BBO office in Boston.[74] 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 is subject to any protective orders the BBO or the SJC issues.[75] 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.[76] That notice must advise the respondent that failure to appear at the hearing is deemed an act of professional misconduct and may be grounds for administrative suspension.[77] 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 and adjust them if necessary.

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.[78]

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.[79]

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.

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74 BBO Rules § 3.20.

75 BBO Rules § 3.22(c). If the hearing is livestreamed, it can be found on the BBO website calendar, https://www.massbbo.org/s/events.

76 SJC Rule 4:01 § 8(3)(b).

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

78 BBO Rules § 3.7(c).

79 BBO Rules § 3.28. *See* Matter of Balliro, 453 Mass. 75, 84, 2009-DDC-4351 (SJC 2009) (bar counsel has burden to prove misconduct); Matter of Hoicka, 442 Mass. 1004, 1006, 2004-DDC-3404 at 2 (SJC 2004) (respondent bears burden to prove informed consent to conflict); Matter of Eisenhauer, 426 Mass. 448, 452, 1998-DDC-2279 at 3 (SJC 1998), *cert. denied*, 524 U.S. 919 (1998) (same); Matter of Murray, 455 Mass. 872, 2010-DDC-4531 (SJC 2010) (burden of proof on certain elements of intentional misuse with deprivation prospectively shifted to attorneys who receive cash, fail to deposit it in account, then are unable to account for it).

B. Opening Statements

At the discretion of the hearing committee chair, the parties may make brief opening statements at the start of the hearing.[80] 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.

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.[81] The committee chair and any BBO member have authority in Massachusetts to issue a hearing subpoena.[82] 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).[83]

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.[84] Note that this is a significant difference from civil or criminal litigation. As discussed in the next section, the committee members also may examine witnesses.

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

81 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.

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

83 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 supra* note 43.

84 BBO Rules § 4.5(d).

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.

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. In some situations, witnesses may testify by videoconferencing.

E. Bar Counsel's Case-in-Chief

As noted in section IX(A), the OBC 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."[85] The OBC's case-in-chief will consist of witnesses, documentary evidence, stipulations, and admissions in the pleadings. As discussed in section VII(B), 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 the 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.[86] As noted in section

[85] Matter of Budnitz, 425 Mass. 1018, 1018 n.1, 1997-DDC-2212 at 2 n.1 (SJC 1997) (citing Matter of Mayberry, 295 Mass. 155, 167 (1936)).

[86] *See* Matter of Patch, 466 Mass. 1016, 1018, 2013-DDC-5092 at 2 (SJC 2013) (respondent did not plead mitigation, and did not offer any evidence to support mitigation; court implies that respondent may have been permitted to offer such evidence).

IX(A), the respondent bears the burden of proof on all claims of mitigation. Chapter 18 discusses mitigation factors in more detail.

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*, 1997-DDC-2155 (SJ 1997), and, if credited, may determine what weight is to be given to it.[87]

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.[88] 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

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87 Board of Bar Overseers Policies and Practices No. 12 (2025).

88 Matter of Diviacchi, 475 Mass. 1013, 1020 (2016) (expert testimony is not necessary to determine whether attorney has violated rules of professional conduct). *See* Matter of Crossen, 450 Mass. 533, 570, 2008-DDC-6871 at 47 (SJC 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 the Discipline of an Attorney, 442 Mass. 660, 669 (2004), and who are permitted to bring some of their expertise to bear in reaching their conclusions. *See* Mass. Gen. Laws ch. 30A § 11(5) ("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").

an excessive fee, the hearing committee must make findings about "the fee customarily charged in the locality for similar legal services,"[89] 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*.[90] The timing and content of expert disclosures is governed by the rules concerning the prehearing conference and the prehearing order that results from it.[91]

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 on their own experience in this way, and the state Administrative Procedure Act permits such reliance.[92]

H. Evidentiary Issues and Objections

Proceedings before the BBO are governed by the Administrative Procedure Act. According to BBO Rules § 3.39, "In any proceeding the admissibility of evidence shall be governed by the Rules of Evidence observed in adjudicatory proceedings under Chapter 30A of the General Laws (State Administrative Procedure)."[93] According to the statute:

> Unless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege

89 Mass. R. Prof. C. 1.5; Matter of Fordham, 423 Mass. 481, 1996-DDC-2004 (SJC 1996). *See also* chapter 11, section II.

90 *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.

91 *See* BBO Rules § 3.23(b)(6)(a). *See also* appendix F for a sample Prehearing Conference Order.

92 *See supra* note 84.

93 BBO Rules § 3.39.

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.[94]

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."[95] 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.[96] 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.[97]

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."[98]

- *Privilege:* 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

94 Mass. Gen. Laws ch. 30A § 11(2).

95 Matter of Segal, 1999-DDC-2473 (SJC 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.

96 *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).

97 Rooney, *supra* note 95, at 4.

98 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, 2016-DDC-5685 (SJ 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 BBO will be upheld if supported by substantial evidence).

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."[99] 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.[100] 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."[101] This principle applies to proceedings before the BBO.[102]

- *Leading questions:* Counsel examining their 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.[103]

  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 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

99 Matter of Kenney, 399 Mass. 431, 437, 1987-DDC-599 at 22 (SJC 1987) (citing Spevack v. Klein, 385 U.S. 511, 514 (1967) (plurality opinion)).

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

101 Labor Relations Comm'n v. Fall River Educators' Ass'n, 382 Mass. 465, 471 (1981).

102 *See* Matter of Boxer, 1998-DDC-2404 at 6 (SJ 1998) (Board Memorandum).

103 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).

> 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.[104]

I. Closing Argument

After each party rests their case, the hearing committee hears closing arguments, first from the respondent, and then from the OBC.[105] (On rare occasions, the committee chair will request written argument in lieu of an oral closing argument.) The BBO Rules state that such closing argument shall occur "directly following the taking of testimony except for good cause shown."[106] In practice, the hearing committee may schedule a different date for closing arguments. 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.

J. Role of the OGC 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."[107] The AGC does not question witnesses or engage in discussions with parties or their counsel. At the end of the

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104 *Cf.* Matter of Moore, 442 Mass. 285, 2004-DDC-3408 (SJC 2004) (respondent's objection to admission of documents properly overruled where the authenticity of the documents is not in dispute).

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

106 BBO Rules § 3.42.

107 Board of Bar Overseers Policies and Practices No. 11 (2025).

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 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.[108]

Practice Tip

The BBO Rules state that a respondent's purchasing a transcript is discretionary, not mandatory. In practice, a respondent must arrange to purchase the transcript because the posthearing briefs must cite to the pages of the transcript.

XI. Posthearing Briefs

Within thirty days after the BBO receives the final transcript of the hearing, each party may file proposed findings of fact and proposed conclusions of law, including a discussion of recommended disposition.[109] 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 them[110]

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

108 BBO Rules § 3.34.
109 BBO Rules § 3.43.
110 BBO Rules §§ 3.44(a)(1), (2).

ences 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 either by mail, in-person delivery, or e-mail. Mail service is complete upon in-person delivery or upon deposit in the United States mail; e-mail service is complete upon pressing "send" or its equivalent.[111] 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 caselaw, 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 receiving the posthearing briefs, the committee deliberates and then must "promptly" submit its report to the BBO.[112] The committee report typically includes the following:[113]

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
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

111 BBO Rules § 3.10.
112 BBO Rules § 3.46.
113 BBO Rules § 3.47.

ultimate responsibility to decide the matter, including a decision whether to file an Information transferring the matter to the court. 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 the conviction to the OBC within ten days.[114] If the crime for which the lawyer was convicted constitutes a "serious crime," as defined in the SJC Rules,[115] 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.[116] "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.[117]

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.[118] The panel's deliberation is subject to the SJC's presumptive sanctions following a conviction. For a felony conviction, the typical sanction is disbarment[119] or, when special mitigating circumstances exist, indefinite suspension.[120] A misdemeanor that qualifies as a "serious crime" warrants a suspension.[121] Other misdemeanor convictions generally warrant at least a public reprimand.[122]

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114 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 Rule 4:01 § 12(7).
115 SJC Rule 4:01 § 12(3).
116 SJC Rule 4:01 § 12(4).
117 SJC Rule 4:01 § 12(1).
118 Board of Bar Overseers Policies and Practices No. 9 (2025).
119 Matter of Otis, 438 Mass. 1016, 1017, 2003-DDC-3241 at 1 (SJC 2003).
120 Matter of Concemi, 422 Mass. 326, 330 n.4, 1996-DDC-1065 at 7 n.4 (SJC 1996).
121 Matter of Eberle, 2010-DDC-4573 (SJ 2010); Matter of Fraser, 2009-DDC-4382 (SJ 2009).
122 Matter of Coyle, 2014-DDC-5372 (BBO 2014).

The principle of issue preclusion described in section VII(B) 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."[123] A panel and the BBO may not make findings that are inconsistent with the conviction.[124]

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 BBO members and not a hearing committee.[125] 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 received an admonition may demand in writing that the admonition be vacated and an expedited hearing convened to review that sanction.[126] The demand must be made within fourteen days of receipt of the admonition. The expedited hearing must be assigned to an SHO. 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.

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

- Absent a showing of good cause, no prehearing conference is held.[127] 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 stipulations[128]

123 SJC Rule 4:01 § 12(2).
124 *Concemi, supra* note 120, 422 Mass. at 328–29, 1996-DDC-1065 at 5 (SJC 1996).
125 Board of Bar Overseers Policies and Practices No. 9 (2025).
126 SJC Rule 4:01 § 20; BBO Rules § 2.12.
127 BBO Rules § 2.12(2)(e).
128 BBO Rules § 2.12(2)(d).

- 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.[129]
- The parties do not file posthearing briefs or findings of fact and conclusions of law, except for good cause shown.[130]

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

[129] BBO Rules § 3.22(b).
[130] 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 malpractice claims and their substantive or procedural requirements; instead, this chapter addresses the disciplinary consequences of a lawyer's breach of duties related to competence and diligence.

II. 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.**

* * *

(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(l), defining *reasonable* and *reasonably*.[1]

The comments to Rule 1.1 confirm that the duty of competence is usually that of "a general practitioner."[2] 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."[3] The task force's MacCrate Report offered lawyers a list of necessary skills for effective law practice.[4]

The comments to Rule 1.1 offer some further understanding about what constitutes competence. The comments stress the importance of adequate prepa-

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1 This same phrase appears in the Terminology section of the *ABA Model Rules of Professional Conduct*. *See* ABA Model Rules of Prof'l Conduct r. 1.0(h) (2013).

2 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).

3 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).

4 *Id.* at 138–40. The report identified the following skills that a competent lawyer must master:

- Problem-solving
- Legal analysis and reasoning
- Legal research
- Factual investigation
- Oral and written communication
- Counseling
- Negotiation
- Litigation and alternative dispute resolution procedures
- Organization and management of legal work
- Recognizing and resolving ethical dilemmas

ration and thoroughness, both of which "are determined in part by what is at stake."[5] 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.[6] 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.[7] 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.[8] 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.[9] The lawyer must reasonably believe that the association will aid in the representation and must obtain the client's consent.[10]

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."[11] The Appeals Court has qualified the standard as follows:

> But it must not be understood that an attorney is liable for every mistake that may occur in practice, and held responsible for the damages that may result. If the attorney acts with a proper degree of attention, with reasonable care, and to the best of his skill and knowledge, he will not be held responsible. Some allowance must always be made for the imperfection of human judgment.[12]

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.

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5 Mass. R. Prof. C. 1.1 cmt. 5.
6 Mass. R. Prof. C. 1.1 cmt. 3.
7 Mass. R. Prof. C. 1.1 cmts. 2, 4.
8 Matter of Fordham, 423 Mass. 481, 1996-DDC-2004 (SJC 1996), *cert. denied*, 519 U.S. 1149 (1997).
9 Mass. R. Prof. C. 1.1 cmt. 2.
10 Mass. R. Prof. C. 1.1 cmt. 6.
11 Pongonis v. Saab, 396 Mass. 1005, 1006 (1985).
12 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, 2010-DIS-7078 at 12 (BBO 2010) (in the circumstances, failure to attend status conferences was "not the stuff of bar discipline"); Matter of an Attorney, 2002-DIS-3239 at 1, 4 (SJ 2002) ("isolated lapse in judgment does not necessarily constitute sanctionable conduct").

By contrast, the constitutional standard for ineffective assistance of counsel in criminal cases, arising from the Sixth Amendment to the U.S. Constitution and Article XII of the Massachusetts Constitution, is a narrower and more constrained competence standard than the one Rule 1.1 imposes.[13] 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 the supposition were true).[15] But a lawyer may, pursuant to Rule 1.2(c), offer to the client limited representation so 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]

Massachusetts is one of the few jurisdictions in the country[17] 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,

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13 Strickland v. Washington, 466 U.S. 668 (1984) (appropriate standard for ineffective assistance of counsel requires both that defense attorney was objectively deficient and that there was reasonable probability that competent attorney would have led to different outcome).

14 *See* Matter of Abelow, 2002-DDC-3126 (SJ 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 (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. Effective February 1, 2019, the SJC approved Trial Court Rule XVI: Uniform Rule on Limited Assistance Representation, which permits limited assistance representation in most civil matters. *See* Massachusetts Trial Court Rules, Rule XVI, https://www.mass.gov/trial-court-rules/trial-court-rule-xvi-uniform-rule-on-limited-assistance-representation.

17 The other jurisdictions are the District of Columbia, Maryland, Michigan, and South Dakota. *See MCLE Rules by Jurisdiction*, AmericanBar.org, https://www.americanbar.org/events-cle/mcle/.

including the benefits and risks associated with relevant technology."[18]

Many reported disciplinary decisions impose sanctions for failure to provide competent service.[19] Other reported decisions have imposed discipline for the related problem of lack of diligence, as described in section III.

Practice Tip

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

B. Sanctions for 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.[20] 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 mis-

[18] Mass. R. Prof. C. 1.1 cmt. 8. The ABA, relying on the same language to its comment to Rule 1.1, advised in a 2017 ethics opinion of the increasing importance of technological competency. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 17-477-R (revised May 22, 2017). Some Massachusetts Rule 1.1 cases reflect discipline being imposed for a lack of technology competence. *See, e.g.*, AD 20-24, 2020-ADM-6169 (BBO 2020) (attorney did not know how to review flash drive provided by client and failed to investigate its contents); Matter of Reisman, 2013-DDC-5227 (BBO 2013) (attorney inexperienced with electronic discovery erroneously advised client to delete computer files).

[19] For a sampling of those decisions, *see, e.g.*, Matter of Nunheimer, 2022-DDC-6473 (SJ 2022) (attorney failed to review and understand Social Security Administration regulation relevant to representation; public reprimand); AD 20-29, 2020-ADM-6174 (BBO 2020) (attorney with no probate experience failed to associate with experienced counsel for probate matter); Matter of Dowell, 2012-DDC-5033 (SJ 2012) (one-year-and-one-day suspension for failure to provide competent representation); Matter of Feeney, 2008-DDC-4312 (BBO 2008) (attorney misread date of accident on police report, filed suit seven days after statute of limitations had expired; public reprimand); AD 01-74, 2001-ADM-3056 (BBO 2001) (attorney advised client, then eight months pregnant, to enter into a separation agreement that did not provide for child support so that client could get her divorce "that day," where client wanted to pursue child support after child was born).

[20] *See, e.g.*, Matter of Dupuy, 2024-DDC-6655 (SJ 2024) (three-month suspension for multiple ethical violations relating to representation of elderly client, including charging excessive fees, failing to communicate with his client, and engaging in "flagrant conflict of interest" in violation of Rules 1.1 and 1.7(a)(2) by hiring his daughter to sell client's stock without disclosing conflict to his client and obtaining her informed consent).

conduct related solely 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 themselves of those remedies.[21]

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 BBO requesting that the disciplinary investigation be stayed pending the outcome of the civil proceedings.[22]

Most disciplinary matters involving Rule 1.1 also included other misconduct. However, in some reported cases, the Rule 1.1 violation predominated. In *Matter of Dilibero*,[23] a respondent was suspended for one year, with six months and one day to be served and the remainder stayed, for giving incorrect legal advice to a vulnerable client. The client—who was a permanent resident charged with serious drug crimes—informed the respondent that preserving a path to citizenship was his primary goal in resolving his case. Nonetheless, later in the representation, the lawyer recommended the client accept a six-month continuance without a finding (CWOF), advising him it would have no immigration-related consequences. In fact, such a disposition would render the client immediately deportable, subject to mandatory detention, ineligible for any available defense to removal, and deemed permanently inadmissible to the United States and ineligible for citizenship. Unaware of these adverse immigration consequences, the client followed the respondent's advice and accepted the CWOF. When the client later confronted the respondent and asked for his assistance, the respondent denied giving the incorrect legal advice and was mostly unhelpful in the client's efforts to vacate his conviction. A single jus-

21 *See, e.g.*, Matter of Pilavis, 2001-DDC-2871 (SJ 2001) (facts established in malpractice matter admissible against lawyer in disciplinary hearing; lawyer disbarred for that and other serious misconduct).

22 Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 4:01 § 11 (authorizing BBO or court to defer on motion by respondent; ordinarily, no deferral occurs).

23 2025-DDC-6726 (SJ 2025).

tice found that a one-year suspension (partially stayed) was warranted given the respondent's Rule 1.1 violation, his related violation of Rule 1.3 (lack of diligence), and the presence of various aggravating factors, which included the respondent's "lack of remorse, and lack of understanding as to his ethical responsibilities; [his client's] vulnerability, as an immigrant facing deportation; and the risk of harm caused by the respondent's incorrect immigration advice and follow-up conversations."[24]

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*,[25] 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*,[26] 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 one year and one day.[27]

Other matters primarily involving Rule 1.1 have resulted in admonitions. In AD 25-13,[28] a father retained a lawyer to represent him in a family law matter involving his minor child. At the time of the engagement, the deadline for the client to respond to the mother's complaints for modification and contempt had already passed, but the lawyer was instructed to try to file a late answer. The lawyer filed the answer but failed to submit a required motion for late filing, resulting in the court's rejection of the filing. The lawyer subsequently failed to appear for two hearings because he was not monitoring his mail and e-mail for communications from the court. Ultimately, the mother dismissed her complaints, and the client thus suffered no harm. The lawyer, who was suffering from medical issues that contributed to his inattentiveness, received an admonition for violating Rules 1.1 and 1.3. *See also* AD 05-01, 2005-ADM-3695 (BBO 2005) (admonition for failing to conduct reasonable and customary inquiry into immigration client's departure from origin country or otherwise associating

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24 *Id.*

25 2011-DDC-4873 (BBO 2011).

26 2000-DDC-2721 (SJ 2000).

27 *See* Matter of Johnson, 2010-DDC-4646 (SJ 2010) (respondent suspended for three months for multiple instances of misconduct stemming largely from lack of competence); Matter of Wysocki, 2000-DDC-2715 (SJ 2000) (respondent neglected numerous client matters but also engaged in financial misconduct; suspended for two years).

28 AD 25-13, 2025-ADM-6705 (BBO 2025).

with lawyer of established competence with immigration matters); AD 00-04, 2000-ADM-2770 (BBO 2000) (admonition for incorrectly advising client on deadline to file claim with state agency).

III. 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.[29] That lack of diligence almost always constitutes less-than-competent representation and, therefore, usually violates Rule 1.1 as well. 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

[29] 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."

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,[30] 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.[31]

While a single instance of neglect may lead to discipline,[32] an isolated neglect of a matter, with minimal or no risk of harm to a client, has not resulted in discipline.[33] Cases involving a pattern of neglect often result in a term suspension.[34]

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30 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).

31 In Matter of Horgan, 1987-DDC-657 at 3–4 (SJ 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."

32 *See* Matter of Greenberg, 2020-DDC-6201 (BBO 2020) (public reprimand where attorney failed to ascertain date of upcoming pretrial conference and did not appear for hearing); AD 20-12, 2020-ADM-6157 (BBO 2020) (failure to file accountings and reports in single conservatorship matter); Matter of Un, 2010-DDC-4682 (BBO 2010) (public reprimand for single instance of neglect of client's immigration matter); AD 05-20, 2005-ADM-3714 (BBO 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).

33 Authorities from other jurisdictions who similarly hold 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").

34 *See, e.g.*, Matter of Morrissey, 2022-DDC-6433 (SJ 2022) (eighteen-month suspension for neglect of four client matters); Matter of Brennan, 2021-DDC-6278 (SJ 2021) (one-year-and-one-day suspension for neglect of three unrelated clients and making intentional misrepresentations

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.[35] In transactional matters, where no court action exists, a lawyer who withdraws from the representation must ascertain whether and when successor counsel is engaged in order to ascertain whether the lawyer has any continuing duties to the client.

The seminal disciplinary decision involving neglect, *Matter of Kane*,[36] 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."[37] The *Kane* guidelines are discussed in the following section. *Kane* did not attempt to define neglect or to limit its scope.[38]

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to client and to bar counsel); Matter of Hoffman, 2019-DDC-6070 (SJ 2019) (suspension of one year and one day where attorney neglected three unrelated matters and failed to keep her clients apprised of status of their cases); Matter of Venturo, 2014-DDC-5329 (SJ 2014) (nine-month suspension where lawyer neglected several client matters, causing at least one matter to be dismissed, and made misrepresentations to clients about the matters and/or failed to notify clients of court action and appeal deadlines, resulting in the loss of clients' claims); Matter of Caggiano, 2008-DDC-4202 (SJ 2008) (one-year-and-one-day suspension for pattern of neglect involving three unrelated client matters).

35 *See*, *e.g.*, Matter of Harsch, 2004-DDC-3504 (BBO 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 firm's name).

36 1997-DDC-2261 (BBO 1997).

37 *Id.* at 6.

38 Other examples of neglect leading to sanctions include Matter of LaRoche, 2022-DDC-6406 (SJ 2022) (criminal attorney failed to review discovery and investigate case prior to trial); Matter of Edge, 2022-DDC-6419 (SJ 2022) (attorney failed to check docket and missed hearing in probate matter); Matter of Kiely, 2020-DDC-6202 (BBO 2020) (attorney failed to make timely distribution of real estate sale proceeds to mortgagors); AD 00-39, 2000-ADM-2805 (BBO 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, 2000-DDC-2721 (SJ 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 entire sentence); Matter of Garabedian, 415 Mass. 77, 1993-DDC-1384 (SJC 1993) (failure to file personal injury action within statute of limitations).

B. Discipline for Violating Rule 1.3

In *Matter of Kane*,[39] 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.

Aggravating factors include making misrepresentations to conceal the neglect or lack of diligence, prior disciplinary history, failing to cooperate with the OBC or the BBO, refusing to acknowledge the wrongful nature of the conduct, and/or abandonment of the practice of law.[40] Moreover, "the Board [will not] hesitate to impose or recommend more severe sanctions in an appropriate case, such as . . . where the character of the harm to a client is particularly outrageous."[41] On the other hand, a lesser sanction may be warranted based on the existence of mitigating factors, including a timely good-faith effort to make restitution or to rectify the consequences of misconduct, a physical or mental disability that contributed to the misconduct, and/or serious personal or emotional problems contributing to the misconduct.[42]

Since 1998, the BBO and the SJC have followed the guidelines *Kane* estab-

39 1997-DDC-2261 (BBO 1997).
40 *Id.* at 8.
41 *Id.* at 9.
42 *Id.* at 8–9.

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lished.[43] The following sections describe selected, but typical, examples of discipline imposed in matters involving neglect.

1. Disbarment

While *Kane* does not address disbarment as a sanction, lawyers have been disbarred for serious, repeated neglect when they also engaged in misconduct to cover up or escape the consequences of the neglect, 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*,[44] 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." In addition, "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.'"[45] 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*.[46] In *Marshall*, the attorney not only failed to represent several clients zealously but also made misrepresentations to clients, did not return client files and unearned retainers, failed to comply with OBC subpoenas and an order of administrative suspension, and did not file an answer to the petition for discipline. In *Matter of Ulin*,[47] a lawyer was disbarred after he "engaged in a pattern of negligent conduct spanning several years, 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."

43 *See* Matter of Foster & Others, 492 Mass. 724, 752–53 (2023) (observing that SJC has endorsed principles set forth in *Kane*).
44 2012-DDC-5022 (SJ 2012).
45 *Id.* at 13–14 (quoting Matter of Ulin, 2002-DDC-3078 at 2 (SJ 2002)).
46 2000-DDC-2719 (SJ 2000).
47 2002-DDC-3078 at 2 (SJ 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 BBO 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."[48]

2. Suspension

Term suspensions are common in cases of neglect, particularly when the neglect is serious, repeated, and causes some harm.[49] 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 been imposed.[50]

An apt example of a suspension for serious neglect is *Matter of Johnson*, in which the attorney received a suspension of two and a half years for misconduct related to his representation of four separate clients and making false statements under oath to the bar counsel during its investigation and to the hearing committee.[51] In three of the client matters, the attorney repeatedly neglected his clients' cases, failed to keep them informed, and lied to cover up his neglect. In one of these cases, he intentionally misdated a notice of withdrawal and the attached certificate of service (which he signed "under the penalties of perjury") to make it look like he had made the filing and service on an earlier date than he did, and *then* lied about it to his client, to the bar counsel (under oath at a recorded meeting), and to the hearing committee (under oath at the hearing). In the fourth matter, the attorney responded to a negative online review from the client after she terminated the representation and, in doing so, disclosed confidential client information without informed consent and falsely claimed that *he* (not his client) terminated the attorney-client relationship.

Upon review, a single justice agreed with the hearing committee's finding that the "floor" for neglecting multiple client matters is a suspension of one year and one day, carrying a required reinstatement hearing. Because the attorney *also* (1) repeatedly lied to his clients and made misrepresentations under oath

48 *Ulin*, 2002-DDC-3078 (SJ 2002).

49 Matter of Collins, 494 Mass. 1024, 1030, 2024-DDC-6659 (SJC 2024) ("Where an attorney engages in repeated neglect resulting in harm to the client, a term suspension for one year and one day is an appropriate remedy," citing Matter of Scannell, 2005-DDC-3630 (SJ 2005)).

50 *See* Matter of Shaughnessy, 442 Mass. 1012, 1014, 2004-DDC-3407 (SJC 2004).

51 Matter of Johnson, 2025-DDC-6793 (SJ 2025).

and (2) disclosed a client's privileged information without his client's consent in a public forum, a suspension of two and a half years was deemed appropriate, especially where the lawyer engaged in some of the misconduct while already under investigation by the bar counsel and because he had previously received a three-month suspension (albeit for dissimilar misconduct). The attorney's reinstatement in the future was made conditional on (1) an audit of his practice by the Law Office Management Assistance Project, (2) execution of a mentoring agreement, and (3) an evaluation by Lawyers Concerned for Lawyers.

In *Matter of Barrat*,[52] 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 one day, in part because the lawyer's diagnosis of depression was a factor in mitigation. Similarly, in *Matter of MacDonald*,[53] 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.[54]

In *Matter of McLaughlin*,[55] a lawyer neglected his duties as counsel for a woman who was terminally ill. Despite his knowledge of the client's condition, the respondent failed to respond to her increasingly desperate pleas to finalize the estate and to transfer her property to friends before she died. He misrepresented the status of his work to the client and continued his engagement after a conflict of interest developed. A single justice concluded the lawyer's "repeated instances of neglect in a probate matter, along with misrepresentation to an estate beneficiary" warranted a suspension of three months.[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

52 2004-DDC-3478 (SJ 2004).

53 2007-DDC-3984 (SJ 2007).

54 *See* Matter of Krabbenhoft, 2007-DDC-4003 (SJ 2007) (six-month suspension for two instances of neglect with misrepresentation to client, mitigated by depression).

55 2024-DDC-6643 (SJ 2024).

56 *See* Matter of Kasilowski, 2015-DDC-5480 (SJ 2015) (three-month suspension for neglect of two estates, including delayed filing of tax returns, which caused estate to incur interest and penalties, about which lawyer did not tell his clients); Matter of Lansky, 2006-DDC-3778 (SJ 2006) (six-month suspension for lawyer who neglected two probate estate matters and engaged in conflict of interest, causing substantial injury to beneficiaries of estates).

57 2009-DDC-4419 (SJ 2009).

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 may have suggested a public reprimand for the single instance of neglect with harm to the client, the lawyer's accompanying misrepresentations justified a suspension of one year and one day.[59]

3. Public Reprimand

According to the *Kane* standards, a lawyer who neglects a single matter and causes harm ought to receive a public reprimand. 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)).

58 2010-DDC-4656 (SJ 2010).

59 *Id.* at 3 (concluding that "[a] suspension for some period of time for neglect concealed by misrepresentations to the client is the appropriate sanction," where attorney made three separate misrepresentations that "went to the status of the case itself" in violation of Rule 1.4 (a) and (b)).

60 2010-DDC-4698 (BBO 2010).

61 2013-DDC-5225 (BBO 2013).

62 *See, e.g.*, Matter of Bettencourt, 2019-DDC-6118 (BBO 2019); Matter of McManus, 2010-DDC-4689 (BBO 2010); *Un*, 2010-DDC-4682 (BBO 2010); Matter of Griffin, 2009-DDC-4491 (BBO 2009); Matter of Fitzgerald, 2007-DDC-4085 (BBO 2007); Matter of Bagamary, 2006-DDC-3856 (BBO 2006); Matter of Williams, 2003-DDC-3325 (BBO 2003); Matter of Dougherty, 2008-DDC-4308 (BBO 2008).

63 *See, e.g.*, Matter of LaPointe, 2023-DDC-6529 (SJ 2023); Matter of Sacco, 2019-DDC-6132 (SJ 2019); Matter of Fleming, 2013-DDC-5234 (BBO 2013); Matter of Watson, 2012-DDC-4957 (SJ 2012); Matter of Lynch, 2007-DDC-4023 (SJ 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] For instance, in AD 20-13,[67] the lawyer failed to appear for a hearing on his client's motion, but the client represented himself and the motion was granted, and the lawyer refunded his fee, so "there was no appreciable harm to the client." Other examples exist in the disciplinary reports.[68]

Similar admonitions appeared under the predecessor to Rule 1.3 in the *Massachusetts Code of Professional Responsibility*. In AD 99-67,[69] the attorney, representing an incarcerated convicted criminal defendant, failed to visit the client in jail, in violation of Disciplinary Rules 6-101(A)(2) and (A)(3);[70] 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

64 2012-DDC-5059 (BBO 2012).

65 *See, e.g.*, Matter of Hopkins, 2024-DDC-6695 (SJ 2024) (three-month suspension for neglecting client matter, leading to entry of judgments of default and damages against client as well as dismissal of appeal therefrom, compounded by failure to inform client of adverse judgments); Matter of Beery, 2012-DDC-5087 (SJ 2012) (three-month suspension for one instance of neglect with failure to cooperate); Matter of Hodgdon, 2007-DDC-4029 (SJ 2007) (three-month suspension for two instances of neglect, with reimbursement to clients, plus failure to cooperate; substantial factors in mitigation and conditions on reinstatement).

66 Matter of Kane, 1997-DDC-2261 at 7 (BBO 1997).

67 2020-ADM-6158 (BBO 2020).

68 *See, e.g.*, AD 22-13, 2022-ADM-6368 (BBO 2022); AD 13-02, 2013-ADM-5239 (BBO 2013); AD 12-04, 2012-ADM-5067 (BBO 2012).

69 1999-ADM-2647 (BBO 1999).

70 Disciplinary Rules [hereinafter DR], Rule 6-101(A)(2) and A(3).

71 1999-ADM-2652 (BBO 1999).

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 for relatively minor misconduct that caused little to no harm, only to risk making the same mistakes again.

IV. 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(g), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[72] SJC Rule 4:01 § 8(1)(b). For a discussion of diversion, *see* chapter 4, section II(C).

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

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[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 Martin, 2022-DDC-6388 (SJ 2022) (attorney fabricated sheriff's invoice to misrepresent to client that he had served petition in timely manner); Matter of Gillis, 2012-DDC-5058 (BBO 2012) (failure to inform client of attorney's failure to prosecute); *O'Reilly, supra* note 58, 2010-DDC-4656 (SJ 2010) (neglect concealed by misrepresentations); Matter of Waisbren, 2008-DDC-4289 (SJ 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, 2010-DDC-4701 (BBO 2010).

[75] Hundreds of disciplinary matters have been reported since 1999 where Rule 1.4 is a source of the lawyer's misconduct. Most also involve a violation of Rule 1.3. *See, e.g.*, Matter of Melvin, 2021-DDC-6333 (BBO 2021) (appointed attorney in guardianship matter failed to appear for hearing and failed to notify client of hearing); AD 10-17, 2010-ADM-4715 (BBO 2010) (attorney violated Rule 1.4 by failing to tell client she did not plan to pursue ex-husband's signature on Qualified Domestic Relations Order (QDRO) that divorce judgment required); AD 09-11, 2009-ADM-4520 (BBO 2009) (attorney's failure to explain to client difficulties of proof she faced, to disclose his lack of knowledge concerning qualifications of investigator he had hired, and to disclose he had not corroborated certain claims by investigator); AD 09-07, 2009-ADM-4516 (BBO 2009) (failure to disclose to client pending discovery and related motions for sanctions that later resulted in dismissal of client's claims, where attorney had hoped to avoid those issues by motion for summary judgment); AD 03-42, 2003-ADM-3374 (BBO 2003) (general duty to meet with incarcerated client to discuss client's case, even when attorney believes there was little to discuss).

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.

* * *

Unless withdrawal can be successfully accomplished, clients must be informed if their lawyer suffers from a mental condition that impairs the lawyer's ability to adequately represent them.[76]

While most serious violations of Rule 1.4 also qualify as neglect of a client matter in violation of Rule 1.3,[77] 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.[78] By contrast, it is hard to imagine, and at least exceedingly rare, for a lawyer to seriously neglect a matter while also maintaining adequate communication with a client.

B. Discipline for Violating Rule 1.4

Discipline based primarily upon a violation of Rule 1.4 without other accompanying misconduct is rare. The reported sanctions in cases that focus on a failure to communicate or to keep a client adequately informed are almost all admonitions. More serious discipline arises when something else goes wrong in the representation and the lawyer fails to communicate with the client because of those problems.

In *Matter of Kennedy*,[79] the respondent received a public reprimand for 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 re-

76 Matter of Gallagher, 2013-DDC-5108 (SJ 2013).

77 *See, e.g.*, AD 24-12, 2024-ADM-6687 (BBO 2024) (admonition for attorney who represented executor of estate and agreed to hold funds in escrow for decedent's grandchildren until they turned eighteen years old but failed to communicate with executor for eight years to determine when to release funds and subsequently failed to promptly release funds when executor instructed).

78 *See, e.g.*, AD 10-17, 2010-ADM-4715 (BBO 2010) (attorney who represented client in family law matter did not advise client she considered QDRO preparation outside scope of engagement).

79 2010-DDC-4693 (BBO 2010).

lationship 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*,[80] the respondent had decided not to handle the client's potential medical malpractice case:

> [T]he respondent never notified the client of his decision, did not return the client's medical records and did not advise the client of his right to consult with other attorneys, of the statute of limitations, or of the consequences of failing to file suit by the end of the limitations period. The respondent did not take any steps to toll the statute of limitations for the client or otherwise protect his rights while he sought to consult with other attorneys.[81]
>
> The lawyer received a public reprimand.

As noted above, fact patterns that primarily involve Rule 1.4 violations often result in admonitions. Examples of the kinds of mistakes that have led to such an admonition include the following:

- In AD 22-12,[82] a lawyer failed to inform an incarcerated criminal defendant of court-ordered changes to the status of his case due to the COVID pandemic.
- In AD 12-10,[83] a lawyer repeatedly failed to respond to inquiries from a client and did not respond promptly to OBC inquiries.
- In AD 10-17,[84] 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 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,[85] 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.

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80 2010-DDC-4701 (BBO 2010).
81 *Id.*
82 2022-ADM-6367 (BBO 2022).
83 2012-ADM-5073 (BBO 2012).
84 2010-ADM-4715 (BBO 2010).
85 2009-ADM-4516 (BBO 2009).

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,[86] 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.[87] 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.[88] Although the CPCS policy applies only to appointed counsel, privately retained counsel are well advised to follow the policy as well.

V. Additional Considerations

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 consti-

86 2003-ADM-3374 (BBO 2003).
87 AD 06-45, 2006-ADM-3912 (BBO 2006).
88 *See, e.g.*, AD 99-74, 1999-ADM-2655 (BBO 1999).
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").

tutes the standard of care for a practicing lawyer.[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, however, 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]

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]

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 reveal

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90 *See* Mass. R. Prof. C., Scope; *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[?]").

92 *See* Matter of Crossen, 450 Mass. 533, 570, 2008-DDC-6871 at 47 (SJC 2008).

93 *Crossen*, 450 Mass. at 570, 2008-DDC-6871 at 47 (SJC 2008); Matter of Tobin, 417 Mass. 81, 86, 1994-DDC-1575 at 6 (SJC 1994) (dictum).

94 Board of Bar Overseers Policies and Practices No. 12 (2025), https://bbopublic.blob.core.windows.net/web/f/bbopolicy.pdf:

> In any disciplinary hearing in which the hearing committee determines that the attorney's compliance with the degree of learning and skill required to be possessed by attorneys practicing in a particular area or areas of the law is relevant to the decision of the committee, expert testimony concerning the standard of care applicable to the attorney's conduct may, in the discretion of the committee, be admitted into evidence, subject to the caveat that an expert's opinion to the effect either (1) that there has or has not been a violation of law or (2) that there has or has not been an ethical violation, is not admissible and must be rejected.

95 *See Crossen, supra* note 93, 450 Mass. at 570, 2008-DDC-6871 at 47 (SJC 2008); Matter of Buckley, 1980-DDC-259 at 2 (SJ 1980).

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.

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 Massachusetts 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. 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 in section II(C) of this chapter.

II. The Duty of Confidentiality

> ***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). "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (i) protected by the attorney-client privilege, (ii) likely to be embarrassing or detrimental to the client if disclosed, or (iii) information that the lawyer has agreed to keep confidential. "Confidential information" does not ordinarily include (A) a lawyer's legal knowledge or legal research or (B) information that is generally known in the local**

1 Mass. R. Prof. C. 1.6(a).
2 Mass. R. Prof. C. 1.6(a), (b), discussed in section IV.

community or in the trade, field, or profession to which the information relates.

(b) A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary, and to the extent required by Rules 3.3, 4.1(b), 8.1 or 8.3 must reveal, such information:

- **(1) to prevent reasonably certain death or substantial bodily harm, 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 . . . . 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 American Bar Association (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.[3])

According to Massachusetts Rule 1.6(a), "'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (i) protected by the attorney-client privilege, (ii) likely to be embarrassing or detrimental to the client if disclosed, or (iii) information that the lawyer has agreed to keep confidential,"[4] but "does not ordinarily include (A) a lawyer's legal knowledge or legal research or (B) information that is generally known in the local community or in the trade, field, or profession to which the information relates."[5] 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. However, in *Matter of*

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[3] 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 if mention of the client's identity creates no possible risk of harm. Such a strict interpretation goes beyond the proper interpretation of the rule.

Restatement (Third) of the Law Governing Lawyers § 60 cmt. [c(i)] (Am. Law Inst. 2000).

[4] Mass. R. Prof. C. 1.6(a).

[5] *Id.*

Kelley,[6] the Supreme Judicial Court (SJC) of Massachusetts clarified that, in a disciplinary context, the burden of proving a violation of Rule 1.6(a), including the burden of proving that the information disclosed was not "generally known," rests with the bar counsel.

A lawyer must not only avoid revealing protected information related to the representation but must also take precautions to avoid inadvertently disclosing information.[7] 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 make reasonable efforts to ensure that the communication devices are safe and secure.[8] 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).[9] While attorneys may ethically transmit information relating to the representation of a client by e-mail, they must consider the security risks associated with e-mail and take reasonable steps to prevent those risks from leading to inadvertent disclosures while the information is being transmitted or stored, which may include employing security measures such as encryption and secure file-sharing.[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 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, although 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 communica-

6 489 Mass. 300, 305 (2022).

7 Matter of Merrill, 2018-DDC-5925 (SJ 2018) (attorney violated Rule 1.6(a) by leaving the client's file containing sensitive and confidential information on client's mother's doorstep where anyone could access it).

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

9 Mass. R. Prof. C. 1.6 cmts. 18, 19.

10 ABA Op. 17-477-R, *supra* note 9; ABA Op. 21-498; *see also* Pennsylvania Bar Association Formal Opinion 2022-400.

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

tions, in court and elsewhere, if those communications fit the narrow definition developed by Massachusetts common law. The SJC describes the elements of 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—such as from a third person—is not privileged, although it may be covered by Rule 1.6.

It is beyond the scope of this book to define the exact reach and proper application of the attorney-client privilege.[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 information to the police in order to prevent his client from committing a criminal act (arson). That disclosure was permissible according to the "future crimes" exception to the duty of confidentiality found in Disciplinary Rule 4-101(C)(3),[17] in place at the time.[18] 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-

12 Matter of a 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).
17 Disciplinary Rules [hereinafter DR], Rule 4-101(D)(3).
18 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.

fraud exception applies. That exception applies only if the client or prospective client seeks advice or assistance in furtherance of criminal conduct."[19] 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.[20]

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 violating Rule 1.6 or its predecessor, DR 4-101, combined with other misconduct. In *Matter of Pool*,[21] a young lawyer disclosed confidential information of a criminal defendant client—the 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*,[22] 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.

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19 *Purcell*, 424 Mass. at 115.

20 In *Purcell*, the court implied that the client's threats qualified as client confidences because they were "communications . . . in furtherance of the rendition of legal services"; Matter of a Grand Jury Investigation, 453 Mass. at 458. In the latter case, involving a client's threats against a judge that the lawyer disclosed, the court made that finding explicit.

21 1984-DDC-456 (SJ 1984). For a discussion of the facts leading to disbarment and the respondent's subsequent reinstatement, *see* Matter of Pool, 401 Mass. 460, 1988-REI-734 (SJC 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. 1984-DDC-456 at 4 (SJ 1984). 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.

22 450 Mass. 165, 2007-DDC-3925 (SJC 2007).

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 Accounts (IOLTA) account, 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).[23] That unwarranted disclosure of confidential client information contributed to the disbarment, but apparently played a relatively minor role.

In *Matter of Ablitt*,[24] an attorney was found to have engaged in a "swath of misconduct" that warranted disbarment. In addition to intentionally misusing client funds, the lawyer engaged in various misconduct related to agreements that he entered into with a "factoring" company to obtain financing for his law firm. In doing so, and among other things, the lawyer revealed confidential client information to the company without his clients' consent and to their disadvantage in violation of Rules 1.6(a), 1.7(b), and 1.8(b).

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.[25]

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.

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23 Matter of O'Malley, 2010-DDC-4624 (SJ 2010).
24 486 Mass. 1011, 1015 (2021).
25 Matter of Delaney, 2005-DDC-3627 (SJ 2005).

In *Matter of Lagana*,[26] a lawyer was suspended for three months for multiple instances of misconduct, including a violation of Rule 1.6 under circumstances that may interest many lawyers who find themselves in a similar situation. In his immigration practice, the respondent represented a client who proved to be nonresponsive. The respondent filed a motion to withdraw his appearance, disclosing in the motion more client information than was necessary to support the motion.[27] That breach of client confidentiality, along with considerable additional misconduct,[28] led to the suspension. Similarly, in *Matter of Hilson*,[29] 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 BBO that "the standard is more than 'appropriate'; disclosures must be 'necessary' in order to satisfy the permissive disclosure exception for self-defense."[30]

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*,[31] 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 one day.

26 2010-DDC-4644 (SJ 2010).

27 *Id.*

28 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.

29 448 Mass. 603, 2007-DDC-3928 (SJC 2007).

30 448 Mass. at 610, n.5 (citing Canon 4, DR 4-101(C)(4)).

31 2004-DDC-3483 (SJ 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.[32]

3. Public Reprimand

Lawyers have received a public reprimand for revealing clients' confidential information. In *Matter of Bulger*,[33] 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 . . . wholly unaware of the impropriety of his misconduct."[34] The BBO dismissed the respondent's argument that he was unsure who his client was during this time as "willful blindness."[35]

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32 *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.

33 2013-DDC-5230 (BBO 2013).

34 *Id.* at 4.

35 *Id. See also* Matter of DuPont, 2013-DDC-5221 (BBO 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).

Another lawyer received a public reprimand for disclosing confidential information on his social media account. In *Matter of Smith*,[36] the lawyer posted several updates on Facebook regarding a care and protection case he was handling on behalf of a client. The updates included information that was confidential—both detrimental and embarrassing to the client. Even though the lawyer did not disclose the client's identity, the BBO found that the posts disclosed sufficient information to make it reasonably likely that a member of the public could connect them to the client, even if there was no evidence that a third party actually recognized the client from the posts.

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), which governs safekeeping of former client confidences.

4. Admonition

The typical sanction for violating Rule 1.6 without any other misconduct or aggravating circumstances is an admonition.[37] For example, in AD 20-15,[38] the lawyer represented a client charged with a violent crime who made several statements to him suggesting that he would harm someone involved in the case. Because the lawyer reasonably believed that there was a sufficiently serious and immediate threat of harm to that individual, he disclosed this information to the police, as was permitted under Rule 1.6(b)(1). However, shortly after the client was arrested and charged with making these threats, the lawyer spoke to a newspaper reporter about the matter and revealed, without his client's consent, confidential information about the client's health, mental state, and intentions. Because these disclosures did not fall within Rule 1.6(b)(1) or any other exception to confidentiality set forth in Rule 1.6(b), the lawyer received an admonition for violating Rule 1.6(a).

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 20-11,[39] the lawyer represented a client in a criminal proceeding in which the client was charged with arson of a dwelling house. The lawyer decided to withdraw from the representation due to a breakdown in the attorney-client relationship following several communications from the client. In his motion

36 2019-DDC-6126 (BBO 2019).
37 *Bulger, supra* note 33, 2013-DDC-5230 at 3 (BBO 2013).
38 2020-ADM-6160 (BBO 2020).
39 2020-ADM-6156 (BBO 2020).

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to withdraw, the lawyer characterized the client's communications as "intense," "violent in nature," and "escalat[ing]." While these disclosures did not cause any ultimate harm to the client in the proceeding, the lawyer had not obtained the client's consent to make them, nor were they impliedly authorized or permitted in the circumstances. In an earlier decision, AD 11-21,[40] 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.

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,[41] 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.[42] And, in AD 07-35,[43] 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 in establishing the claim for legal fees. The BBO concluded that such disclosure violated Rule 1.6(a).

In another admonition matter, AD 06-24,[44] the lawyer was disciplined after disclosing information from a prospective client to the lawyer's estranged husband. The facts learned from the prospective client were relevant to an upcoming divorce or separation dispute between the lawyer and 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.[45]

A disciplinary matter arising under the predecessor to Rule 1.6 involved lawyers using information from one client's case to substantially advance another client's interests. In *Matter of the Discipline of Two Attorneys*,[46] the lawyers rep-

[40] 2011-ADM-4910 (BBO 2011).
[41] 2009-ADM-4527 (BBO 2009).
[42] *See* Robert M. Daniszewski, *Coping with Negative Online Reviews* (October 2020), https://www.massbbo.org/Files?fileName=online-reviews.pdf.
[43] 2007-ADM-4122 (BBO 2007).
[44] 2006-ADM-3891 (BBO 2006).
[45] 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.
[46] 421 Mass. 619 (1996).

resenting 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 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."[47]

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.

III. The Duty of Confidentiality to Former Clients

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.

[47] 421 Mass. at 622–23 (1996).

A. Discipline for Revealing or Using Former Client Confidences Under Rule 1.9(c)

Lawyers on occasion have been disciplined for using or disclosing client information after a 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 client confidences in violation of Rule 1.9(c), although several lawyers have received admonitions or public reprimands.

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.[48]

1. Public Reprimand

Lawyers have been publicly reprimanded on occasion for disclosing former clients' information. In *Matter of Hochberg*,[49] 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. However, 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*,[50] 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 with-

[48] The ABA *Model Rules* include 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."
[49] 2001-DDC-2975 (BBO 2001).
[50] 2010-DDC-4669 (BBO 2010).

drew 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*,[51] 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 lawyer's less-than-competent legal services in the underlying matter, led to 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 in these cases appears to be based on the harm, or risk of harm, caused to the former client. In AD 09-08,[52] the lawyer's misconduct was based solely on Rule 1.9(c). The respondent had learned valuable information while working as an in-house lawyer for a company. After she left the company and established a competing business, she used the information about the former client to its disadvantage. Similarly, in AD 09-13,[53] 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, thereby revealing confidential information. And in AD 08-09,[54] 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.[55]

IV. Exceptions to the Duty of Confidentiality

A lawyer who reveals a client's confidential information is subject to discipline unless the lawyer is authorized by the client or one of the exceptions identified in

51 2010-DDC-4727 (BBO 2010).
52 2009-ADM-4517 (BBO 2009).
53 2009-ADM-4522 (BBO 2009).
54 2008-ADM-4331 (BBO 2008).
55 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).

Rule 1.6 or 1.9 to make the disclosure. 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 other circumstances, a lawyer is required to reveal some information that otherwise qualifies as confidential under Rule 1.6.

A lawyer has permission 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."[56]

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, 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* differ from the above provisions in some minor ways. The *Model Rules* narrow the discretion a lawyer has under Rule 1.6(b)(2) to disclose a client's fraudulent acts that may result in substantial financial injury to situations in which the fraud is related to the lawyer's services.[57] 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

[56] Mass. R. Prof. C. 1.0(g).

[57] *Cf.* ABA Model Rules of Prof'l Conduct r. 1.6(b)(1), (2).

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 client information necessary 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 responding to the complaint and during the resulting adjudicatory proceedings.

   The general rule in Massachusetts (and elsewhere) is that an attorney may disclose otherwise-privileged communications in order to respond to a client's allegations of misconduct. The client's complaint effects a waiver of the client's privilege.[58] If a person other than the attorney's client makes

[58] *See, e.g.*, SEC v. Forma, 117 F.R.D. 516, 524 (S.D.N.Y. 1987) ("The self-defense doctrine permits

the complaint, the common law doctrine across the country also permits the lawyer to reveal otherwise-privileged information in order to establish a defense.[59] The same exception appears explicitly in the Massachusetts version of Rule 1.6(b)(5). But the lawyer 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.[60]

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."

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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).

[59] *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).

[60] *See, e.g.*, AD 04-47, 2004-ADM-3556 (BBO 2004); Matter of Markley, 2004-DDC-3498 (BBO 2004); AD 07-06, 2007-ADM-4095 (BBO 2007); AD 07-35, 2007-ADM-4122 (BBO 2007); Matter of Acharya, 2010-DDC-4727 (BBO 2010).

The next three exceptions are mandatory; they may *require* that lawyers reveal some client information and face discipline if they fail to do so.

6. *To prevent or rectify fraud on a tribunal:* Under Rules 3.3(a), 3.3(b), and 3.3(c), 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.[61] Chapter 12, 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 of this chapter, 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).[62] Much common law from other states,[63] as well as the *Restatement of the Law Governing Lawyers*,[64] 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. While no Massachusetts disciplinary cases have directly applied Rule 3.4 to a criminal defense lawyer's concealment of evidence, the SJC has indicated its acceptance of the foregoing line of authority.[65]

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61 *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).
62 Mass. R. Prof. C. 3.4(a).
63 *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).
64 Restatement (Third) of the Law Governing Lawyers § 119 (Am. Law Inst. 2000).
65 *See* Matter of a Grand Jury Investigation, 470 Mass. 399, 400, 403–7 (2015).

CHAPTER NINE

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

I. Introduction

While 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 advising a client on 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. Occasionally, misconduct may result from a lawyer misreading or misunderstanding the applicable laws that govern the proper sharing of decision-making authority with the client.

This chapter reviews the relevant law and discusses *Massachusetts Rules of Professional Conduct* 1.2, 1.4, 1.13, and 1.14, which explain the lawyer's and client's responsibilities. It identifies the basic purpose of each rule and describes the kinds of sanctions lawyers have faced for misconduct involving these rules.

II. Decision-Making for a Client

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) A lawyer shall seek the lawful objectives of his or her client through reasonably available means permitted by law and these Rules. A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in

the legal process. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

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

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Rule 1.4: Communication

(a) A lawyer shall:

- **(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(g), is required by these Rules;**
- **(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;**
- **(3) keep the client reasonably informed about the status of the matter;**
- **(4) promptly comply with reasonable requests for information; and**
- **(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.**

> **(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.**

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 during the 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 . . . ." (emphasis added).[4] The rule specifies certain decisions that the client must make: (a) whether to accept a settlement offer in a matter and (b) in criminal proceedings, whether to enter a plea; whether to waive a jury trial; and whether the client will testify.[5] By listing those discrete decisions as ones the lawyer may not make unilaterally, but 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.[6] Although not listed, some

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

2 Restatement (Third) of the Law Governing Lawyers [hereinafter Restatement] §§ 20–22 (Am. L. Inst. 2000) .

3 Mass. R. Prof. C. 1.2(d); 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).

5 *Id.*

6 *See* Commonwealth v. Miranda, 484 Mass. 799, 819 (2020) (noting trial strategy, the viability and ethics of a legal argument, and analysis of the law as applied to the facts is the responsibility of counsel, not the criminal defendant).

decisions (such as whether to appeal an adverse judgment) remain with the client.[7] 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."[8] Supporting that notion, Rule 1.4 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.[9]

In short, the lesson of Rules 1.2 and 1.4 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,[10] the Board of Bar Overseers (BBO) only occasionally has disciplined a lawyer where the sole misconduct was failing to confer with a client.[11] By contrast, when other misconduct occurs with it, a lawyer's failure to keep a client informed has frequently led to formal discipline, particularly when the lawyer failed to communicate about significant developments in the case, such as dismissal for noncompliance with discovery.[12]

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:

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7 Restatement § 22(1).

8 Mass. R. Prof. C. 1.2 cmt. 2.

9 *See* Mass. R. Prof. C. 1.4(a), (b); *see also* Restatement § 20.

10 *See* Williams v. Ely, 423 Mass. 467 (1996) (law firm was negligent for failing to advise clients of unsettled state of law and adverse consequences); Moores v. Greenberg, 834 F.2d 1105, 1107–8 (1st Cir. 1987) (finding of legal malpractice when attorney failed to advise client of settlement opportunities); Fishman v. Brooks, 396 Mass. 643 (1986) (enunciating standard of care).

11 *But see* AD 22-12, 2022-ADM-6367 (BBO 2022) (lawyer admonished for repeatedly failing to keep his incarcerated client reasonably informed about status of his case, including scheduling of court proceedings and his assessment of client's eligibility for release under SJC's recently enacted COVID-19 order). Furthermore, lawyers have been disciplined for instances of misconduct that, taken together, were rooted in an overall failure to communicate with a client. *See, e.g.*, AD 21-02, 2021-ADM-6251 (BBO 2021) (lawyer failed to adequately communicate to client about status of their appeal, compounded by failure to communicate in writing basis of fee for representation at its outset).

12 *See* Matter of Chomko, 2017-DDC-5839 (BBO 2017); Matter of Galica, 2010-DDC-4546 (SJ 2010); Matter of Gately, 2007-DDC-4052 (SJ 2007); Matter of Lipton, 2004-DDC-3476 (SJ 2004). *See* Matter of Kelley, 489 Mass. 300, 307–8, 2022-DDC-6404 at 14–15 (SJC 2022) ("In cases involving failure to communicate, attorneys have been privately reprimanded, rather than receiving a harsher sanction, even in the face of aggravating circumstances. . . . Here, however, the aggravating factors warrant more than a private admonition [including the respondent having] substantial experience in the practice of law . . . having been disciplined before, [and committing] multiple rules violations involving multiple clients, . . . who were vulnerable individuals seeking disability benefits" (citations omitted)).

> 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. However, lawyers are not forbidden 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 or a fraudulent act and explaining the implications of doing so (which may include the likelihood of detection and the punishment should detection occur) is a slippery one. But the line exists—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.[13]

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.[14] Of course, a lawyer may (and most often should) properly engage the client in moral conversation about the wisdom of such activity.[15]

Also, 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." Properly invoked, Rule 1.2(c), permits a lawyer not to perform certain tasks that would be part of the typical representation, usually to save the client money (or, in public interest settings, to allocate a lawyer's limited

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13 *See e.g.*, Matter of Hayes, 493 Mass. 1010, 2023-DDC-6583 (SJC 2023) (lawyer disbarred for devising and engaging in a complex scheme to defraud Probate and Family Court and U.S. Bankruptcy Court to prevent mother of his client's children from obtaining increase in child support after client won lottery); Matter of Hurley, 2017-DDC-5771 (SJ 2017) (lawyer suspended for one year and one day for assisting clients in fraudulent scheme to gain control of elderly, competent grandmother's estate through conservatorship); Matter of Connell, 2015-DDC-5452 (SJ 2015) (public reprimand for lawyer who assisted client in preparation and execution of usurious loans without providing statutory notice to attorney general, conduct which constituted a crime under Massachusetts law).

14 *See* Mass. R. Prof. C. 1.2 cmt. 9.

15 *See* Mass. R. Prof. C. 2.1.

time and resources in the most efficient manner).[16] The limitation is subject to the lawyer's duties of competence as expressed in Rule 1.1 and to a vigorous informed consent process. The most common example of this kind of limited representation is "unbundled" legal services, discussed in chapter 7 on competence.[17]

B. Discipline for Violating Rule 1.2

1. Disbarment

Among Rule 1.2 cases, *Matter of Hayes*[18] stands out because the lawyer was disbarred for violating 1.2(a) when he failed to "seek the lawful objectives of his or her client through reasonably available means" and 1.2(d) when he counseled and assisted his client in committing fraud. The lawyer concocted a scheme to hide $1 million of lottery winnings so that his client could avoid child-support obligations. He convinced his client to claim falsely that half the winnings belonged to the client's brother and to create a trust whereby he could deposit a portion of the money into the lawyer's Interest on Lawyers' Trust Accounts (IOLTA) account. To further the scheme, the lawyer also filed a frivolous bankruptcy petition on behalf of the client. These actions violated the probate court order and ran afoul of several rules of professional conduct. For example, the lawyer made misrepresentations to the court; his fee agreement was deemed "predatory," leading to excessive fees; and his trust account record-keeping was not compliant. A single justice entered an order for his disbarment, which the Supreme Judicial Court (SJC) affirmed on appeal.

The majority of the cases where the SJC has disbarred lawyers for misconduct related to Rule 1.2 involved making significant legal decisions without client authority and then misrepresenting the status of matters to clients or others. The cases often contain multiple instances of misconduct, not just a violation of Rule 1.2. For example, in *Matter of Cobb*,[19] a lawyer was disbarred for serious misconduct while representing three separate clients, one occurrence involving the acceptance of 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*,[20] a lawyer was disbarred

16 The Supreme Judicial Court (SJC) allows attorneys to provide limited assistance representation in the trial courts under specific conditions. *See* Massachusetts Trial Court Rules, Rule XVI, https://www.mass.gov/trial-court-rules/trial-court-rule-xvi-uniform-rule-on-limited-assistance-representation.

17 "Unbundled" legal services refers to an arrangement by which a lawyer agrees to perform certain discrete tasks on a matter but not to represent the client fully.

18 493 Mass. 1010, 2023-DDC-6583 (SJC 2023).

19 445 Mass. 452, 2005-DDC-3567 (SJC 2005).

20 449 Mass. 154, 2007-DDC-3919 (SJC 2007).

for multiple instances of misconduct, including settling a lawsuit without client permission and then mishandling the resulting proceeds.[21]

Matter of Marani[22] 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 BBO 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 BBO recommended, and the SJC entered, a judgment of disbarment.[23]

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)).[24] Other lawyers have been disbarred for misconduct involving Rule 1.2 when they egregiously neglected client matters and caused the clients significant harm.[25] 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*.[26] There, the respondent settled

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21 *See also* Matter of Siciliano, 2007-DDC-4143 (SJ 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).

22 1998-DDC-2411 (SJ 1998).

23 *See also* Matter of Corbin, 1995-DDC-1780 (SJ 1995) (lawyers settled client matters without consent, forged client signatures, and misappropriated client funds on several occasions; affidavit of resignation accepted, and order of disbarment entered).

24 *See, e.g.*, Matter of LiBassi, 449 Mass. 1014, 2007-DDC-3923 (SJC 2007); Matter of Dahl, 1998-DDC-2456 (SJ 1998); Matter of Okai, 1997-DDC-1865 (SJ 1997).

25 *See, e.g.*, Matter of O'Desky, 2008-DDC-4260 (SJ 2008); Matter of Cohen, 2011-DDC-4766 (SJ 2011); Matter of Espinosa, 2012-DDC-5022 (SJ 2012).

26 2006-DDC-3845 (SJ 2006).

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. In affirming a one-year suspension for the respondent, the single justice adopted the hearing report, which 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 he 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.[27]

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.

Other lawyers have been suspended for settling matters without client authority. In *Matter of Buck*,[28] a lawyer was suspended for one year for conduct similar to that in *Traficonte*. In *Buck*, the lawyer settled a personal injury case without client authority and without sufficient medical evidence to warrant a settlement. Then, he 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.[29]

In *Matter of Chancellor*,[30] the lawyer was suspended indefinitely after settling a client's matter without client permission in order to receive a contingent fee.

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27 While *Traficonte* clearly violated DR 5-106(A) by settling a matter without client consent, it is important to note that in the context of class actions, the authority of the named plaintiffs to control the litigation is considerably less than in ordinary civil or criminal litigation. The lawyer's duty is to the class, not to the named plaintiff individually. For examples of disputes about this principle, *see* Bartle v. Berry, 80 Mass. App. Ct. 372 (2011); Ehrlich v. Stern, 74 Mass. App. Ct. 531 (2009) (both concerning class action disputes involving claims against distributor of Poland Spring bottled water).

28 2006-DDC-3782 (SJ 2006).

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

30 2012-DDC-4992 (SJ 2012); *see also* Matter of Thalheimer, 2008-DDC-4347 (SJ 2008) (indefinite suspension); Matter of Barrese, 2005-DDC-3615 (SJ 2005) (indefinite suspension).

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 the client's IOLTA account and lied to the Office of the Bar Counsel during the investigation, factors that contributed to him receiving more serious discipline.

In *Matter of King*,[31] the respondent stipulated to a two-month suspension 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 respondent of the discharge and requested the client's file. Instead of sending the client's file to the new counsel, the respondent filed suit on behalf of the client without informing the client or obtaining consent. In the second matter, the respondent was discharged after the client retained new counsel, but the respondent failed to withdraw. He then settled the client's claim without the client's knowledge and consent and took his fee from the settlement.

A lawyer can be suspended for violations of Rule 1.2 that do not involve failing to obtain client authorization of a settlement. In *Matter of Talasazan*,[32] while litigating a matter, the respondent filed multiple motions that failed to advance his client's interests. All the motions were denied. He withdrew from the case and then filed a frivolous motion for attorney's fees and costs. The respondent proceeded to file a frivolous petition for relief on behalf of the client, whom the respondent was no longer representing, and later filed two more frivolous motions. All the documents were filed without the former client's consent. In doing so, the respondent violated Rule 1.2(a), Rule 1.4(a)(1)–(5), and other rules. The respondent received a two-year suspension, which was entered by default when the respondent failed to appear for his disciplinary hearing.

In *Matter of Ruggiero*,[33] a lawyer was suspended for one year and one day for several acts of misconduct while working with nonlawyers to help Massachusetts and Rhode Island homeowners apply for mortgage relief loans. He failed to seek the lawful objectives of his client when he went against a client's repeated instruction to not pursue a loan modification that would not likely be approved; he instead submitted the loan application knowing it would likely be rejected, violating Mass. R. Prof. C. 1.2(a). The lawyer also failed to keep clients reasonably informed, to consult with clients about accomplishing their objectives, and to reasonably explain matters so clients could make informed choices about their representation, violating the Rhode Island equivalent of Mass. R.

31 2007-DDC-4048 (SJ 2007).
32 2023-DDC-6544 (SJ 2023).
33 2023-DDC-6515 (SJ 2023).

Prof. C. 1.4. In addition, the lawyer also was found to have violated Rule 5.3(c) by failing to supervise nonlawyer agents, Rule 5.4 for fee-sharing with nonlawyers, and a few other rules.

In *Matter of Bozzotto*,[34] 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 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 Blumenthal*,[35] an attorney stipulated to a public reprimand for settling a landlord-tenant matter without the client's permission. The client had hired the attorney to defend him in two summary process actions where the landlord was seeking back rent and possession. The client's defenses were weak. When the client failed to appear for the trial without any justification and was at risk of being defaulted, the attorney agreed to the settlement on his own because he was convinced that it was the best outcome for his client. After learning of the settlement, the client filed a pro se motion seeking relief from the judgment; however, the motion was dismissed when the client failed to appear for a hearing in the matter. The attorney's failure to obtain his client's authorization to settle the summary process actions violated Mass. R. Prof. C. 1.2(a) and Mass. R. Prof. C. 1.4(a) and (b).

You Should Know

Lawyers who act without proper client authority but without selfish or improper intentions may receive a public reprimand rather than a suspension, if the clients do not suffer substantial harm.

In *Matter of Blake*,[36] an attorney violated Rule 1.2 by continuing to prosecute an action over the client's objection. The client was administratrix of her sister's

[34] 2011-DDC-4773 (SJ 2011).
[35] 2024-DDC-6638 (BBO 2024).
[36] 2010-DDC-4700 (BBO 2010).

and brother's estates; the attorney and client disagreed whether three bank accounts left in the siblings' names were joint accounts. The client opposed filing an action in 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*,[37] 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 attorney's 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 Multistate Professional Responsibility Examination within a year; if not, the sanction would instead be a one-month suspension.

In *Matter of Mason*[38] 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).[39] 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.[40]

4. Admonition

Lawyers who act without client consent with little or no harm to the client frequently receive admonitions. For example, in AD 22-17,[41] a lawyer, who represented an elderly client whose competence was in question, implemented a plan with the client's power of attorney (the client's son) to transfer the client's

37 2006-DDC-3863 (BBO 2006).

38 2001-DDC-2960 (BBO 2001).

39 Under the previous *Disciplinary Rules*, 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.

40 *See also* Matter of Bixby, 2001-DDC-2968 (BBO 2001) (dismissal of case without client's authorization resulted in public reprimand).

41 2022-ADM-6372 (BBO 2022).

assets to a revocable trust pending the outcome of a competence evaluation. The plan was designed to protect the client from pressures that he was receiving from another family member to make changes to his estate plan; however, the lawyer failed to communicate with his client to determine his competency before the client's assets were transferred to the trust, thus violating Rules 1.2(a) and 1.4.

In AD 99-22,[42] an attorney added unauthorized language to a mortgage, violating Rule 1.2(a). 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 BBO 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,[43] 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 BBO also imposed an admonition. In AD 06-37,[44] 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 BBO 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.

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42 1999-ADM-2599 (BBO 1999).

43 1992-ADM-1150 (BBO 1992). Private reprimands were the predecessor to what is now known as an admonition. Both are private disciplinary sanctions.

44 2006-ADM-3904 (BBO 2006).

C. Discipline for Violating Rule 1.4

1. Disbarment

The SJC has disbarred lawyers for misconduct involving Rule 1.4, but typically in connection with other, related, serious rule violations. Because lawyers who misappropriate client funds or engage in conflicts of interest usually do not keep their clients sufficiently apprised of developments in the matters, virtually every such disciplinary opinion includes a reference to Rule 1.4.[45] 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.[46] 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. In *Matter of Espinosa*,[47] 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 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.

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[45] *See, e.g.*, Matter of Cowan, 2023-DDC-6573 (SJ 2023) (lawyer disbarred for, inter alia, misappropriating over half a million dollars in client funds and then ceasing to communicate with harmed clients); Matter of Arnowitz, 2011-DDC-4789 (SJ 2011) (failure to inform client of settlement, approval of release without client consent, and signing stipulation of dismissal without notifying client); Matter of Campanella, 2006-DDC-3833 (SJ 2006) (settled matter without client consent, misappropriated proceeds); Matter of Pinson, 2009-DDC-4367 (SJ 2009) (settlement of several personal injury matters without informed consent); Matter of Reynolds, 2012-DDC-4946 (SJ 2012) (misappropriating client funds); Matter of Steele, 2008-DDC-4248 (SJ 2008) (mismanagement of liens on personal injury award).

[46] *See, e.g.*, *Cowan*, 2023-DDC-6573 (SJ 2023) (neglected client matters, misused unearned retainers and afterward provided clients with false documents to conceal misappropriation, and ultimately stopped communicating with clients); *Cohen, supra* note 25, 2011-DDC-4766 (SJ 2011) (neglect of divorce and trademark matters); Matter of Daniels, 2011-DDC-4792 (SJ 2011) (misrepresentation to clients about neglected matters); *O'Desky, supra* note 25, 2008-DDC-4260 (SJ 2008) (neglect of divorce client matters; misappropriating funds).

[47] 2012-DDC-5022 (SJ 2012). The respondent had previously resigned and been disbarred, 1991-DDC-1024 (SJ 1991), and reinstated, 1997-REI-2217 (SJ 1997). This was therefore his second disbarment.

In *Matter of Mangano*,[48] 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 he be disbarred.[49]

2. Suspension

The disciplinary reports detail numerous suspension decisions involving Rule 1.4 violations, usually along with other rules. As discussed in the previous section regarding disbarment, most of those sanctions 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 plays a more significant role.

For instance, in *Matter of Grayer*,[50] the SJC affirmed a one-year-and-one-day suspension for a respondent who provided inadequate representation to a client charged with a criminal matter. The client was not a U.S. citizen and was concerned that the charge would affect his immigration status. The respondent told him to admit to certain facts and the case would be continued without a finding. In the plea colloquy that followed, the judge informed the client of the possible immigration consequences of the plea. When asked, the respondent assured the client that it was "okay," and explained that the judge was using terminology read to every defendant. The respondent did not fully explain to the client the potential immigration consequences of the plea, specifically that an admission to sufficient facts would be considered a conviction under federal law. Subsequently, Immigration and Customs Enforcement detained the client due to his admission. "The respondent's failure to determine, understand, and advise the client of the immigration consequences of an admission to sufficient facts [in a criminal matter], despite knowing the client's immigration status" violated Rules 1.1, 1.2(a), and 1.4(a).[51]

In *Matter of Donovan*,[52] 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

48 2012-DDC-4963 (SJ 2012).

49 *See also* Matter of Sachar, 2009-DDC-4431 (SJ 2009); Matter of Conley, 2009-DDC-4369 (SJ 2009); Matter of Osagiede, 2008-DDC-4244 (SJ 2008), *aff'd*, 453 Mass. 1001, 2009-DDC-4352 (SJC 2009).

50 483 Mass. 1013 (2019).

51 *Id.* at 1015.

52 2011-DDC-4761 (SJ 2011).

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*,[53] 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.

Practice Tip

Lawyers sometimes act without informing their client 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.

In a different *Matter of Grayer*,[54] 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 concerned his duty under Rule 1.4 to keep his clients apprised of how he was managing their cases.[55]

53 2010-DDC-4623 (SJ 2010).

54 2007-DDC-4044 (SJ 2007).

55 *See also* Matter of Traft, 2023-DDC-6509 (SJ 2023) (lawyer suspended for six months and one day for failing to file timely notice of appeal for client and failing to advise client that statutory interest continued to run during appeal; separately, over four consecutive years, the lawyer misrepresented on his bar renewal application that he carried malpractice insurance).

3. Public Reprimand

Many Massachusetts lawyers have received public reprimands involving violations of Rule 1.4, most of which included other wrongdoing. For instance, *Matter of Boyle*[56] concerned a lawyer's failure to advise a client to attend a hearing in a criminal matter. When the client did not attend, the lawyer erroneously informed the presiding judge that he had had no contact with the client about the date of the hearing. A default warrant against the client was therefore issued. The lawyer was publicly reprimanded for failing to communicate with his client and for making a negligent misrepresentation that was attributed to incomplete paperwork in his file and his faulty memory.

One public reprimand where Rule 1.4 played a more significant role was *Matter of Atwood*.[57] 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*[58] 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 whose service was frequently cut off because of billing problems) and failed to reply to several letters from a client who was in prison.[59]

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*,[60] 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*,[61] an attorney received a public reprimand for misconduct that included serious violations of Rule 1.4(a) and (b). The lawyer, rep-

56 2022-DDC-6439 (BBO 2022).
57 2010-DDC-4692 (BBO 2010).
58 2008-DDC-4345 (BBO 2008).
59 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, 2006-DDC-3862 (BBO 2006).
60 2010-DDC-4679 (BBO 2010).
61 2010-DDC-4733 (BBO 2010); *see also* Matter of Berkland, 2010-DDC-4698 (BBO 2010) (attorney received public reprimand for repeatedly failing to respond to interrogatories and failing to inform his client).

resenting a tenant in a summary process eviction, 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*,[62] an attorney received a public reprimand for violating Rule 1.4 and other 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 example, in AD 20-25,[63] the attorney violated Rules 1.4(a)(4) and 1.5(b) for failing to respond to his estate planning client's requests for information and failing to provide a written statement of the scope of the representation and fees. In AD 19-25,[64] an attorney violated Rules 1.4(a)(1), 1.4(a)(3), and 1.4(b) by failing to discuss a plea deal with his client and failing to inform his client that a colleague would be covering a court appearance. In AD 17-01,[65] an attorney violated Rules 1.1, 1.2(a), and 1.4(a) and (b) for failing to meet with an incarcerated client until the day before trial and failing to return the client's phone calls.

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. Organizational Clients and Decision-Making Authority

Rules 1.2 and 1.4 apply to all lawyers, whether they are representing individual clients or organizations. However, lawyers representing organizations have distinct duties as described in Rule 1.13.

62 2010-DDC-4677 (BBO 2010).
63 2020-ADM-6170 (BBO 2020).
64 2019-ADM-6034 (BBO 2019).
65 2017-ADM-5724 (BBO 2017).

Rule 1.13: Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

A. Decision-Making Principles Applied to Organizational Clients

1. Rule 1.13 Guidance on Representing Organizations

Rule 1.13 offers guidance on properly counseling 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.[66]

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.[67] In allocating decision-making authority in the organizational setting, the lawyer must rely on

66 *See, e.g.*, Matter of Wise, 433 Mass. 80, 2000-DDC-2685 (SJC 2000).

67 The same principle generally applies under the common law. *See* Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515 (1989).

the "duly authorized constituents" of the organization for guidance. 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 situations, it is unclear who lawfully speaks for the client, especially when an organization encounters internal disputes. Rule 1.13 does not resolve those questions for the lawyer, except to require that the lawyer follow the direction of the "duly authorized" constituents. So, the lawyer must rely on applicable corporate law and agency principles to discern whose directions to honor.[68]

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 duty 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.[69] 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. To date, no Massachusetts lawyer has been sanctioned for making the wrong decision in such a setting.[70]

Nothing in Rule 1.13 relieves a lawyer of the responsibility to honor Rule 1.2(d), which directs a lawyer 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 by 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

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68 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).

69 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. 205 (2003) (implementing the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745).

70 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).

> is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Under this standard, a Massachusetts lawyer must *do something* 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.[71]

2. The Constituent/Client Distinction

The most common ethical challenge for the lawyer representing an organization (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.[72] While the lawyer may look to the constituents to function 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 that

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71 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."

72 *See, e.g.*, *Robertson, supra* note 67, 404 Mass. at 521 ("[a]n attorney for a corporation does not simply by virtue of that capacity become the attorney for . . . its officers, directors or shareholders," quoting 1 R.E. Mallen & J.M. Smith, Legal Malpractice § 7.6 (3d ed. 1989)).

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.[73] 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.[74] 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*,[75] 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 for 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 the rule. In one case, *Matter of Wise*,[76] the attorney was suspended for six months for misconduct that arose 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 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* were

73 *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 514 (2025) (encouraging lawyers to advise and remind organization's constituents about lawyer's role early and often during the relationship because "the constituents through whom the lawyer conveys advice may misperceive the lawyer's role and mistakenly believe that they can rely personally on the lawyer's advice").

74 *See* Peter A. Joy & Kevin C. McMunigal, *Corporate "Miranda" Warnings*, 25 A.B.A. Crim. Just. 47 (Summer 2010); United States v. Ruehle, 583 F.3d 600, 604 n.3 (9th Cir. 2009).

75 91 Mass. App. Ct. 835 (2017).

76 433 Mass. 80, 2000-DDC-2685 (SJC 2000).

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.[77] By favoring and cooperating with the dissident faction within an internal organizational dispute 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.[78] *Wise* serves as an important warning to lawyers who represent organizations about the need to exercise care in determining who speaks for the client.

In *Matter of Bulger*,[79] 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 BBO rejected that claim as "willful blindness."

IV. Clients with Diminished Capacity and Decision-Making Authority

Rules 1.2 and 1.4 assume that a client is capable of shared decision-making about the client's matters. However, some clients may suffer from impairments that hinder their ability to participate meaningfully in their legal matters. Rule 1.14 addresses the lawyer's responsibilities in such settings. In Massachusetts, few lawyers have been disciplined for engaging in conduct that violated Rule 1.14.

> ***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.**

77 *Wise*, 433 Mass. at 85–86.

78 The court said that the duty of a lawyer facing such a dispute about control of an organization is to "remain neutral." *Id*. 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.

79 2013-DDC-5230 (BBO 2013).

(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 When Clients Have 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 limitation that substantially compromises their ability to make decisions, 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.[80] 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

[80] Mass. R. Prof. C. 1.14 cmt. 2.

with diminished capacity. That limited capacity may result from developmental disability, mental illness, or age, such as when a lawyer is appointed to represent a client who is a minor. Rule 1.14(b) articulates the factors that can invoke a lawyer's added 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 representation . . . .[81]

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) as a result, the client cannot adequately act in their 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 differently from 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.[82]

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 capacity to reason.[83] Once a lawyer rea-

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81 Mass. R. Prof. C. 1.14(b).

82 Mass. R. Prof. C. 1.14 cmt. 6.

83 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").

sonably concludes 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, despite the usual prohibition on speaking with others about a client's affairs. An attorney is not required to consult with an expert before acting under the rule. Usually, the decision to act (including consulting an expert) is one of the things that would otherwise violate the lawyer's duties with unimpaired clients. However, Rule 1.14 would permit such action if 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.[84]

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" standard.[85] 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.

Matter of Dupuy[86] contains additional guidance to help lawyers navigate this

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[84] Mass. R. Prof. C. 1.14 cmt. 7. *See also* Robert M. Daniszewski and Constance V. Vecchione, *Representing Clients with Diminished Capacity*, Board of Bar Overseers (June 2020), https://www.massbbo.org/Files?fileName=diminished.pdf.

[85] *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).

[86] 2024-DDC-6655 (SJ 2024).

rule. In that matter, the single justice addressed a respondent's inappropriate application of Rule 1.14 as a defense to his misconduct. The single justice wrote:

> While recognizing and seeking to address the challenges inherent in representing a client with diminished capacity, the rule is not "carte blanche" for a lawyer to supplant the client's will. See Restatement (Third) of the Law Governing Lawyers § 24 comment [c] (2000) ("A client with diminished capacity is entitled to make decisions normally made by clients to the extent that the client is able to do so"). Rather, rule 1.14 reflects the understanding that "[d]isabilities in making decisions vary from mild to totally incapacitating; they may impair a client's ability to decide matters generally or only with respect to some decisions at some times." *Id*. Thus, the extent of a lawyer's role in making decisions on behalf of his or her client will depend on "the extent a client is incapable of doing so" for themselves. *Id*. at comment [b].

Many lawyers have received discipline for mistreating clients with diminished capacity,[87] but few decisions have sanctioned a lawyer for misapplying or misunderstanding the duties under Rule 1.14. The defensive manner in which Rule 1.14 primarily operates might explain the scarcity of discipline described in the following section. 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.[88]

B. Discipline for Violating Rule 1.14

As noted, only a few lawyers have been disciplined for misconduct with Rule 1.14 as the focus.

In *Matter of Dupuy*,[89] a lawyer was found to have violated multiple ethical rules during his representation of an elderly client including, inter alia, charging clearly excessive fees, failing to communicate with his client, and engaging in a self-interested transaction. The lawyer had been retained by the client to help

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87 *See, e.g.*, Matter of Clooney, 403 Mass. 654 (1988) (disbarment after misuse of funds belonging to "elderly, impaired" clients); Matter of Muse, 1996-DDC-1950 (SJ 1996) (three-year suspension for misconduct involving elderly, impaired client); Matter of Hurley, 1992-DDC-1221 (SJ 1992) (disbarment for scheming to become guardian for elderly disabled woman and misappropriating funds).

88 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).

89 2024-DDC-6655 (SJ 2024).

her move out of an elder care facility and back into her home. Shortly after being retained, the respondent arranged to become the durable attorney over his client's assets; transferred the title of her home into a trust of which he was the named cotrustee; liquidated some of the client's assets to pay her expenses through the sale of stock that she owned; and performed nonlegal services for the client, such as picking up the mail, but at a legal billing rate of $350 per hour. In his defense, the lawyer claimed his conduct was justified by or in furtherance of his obligations under Rule 1.14. The single justice rejected this defense, noting that, while his client exhibited symptoms associated with the first stage of dementia, she retained considerable ability to consult on and be informed of matters. This being so, the lawyer fell short of his obligation to maintain a normal lawyer-client relationship as much as reasonably possible, including by failing to keep her informed or consult with her regarding the sale of her own stock holdings to pay his legal fees.

In *Matter of Eskenas*,[90] the respondent represented a frail nursing home resident in a divorce. 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*,[91] the respondent was suspended for one year and one day for misconduct involving failure to respect 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*,[92] 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*[93] and *Matter of Ward*,[94] the respondents jointly represented a woman with diminished capacity

90 2014-DDC-5371 (BBO 2014).
91 460 Mass. 1012, 2011-DDC-4737 (SJC 2011).
92 2015-DDC-5525 (BBO 2015).
93 2016-DDC-5714 (SJ 2016) (three-month suspension, stayed).
94 2016-DDC-5708 (BBO 2016) (public reprimand).

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.[95]

In AD 17-06,[96] 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.

95 Neither the *Robin* nor the *Ward* discipline report cited Rule 1.14.
96 2017-ADM-5729 (BBO 2017).

CHAPTER TEN

Problems of Conflicts of Interest: Concurrent Conflicts, Successive Conflicts, and Business Transactions (Rules 1.7 Through 1.10 and Rule 1.18)

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 matters investigated by the Office of the Bar Counsel.[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.

Most conflicts of interest appear in one of two quite different forms. First, a lawyer may not proceed in the face of a *concurrent conflict of interest*. A *concurrent conflict* means that the lawyer either opposes an ongoing client through some other representation or suffers from some impairment that limits the lawyer's ability to offer unfettered, zealous representation to a client. Second, a

[1] According to the annual reports of the Office of the Bar Counsel, the most common disciplinary investigations involve alleged neglect and the mishandling of trust accounts. *See, e.g.*, Massachusetts Office of Bar Counsel of the Supreme Judicial Court, Annual Report to the Supreme Judicial Court, Fiscal Year 2024, at 8.

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, imputed conflicts, and prospective client conflicts, as set out in the *Massachusetts Rules of Professional Conduct*, Rules 1.7, 1.8, 1.9, 1.10, and 1.18. 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. 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.

(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. A concurrent conflict of interest exists if "the representation of one client will be *directly adverse* to another client,"[2] 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).[3] 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 conflicts.[4] Section II(B) provides examples of misconduct leading to lawyer discipline under Rule 1.7.

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2 Mass. R. Prof. C. 1.7(a)(1).

3 Mass. R. Prof. C. 1.7(a)(2).

4 *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). In addition to disciplinary caselaw, concurrent conflicts of interests frequently arise in the context of claims of ineffective assistance of counsel by criminal defendants. *See e.g.*, Commonwealth v. Brown, 494 Mass. 326, 236 N.E.3d 780, 790 (2024) (counsel had actual conflict of interest because representation required that she decide whether to file motion to suppress that would be critical of her own conduct); Commonwealth v. Dew, 492 Mass. 254, 255 (2023) (counsel's racial animus toward group of which his clients were members created conflict of interest); Carrasquillo v. Hampden County District Courts, 484 Mass. 367, 388 (2020) (lawyers are conflicted when their heavy caseload makes it impossible for them to adequately represent some clients).

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 of the lawyer, leading the lawyer to possibly downplay advocating for the client.
- 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 might have to end that representation, although the lawyer may 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 conditions:

- The lawyer "reasonably believes" the representation will not be adversely affected, notwithstanding the conflict.
- The representation is not prohibited by law.
- The representation does not involve the lawyer representing opposing parties in the same litigation or matter.
- Each affected client gives consent, confirmed in writing, after being informed of the material risks of and alternatives to continued representation.[5]

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

[5] Mass. R. Prof. C. 1.7(b); *see also* Rules 1.0(d) and 1.0(g).

arising from the conflict.[6] 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 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 BBO 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, [a 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.[7]

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 Ablitt*,[8] *Matter of*

6 Mass. R. Prof. C. 1.0(d) requires such a writing, and Rule 1.0(g) describes the nature of the informed consent discussion that the writing must memorialize.

7 2002-ADM-3238 at 8 (BBO 2002) (citations omitted).

8 486 Mass. 1011 (2021). The respondent intentionally misused client funds, failed to maintain compliant Interest on Lawyers' Trust Accounts records, made misrepresentations, disclosed confi-

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 more frequent. *Matter of Pike*[12] is perhaps the most notable serious conflict-of-interest disciplinary matter in Massachusetts. In *Pike*, the lawyer was suspended for six months for representing both a tenant and their 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 and in disregard of his client's interests," and that the client had suffered prejudice as a result.[13]

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dential client information in violation of Mass. R. Prof. C. 1.8(b), and failed to obtain informed consent for a conflict in violation of Mass. R. Prof. C. 1.7(b).

9 2009-DDC-4369 (SJ 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 2004-DDC-3561 (SJ 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, 2006-DDC-3785 (SJ 2006) (disbarment after converting client funds and conflict of interest); Matter of Clark, 2005-DDC-3569 (SJ 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 [hereinafter ABA Standards] § 4.31(a) (1986, 1992).

12 408 Mass. 740, 1990-DDC-952 (SJC 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).

13 *Pike*, 408 Mass. at 745, 1990-DDC-952 at 6 (SJC 1990).

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.

Suspensions for conflict of interest generally include findings that the lawyers acted selfishly or with complete disregard for 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] And in *Matter of Kretowicz*,[17] a lawyer stipulated to a suspension of one year and one day following his sexual relationship with a divorce client.

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.[18] The sanctions in Massachu-

14 433 Mass. 80, 2000-DDC-2685 (SJC 2000). The *Wise* matter appears in the discussion of representing organizational clients in chapter 9, section III(B).

15 447 Mass. 345, 2006-DDC-3740 (SJC 2006).

16 447 Mass. at 359–60, 2006-DDC-3740 at 7 (SJC 2006).

17 2019-DDC-6056 (SJ 2019).

18 *See, e.g.*, Matter of Dupuy, 2024-DDC-6655 (SJ 2024) (three-month suspension for multiple ethical violations related to representation of elderly client, including engaging in conflict of interest by hiring his daughter to sell client's stock without disclosing "obvious" conflict and obtaining informed consent; lawyer's failure to perceive conflict of interest in such circumstances also reflected adversely on lawyer's fitness to practice law, in violation of Rule 8.4(h), and his failure to investigate using less expensive alternative broker to his daughter constituted lack of competence, in violation of Rule 1.1); Matter of Lansky, 2006-DDC-3778 (SJ 2006) (six-month suspension for combination of neglect, conflict of interest, and substantial harm); Matter of Doherty, 2004-DDC-3471 (SJ 2004) (two-year suspension for representing both driver and estate of deceased passenger in auto accident, plus commingling client funds); Matter of Owens, 2003-DDC-3279 (SJ 2003) (six-month suspension

setts for conflicts of interest without those other factors may be less severe than in other jurisdictions.[19]

3. Public Reprimand

As noted earlier, in Massachusetts "public discipline will be imposed if harm results from an *obvious conflict*" (emphasis added).[20] 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.[21]

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.[22]

The *Carnahan* court cited the following examples of conflicts of interest warranting a public reprimand: *Matter of Manelis*,[23] in which an attorney drafted a new will for a father at the request of the beneficiary son without discussing the matter separately with the father and without conducting reasonable investiga-

for allowing buyer of lots to direct his judgment in defending adverse possession suit, while simultaneously purporting to represent deceased client's estate and executrix as seller of lots; lawyer also engaged in neglect and caused substantial harm).

19 The reported suspension cases in Massachusetts show sanctions that are less than the *ABA Standards* recommend. The *ABA Standards* describe the criteria 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.

20 Matter of Carnahan, 449 Mass. 1003, 1004–5, 2007-DDC-3929 (SJC 2007) (quoting AD 02-13, 2002-ADM-3238 (BBO 2002)).

21 *Carnahan*, 449 Mass. at 1004–5. The bar counsel sought a six-month suspension for Carnahan, but the SJC concluded that his misconduct warranted a public reprimand.

22 *See* Matter of Martinian, 2010-DDC-4687 (BBO 2010) (discussed later in this section in the text accompanying note 26).

23 2002-DDC-3174 (BBO 2002).

tion into the father's competency; *Matter of Reynolds*,[24] in which an attorney drafted estate planning documents benefiting the live-in caregivers of an elderly woman without inquiring about the parties' relationship and knowing that the documents represented fundamental changes in the estate plan detrimental to the family members; and *Matter of Epstein*,[25] in which an attorney prepared a will for a father-in-law's seventy-two-year-old sister benefiting the father-in-law where the attorney knew, or should have known, that the sister was not competent to execute her 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. An example of this pitfall is *Matter of Martinian*,[26] 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.[27]

Additional examples of concurrent conflicts resulting in public reprimands include *Matter of DiFazio*,[28] in which a lawyer sent a notice to quit a premise to one current client on behalf of another current client; *Matter of Goodman*,[29] in which a lawyer representing a client in litigation began to negotiate employment with the opposing law firm and did not inform his client until after he had joined the opposing firm; *Matter of Zinni*,[30] in which a lawyer represented

24 1999-DDC-2581 (BBO 1999).
25 1991-DDC-1087 (SJ 1991).
26 2010-DDC-4687 (BBO 2010).
27 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.
28 2024-DDC-6622 (BBO 2024).
29 2022-DDC-6443 (BBO 2022).
30 2015-DDC-5525 (BBO 2015).

parties with adverse interest in an action challenging the validity of a will that the lawyer had drafted; *Matter of Berg*,[31] in which a lawyer represented both the buyer and seller in the same real estate transaction involving unusual and unfair terms; and *Matter of McClure*,[32] in which an attorney serving as a town-elected official represented private clients in a lawsuit against the town.

4. Admonition

Any finding of an impermissible conflict of interest that does not cause harm and is not unwaivable will generally lead to an admonition. As the BBO has noted, "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."[33]

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 08-11,[34] 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"; without having any authority to discipline the firm,[35] 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.

31 2019-DDC-6098 (BBO 2019).
32 2018-DDC-5977 (BBO 2018).
33 AD 02-13, 2002-ADM-3238 (BBO 2002).
34 2008-ADM-4333 (BBO 2008). *See also* AD 18-08, 2018-ADM-5869 (BBO 2018), in which two lawyers were admonished after a firm conflict check failed to detect that the firm was simultaneously representing a husband in a divorce and his wife in the sale of marital assets.
35 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 Firms? 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.

And in AD 11-04,[36] a lawyer violated Rule 1.7(b) as it read in 2011, along with Rules 1.16(a)(1) and 1.4(b), when she represented a client in the probate of his uncle's estate, knowing that her former law firm, in which her father was a principal, had helped the uncle establish his estate plan but had neglected to fund an important trust as part of that plan. The lawyer did not explain to the nephew the implications of her father's mistake. The 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.

Other admonitions involving ultimately harmless concurrent conflicts include AD 06-11,[37] in which a lawyer filed a lawsuit for unpaid fees against a client two weeks prior to withdrawing his appearance from that client's case; AD 18-24,[38] in which a lawyer represented a relative in a criminal matter in which the relative was alleged to have used the lawyer's own home network to commit the crime; AD 19-23,[39] in which a lawyer represented both the lender and seller in a real estate transaction without obtaining informed consent; and AD 22-24,[40] in which a lawyer represented a daughter and grandfather with unaligned interests in a guardianship matter.

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**

36 2011-ADM-4894 (BBO 2011).

37 2006-ADM-3878 (BBO 2006). *See also* AD 06-08, 2006-ADM-3876 (BBO 2006) and AD 20-04, 2020-ADM-6149 (BBO 2020), in which a lawyer violated Rules 1.7 and 1.16(a) by suing clients for unpaid fees without first formally withdrawing from the representations.

38 2018-ADM-5885 (BBO 2018).

39 2019-ADM-6032 (BBO 2019).

40 2022-ADM-6379 (BBO 2022).

disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(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; and

(3) a lawyer representing an indigent client pro bono publico may provide modest gifts to the client for food, clothing, shelter, transportation, medicine, and other basic living expenses, provided that the lawyer may not:
  (i) promise, assure, or imply the availability of such gifts prior to retention or as an inducement to enter into the client-lawyer relationship or to continue the client-lawyer relationship after retention;
  (ii) seek or accept reimbursement, including from the proceeds of a settlement or judgment, from the client, a relative of the client, or anyone affiliated with the client; or
  (iii) publicize or advertise a willingness to provide such gifts to prospective clients.

  Gifts of financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

(4) When a non-profit organization that provides free legal and other services to indigent clients has received donations or other funding to provide humanitarian aid to persons in need, such as financial assistance to pay for food, clothing, shelter, transportation, medicine, and other basic living expenses, the organization's use of such donations or other funding to provide humanitarian aid to its clients, or the clients' families, shall not be deemed a violation of Rule 1.8(e).

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or

against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek 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) A lawyer shall not:

(1) during the course of any representation by the lawyer or the lawyer's firm, employ coercion, intimidation, or undue influence to enter into or continue sexual relations with a client; or

(2) as a condition of entering into or continuing any representation by the lawyer or the lawyer's firm, require or demand sexual relations with a client or prospective client.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (j) 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)[41]
- With potentially famous clients who wish to pay the lawyer by offering some intellectual property rights to the client's story[42]
- Writing wills or similar estate planning documents where the lawyer or a family member will be a beneficiary[43]
- Who wish to advance living expenses or similar aid to a litigation client[44]
- Whose work for one client will be paid for by a third party[45]
- Representing several clients who wish to engage in an aggregate settlement of their claims[46]
- Who wish to limit liability by an agreement with the client waiving prospectively any malpractice claims against the lawyer[47]
- Who have or seek to have a sexual relationship with a client[48]

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.[49] 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.[50]

Rule 1.8(j), adopted in 2022, prohibits sexual relationships with clients that are coercive in nature or that are a condition of the representation. Comments 12 and 12A of Rule 1.7 advise that, even when not prohibited by Rule 1.8(j), sexual relationships with clients or with the representative of an orga-

41 Mass. R. Prof. C. 1.8(a).
42 Mass. R. Prof. C. 1.8(d).
43 Mass. R. Prof. C. 1.8(c).
44 Mass. R. Prof. C. 1.8(e). Rule 1.8(e)(3) was adopted by amendment in 2022 to allow modest gifts to indigent pro bono clients under certain conditions.
45 Mass. R. Prof. C. 1.8(f).
46 Mass. R. Prof. C. 1.8(g).
47 Mass. R. Prof. C. 1.8(h).
48 Mass. R. Prof. C. 1.8(j).
49 *See* Mass. R. Prof. C. 1.8(i) (2014 version, since removed). *See* Adam's Rib (Metro-Goldwyn-Mayer 1949) (comedy involving husband and wife lawyers played by Spencer Tracy and Katharine Hepburn).
50 *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 20-494 (2020) (examining conflicts arising out of lawyer's personal relationship with opposing counsel).

nizational client can impair a lawyer's judgment and constitute a violation of Rule 1.7.

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.[51]

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*,[52] the SJC disbarred an attorney after his felony conviction for sharing a client's personal financial data with service providers. His use of confidential client information for his own benefit violated Rule 1.8(b).[53]

Practice Tip

The two most common troubles that lawyers encounter with Rule 1.8 are engaging in improper business transactions with a client and providing improper financial assistance to a client.

2. Suspension

The SJC has imposed term suspensions on lawyers whose conduct violated Rule 1.8. In *Matter of Duggan*,[54] 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(a) notice or fairness requirements. The clients later sued the lawyer and obtained

51 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.
52 2010-DDC-4556 (SJ 2010).
53 *See Ablitt, supra* note 8, 486 Mass. 1011 (2021); Matter of Conley, 2009-DDC-4369 (SJ 2009); Matter of Cruz, 2004-DDC-3485 (SJ 2004); Matter of Fuller, 2004-DDC-3430 (SJ 2004).
54 2006-DDC-3840 (SJ 2006).

an order undoing the transactions.[55] Similarly, in *Matter of Costantino*,[56] a lawyer was suspended for three months after he entered into a series of transactions with a client in violation of Rule 1.8(a), involving a loan to the client and the lawyer acquiring an ownership interest in the client's home, with no ultimate financial benefit to the lawyer.

In *Matter of Glynn*,[57] 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 for six months and one day. In *Matter of Balliro*,[58] the SJC accepted a stipulation for a suspension of one year and one day after the respondent arranged and prepared mortgage documents to secure his and his partner's attorney's fees, without obtaining his client's consent or otherwise complying with Rule 1.8(a). The respondent also represented multiple parties to the transaction, in violation of Rule 1.7.

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."[59]

In *Matter of Lupo*,[60] 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*,[61] the lawyer was suspended for three years for inducing trustee clients to loan him $50,000 on terms unfavorable to the trust.[62]

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55 Duggan v. Gonsalves, 65 Mass. App. Ct. 250 (2005).
56 2024-DDC-6613 (SJ 2024).
57 2005-DDC-3629 (SJ 2005).
58 2013-DDC-5178 (SJ 2013).
59 Matter of Weisman, 2014-DDC-5321 (SJ 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, 2008-DDC-4315 (BBO 2008) (public reprimand for Rule 1.8 violation related to attorney's fee); AD 10-12, 2010-ADM-4715 (SJ 2010) (admonition for creating lien to secure fees).
60 447 Mass. 345, 2006-DDC-3740 (SJC 2006).
61 1993-DDC-1383 (SJ 1993).
62 *See* Matter of Moran, 2011-DDC-4856 (SJ 2011) (two-month suspension for violating Rule

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*,[63] 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 Los* (bequest to respondent's son),[64] *Matter of Field* (bequest to the respondent's spouse),[65] *Matter of Toner* (bequest to respondent, his wife, and his children),[66] and *Matter of Filosa* (bequest to lawyer as remainder-person of a will),[67] 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.[68]

In *Matter of Lathrop*,[69] 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

1.8(c) (lawyer drafted will naming himself as beneficiary) and 1.8(a) (lawyer solicited loan from same client that was not fair and reasonable and was preceded by no notice requirements)).

63 2004-DDC-3494 (BBO 2004).

64 PR-2023-10, 2023-DDC-6559 (BBO 2023).

65 2004-DDC-3503 (BBO 2004).

66 2000-DDC-2765 (BBO 2000).

67 2008-DDC-4310 (BBO 2008).

68 *See, e.g.*, *Id.* (public reprimand after lawyer drafted estate plan provisions favoring him at client's direct insistence after lawyer counseled otherwise; no party objected to provision); Matter of Viegas, 2004-DDC-3494 (BBO 2004) (attorney disclaimed what client bequeathed to him, and objection by heir had no basis, but public reprimand still resulted); Matter of Field, 2004-DDC-3503 (BBO 2004) (public reprimand still resulted despite attorney and his wife knowing testatrix for many decades, maintaining close relationship with her, and frequently socializing and spending all major holidays together).

69 2008-DDC-4315 (BBO 2008).

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*,[70] who represented a client in a transaction in which the attorney's immediate family had a substantial personal financial interest without full disclosure and consent from the client.

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*,[71] 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.[72]

4. Admonition

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,[73] 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,[74] 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

70 1993-DDC-1364 (SJ 1993).
71 2004-DDC-3493 (BBO 2004).
72 *See* Matter of Humphries, 2008-DDC-4307 (BBO 2008) (public reprimand for respondent who, in effort to assist client, obtained title to her home).
73 2008-ADM-4341 (BBO 2008).
74 2009-ADM-4518 (BBO 2009).

the terms, however. In each instance, the BBO deemed admonition an adequate sanction for the lawyer's misconduct.

In AD 01-51,[75] 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,[76] 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,[77] 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,[78] 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. Similarly, in AD 19-06, a criminal attorney was admonished after he failed to obtain a client's informed consent to his accepting payment from the client's relatives.[79]

In AD 10-12,[80] 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 ac-

75 2001-ADM-3033 (BBO 2001).
76 2009-ADM-4525 (BBO 2009).
77 2006-ADM-3879 (BBO 2006).
78 2004-ADM-3553 (BBO 2004).
79 2019-ADM-6015 (BBO 2019).
80 2010-ADM-4715 (SJ 2010).

quiring an interest in the litigation's subject matter. The reported admonition summary does not indicate that the client suffered any harm.

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, unless the conflict is based on the lawyer's personal interest and does not present a significant risk of materially limiting the representation by other lawyers in the firm.[81]

> ***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**

[81] For example, Rule 1.7 cmt. 11 explains that a conflict triggered by the lawyer's spouse or other close relative representing the adverse party is not imputed to other members of a firm.

(2) any lawyer remaining in the former firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) When a lawyer becomes associated with a firm ("new firm"), the new firm may not undertake to or continue to represent a person in a matter that the firm knows or reasonably should know is the same or substantially related to a matter in which the newly associated lawyer (the "personally disqualified lawyer"), or the former firm, had previously represented a client whose interests are materially adverse to the new firm's client unless:

(1) the personally disqualified lawyer has no information protected by Rule 1.6 or Rule 1.9 that is material to the matter ("material information"); or

(2) the personally disqualified lawyer (i) had neither involvement nor information relating to the matter sufficient to provide a substantial benefit to the new firm's client and (ii) is screened from any participation in the matter in accordance with paragraph (e) of this Rule and is apportioned no part of the fee therefrom.

(e) For the purposes of paragraph (d) of this Rule and of Rules 1.11 and 1.12, a personally disqualified lawyer in a firm will be deemed to have been screened from any participation in a matter if:

(1) all material information possessed by the personally disqualified lawyer has been isolated from the firm;

(2) the personally disqualified lawyer has been isolated from all contact with the new firm's client relating to the matter, and any witness for or against the new firm's client;

(3) the personally disqualified lawyer and the new firm have been precluded from discussing the matter with each other;

(4) the former client of the personally disqualified lawyer or of the former firm receives notice of the conflict and an affidavit of the personally disqualified lawyer and the 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 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 for 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.[82] The comments to the rule also

[82] Mass. R. Prof. C. 1.10(a).

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."[83]

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 are not deemed to be "associated in a firm," as that term is used in Rule 1.10(a), for that reason alone. Lawyers who share an office suite and operate distinct law practices do not need to check with each other for the conflicts discussed in this chapter and may be able to represent adverse parties, provided they take steps to shield the confidentiality of their respective clients, clearly communicate to the public about their relationship, and do not hold themselves out to the public as a member of the same firm.[84] However, employing a common receptionist or other staff who have access to client information 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. Allison*, 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."[85]

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83 Mass. R. Prof. C. 1.10 cmt. 3.

84 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 23-507 (2023). The ABA opinion states that whether lawyers sharing office space may represent adverse parties will turn on the specifics of the office-sharing arrangement and may obligate the lawyers to disclose the office-sharing arrangement to their respective clients. *See also* Annotated Model Rules of Prof'l Conduct r. 199 (Am. Bar Ass'n., 2015) (citing Monroe v. City of Topeka, 988 P.2d 228 (Kan. 1999)) (indicia of lawyers presenting themselves to public as 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).

85 Commonwealth v. Allison, 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 [hereinafter Restatement] § 123 cmt. e (Am. Law Inst. 2000).

III. 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.

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.

(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.[86] 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. While the concurrent conflicts rules focus on loyalty and the lawyer's independent professional judgment, the successive conflict rule is focused principally on the protection of confidential information.[87] 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.[88]

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 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 ABA *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

86 *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 that case).
87 *Id.*
88 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)).

example is the case of *O'Donnell v. Robert Half International, Inc.*[89] 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 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.[90] 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.[91] 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.[92]

As noted previously, successive conflicts matters do not appear often in the

89 641 F. Supp. 2d 84, 87 (D. Mass. 2009).

90 *Id.* at 89. Mass. Rule 1.9 cmt. 6 establishes a rebuttable presumption that a lawyer learned relevant information during a prior representation.

91 *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 later discussion in section III(B).

92 *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).

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,[93] per Rule 1.10(a). The previous discussion about imputed disqualification applies with equal force here, with an important exception—the availability of *screening* in some circumstances to address successive representation conflicts. By contrast, screening is not available to address concurrent conflicts 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.[94] That screening opportunity is narrower than that permitted under the ABA *Model Rules*.[95] 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.

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93 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 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.

94 MASS. R. PROF. C. 1.10(d).

95 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.

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 less common in Massachusetts than discipline for concurrent conflicts under Rule 1.7. Rule 1.9 protection essentially focuses on former client confidences.

You Should Know

The SJC has stated that violating the successive conflicts rules, without a finding that the lawyer was motivated by self-interest, should result in an admonition.[96]

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*,[97] 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*,[98] 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 businessman's wife relevant to the

96 Matter of the Discipline of an Attorney, 449 Mass. 1001, 1002 (2007) (rescript).
97 2004-DDC-3561 (SJ 2004).
98 2012-DDC-5017 (SJ 2012).

wife's immigration proceedings the respondent had handled."[99] The respondent was suspended for six months and one day for this and other misconduct.

In *Matter of Wise*,[100] the respondent lawyer received a six-month suspension for actions regarding a client, a nonprofit corporation that 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 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.

In *Matter of Nissenbaum*,[101] the respondent received a three-year suspension for multiple instances of misconduct before the Probate and Family Court and the Appeals Court. Three brothers had retained the respondent to represent them in connection with their father's financial affairs, and the respondent recommended another attorney to serve as the father's guardian. The respondent made false and misleading statements to the court as to when his representation of the brothers ended. After the representation of the brothers did end, he appeared for the guardian in the same matter, even though the guardian's interests had become adverse to the brothers.

3. Public Reprimand

At least one serious violation of Rule 1.9 resulted 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*,[102] 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.

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99 *Id.* at 2.
100 433 Mass. 80, 2000-DDC-2685 (SJC 2000).
101 2018-DDC-5962 (SJ 2018).
102 2006-DDC-3850 (BBO 2006).

In *Matter of Horrigan*,[103] 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.

In *Matter of Schwartz*,[104] 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 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*,[105] 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

A violation of Rule 1.9 that does not cause harm will likely result in an admonition. For example, in AD 23-09,[106] an attorney who had previously represented both a talent agency and its clients was disqualified by a court from

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103 2010-DDC-4669 (BBO 2010) (also discussed in chapter 8, section III(A)(1)). *See also* Matter of Spero, 2022-DDC-6452 (BBO 2022) (attorney received public reprimand for filing confidential client information in litigation after representation was terminated, and negligent misrepresentation in separate matter).

104 2002-DDC-3151 (BBO 2002).

105 2009-DDC-4490 (BBO 2009).

106 2023-ADM-6493 (BBO 2023).

representing the agency in a suit against one of those clients, but there was "no ultimate harm caused by the respondent's initial involvement in the case." And in AD 22-16,[107], an attorney represented both an employer and employee in an Employee Retirement Income Security Act lawsuit against a pension plan administrator. When a dispute developed between the employer and employee, the respondent continued to represent only the employee in the matter without obtaining the informed consent in writing from the employer. The respondent ultimately withdrew altogether without causing any demonstrable harm.

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 the Discipline of an Attorney*,[108] 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."[109] 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.[110]

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,[111] forbidding a lawyer from abandoning

107 2022-ADM-6371 (BBO 2022).
108 449 Mass. 1001 (2007).
109 *Id.*
110 449 Mass. at 1002 (distinguishing Matter of Dionisi, 1993-DDC-1364 at 2 (SJ 1993); Matter of Warren, 1992-DDC-1248 at 2 (SJ 1992)). None of the cited examples involved Rule 1.9(a) or (b).
111 The phrase was coined in Picker Int'l v. Varian Assocs., 670 F. Supp. 1363, 1365–66 (N.D. Ohio 1987).

a client prior to accepting a new client in order to exploit the less restrictive former client conflicts rule.[112]

In Massachusetts, the SJC has never expressly adopted the hot potato doctrine.[113] 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. Abrano*,[114] 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.[115] 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."[116]

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*,[117] discussed in section III(B)(3), under Rule 1.9, the lawyer's misconduct involved a conflict of interest of his firm.

In AD 08-11,[118] 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.

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112 *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 cmt. c and Reporter's Note to cmt. c (2000).

113 *See* Paul Lannon & Jeffrey D. Woolf, *When Clients Clash:* Abrano, *Hot Potato and the Duty of Loyalty*, 60 Boston Bar J. 4 (2016).

114 474 Mass. 504 (2016).

115 *Id.* at 510.

116 *Id.* at 512.

117 2002-DDC-3151 (BBO 2002).

118 2008-ADM-4333 (BBO 2008).

IV. The Rules Governing Prospective Client Conflicts of Interest

A. Prospective Client Conflicts Under Rule 1.18

Effective July 1, 2015, the SJC adopted Mass. R. Prof. C. 1.18, which addresses the duties of lawyers to prospective clients. A prospective client is "a person who consults with a lawyer about the possibility of forming an attorney-client relationship," even if no such relationship is formed.[119]

Rule 1.18: Duties to Prospective Clients

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned confidential information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to confidential information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received confidential information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

- **(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:**
- **(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and**

[119] Mass. R. Prof. C. 1.18(a).

> **(i) the disqualified lawyer is timely screened, as defined in Rule 1.10(e), from any participation in the matter and is apportioned no part of the fee therefrom; and**
> **(ii) written notice is promptly given to the prospective client.**

Like Rule 1.9, Rule 1.18 focuses on the confidential information a lawyer may have obtained during a consultation with a prospective client. A lawyer who learns confidential information from a prospective client shall not use or reveal that information, even if no client-lawyer relationship ensues, unless an exception allows the disclosure.[120] A lawyer's receipt of confidential information during a prospective consultation may create a conflict of interest that prevents the lawyer, and the lawyer's firm, from being adverse to that prospective client in the same or a substantially related matter, but only if the lawyer received information that could be "significantly harmful" to the prospective client.[121]

Notwithstanding a Rule 1.18 conflict, the conflicted lawyer can be adverse to a prospective client if informed consent in writing is obtained from both the prospective client and the affected current client.[122] Alternatively, other attorneys in the conflicted lawyer's firm are permitted to be adverse to the prospective client if the conflicted lawyer took reasonable measures to avoid the receipt of more confidential information than was necessary to evaluate the representation, if the conflicted lawyer is screened pursuant to the screening procedure set forth in Rule 1.10, and if written notice is promptly given to the prospective client.[123]

B. Discipline for Prospective Client Conflicts Under Rule 1.18

Rule 1.18 has not yet been the basis for discipline in any Massachusetts case.

Prior to adoption of the rule, at least one lawyer was disciplined for conduct in relation to a prospective client's confidential information. In AD 06-24,[124] a

120 Mass. R. Prof. C. 1.18(b).

121 Mass. R. Prof. C. 1.18(c). For a discussion of the meaning of "significantly harmful," *see* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 20-492 (2020) (discussing obligations to prospective clients).

122 Mass. R. Prof. C. 1.18(d)(1).

123 Mass. R. Prof. C. 1.18(d)(2). For a discussion of the steps a lawyer can take to avoid obtaining more confidential information than necessary, *see* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 25-510 (2024) (discussing the avoidance of the imputation of prospective client conflicts). *See also* David A. Kluft, *Ethical Duties to Prospective Clients* (2023) Massachusetts Board of Bar Overseers, https://www.massbbo.org/Files?fileName=Ethical%20Duties%20to%20Prospective%20Clients.pdf.

124 2006-ADM-3891 (BBO 2006).

lawyer received confidential information from a prospective client and, based on that information, learned that the prospective client was in a relationship with the lawyer's estranged husband. Although the lawyer turned down the representation, she used some of the prospective client's information in her dispute with the husband. She was admonished on the grounds that Rule 1.6(a) and 1.9(c) "apply to confidential information imparted by a prospective client for purposes of determining whether the lawyer will accept a case even if the lawyer is never retained." This principle is now incorporated directly into Rule 1.18.

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 more than 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, or by failing to communicate the fee agreement to the client in writing. Much more often, lawyers fail to comply with record-keeping obligations, fail to handle funds properly, or intentionally misuse funds or property held in trust. Both situations represent a serious breach of the lawyer's fiduciary duties to clients or third parties.

II. Lawyer's Fees

Rule 1.5 of the *Massachusetts Rules of Professional Conduct*, along with some state statutes and common law, governs fee agreements—particularly contingent fee agreements—and the charging and collection of lawyer's fees.

Rule 1.5: Fees

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

(b)(1) Except as provided in paragraph (b)(2), the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.
(2) The requirement of a writing shall not apply to a single-session legal consultation or where the lawyer reasonably expects the total fee to be charged to the client to be less than $500. Where an indigent representation fee is imposed by a court, no fee agreement has been entered into between the lawyer and client, and a writing is not required.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Except for contingent fee arrangements concerning the collection of commercial accounts and of insurance company subrogation claims, a contingent fee agreement shall be in writing and signed in duplicate by both the lawyer and the client within a reasonable time after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the lawyer for a period of six years after the conclusion of the contingent fee matter. The writing shall state the following:

(1) the name and address of each client;
(2) the name and address of the lawyer or lawyers to be retained;
(3) the nature of the claim, controversy, and other matters with reference to which the services are to be performed;
(4) the contingency upon which compensation will be paid, whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected for him or her by the lawyer, and if the lawyer is to be paid any fee for the representation that will not be determined on a contingency, the method by which this fee will be determined;
(5) the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer out of amounts collected, and unless the parties otherwise agree in writing, that the lawyer shall be entitled to the greater of (i) the amount of any attorney's fees awarded by the court or included in the settlement or (ii) the amount determined by application of the percentage or other formula to the recovery amount not including such attorney's fees;
(6) the method by which litigation and other expenses are to be calculated and paid or reimbursed, whether expenses are to be paid or reimbursed only from the recovery, and whether such expenses are to be deducted from the recovery before or after the contingent fee is calculated;
(7) if the lawyer intends to pursue such a claim, the client's potential liability for expenses and reasonable attorney's

fees if the attorney-client relationship is terminated before the conclusion of the case for any reason, including a statement of the basis on which such expenses and fees will be claimed, and, if applicable, the method by which such expenses and fees will be calculated; and

(8) if the lawyer is the successor to a lawyer whose representation has terminated before the conclusion of the case, whether the client or the successor lawyer is to be responsible for payment of former counsel's attorney's fees and expenses, if any such payment is due.

Upon conclusion of a contingent fee matter for which a writing is required under this paragraph, the lawyer shall provide the client with a written statement explaining the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. At any time prior to the occurrence of the contingency, the lawyer shall, within twenty days after either (1) the termination of the attorney-client relationship or (2) receipt of a written request from the client when the relationship has not terminated, provide the client with a written itemized statement of services rendered and expenses incurred; except, however, that the lawyer shall not be required to provide the statement if the lawyer informs the client in writing that he or she does not intend to claim entitlement to a fee or expenses in the event the relationship is terminated before the conclusion of the contingent fee matter.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee (including a referral fee) between lawyers who are not in the same firm may be made only if the client is notified before or at the time the client enters into a fee agreement for the matter that a division of fees will be made and consents to

the joint participation in writing and the total fee is reasonable. This limitation does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

(f)(1) The following forms of contingent fee agreement may be used to satisfy the requirements of paragraphs (c) and (e) if they accurately and fully reflect the terms of the engagement.

(2) A lawyer who uses Form A does not need to provide any additional explanation to a client beyond that otherwise required by this rule. The form contingent fee agreement identified as Form B includes two alternative provisions in paragraphs (3) and (7). A lawyer who uses Form B shall show and explain these options to the client, and obtain the client's informed consent confirmed in writing to each selected option. A client's initialing next to the selected option meets the "confirmed in writing" requirement.

(3) The authorization of Forms A and B shall not prevent the use of other forms consistent with this rule. A lawyer who uses a form of contingent fee agreement that contains provisions that materially differ from or add to those contained in Forms A or B shall explain those different or added provisions or options to the client and obtain the client's informed consent confirmed in writing. For purposes of this rule, a fee agreement that omits option (i) in paragraph (3), and, where applicable, option (i) in paragraph (7) of Form B is an agreement that materially differs from the model forms. A fee agreement containing a statement in which the client specifically confirms with his or her signature that the lawyer has explained that there are provisions of the fee agreement, clearly identified by the lawyer, that materially differ from, or add to, those contained in Forms A or B meets the "confirmed in writing" requirement.

(4) The requirements of paragraphs (f)(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 consider 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 of less than $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 not only is required by the rule but is essential for both parties' understanding of what the lawyer will and will not address during the representation.

One further aspect of Rule 1.5 deserves mention because it is quintessentially a Massachusetts practice and tradition. Unlike almost every other jurisdiction in the nation, Massachusetts permits an attorney's fee to be divided with a lawyer who does not practice in the 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

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).
5 The American Bar Association's *Model Rules*, which most jurisdictions follow, states that the fee basis shall be communicated "preferably in writing." *See* Model Rules of Prof'l Conduct r. 1.5(b) (Am. Bar Ass'n, 2025).
6 Mass. R. Prof. C. 1.5(e).

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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 (OBC) has written several articles on fee agreements in general and contingent fee agreements in particular, which are available on the BBO 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 BBO and SJC do not treat charging a client a clearly excessive fee in the same way as misappropriating client funds or property.

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[7] *See* Model Rules of Prof'l Conduct r. 1.5(e).

[8] *See, e.g.*, Dorothy Anderson, *Flat Fees: A Three-Dimensional View*, Board of Bar Overseers (June 2018), https://www.massbbo.org/Files?fileName=FlatFees.pdf; Robert Daniszewski, *Too Much of a Good Thing: Understanding the Rule 1.5(a) Prohibition on Clearly Excessive Fees*, Board of Bar Overseers (Oct. 2017), https://www.massbbo.org/Files?fileName=clearly-excessive-fees.pdf; Nancy E. Kaufman & Constance V. Vecchione, *The Ethics of Charging and Collecting Fees*, Board of Bar Overseers (updated Nov. 2015), https://www.massbbo.org/Files?fileName=ethicsfees.pdf; Constance V. Vecchione, *FAQs: Mass. R. Prof. C. 1.5(b) and Written Fee Arrangements*, Board of Bar Overseers (Apr. 2013), https://www.massbbo.org/Files?fileName=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.

[9] Matter of Schoepfer, 426 Mass. 183, 185–88, n.2, 1997-DDC-2042 (SJC 1997).

You Should Know

In *Matter of Schoepfer*,[10] 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.[11]

In *Matter of Goldstone*,[12] 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.[13] 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.[14]

In *Matter of Smith*,[15] 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.[16]

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10 *Id.*

11 *Id.* (citing Matter of the Discipline of an Attorney, 392 Mass. 827, 836–37 (1984)).

12 445 Mass. 551, 2005-DDC-3568 (SJC 2005).

13 *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).

14 *Goldstone, supra* note 12, 455 Mass. at 566.

15 2005-DDC-3660 (SJ 2005).

16 *See* Matter of Pomeroy, 2010-DDC-4577 (SJ 2010) (when elderly client retained respondent to liquidate bank accounts and turn proceeds over to him, she converted over $812,000; when her conduct was discovered, respondent claimed this represented contingent fee owed for these services;

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 in conjunction with other serious misconduct. In *Matter of Pepyne*,[17] 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*,[18] the single justice disbarred a lawyer for collecting a higher fee in a workers' compensation matter than the settlement provided for and misleading his client about the accurate fee. He also engaged in separate misconduct where he neglected a matter and lied to his client about his carelessness.

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 matter,[19] a criminal defense matter,[20] and mortgage assistance/foreclosure matters.[21]

respondent later fabricated documents to conceal her activities; ultimately, respondent submitted affidavit of resignation and was disbarred).

17 2010-DDC-4608 (SJ 2010).

18 2010-DDC-4662 (SJ 2010).

19 *Id.*

20 Matter of Serpa, 2014-DDC-5327 (SJ 2014).

21 Matter of Zak, 476 Mass. 1034, 2017-DDC-5783 (SJC 2017) (fees charged and collected in violation of federal and state statutes prohibiting advance fees for mortgage assistance relief, unless deposited in trust account, violated Mass. R. Prof. C. 1.5(a)); Matter of Ruggiero, 2023-DDC-6515 (SJ 2023) (collection of advance fees from homeowners in connection with mortgage assistance relief services, which was prohibited by federal regulations in effect at the time).

2. Suspension

Lawyers suspended for violating Rule 1.5 have typically overcharged a client intentionally, with some misrepresentation about the fee. In *Matter of Zankowski*,[22] the lawyer was suspended for two years for intentionally overbilling several clients for services not rendered. The lawyer, a partner at a large law firm, did not maintain contemporaneous time records. Instead, her assistant pieced together the lawyer's workweek to create a weekly time sheet, which the lawyer then edited with her own recollection of her hours. Those time sheets were forwarded to the firm's accounting department, which organized them by client and sent the lawyer draft bills, which she would actively edit, adding her own time and that of the other lawyers that she claimed she had then remembered. She added many hours under the names of associates, using as an excuse that the hours were real, but involved her own time rather than the associates' time. During a nine-month period, the lawyer added 450 hours (about $216,000) to her client bills with no supporting records. The court described the bills as "fictional."[23] The court noted, "In our assessment, it is the established dishonest nature of the respondent's billing that differentiates this case from cases involving charging 'excessive' fees."[24]

In *Matter of Santangelo*,[25] an attorney was suspended for six months and ordered to pay restitution to his client for, among other things, collecting legal fees for work on an appeal that had already been dismissed due to the respondent's neglect. The attorney had been retained to appeal a monetary judgment entered against his client. Thereafter, the attorney missed the deadline for docketing the appeal but failed to inform the client of his negligence or that the appeal was

22 487 Mass. 140 (2021).

23 *Id.* at 147. Significantly, the court observed that such "[k]nowing submission of false or fraudulent bills . . . is not equivalent to charging an excessive fee." *Id.* at 151 (dishonest nature of respondent's intentional overbilling differentiated her misconduct from cases involving charges of excessive fees). The court made a similar observation in Matter of Hayes, 493 Mass. 1010, 2023-DDC-6583 (SJC 2023). In *Hayes*, an attorney was disbarred for devising and engaging in a complex scheme to defraud the family court and bankruptcy court in order to prevent the mother of his client's children from obtaining an increase in child support after the client won the lottery. During the representation, the attorney directed his client—who was unsophisticated and vulnerable—to sign a fee agreement that gave the respondent "sole discretion" to decide what work to perform and what fees to charge, without notice to the client or authorization. The attorney thereafter surreptitiously disbursed a substantial portion of the lottery winnings to himself as purported legal fees for services performed on behalf of the client. Rather than characterizing such misconduct as merely the collection of excessive fees, the court equated it to the conversion and misappropriation of client funds because "the entire engagement [between the respondent and the client] was imbued with fraud and greed." *Id.* at 1015.

24 *Zankowski*, 487 Mass. at 150.

25 2025-DDC-6773 (SJ 2025).

dismissed by the court as a result. Instead, the attorney misrepresented the status of the case to conceal his neglect while encouraging his client to pay his legal fees. The attorney was suspended for violating Rules 1.1, 1.2(a), 1.3, 1.4, 1.5(a), 1.5(b), 8.4(c), and 8.4(h), with his reinstatement conditioned on refunding $4,500 in collected fees to the client.

In *Matter of Beaulieu*,[26] 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*,[27] a report that may interest private firm lawyers, an attorney was suspended for one year and one 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.

In *Matter of Rafferty*,[28] the single justice gave the lawyer a four-month suspension, with reinstatement conditioned on passing the Multistate Professional Responsibility Examination 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.

In *Matter of Beatrice*,[29] 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*,[30] 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.[31]

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26 2013-DDC-5261 (SJ 2013).
27 2012-DDC-5019 (SJ 2012).
28 2010-DDC-4593 (SJ 2010).
29 1998-DDC-2459 (SJ 1998).
30 2015-DDC-5496 (SJ 2015).
31 *See also* Matter of Gibson, 2011-DDC-4836 (SJ 2011) (single justice order suspended respondent indefinitely, without reference to Rule 1.5, after respondent entered into grossly unfair contingent fee agreement and misappropriated funds held).

Lawyers have also been suspended for charging legal rates to perform various tasks that did not require the training, skill, or experience of a lawyer. In *Matter of Moran*,[32] a lawyer, who was representing two elderly women through a power of attorney, received a fifteen-month suspension for violating Rule 1.5(a) by charging legal rates for a broad variety of nonlegal services. As power of attorney, the lawyer charged his legal hourly rate for (1) taking care of the clients' house, including snow removal and yard cleanup; (2) selling the house and personal property; (3) checking the clients' mail; (4) conferring with doctors, nurses, and medical staff, and making medical appointments; (5) making social visits; and (6) making funeral and burial arrangements.

In other Rule 1.5 matters, lawyers have been suspended for trying to collect contingent fees on contingencies that did not occur,[33] for charging monthly fees which bore no relation to the work done,[34] and for charging fees prohibited by state or federal statutes.[35]

Overbilling litigation expense funds also violates Rule 1.5 and, in conjunction with other misconduct (including the overbilling of fees) resulted in suspensions in *Matter of Harris-Daley*[36] and *Matter of Pudlo*.[37]

3. Public Reprimand

In the absence of additional misconduct or aggravating circumstances (such as when an attorney takes advantage of a vulnerable client), the most common sanction for charging an excessive fee is a public reprimand.[38] Many lawyers have received public reprimands for violating Rule 1.5, in relation to either charging an hourly fee or a contingent fee arrangement. The most prominent SJC treat-

32 479 Mass. 1016, 2018-DDC-5930 (SJC 2018).

33 Matter of Diviacchi, 475 Mass. 1013, 2016-DDC-5707 (SJC 2016) (twenty-seven-month suspension for, inter alia, contingent fee agreement that did not conform to Rule 1.5(f), failing to review nonconforming terms of agreement with client, and seeking to collect contingent fee where contingency did not occur).

34 Matter of McArdle, 2022-DDC-6474 (SJ 2022) (eighteen-month suspension for using unreasonable and illegal fee agreements in connection with representing foreclosure defense clients, and charges of, inter alia, "monthly fees that bore no relation to the work performed, retainers that the respondent did not have to earn, non-refundable up-front fees, early termination fees, and other clearly excessive fees," in violation of Rule 1.5(a)).

35 *Ruggiero*, 2023-DDC-6515 (SJ 2023) (lawyer suspended for one year and one day for participating in scheme with nonlawyers to charge and collect excessive and prohibited fees from fifteen clients seeking to avoid foreclosure).

36 2018-DDC-6000 (SJ 2018) (lawyer charged client $4,950 to hire investigator but paid investigator only $900).

37 460 Mass. 400, 2011-DDC-4734 (SJC 2011) (lawyer charged client $7,350 for expert witness they never engaged).

38 *Rafferty, supra* note 28, 2010-DDC-4593 at 2 (SJ 2010) ("[T]he typical sanction for charging an excessive fee is a public reprimand").

ment for an excessive fee has been *Matter of Fordham*,[39] 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).

In *Matter of Henry*,[40] the attorney was publicly 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*,[41] an attorney received a public reprimand because the fees she charged 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. In *Matter of Knight*,[42] the lawyer was publicly reprimanded for failing to communicate his fee in writing to his divorce client, and then charging and collecting significant additional payments beyond the flat fee to which he and the client had orally agreed. In *Pepyne*,[43] a lawyer was publicly reprimanded for charging a $2,000 fee to pay liens where no significant work was necessary to pay the liens.

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. For example, in *Matter of Carroll*,[44] 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*,[45] the attorney ignored a previous lawyer's claim to a share of the contingent fee proceeds and

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39 423 Mass. 481, 1996-DDC-2004 (SJC 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, 2009-DDC-4508 (BBO 2009) (restitution and other factors in mitigation); Matter of Olchowski, 2008-DDC-4302 (BBO 2008) (restitution).

40 2012-DDC-5025 (SJ 2012).

41 2012-DDC-5050 (BBO 2012).

42 2023-DDC-6534 (BBO 2023).

43 2010-DDC-4608 (SJ 2010).

44 2012-DDC-5038 (BBO 2012). *See also* Matter of Kelleher, 2010-DDC-4684 (BBO 2010) (attorney also faced public reprimand for misconduct, including not having written contingent fee agreement); Matter of Foley, 2009-DDC-4439 (SJ 2009) (attorney faced three-month suspension, stayed for one year under probationary conditions, for entering into contingent fee agreement without written fee agreement, among other violations).

45 2010-DDC-4684 (BBO 2010).

also failed to prepare a written contingent fee agreement. In *Matter of Faria*,[46] 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.[47]

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 relatively minor and the client suffered little or no harm. For example, in AD 21-14,[48] the respondent was retained for a flat fee to handle wire transfers for clients. In conducting these transactions, the respondent also charged his clients a small administrative fee, even though he did not incur any expense for the transfers. In doing so, he violated Rule 1.5(a). In AD 00-78,[49] 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,[50] an attorney failed to execute a written contingent fee agreement with the client, leading to disagreement about its terms. The lawyer also offered less-than-competent services to the client but made full amends to remedy any potential harm.[51] In AD 06-02,[52] 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,[53] 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 OBC. Other examples of a similar nature exist in the disciplinary reports.[54]

46 2009-DDC-4487 (BBO 2009).

47 *See also* Matter of Neal, 2003-DDC-3328 (BBO 2003) (public reprimand for misconduct, including failing to maintain copy of contingent fee agreement).

48 2021-ADM-6263 (BBO 2021).

49 2000-ADM-2844 (BBO 2000).

50 2009-ADM-4511 (BBO 2009).

51 For a similar, if perhaps more surprising, example, *see* AD 08-18, 2008-ADM-4340 (BBO 2008) (no written contingent fee agreement, plus neglect leading to dismissal of client's case; successor counsel obtained reversal of dismissal, so ultimately no substantial harm to client). *Cf.* AD 00-12, 2000-ADM-2778 (BBO 2000) (admonition solely for failure to have contingent fee agreement in writing).

52 2006-ADM-3870 (BBO 2006).

53 2004-ADM-3514 (BBO 2004).

54 *See* AD 06-06, 2006-ADM-3874 (BBO 2006); AD 05-17, 2005-ADM-3711 (BBO 2005); AD 03-32, 2003-ADM-3364 (BBO 2003); AD 02-55, 2002-ADM-3233 (BBO 2002); AD 02-50, 2002-ADM-3228 (BBO 2002); AD 00-34, 2000-ADM-2800 (BBO 2000).

Lawyers are most often admonished for violating Rule1.5(b)(1), by failing to communicate in writing the rate and basis of the fee and expenses for which the client will be responsible.[55] The rule does not necessitate a formal fee agreement, and communication by letter or e-mail may satisfy the writing requirement.

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 *Fordham*,[56] 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.'"[57]

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.

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55 AD 20-02, 2020-ADM-6147 (BBO 2020) (admonition plus continuing legal education (CLE) for failure to memorialize fee agreement in criminal case and violating Rule 1.8(f) by not obtaining informed consent for payment by another person); AD 19-03, 2019-ADM-6012 (BBO 2019) (admonition plus CLE for failure to memorialize fee arrangement whereby lawyer charged $250 flat fee for each court appearance); AD 18-10, 2018-ADM-5871 (BBO 2018) (criminal defense case); AD 17-25, 2017-ADM-5747 (BBO 2017) (lack of written fee agreement in three flat fee matters and one hourly fee matter).

56 423 Mass. 481, 1996-DDC-2004 (SJC 1996) (public reprimand).

57 *Fordham, supra* note 39, 423 Mass. at 490 (quoting Matter of the Estate of Larson, 103 Wash. 2d 517, 531, 694 P.2d 1051 (1985)).

Rafferty, discussed earlier in section II(B)(2), offers a somewhat different approach. In that case, the court affirmed that the respondent's fee was clearly excessive, but not because his hourly fee was out of line with the rates of lawyers offering comparable services. Rafferty violated Rule 1.5 because the "total fee charged by the respondent for the discovery phase of the two cases, about $700,000, 'destroyed the economic viability of the cases.'"[58] This suggests that lawyers must be mindful of some proportionality between the fees they charge and the monetary value of the matter in which they are charging.

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.[59] Rules 1.5(c) and (f), and comments 3 and 3A–D, 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; and
- Whether the lawyer or the client is responsible for litigation expenses.

In addition, the agreement must address 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. If the agreement is silent, the successor lawyer is responsible for the previous lawyer's fees.

Rule 1.5 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

[58] *Rafferty, supra* note 38, 2010-DDC-4593 at 2 (SJ 2010).
[59] *See, e.g.*, Timothy Dacey III, *Fee Agreements*, in Ethical Lawyering in Massachusetts, Chapter 5 (James Bolan & Sara Holden eds. 2024); Kaufman & Vecchione, *supra* note 8.

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and obtain the client's informed consent confirmed in writing."[60] In *Matter of Diviacchi*,[61] the lawyer was suspended for twenty-seven months for using a non-conforming contingent fee agreement and not explaining its terms to the client, among other misconduct.

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*,[62] 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*,[63] 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*,[64] 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.[65]

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.[66] 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.[67] In some circumstances, a material change to an existing contract might

60 Mass. R. Prof. C. 1.5(f)(3).
61 475 Mass. 1013 (2016).
62 10 Mass. App. Ct. 571 (1980), *aff'd*, 384 Mass. 803 (1981).
63 442 Mass. 692 (2004).
64 450 Mass. 473 (2008).
65 *Id.* 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."
66 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").
67 *See* Model Rules of Prof'l Conduct r. 1.5, annot. at 108–9 ("Modification of Agreements").

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qualify as a business transaction between a lawyer and a client, triggering the requirements of Rule 1.8(a).[68] For example, in *Matter of Weisman*,[69] 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(i). A fee paid in property may constitute a business transaction with a client and be subject to Mass. R. Prof. C. 1.8(a)."[70] 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."[71]

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).[72] 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.[73] Lawyers may ac-

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[68] 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, 2008-DDC-4144 at 1, 10-14 (SJC 2008)), amendments to the fee agreement might fall within that rule. *See* Kaufman & Vecchione, *supra* note 8, at 4 ("A lawyer's ability to modify a fee agreement during the course of the representation is limited by the provisions of Mass. R. Prof. C. 1.8(a), concerning business transactions with clients").

[69] 2014-DDC-5321 (SJ 2014).

[70] Kaufman & Vecchione, *supra* note 8, at 7.

[71] 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").

[72] 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, the client must have the opportunity to consult with separate counsel and must consent in writing to the transaction.

[73] *See, e.g.*, Rubin v. Murray, 79 Mass. App. Ct. 64 (2011). For commentary about that practice,

cept such an equity interest in the client as the fee,[74] 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.[75] 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*,[76] a device sometimes known as an "attorney's lien"[77] or a "charging lien."[78] 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."[79]

Practice Tip

The OBC 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.

Rule 1.15A contains detailed instructions regarding how to handle files on closed matters. It 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]

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).

74 *Rubin*, 79 Mass. App. Ct. 64.

75 *Id.* at 75.

76 Mass. Gen. Laws ch. 221, § 50 (2018).

77 *See, e.g.*, Matter of King, 2007-DDC-4048 (SJ 2007).

78 *See, e.g.*, Boswell v. Zephyr Lines, Inc., 414 Mass. 241, 244 (1993).

79 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).

lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would unfairly prejudice the client." The reader is advised to consult the rule and its commentary.[80]

III. Holding and Safekeeping Property

Rule 1.15 of the *Massachusetts Rules of Professional Conduct* governs 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 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

[80] *See also* Joseph Berman & Constance Vecchione, *New Rule on Client Files Will Provide Clear Guidance for Lawyers*, Board of Bar Overseers (Sept. 2018), https://www.massbbo.org/Files?fileName=ClientFilesRule.pdf.

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.

(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 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 that 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 that 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 that in the judgment of the lawyer are nominal in amount, or are to be held for a short period of time, or (ii) for all other trust funds, an individual account with the interest payable as directed by the client or third person on whose behalf the trust property is held. The foregoing deposit requirements apply to funds received by lawyers in connection with real estate transactions and loan closings, provided, however, that a trust account in a lending bank in the name of a lawyer representing the lending bank and used exclusively for depositing and disbursing funds in connection with that particular bank's loan transactions, shall not be required but is permitted to be established as an IOLTA account. All IOLTA accounts shall be established in compliance with the provisions of paragraph (g) of this Rule.

(7) Property held for no compensation as a custodian for a minor family member is not subject to the Operational Requirements for Trust Accounts set out in this paragraph (e) or to the Required Accounts and Records in paragraph (f) of this Rule. As used in this paragraph, "family member" refers to 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.

(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 contemporaneous and complete records of the receipt, maintenance, and disposition of that trust property, including all records required by this paragraph. Records shall be preserved for a period of six years after termination of the representation and after distribution of the property. Records may be maintained by computer subject to the requirements of subparagraph (1)G of this paragraph (f) or they may be prepared manually.

(1) *Trust account records:* The following books and records must be maintained for each trust account:

A. *Account documentation:* A record of the name and address of the bank or other depository; account number; account title; opening and closing dates; and the type of account, whether pooled, with net interest paid to the IOLTA Committee (IOLTA account), or account with interest paid to the client or third person on whose behalf the trust property is held (including master or umbrella accounts with individual subaccounts).

B. *Check register:* A check register recording in chronological order the date and amount of all deposits; the date, check or transaction number, amount, and payee of all disbursements, whether by check, electronic transfer, or other means; the date and amount of every other credit or debit of whatever nature; the identity of the client matter for which funds were deposited or disbursed; and the current balance in the account.

C. *Individual client records:* A record for each client or third person for whom the lawyer received trust funds documenting each receipt and disbursement of the funds of the client or third person, the identity of the client matter for which funds were deposited or disbursed, and the balance held for the client or third person, including a subsidiary ledger or 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 that 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 that appears in each record as of the reporting date, and calculating the total. For the purpose of the calculation required by this paragraph, bank fees and charges shall be considered an individual client record. No balance for an individual client may be negative at any time.

F. *Account documentation:* For each trust account, the lawyer shall retain contemporaneous records of transactions as necessary to document the transactions. The lawyer must retain:
   (i) bank statements.
   (ii) all transaction records returned by the bank, including canceled checks and records of electronic transactions.
   (iii) records of deposits separately listing each deposited item and the client or third person for whom the deposit is being made.

G. *Electronic record retention:* A lawyer who maintains a trust account record by computer must maintain the check register, client ledgers, and reconciliation reports in a form that can be reproduced in printed hard copy.

Electronic records must be regularly backed up by an appropriate storage device.

(2) *Business accounts:* Each lawyer who receives trust funds must maintain at least one bank account, other than the trust account, for funds received and disbursed other than in the lawyer's fiduciary capacity.

(3) *Trust property other than funds:* A lawyer who receives trust property other than funds must maintain a record showing the identity, location, and disposition of all such property.

(4) *Dissolution of a law firm:* Upon dissolution of a law firm, the partners shall make reasonable efforts to ensure the maintenance of client trust account records specified in this Rule.

(g) *Interest on Lawyers' Trust Accounts:*

(1) The IOLTA account shall be established with any bank, savings and loan association, or credit union authorized by Federal or State law to do business in Massachusetts and insured by the Federal Deposit Insurance Corporation or similar State insurance programs for State chartered institutions. At the direction of the lawyer, funds in the IOLTA account in excess of $100,000 may be temporarily reinvested in repurchase agreements fully collateralized by U.S. Government obligations. Funds in the IOLTA account shall be subject to withdrawal upon request and without delay.

(2) Lawyers creating and maintaining an IOLTA account shall direct the depository institution:

(i) to remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the IOLTA Committee;

(ii) to transmit with each remittance to the IOLTA Committee a statement showing the name of the lawyer who or law firm that deposited the funds; and

(iii) at the same time to transmit to the depositing lawyer a report showing the amount paid, the rate of interest

applied, and the method by which the interest was computed.

(3) Lawyers shall certify their compliance with this Rule as required by SJC Rule 4:02, § 2.

(4) This court shall appoint members of a permanent IOLTA Committee to fixed terms on a staggered basis. The representatives appointed to the committee shall oversee the operation of a comprehensive IOLTA program, including:

(i) the receipt of all IOLTA funds and their disbursement, net of actual expenses, to the designated charitable entities, as follows: sixty-seven percent (67%) to the Massachusetts Legal Assistance Corporation and the remaining thirty-three percent (33%) to other designated charitable entities in such proportions as the Supreme Judicial Court may order;

(ii) the education of lawyers as to their obligation to create and maintain IOLTA accounts under this Rule;

(iii) the encouragement of the banking community and the public to support the IOLTA program;

(iv) the obtaining of tax rulings and other administrative approval for a comprehensive IOLTA program as appropriate;

(v) the preparation of such guidelines and rules, subject to court approval, as may be deemed necessary or advisable for the operation of a comprehensive IOLTA program;

(vi) establishment of standards for reserve accounts by the recipient charitable entities for the deposit of IOLTA funds that 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 and IOLTA account inactivity notification:* All trust accounts shall be established in compliance with the following provisions:

(1) A lawyer shall maintain trust accounts only in financial institutions that have filed with the Board of Bar Overseers an agreement, in a form provided by the Board, (i) 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 in accordance with subparagraph (h)(4) of this Rule, and (ii) to report inactivity in an IOLTA account in accordance with subparagraphs (h)(5) and (h)(6) of this Rule.

(2) Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon thirty days' notice in writing to the Board.

(3) The Board shall publish annually a list of financial institutions that 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) The IOLTA account inactivity notification agreement shall provide that the financial institution shall give notice as follows:

(i) After two and one-half years of inactivity in an IOLTA account, the financial institution shall notify the lawyer and, if known, the law firm at which the lawyer last practiced while holding the account that the account has shown no activity for two and one-half years and that such inactivity shall be reported to the Board if it continues for six more months.

(ii) After three years of inactivity in an IOLTA account, the financial institution shall notify the Board that the account is inactive, with copies to the lawyer and, if known, the law firm at which the lawyer last practiced while holding the account.

Inactivity shall be measured from the date of the last transaction or the date when the lawyer notifies the financial institution that the account shall remain open pursuant to subparagraph (h)(7) of this Rule, whichever is later. For purposes of this Rule, automatic interest accrual and disbursement of interest to the IOLTA Committee shall not constitute activity.

(6) The notifications required by subparagraph (h)(5) of this Rule shall contain the account name, the account number, the lawyer's (or law firm's) name, the current balance of the account, and the date and amount of the last transaction in the account other than automatic interest accrual and disbursement of interest to the IOLTA Committee.

(7) When a lawyer receives a copy of the inactivity notification that a financial institution sent to the Board, the lawyer shall close the account and distribute the funds either to the owner of the funds or to the IOLTA Committee, as applicable, unless the IOLTA account contains no unidentified or unclaimed funds, and the lawyer has a valid reason for maintaining the IOLTA account. The lawyer shall notify the Board in writing of the action taken or, if no action is taken, of the reason that the IOLTA account will remain open. If the IOLTA account will remain open, the lawyer shall also notify the financial institution in writing that the IOLTA account will remain open. If, within one year from the date the financial institution sent the inactivity

notification to the Board, the lawyer neither closes the IOLTA account nor notifies the financial institution that the IOLTA account will remain open, the financial institution shall distribute the balance of the IOLTA account to the IOLTA Committee and close the IOLTA account.

(8) 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.

(9) The following definitions shall be applicable to paragraph (h) of this Rule:

(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 that accepts for deposit funds held in trust by lawyers.

(ii) "Notice of dishonor" refers to the notice that a financial institution is required to give, under the laws of this Commonwealth, upon presentation of an instrument that the institution dishonors.

(iii) "Properly payable" refers to an instrument that, if presented in the normal course of business, is in a form requiring payment under the laws of this Commonwealth.

(i) *Disposition of unidentified and unclaimed funds in IOLTA accounts:*

(1) When a lawyer discovers that an IOLTA account contains funds that the lawyer reasonably believes are unidentified funds or unclaimed funds, the lawyer shall promptly make reasonable and diligent efforts to identify the owner of the unidentified funds or locate the owner of the unclaimed funds and to transmit the funds to the owner.

(2) If the lawyer has made reasonable and diligent but unsuccessful efforts to identify the owner of unidentified funds or locate the owner of unclaimed funds, the lawyer may remit the funds to the IOLTA Committee at any time

before the funds are required to be remitted to the IOLTA Committee pursuant to paragraph (i)(3) of this Rule.

(3) If the lawyer has been unable to identify the owner of unidentified funds or to locate the owner of unclaimed funds and transmit the funds to the owner within three years after discovering that the IOLTA account contains unidentified or unclaimed funds, the lawyer shall remit the funds to the IOLTA Committee.

(4) When a lawyer remits funds to the IOLTA Committee pursuant to paragraph (i)(2) or (i)(3) of this Rule, (i) the lawyer shall provide a report to the IOLTA Committee in a form provided by the IOLTA Committee and shall comply with the procedures of the IOLTA Committee for the transfer of funds, and (ii) if the amount of funds transferred to the IOLTA Committee in a twelve-month period exceeds the applicable threshold amount, the lawyer shall, in a form provided by the Board, provide a report to the Board within fourteen days of transferring the funds that bring the twelve-month total of funds transmitted to the IOLTA Committee above the applicable threshold amount.

(5) A lawyer shall:

(i) respond to requests from the Board for information regarding the lawyer's efforts to identify or locate the owner of funds held in the lawyer's IOLTA account;

(ii) cooperate with the Board in any investigation of a claim of ownership of funds previously remitted to the IOLTA Committee;

(iii) notify the Board and the IOLTA Committee if the lawyer identifies or locates the owner of funds previously remitted to the IOLTA Committee pursuant to this section and make reasonable and diligent efforts to assist the owner in reclaiming the funds.

(6) The following definitions shall be applicable to paragraph (i) of this Rule:

(i) "Unidentified funds" refer to funds in an IOLTA account, the owner of which cannot be identified.

(ii) "Unclaimed funds" refer to funds in an IOLTA account, the owner of which can be identified but not

> **located or contacted, or the owner of which can be located but has indicated an intent not to claim them.**
>
> **(iii) The "owner" of unidentified or unclaimed funds refers to the person on whose behalf the lawyer was holding the funds and any court-appointed representative of that person or the person's estate.**
>
> **(iv) The "applicable threshold amount" is $500, or such amount as may be proposed by the Board, and after approval by the Supreme Judicial Court, published by the Board as the applicable threshold amount.**

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.[81] 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,

[81] It is true, however, as discussed in section III(B)(2), suspensions under Rule 1.15, that a lawyer who misappropriates third-party funds outside the practice of law may receive lesser discipline than a lawyer who misappropriates client funds.

the typical understanding of the term *retainer*,[82] 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.[83]

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*,[84] belongs to the lawyer when paid and need not (and in fact may not) be held as property of another or placed in the lawyer's trust account.[85] Lawyers sometimes confuse the two retainer versions, at considerable peril. Any lawyer charging a classic retainer should have a written document, created before or within a reasonable time after the retainer is received, that clearly demonstrates 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.[86] 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. The "no-commingling" rule prohibits a lawyer from keeping the earned fees in the

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82 Matter of Sharif, 459 Mass. 558, 2011-DDC-4735 (SJC 2011) (citing Matter of Garabedian, 415 Mass. 77, 80–81, 1993-DDC-1384 (SJC 1993)).

83 *Zak, supra* note 21, 476 Mass. at 1040; *Ruggiero, supra* note 35, 2023-DDC-6515 (SJ 2023).

84 *Sharif, supra* note 82, 459 Mass. at 568.

85 *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)).

86 *See, e.g., IOLTA Resources*, Board of Bar Overseers, https://www.massbbo.org/s/iolta-resources.

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 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."[87] Moreover, the "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."[88] 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.[89] The funds must remain in the trust account as long as the lawyer knows that a dispute regarding ownership of the funds exists.[90] 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.[91] In addition, "'[A]n attorney is not required to serve as a collection agent for [a third party],'"[92] but a lawyer holding funds in a trust account to which a third

87 Mass. R. Prof. C. 1.15(d)(2).

88 Mass. R. Prof. C. 1.15(c).

89 Mass. R. Prof. C. 1.15(b)(2)(ii).

90 The same is true if the lawyer knows that a *third party* disputes the lawyer's right to the trust funds. Mass. R. Prof. C. 1.15(b)(2)(ii); *see, e.g.*, Matter of Gannett, 489 Mass. 1007, 2022-DDC-6403 (SJC 2022) (disbarment for lawyer who intentionally misused trust funds when he deposited bank check in amount of $42,227.28 into his IOLTA account in connection with client matter and then withdrew funds as his purported legal fees in matter when he knew that bank disputed his entitlement to funds).

91 Frontier Enterprises, Inc. v. Anchor Company of Marblehead, Inc., 404 Mass. 506, 513 (1989).

92 *Id.* (quoting Blue Cross of Mass., Inc. v. Travaline, 398 Mass. 582, 590 (1986)).

party has a legitimate claim possesses a fiduciary duty to that third party not to distribute the funds until the claim is resolved.[93]

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.[94] This is because the 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) 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.[95] 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.[96]

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. Effective September 1, 2024, banks are also re-

93 *See* Matter of Hilson, 448 Mass. 603, 2007-DDC-3928 (SJC 2007) (indefinite suspension after respondent distributed funds held in escrow despite outstanding claims to funds).

94 Mass. R. Prof. C. 1.15(e)(6) refers to this as a "pooled account ('IOLTA account')."

95 *IOLTA Guidelines*, Massachusetts IOLTA, https://www.maiolta.org/for-attorneys. In 2024, the IOLTA Committee received $34 million in interest income and nearly $3.5 million from opt-out attorney registration fees, *pro hac vice* fees, *cy pres* awards, and undistributable IOLTA funds; *see Annual Report 2024*, Massachusetts IOLTA, https://maiolta.org/all-documents/33-annual-report/file. The committee uses the funds to support a significant amount of legal aid and projects to improve the administration of justice in Massachusetts.

96 *See* Matter of Montague, 2010-DDC-4649 (SJ 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."

quired to notify a lawyer whose IOLTA account has been dormant for two and a half years and file a report with the BBO if the lawyer has taken no action with respect to that account after three years.[97]

Unclaimed and unidentified IOLTA funds: Lawyers generally have a duty to promptly deliver to a client or third party any funds that the client or third party is entitled to receive.[98] Lawyers, however, sometimes accumulate unclaimed or unidentified funds in an IOLTA account because funds were not disbursed to or checks were not negotiated by the payees, or because past or present record-keeping practices were not adequate to determine the identity of the funds. Effective September 1, 2024, when a lawyer discovers unclaimed and/or unidentified funds in their IOLTA account, they must take steps to distribute those funds.[99] In the case of funds whose owners are known, the lawyer must make diligent efforts to locate the owners and remit the funds; in the case of funds whose owners are not known, the lawyer must employ all available resources to identify the owners.

Once an attorney has made duly diligent efforts, they *may* transmit the funds to the Massachusetts IOLTA Committee at any time. After three years of such efforts, a lawyer *must* transmit the funds to the committee. In either case, the funds must be accompanied by a report, in a form available on the IOLTA Committee's website, in which the attorney attests, under the pains and penalties of perjury, to the efforts made.[100] Transfers of amounts exceeding "the threshold amount" (currently $500) in any twelve-month period must be reported to the bar counsel within fourteen days of the transfer.[101] If the bar counsel or the BBO seeks further information about the efforts made to locate the owners of unclaimed funds or determine the ownership of unidentified funds, the lawyer must cooperate with those requests.[102]

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 a flat fee, which is defined 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."[103]

97 Mass. R. Prof. C. 1.15(h)(5). A dormant account is one that has had no activity for two and a half years, other than accruing interest on the attorney's deposit of funds to pay bank fees. Per Rule 1.15(h)(7), when a lawyer receives a bank notice of a dormant IOLTA account, the lawyer must distribute the funds in the account to the owners of the funds or inform the bank why the account should remain open.

98 Mass. R. Prof. C. 1.15(c).

99 Mass. R. Prof. C. 1.15(i). The revisions to Rule 1.15 were in response to the Supreme Judicial Court's decision in Matter of Olchowski, 485 Mass. 807, 2020-DDC-6675 (SJC 2020).

100 *See Unclaimed and Unidentified Funds*, Massachusetts IOLTA, https://www.maiolta.org/for-attorneys/undistributable-iolta-funds.

101 Mass. R. Prof. C. 1.15(i)(4).

102 Mass. R. Prof. C. 1.15(i)(5).

103 Mass. R. Prof. C. 1.15 cmt. 2A.

An attorney may deposit a flat fee directly into the operating account. However, if they choose 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 any unearned portion of that fee to the client.[104]

Mishandling other people's funds has been a persistent source of trouble for lawyers and has caused many to face BBO disciplinary proceedings. More than a thousand decisions between 1999 and 2025 refer to Rule 1.15. Hundreds of such reports also refer to Rule 1.5, and the bar counsel reports fee disputes as a significant source of client complaints.[105] 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. 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*,[106] the SJC confirmed the standards expressed in its 1984 decision *Matter of the Discipline of an Attorney*[107] (known as the "Three Attorneys" case). In 2025, in *Matter of Sargent*,[108] the SJC reaffirmed the application of these standards. 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.[109]

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104 *Id.* (Comment 2A addresses everything described in the paragraph in the text.) *See also* Mass. R. Prof. C. 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred"). *See*, *e.g.*, Matter of Hooker, 2018-DDC-5970 (BBO 2018) (public reprimand for lawyer who, until OBC intervened, retained entirety of client's $25,000 flat fee for estate work even though he failed to perform most of work, in violation of Rule 1.16(d)). For a thorough discussion of flat fees, *see* Anderson, *supra* note 8.

105 *See generally Annual Reports*, Board of Bar Overseers, https://www.massbbo.org/s/reports.

106 426 Mass. 183.

107 392 Mass. 827.

108 496 Mass. 505, 2025-DDC-6789 (SJC 2025).

109 426 Mass. at 187 (quoting Three Attorneys, 392 Mass. at 836).

An inadvertent misuse of funds held for others with some deprivation to the owner of the funds warrants a term suspension,[110] as does intentional misuse without deprivation or intent to deprive.[111] An unintentional misappropriation of funds without any deprivation to the funds' owners often leads to a public reprimand and, in some circumstances, a short-term suspension.[112] Commingling alone, without deprivation, results in an admonition or a public reprimand.[113] 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."[114]

1. Disbarment

Since *Schoepfer*,[115] the SJC has pointed to a constellation of aggravating and special mitigating factors when justifying either a disbarment or an indefinite suspension for an attorney's intentional misuse of trust funds accompanied by an intention to deprive or actual deprivation. Within this universe of guiding factors, restitution has been recognized as the shining polestar.[116] Thus, where a respondent has made full restitution to the injured client or third party in a timely fashion, an indefinite suspension is usually the sanction.[117] Conversely,

110 Matter of Jackman, 444 Mass. 1013, 1014, 2005-DDC-3564 (SJC 2005) (rescript) ("where, as here, the unintentional misconduct has resulted in even temporary deprivation, a term suspension is typical"); *see also* Matter of Johnson, 2018-DDC-5996 (SJ 2018) (three-month suspension for negligently misusing settlement funds with deprivation and failure to comply with record-keeping rules).

111 Matter of Carmel-Montes, 2019-DDC-6114 (SJ 2019) (six-month suspension for intentional misuse of retainer collected under unambiguous hourly fee agreement, without deprivation); Matter of Guerrero, 2015-DDC-5497 (SJ 2015) (six-month suspension, with conditions, for intentional misuse of escrow funds, without deprivation).

112 Matter of Cimini, 2024-DDC-6634 (SJ 2024); Matter of Murray, 455 Mass. 872, 879, 2010-DDC-4531 (SJC 2010) (citing Matter of Abromovitz, 2007-DDC-4070 (BBO 2007)); Matter of McCarthy, 2005-DDC-3682 (BBO 2005)).

113 *See, e.g.*, Matter of DeFeo, 2021-DDC-6332 (BBO 2021) (public reprimand for compliant trust account record-keeping and commingling); AD 21-21, 2021-ADM-6270 (BBO 2021) (admonition for accounting violations, commingling personal funds in trust account, and paying personal expenses out of trust account).

114 Matter of Watt, 430 Mass. 232, 236 (1999).

115 426 Mass. 183, 1997-DDC-2042 (SJC 1997).

116 *See Sargent, supra* note 108, 496 Mass. at 515 ("Restitution is a critical factor in determining whether disbarment or indefinite suspension is the appropriate sanction for intentional misuse with intent to deprive or with actual deprivation resulting"); Matter of LiBassi, 449 Mass. 1014, 1017 (2007) ("[T]he court generally considers whether restitution has been made in choosing between disbarment and indefinite suspension)." *Cf. Schoepfer, supra* note 109, 426 Mass. at 184 n.1, n.188 (holding that indefinite suspension was appropriate sanction, where attorney made full restitution with interest and court expressly did not consider or rely on attorney's additional disciplinary violations "to keep [its] analysis unaffected by extraneous considerations").

117 *See*, *e.g.*, Matter of Corbett, 478 Mass. 1004, 1005 (2017) (recognizing that "payment of

where the respondent has not promptly made the injured client or third party whole, disbarment is almost always the outcome.[118] Disbarment also typically results where there are aggravating factors (such as prior disciplinary history) or other misconduct is present, particularly when there has been a violation of Rule 8.4(c), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation."

Most recently, in *Sargent*, the SJC disbarred a lawyer who misappropriated personal injury protection (PIP) funds and engaged in other misconduct.[119] The lawyer represented a child who had been hit by a car and incurred significant medical expenses. The lawyer submitted to the driver's insurance company a claim for PIP funds that he supported with the child's various medical bills. The insurance company sent the lawyer a check for $8,000 in PIP funds, which the lawyer deposited into his IOLTA account. Beginning the next day, and continuing for two months through seventeen separate transactions, the lawyer withdrew the entire $8,000 in PIP funds for his own use. The bar counsel subsequently began an investigation and requested the lawyer's IOLTA records. The day before his response was due, the lawyer deposited $8,000 into his IOLTA account and then issued a check from that account to the child's mother in the amount of $8,000. In rejecting the lawyer's argument that there was no deprivation and that disbarment was, therefore, unwarranted, the SJC held that "the PIP funds became due to the child's medical providers upon the [lawyer's] receipt of those funds."[120] The lawyer's subsequent payment to the child's mother did not constitute restitution, the SJC further held, because the medical providers (not the child or her mother) were the injured parties.[121] Moreover, "the timing and the [lawyer's] motive provide[d] further reasons why his payment should not be credited as a mitigating factor."[122] The court rejected the lawyer's other claimed mitigation and noted several aggravating factors, which further supported the sanction.

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restitution may tip the balance toward imposition of an indefinite suspension rather than disbarment"), citing *Watt, supra* note 114, 430 Mass. at 236; Matter of Osagiede, 2008-DDC-4244 at 5 (SJ 2008), *aff'd by*, 453 Mass. 1001 (2009) ("Where restitution has been made, indefinite suspension is usually favored"), citing Matter of Bryan, 411 Mass. 288 (1992).

118 *See*, *e.g.*, Matter of Williams, 491 Mass. 1021, 1026 (2023) ("Where deprivation is ongoing, . . . the presumptive sanction is disbarment"); Matter of Collins, 2010-DDC-4532 at 1–2 (SJC 2010) ("Where . . . the attorney fails to repay the client in full, disbarment is indicated"); Matter of Dasent, 446 Mass. 1010, 1012–13 (2006) ("It is established that, where a respondent has intentionally misused client funds, and failed to pay his client all that was due to her, the usual and presumptive sanction is disbarment").

119 496 Mass. 505, 2025-DDC-6789 (SJC 2025).

120 496 Mass. at 511.

121 *Id.* at 515–16.

122 *Id.* at 516.

Another apt example is *Matter of Pasterczyk*,[123] 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 Williams*,[124] a lawyer was disbarred for intentional misuse of client funds with deprivation, punctuated by several aggravating factors. The lawyer, who specialized in medical malpractice cases, deducted her fees and costs from the settlement amounts before remitting the remainder to the client. In doing so, however, she intentionally overstated to the clients the litigation costs that her office paid by thousands of dollars, misused those funds, and deprived the clients.[125] On appeal from the single justice, the SJC affirmed that disbarment was the appropriate sanction where the respondent's already egregious conduct was aggravated by, inter alia, her lack of candor before the hearing committee and her attempt to shift the blame for her misconduct to a previously disbarred attorney who had worked for the firm.

In *Matter of Ablitt*,[126] the majority owner of a default services law practice was disbarred after gross mismanagement of the firm led to its demise. The firm was already in financial distress when the respondent hired a new chief financial officer (CFO) in 2011 to straighten out the accounts. But when the firm could no longer meet its operating expenses, the new CFO began paying operating expenses from IOLTA funds. The respondent ratified the CFO's conduct by failing to fire him when he learned of the misconduct. The court found that he was willfully blind to the misuse and failed to adequately supervise the accounting staff, even after he became aware of the misuse. Later, the respondent misrepresented the firm's financial status to a factoring company, which he engaged in an effort to keep the firm afloat; he also allowed the factor unauthorized excess to confidential client files. The court reasoned that disbarment was the appropriate sanction, where the bar counsel established not only respondent's intentional misuse of funds with deprivation but failure to supervise the accounting staff, misrepresentation to the factor, and disclosure of confidential information.

123 2013-DDC-5137 (SJ 2013).

124 491 Mass. 1021, 2023-DDC-6510 (SJC 2023).

125 Williams also engaged in record-keeping violations, failed to cooperate with the bar counsel's investigation, and failed to comply with an order of administrative suspension.

126 486 Mass. 1011, 2021-DDC-6281 (SJC 2021).

In *Matter of Dasent*,[127] the SJC disbarred a lawyer who commingled and misappropriated the client's funds. The respondent did not make restitution, failed to cooperate with the bar counsel, made misrepresentations during the disciplinary proceeding, and fabricated evidence.

You Should Know

Under the presumptions established by *Schoepfer* and its progeny, a lawyer who has intentionally used client or third-party funds for their own purposes and has either intended to deprive the client or third party of the funds, at least temporarily, or caused deprivation regardless of intent, will be indefinitely suspended or disbarred.[128] "Restitution is a critical factor in determining whether disbarment or indefinite suspension is the appropriate sanction for intentional misuse with intent to deprive or with actual deprivation resulting."[129]

Several other comparable examples exist in the disciplinary reports. In *Matter of McBride*,[130] 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*,[131] 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.[132]

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127 446 Mass. 1010, 2006-DDC-3738 (SJC 2006).

128 *Schoepfer, supra* note 116, 426 Mass. at 188.

129 *Sargent, supra* note 119, 496 Mass. at 515 ("Whether restitution justifies a reduction in sanction will depend on the totality of the circumstances, including the timing and the amount of the restitution payment").

130 449 Mass. 154, 2007-DDC-3919 (SJC 2007).

131 2012-DDC-5010 (SJ 2012).

132 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, 2003-DDC-3240 (SJC 2003) (included false testimony under oath concerning misappropriated assets); Matter of Paczkowski, 2010-DDC-4661 (SJ 2010) (included failure to cooperate with bar counsel); Matter of

In a few cases, the BBO and the court have considered whether to reduce the sanction in an intentional misuse case where the respondent proved that the misconduct was a result of addiction. 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*,[133] 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.[134] In *Matter of Collins*,[135] 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.[136]

2. Suspension

Based on the *Schoepfer* standard, a lawyer who intentionally misappropriates client or third-party funds with deprivation to the client may receive an indefinite suspension and not disbarment, if full restitution is voluntarily

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Sardeson, 2007-DDC-3966 (SJ 2007) (same); Matter of Dragon, 440 Mass. 1023, 1023–24, 2003-DDC-3243 (SJC 2003) (included lack of candor to bar counsel and vulnerability of clients, who were harmed); Matter of Bryan, 411 Mass. 288, 1991-DDC-1173 (SJC 1991) (failure to make restitution along with noncompliance with terms of temporary suspension).

133 2010-DDC-4636 (SJ 2010).

134 *See also* Matter of Gustafson, 1990-DDC-802 (SJ 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. Collins*, 455 Mass. 1020, 2010-DDC-4532 (SJC 2010) (attorney completed rehabilitation program, self-reported misappropriation of client funds to bar counsel, and paid back more than half of what he owed; indefinite suspension on condition that attorney complete restitution); Matter of Hull, 1990-DDC-344 (SJ 1990) (lawyer's rehabilitation efforts regarding addiction served as mitigation after misappropriation of client funds; indefinite suspension ordered); Matter of Hughes, 2023-DDC-6539 (SJ 2023) (lawyer disbarred for intentional misuse of client funds, where he failed to prove that his poor mental health, family circumstances, and cancer diagnoses had causal relationship to his misconduct, and failed to prove that his restitution was complete or made in good faith).

135 455 Mass. 1020, 2010-DDC-4532 (SJC 2010) (on its specific facts, indefinite suspension).

136 For a sample of such matters, *see, e.g.*, Matter of Thomas, 2019-DDC-6144 (SJ 2019); Matter of Knoblock, 2019-DDC-6143 (SJ 2019); Matter of Catala, 2012-DDC-5006 (SJ 2012); Matter of Reynolds, 2012-DDC-4946 (SJ 2012); Matter of Daniels, 2011-DDC-4792 (SJ 2011); Matter of O'Malley, 2010-DDC-4624 (SJ 2010); Matter of Lamond, 2010-DDC-4579 (SJ 2010); Matter of Connor, 2010-DDC-4612 (SJ 2010); Matter of Hodgdon, 2008-DDC-4185 (SJ 2008); Matter of Yonce, 2004-DDC-3436 (SJ 2004).

made in a timely fashion. As previously noted, the more serious sanction of disbarment typically results when restitution is not made or some additional factor is present.[137]

You Should Know

The typical sanction for intentionally misappropriating client or third-party funds with deprivation to the client or third party is disbarment or an indefinite suspension, absent other misconduct. If the attorney voluntarily makes timely and full 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 *Schoepfer*,[138] the court imposed an indefinite suspension for a lawyer intentionally misappropriating client funds. In *Matter of Thalheimer*,[139] 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."[140] In *Matter of Abelson*,[141] 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

137 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.'" *LiBassi*, 449 Mass. 1014, 1017, 2007-DDC-3923 at 2–3 (SJC 2007) (quoting Matter of Hollingsworth, 2000-DDC-2734 at 5 (SJ 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 Collins*, 455 Mass. 1020, 1022, 2010-DDC-4532 (SJC 2010) (citing, as a source of authority for "prudent investor" rule as a calculation of rate of interest, Piemonte v. New Boston Garden Corp., 377 Mass. 719, 735 (1979)). The SJC has also declined to reduce disbarment to an indefinite suspension when restitution was not based on true remorse for the lawyer's misconduct. *Corbett, supra* note 117, 478 Mass. 1004.

138 426 Mass. 183, 1997-DDC-2042 (SJC 1997).

139 2008-DDC-4347 (SJ 2008).

140 *Id.* at 4.

141 2008-DDC-4208 (SJ 2008).

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*,[142] the attorney commingled funds and misappropriated his clients' funds, along with other misconduct. The SJC vacated an order of a single justice imposing a thirty-month suspension and ordered an indefinite suspension, concluding that nothing in the record "warrant[ed] a lesser sanction than what is usual and presumptive."[143] In *Matter of Haese*,[144] the respondent was disbarred, despite making restitution, because of the seriousness of his misconduct. In *Matter of Strauss*,[145] the court ordered the indefinite suspension of a lawyer who had misused client settlement funds of less than $3,000 before returning them to the client several weeks after they were due to her. The respondent claimed that, although he had withdrawn the client's funds from his IOLTA account, he had at all relevant times maintained an equivalent amount in cash in an envelope on his desk. Rejecting that defense both factually and legally, the court reiterated the *Schoepfer* standard, which makes no exceptions for misusing small amounts of client funds for short periods of time, and declared that client funds may not be treated as "fungible commodities."[146]

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.[147] One such example is *Matter of Guidry*,[148] 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."[149] Respondents have relied on *Guidry* on occasion to justify a lesser

142 444 Mass 1002, 2005-DDC-3565 (SJC 2005).
143 *Id.* at 1003. For a sampling of other indefinite suspension matters similar to those described in the text, *see, e.g.*, Matter of Eleey, 2012-DDC-5089 (SJ 2012); Matter of Montague, 2010-DDC-4649 (SJ 2010); Matter of Tolins, 2008-DDC-4212 (SJ 2008); Matter of Moriarty, 2005-DDC-3591 (SJ 2005); Matter of Gonick, 1999-DDC-2540 (SJ 1999); Matter of Milgroom, 1998-DDC-2391 at 13 (SJ 1998).
144 468 Mass. 1002, 2014-DDC-5266 (SJC 2014).
145 479 Mass. 294, 2018-DDC-5927 (SJC 2018).
146 *Id.* at 301.
147 *Schoepfer*, 426 Mass. at 188 ("If a disability caused a lawyer's conduct, the discipline should be moderated").
148 1999-DDC-2542 (SJ 1999).
149 *Id.* at 3.

sanction than an indefinite suspension.[150] For instance, in *Matter of Dodd*,[151] 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.[152]

The court has distinguished between misappropriating client funds while in the role of counsel and misappropriating third-party funds outside the 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.[153]

In *Matter of Barrett*,[154] 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 *Hilson*,[155] the respondent was indefinitely suspended for converting third-party funds held while representing a real estate broker. The court wrote, "Had the respondent

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150 For those that succeeded, *see* Matter of Sweeney, 2016-DDC-5596 (SJ 2016) (eighteen-month suspension); Matter of Greenidge, 2014-DDC-5279 (SJ 2014) (one-year suspension); Matter of Jebb, 2008-DDC-4243 (SJ 2008) (thirty-month suspension). For those that did not succeed, *see* Matter of (John) Johnson, 444 Mass. 1002, 2005-DDC-3565 (SJC 2005) (indefinite suspension); Matter of (Gale) Johnson, 2007-DDC-4042 (SJ 2007), *aff'd*, 452 Mass. 1010, 2008-DDC-4149 (SJC 2008) (indefinite suspension).

151 2005-DDC-3605 (SJ 2005).

152 *Id.* at 7; *see also Sweeney, supra* note 150, 2016-DDC-5596 (SJ 2016) (attorney suspended for eighteen months instead of indefinitely for intentionally misusing client funds to pay his daughter's college tuition so that she would have access to health insurance to cover future surgeries related to "horrific" car accident in which she was severely injured; this mitigating circumstance was deemed "exceptional" because attorney honestly and reasonably believed that his actions were necessary to save his daughter's life).

153 Matter of Hilson, 448 Mass. 603, 619, 2007-DDC-3928 at 9 (SJC 2007).

154 447 Mass. 453, 464–65, 2006-DDC-3737 (SJC 2006).

155 448 Mass. 603, 2007-DDC-3928 (SJC 2007).

simply converted third-party funds while acting outside the practice of law, a two-year suspension might be in order."[156] In several matters, lawyers have been suspended for converting their firm's funds to their own use.[157]

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.[158] In *Sharif*,[159] the SJC explained the difference:

> [W]here an attorney intentionally uses funds advanced to pay legal fees with intent to deprive the client of those funds, either permanently or temporarily, or where the client was actually deprived of those funds, regardless of the attorney's intent, the attorney's misconduct is serious and merits a severe sanction. But we do not agree that the sanctions of disbarment or indefinite suspension should presumptively apply to all such cases . . . . The presumptive sanction of disbarment or indefinite suspension that we established in cases involving the intentional misuse of traditional client funds is not mandatory, but "[a]n offending lawyer has a heavy burden to demonstrate" that the sanction should not be applied, and we will not depart from the presumed sanction without providing "clear and convincing reasons for doing so."[160]

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156 *Id.* at 618. *See also* Matter of Cortiella, 2007-DDC-4034 (SJ 2007) (as CEO of corporation, respondent misdirected money to himself; full restitution paid; two-year suspension).

157 *See*, *e.g.*, Matter of Sablone, 2022-DDC-6420 (SJ 2022) (attorney suspended for one year and one day for obtaining $1,952.85 in reimbursement from his firm, where he had already been reimbursed by another entity); Matter of Levy, 2016-DDC-5685 (SJ 2016) (lawyer suspended for one year and one day for stealing retainer funds from firm escrow account); Matter of Carreiro, 2009-DDC-4386 (SJ 2009) (two-year suspension for converting check payable to employer firm, aggravated by fabricated check in effort to conceal misuse); Matter of Chum, 2013-DDC-5191 (SJ 2013) (eighteen-month suspension for two incidents of stealing cash from employer; restitution paid).

158 *See* Matter of Knight, 495 Mass. 1038, 1043, 2025-DDC-6760 (SJC 2025) ("Although the presumptive sanction for intentional misuse of traditional client funds is disbarment or indefinite suspension, we do not apply the same presumption in cases involving the intentional misuse of retainer funds with deprivation"); *see, e.g.*, *Carmel-Montes, supra* note 111, 2019-DDC-6114 (SJ 2019) (six-month suspension; BBO determined that lawyer's withdrawal of $29,000 retainer from his IOLTA account before it was earned was intentional misuse without deprivation, even though respondent informed client he would seek no further fees, and respondent believed it was flat fee); Matter of Hopwood, 2008-DDC-4217 (SJ 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 *Schoepfer*"); Matter of Pudlo, 460 Mass. 400, 2011-DDC-4734 (SJC 2011) (one-year suspension, six months stayed with conditions); *Sharif, supra* note 84, 459 Mass. 558, 2011-DDC-4735 (SJC 2011) (three-year term suspension, third year stayed).

159 459 Mass. 558, 2011-DDC-4735 (SJC 2011).

160 *Id.* at 566–67 (quoting *Schoepfer, supra* note 158).

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."[161] 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*.[162]

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 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.[163]

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161 *Jackman, supra* note 110, 444 Mass. 1013, 1014, 2005-DDC-3564 (SJC 2005).

162 *See, e.g.*, Matter of Pitman, 2020-DDC-6183 (SJ 2020) (one-year-and-one-day suspension for negligently engaging in record-keeping violations, misusing client funds, and failing to provide itemized bill to client prior to withdrawing retainer funds); *Murray, supra* note 112, 455 Mass. 872 (six-month suspension); Matter of Wilsker, 2009-DDC-4474 (SJ 2009) (nine-month suspension); Matter of Ryan, 2008-DDC-4250 (SJ 2008) (nine-month suspension); Matter of Sylvia, 2008-DDC-4237 (SJ 2008) (three-month suspension).

163 *Murray*, 455 Mass. at 887–88. *See also* Matter of Mahlowitz, 2021-DDC-6312 (SJ 2021) (six-month suspension for receiving part of fee in cash and failing to deposit cash into account or prove cash had been properly safeguarded).

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.[164]

3. Public Reprimand

Lawyers often receive public reprimands for mishandling funds held in trust when the misconduct results from negligence and the client suffers no deprivation.[165] The disciplinary reports are filled with such examples.[166]

You Should Know

The typical sanction for a lawyer who negligently misappropriates client funds with no deprivation to the client, or who mismanages a trust account, is a public reprimand unless there is additional misconduct or there are aggravating circumstances.

In *Matter of Franchitto*,[167] 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.

Public reprimands are also administered when attorneys engage in serious, repeated, or aggravated record-keeping violations. In *Matter of Chavin*,[168] an attorney was publicly reprimanded for failing to maintain any of the records

164 *See, e.g.*, Matter of Manoff, 2013-DDC-5157 (SJ 2013); Matter of LaPre, 2010-DDC-4683 (BBO 2010).

165 *Jackman, supra* note 161, 444 Mass. 1013, 1014.

166 *See, e.g.*, Matter of Graves, 2022-DDC-6444 (BBO 2022); Matter of O'Connor, 2022-DDC-6446 (BBO 2022); Matter of Parry, 2017-DDC-5837 (BBO 2017). *But see Cimini, supra* note 112, 2024-DDC-6634 (SJ 2024) (three-month suspension, stayed for one year on conditions, for trust account violations and two instances of negligent misuse, aggravated by lawyer's absence of written fee documents, his commingling of personal money and trust funds, and his experience as attorney).

167 448 Mass. 1007, 2007-DDC-3932 (SJC 2007).

168 2024-DDC-6619 (BBO 2024).

required by Rule 1.15. For example, he failed to maintain a compliant IOLTA check register with a client identifier after each transaction, maintain individual client ledgers, maintain a bank fees and charges ledger, and perform a three-way reconciliation of the account every sixty days and maintain reconciliation reports. While the BBO also considers mitigation (the lawyer's health problems) and aggravation (a prior but dissimilar admonition), *Chavin* reflects that a lawyer who entirely abdicates their record-keeping responsibilities is likely to receive at least a public reprimand.[169]

4. Admonition

Admonitions are common for lawyers who commingle client funds with their own funds and for partial failures to comply with all of the record-keeping requirements set forth in Rule 1.15. In general, most of the admonitions in this area result from the lawyer's record-keeping violations that do not amount to a full-blown failure to maintain records.[170]

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169 *See, e.g.*, Matter of Avalon, 2022-DDC-6438 (BBO 2022); Matter of Castillo, 2019-DDC-6138 (BBO 2019); Matter of Cartmill, 2019-DDC-6050 (BBO 2019); Matter of Maguire, 2019-DDC-6089 (BBO 2019); Matter of Keaveny, 2019-DDC-6122 (BBO 2019); Matter of Leonard, 2018-DDC-5964 (BBO 2018); Matter of Scola, 2018-DDC-5941 (BBO 2018); Matter of Green, 2018-DDC-5940 (BBO 2018); Matter of Weiner, 2018-DDC-5957 (BBO 2018); Matter of Paolino, 2017-DDC-5805 (BBO 2017).

170 *See, e.g.*, AD 25-04, 2025-ADM-6720 (BBO 2025) (admonition for authorizing disbursement of funds from IOLTA account before funds were available for withdrawal, for failing to maintain a compliant bank fees ledger, and for failing to withdraw funds belonging to lawyer at earliest reasonable time); AD 24-07, 2024-ADM-6692 (BBO 2024) (admonition for failing to maintain compliant check registers, client ledgers, and reconciliation reports; and for disbursing funds on behalf of clients when account did not yet hold sufficient funds for those clients to cover disbursal, thus creating negative client fund balances in account); AD 22-08, 2022-ADM-6363 (BBO 2022) (admonition for creating two-way rather than three-way reconciliation reports, for depositing firm funds in IOLTA account, and for failing to promptly disburse funds once they became due from account); AD 22-01, 2022-ADM-6357 (BBO 2022) (admonition for failing to prepare compliant reconciliation report, causing lawyer to fail to detect shortfall in IOLTA account prior to issuing check, which was later dishonored and caused negative client balance in account).

CHAPTER TWELVE

Candor to the Court and Third Parties (Rules 3.3, 4.1(a), and 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. They 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. Candor Toward 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**

adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false, except as provided in Rule 3.3(e). If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding including all appeals, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed.

(1) If a lawyer discovers this intention before accepting the representation of the client, the lawyer shall not accept the representation.

(2) If, in the course of representing a defendant prior to

trial, the lawyer discovers this intention and is unable to persuade the client not to testify falsely, the lawyer shall seek to withdraw from the representation, requesting any required permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to withdraw, the lawyer may not prevent the client from testifying.

(3) If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals.

A. The Lessons of Rule 3.3

Most lawyers understand Rule 3.3 as the "no perjury" rule. While it has several 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 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] In other words, "half-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 any tribunal "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed

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1 Mass. R. Prof. C. 3.3(a)(1).
2 Mass. R. Prof. C. 3.3(a)(3).
3 Mass. R. Prof. C. 3.3(b).
4 Mass. R. Prof. C. 3.3(a)(3), (b).
5 Mass. R. Prof. C. 3.3(a)(3).
6 Mass. R. Prof. C. 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 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, 2013-DDC-5186 (SJ 2013) ("calculatedly misleading" statement violates Rule 3.3(a)); Matter of O'Toole, 2015-DDC-5488 (SJ 2015) (citing authorities). In Matter of Angwafo, 453 Mass. 28, 2009-DDC-4348 (SJC 2009), the BBO concluded that the "deceitful" statements the respondent made were not sufficiently false to violate Rule 3.3 but did violate Rule 8.4(c). However, in Matter of Farina, 2017-DDC-5833 (SJ 2017), a lawyer's somewhat vague assurance to the court that his client was doing "very well" and had put his past drug issues behind him, where the client had just been arrested on new drug charges in another state, constituted a sufficiently clear misrepresentation to have violated Rule 3.3(a).
8 *O'Toole*, 2015-DDC-5488 at 12 (SJ 2015); *see also* Matter of Pemstein, 2000-DDC-2693 (SJ 2000).
9 Kannavos v. Annino, 356 Mass. 42, 48 (1969).
10 Mass. R. Prof. C. 3.3(d) (2015).

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 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 imposed by the previous Massachusetts disciplinary code, which limited that obligation to revealing nonprivileged material.[13] The duties Rule 3.3 establishes to rectify false testimony 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 and may not use that evidence in their closing argument.

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

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11 Mass. R. Prof. C. 3.3(a)(2).

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 *Angwafo, supra* note 7, 453 Mass. at 34. *See also* Matter of Zimmerman, 2001-DDC-2932 at 4 (SJ 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.

two years for a lawyer making false statements under oath. The Supreme Judicial 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, (4) to further the lawyer's interests, not the client's, and (5) about a matter that goes to the substantive merits of the litigation. The more of these five factors are present, the more serious the sanction. Lesser sanctions have applied when 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 governs.

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 sections II(B)(3) and (4).

1. Disbarment

An attorney giving false testimony under oath may be disbarred, but usually in egregious circumstances, typically those involving other misconduct

16 Matter of Goodman, 2006-DDC-3832 at 4 (SJ 2006). *See also Zimmerman, supra* note 14, 2001-DDC-2932 at 6 (SJ 2001) ("one-year suspension is 'standard' sanction for material misrepresentations to tribunal," citing Matter of McCarthy, 416 Mass. 423, 1993-DDC-1265 (SJC 1993)); Matter of Neitlich, 413 Mass. 416, 1992-DDC-1167 (SJC 1992).

17 Matter of Sousa, 2009-DDC-4396 at 5 (SJ 2009) (citing Matter of O'Donnell, 2007-DDC-3971 at n.3 (SJ 2007)). *See also* Matter of Shaw, 427 Mass. 764, 767–69, 1998-DDC-2234 (SJC 1998) (two-year suspension for false testimony in court, filing false affidavits, and issuing misleading opinion letters signed under oath with forged notarization).

18 *Shaw*, 427 Mass. at 769 (quoting Matter of Budnitz, 425 Mass. 1018, 1019, 1997-DDC-2212 (SJC 1997)).

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]

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

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[19] *See* Matter of Balliro, 453 Mass. 75, 86, 2009-DDC-4351 at 7 (SJC 2009) (citing Matter of Sleeper, 251 Mass. 6 (1925)); *Budnitz*, 425 Mass. 1018. 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-DDC-3240 (SJC 2003) (attorney disbarred for lying to judge under oath, misappropriating client funds, engaging in ex parte communications with judge in effort to influence outcome of proceeding, divulging confidential client information, and violating court orders).

[21] *Bailey*, 439 Mass. 134 at 151.

[22] 455 Mass. 722, 2010-DDC-4533 (SJC 2010).

[23] *See also* Matter of Kelly, 2010-DDC-4564 (SJ 2010) (disbarment after felony conviction on twenty counts, including forging documents submitted to court); Matter of Lonardo, 2009-DDC-4366 (SJ 2009) (disbarment after conviction of conspiracy to commit insurance fraud). In Matter of Foley, 439 Mass. 324, 331, 2003-DDC-3242 (SJC 2003) (three-year suspension where respondent fabricated defense for criminal defense client but never presented it because putative client was actually undercover FBI agent; case was *nolle prossed* when district attorney learned defendant's true identity and that his arrest had been part of undercover investigation). 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.

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]

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

24 2009-DDC-4396 at 5 (SJ 2009).

25 For other instances of the presumptive sanction of a two-year suspension for false evidence made under oath, *see, e.g.*, *Shaw, supra* note 18, 427 Mass. 764 (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, 1998-DDC-2459 (SJ 1998) (two-year suspension for lying under oath about relationship with suspended attorney working in his office, mishandling bankruptcy proceedings, and charging contingent fee in criminal case, aggravated by testifying falsely to hearing committee).

26 Matter of Slavitt, 2006-DDC-3826 (SJ 2006), *modified on appeal*, 449 Mass. 25, 2007-DDC-3926 (SJC 2007); Matter of Macero, 2011-DDC-4811 (SJ 2011) (presumptive sanction is one-year suspension).

27 *Sousa, supra* note 24, 2009-DDC-4396 at 5 (SJ 2009) (citing *O'Donnell, supra* note 17, 2007-DDC-3971 at n.3 (SJ 2007)).

28 *See* Matter of Powell, 2014-DDC-5330 at 4 n.2 (SJ 2014) (noting that "[c]ases involving false affidavits usually result in a one-year suspension," but imposing six-month suspension in light of lack of materiality); Matter of Livingstone, 2011-DDC-4794 (SJ 2011) (one-year suspension by stipulation); Matter of Cross, 1999-DDC-2578 (BBO 1999) (public reprimand in light of lack of materiality). *But see* Matter of Diviacchi, 475 Mass. 1013, 2016-DDC-5707 (SJC 2016) (twenty-seven-month suspension standard after respondent filed false complaint signed under oath, then relied on false statements in arguments to court, and for other misconduct).

29 2007-DDC-3971 (SJ 2007).

30 439 Mass. 324, 2003-DDC-3242 (SJC 2003).

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. In *Matter of Nissenbaum*,[31] a lawyer serving as counsel to a court-appointed guardian received a three-year suspension for an array of misconduct that included a false denial before the probate court, not under oath, that he was also representing the ward's adult children in the same case, an obvious conflict situation.

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 witness[32] or concerning the lawyer's personal affairs. (In 2015, the SJC added a comment 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."[33]) In *Matter of Finnerty*,[34] the respondent was suspended for six months after he intentionally misrepresented to the Probate and Family Court (under penalties of perjury[35]) 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."[36] In *Matter of Angwafo*,[37] the respondent was suspended for one month for misstating financial and other matters in a Probate and Family Court proceeding. She suffered from extreme domestic violence, amounting to "terror" at the time.[38] In *Matter of Leahy*,[39] the single justice suspended the respondent for two months after he submitted false affidavits in a dispute about custody

31 2018-DDC-5962 (SJ 2018).

32 Matter of Bartley, 2014-DDC-5352 (SJ 2014) (respondent suspended for one year and one day for false testimony as witness).

33 Mass. R. Prof. C. 3.3 cmt. 1. *See also infra* discussion accompanying note 98.

34 418 Mass. 821, 1994-DDC-1643 (SJC 1994).

35 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.

36 *Finnerty*, 418 Mass. at 830. In *Angwafo, supra* note 14, 453 Mass. 28, 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." *Finnerty*, 418 Mass. at 828.

37 453 Mass. 28, 2009-DDC-4348 (SJC 2009).

38 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).

39 2012-DDC-4968 (SJ 2012).

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."[40] The respondent's lack of financial motive justified a shorter suspension. In *Matter of Vinci*,[41] 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.[42]

In *Matter of Balliro*,[43] 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 recommendation of a public reprimand, the SJC disagreed and imposed the six-month suspension.[44]

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

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[40] *Id.* at 12 (citing Matter of Ring, 427 Mass. 186, 1998-DDC-2401 (SJC 1998) (three months); Matter of Kersey, 432 Mass. 1020, 2000-DDC-2684 (SJC 2000) (three months); *Finnerty, supra* note 36, 418 Mass. 821 (six months); Matter of Kilkenny, 2010-DDC-4615 (SJ 2010) (three months)).

[41] 2007-DDC-4040 (SJ 2007). For a similar type of misconduct, *see* Matter of Wong, 2005-DDC-3602 (SJ 2005) (one-year suspension where lawyer failed to update her personal bankruptcy filings to show increased income; presumably original filing was under oath, but lawyer omitted facts rather than misstated facts). *See also* Matter of Zizza, 2020-DDC-6243 (SJ 2020) (six-month suspension, with three months stayed on conditions, for lawyer who failed to include pending personal injury lawsuits on her bankruptcy statements of assets).

[42] *See also* Matter of Pezza, 2013-DDC-5211 (SJ 2013) (one-year-and-one-day suspension for submitting false affidavit to court to help acquaintance; only Rules 8.4(c) and (d) cited); *Powell, supra* note 28, 2014-DDC-5330 (SJ 2014) (stipulation; suspension of six months and one day for false affidavit in same proceeding as *Pezza*; no rules cited).

[43] 453 Mass. 75, 2009-DDC-4351 (SJC 2009).

[44] 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, 2002-DDC-3074 (SJC 2002) (attorney suspended for two months after conviction of misdemeanor arising from violent assault on estranged wife)." *Balliro, supra* note 19, 2009-DDC-4351 at 7 (SJC 2009). *See also Angwafo, supra* note 36, 453 Mass. 28 (one-month suspension for false statements resulting from severe domestic abuse).

suspension. For instance, in 1993, in *Matter of McCarthy*,[45] 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*,[46] 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 later 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.[47]

In 2003, the SJC suggested stiffer penalties for misrepresentation. In *Matter of Griffith*,[48] 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.[49]

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*,[50] 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*,[51] 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

45 416 Mass. 423, 1993-DDC-1265 (SJC 1993). At the time, a one-year suspension required a reinstatement hearing.
46 413 Mass. 416, 1992-DDC-1167 (SJC 1992).
47 *See* Matter of Corben, 2010-DDC-4597 (SJ 2010) (attorney fabricated story to challenge parking tickets); Matter of Cosmos, 2006-DDC-3835 (SJ 2006) (false statement on pleading).
48 440 Mass. 500, 2003-DDC-3405 (SJ 2003).
49 *Id.* at 509 (citing *Finnerty, supra* note 40, 418 Mass. 821).
50 2007-DDC-4010 (SJ 2007).
51 2004-DDC-3442 (SJ 2004).

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engaged in an impermissible business relationship with the client. In *Matter of Carchidi*,[52] 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.[53] In *Matter of Munroe*,[54] 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*,[55] 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*,[56] a newly admitted lawyer was suspended for six months, with probation conditions, after preparing false affidavits and backdating documents in an effort to reinstate cases dismissed because of his carelessness. The single justice in *MacDonald* deemed that conduct more egregious than that at issue in *Matter of Long*,[57] 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*.

In *Matter of Macero*,[58] the single justice adopted the BBO memorandum, which declined to recommend a suspension greater than one year, citing *Neitlich* and *McCarthy* for the "presumptive sanction" of a "one-year suspension."[59] In

52 2013-DDC-5143 (SJ 2013). The report implies that the accounting filed with the court was *not* made under oath.

53 For similar violations of Rule 3.3 where the attorney filed a false account in Probate and Family Court, *see* Matter of Zadworny, 2010-DDC-4572 (SJ 2010) (attorney's violation of Rule 3.3 by filing a false account in probate court led to an indefinite suspension); Matter of Steinkrauss, 2010-DDC-4641 (SJ 2010) (violation led to order accepting respondent's resignation); Matter of Nicholls, 2010-DDC-4598 (SJ 2010) (attorney disbarred after misrepresenting his handling of escrow funds in accounting to the court); Matter of Reardon, 2006-DDC-3838 (SJ 2006) (attorney was disbarred for filing false account with Probate and Family Court, saying that he had distributed funds to beneficiary's estate when no such distributions were made).

54 2010-DDC-4635 (SJ 2010).

55 2018-DDC-5930 (SJC 2018).

56 2007-DDC-3984 (SJ 2007).

57 2000-DDC-2751 (SJ 2000).

58 2011-DDC-4811 (SJ 2011).

59 *Id.*

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 BBO memorandum did not refer to the court's warning in *Griffith* regarding possible stiffer sanctions.

As a single justice observed in *Matter of Francoeur*,[60] the lengths of suspension imposed on lawyers for making false representations to a court may depend on whether the misrepresentation pertained to a procedural matter, as opposed to a misrepresentation "central to the substance of the litigation," with the latter category tending to result in a longer term of suspension. The single justice also suggested the presence or absence of planning and deliberation behind the lawyer's misconduct as a factor that helps explain the range of suspensions lawyers have received for violating Rule 3.3(a). Consistent with the justice's observations, lawyers have not infrequently received suspensions of just six months or six months and one day for misrepresentations relating to procedural matters within a case rather than those affecting the substantive merits of the dispute.[61] Examples of "procedural" misrepresentations include conduct by lawyers who forge the signature of an absent individual to an otherwise truthful document or statement. Such lawyers tend to receive a short 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*,[62] 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*,[63] an attorney received a public reprimand after he, with the client's authorization, signed the client's

60 2022-DDC-6425 (SJ 2022).

61 *See O'Toole, supra* note 8, 2015-DDC-5488 (SJ 2015) (six months for making misrepresentations to court and opposing counsel concerning status of funds held in escrow); Matter of Surprenant, 2011-DDC-4825 (SJ 2011) (misrepresentations and false certifications to bankruptcy court as to client's participation in credit counseling and other matters); Matter of Smoot, 2010-DDC-4590 (SJ 2010) (six months and one day, with three months stayed, for misrepresentation that deceased opposing counsel had been served with summary judgment motion); Matter of Shuman, 2001-DDC-2875 (SJ 2001) (six months for misrepresentations as to expert witness's anticipated testimony).

62 2003-DDC-3300 (SJ 2003).

63 2006-DDC-3849 (BBO 2006).

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).

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*,[64] 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.

In *Matter of Cook*,[65] a lawyer received a public reprimand, by stipulation, for filing a will in the probate court that he had directed his administrative assistant to notarize despite the fact that she had not been present at the time the will was signed.

4. Admonition

Few lawyers who have violated Rule 3.3 have received mere admonitions. In AD 15-02,[66] 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 06-41,[67] 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

64 1999-DDC-2578 (BBO 1999).
65 2018-DDC-5999 (BBO 2018).
66 2015-ADM-5528 (BBO 2015) (supervisor stipulated to term suspension). Matter of Newman, 2015-DDC-5464 (SJ 2015).
67 2006-ADM-3908 (BBO 2006).

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.

The only other admonition related to Rule 3.3 concerns Rule 3.3(d), which pertains to disclosure during an ex parte proceeding. In AD 00-24,[68] 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. 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 nonmaterial 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 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

[68] 2000-ADM-2790 (BBO 2000).

> 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.[69]

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.[70] (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,[71] 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."[72] 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).[73] 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."[74]

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.[75]

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69 Mass. R. Prof. C. 4.1 cmt. 2.

70 *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).

71 *See supra* notes 1–14.

72 Mass. R. Prof. C. 4.1 cmt. 1.

73 *O'Toole, supra* note 61, 2015-DDC-5488 (SJ 2015) (citing authorities). *See also Hession, supra* note 7, 2013-DDC-5186 (SJ 2013) ("calculatedly misleading" statements, even if literally true, may qualify as misrepresentations; addressing Rule 3.3(a), not Rule 4.1). In *Angwafo, supra* note 44, 453 Mass. 28, 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).

74 Mass. R. Prof. C. 8.4(c). *See* Matter of Levy, 2009-DDC-4489 (BBO 2009) (attorney who misrepresented terms while acting as 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.

75 Matter of Crossen, 450 Mass. 533, 565–66, 2008-DDC-6871 (SJC 2008) (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(a)

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.[76] Moreover, several lawyers have been disbarred for such misconduct when combined with other serious misconduct. For example, in *Matter of Pepyne*,[77] 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*,[78] 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*,[79] 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.

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).[80]

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[76] *See, e.g.*, Matter of Concemi, 422 Mass. 326, 1996-DDC-1065 at 2 (SJC 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 lawyer); Matter of Walsh, 1997-DDC-1611 (SJ 1997) (affidavit of resignation accepted and disbarment ordered after conviction for making false statements to 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, 1996-DDC-1964 (SJC 1996).

[77] 2010-DDC-4608 (SJ 2010).

[78] 2007-DDC-4143 (SJ 2007).

[79] 2007-DDC-3979 (SJ 2007).

[80] For other examples of a lawyer disbarred for a combination of misconduct, including misrep-

2. Suspension

The sanction for lawyers who misrepresent facts in order to deceive others and cause them harm is most 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.[81] Nevertheless, lawyers have incurred suspensions for periods longer than one year for violating Rule 4.1(a). In *Matter of Friery*,[82] 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 "MD" 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.

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*,[83] 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*,[84]

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resentation to others, *see, e.g.*, Matter of Ablitt, 2020-DDC-6191 (SJ 2020) (misrepresentations to factoring company regarding law firm's financial condition); Matter of Connolly, 2007-DDC-4047 (SJ 2007) (cover-up of neglect of probate matters); Matter of Roberts, 2006-DDC-3785 (SJ 2006) (misrepresentations to cover for mishandling client funds); Matter of McDonald, 2004-DDC-3561 (SJ 2004) (misrepresentations about mishandling of client funds, including in bankruptcy proceeding).

[81] *Goodman, supra* note 16, 2006-DDC-3832 (SJ 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").

[82] 2012-DDC-4990 (SJ 2012).

[83] 2011-DDC-4784 (SJ 2011).

[84] 2010-DDC-4610 (SJ 2010).

the respondent participated in the same schemes as the lawyer in *Alberino*. She was suspended for one year and one day, the lighter discipline likely the result of her having less responsibility for orchestrating the scheme.[85] Other lawyers involved in fraudulent real estate transactions have received similar suspensions, with the length of the suspension seemingly determined by the respondent's level of responsibility and the number of transactions affected by misrepresentations.[86]

In *Matter of Goodman*,[87] the single justice imposed a one-year suspension, with a reinstatement petition and hearing required,[88] for what he termed the respondent's "brazen" misrepresentations while representing clients in personal injury cases. In one matter, the attorney made false statements to a health insurer in order to release its lien against the proceeds of a client's recovery. In another case, that attorney failed to disclose his client's death to the insurer and implied that the plaintiff was alive. By comparison, in *Matter of Mulvey*,[89] 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*,[90] the lawyer was suspended for one year and one 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*,[91] 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 miscon-

85 *See also* Matter of Sementelli, 2013-DDC-5209 (SJ 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, not Rule 4.1.

86 *See, e.g.*, Matter of Palmer, 2009-DDC-4451 (SJ 2009) (twenty-one-month suspension for executing false HUD-1 settlement statements); Matter of Robbins, 2008-DDC-4288 (SJ 2008) (nine-month suspension for participation in real estate closing fraud; lawyer acted at employer's direction).

87 2006-DDC-3832 (SJ 2006).

88 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 [hereinafter SJC Rule] 4:01, § 18(2). 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 one year and one day, *see* chapter 4.

89 2009-DDC-4417 (SJ 2009).

90 2004-DDC-3435 (SJ 2004).

91 2001-DDC-2873 (SJ 2001).

duct to previous disciplinary matters, concluded that a one-year suspension was appropriate.[92] 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 Hass*.[93] In *Hass*, the SJC affirmed the decision of a single justice ordering a two-month suspension for a lawyer who, in the course of assisting his client in obtaining multiple cash advances against a $6,600 personal injury settlement, falsely represented to two separate legal funding companies that his client had not received any prior cash advances against her claim.

3. Public Reprimand

Aside from instances of lying to clients (misconduct not covered by Rule 4.1(a), which only applies to third persons), lawyers have rarely received less than a suspension in Massachusetts for making misrepresentations outside of court in violation of this rule. In *Matter of Cauley*,[94] however, an in-house lawyer who had neglected to obtain her self-insured company's authorization to settle a $250,000 personal injury claim received a public reprimand, by stipulation, for repeatedly lying to outside counsel that the resulting delay in issuing payment to the plaintiff was due to a problem with "the insurer." The client company ultimately was forced to pay the $250,000, plus interest, attorney's fees, costs, and contempt sanctions arising from the plaintiff's subsequent efforts to enforce the unauthorized settlement. The BBO summary in *Cauley* notes the existence of "extraordinary circumstances in mitigation concerning family illnesses" that warranted resolving the case with just a public reprimand.[95]

4. Admonition

The board has, on occasion, concluded that some misrepresentations to third parties in violation of Rule 4.1 may warrant an admonition, particularly if the recipient has not been harmed and when mitigating factors exist. In *Matter of an Attorney*,[96] 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

92 The single justice used as a relevant benchmark Matter of Eastwood, 1994-DDC-1635 (SJ 1994) (one-year suspension for participation in fraudulent real estate transaction).
93 477 Mass. 1015, 2017-DDC-5806 (SJC 2017).
94 2021-DDC-6313 (BBO 2021).
95 *Id.* at 1.
96 AD 07-33, 2007-ADM-4120 (SJ 2007).

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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 BBO decided against imposing a public reprimand and instead admonished the lawyer. A single justice approved that order.

In AD 18-16,[97] the BBO issued an admonition against a lawyer who misrepresented to the closing attorney handling the sale of a divorcing couple's marital home that he held a lien over a portion of the sale proceeds for outstanding legal fees owed to him by the wife. The lawyer had not asserted an attorney's lien nor even invoiced his client for the claimed fees. He subsequently repudiated his assertion of a lien and instructed the closing attorney to release the client's share of the sale proceeds to her. In addition to Rule 4.1(a), the admonition summary cited the lawyer for violations of Rules 8.4(c) and 8.4(h), as well as violating Rule 1.8(i), for attempting to assert a proprietary interest over the subject matter of litigation.

IV. 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.[98] Rule 8.4(c) applies to lawyers acting within or outside the role of attorney, unlike Rules 3.3 and 4.1, which apply to a lawyer acting on behalf of a client.[99] Section IV(C) addresses specific areas in which Massachusetts lawyers should consider Rule 8.4(c).

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97 2018-ADM-5877 (BBO 2018).

98 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 6 and accompanying text. Rule 4.1(a) and its comments permit a lawyer to misstate authority and other nonmaterial facts in negotiation. *See supra* note 70 and accompanying text. Neither of those authorities is undermined by the blanket prohibitions in Rule 8.4 against lawyer deception or dishonesty.

99 Mass. R. Prof. C. 3.3 cmt. 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.*, *Balliro, supra* note 44, 2009-DDC-4351 (SJC 2009) (criminal trial involving father of her child); Matter of Szostkiewicz, 2015-DDC-5458 (SJ 2015) (personal child support matter); *Leahy, supra* note 39, 2012-DDC-4968 (SJ 2012) (respondent's divorce). Rule 4.1 applies to lawyers "in the course of representing a client."

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*,[100] 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)."[101] To qualify as fraud or misrepresentation, the misconduct must be intentional,[102] but reliance is not necessary.[103] No disciplinary report or SJC opinion has used the term *dishonesty* as a direct basis for discipline,[104] but other jurisdictions have disciplined attorneys for dishonesty that did not amount to fraud, deceit, or misrepresentation.[105]

B. Discipline for Violating Rule 8.4(c)

The Massachusetts disciplinary reports include hundreds of disciplinary matters since 1999 where Rule 8.4(c) played a role in the disposition.

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100 453 Mass. 28, 2009-DDC-4348 (SJC 2009).

101 *Id.* at 37–38.

102 *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, 2005-DDC-3631 (SJ 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).

103 *See* Matter of Hutton, 2015-DDC-5518 (HC 2015) ("Our cases have not construed rule 8.4(c) to require a showing of detrimental reliance").

104 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, supra* note 100, 453 Mass. at 37–38; *O'Toole, supra* note 73, 2015-DDC-5488 (SJ 2015).

105 *See* Matter of 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).

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.[106] Also, cases involving intentional misuse of funds are typically charged under both Rule 1.15 and Rule 8.4(c).[107]

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 suspension.[108] For instance, in *Matter of Ciapciak*,[109] 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*,[110] 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*,[111] 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 Porter*,[112] an attorney's affidavit of resignation was accepted, and he was disbarred, for various acts of financial misconduct, including billing his law firm and clients for personal expenses unrelated to any client's legal matter.

In *Matter of Cohen*,[113] the single justice disbarred an attorney who had devised a "scheme to defraud insurers by submitting false, inflated, and backdated

106 For one such example, *see Sementelli, supra* note 85, 2013-DDC-5209 (SJ 2013) (eighteen-month suspension where Rule 8.4 served as primary basis for three of four counts where misconduct involved lawyer deception of others).
107 *See, e.g.*, Matter of Strauss, 479 Mass. 294, 2018-DDC-5927 (SJC 2018).
108 Matter of Patch, 466 Mass. 1016, 1018, 2013-DDC-5092 (SJC 2013) (order of disbarment entered following felony conviction; later vacated when conviction vacated).
109 2009-DDC-4457 (SJ 2009).
110 2007-DDC-4004 (SJ 2007).
111 2004-DDC-3467 (SJ 2004).
112 2017-DDC-5769 (SJ 2017).
113 1988-DDC-534 (SJ 1988).

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*,[114] discussed in section III(A) as well as other chapters in this book,[115] 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*,[116] 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 from his misdeeds at the expense of clients. We therefore conclude that an indefinite suspension is appropriate.[117]

In *Matter of Voros*,[118] 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*,[119] 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.

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114 450 Mass. 533, 2008-DDC-6871 (SJC 2008).

115 *See also* Matter of Curry, 450 Mass. 503, 2008-DDC-4145 (SJC 2008) (companion case to *Crossen*; lawyer disbarred); Matter of Donahue, 2006-DDC-3918 (SJ 2006) (companion case; three-year suspension).

116 447 Mass. 345, 2006-DDC-3740 (SJC 2006).

117 447 Mass. at 359, 2006-DDC-3740 at 6 (SJC 2006).

118 1995-DDC-1864 (SJ 1995).

119 2004-DDC-3423 (SJ 2004).

In *Matter of Gleason*,[120] 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 BBO compared this misconduct to *Matter of Jacobson*,[121] 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 Zankowski*,[122] a lawyer received a two-year suspension for violating both Rule 8.4(c) and Rule 1.5(a) (clearly excessive fees) by engaging in a pattern of inflating the number of hours she worked on hourly-fee cases.

In *Matter of Cloonan*,[123] 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. In *Matter of Lussier*,[124] an attorney received an indefinite suspension for misusing his employee's retirement contributions and failing to make required matching contributions in a timely manner.

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*,[125] 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*,[126] an attorney was suspended for six months after he inflated his résumé and altered his law school transcript. In *Matter of Days*,[127] an attorney was suspended for two months for failing to notify the BBO 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

120 1994-DDC-1644 (SJ 1994).
121 1991-DDC-1073 (SJ 1991).
122 487 Mass. 140, 2021-DDC-6288 (SJC 2021).
123 2009-DDC-4449 (SJ 2009).
124 2019-DDC-6049 (SJ 2019).
125 2010-DDC-4596 (SJ 2010).
126 2006-DDC-3805 (SJ 2006).
127 2014-DDC-5359 (SJ 2014); *see also* Matter of Powers, 2010-DDC-4632 (SJ 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 suspension of one year and one day).

annual registration statement that she had insurance.[128] In *Matter of Walckner*,[129] 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*,[130] 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*[131] and *Matter of Buenaventura*,[132] lawyers received public reprimands for notarizing signatures they had not witnessed, relying instead on the client's or third party's representations that they were authentic (when they were not). And in *Matter of Cowin*,[133] 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 Higgins*,[134] an attorney received a public reprimand, by stipulation, for falsely holding himself out to the police that he was representing the sister of a client, a sister who had not actually retained him, in order to assert a claim on the sister's behalf to certain funds that the police had recovered. In *Matter of Baker*,[135] an attorney stipulated to a public reprimand based on

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128 Further examples of suspensions imposed on lawyers who submitted false information to the BBO as part of their annual registration renewals can be found in Matter of Pahl, 2021-DDC-6290 (SJ 2021) (one year and one day for misconduct that included sending altered documents to CPCS regarding professional liability coverage); and Matter of Mohammed, 2018-DDC-5973 (SJ 2018) (four months).

129 2018-DDC-5923 (SJ 2018) (collecting cases).

130 1999-DDC-2578 (BBO 1999). *Cross* was mentioned in the discussion of Rule 3.3 in section II(B)(3).

131 1994-DDC-1623 (BBO 1994).

132 2017-DDC-5859 (BBO 2017).

133 1981-DDC-293 (SJ 1981).

134 2021-DDC-6325 (BBO 2021).

135 2007-DDC-4089 (BBO 2007).

his failure to affirmatively disclose to a participant in a real estate closing that the HUD-1 statement his client signed was inaccurate and misrepresented the facts. In *Matter of Lederman*,[136] 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 BBO opinions refer only to Rule 8.4(c). Also, in *Matter of Farber*,[137] 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 12-08,[138] an attorney received an admonition after she submitted an affidavit on which she had signed her client's signature, with her client's permission, after the client had reviewed the document. In AD 07-27,[139] an attorney received an admonition after he signed a real estate deed outside of the presence of a notary, expecting it to be notarized later, as it was. And in AD 08-12,[140] an attorney submitted documents to the Internal Revenue Service and the Massachusetts 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 BBO reduced it to an admonition, based on the lack of harm and the fact that the deception occurred outside of the practice of law.

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136 2006-DDC-3850 (BBO 2006).

137 2011-DDC-4820 (SJ 2011).

138 2012-ADM-5071 (BBO 2012). Similarly, in AD 12-06, 2012-ADM-5069 (BBO 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 08-14, 2008-ADM-4336 (BBO 2008); AD 05-19, 2005-ADM-3713 (BBO 2005); AD 04-44, 2004-ADM-3553 (BBO 2004); AD 03-09, 2003-ADM-3341 (BBO 2003); AD 03-60, 2003-ADM-3392 (BBO 2003); AD 03-62, 2003-ADM-3394 (BBO 2003).

139 2007-ADM-4115 (BBO 2007).

140 2008-ADM-4334 (BBO 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. 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*,[141] 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*,[142] the lawyer was suspended for two years for multiple instances of misconduct while acting as a corporate officer. In *Matter of Rice*,[143] a lawyer who was also a debtor in a personal bankruptcy case received a three-month suspension for forging a letter, ostensibly written by the Chapter 13 trustee, authorizing him to obtain an automobile loan during the pendency of the bankruptcy proceeding.

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.

141 2009-DDC-4467 (SJ 2009). This was the respondent's third suspension. His first, Matter of Lee, 2001-DDC-2954 (SJ 2001), was also for conduct not in the role as a lawyer.
142 447 Mass. 453, 2006-DDC-3737 (SJC 2006).
143 2017-DDC-5773 (SJ 2017).

Some well-intended, but nevertheless 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 each 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,[144] but a federal district court judge, in *Leysock v. Forest Laboratories, Inc.*,[145] 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,[146] but the action here far exceeded any such allowable, limited deception.[147]

While some courts or commentators outside of the Commonwealth have concluded that such activity violates Rule 8.4(c),[148] some states that have ad-

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144 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 Crossen, supra* note 114, 450 Mass. 533, 565–66; *Curry, supra* note 115, 450 Mass. 503, 522–25. 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 infra* note 149.

145 2017 WL 1591833 at *1 (D. Mass., May 25, 2017) (Saylor, J.).

146 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.

147 *Id.*, slip op. at 15–23.

148 *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.

dressed the question have condoned private testers.[149] *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.[150]

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).[151] 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 1978 ethics opinion that the practice was deceptive and troublesome,[152] the ABA issued a formal opinion in 2007 concluding that the practice of ghostwriting generally presents no ethical problems at all.[153]

The Massachusetts Trial Court Rules now permit limited assistance representation, including, in narrow circumstances, ghostwriting for pro se litigants.

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149 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").

150 *Compare Crossen, supra* note 144, 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, supra* note 144, 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").

151 *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).

152 ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1414 (1978).

153 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007).

That rule addresses ghostwriting with the following instructions to lawyers:

> An attorney may assist a party in preparing a pleading, motion or any other document that the party will sign and file in court. In assisting the preparation of any such pleading, motion or other document, the attorney shall insert the notation "prepared with assistance of counsel." Assisting a party with this type of document preparation does not constitute a general or limited appearance of the attorney. The party remains responsible to the court and other parties for all statements in any pleading, motion, or other document prepared but not signed by an attorney.[154]

The inclusion of this provision appears to settle what had historically been a somewhat controversial question in Massachusetts as to the ethical propriety of ghostwriting. The practice does, however, still constitute the practice of law. Therefore, a Massachusetts lawyer who agrees to prepare pleadings on behalf of a client without entering an appearance in the client's case will still be required to comply with any and all ethical rules that would otherwise apply to the aspect of the case that the lawyer has agreed to undertake, such as competence (Mass. R. Prof. C. 1.1), diligence (Mass. R. Prof. C. 1.3), communication (Mass. R. Prof. C. 1.4), the requirement of a written fee agreement (Mass. R. Prof. C. 1.5), and avoiding conflicts of interest (Mass. R. Prof. C. 1.7).[155]

[154] Massachusetts Trial Court Rules, Rule XVI (9), https://www.mass.gov/trial-court-rules/trial-court-rule-xvi-uniform-rule-on-limited-assistance-representation#9-assisting-a-party-to-prepare-court-documents.

[155] *See, e.g.*, Sarah A. Chambers & Robert M. Daniszewski, *Unbundling Legal Services: Limited Assistance Representation and Ghostwriting*, Board of Bar Overseers (updated April 2022), https://bbopublic.blob.core.windows.net/web/f/limitedassistance.pdf.

CHAPTER THIRTEEN

Other Limits on Zealous Advocacy (Rules 1.2(d), 3.1, 3.2, 3.4, 3.5, and Rules 4.2 Through 4.4)

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 a lawyer occasionally fails 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, a lawyer goes 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.

II. 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.

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[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 "Diligence," in chapter 7, section III, and "Problems of Conflicts of Interest," in chapter 10.

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

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(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 prohibits a lawyer from offering assistance to a client in a matter that the lawyer knows is criminal or fraudulent.

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.[3]

[3] Effective June 1, 2025, the *Massachusetts Rules of Professional Conduct* clarified the obligation of lawyers confronted with these types of situations. Per Rule 1.16(a)(4), attorneys must withdraw when they know "that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5)." Rule 1.4(a)(5) requires lawyers to "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."

Rule 3.1 establishes a different, but related, constraint on lawyer conduct. 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 legally (as opposed to factually) 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.[4] For instance, in *Matter of Kelly*,[5] 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 of disbarment.[6] Similarly, in *Matter of Lonardo*,[7] the respondent agreed to disbarment after he was convicted of conspiracy to commit automobile insurance fraud.

Outside of the conviction context, lawyers have been disbarred for pursuing frivolous claims or for assisting with client fraud when there is additional serious misconduct. For example, in *Matter of Hayes*,[8] the respondent was disbarred for devising and engaging in a complex scheme to defraud the fam-

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4 Matter of Patch, 466 Mass. 1016, 1018 (2013). In Matter of Foley, 439 Mass. 324, 2003-DDC-3242 (SJC 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.

5 2010-DDC-4564 (SJ 2010).

6 *Id.* 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.

7 2009-DDC-4366 (SJ 2009).

8 2023-DDC-6507 (SJ 2023).

ily court and bankruptcy court in order to prevent the mother of his client's children from obtaining an increase in child support after the client won the lottery. The respondent's conduct included filing a meritless and false bankruptcy petition in order to obtain a stay of his client's child-support proceeding, secreting the lottery winnings in his Interest on Lawyers' Trust Accounts (IOLTA) and other trust accounts, violating court orders, and extracting excessive and unjustified legal fees from his client via the secreted funds the respondent held.

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.

In *Matter of Cobb*,[9] 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.[10] 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."[11]

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*,[12] along with its companion case, *Matter of Curry*.[13] 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

9 445 Mass. 452, 2005-DDC-3567 (SJC 2005).

10 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 . . . ."

11 *Cobb, supra* note 9, 445 Mass. at 480.

12 450 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*.

13 450 Mass. 503 (2008).

the recordings to threaten the former clerk with bar discipline proceedings. The SJC, noting "the elementary observation that 'an attorney is not free to [do] anything and everything imaginable . . . under the pretext of protecting his client's right to a fair trial and fair representation,'"[14] 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.[15]

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.[16] That respondent persuaded the BBO that "he participated only in the planning, and not the execution, of the [intolerable] venture."[17]

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.[18] 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 O'Connor*[19] was indefinitely suspended when he assisted a client in operating an illegal gambling operation and assisted a friend with laundering money. In *Matter of Hurley*,[20] a lawyer assisted his clients in a fraudulent scheme to gain control of their elderly aunt's estate by filing a meritless petition for conservatorship, fil-

14 *Crossen, supra* note 12, 450 Mass. at 563 (quoting United States v. Cooper, 872 F.2d 1, 3 (1st Cir. 1989)).
15 *Id.* at 576. The respondent in *Curry* made similar arguments, and the SJC responded consistent with its analysis in *Crossen*, 450 Mass. at 530–31.
16 Matter of Donahue, 2006-DDC-3918 (SJ 2006).
17 *Id.* at 72–73. 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.
18 *See, e.g.*, Matter of McCarthy, 416 Mass. 423 (1993) (one-year suspension); Matter of Neitlich, 413 Mass. 416 (1992) (one-year suspension); *Foley, supra* note 4, 439 Mass. 324 (three-year suspension).
19 2011-DDC-4834 (SJ 2011).
20 2017-DDC-5771 (SJ 2017).

ing frivolous pleadings, and making numerous false statements to various courts. The lawyer received a suspension of one year and one day. In *Matter of Buck*,[21] the respondent assisted his client in selling stolen videotapes, including creating a Delaware corporation to use in the scheme. The single justice ordered an indefinite suspension. The lawyer also made false statements to the Office of the Bar Counsel (OBC), which contributed to his severe sanction. By comparison, in *Matter of Phillips*,[22] 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.[23] 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*,[24] 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*,[25] a different lawyer involved in the same schemes as those in *Alberino* was suspended for one year and one day. In *Hanserd*, the lawyer was inexperienced and suffering from medical issues, and those mitigating factors likely accounted for the difference between her sanction and the sanction in *Alberino*. In *Matter of Robbins*,[26] 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*

21 2011-DDC-4777 (SJ 2011).

22 2008-DDC-4234 (SJ 2008).

23 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).

24 2011-DDC-4784 (SJ 2011).

25 2010-DDC-4610 (SJ 2010).

26 2008-DDC-4288 (SJ 2008) (stipulation to nine-month suspension).

of Palmer,[27] a lawyer who prepared inaccurate HUD-1 Settlement Statements for several real estate closings was suspended for twenty-three months. The lawyer played a more leading role in the schemes than the lawyer in *Robbins*, which likely explains the longer suspension. Both cases arose from stipulations.[28]

A lawyer's assertion of frivolous claims in violation of Rule 3.1 is likely to be suspended for a year or more. In *Matter of Collins*,[29] a lawyer received a suspension of eighteen months for engaging in a myriad of misconduct while representing a client seeking to avoid eviction from her home, including repeatedly asserting frivolous arguments and pursuing frivolous appeals before various state and federal courts in Massachusetts. In rendering its decision, the SJC found that an "appropriate remedy" for such frivolous misconduct was "a term suspension for one year and one day."[30] Because the lawyer also repeatedly neglected his client interests and failed to comply with court orders, a longer suspension was entered.[31]

In *Matter of Cohen*,[32] 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.[33]

Several lawyers have been suspended for making baseless and vindictive accusations against judges, misconduct that also violated Rule 8.2. In *Matter of Belanger*,[34] a lawyer was suspended for two years based on her misconduct in

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27 2009-DDC-4451 (SJ 2009).

28 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*); Matter of Walsh, 1997-DDC-1611 (SJ 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.

29 494 Mass. 1024, 2024-DDC-6659 (SJC 2024).

30 *Id.* at 1030–31, citing Matter of Corona-Perez, 2018-DDC-5921 at 2 (SJ 2018); Matter of Kim, 2016-DDC-5658 at 6–7 (SJ 2016).

31 *Collins*, 494 Mass. at 1031.

32 435 Mass. 7, 2001-DDC-2683 (SJC 2001).

33 *See also* Matter of Ellis, 2016-DDC-5617 (SJ 2016) (six-month suspension, stayed for two years with conditions, for attorney who filed multiple frivolous actions in violation of Rule 3.1, specifically a civil action for one client to enforce workers' compensation award without exhausting administrative remedies and civil action for second client in lieu of workers' compensation claim, even though action was precluded by workers' compensation statute; aggravated by other acts of misconduct).

34 2021-DDC-6280 (SJ 2021).

a guardianship proceeding involving her father. The lawyer disobeyed several court orders, impersonated her sister to circumvent the authority of her father's guardian, and filed multiple lawsuits making allegations concerning the integrity of several judges with reckless disregard as to their truth or falsity and when she should have known they were false. In *Matter of Kurker*,[35] the respondent was suspended for one year and one 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.[36] In *Matter of Harrington*,[37] the respondent was suspended for one year and one day for repeatedly making baseless accusations about a judge's honesty, character, fitness, and qualifications as well as for misrepresenting facts and caselaw, all while representing himself in his postdivorce proceedings. In *Matter of Talasazan*,[38] a lawyer was suspended for two years for varied misconduct, including filing a frivolous motion to recover attorney's fees from a former client. When the motion was denied, the lawyer filed a petition for relief with the SJC in which he alleged or insinuated wrongdoing by his former client, a probate court judge, a Superior Court judge, and a city councillor.

Lawyers have also been suspended for making frivolous filings in violation of Rule 3.1 in the context of personal litigation, especially where the misconduct includes dishonesty or violation of court orders. For instance, in *Matter of Corona-Perez*,[39] the respondent was suspended for one year and one day after she made multiple frivolous filings and appeals in multiple courts, despite being ordered to stop, while representing herself and her former spouse in litigation relating to property ownership. Similarly, in *Matter of Kim*,[40] an attorney was suspended for one year and one day after she filed numerous frivolous filings and appeals relating to the foreclosure of her condominium, even after

35 2002-DDC-3131 (SJ 2002).

36 *See also* Matter of Van Hoozer, 2004-DDC-3462 (SJ 2004) (three-year suspension for various misconduct in divorce case, including filing pleadings with no good-faith basis; other serious misconduct contributed to lengthy suspension).

37 2011-DDC-4797 (SJ 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 . . . ."

38 2023-DDC-6544 (SJ 2023).

39 2018-DDC-5921 (SJ 2018).

40 2016-DDC-5658 (SJ 2016).

being ordered to stop. In *Matter of O'Leary*,[41] the single justice suspended a respondent whom the court had sanctioned under the *General Laws of Massachusetts* (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." 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,"[42] many court-ordered sanctions under Mass. Gen. Laws ch. 231, § 6F, also constitute a violation of Rule 3.1.

3. Public Reprimand

While only a few public reprimands are associated with Rule 1.2(d),[43] many attorneys have been publicly reprimanded for filing a groundless pleading or appeal in violation of 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*,[44] *Matter of Weissman*,[45] and *Matter of Dittami*.[46] The justice also

41 2009-DDC-4409 (SJ 2009).

42 *Id.* at 5.

43 *See, e.g.*, Matter of Baghdady, 2009-DDC-4497 (BBO 2009) (respondent received public reprimand for failing to correct false deposition testimony by witness and false notarization of interrogatories, in violation of Rules 1.2, 8.4(c), and 8.4(d)).

44 2008-DDC-4322 (BBO 2008) (among a number of other disciplinary violations, attorney made frivolous allegations in a pleading).

45 2006-DDC-3859 (BBO 2006) (attorney sought execution and filing for lien against client in amount over what was due to her, without checking what was due).

46 1993-DDC-1385 (SJ 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, 2012-DDC-5061 (BBO 2012) (attorney received public reprimand after filing, with no support, complaint for contempt in Probate and Family Court alleging that ex-husband of his client

noted that other such violations had resulted in admonitions, discussed in the following subsection.

More recently, in 2021, a lawyer was publicly reprimanded when he filed a groundless appeal of an administrative magistrate's order and failed to abide by certain of the magistrate's orders.[47] In 2024, a lawyer was publicly reprimanded for violating Rule 3.1 after the court sanctioned him for bringing a frivolous complaint regarding a personal real estate matter and failing to abide by court rules regarding the filing of an amended complaint.[48]

4. Admonition

No lawyer has received an admonition for violating Rule 1.2(d) by assisting a client in a crime or fraud.[49] Some lawyers have received admonitions for violating Rule 3.1. One such instructive admonition is AD 00-53,[50] 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 02-09[51] and AD 02-11,[52] 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. Additionally, in AD 20-14,[53] a respondent received an admonition for filing a frivolous notice of removal in federal court of his client's state court petition for custody. The filing was frivolous because the client lacked standing to remove his own petition, the notice was untimely, and there was no basis for federal subject matter jurisdiction.

had violated court order by failing to pay for client's son's tuition costs).

47 Matter of Lydon, 2021-DDC-6314 (BBO 2021).

48 Matter of Triantos, 2024-DDC-6648 (BBO 2024) (in aggravation, lawyer had prior public reprimand for IOLTA record-keeping violations, which had minimal weight on sanction).

49 *See* Matter of Connell, 2015-DDC-5452 (SJ 2015) (noting this fact).

50 2000-ADM-2819 (BBO 2000).

51 2002-ADM-3190 (BBO 2002).

52 2002-ADM-3191 (BBO 2002).

53 2020-ADM-6159 (BBO 2020).

Practice Tip

While courts may not always refer matters to the BBO when a lawyer is sanctioned under civil procedure rules[54] relating to frivolous and groundless filings, many court-ordered sanctions under these rules could also evidence a violation of Rule 3.1.[55]

III. 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.

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

54 Fed. R. Civ. P. 11(b) ("By presenting to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; . . ."); Mass. R. Civ. P. 11(a) ("The signature of any attorney to a pleading constitutes a certificate that the attorney has read the pleading; that to the best of the attorney's knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay).

55 *See, e.g.*, *Triantos, supra* note 48, 2024-DDC-6648 (BBO 2024); AD 20-14, 2020-ADM-6159 (BBO 2020); *Corona-Perez, supra* note 39, 2018-DDC-5921 (SJ 2018).

having potential evidentiary value, or 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.

Rule 3.5: Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer, either directly or through communications with the judge or otherwise, a desire not to communicate with the lawyer; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(4) the communication is initiated 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

(1) use means that have no substantial purpose other than to embarrass, harass, delay, or burden a third person,

(2) use methods of obtaining evidence that violate the legal rights of such a person, or

(3) engage in conduct that manifests bias or prejudice against such a person based on race, sex, marital status, religion, national origin, disability, age, sexual orientation, or gender identity. This clause (3) does not preclude legitimate advice or advocacy otherwise consistent with these Rules.

(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: (1) limits on litigation tac-

tics and (2) limits on contact with persons whose interests are opposed to the lawyer's client. This subsection addresses the limits on certain litigation tactics. Limits on contact with others, Rule 3.4 subsections (f) and (g), are discussed in section IV.

Lawyers, and especially litigators, act strategically to accomplish their client's 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).[56]

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.[57] 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 one provision that is not self-evident and that deserves some separate discussion. 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."[58] 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,

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56 Mass. R. Prof. C. 3.2 cmt. 1.

57 Mass. R. Prof. C. 3.4 (a), (e).

58 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.

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).[59]

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*.[60] In *Commonwealth v. Moore*,[61] the court sought to resolve any conflicts and adopted another revision to Rule 3.5(c), which went into effect in 2017.[62]

Rule 4.4 limits attorneys' zealous advocacy efforts by forbidding them to "use means that have no substantial purpose other than to embarrass, harass, delay, or burden a third person, [or to] use methods of obtaining evidence that violate the legal rights of such a person."[63] This prohibition applies whether a lawyer is representing a client or acting pro se in a personal matter.[64]

Rule 4.4(a)(2) confirms a lawyer's duty to respect the attorney-client privilege rights of others with whom the lawyer interacts.[65] For example, in *Matter of Ebitz*,[66] 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.

Rule 4.4(a)(3),[67] effective October 1, 2022, articulates a further constraint

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59 Massachusetts Bar Association Ethics Op. 83-2 (1983) (interpreting DR 7-105(A)).

60 377 Mass. 192 (1979).

61 474 Mass. 541 (2016).

62 *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.

63 Mass. R. Prof. C. 4.4(a)(1) and (2).

64 Matter of Samra, 2023-DDC-6525 (BBO 2023).

65 *See* Matter of Barnes, 2009-DDC-4484 (BBO 2009).

66 1992-DDC-1255 (SJ 1992).

67 Mass. R. Prof. C. 4.4(a)(3) (2022) was adopted as an expanded version of former Mass. R. Prof. C. 3.4(i), which was repealed effective October 21, 2022. New Rule 4.4(a)(3) brought Massachusetts in closer alignment to the ABA Rule 8.4(g) as amended in 2016, which prohibits lawyers from manifesting bias in *all* representative capacities. ABA Model Rules of Prof'l Conduct r. 8.4(g). The prior Massachusetts rule 3.4(i) confined this prohibition to lawyers appearing before a tribunal.

on a lawyer's advocacy efforts, even if the tactic would benefit a client. It states that a lawyer, when representing a client, shall not "engage in conduct that manifests bias or prejudice against such a person based on race, sex, marital status, religion, national origin, disability, age, sexual orientation, or gender identity."[68] As of 2024, a lawyer had not been disciplined for violating Rule 4.4(a)(3) or its predecessor Rule 3.4(i) (repealed).

Rule 4.4(b) addresses what should happen when an opposing lawyer mistakenly sends a lawyer documents that otherwise would be fully privileged. The rule requires the recipient of inadvertently sent material to "promptly notify the sender."[69] The rule says nothing more about the lawyer's other responsibilities. In Massachusetts, an inadvertent disclosure does not automatically waive the attorney-client privilege; the privilege may or may not be waived, depending on the level of care the party or the lawyer takes,[70] and a lawyer must proceed with caution when receiving an otherwise privileged document apparently sent in error.[71] As of 2024, the BBO and the SJC have never disciplined a lawyer for violating Rule 4.4(b).

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.[72] Some lawyers have been disbarred for engaging in misconduct in violation of Rule 3.4, and many disbarred lawyers have violated Rule

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68 Comment 1B clarifies that "[w]hen these factors are relevant to a representation, paragraph (a)(3) does not prohibit legitimate advocacy or advice."

69 Mass. R. Prof. C. 4.4(b).

70 *See* Matter of the Reorganization of Electric Mutual Liability Ins. Co. Ltd. (Bermuda), 425 Mass. 419, 422 (1997) (documents sent to opposing party by 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).

71 Lawyers who wish to use the inadvertently disclosed document find support from the Massachusetts Bar Association Committee on Professional Ethics. *See* Massachusetts Bar Association 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 Mass. R. Civ. P. 26(b)(5)(B). The value of this opinion, rendered before Massachusetts adopted Mass. R. Prof. C. 4.4(b) in 2015, is questionable but untested.

72 *See*, *e.g.*, Matter of Friedman, 2006-DDC-3795 (SJ 2006).

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."[73]

As discussed elsewhere in this book, in *Matter of Foster & Others*,[74] a lawyer was disbarred for an array of rule violations, including Rules 3.4(a) and (c), associated with her failure to turn over exculpatory evidence relating to criminal defendants affected by misconduct at a state drug lab as required by Rule 3.8(d). Her misconduct also included dishonesty in violation of Rule 8.4(c).

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*,[75] 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, the witness lied to the grand jury, and the attorney was disbarred for that misconduct. Additionally, in *Matter of Hayes* (discussed earlier in section II(B)(1)), an attorney represented a client who had won the lottery. On the attorney's advice the client secreted his winnings from the family court in an effort to avoid paying child support.[76]

You Should Know

According to the SJC, the "standard" sanction for repeatedly violating court orders is "at least a suspension."[77] 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.

In *Matter of Terzian*,[78] 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 con-

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73 Mass. R. Prof. C. 3.4(c). For examples of that misconduct, *see, e.g.*, Matter of Clifford, 2010-DDC-4636 (SJ 2010); Matter of Connor, 2010-DDC-4612 (SJ 2010); Matter of Veysey, 2010-DDC-4569 (SJ 2010).

74 *See* Matter of Foster & Others, 492 Mass. 724 (2023).

75 2008-DDC-4249 (SJ 2008).

76 2023-DDC-6507 (SJ 2023).

77 Matter of Johnson, 2006-DDC-3817 (SJ 2006), *aff'd*, 450 Mass. 165 (2007). *See also* Matter of Ring, 427 Mass. 186, 191 (1998).

78 2005-DDC-3668 (SJ 2005); *see also* Commonwealth v. Terzian, 61 Mass. App. Ct. 739 (2004) (the underlying criminal matter).

viction is disbarment, as noted in chapter 12.)[79] Similarly, in *Matter of Jones*,[80] 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 engaging in fraud within BBO proceedings. In *Matter of Geller*,[81] 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

Suspensions for overzealous misbehavior before a court typically have resulted when the lawyer's misconduct affected, or could have affected if successful, the fairness and integrity of the proceedings. Suspensions also occur when the misconduct includes offering false evidence, which 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*,[82] a Massachusetts lawyer practicing as an assistant United States attorney for the Department of Justice in Washington, D.C., 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 one year and one day. No other reported Massachusetts disciplinary decision involves primarily violating Rule 3.2.[83]

A single justice has written that "for [violation of court orders,] the standard sanction is at least a suspension."[84] 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

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79 *See* chapter 12, section (II)(B)(1), note 23 and *supra* note 4.
80 2000-DDC-2691 (SJ 2000).
81 2007-DDC-4054 (SJ 2007).
82 2010-DDC-4567 (SJ 2010).
83 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.
84 *Johnson, supra* note 77, 2006-DDC-3817 (SJ 2006). *See also Ring, supra* note 77, 427 Mass. at 191.

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*,[85] 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*,[86] an attorney represented a client in a claim for injuries sustained in a fall. The client died from unrelated causes after the attorney had notified the insurer of the claim. The attorney directed his staff not to disclose the client's death unless specifically asked and further told his staff to alter a medical report 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 one 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.

In *Matter of Ranney*,[87] a lawyer was suspended for one year and one day for violations of Rule 3.4(a) and (c) when he failed to produce documents responsive to a discovery request. His misconduct included misrepresentations to courts in violation of Rule 3.3.

Other instances of lawyers whose excessive dishonesty in representing clients led to term suspensions include *Matter of Gross*,[88] *Matter of Foley*,[89] and *Matter of Griffith*.[90] 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.

85 2007-DDC-4027 (SJ 2007).
86 2006-DDC-3832 (SJ 2006).
87 2017-DDC-5795 (SJ 2017).
88 435 Mass. 445 (2001), 2001-DDC-2686 (SJC 2001).
89 439 Mass. 324, 2003-DDC-3242 (SJC 2003).
90 440 Mass. 500, 2003-DDC-3405 (SJ 2003).

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."[91]

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 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 one year.[92]

Compare those reports to *Matter of Diamond*,[93] where an attorney was suspended for three months for using inappropriate and offensive language in open court[94] and for using in court a confidential Criminal Offender Record Information report 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.[95] Other lawyers have been

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91 *Foley, supra* note 89, 439 Mass. at 336. *Foley* served as an example of violating the rules against presenting false testimony; *see also Patch, supra* note 4, 466 Mass. 1016 and *Donahue, supra* note 16, 2006-DDC-3918 at 72–73 (SJ 2006).

92 *Griffith* served as an example of violating the rules against presenting false testimony. *See Griffith, supra* note 90, 440 Mass. 500.

93 2000-DDC-2720 (SJ 2000).

94 *Id.* The respondent said to the lawyer representing the other party, "If you want discovery, you're going to get discovery up the ass."

95 *See, e.g.*, Matter of Feeney, 2013-DDC-5163 (SJ 2013) (one-year-and-one-day suspension); Matter of Saletan, 2013-DDC-5138 (SJ 2013) (six-month suspension); Matter of Dowell, 2012-DDC-5033 (SJ 2012) (one-year-and-one-day suspension); Matter of Days, 2014-DDC-5359

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*,[96] 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*,[97] the attorney was suspended for one year and one day after failing to make court-ordered accountings on matters for which the lawyer served as a fiduciary. In *Matter of Quinn*,[98] the lawyer was suspended 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,[99] the sanction for personal misconduct tends to be less severe than misconduct in client representation. In *Matter of Cullen*,[100] 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*,[101] 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*,[102] 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 BBO's recommendation of a

(SJ 2014) (two-month suspension); Matter of Johnson, 2011-DDC-4771 (SJ 2011) (two-year suspension); Matter of Cooney, 2008-DDC-4285 (SJ 2008) (indefinite suspension). All of these matters obviously implicated other misconduct, as the lawyers were in the midst of BBO disciplinary procedures.

96 2010-DDC-4635 (SJ 2010).

97 2013-DDC-5156 (SJ 2013).

98 1996-DDC-2037 (SJ 1996).

99 Matter of Leahy, 2012-DDC-4968 (SJ 2012).

100 2012-DDC-5013 (SJ 2012).

101 2007-DDC-4040 (SJ 2007).

102 2012-DDC-4968 (SJ 2012).

one-year suspension, stayed for two years.[103] A review of the disciplinary reports shows several other examples of lawyers receiving term suspensions after failing to comply with orders related to their own personal criminal conduct or domestic relations dispute,[104] while others have received public reprimands, as described in section III(B)(3).[105]

Occasionally, lawyers have been suspended for violating Rule 3.5, which requires fair tactics and decorum before a tribunal, or its predecessor, DR 7-106, 7-108 (D), and 7-110 (B). Two such matters involved ex parte communication with a judge. In *Matter of Lipis*,[106] the respondent was suspended for two years for improper ex parte contact with a judge on a pending matter, among other misconduct (including posing as a judge's clerk in a telephone call to an insurer, in which the respondent "quoted the judge as saying the insurer was going to get 'hammered'" if it did not settle). The misconduct also violated Rule 4.4(a). In aggravation, the same lawyer had received a public reprimand a few years earlier for a different violation of Rule 3.5.[107] Another instance of improper ex parte contact with a judge led to a three-month suspension, with one justice dissenting. In *Matter of Orfanello*,[108] 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 BBO 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. One justice dissenting on the sanction to apply, concluded that "an isolated instance of indiscretion in an otherwise unimpeachable forty-year devotion to the system of justice" war-

103 The single justice compared this respondent's actions to the following examples: Matter of Kilkenny, 2010-DDC-4615 (SJ 2010) (three-month suspension); Matter of Angwafo, 453 Mass. 28, 37, 39 (2009) (one-month suspension); Matter of Kersey, 432 Mass. 1020 (2000) (three-month suspension); *Ring, supra* note 84, 427 Mass. 186 (three-month suspension); Matter of Finnerty, 418 Mass. 821, 830 (1994) (six-month suspension).

104 *See, e.g.*, Matter of Laroche-St. Fleur 2022-DDC-6406 (SJ 2022) (eighteen-month suspension for violating court orders, engaging in frivolous litigation, and filing false financial statements in personal divorce); Matter of Mahoney 2021-DDC-6348 (SJ 2021) (three-month suspension stayed for one year on conditions for failing to comply with court orders regarding payment of attorney's fees; mitigating factors were present); Matter of Norris, 2018-DDC-5917 (SJ 2018) (six-month suspension with required reinstatement hearing for repeated violation of court orders in personal divorce); *see also Cullen, supra* note 100, 2012-DDC-5013 (SJ 2012); *Vinci, supra* note 101, 2007-DDC-4040 (SJ 2007); *Leahy, supra* note 102, 2012-DDC-4968 (SJ 2012).

105 *See* Matter of Silva, 2006-DDC-3853 (BBO 2006); Matter of Melican, 2010-DDC-4674 (BBO 2010).

106 2008-DDC-4272 (SJ 2008).

107 Matter of Lipis, 2002-DDC-3177 (BBO 2002) (at court-ordered mediation, respondent interrupted defense counsel's presentation by calling him "a liar" and "a piece of shit," and referred to defense counsel as "Satan" and defense experts as "whores").

108 411 Mass. 551, 1992-DDC-1180 (SJC 1992).

ranted, at most, a public reprimand as recommended by the bar counsel and the respondent.[109]

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*,[110] the lawyer was suspended for one year and one day after multiple instances of misconduct, one of which netted him a ninety-day sentence for criminal contempt. As noted in the following 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*,[111] 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 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*,[112] 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 BBO 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."[113] The single justice ordered a public censure.

Some lawyers have received a public reprimand for misconduct in court other than misrepresentation. For instance, in *Matter of Cosentino*,[114] the BBO publicly reprimanded a lawyer for engaging in conduct that was intended to disrupt a tribunal. The lawyer represented corporate defendants in a Superior Court lawsuit. At a pretrial hearing, the respondent informed the judge that a trial was

[109] 411 Mass. at 558. The respondent at the time served as the executive secretary to the administrative justice of the Superior Court.
[110] 2016-DDC-5688 (SJ 2016).
[111] 2001-DDC-2969 (BBO 2001).
[112] 2001-DDC-2930 (SJ 2001).
[113] *Id.* at 5.
[114] 2024-DDC-6615 (BBO 2024).

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likely unnecessary because his clients had been consulting with a bankruptcy attorney and were either going to default or file for bankruptcy protection prior to trial. When questions arose about whether both clients had retained bankruptcy counsel (and, if not, whether the trial could proceed as to the other client), the judge instructed his clerk to call the bankruptcy attorney from the courtroom. While the clerk was dialing the bankruptcy attorney's number, the respondent took his cell phone from his pocket and sent the bankruptcy attorney an e-mail and a text telling the attorney not to pick up the incoming call. The respondent did not inform the judge that he was sending these messages. The bankruptcy attorney ultimately did not pick up the phone because he was occupied with another client, and not because of the respondent's e-mail and text. Upon review, the BBO found that the respondent's actions violated Rule 3.5(d), and also constituted conduct that was prejudicial to the administration of justice, in violation of 8.4(d), and adversely reflected on the respondent's fitness to practice law, in violation of Rule 8.4(h).

In *Matter of Reisman*,[115] a lawyer violated Rule 3.4(a) by advising 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 Rosin*,[116] a lawyer was publicly reprimanded for coaching a witness during his client's remote deposition in violation of the *Federal Rules of Civil Procedure* prohibiting impeding the fair examination of a deponent.[117] The BBO found that this conduct violated *Massachusetts Rules of Professional Conduct* 3.4(a) and 8.4(d) (conduct prejudicial to the administration of justice), cautioning, however, that "future cases of deposition misconduct, and all forms of discovery abuse, may not be viewed as indulgently as this case."[118]

In *Matter of Nelson*,[119] 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*[120] a lawyer received a public reprimand for his obscenity-laden tirade in court.

115 2013-DDC-5227 (BBO 2013).
116 2023-DDC-6577 (BBO 2023).
117 Fed. R. Civ. P. 30(d).
118 *Rosin, supra* note 116, 2023-DDC-6577 (BBO 2023).
119 2009-DDC-4492 (BBO 2009).
120 2002-DDC-3177 (BBO 2002).

In *Matter of Campbell*,[121] 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.[122]

Other public reprimands resulting from violating Rule 3.4 occurred in the lawyers' personal matters. In both *Matter of Sanchez*[123] and *Matter of Silva*,[124] 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*,[125] 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. In *Matter of Szymanski*,[126] a lawyer, who was also a state police officer, received a public reprimand for violating Rules 4.4(a) and 8.4(d) when he used his position as a state trooper to obtain and disseminate criminal record information in connection with cases he was handling in his private legal practice. And in *Matter of Barnes*,[127] 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,[128] 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. In AD 19-18,[129] a lawyer asked a question at trial that the judge had ordered him

121 2008-DDC-4298 (BBO 2008).
122 *Cf. Quinn, supra* note 98, 1996-DDC-2037 (SJ 1996) (three-month suspension for similar misconduct, discussed *supra* note 98); *see also Geller, supra* note 81, 2007-DDC-4054 (SJ 2007), discussed in section III(B)(1).
123 2007-DDC-4084 (BBO 2007).
124 2006-DDC-3853 (BBO 2006).
125 2010-DDC-4674 (BBO 2010).
126 2019-DDC-6084 (BBO 2019).
127 2009-DDC-4484 (BBO 2009).
128 1987-ADM-639 (BBO 1987).
129 2019-ADM-6027 (BBO 2019).

to avoid, in violation of Rule 3.4(c). In AD 00-60,[130] 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).[131] In AD 06-16,[132] 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.

Lawyers occasionally have been admonished for threatening to present criminal charges solely to obtain an advantage in a civil matter. In AD 20-16,[133] a lawyer representing a client in a civil matter told opposing counsel that he would file criminal charges against his client for wiretapping if he did not agree to settle the civil matter. In AD 97-106,[134] 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." Similarly, in AD 01-02,[135] 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,[136] 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. Limitations on the Lawyer's 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.

130 AD 00-60, 2000-ADM-2826 (BBO 2000).
131 *See also* AD 05-04, 2005-ADM-3698 (BBO 2005) (attorney violated 3.4(e) by making improper closing remarks in a criminal proceeding).
132 2006-ADM-3883 (BBO 2006).
133 2020-ADM-6161 (BBO 2020).
134 1997-ADM-2053 (BBO 1997).
135 2001-ADM-2984 (BBO 2001).
136 2014-ADM-5393 (BBO 2014).

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, provided that a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in preparing, attending or testifying; and

(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 prohibit certain kinds of contact with individuals as part of a lawyer's representation of a client. Those restrictions typically appear in three 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.[137] 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.[138] However, after deciding the *Messing* case[139] in 2002, the SJC amended the com-

137 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).

138 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 cmt. 4 (1998). Because the Massachusetts evidence rules treat any statement by an agent made on a subject matter within the scope of their employment as an admission under the hearsay rule (*see, e.g.*, Ruszcyk 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.

139 Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College, 436 Mass. 347 (2002).

ments 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."[140] 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.[141]

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.[142] 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.[143]

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. For example, a lawyer would not violate Rule 4.2 by communicating with a public official working for a government agency, even if the lawyer was currently suing that government agency, if the lawyer's client had a constitutional right to petition that official.[144] 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

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140 *Id.* at 354 (quoting the Superior Court judge who had imposed sanctions on the plaintiff firm in that case).

141 Mass. R. Prof. C. 4.2 cmt. 7.

142 *See* Clark v. Beverly Health & Rehabilitation Services, Inc., 440 Mass. 270 (2003).

143 *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") (internal citations omitted).

144 Mass. R. Prof. C. 4.2 cmt. 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 cmt. b. (Am. L. Inst. 2000).

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.[145] Lawyers representing clients in those settings regularly employ legal arguments and cite legal 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 OBC, 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.[146]

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145 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 Resources*, Mass.gov, https://www.mass.gov/service-details/access-to-justice-initiative.

146 Nancy Kaufman, *Can We Talk: Communicating with Unrepresented Persons*, Board of Bar Overseers (Nov. 2003), https://bbopublic.massbbo.org/web/f/talk.pdf.

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.[147] 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.[148] Several lawyers have been disciplined for inappropriate contact with unrepresented persons, but few of those cases involve negotiation with a pro se litigant.

B. Discipline for 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*,[149] 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*,[150] 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.

147 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.

148 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, 2006-DDC-3861 (BBO 2006) (discussed in section IV(B)(3)).

149 2007-DDC-3943 (SJ 2007).

150 2009-DDC-4388 (SJ 2009).

No lawyer has been disbarred for misconduct solely or primarily involving a violation of Rules 4.2 or 4.3.

2. Suspension

A remarkable violation of Rule 4.2 occurred in *Matter of Bianco*,[151] leading to a suspension of one year and one day. In *Bianco*, a newly admitted lawyer assisted a more experienced attorney in defending a hospital in a sexual harassment lawsuit that a female 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, 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.

No other suspensions have occurred for primarily violating Rule 4.2. In *Matter of Watts*,[152] 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*,[153] 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 additional misconduct involving misuse of the receivership assets.

In *Matter of Casas*,[154] a lawyer received a three-month suspension, stayed for one year on conditions, for multiple rule violations including Rule 4.3. The attorney represented a corporation that operated a restaurant in a leased space and had one officer. The officer—not the corporation—was a named party on

151 2005-DDC-3638 (SJ 2005).
152 2005-DDC-3636 (SJ 2005).
153 2002-DDC-3135 (SJ 2002).
154 2023-DDC-6502 (SJ 2023).

the lease with the landlord. When a dispute arose over the lease, the respondent advocated for the interests of the corporation but, in doing so, misled the officer into believing that he also represented his individual interests in the matter. The lawyer failed to inform the officer that he did not represent his individual interests, that the officer's interests could differ from those of the corporation, and/or that the officer should have his own counsel. While the lawyer also misrepresented his role in the dispute to the landlord and engaged in a Rule 1.15 record-keeping violation, a stayed suspension was deemed sufficient because the misconduct was largely caused by the respondent's inexperience in such matters and caused no ultimate harm.

3. Public Reprimand

Lawyers have received public reprimands for violating Rule 4.2 or its predecessor. In *Matter of Parlow*,[155] the respondent represented a codefendant in a criminal matter in which the second codefendant was represented by separate counsel. The second codefendant made an unsolicited call to the respondent and confessed to one of the charged crimes. The respondent then drafted an affidavit containing the confession, obtained the second defendant's signature, and provided it to the prosecutor, who informed the second defendant's counsel. The respondent's actions violated Rule 4.2. In *Matter of Kent*,[156] 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*,[157] 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.

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*.[158] 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

155 2023-DDC-6500 (HC 2023).
156 2005-DDC-3677 (BBO 2005).
157 1988-DDC-623 (SJ 1988).
158 2009-DDC-4484 (BBO 2009).

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making clear his role as the defendant's lawyer and without advising her to obtain her own counsel.

Similarly, in *Matter of Monaco*,[159] 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*,[160] 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*,[161] 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

The BBO has imposed private discipline for conduct violating Rule 3.4(g) and its predecessor. In AD 15-18,[162] a lawyer was admonished when an expert witness offered to forgo payment unless the lawyer won the case. The lawyer accepted the offer and did not pay the witness after he lost the case. In PR 97-38,[163] 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,[164] an attorney received a private reprimand for allowing witnesses to be compensated with a percentage of the settlements obtained in lawsuits. That attorney routinely employed expert witnesses on behalf of his clients and impermissibly compensated the witnesses based on the outcome.

The BBO has issued many admonitions for simple violations of Rule 4.2 with-

159 2006-DDC-3861 (BBO 2006).
160 2002-DDC-3168 (BBO 2002).
161 1995-DDC-1766 (BBO 1995).
162 2015-ADM-5544 (BBO 2015).
163 1997-ADM-2085 (BBO 1997).
164 1988-ADM-720 (BBO 1988).

out any serious harm to the represented person. For example, in AD 20-28,[165] a lawyer e-mailed a letter to opposing parties and their counsel, which prompted opposing counsel to instruct the lawyer to stop e-mailing her clients directly. Despite being asked not to do so, the lawyer sent another e-mail to the opposing parties and counsel. In AD 19-07,[166] a lawyer who represented a party in a property dispute against a neighbor, who was also represented by counsel, visited the property to take photos. While there, he accepted the neighbor's invitation to come onto the property to discuss the matter. Many other examples exist of admonitions for unauthorized contact with a represented person, without any significant harm to the represented person.[167]

The BBO has issued few admonitions for violating Rule 4.3 and instead has imposed more serious discipline when a lawyer advised an unrepresented person with interests different from the lawyer's client.[168] But in AD 10-03,[169] 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.

165 2020-ADM-6173 (BBO 2020).

166 2019-ADM-6016 (BBO 2019).

167 *See, e.g.*, AD 03-16, 2003-ADM-3348 (BBO 2003); AD 02-32, 2002-ADM-3210 (BBO 2002); AD 02-33, 2002-ADM-3211 (BBO 2002); AD 00-46, 2000-ADM-2812 (BBO 2000); AD 99-77, 1999-ADM-2658 (BBO 1999); AD 96-04, 1996-ADM-1908 (BBO 1996); AD 96-49, 1996-ADM-1918 (BBO 1996); AD 96-62, 1996-ADM-1933 (BBO 1996); PR 80-16, 1980-ADM-248 (BBO 1980); PR 78-2, 1978-ADM-104 (BBO 1978).

168 *But see* AD 20-18, 2020-ADM-6163 (BBO 2020) (admonition for attorney who conducted internal investigation, including employee interviews, of company but failed to advise represented interviewees that his law partner and therefore his firm also was advising company on matter). *See also* AD 20-21, 2020-ADM-6166 (BBO 2020), in which the lawyer's partner was admonished for his role in assisting his partner to violate Rule 4.3 in violation of Rule 8.4(a) (assisting another to violate rules).

169 2010-ADM-4706 (BBO 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 supervise the work of others who assist in their practices. The *Massachusetts Rules of Professional Conduct* enforce these principles by prohibiting a lawyer from assisting in the unauthorized practice of law, by prohibiting nonlawyers from owning an interest in law firms or directing a lawyer's legal practice, and by limiting the role that nonlawyers may play in operating law firms. Rules 5.1 through 5.7 address the business relationships lawyers may have with nonlawyers, and Rule 1.17 limits how a lawyer may sell an ongoing business that includes the practice of law.

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 supervising their staff, and Rule 5.5, which forbids a lawyer from assisting in the unauthorized practice of law. This chapter briefly describes the various rules and discusses the types of discipline typically associated with their violation.

II. The Sale of a Law Practice

Under appropriate circumstances, a lawyer may sell a private law practice, with necessary safeguards to protect the interests of the clients. Rule 1.17 spells out 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

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 simply 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 Rules of Professional Conduct*, 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 ABA 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) also requires that the transferring lawyer "ceases 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. However, Massachusetts 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 Rule 1.17 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 distinction, 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 this 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]

[1] Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility 696 § 1.17 (2012–2013 ed.).

Practice Tip

Lawyers who lose their licenses to practice because of disbarment or suspension might be permitted to sell their portfolio. No Massachusetts report or opinion forbids the practice. The disbarred or suspended 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 order of discipline was effective.[2]

B. Discipline for Violating Rule 1.17

No Massachusetts lawyer has ever been disciplined for violating Rule 1.17.

III. 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.

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] In Massachusetts, a referral fee is earned when the referral is made. If the fee was earned while the lawyer was not disbarred or suspended, the lawyer may accept the fee.

(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 operating within an organizational context, as well as the duties of nonlawyers who assist lawyers in providing legal services.

Rule 5.1 states obvious principles and 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.[3] 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.[4] When a manager or supervisor is subject to discipline for a junior or supervised lawyer's misconduct, it usually stems from one of those circumstances.

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 a civil action based upon a junior lawyer's misconduct. Those issues are beyond the scope of this book.[5]

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.[6]

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[3] *See, e.g.*, AD 22-14, 2022-ADM-6369 (BBO 2022) (private discipline); Matter of Foley, 2010-DDC-4607 (SJ 2010) (suspension).

[4] Mass. R. Prof. C. 5.1(c)(2).

[5] Rule 5.1 cmt. 7 ("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").

[6] Mass. R. Prof. C. 5.2(a).

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. Subordinate lawyers facing discipline in other states have occasionally raised this defense, but typically without success because the resolution was *unreasonable*.[7] The SJC addressed the defense in *Matter of Foster & Others*.[8] In that case, one of the respondent lawyers—a prosecutor (Foster) who falsely represented to a tribunal that exculpatory evidence had been disclosed when it had not been—invoked Rule 5.2(b) to argue, in mitigation, that she relied reasonably on representations made to her by her supervisors about the evidence.[9] The SJC held that reasonable, good-faith reliance on a senior attorney's statements could be a special mitigating factor; however, the court gave the factor less weight than it could have in Foster's case because she affirmed and added "gloss" to the representations made to her by her supervisors.[10] Foster's multiple rule violations and aggravating factors resulted in her receiving a term suspension of one year and one day.[11]

Typically, when a supervisor and a supervisee engage in related misconduct, the supervisor will receive more serious discipline.[12] However, that was not the case in *Matter of Foster & Others*. One of the respondents—an experienced criminal prosecutor (Verner)—was found to have relied reasonably on assurances from a subordinate prosecutor that all exculpatory evidence had been disclosed in the case.[13] Such reliance, according to the SJC, constituted a special mitigating factor that weighed fully in favor of a lesser sanction.[14] Therefore, although there were aggravating factors that may have called for a term suspension, Verner received only a public reprimand for his violations of Rules 5.1(b) and 1.3.[15]

Rule 5.3 essentially replicates the responsibilities set out for managers, part-

7 *See, e.g.*, *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").

8 492 Mass. 724, 2023-DDC-6564, 2023-DDC-6565 (SJC 2023).

9 *Id*. at 760–62.

10 *Id*.

11 *Id*. at 764.

12 For example, *compare* Matter of Newman, 2015-DDC-5464 (SJ 2015) (four-month suspension for filing appellate brief relying on statement discovered to be false after associate declined to file brief for that reason) *with* AD 15-02, 2015-ADM-5528 (BBO 2015) (admonition for associate, who, on employer's instructions, did not withdraw false statement, which he believed to be true when he made it).

13 *Foster & Others*, 492 Mass. at 747–49.

14 *Id.* at 749.

15 *Id.* at 756–57.

ners, and supervisors under Rule 5.1, but it applies them to lawyers who supervise paralegals, support staff, and other nonlawyers who work in law firms or organizations. 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 and ends with 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 have never resulted in a disbarment or a suspension unless accompanied by other rule violations.

1. Disbarment

Lawyers have been disbarred for inadequate supervision when their misconduct led directly to the misuse of client funds. In *Matter of Ablitt*,[16] the lawyer ran a "default services" practice, which required his firm to advance costs, including those for filing fees, title searches, publication, and auctions for their lender clients. When the firm experienced a financial downturn that depleted the firm's operating account, nonlawyers from the firm's accounting department implemented a scheme to use client funds in the firm's Interest on Lawyers' Trust Accounts (IOLTA) account to pay firm expenses. The lawyer was disbarred for, inter alia, the intentional misuse of client funds. The court found that the lawyer violated Rule 5.3 in two respects: first, by failing to supervise the nonlawyer staff who concocted the scheme and, second, by failing to terminate the staff and end the misuse when he learned of it, thereby ratifying their misconduct.

Practice Tip

Lawyers delegate work to subordinate lawyers, paralegals, and support staff in order to operate a more efficient law practice. Delegation requires careful oversight, however. While lawyers obviously need not reproduce all the work others perform under their supervision, lawyers must have in place reasonable systems to ensure that the work is done correctly. A lawyer cannot defend against a misconduct charge simply by saying that the lawyer being supervised made the mistakes.[17]

16 486 Mass. 1011, 2021-DDC-6281 (SJC 2021).

17 *See, e.g.*, Matter of Abelson, 2008-DDC-4208 (SJ 2008).

2. Suspension

Lawyers have been suspended after they failed to supervise support staff who mishandled client matters, often in combination with additional misconduct. In *Matter of Ruggiero*,[18] the respondent received a one-year-and-one-day suspension for, inter alia, participating in a scheme with nonlawyers to charge and collect illegal and excessive fees from fifteen clients—homeowners in Massachusetts and Rhode Island seeking relief from their mortgage loans. On appeal, the respondent admitted that he gave no instructions to his nonlawyer staff, and the record contained no evidence that he supervised the staff or reviewed file notes. For one client, these failures led to "critical errors in [the client's] application."[19] The single justice stated that the record supported Ruggiero's violation of 5.3(c) because he "ratif[ied], through both action and inaction, the misconduct of his nonlawyer agents."[20]

In *Matter of Lewis*,[21] the respondent stipulated to a three-year suspension for multiple violations of the *Rules of Professional Conduct* during his firm's representation of seven clients, which included, inter alia, charging excessive fees, retaining unearned fees, and neglecting the interests of his clients. In three of the matters, he sent associates to represent clients in court without adequately preparing the associates or informing the clients (two of whom he had promised to represent personally), violating Rules 5.1(a) and (b), 1.3, and 1.4(a). In one matter, the associate failed to address a key issue in the case. In another, the associate failed to get a hearing date to argue a motion to continue for a client who had given the respondent advance notice that the client had a work obligation on the original hearing date. The motion to continue was denied and the client had to appear immediately. Further, the client had to pay the wife's attorney's fees incurred by his delayed arrival.

In *Matter of Goldberg*,[22] an attorney's failure to supervise his office staff contributed to a suspension for one year and one 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 entrusted with 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.[23] In *Matter of Heartquist*,[24] the respondent failed to supervise an employee who embezzled cli-

18 2023-DDC-6515 (SJ 2023).
19 *Id.*
20 *Id.*
21 2018-DDC-6002 (SJ 2018).
22 2007-DDC-4041 (SJ 2007).
23 *See also* Matter of Collins, 2009-DDC-4469 (SJ 2009) (six-month suspension with required reinstatement hearing after office manager embezzled client and fiduciary funds).
24 2013-DDC-5168 (SJ 2013).

ent funds. The Board of Bar Overseers (BBO) 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 one day.

Other lawyers have been suspended while failing to prevent, or even encouraging, unethical practices by support staff. For instance, in *Matter of Goodman*,[25] 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 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 improperly supervising his staff contributed to the severity of the discipline imposed.[26]

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.

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 Marullo*,[27] a lawyer received a public reprimand for filing pleadings that contained fictitious case citations generated by artificial intelligence. To prepare the pleadings, the lawyer relied on an associate and interns who, unbeknownst to him, used an AI program to conduct research for inclusion in the legal briefs. Because the lawyer failed to check the accuracy of citations in the pleadings before he filed them under his name, he did not realize that he had cited to four nonexistent cases, referenced nonexistent quotations from caselaw, and misrepresented what relevant authority stood for. After the presiding judge detected the fictitious citations, the respondent investigated the matter, learned of and dis-

25 2006-DDC-3832 (SJ 2006).

26 *See also Ablitt, supra* note 16, 486 Mass. 1011, 1017 (2021) (citing cases where term suspensions entered for failing to supervise nonlawyer employees, resulting in pecuniary loss for clients).

27 2025-DDC-6761 (BBO 2025).

closed his subordinates' misconduct, and was fined by the court. When the matter came before the Board, the lawyer stipulated that his failure to supervise his staff and detect on his own that the pleadings contained multiple false and misleading citations violated Rules 1.1, 1.3, 5.1, 5.3, and 8.4(d). In *Matter of James*,[28] a solo practitioner stipulated to a public reprimand and a Law Office Management Assistance Program (LOMAP) assessment for violations of Rules 5.3(a)–(c), 1.1, and 8.4(d) for allowing her paralegal to sign her name to multiple pleadings, motions, certifications, appearances, and other documents over the course of thirteen months. The paralegal also signed client names on affidavits on three occasions without the attorney's direction or knowledge. A prior public reprimand weighed in aggravation, and in mitigation "there was no ultimate harm to the clients and no effect on the cases . . . ."[29]

In *Matter of Hopper*,[30] 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 exploit client funds for his personal use or gain, he received a public reprimand. In *Matter of Levy*,[31] 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.[32]

Whether a failure to supervise another lawyer warrants a public reprimand, rather than a term suspension, is likewise typically tied to the extent of the harm caused and/or the presence of additional misconduct. In *Matter of Booth*,[33] the respondent, a partner of a law firm, violated Rules 5.1(c)(2) and 1.3 because he was on notice of his law partner's successive contempt orders and sanctions and

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28 2019-DDC-6139 (BBO 2019).

29 *Id.* at 2. *See also* Matter of Goldberg, 2018-DDC-5951 (BBO 2018) (attorney publicly reprimanded for, inter alia, allowing legal and nonlegal staff to sign his name to pleadings without indicating attorney had not actually signed document).

30 2009-DDC-4493 (BBO 2009). *See also* Matter of Kalperis, 2008-DDC-4314 (BBO 2008) (attorney faced public reprimand for failure to supervise bookkeeper's incorrect management of IOLTA account and funds).

31 2009-DDC-4489 (BBO 2009).

32 *See also* Matter of Perrone, 2007-DDC-4067 (BBO 2007) (public reprimand where longtime trusted secretary's embezzlement was hard to discover and was undetected by respondent's accountant and title insurer).

33 2022-DDC-6437 (BBO 2022).

failed to take reasonable action to protect the firm or its clients. The respondent did not take steps to avoid or mitigate the consequences of the partner's actions at the time. The respondent stipulated to a public reprimand.[34]

In *Matter of Baron*,[35] the BBO 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*,[36] the BBO 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 neither client suffered deprivation.

4. Admonition

Admonitions are a common sanction for sloppy office procedures or supervision that result in no or very little harm. For instance, in AD 22-14,[37] a partner of a firm was admonished for violating Rule 5.1(a) because he failed to supervise two other partners in the office, which led to IOLTA record-keeping violations. Also, he failed to ensure that the firm had reasonable measures for keeping trust account records in compliance with Rule 1.15. In AD 17-16,[38] a law partner failed to supervise an associate in an immigration matter, resulting in the failure to file a timely motion to reopen the case and terminate an order of deportation. The client was briefly incarcerated as a result but released after the partner filed an emergency motion to reopen and stay removal. In AD 10-19,[39] an attorney received an admonition for failing to ensure that his firm had measures to prevent lawyers from engaging in conflicts of interest. Had a lawyer or staff member in the firm conducted a check, it would have revealed that the firm previously represented one of its clients' adversaries. In AD 07-20,[40] misunderstanding the attorney's instructions, an inexperienced secretary included confidential information in a letter to a client's insurer. In AD 06-18,[41] 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,[42] the respondent

34 *See also* Matter of Gleason, 2012-DDC-5059 at 1–2 (BBO 2012) (public reprimand for failing to supervise associate in filing claim within statute of limitations).
35 2001-DDC-2961 (BBO 2001).
36 1996-DDC-1962 (BBO 1996).
37 2022-ADM-6369 (BBO 2022).
38 2017-ADM-5739 (BBO 2017).
39 2010-ADM-4722 (BBO 2010).
40 2007-ADM-4108 (BBO 2007).
41 2006-ADM-3885 (BBO 2006).
42 2005-ADM-3704 (BBO 2005).

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*.

Other examples exist of admonitions involving violations of Rule 5.3. In AD 25-01,[43] an attorney, representing the wife in a divorce matter, violated Mass. R. Prof. C. 1.3 when she failed to act diligently to ensure a divorce complaint and summons were served. Additionally, the attorney violated Mass. R. Prof. C. 5.3(b) because she failed to reasonably supervise the paralegal to whom she assigned the task. Due to the lack of service, the client's husband was not prohibited from buying a house with marital funds and removing the lawyer's client as a beneficiary on certain financial accounts. When the client learned of this, she terminated the respondent and retained successor counsel, who litigated the matter. Following a trial, the husband was ordered to restore the wife's beneficiary status and sell the house he purchased with marital assets, with the proceeds to be split equally between the parties. The client therefore was not ultimately harmed by the respondent's lack of diligence and inadequate supervision.

In AD 20-05,[44] an attorney failed to adequately supervise his paralegal's preparation of an application for changes to a liquor license and failed to adequately prepare the manager for the hearing, violating Rule 5.3. Unbeknownst to the respondent because of his inadequate preparation and supervision, the application and manager's testimony contained false and misleading statements. The attorney, who had no prior discipline, received an admonition and agreed to continuing legal education and a LOMAP audit. In AD 05-26,[45] both 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.

IV. Unauthorized Practice of Law Within a Law Practice

As the practice of law becomes more nationwide—and international—the issues involving the unauthorized practice of law are increasing. The remote delivery of legal services that evolved during the COVID-19 pandemic affected how jurisdictions interpreted and enforced Rule 5.5. This section discusses some of those issues.

[43] 2025-ADM-6723 (BBO 2025).
[44] 2020-ADM-6150 (BBO 2020).
[45] 2005-ADM-3720 (BBO 2005).

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(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

(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 crime.[46] In addition to the criminal law against unauthorized practice by nonlawyers, Rule 5.5 prohibits lawyers from exceeding the bounds of their authorized practice in other states and from assisting others in the unauthorized practice of law. Rule 5.5 also sets forth guidelines restricting the extent to which lawyers licensed in other states can practice in the Commonwealth.

1. Practicing Outside Massachusetts

Rule 5.5(a) provides that "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction . . . ." This prohibition applies not only to the practice of law in Massachusetts but in other jurisdictions as well. Therefore, Massachusetts lawyers practicing without authorization in another state may be in violation of Massachusetts Rule 5.5(a) as well as the unauthorized practice rules of that other state.[47] Massachusetts

[46] Mass. Gen. Laws c. 221, § 41. Note that inactive lawyers may provide pro bono services in limited circumstances, as described in chapter 24, section II(A)(6).

[47] Similarly, lawyers admitted in other jurisdictions who commit unauthorized practice or other misconduct in Massachusetts are subject to discipline in Massachusetts. According to Mass. R. Prof. C. 8.5(a), "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." On this basis, lawyers ad-

lawyers who find themselves practicing law outside of Massachusetts's borders must therefore familiarize themselves with the unauthorized practice rules of that jurisdiction, especially any applicable temporary practice exceptions.

2. Practice of Law After Suspension

Lawyers suspended from practice who continue to offer legal services or to hold themselves out as lawyers also violate Rule 5.5(a).[48] Because those individuals remain members of the Massachusetts bar, even if their license to practice has been suspended, they must honor the prohibition against the unauthorized practice of law (UPL), and Rule 5.5 applies to them.[49]

3. Assisting in the Unauthorized Practice of Law

Rule 5.5(a) prohibits a lawyer from assisting in UPL. Connected to 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.[50] The most common example of this misconduct is when a lawyer irresponsibly delegates important lawyering tasks to a staff member.[51] 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. The activity of laypersons overseeing residential real estate closings has led to some significant appellate guidance about the scope of UPL,[52] and the Office of 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.[53]

The prohibition against assisting in UPL has special relevance to a lawyer

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mitted elsewhere have received discipline for engaging in misconduct in Massachusetts. *See, e.g.*, AD 21-08, 2021-ADM-6257 (BBO 2021) (Ohio lawyer admonished for misleading advertising in violation of Mass. R. Prof. C. 7.1). To date, a non-Massachusetts lawyer has not been disciplined for violating Rule 5.5.

48 *See, e.g.*, Matter of Linnehan, 2010-DDC-4599 (SJ 2010) (suspension); Matter of Gillespie, 2010-DDC-4670 (BBO 2010) (public reprimand); AD 09-03, 2009-ADM-4512 (BBO 2009) (admonition).

49 *See* SJC Rule 4:01 § 17(8) (imposing further reinstatement delays for lawyers who practice with suspended license).

50 *See, e.g.*, Matter of Hrones, 457 Mass. 844, 2010-DDC-4535 (SJC 2010).

51 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.

52 *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).

53 Bruce T. Eisenhut, *Bearing Witness: REBA v. NREIS and Witness-Only Closings*, Board of Bar Overseers (May 2013), https://www.massbbo.org/Files?fileName=bearingwitness.pdf.

who employs a disbarred or suspended lawyer to serve as a paralegal. A disbarred or suspended lawyer does not by virtue of the discipline become a layperson who can be hired to assist a licensed lawyer in a practice. SJC Rule 4:01 § 17(7) expressly limits a suspended or disbarred lawyer's activity as a paralegal:

> Except as provided in section 18(3) 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.

The exception—Rule 4:01 § 18(3)—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.[54] As discussed in chapter 23, working as a paralegal with such authorization often is useful to the disciplined lawyer when seeking to establish his or her competence to resume the practice of law at any required reinstatement proceeding.

Practice Tip

Unless the court has allowed a suspended or disbarred lawyer to be employed as a paralegal, an attorney may not pay or engage such a lawyer to perform any task, including a job unconnected to the practice of law.[55]

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54 SJC Rule 4:01 § 18(3) provides 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.

55 Notably, in Matter of Bott, 462 Mass. 430, 2012-DDC-4920 (SJC 2012), the SJC considered whether an attorney who resigned as a disciplinary sanction could permissibly be retained to work as a mediator. The court concluded that, even though mediation does not in all circumstances constitute the practice of law, an attorney who is subject to such a disciplinary order or who has been suspended or disbarred, may be prohibited from serving as a mediator when to do so would be perceived by the public as an extension of the attorney's practice of law, or when the conduct of the mediation is so closely related to the practice of law as to constitute legal work within the meaning of SJC Rule 4:01 § 17(7). The court remanded the case to a single justice, who ultimately entered an ordering allowing the resigned attorney to seek employment as a mediator subject to numerous restrictive conditions. Matter of Bott, 2012-DDC-4922 (SJ 2012).

4. Remote Cross-Border Practice

When COVID-19 was declared a global pandemic, many lawyers transitioned to remote work. As a practical matter, this meant that many lawyers were physically located in a state in which they were not licensed while practicing remotely in a state in which they were licensed. Given this phenomenon, the ABA issued Formal Opinion 495, which took the position that this type of remote practice was not a violation of Model Rule 5.5(b), provided that the lawyer did not hold themselves out as a lawyer in the state in which they were not licensed.[56] After the ABA opinion, many states followed suit. Effective April 1, 2024, the SJC adopted comment 4A to Rule 5.5, which specifically addresses cross-border remote practice from Massachusetts. It provides:

> Lawyers who are not admitted to practice in Massachusetts may remotely practice the law of the jurisdictions in which they are licensed while physically present in Massachusetts if they do not hold themselves out as being admitted to practice in Massachusetts, do not advertise or otherwise hold themselves out as having an office in Massachusetts, and do not provide, offer to provide, or hold themselves out as authorized to provide legal services in Massachusetts.

Comment 4A to the Massachusetts version of Rule 5.5 applies only to lawyers not licensed in Massachusetts who are practicing remotely in another state from Massachusetts.[57] Massachusetts-licensed lawyers practicing remotely in Massachusetts while sitting in another state must consult with that other state's version of Rule 5.5 to see if their actions constitute the unauthorized practice of law.

5. Defining the Practice of Law

Whether an attorney or a nonattorney 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

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[56] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 (2020) (offering guidance on practicing remotely while physically present in jurisdiction in which lawyer was not admitted).

[57] *See* David Kluft, *What You Should Know About Cross-Border Remote Practice*, Board of Bar Overseers (updated March 2024), https://www.massbbo.org/Files?fileName=(UpdatedMarch%202024)%20What%20you%20should%20know%20about%20Cross%20Border%20Remote%20Practice.pdf.

determination, one might hope for some clarity within reported decisions about what exactly qualifies as the practice of law. Unfortunately, a definition of "the practice of law" is unclear and often 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*,[58] 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."[59]

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.

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[58] *Real Estate Bar Ass'n for Massachusetts, Inc. v. Nat'l Real Estate Info. Servs.*, 459 Mass. 512 (REBA).
[59] *Id.* at 517–18 (internal citations and quotations 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).

Practice Tip

Conduct that would not be viewed as UPL when performed by a layperson may be deemed the unauthorized practice of law when performed by a suspended or disbarred attorney.[60]

6. Exceptions

Most states have narrow exceptions that allow lawyers not licensed by the state to practice there under certain conditions. The Massachusetts exceptions are set forth in Rules 5.5(c) and 5.5(d).

Rule 5.5(c) addresses exceptions permitting "temporary" practice, in other words, the proper scope of legal services that a lawyer admitted in another jurisdiction may offer to clients on a temporary basis in Massachusetts. Out-of-state lawyers who engage in activity beyond what Rule 5.5(c) permits may face discipline in Massachusetts as well as in their home states for violating the limits Massachusetts imposes. In some cases, 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.[61]

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,[62] (2) when a court permits an appearance under a *pro hac vice* arrangement,[63] and, most importantly from a practical and operational standpoint, (3) in matters that "arise out of or are reasonably related to the lawyer's practice" in the lawyer's own jurisdiction.[64] 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.[65]

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60 *See Bott, supra* note 55, 2012-DDC-4920 (SJC 2012). For further discussion of the restrictions on suspended or disbarred lawyers, *see* chapter 22, section III(C).

61 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, § 5.5-5 (listing loss of fees, disgorgement of fees, criminal prosecution, injunctive or declaratory relief, and contempt as remedies for unauthorized practice).

62 Mass. R. Prof. C. 5.5(c)(1).

63 Mass. R. Prof. C. 5.5(c)(2).

64 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).

65 *See, e.g.*, Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading*

Rule 5.5(d) includes another exception relevant to in-house counsel. Often, a lawyer from outside Massachusetts will move to the Commonwealth 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 if 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.[66] 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.[67] Additionally, any such lawyer must register with the bar as an in-house counsel.[68]

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.[69]

B. Discipline for Violating Rule 5.5

As evidenced by the caselaw below, 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 nonlawyer in the practice of law.

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 on malpractice, court denied fees for work New York lawyers performed "in" California).

66 *See* SJC Rule 3:15 (requiring registration and payment of $301 fee to the BBO, except in pro bono matters, if appearing *pro hac vice*).

67 *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).

68 *See* SJC Rule 4:02 § 9. *See also* chapter 24, section II(A)(5).

69 *See, e.g.*, Matter of Finn, 433 Mass. 418 (2001); Matter of Shea, 1991-DDC-1076 (SJ 1991); Matter of Weitz, 2010-DDC-4655 (SJ 2010).

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;[70] some disbarment orders followed when a lawyer assisted in unauthorized practice. In all disbarment matters the lawyer had engaged in other misconduct as well. In one of those matters, *Matter of Flak*,[71] the attorney associated with a nonattorney who was a convicted felon and a "jailhouse lawyer," and who had established a business called Federal Parole Legal Services (FPLS) to provide legal services to federal inmates. The attorney entered 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 acts of misconduct.

2. Suspension

Many lawyers have received term suspensions for knowingly engaging or assisting in UPL in violation of Rule 5.5. In *Matter of Porreca*,[72] a lawyer asked the respondent to be lead counsel to represent dozens of clients in a toxic tort litigation matter. When the respondent agreed to the representation, he did not know that the lawyer was suspended. However, after he became aware of the suspension, the respondent allowed the suspended lawyer to continue assisting him, thereby engaging in the unauthorized practice of law. The respondent received a six-month suspension for his violation of Rule 5.5(a) and related rule violations. In *Matter of Lovett and Lovett*,[73] two brothers, each of whom were licensed to practice law *only* in Massachusetts, maintained an active law practice in Rhode Island. To avoid detection, the brothers surreptitiously arranged for attorneys with Rhode Island law licenses to sign their documents and appear in Rhode Island courts on their cases. Both brothers were suspended for a period of one year for violating Rule 5.5.

Many Rule 5.5 cases involve lawyers who continued to practice law after being administratively suspended. A term suspension is the usual outcome when the misconduct is knowing and egregious.[74] For instance, in *Matter of Notar-*

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70 *See, e.g.*, Matter of Weiss, 2020-DDC-6219 (SJ 2020) (practicing during administrative suspension); Matter of Veysey, 2010-DDC-4569 (SJ 2010) (same); Matter of Lamond, 2010-DDC-4579 (SJ 2010) (same); Matter of Clifford, 2010-DDC-4636 (SJ 2010) (same); Matter of LiBassi, 449 Mass. 1014, 2007-DDC-3923 (SJC 2007) (same).

71 1990-DDC-812 (SJ 1990).

72 2022-DDC-6405 (SJ 2022).

73 2018-DDC-5899, 2018-DDC-5900 (SJ 2018).

74 *See, e.g.*, Matter of Notargiacomo, 2021-DDC-6302 (SJ 2021) (one year and one day); Matter of Saletan, 2013-DDC-5138 (SJ 2013) (six months and one day); Matter of Gustafson, 2012-DDC-

giacomo,[75] the attorney practiced for ten years with a national law firm while administratively suspended. When the attorney attempted to cure the administrative suspension and regain active status, he made misrepresentations in an affidavit he filed with the BBO. The attorney was suspended for one year and one day for violating not only Rule 5.5(a), but also Rules 3.4(c), 8.4(c), 8.4(d), 8.4(h), and SJC Rule 4:01 § 17(5) and (6).

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.[76]

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 bar counsel's becoming aware of the problem), so the suspensions typically include some representational misconduct in addition to failing to supervise the employee. A well-known example is *Matter of Hrones*.[77] In *Hrones*, an attorney was under the mistaken belief that his paralegal was authorized to practice before the Massachusetts Commission Against Discrimination (MCAD), and he assisted the paralegal in effectively operating an MCAD practice under the attorney's name. The BBO 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 one year and one day.[78] In *Matter of Jackman*,[79] the attorney created a law partnership with a

5009 (SJ 2012), *aff'd*, 464 Mass. 1021, 2013-DDC-5093 (SJC 2013) (six months); Matter of Blessington, 2003-DDC-3287 (SJ 2003) (six months and one day).

75 2021-DDC-6302 (SJ 2021).

76 For a discussion of administrative suspensions, *see* chapter 4. 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.

77 457 Mass. 844, 2010-DDC-4535 (SJC 2010).

78 *See also* Restatement (Third) of the Law Governing Lawyers § 4 cmt. g (Am. L. Inst. 2000); Matter of DiCicco, 1989-DDC-829 (SJ 1989) (attorney assisted in unauthorized practice of law when he formed a business with a paralegal to represent prison inmates, listed paralegal as "Of Counsel," and failed to supervise paralegal).

79 444 Mass. 1013, 2005-DDC-3564 (SJC 2005).

nonlawyer and shared fees with him. The nonlawyer also commingled and misappropriated client funds. The SJC equated that misconduct with negligent misuse of client funds with deprivation and imposed a two-year suspension, followed by a practice limitation upon reinstatement (representing only criminal defendants in district court).

In *Matter of Burns*,[80] 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 substandard service. By contrast, in *Matter of Dash*,[81] 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 one day—merely one day more than in *Matter of Burns* (although that extra day triggered additional reinstatement requirements). And in *Matter of Levin*,[82] 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 the underlying substantive work, and the respondent merely appeared at the closings as the properly licensed lawyer needed to complete the transactions.

In *Matter of Vasa*,[83] the single justice followed *Matter of O'Neill*[84] and suspended the lawyer for three months for assisting a nonlawyer with activities within the respondent's law firm that qualified as practicing law.

In *Matter of Ramos*, a Massachusetts lawyer was suspended for six months for practicing law in Ohio without a license to practice in that state.[85] The report does not indicate whether the lawyer offered any substandard services to his Ohio clients.[86]

80 2000-DDC-2714 (SJ 2000).
81 2006-DDC-3810 (SJ 2006).
82 2002-DDC-3180 (BBO 2002).
83 2016-DDC-5680 (SJ 2016).
84 2014-DDC-5346 (SJ 2014).
85 2013-DDC-5199 (SJ 2013). The lawyer also failed to report a conviction to the bar counsel.
86 *See also* Matter of Airewele, 2012-DDC-5017 (SJ 2012) (suspension of six months and one day for practicing in Georgia without a license, along with neglect and conflict of interest).

3. Public Reprimand

A lawyer who is fully aware of their administrative suspension and nonetheless practices law in violation of Rule 5.5 may receive a public reprimand (and not a term suspension) if the scope of the misconduct is relatively limited and there is no additional misconduct. For instance, in *Matter of Rademacher*,[87] a lawyer was administratively suspended for failing to pay his bar dues. Over the next six months, without giving consideration to his administrative suspension, the lawyer appeared in three separate criminal cases in the Massachusetts district courts. Following the initiation of an investigation by the bar counsel, the lawyer promptly sought admission to practice and was readmitted. He received a public reprimand.[88]

4. Admonition

Admonitions for UPL while administratively suspended typically result when (1) the lawyer did *not* have actual knowledge of the suspension and took prompt corrective action once aware of it,[89] or (2) the lawyer was aware of the suspension but made an innocent mistake, believing it did not apply to the legal work in question.[90]

On occasion, the BBO has admonished a lawyer for limited practice in another jurisdiction without a license. For instance, in AD 21-17,[91] a Massachusetts attorney who resided in California filed a complaint to quiet title on the property of an elderly friend. The attorney was coplaintiff, as he alleged that the friend agreed to grant him an interest in the property if he could get the title in the friend's name. Despite the attorney not being admitted to practice in California, he filed three motions on behalf of the friend, in violation of Rule 5.5(a).

87 2017-DDC-5841 (BBO 2017).

88 *See also Gillespie, supra* note 48, 2010-DDC-4670 (BBO 2010) (public reprimand after respondent continued to practice law despite administrative suspension for nonpayment of bar dues, in violation of Rule 5.5(a); at time of misconduct, respondent reasonably believed then partner had paid registration fees).

89 *See, e.g.*, AD 21-10, 2021-ADM-6259 (BBO 2021) (lawyer unaware of administrative suspension while practicing law took prompt corrective action once aware).

90 *See, e.g.*, AD 23-05, 2023-ADM-6489 (BBO 2023) (lawyer admonished for becoming aware of administrative suspension while working as chief operating officer and then chief legal officer for corporations based on mistaken belief that an active law license was not required for her work).

91 2021-ADM-6266 (BBO 2021).

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.

Rule 5.4: Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer or law firm may agree to share a statutory or tribunal-approved fee award, or a settlement in a matter eligible for such an award, with a qualified legal assistance organization that referred the matter to the lawyer or law firm, if 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;

(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 does not generate much activity in 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, provided 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 rendered, 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 no such efforts have succeeded thus far in Massachusetts. However, a few jurisdictions have adopted changes to Rule 5.4 that allow lawyers and nonlawyers to form such business structures.[92]

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 in violation of Rule 5.4, as discussed in the following section.

Rule 5.7 complements Rule 5.4 and establishes procedures to follow when a lawyer offers clients "ancillary services," which can be described as services that may supplement or be connected to legal engagements but 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 if 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 when law-related services are given the same ethical protections as legal services. Some ancillary nonlegal services may be considered "business transactions" with clients and subject to the disclosures required under Rule 1.8(a).[93]

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92 *See* Jayne R. Reardon, *Nonlawyer Ownership Is Not the End of Professionalism*, American Bar Association (July 1, 2024), https://www.americanbar.org/groups/law_practice/resources/law-practice-magazine/2024/july-august-2024/nonlawyer-ownership-is-not-the-end-of-professionalism/?utm_source=sfmc&utm_medium=email&utm_campaign=&promo=&utm_id=870036&sfmc_id=53146003 (discussing changes to Rule 5.4 that D.C., Utah, and Ariz. adopted to allow MDPs and providing brief overview of data on client complaints for attorneys using alternative practice models).

93 *See* Robert M. Daniszewski, *The Cost of Doing Business (with a Client)*, Board of Bar Overseers (December 2022), https://www.massbbo.org/Files?fileName=cost_of_doing_business.pdf.

B. Discipline for Violating Rules 5.4 and 5.7

The lawyers who have been disciplined for violating Rule 5.4 shared legal fees with nonlawyers. In *Matter of Zak*,[94] 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 client referrals. In *Matter of Shalom*,[95] the lawyer was suspended indefinitely for multiple instances of misconduct, including paying a finder's fee to a nonlawyer in return for a referral.[96] In *Matter of Hale*,[97] the attorney received a public reprimand for agreeing to pay his paralegal 25% of the legal fees received for his immigration work. The lawyer's prior admonition served as an aggravating factor. Two other lawyers received admonitions for sharing fees. In AD 08-04,[98] the lawyer received an admonition for agreeing to pay his office manager 33% of all his legal fees as her salary.

Very few Massachusetts lawyers have been disciplined for misconduct involving Rule 5.7. On two occasions, lawyers received admonitions for providing ancillary services to customers without making clear that the activities were not legal services. In AD 03-30,[99] the respondent, who operated 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 respondent did not explain to the client that his services were not legal services. And in AD 03-02,[100] 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. 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 in the best interest of the public to let clients choose their own counsel.

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94 476 Mass. 1034, 2017-DDC-5783 (SJC 2017).
95 2003-DDC-3275 (SJ 2003).
96 *See also Jackman, supra* note 79, 444 Mass. 1013, 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.
97 2004-DDC-3495 (BBO 2004).
98 2008-ADM-4326 (BBO 2008).
99 2003-ADM-3362 (BBO 2003).
100 2003-ADM-3334 (BBO 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.[101] 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."[102]

Rule 5.6 has seldom been the source of discipline in Massachusetts.[103] 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.[104] 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.[105]

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101 *See* Disciplinary Rules, Rule 2-108.

102 Meehan v. Shaughnessy, 404 Mass. 419, 431 (1989).

103 In Matter of Traficonte, 2006-DDC-3845 (SJ 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.

104 *See, e.g.*, *Meehan*, 404 Mass. at 431; 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).

105 *See, e.g.*, *Jackman, supra* note 96, 444 Mass. 1013 (ordering that 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 7.3)

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. Effective October 1, 2022, the Supreme Judicial Court (SJC) amended the *Rules of Professional Conduct*, repealing former Rules 7.1 through 7.5 and replacing them with Rules 7.1 through 7.3. The substance of the rules remains essentially the same.[1]

II. Advertising and Solicitation

Regulations regarding lawyers' efforts to obtain clients appear in Rules 7.1 through 7.3. 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 may 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 three rules, without extensively discussing the regulatory details.[2]

[1] Matter of Ruggiero, 2023-DDC-6515 (SJ 2023).

[2] 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*

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: Communications Concerning a Lawyer's Services; Specific Rules

(a) A lawyer may communicate information regarding the lawyer's services through any media.

(b) A lawyer shall neither compensate nor give or promise 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) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.**

(c) Lawyers may hold themselves out publicly as specialists in particular services, fields, and areas of law if the communication is

Ethical Limits on Lawyer Advertising and Solicitation, Board of Bar Overseers (Sept. 2016), https://bbopublic.blob.core.windows.net/web/f/advertising.pdf; Sarah A. Chambers, *Pick Me! Pick Me! Pick Me! (An Advertising and Solicitation Update)*, Board of Bar Overseers (March 2005), https://bbopublic.blob.core.windows.net/web/f/pickme.pdf.

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. However, a lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless 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 that has been 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."

(d) Any communication made under this Rule must include the name of at least one lawyer or law firm responsible for its content.

Rule 7.3: Solicitation of Clients

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) (i) representative of an organization, including a non-profit or government entity, in connection with the activities of such organization, or (ii) person engaged in trade or commerce as defined in G. L. c. 93A, § 1 (b), in connection with such person's trade or commerce.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), 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.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

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.[3] Rule 7.1(a) sets forth an objective standard; no showing that a client relied on the misrepresentation is required. Rather Rule 7.1(a)'s materiality standard is met when the deceptive communication is one on which a client could be expected to rely or that would lead a reasonable person to believe something about the firm or the lawyer that was not true.[4] 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

[3] Matter of Zak, 476 Mass. 1034, 1038, 2017-DDC-5783 at 6 (SJC 2017) (the SJC, in disbarring attorney who engaged in unfair and deceptive practices in marketing his legal practice, noted that "[t]here need not be evidence that a client was misled or deceived to establish a violation of the rules of professional conduct").

[4] *Ruggiero, supra* note 1, 2023-DDC-6515 (SJ 2023).

these memberships were as 'associates' and that neither respondent was licensed to practice law in Rhode Island." That conduct violated Rule 7.1.[5]

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 future success on behalf of prospective clients or favorably compare their services to other lawyers unless they can substantiate the claim.

Comments 5 through 9 (formerly Rule 7.5) clarify Rule 7.1's general prohibition of false or misleading names that a lawyer may use for a law firm or practice.[6] Law firm names may not be false or misleading; a law firm may use a trade name if the name satisfies that criterion.[7] A Massachusetts law firm may use its name in a different jurisdiction (the converse is also true), but it must identify the jurisdictional limitations of its lawyers. If a law practice uses a name that implies more than one attorney (such as "Law Group" or "Associates"), that usage must not be misleading.[8]

Rule 7.1 becomes challenging in two settings.[9] One relates to the role of a lawyer with an "of counsel" relationship with a firm. The other relates to the situation where lawyers share space but do not operate as a single firm.

In Formal Op. 90-357,[10] 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

5 AD 03-47, 2003-ADM-3379 (BBO 2003).

6 *See also* Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 3:06 § 2(c) (if a law firm operates as a limited liability entity, "[t]he name of the entity shall contain words or abbreviations that indicate that it is a limited liability entity").

7 Mass. R. Prof. C. 7.1 cmts. 5–8. 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. 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 5 that a firm name may include only current, retired, or deceased law firm members.

8 *See* Matter of Miller, 2012-DDC-5043 (BBO 2012) (solo lawyer marketed his firm as "group" and "associates," among other misconduct; public reprimand); AD 05-05, 2005-ADM-3699 (BBO 2005) (admonition for implying associates while operating solo practice).

9 *See* Chambers, *supra* note 2.

10 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 90-357 (1990).

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 Counsel has advised 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 named 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.[11]

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 7 to Rule 7.1 explains the limitation:

> [L]awyers who are not in fact partners, such as those who are only sharing office facilities, may not denominate themselves as, for example, "Smith and Jones," or "Smith and Jones, A Professional Association," for those titles, in the absence of an effective disclaimer of joint responsibility, suggest partnership in the practice of law or that they are practicing law together in a firm. Likewise, the use of the term "associates" by a group of lawyers implies practice in either a partnership or sole proprietorship form and may not be used by a group in which the individual members disclaim the joint or vicarious responsibility inherent in such forms of business in the absence of an effective disclaimer of such responsibility.[12]

This comment to Rule 7.1 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. In order for a disclaimer to be effective, a 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 de-

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11 Nancy Kaufman, *The Of Counsel Relationship*, Board of Bar Overseers (Oct. 2000), https://www.massbbo.org/Files?fileName=ofcounsel.pdf (discussing predecessor versions of Mass. R. Prof. C. 7.1 and 7.5, which were amended on October 1, 2022, but remain essentially the same). 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).

12 Mass. R. Prof. C. 7.1 cmt. 7.

tailed disclaimer should appear on the letterhead, website, advertising, and any other medium in which the name of the office appears, and not just the name of the individual attorney.

In the past, lawyers have on occasion received discipline for violating former Rule 7.5 because of the trade name chosen, although typically the discipline arises in conjunction with other, more significant misconduct.[13] At least one attorney, however, has been publicly reprimanded for using a misleading firm name, with no other misconduct.[14]

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 advertising[15] and the lawyer may not pay or otherwise reward anyone for recommending the lawyer's services,[16] except for such understandable items as payment for the cost of advertising, for a lawyer referral service, pursuant to a nonexclusive reciprocal referral agreement about which the client is informed, or nominal gifts that are expressions of appreciation.[17]

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,[18] 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 cannot be documented as true for prospective clients, or imply that the lawyer will obtain certain results for a client.[19]

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13 *See, e.g.*, Matter of Airewele, 2012-DDC-5017 (SJ 2012) (suspension for more serious misconduct); Matter of O'Reilly, 2010-DDC-4656 (SJ 2010) (suspension for more serious misconduct).

14 Matter of Zachery, 2007-DDC-4065 (BBO 2007) (violation of former Rule 7.5 for using name of lawyer who was not part of law firm).

15 Mass. R. Prof. C. 7.2(d).

16 Mass. R. Prof. C. 7.2(b). *See Zak, supra* note 3, 476 Mass. at 1037, 2017-DDC-5783 at 4–5 (SJC 2017) (sharing fees with nonlawyer agent to locate clients violated this rule; respondent disbarred for this and other misconduct).

17 Mass. R. Prof. C. 7.2(b)(1), (2), (4), (5).

18 *See* Kasten, *supra* note 2, at 42. *See also* Matter of Saletan, 2013-DDC-5138 (SJ 2013) (inactive lawyer's identification as counsel on LinkedIn page violated Rule 7.1).

19 *See, e.g.*, Utah State Bar Ethics Advisory Comm., Op. 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 cmt. 3.

Rule 7.2(c) (previously Rule 7.4) regulates lawyers' claims to special expertise. A Massachusetts lawyer may claim to be an expert or a specialist, but only if that claim is not false or misleading.[20] If the lawyer wishes to advertise a certification in a specific legal area by an organization that has been approved by either a state authority or the American Bar Association, the lawyer need only identify that organization in the advertisement. If, on the other hand, the organization is not approved, then the advertisement must state that the certifying organization is a private organization that is not regulated by a state authority or the American Bar Association.[21] 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 may be held to a higher standard of care in a malpractice case.[22] Lawyers have occasionally faced discipline for misconduct implicating former Rule 7.4, including earlier versions of this limitation.[23]

Practice Tips

Social media counts.[24] Anything you say about your practice on social media sites may qualify as advertising and, therefore, must conform to the rules.

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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.

20 Mass. R. Prof. C. 7.2(c).

21 *Id.*

22 *Id.* at cmt. 9.

23 *See* Matter of Tierney, 2018-DDC-5952 (BBO 2018) (public reprimand for lawyer who, inter alia, held himself out, through his law firm name, advertisements, website, stationery, and business cards, as CPA after his CPA license expired); Matter of Capone, 2001-DDC-2927 (SJ 2001) (indefinite suspension for multiple instances of misconduct, including falsely claiming board certification on letterhead); AD 09-12, 2009-ADM-4521 (BBO 2009) (admonition for attorney who held himself out as specialist in immigration law without experience in that area).

24 *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. Rule 7.3(a) defines solicitation as "a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter."[25] Rule 7.3 states that lawyers may not solicit prospective clients *at all* if the person has indicated to the lawyer a desire not to be solicited;[26] may not solicit *for a fee* if the prospective client is vulnerable and cannot exercise reasonable judgment;[27] 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.[28]

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 restrictive in this area in order to protect potentially vulnerable individuals.

III. Discipline for Violating Rules 7.1 Through 7.3

This section reviews the discipline imposed on Massachusetts lawyers for violating the rules governing marketing and solicitation.[29] The review proceeds

[25] Mass. R. Prof. C. 7.3(a).
[26] Mass. R. Prof. C. 7.3(c)(1).
[27] Mass. R. Prof. C. 7.3(c)(3).
[28] Mass. R. Prof. C. 7.3(b).
[29] No reported case has applied new Rules 7.1 through 7.3. The cases discussing the former rules are instructive and therefore are included herein.

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 marketing rules has been an admonition, but occasionally more serious discipline has been imposed.

You Should Know

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 SJC has included a marketing violation among other misconduct in a disbarment decision,[30] but the sanction for getting into trouble in this area is usually less severe than losing one's license.

B. Suspension

No Massachusetts lawyer has been suspended primarily for a violation of former 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*,[31] the respondent was suspended for six months and one 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*,[32] the attorney was suspended for six

[30] *See, e.g.*, *Zak, supra* note 16, 476 Mass. 1034, 2017-DDC-5783 (SJC 2017) (attorney violated rules 7.1, 7.2, and numerous other rules, warranting his disbarment for wide-ranging misconduct involving loan modification business); Matter of Krantz, 2015-DDC-5495 (SJ 2015) (along with serious misappropriation of funds, practice of law in Florida without license there, with misleading firm name; disbarment); Matter of Duerr, 2005-DDC-3637 (SJ 2005) (along with other misconduct, respondent distributed business cards while administratively suspended, in violation of former Rule 7.1); Matter of Kaigler, 1990-DDC-838 (SJ 1990) (among much misconduct, including converting client property, respondent offered free legal services in return for referrals, in violation of DR 2-103(E), the predecessor to former Rule 7.2(b)); Matter of Flak, 1990-DDC-812 (SJ 1990) (disbarment for serious misconduct, including, as one count, falsely holding himself out as specialist in federal parole postconviction relief).

[31] 2013-DDC-5138 (SJ 2013).

[32] 2012-DDC-5017 (SJ 2012).

months and one 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."[33]

Aside from these unauthorized practice cases and some occasional matters where the lawyers engaged in serious misconduct but incidentally failed to comply with the rules governing marketing,[34] no Massachusetts lawyer has been suspended for violating the rules governing advertising and solicitation.

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 Gordon*,[35] 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*,[36] 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.[37]

Outside of direct solicitation, few disciplinary matters involving primarily

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33 For similar suspensions combined with unauthorized practice, *see* Matter of Larkowich, 2015-DDC-5455 (SJ 2015), 2015 WL 9309007 (2015); Matter of Daniels, 2007-DDC-3976 (SJ 2007); Matter of Finn, 2001-DDC-2851 (SJC 2001); Matter of Shea, 1991-DDC-1076 (SJ 1991).

34 *See, e.g.*, Matter of Barros, 2013-DDC-5144 (SJ 2013) (along with assistance of unauthorized practice, misrepresenting size and nature of firm on letterhead and website; suspension of six months and one day); Matter of Shalom, 2003-DDC-3275 (SJ 2003) (converting client funds, assisting criminal conduct, and paying another to refer matters to lawyer; indefinite suspension); Matter of Galat, 2002-DDC-3135 (SJ 2002) (serious conflict of interest, misrepresentations to clients, and use of improper firm name; indefinite suspension).

35 2007-DDC-4076 (BBO 2007); *see also* Matter of D'Arcy, 1995-DDC-1803 (BBO 1995) (attorney received public reprimand after urging defendant to retain him for fee after overhearing discussion between presiding judge and defendant).

36 1996-DDC-2023 (BBO 1996) (in aggravation, hearing committee found lawyer intentionally lied about his actions during BBO proceedings).

37 *See, e.g.*, Matter of Holzberg, 1996-DDC-1994 (BBO 1996) (solicitation letter with intentionally too-small font (as required by prior version of rules) identifying communication as marketing). *Cf.* Matter of White, 2012-DDC-5049 (BBO 2012) (improper solicitation, with separate count of neglect of matter; public reprimand).

marketing have led to public reprimands. In *Matter of Zachery*,[38] mentioned in section II(A), 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 from them. All of the other public reprimands involving violations of former Rules 7.1 through 7.5 have involved other, separate misconduct.[39]

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 reasonable 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,[40] the attorney, a sole practitioner, identified his law practice in his letterhead as his name "& Associates." In AD 00-23,[41] 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,[42] 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 adviser. 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,[43] an attorney on inactive status in Massachusetts identified himself on letterhead as a member

38 2007-DDC-4065 (BBO 2007).

39 *See, e.g.*, Matter of Nardi, 1994-DDC-1594 (BBO 1994) (public reprimand where attorney allowed corporation to solicit professional employment on his behalf while selling living trusts to consumers; also conflict of interest, poor representation, and assistance with unauthorized practice); Matter of Connell, 1990-DDC-930 (SJ 1990) (public reprimand and one-year probation where attorney, while performing legal services as independent contractor, acquiesced in using his name in misleading advertising; also assisted with unauthorized practice).

40 2006-ADM-3875 (BBO 2006). *See also* AD 05-05, 2005-ADM-3699 (BBO 2005) (lawyer in solo practice used firm name that falsely implied he employed associates or worked with partners, in violation of Rule 7.1); AD 98-64, 1998-ADM-2346 (BBO 1998) (lawyer in solo practice admonished for use of "Associates" in firm name).

41 2000-ADM-2789 (BBO 2000).

42 1996-ADM-1910 (BBO 1996).

43 1996-ADM-1878 (BBO 1996).

of the Massachusetts bar without noting his inactive status. In PR 86-19,[44] the attorney's law office included on firm letterhead the name of an attorney the firm had hoped to hire, but had not. In PR 87-8,[45] 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 themself as a lawyer. (As noted in section III, a similar type of misconduct resulted in term suspensions for two lawyers.[46]) In AD 98-22,[47] 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,[48] 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 for that misconduct over time.

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,[49] 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,[50] 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,[51] 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,[52] the attorney sent a letter to an individual three days after his wife's death—the day of her funeral—expressing condolences and offering legal assistance if needed. The respondent attorney

44 1986-ADM-560 (BBO 1986).
45 1987-ADM-651 (BBO 1987).
46 *See Saletan, supra* note 18, 2013-DDC-5138 (SJ 2013), and *Airewele, supra* note 13, 2012-DDC-5017 (SJ 2012), discussed in section III(B).
47 1998-ADM-2304 (BBO 1998).
48 1999-ADM-2621 (BBO 1999).
49 2005-ADM-3719 (BBO 2005).
50 1999-ADM-2593 (BBO 1999).
51 1993-ADM-1299 (BBO 1993).
52 1993-ADM-1326 (BBO 1993).

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,[53] 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 use social media frequently. 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,[54] 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.[55] Assertions on the site that are not true may subject you to discipline.[56]
- *Social networking sites qualify as advertising:* If you belong to LinkedIn or Facebook, your profile descriptions may qualify as advertising.[57]
- *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.
- *Posts on X (formerly known as Twitter) may also qualify as written correspondence:* Such messages may qualify as "written communication" under Rule 7.3(c), as previously described in section II(C).
- *Real-time electronic communications with individuals are considered in-person communications:* Live chats, text messages, and e-mails with prospective clients in real time can constitute in-person solicitation. Those interactions can also form attorney-client obligations.[58]

53 2009-ADM-4521 (BBO 2009).

54 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).

55 *See* Gilmore, *supra* note 2.

56 *See, e.g.*, *Barros, supra* note 34, 2013-DDC-5144 (SJ 2013); AD 03-47, 2003-ADM-3379 (BBO 2003) (admonition for misleading statements on website about bar membership).

57 Kasten, *supra* note 2.

58 *See* Paul R. Tremblay, *Forming Involuntary Client Relationships*, 52 Boston B.J. 12 (Feb. 2008) (describing risks of offering advice during casual conversations).

- *Be cautious about the unauthorized practice of law:* Chapter 14 discusses 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.[59] 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.[60]
- *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.[61] 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 they use a blog post to argue for a position adverse to that which they advocate on behalf of a client, they may have created a conflict of interest or undercut their competence on behalf of that client.[62]
- *Social media leaves a footprint and is discoverable:* This last message may best be directed to clients, but lawyers may also want to keep this in mind as they conduct their practice.
- *Be aware of the importance of protections on client confidentiality when posting client matters on social media*.[63]

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59 *Id.*

60 *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).

61 S.C. Bar Ethics Advisory Comm., Op. 09-10, 2009 WL 6850298 (2009).

62 *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).

63 Matter of Smith, 2019-DDC-6126 (BBO 2019).

CHAPTER SIXTEEN

Prosecutor Duties (Rules 3.8, 4.2, 5.1(b), 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."[1] While prosecutors may (and usually do) perform zealously, they must temper their zeal with a concern for the defendant's rights, the victim's and society's interests, and fairness. "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.

II. 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 cmt. 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;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose:

(1) refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule; and

(2) take reasonable steps to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule;

(g) not avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused; and

(h) refrain from seeking, as a condition of a disposition agreement in a criminal matter, the defendant's waiver of claims of ineffective assistance of counsel or prosecutorial misconduct.

(i) When, because of new, credible, and material evidence, a prosecutor knows that there is a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) if the conviction was not obtained by that prosecutor's office, disclose that evidence to an appropriate court or the chief prosecutor of the office that obtained the conviction, and

(2) if the conviction was obtained by that prosecutor's office,

(i) disclose that evidence to the appropriate court;

(ii) notify the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;

(iii) disclose that evidence to the defendant unless a court authorizes delay for good cause shown; and

> **(iv) undertake or assist in any further investigation as the court may direct.**
>
> **(j) When a prosecutor knows that clear and convincing evidence establishes that a defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the injustice.**
>
> **(k) A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (i) and (j), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.**

A. The Lessons of Rule 3.8

Before Massachusetts adopted Rule 3.8 in 1998, Massachusetts prosecutors were governed by 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 American Bar Association (ABA) Model Rule 3.8, outlines the following requirements for prosecutors, 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 & Suzanne Valdez, Prosecutorial Ethics (3d ed. 2019); Joseph M. Makalusky & Tasha Marshall, *Ethics Issues for Government Lawyers*, in Ethical Lawyering in Massachusetts (James S. Bolan & Sara N. Holden eds., 6th ed., 2024).

[4] *See, e.g.*, Commonwealth 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 written 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] The Massachusetts provision, which is stricter than the ABA Model Rule, prohibits a prosecutor from

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5 Mass. R. Prof. C. 3.8(c).

6 *Cf.* Model Rules of Prof'l Conduct r. 3.8(c) (Am. Bar Ass'n 2025) (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).

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 toward defendants who have already been convicted, when evidence arises that they may in fact be innocent. 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 personal knowledge of facts in issue or 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. One example followed the infamous scandal at the state drug lab in Amherst.[14] In *Matter of Foster & Others*,[15] the SJC disciplined three former assistant attorneys general for their involvement in the withholding of exculpatory evidence during the prosecution of the state chemist Sonja Farak. The trial prosecutor, who violated Rule 3.8(d) and numerous other rules by failing to disclose the exculpatory evidence and knowingly making materially misleading statements concerning the disclosure of the exculpatory evidence, was disbarred.[16] The court recognized that as a result of the "intentional and egregious misconduct, the due

11 Mass. R. Prof. C. 3.8(e)(1), (2). ABA 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 . . . in 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, Rules 3.8(h) and (i) stated the same thing specifically for prosecutors.

13 *See* Makalusky & Marshall, *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 *See* Commonwealth v. Claudio, 484 Mass. 203 (2020); Comm. for Pub. Couns. Servs. v. Att'y Gen., 480 Mass. 700 (2018).

15 492 Mass. 724 (2023).

16 *Id.* at 765, 769–70.

process rights of thousands of criminal defendants were violated for a prolonged period based on the withholding of exculpatory evidence."[17] The appellate prosecutor, who demonstrated "gross incompetence" and made reckless misrepresentations to the court concerning the disclosure of the exculpatory evidence, received a suspension of one year and one day.[18] The supervising prosecutor who failed to adequately and diligently supervise the trial prosecutor and neglected to ensure that all exculpatory evidence was disclosed received a public reprimand.[19]

In *Matter of Nelson*,[20] 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.

An earlier report suggests a more lax standard. In AD 80-18,[21] 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 the 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.[22]

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, for example, 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.[23]

17 *Id.* at 770.
18 *Id.* at 745, 763–65.
19 *Id.* at 747, 751–57.
20 2009-DDC-4492 (BBO 2009).
21 1980-ADM-6927 (SJ 1980).
22 *Id.* at 2. The former private reprimand sanction reflected in AD 80-18 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, section II(D). That difference might account for a seemingly more lax treatment of the misconduct.
23 *See also* Matter of Kowalski, 2024-DDC-6673 (BBO 2024) (public reprimand for prosecutor's violation of Rule 8.4(d) by committing errors during cross-examination and during his closing argument, which were sole bases for overturning defendant's conviction on appeal).

In AD 00-60,[24] 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.[25]

III. 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.

> ***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.**

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

[24] 2000-ADM-2826 (BBO 2000).

[25] *See also* AD 01-03, 2001-ADM-2985 (BBO 2001) (admonition for prosecutor's improper closing argument, where Appeals Court criticized argument but affirmed defendant's conviction due to strong evidence of guilt and detailed curative instructions); AD 01-20, 2001-ADM-3002 (BBO 2001) (admonition issued in circumstances similar to AD 01-03).

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.

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.[26] Because often the investigation concerns matters for which the suspect does not yet know he is a suspect, the prosecutor may successfully conclude that the lawyer is not the person's lawyer for that matter. Sometimes, though, the suspect has the equivalent of "house counsel," in which event that argument does not work for the prosecutor.[27]

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.[28] 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.[29] 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 . . . .

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26 *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. Aug. 7, 2008) (suspect had lawyer for related civil proceeding, but not for criminal matter being investigated; covert contact allowed by order of court and therefore "authorized by law").

27 United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990) (using the term "house counsel").

28 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 the constitutional right would not play a role in determining the propriety of the contact.

29 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).

> [T]he use of informants by government prosecutors in a preindictment, non-custodial situation . . . will generally fall within the "authorized by law" exception.[30]

Most courts have followed the *Hammad* principle,[31] 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.[32] The question of the scope of the "authorized by law" exception remains open for Massachusetts prosecutors.

No Massachusetts prosecutor has been disciplined for improper contact with a represented person through an undercover investigation,[33] and no reported decisions show a judge granting relief to a defendant for that reason.[34]

B. Discipline for Violating Rule 4.2

In *Matter of Marshard*,[35] a prosecutor was suspended for one month and ordered to attend a legal ethics class for her misconduct in meeting with a witness who was represented by a court-appointed lawyer without first seeking the consent of that lawyer. Marshard met the witness—who seemed agitated, did not understand the conversation, and asked to meet with his lawyer—to discuss with him testifying in a case she was then prosecuting, in exchange for which she promised that he would not be charged. When the judge later asked if the witness's at-

30 *Hammad*, 858 F.2d at 839, 840.

31 *See* United States v. Balter, 91 F.3d 427 (3d Cir. 1996) (collecting cases).

32 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); AD 80-18, 1980-ADM-6927 (SJ 1980).

33 Matter of Carbone, 2017-DDC-5758 (SJ 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 a 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).

34 *Cf. In re* Criminal Investigation of Doe, 901 F. Supp. 2d 251 (D. Mass. 2012) (refusing to grant federal prosecutors advance authority to contact a targeted individual through covert means without the consent of that individual's counsel, but not addressing whether under appropriate circumstances the prosecutors would be authorized by law to do so proactively); *In re* Doe, 2008 WL 3274429 *1 (allowing the government to conduct a noncustodial interview of an unindicted individual believed to have retained counsel in a related civil proceeding).

35 2018-DDC-5986 (SJ 2018).

torney had been at the meeting, she lied and denied that he had been appointed at the time, an assertion the appointed attorney immediately corrected.[36]

In recommending a suspension rather than a public reprimand, as the hearing committee had suggested, the BBO emphasized that the prosecutor's abuse of power was aggravated by the misrepresentations made to the court about the unauthorized contact.[37] As the BBO further observed, "While Rule 4.2 plays an important role in protecting litigants in all types of cases, we note its special significance in criminal law, where the balance of power tilts strongly in favor of the government."[38]

IV. Limits on the Prosecutor's Use of Deception in Undercover Investigations

> ***Rule 8.4(c): Misconduct***
>
> **It is professional misconduct for a lawyer to:**
>
> * * *
>
> **(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation[.]**

A. The Lessons of Rule 8.4(c) for Prosecutors

Chapter 12 addresses Rule 8.4(c), the provision prohibiting a lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation,"[39] 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 supervision of undercover informants or undercover police officers literally involves "deceit" and "misrepresentation," so the question here is whether a prosecutor who oversees such an operation is subject to discipline under Rule 8.4(c). At least one court in another state has concluded that they are.[40]

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36 *Id.* at 10 (Board Memorandum).
37 *Id.* at 7, 13–14 (Board Memorandum).
38 *Id.* at 14 (Board Memorandum).
39 *See* chapter 12, section IV.
40 *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 expressly allow undercover contacts.

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*,[41] 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.[42]

A U.S. District Court judge in the District of Massachusetts has read *Crossen* in this same approving way.[43] 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)

One assistant district attorney was disciplined for violating DR 1-102(A)(4), the predecessor to Rule 8.4(c). In *Matter of Bloom*,[44] in a matter the single justice labeled as "outrageous," the respondent tried to trick two defendants into signing a false confession and forged both a false confession of a third participant and a police officer's signature on that document. The respondent received a public reprimand.

In *Matter of Foster & Others*,[45] an assistant attorney general knowingly made materially misleading statements to two assistant district attorneys and coun-

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41 450 Mass. 533, 565–66, 2008-DDC-6871 at 40–42 (SJC 2008).

42 *Id.* at 566. In a companion case to *Crossen*, the SJC suggested, by negative implication, that it might permit private lawyers to use impostors 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, 2008-DDC-4145 at 10–11 (SJC 2008).

43 Leysock v. Forest Labs., Inc., 2017 WL 1591833 (D. Mass. May 25, 2017) (Saylor, J.) (discussed in chapter 12, section IV(C)).

44 1993-DDC-1462 (SJ 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.

45 492 Mass. at 744.

sel for the state police about the disclosure of exculpatory evidence in violation of Rule 8.4(c). The prosecutor was disbarred, but the severity of the sanction was primarily driven by the Rule 3.8(d) violation and the unprecedented harm caused by the failure to disclose the exculpatory evidence.[46]

V. The Responsibility to Properly Supervise Prosecutors

> ***Rule 5.1(b): Responsibilities of Partners, Managers, and Supervisory Lawyers***
>
> * * *
>
> **(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.**

Although the duties of supervisory lawyers are discussed elsewhere in greater detail,[47] the *Foster* case merits attention here as the first Massachusetts case disciplining a prosecutor for failing to properly supervise a subordinate prosecutor.[48] In that case, the supervisor's lack of diligence and neglect in ensuring that his subordinate disclosed exculpatory evidence "caused harm that was 'particularly outrageous' to victims who were vulnerable[.]"[49] The SJC recognized that "[u]nder rule 5.1, [the supervisor] was not entitled to assume that [the subordinate prosecutor] would 'inevitably conform' to the rules of professional conduct."[50] The respondent's misconduct was only mitigated by the fact that he reasonably and in good faith relied on his subordinate's misrepresentations that she had turned over the exculpatory evidence at issue.[51]

46 *Id.* at 769–70. *See also* section II(B).
47 *See* chapter 14, section III.
48 *Foster & Others, supra* note 46, 492 Mass. at 747, 752–57.
49 *Id.* at 756 (quoting Matter of Kane, 1997-DDC-2261 at 9 (BBO 1997)).
50 *Id.* at 751 (citing Mass. R. Prof. C. 5.1 cmt. 2).
51 *Id.* at 726.

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. 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 policymaking 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;
(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 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 certain settings while permitting lawyers to speak when circumstances warrant public comment.

No lawyer has ever been disciplined in Massachusetts for violating Rule 3.6, and the rule has been relied upon only once in reported caselaw 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.

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, will be publicly communicated and that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[3] Lawyers, therefore, may not make statements to the media, including in social media,[4] if the statements have a good chance of prejudicing the proceeding about which the lawyer speaks. Because lawyers sometimes do have to speak about their work in order to competently represent their client's interests, 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.[5]

In the most celebrated disciplinary matter involving Rule 3.6, a matter arising in Nevada that reached the United States Supreme Court, the original sanction for the lawyer's prejudicial statements by the state was only a private reprimand.[6] The Supreme Court ultimately reversed this discipline, ruling that the rule then

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 respondent's statements).

3 Mass. R. Prof. C. 3.6(a).

4 *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).

5 Mass. R. Prof. C. 3.6 cmt. 5.

6 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.

in effect was unconstitutionally ambiguous because it interfered with a criminal defense attorney's free speech.

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.[7]

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 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

[7] Gilda Tuoni Russell, Massachusetts Professional Responsibility § 36.04 (2003).

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."[8]

The rationales for this rule are several and not always consistent.[9] 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.

The SJC has agreed that the rule is primarily to prevent jury confusion[10] but also to protect the lawyer's client.[11] Courts are also concerned that opposing

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8 Mass. R. Prof. C. 3.7(a)(1)–(3).

9 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).

10 *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)).

11 *Id.* 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)).

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.[12]

Practice Tip

Lawyers who are disciplined for violating Rule 3.7 often chose 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*,[13] 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 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*,[14] 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*,[15] an attorney received a public reprimand for violating DR 5-101(B)

12 At least thirty Massachusetts court decisions cataloged on Westlaw refer to Rule 3.7, and most 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").

13 2005-DDC-3652 (SJ 2005).

14 2015-DDC-5525 (BBO 2015) (public reprimand).

15 1999-DDC-2583 (BBO 1999).

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*,[16] an attorney received a public reprimand for engaging in a conflict of interest that led 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 BBO concluded that she should not have represented the client at the trial and in doing so violated DR 5-101(B).[17]

The remaining discipline for violating DR 5-101(B) or DR 5-102(A) has been private reprimands. In PR 90-39,[18] 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 BBO 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 have otherwise received a public reprimand. And in PR 88-19,[19] 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.

16 2001-DDC-2974 (BBO 2001).
17 The BBO opinion relied upon DR 5-102(A), which addressed the need to withdraw when a lawyer's testimony becomes necessary.
18 1990-ADM-890 (BBO 1990).
19 1988-ADM-712 (BBO 1988).

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, lawyers should not imply that they are disinterested if they are 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. In contrast, 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.[20] The rule also confirms, again by implication, that a lawyer appearing in this role is *not* prohibited from making frivolous arguments.[21] Rule 3.9 has not been the source of discipline in Massachusetts.

[20] Mass. R. Prof. C. 3.9 cmt. 4.

[21] Annotated Model Rules of Prof'l Conduct r. 3.9 (Am. Bar Ass'n 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 fac-

[1] Matter of Collins, 455 Mass. 1020, 1021, 2010-DDC-4532 at 1 (SJC 2010) (citations omitted) (quoting Matter of Alter, 389 Mass. 153, 156 (1983); *see also* Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984)).

[2] Matter of Finn, 433 Mass. 418, 424, 2001-DDC-2851 (SJC 2001); Matter of Hurley, 418 Mass. 649, 652 (1994), *cert. denied*, 514 U.S. 1036 (1995).

tors. Finally, the chapter describes the necessary steps for maintaining the ability to introduce evidence of such factors in a disciplinary hearing.

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.

You Should Know

A review of decisions by the SJC, the single justices, and the BBO shows that, while the reports regularly inquire about both factors, aggravation plays a far more prominent role in the determination of discipline than mitigation. Many cases and reports note the absence of any mitigating factors, but very few note the absence of aggravating factors.

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 BBO 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. The SJC distinguishes *typical* mitigation factors from *special* mitigating factors.[5] Typical factors ordinarily will not be mitigating. Special mit-

[3] Matter of Johnson, 2004-DDC-3418 (SJ 2004), *overruled on other grounds*, 444 Mass. 1002, 2005-DDC-3565 (SJC 2005). *See also* Matter of Balliro, 453 Mass. 75, 2009-DDC-4351 (SJC 2009); Matter of Goldberg, 434 Mass. 1022, 1023, 2001-DDC-2852 (SJC 2001) ("the mitigating circumstances warrant[] departure from the presumptive sanction").

[4] Matter of Kelley, 489 Mass. 300, 305, 2022-DDC-6404 (SJC 2022).

[5] *Alter, supra* note 1, 389 Mass. at 156–57.

igating factors "are those that generally do warrant a deviation from the 'usual and presumptive sanction.'"[6]

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 this chapter addresses that important topic, however, it first discusses considerations that the SJC has stated usually do not serve as mitigation.[7]

You Should Know

The SJC uses 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 may play a role in determining the sanction in certain circumstances, 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.[8]

While the SJC announced that list several decades ago, the court continues to treat those circumstances as not warranting a reduction in a presumptive

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[6] Matter of Foster & Others, 492 Mass. 724, 748, 2023-DDC-6564, 2023-DDC-6565 (SJC 2023) (quoting Matter of Concemi, 422 Mass. 326, 330 (1996)).

[7] *Typical* mitigation factors may nonetheless play some role in some circumstances. Matter of Doyle, 429 Mass. 1013, 1014 n.5, 1999-DDC-2468 (SJC 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, 2005-DDC-3605 at 7 (SJ 2005) (single justice may consider typical factors as part of "totality of the circumstances," when considered along with special mitigating factors); Matter of Grew, 2007-DDC-3960 at 4–5 (SJ 2007) (typical mitigating factors may be considered to place sanction within range of permissible sanctions).

[8] *Alter, supra* note 5, 389 Mass. at 157, 1983-DDC-270 at 5 (SJC 1983) (citing Matter of Barkin, 1977-DDC-024 at 4 (SJ 1977)).

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."[9] The court then stated that "typical mitigating evidence generally [is] not given substantial weight."[10]

The following typical mitigating considerations that the SJC or the BBO 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*,[11] 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. In *Matter of Dragon*,[12] the single justice rejected as a factor in mitigation the respondent's record of substantial pro bono service on BBO matters. The respondent 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.[13] 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*,[14] in approving a stipulation to a public reprimand, the BBO 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."[15]

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9 Matter of Finneran, 455 Mass. 722, 735, 2010-DDC-4533 at 6 (SJC 2010) (quoting *Alter*, 389 Mass. at 157) (citing Matter of Saab, 406 Mass. 315, 327, 1989-DDC-794 (SJC 1989)).

10 *Finneran*, 455 Mass. at 735, 2010-DDC-4533 at n.19 (SJC 2010) (citing Matter of Bailey, 439 Mass. 134, 151, 2003-DDC-3240 at 8 (SJC 2003)); *see also* Matter of Otis, 438 Mass. 1016, 1017 n.3, 2003-DDC-3241 (SJC 2003) (frequent pro bono representation of indigent clients and lack of prior record of discipline); Matter of Kennedy, 428 Mass. 156, 159, 1998-DDC-1960 at 6 (SJC 1998) (community service, pro bono representation of clients, and favorable reputation in the community).

11 438 Mass. 1016, 1017 n.3, 2003-DDC-3241 at 2 (SJC 2003).

12 2002-DDC-3117 (SJ 2002) (single justice opinion), *aff'd*, 440 Mass. 1023, 2003-DDC-3243 (SJC 2003).

13 *See, e.g.*, Matter of Dasent, 446 Mass. 1010, 2006-DDC-3738 (SJC 2006) (disbarment); Matter of Johnson, 2007-DDC-4042 (SJ 2007), *aff'd*, 452 Mass. 1010, 2008-DDC-4149 (SJC 2008) (indefinite suspension).

14 2012-DDC-5059 (BBO 2012).

15 *See also* Matter of Jebb, 2008-DDC-4243 (SJ 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 their career to working with underserved populations.[16] For instance, in *Matter of Serpa*,[17] 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."[18] The BBO 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."[19] While never stated explicitly in SJC opinions or BBO 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.[20]

  However, extraordinary cooperation with and assistance to the bar counsel may mitigate a presumptive sanction in some instances. In *Matter of Scola*,[21] 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 while noting in mitigation 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."[22] The BBO adopted

16 *See, e.g.*, Matter of Osagiede, 2008-DDC-4244 (SJ 2008), *aff'd*, 453 Mass. 1001, 2009-DDC-4352 (SJC 2009) (devoting his practice to working with underserved community considered typical); Matter of McArdle, 2022-DDC-6457 (BBO 2022) (service to underprivileged clients considered typical); Matter of Moore, 442 Mass. 285, 2004-DDC-3408 (SJC 2004) (services provided to underserved population considered typical); *Finn, supra* note 2, 433 Mass. 418, 2001-DDC-2851 (SJC 2001) (services provided to underserved population considered typical).

17 2014-DDC-5327 (SJ 2014).

18 2013-DDC-5230 at 5 (BBO 2013).

19 429 Mass. 1013, 1014 n.5, 1999-DDC-2468 at 2 (SJC 1999). *See also* AD 02-12, 2002-ADM-3237 (BBO 2002).

20 *See* Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 4:01 §§ 3(1)(b)–(d) (failure to cooperate is grounds for discipline).

21 2010-DDC-4554 (SJ 2010) (single justice decision).

22 *Id.* at 3.

the hearing committee's findings of fact and its recommendation for discipline. The single justice, however, imposed a public reprimand. On appeal, the SJC imposed a term suspension but stayed the sanction, "in light of the significant mitigating factors."[23]

- *Lack of prior discipline:* While, as section III 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."[24] On occasion, however, this factor may play a mitigating role.[25]
- *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*,[26] 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.[27] 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."[28]
- *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."[29]

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23 Matter of Scola, 460 Mass. 1003, 1006, 2011-DDC-4736 at 4 (SJC 2011).

24 408 Mass. 740, 745, 1990-DDC-952 at 6 (SJC 1990).

25 *See, e.g.*, Matter of Donaldson, 2011-DDC-4778 (SJ 2011) ("[i]n mitigation, the attorney had no record of prior discipline"); Matter of Goldfarb, 2002-DDC-7074 (SJ 2002) (lack of prior discipline listed as mitigating factor).

26 440 Mass. 1023, 1024, 2003-DDC-3243 (SJC 2003). *See also* Matter of Parlow, 2023-DDC-6500 (HC 2023).

27 *Concemi, supra* note 6, 422 Mass. at 330, 1996-DDC-1065 (SJC 1996); Matter of McCarthy, 416 Mass. 423, 431 (1993); Matter of Neitlich, 413 Mass. 416, 425 (1992).

28 Matter of Nickerson, 422 Mass. 333, 337, 1996-DDC-1964 at 9 (SJC 1996) (quoting Matter of Keenan, 314 Mass. 544, 547 (1943)).

29 Matter of Luongo, 416 Mass. 308, 311, 1993-DDC-1363 at 5 (SJC 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*,[30] 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."
- *Duty of zealous advocacy:* On occasion, an attorney will argue that their duty of zealous advocacy accounted for their misconduct and should be considered as a mitigating factor in determining the discipline imposed. If it is a factor at all, it is typical. In *Matter of Parlow*,[31] an attorney had improper contact with a represented person in violation of Mass. R. Prof. C. 4.2. In mitigation, he argued that "he was caught in an 'ethical dilemma' because of [the represented person's] unsolicited contact and exculpatory disclosure." The BBO rejected that argument, writing "there is legal authority to the effect that zealous advocacy is a typical mitigating factor."[32]

The list of factors 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 factors 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.[33]

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.[34] 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

30 2007-DDC-3976 (SJ 2007).
31 2023-DDC-6500 (HC 2023).
32 *Id.* The BBO cited AD 19-18, 2019-ADM-6027 at 10 (BBO 2019).
33 *See, e.g.*, *Otis, supra* note 11, 438 Mass. at 1017 n.3, 2003-DDC-3241 at 2 n.3 (SJC 2003) (pro bono service); *Dragon, supra* note 26, 440 Mass. 1023, 1024, 2003-DDC-3243 (SJC 2003) (excessive workload).
34 *Alter, supra* note 8, 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").

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 that fact 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.[35]

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 usual, 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*,[36] 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.[37]

35 *Balliro, supra* note 3, 453 Mass. at 85, 2009-DDC-4351 at 6 (SJC 2009); Matter of Slavitt, 449 Mass. 25, 30, 2007-DDC-3926 (SJC 2007); Matter of Foley, 439 Mass. 324, 333, 2003-DDC-3242 (SJC 2003).

36 448 Mass. 819 (2007).

37 *See also* Matter of Grossman, 1983-DDC-407 (SJ 1983) (one-year suspension for fraud on court; inexperience taken into account); Matter of McIntyre, 426 Mass. 1012, 1015, 1998-DDC-469 at 6 (SJC 1998); Matter of Hanserd, 2010-DDC-4610 (SJ 2010); AD 05-04, 2005-ADM-3698 (BBO 2005); *Nickerson, supra* note 28, 422 Mass. 333, 1996-DDC-1964 (SJC 1996).

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.[38]

- *Reliance on the representations of an associate or partner:* In *Matter of Foster & Others*, the SJC stated that "[r]eliance, when it is reasonable and in good faith, may indicate a lesser degree of culpability."[39] Such reliance is not a typical mitigating factor but a special factor. "We conclude that reasonable and good faith reliance is a special rather than a typical mitigating factor, and so should weigh in favor of a lesser sanction."[40] In *Foster*, one of the attorneys in the disciplinary proceeding relied on false statements made to him by his subordinate, who was experienced and actively prosecuting the case in question. The attorney's reliance on the subordinate's false assurances to him was reasonable and in good faith, and therefore his discipline was less than it otherwise may have been.

- *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*,[41] 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.[42]

- *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."[43] In

38 Matter of Bryan, 411 Mass. 288, 292, 1991-DDC-1173 at 6–7 (SJC 1991) (misappropriation of funds with deprivation; disbarment despite inexperience); Matter of Marshall, 2000-DDC-2719 (SJ 2000) (identity theft by graduate of unaccredited law school in order to become member of Arizona bar; indefinite suspension despite inexperience).

39 492 Mass. 724, 748, 2023-DDC-6564, 2023-DDC-6565 (SJC 2023).

40 *Id.*

41 448 Mass. 1007, 2007-DDC-3932 (SJC 2007).

42 *See also* Matter of Badar, 2022-DDC-6402 (SJ 2022); Matter of Rossi, 2022-DDC-6408 (BBO 2022). *But see* Matter of Watson, 2021-DDC-6350 (BBO 2021) ("Although not mitigating, the respondent self-reported to bar counsel").

43 426 Mass. 183, 188, 1997-DDC-2042 (SJC 1997).

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*,[44] 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*,[45] 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*,[46] a lawyer failed to pay her annual registration fees to the BBO and continued to practice after her license had been administratively suspended. In approving a two-month suspension, the single justice wrote:

> In mitigation, the respondent's failure to register and unauthorized practice occurred during a time when an immediate member of the respondent's family was suffering from a mental illness and undergoing a serious crisis requiring direct, daily care by the respondent. The burden on the respondent caused substantial stress and significantly distracted the respondent from the requirements of her legal practice.[47]

To serve as special mitigation, the stresses must be causally related to the misconduct. In *Matter of Johnson*,[48] 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

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44 2005-DDC-3605 at 7 (SJ 2005).

45 1999-DDC-2542 (SJ 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").

46 2009-DDC-4446 (SJ 2009).

47 *See also Hanserd, supra* note 37, 2010-DDC-4610 at 3 (SJ 2010) ("[T]he 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, 2004-ADM-3520 (BBO 2004) ("The respondent's own divorce and a serious illness in his family contributed to his neglect of the complainant's case").

48 444 Mass. 1002, 2005-DDC-3565 (SJC 2005).

> 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.[49]

- *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*,[50] 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.[51]

  By comparison, in *Matter of Barrat*,[52] 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.[53]

  In *Matter of Balliro*,[54] a lawyer who falsely testified in a hearing involving a man who had physically abused her received a lesser sanction

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49 *Id.* at 1003.

50 2007-DDC-3984 (SJ 2007).

51 *See also* Matter of Mahoney, 2021-DDC-6348 (SJ 2021) (attorney's diagnosed anxiety and depression "interfered meaningfully with his ability to make appropriate decisions" in his representation, mitigating his discipline); Matter of Patch, 2004-DDC-3474 (SJ 2004) (respondent's "depression and financial situation continued to deteriorate" despite treatment efforts; that condition served as mitigation).

52 2004-DDC-3478 (SJ 2004).

53 *See also* Matter of Haese, 468 Mass. 1002, 2014-DDC-5266 (SJC 2014) (no evidence that attorney's multiple acts of intentional misconduct were product of his medical illness).

54 453 Mass. 75, 2009-DDC-4351 (SJC 2009).

because of the psychological state she was in at the time she testified. In *Matter of Davidson*,[55] the lawyer offered evidence of his depression as mitigation for his misconduct involving neglecting his obligations to his client and then engaging in a scheme to hide his neglect by, among other things, fabricating court documents. The single justice accepted that mitigating factor as it related to the lawyer's neglect of client matters but held that the "fabrication of court documents is an intentional act of manipulation that cannot be fairly attributed to depression."[56]

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.[57] 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.[58]

- *Addiction:* Although addiction is an illness, 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*,[59] after a respondent neglected several matters, the single justice accepted a stipulated suspension for one year and one day. The report noted, in mitigation, that the neglect resulted from the attorney's severe alcoholism. His achieving sobriety after contact from the bar counsel also served as a favorable fact. In *Matter of Epstein*,[60] 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*

55 2000-DDC-2688 (SJ 2000).

56 *Id.*

57 *See, e.g.*, Matter of Eberle, 2009-DDC-4448 (SJ 2009) (unspecified "disability" warrants no weight); Matter of Wasserman, 2007-DDC-3998 (SJ 2007) (no evidence of psychological distress offered).

58 *Haese, supra* note 53, 468 Mass. 1002, 2014-DDC-5266 (SJC 2014); Matter of Johnson, 452 Mass. 1010, 1011, 2008-DDC-4149 (SJC 2008) (rescript); Matter of Davidson, 2000-DDC-2688 (SJ 2000).

59 2001-DDC-2913 (SJ 2001). *See also* Matter of Morgan, 2001-DDC-2861 (SJ 2001) (one-year-and-one-day suspension for numerous instances of neglect; in mitigation, attorney treated for anxiety and severe depression).

60 2009-DDC-4368 (SJ 2009).

Collins,[61] 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] (emphasis added).[62]

In an older report, *Matter of Hull*,[63] 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 *Matter of Morgan*,[64] 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. That condition, however, may serve as useful context to understand an attorney's actions and might warrant a stay of a suspension. In *Matter of Parker*,[65] the single justice agreed that the respondent's alcoholism was not a causal factor in his serious misconduct, but nevertheless ordered a stay of the six-month suspension, noting that a stay connected to treatment "would further the goal of protecting the public and helping the respondent."

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
3. Successful treatment for the condition

The respondent must be prepared to disclose all relevant medical records to the bar counsel.

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61 455 Mass. 1020, 2010-DDC-4532 (SJC 2010). *See also* Matter of Gustafson, 1990-DDC-802 at 2 (SJ 1990) (alcoholism, even if proven, should not serve as mitigation in cases of misappropriation of client funds).

62 *Collins*, 455 Mass. at 1021, 2010-DDC-4532 at 2 (SJC 2010).

63 1990-DDC-344 at 2 (SJ 1990).

64 2004-DDC-3431 (SJ 2004).

65 2023-DDC-6518 (SJ 2023).

- *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.[66] On some occasions, restitution is identified as a special mitigating factor,[67] but making restitution does not serve as a special mitigating factor if the restitution occurs because of a client complaint or a court order.[68]

  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.[69] As the BBO has stated, "We recognize repayment as mitigating because we want to acknowledge lawyers who have voluntarily admitted their misconduct and taken voluntary steps to make amends."[70] But restitution must be proactive; repayment after a complaint serves no mitigating purpose.[71] For example, in *Matter of Guidry*,[72] 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.[73]

  Forced restitution, as noted, typically does not serve as a mitigating consideration. In *Matter of LiBassi*, the SJC wrote that "[r]ecovery

66 *See* section III.

67 *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); Annotated Standards for Imposing Lawyer Sanctions [hereinafter Annotated Standards] § 9.3(d) (Am. Bar Ass'n, 2d ed., 2019) (mitigating factors include "timely good faith effort to make restitution or to rectify consequences of misconduct").

68 *See, e.g.*, Matter of Sharif, 459 Mass. 558, 563 n.4, 2011-DDC-4735 (SJC 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, 2007-DDC-3923 (SJC 2007) (restitution made through court action not considered in mitigation of sanction).

69 *See Bryan, supra* note 38, 411 Mass. at 292, 1991-DDC-1173 at 6 (SJC 1991); Matter of the Discipline of an Attorney ("Three Attorneys"), 392 Mass. 827, 836–37 (1984); Matter of Schoepfer, 426 Mass. 183, 187–88, 1997-DDC-2042 (SJC 1997).

70 Matter of Newton, 2023-DDC-6553 (BBO 2023). As the SJC has written, "[R]estitution often evinces 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.'" Matter of Corbett, 478 Mass. 1004, 1005, 2017-DDC-5848 (SJC 2017) (quoting Matter of McCarthy, 2007-REI-4061 at 1 (SJ 2007)).

71 *Corbett*, 478 Mass. at 1006.

72 1999-DDC-2542 (SJ 1999).

73 *See also, e.g.*, Matter of Johnson, 444 Mass. 1002, 1004, 2005-DDC-3565 at 2 (SJC 2005) (distinguishing *Guidry* based on the proactive restitution, among other reasons).

obtained through court action 'is not "restitution" for purposes of choosing an appropriate sanction.'"[74] Also, payment to the injured party through the respondent's liability carrier does not likely qualify as a mitigating factor, but it may affect the degree of harm the lawyer's misconduct caused.

Practice Tip

Do not confuse restitution with absence of injury. As the single justice wrote in *Matter of Lansky*,[75] "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,"[76] 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."[77]

  Few respondents have successfully used the fact of delay to obtain mitigation. In *Matter of Kerlinsky*,[78] while the respondent's attempt to

74 449 Mass. 1014, 1016, 2007-DDC-3923 at 3 (SJC 2007) (quoting *Bryan, supra* note 69, 411 Mass. at 292). *See also* Annotated Standards, *supra* note 67, at § 9.4 (a) ("forced or compelled restitution" should not be considered as either aggravating or mitigating factor).
75 2006-DDC-3778 (SJ 2006).
76 Matter of Kerlinsky, 406 Mass. 67, 76 n.8, 1989-DDC-796 (SJC 1989), *cert. denied*, 498 U.S. 1027 (1991).
77 Matter of Grossman, 448 Mass. 151, 152, 2007-DDC-3931 at 1 (SJC 2007).
78 406 Mass. 67, 76 n.8 (1989), *cert. denied*, 498 U.S. 1027 (1991).

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 ability to obtain witness testimony. In *Matter of Perrone*,[79] 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*,[80] 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 have succeeded.[81]

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.[82]

- *Misconduct arising from the attorney's personal domestic relations matter:* While not always phrased expressly as "mitigation," the sanctions imposed upon a lawyer for misconduct within the lawyer's own divorce or similar domestic relations matter have often been less than the "usual and presumptive" discipline for that misconduct. As the SJC stated in a 2022 opinion, "[t]he sanctions imposed for misconduct during a lawyer's own

79 2007-DDC-4067 (BBO 2007).

80 435 Mass. 445, 451, 2001-DDC-2686 at 3–4 (SJC 2001).

81 *See, e.g.*, Matter of Crossen, 450 Mass. 533, 577, 2008-DDC-6871 (SJC 2008) (no prejudice proven); Matter of Early, 2005-DDC-3614 (SJ 2005) (no prejudice proven); Matter of McBride, 2005-DDC-3597 (SJ 2005), *aff'd*, 449 Mass. 154, 2007-DDC-3919 (SJC 2007) (same).

82 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."

divorce have fallen short of those imposed when an attorney engages in misconduct while representing others."[83] "This disparity may reflect . . . a commonsense understanding that infractions motivated by 'deep disagreements' with an estranged spouse can be 'a poor predictor of future professional misconduct, especially as regards client matters.'"[84]

Several Massachusetts attorneys have received sanctions after misconduct during a contentious Probate and Family Court matter or similar litigated dispute with a spouse or partner. In many of those cases, the sanction imposed was less than the "usual and presumptive" sanction for the charged misconduct.[85] The lesser sanctions surely reflected, in the respective individual cases, proven special mitigating factors, such as depression and severe mental anguish connected to the family dispute. But the cases support the proposition that when acting as a litigant for themselves in a domestic relations matter, lawyers may receive lighter discipline than they would receive if the misconduct occurred while representing a client.

At the same time, as the SJC has emphasized, an attorney is not "entitled to a free pass simply because 'the matter about which [he or] she testified falsely was a private one that arose in the context of a purely personal relationship.'"[86] And the mere fact that misconduct occurred in the attorney's dispute with a spouse or former spouse does not entitle that attorney to mitigation. For example, in *Matter of Kaplan*,[87] an attorney became embroiled in a dispute with his former spouse about his assets and the proper alimony payments. In the course of that Probate and Family Court proceeding, he submitted deceitful financial statements to the court, refused to make court-ordered payments to a former spouse, failed to comply with discovery duties, and received a contempt citation from the trial judge. The single justice held that "the fact that the misconduct took place in a divorce proceeding" was not a mitigating factor. At the same time, the court agreed that "the facts and misconduct in *Matter of*

83 Matter of Laroche-St. Fleur, 490 Mass. 1020, 1024, 2022-DDC-6469 (SJC 2022) (quoting, approvingly, the hearing committee report).

84 *Id.*, quoting Matter of Leahy, 2012-DDC-4968 at 9–10 (SJ 2012).

85 For examples of lesser sanctions for misconduct that warranted a presumptive sanction of two years, *see, e.g.*, Matter of Ring, 427 Mass. 186, 192–93 (1998) (three months); Matter of Finnerty, 418 Mass. 821, 828–30 (1994) (six months); *Leahy*, 2012-DDC-4968 at 13 (SJ 2012) (two months); Matter of Kilkenny, 2010-DDC-4615 (SJ 2010) (three months); Matter of Okai, 1995-DDC-1866 at 2–4 (SJ 1995) (one year).

86 *Laroche-St. Fleur, supra* note 84, 490 Mass. at 1024 (quoting *Leahy*, 2012-DDC-4968 at 12 (SJ 2012), quoting *Balliro, supra* note 54, 453 Mass. at 88, 2009-DDC-4351 (SJC 2009)).

87 2024-DDC-6630 (SJ 2024).

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Laroche-St. Fleur are highly similar to those in the present case," and the SJC in *Laroche-St. Fleur* did treat the fact that the misconduct occurred in the course of the attorney's personal divorce proceeding as warranting a reduced sanction.[88]

Any mitigation available because the attorney's misconduct occurred during their own domestic dispute must not be confused with the separate "private citizen exception" to presumptive sanctions.[89] The private citizen exception will operate to lessen sanctions in purely private conduct unrelated to the practice of law,[90] but it has no applicability to conduct involving judicial proceedings.[91]

III. Aggravating Factors

In determining an appropriate sanction for a lawyer who has committed misconduct, the BBO and SJC consider aggravating circumstances, which, if present, contribute to a more serious level of discipline or diminish the effect of a proven mitigating factor. The SJC and the BBO 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."[92] That position has not changed in the intervening decades.[93] At times, the BBO employs a "step" approach, where each successive instance of discipline leads to the next sanction level.[94] In

88 *See* 490 Mass. at 1024.

89 The SJC first referred to the private citizen exception in *Concemi, supra* note 27, 422 Mass. at 331 n.5.

90 *Otis*, 438 Mass. at 1017 n.3 (declining to apply exception). For examples where the exception has applied, *see* Matter of Griffin, SJC No. BD-93-31 (March 29, 1995); Matter of Behenna, SJC No. BD-92-72 (October 7, 1994); Matter of Bedinger, SJC No. BD-92-34 (March 11, 1994). In the past thirty years or more, no attorney has successfully invoked the private citizen exception to mitigate a sanction.

91 *Otis*, 438 Mass. at 1017 n.3.

92 Matter of Dawkins, 412 Mass. 90, 96, 1992-DDC-1187 at 7 (SJC 1992).

93 *See, e.g.*, Matter of Murray, 455 Mass. 872, 883, 2010-DDC-4531 at 5 (SJC 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*).

94 *See* Matter of Grayer, 483 Mass. 1013, 1019 (2019) ("in the absence of mitigating factors, discipline should proceed in increments of escalating severity") (quoting Matter of Chambers, 421 Mass. 256, 260, 1995-DDC-6863 at 6 (SJC 1995)).

Matter of Barrat,[95] 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."[96]

Relatively minor prior misconduct, unrelated to the charged misconduct and not having caused harm, may not serve as an aggravating factor.[97] Also, in *Matter of Ruggiero*, the single justice noted that the fact of an earlier diversion agreement, in lieu of a sanction, ought not be considered an aggravating factor.[98]

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.[99] But multiple rule violations related to "a single core of misconduct" will not necessarily qualify as an aggravating factor.[100]

- *Lack of candor during the disciplinary process:* The SJC and the BBO frequently identify a respondent's lack of candor during the disciplinary proceedings as an aggravating factor justifying more serious discipline. For instance, in *Matter of Crossen*, the SJC, in ordering the respondent disbarred, noted as "even more compelling" an aggravating factor the

95 2004-DDC-3478 (SJ 2004).
96 Matter of Ryan, 2008-DDC-4210 at 4 (SJ 2008).
97 Matter of Chavin, 2024-DDC-6619 (BBO 2024). *See also* Matter of Blais, 2022-DDC-6387 (HC 2022), 2022-DDC-6427 (SJ 2022) (hearing committee report; administrative suspension not aggravating factor if attorney did not practice while suspended).
98 2023-DDC-6515 (SJ 2023) ("[T]he respondent's diversion agreement did not constitute an aggravating factor. . . . [D]oing so could have a chilling effect on attorneys acceding to diversion agreements in the future, thus risking an important educational tool, and inapposite to the express terms of the diversion agreement").
99 *See Saab, supra* note 9, 406 Mass. at 327, 1989-DDC-794 at 13 (SJC 1989) (in deciding sanction, "consideration of the cumulative effect of several violations is proper").
100 *See* Matter of Cimini, 2023-DDC-6567 (HC 2023) (hearing committee report), *aff'd*; Matter of Cimini, 2024-DDC-6634 (SJ 2024).

respondent's "'marked' lack of candor in the disciplinary proceedings."[101] In *Matter of Moore*,[102] 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. While respondents are entitled to defend themselves without penalty, there is a distinction between presenting an unsuccessful defense and lying in hearing testimony.[103] A finding of lack of candor typically requires finding deliberately false testimony or testimony given with the intent to deceive.[104]

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.[105]

- *Selfish motive and intentional actions:* The SJC and the BBO 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.[106] In *Matter of Foley*,[107] 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

101 450 Mass. 533, 580, 2008-DDC-6871 at 58 (SJC 2008) (quoting the hearing committee report).
102 442 Mass. 285, 289–90, 296, 2004-DDC-3408 at 5 (SJC 2004). *See also* Matter of Murray, 2013-DDC-5099 (SJ 2013); Matter of Macero, 2011-DDC-4811 (SJ 2011).
103 Matter of Eisenhauer, 426 Mass. 448, 455–56, 1998-DDC-2279 at 4–5 (SJC 1998), *cert. denied*, 524 U.S. 919 (1998).
104 *Crossen, supra* note 101, 450 Mass. at 580, 2008-DDC-6871 at 58–59 (SJC 2008) (special hearing officer found "deliberately false testimony"); Matter of Hoicka, 442 Mass. 1004, 1006, 2004-DDC-3404 at 2 (SJC 2004) (rescript) (hearing officer must determine whether respondent's testimony was deliberately false or simply mistaken); Matter of Friedman, 1991-DDC-1117 at 4 (SJ 1991) (lack of candor before tribunal weighed as aggravating circumstance).
105 *See, e.g.*, Matter of Zankowski, 487 Mass. 140, 153 (2021) ("While an attorney is entitled to defend against allegations of a petition for discipline, the hearing committee may determine whether to credit the testimony and evidence, and it may consider in aggravation any lack of candor it finds").
106 *See* Matter of Pike, 408 Mass. 740, 1990-DDC-952 (SJC 1990); Matter of Wise, 433 Mass. 80, 2000-DDC-2685 (SJC 2000).
107 439 Mass. 324, 335, 339, 2003-DDC-3242 at 3, 5 (SJC 2003).

deliberate[]" misconduct. Similarly, in *Matter of Aufiero*,[108] the attorney received a two-year suspension after the BBO 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,[109] with a selfish motive being an aggravating factor. In *Matter of DeMarco*,[110] the lawyer's disbarment resulted in part from his "selfish" motivation in misappropriating funds as a trustee.[111] And in *Matter of Rafferty*,[112] the respondent's motive "to retain a client who was paying him large fees" constituted an aggravating factor. In *Matter of DiLibero*,[113] the BBO offered a distinction between having a selfish motive, which is aggravating, and seeking to preserve one's reputation, which is not.

- *Harm to others:* The fact that the lawyer's actions harmed a client or third party serves as an aggravating factor. And, as the SJC has written, "Generally speaking, the more culpable a respondent is in causing harm, . . . the more heavily the harm weighs in aggravation."[114] In 1997, in *Matter of Aufiero*,[115] 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*,[116] the lawyer mishandled the affairs of an elderly, disabled client. In determining that a public reprimand was the appropriate sanction, the BBO noted that "his conduct had the potential to cause serious harm to his client." In *Matter of Heartquist*,[117] the lawyer's criminal activity caused physical harm to a victim, and that

108 1997-DDC-2221 at 20 (SJ 1997).

109 *See, e.g.*, *Leahy, supra* note 86, 2012-DDC-4968 at 9 (SJ 2012) (no financial motive distinguished this matter from otherwise comparable matters); Matter of O'Neill, 2014-DDC-5346 (SJ 2014) ("[i]n mitigation, the respondent had no selfish motive and gained no personal advantage").

110 2009-DDC-4443 (SJ 2009).

111 *See also* Matter of Hilson, 448 Mass. 603, 619, 2007-DDC-3928 at 9 (SJC 2007) (conduct motivated by personal financial interests and gain is aggravating); Matter of O'Leary, 2009-DDC-4409 (SJ 2009); *Bailey, supra* note 10, 439 Mass. at 152, 2003-DDC-3240 at 8 (SJC 2003); *Kennedy, supra* note 10, 428 Mass. at 159, 1998-DDC-1960 at 6 (SJC 1998); *Pike, supra* note 106, 408 Mass. at 745–46, 1990-DDC-952 at 6 (SJC 1990).

112 2010-DDC-4593 (SJ 2010). *See also* Matter of Zak, 476 Mass. 1034, 2017-DDC-5783 (SJC 2017).

113 2024-DDC-6605 (BBO 2024) ("Our cases constrain 'selfish motive' to instances of greed or seeking monetary gain. Preservation of one's reputation is not a selfish motive").

114 *Foster & Others, supra* note 39, 492 Mass. at 753, 2023-DDC-6564, 2023-DDC-6565 (SJC 2023). The court also noted, "While harm is not everything, it is properly taken into account as an aggravating factor for all three respondents here."

115 1997-DDC-2221 (SJ 1997).

116 2014-DDC-5371 (BBO 2014).

117 2013-DDC-5168 (SJ 2013).

fact served as an aggravating consideration. In *Matter of Gleason*,[118] the lawyer received a public reprimand after the BBO considered as an aggravating factor the harm his neglect had caused his clients.[119]

- *Vulnerable client or third party:* A lawyer who engages in misconduct will receive a more severe sanction if that misconduct affects a vulnerable client or third party, even in the absence of actual harm. In *Matter of Ruggiero*,[120] the single justice defined that quality as follows: "A client is 'vulnerable' when the client (i) has limited education, (ii) has limited or no ability to speak English, (iii) is elderly, (iv) is unsophisticated, or (v) is dealing with a calamitous personal situation."

  In *Matter of Lupo*, the SJC identified as a factor in aggravation that the respondent "took advantage of elderly, unsophisticated, and vulnerable clients."[121] In *Matter of Hayes*,[122] the SJC considered as an aggravating factor that the lawyer "took advantage of an unsophisticated and vulnerable client with a limited education and mental health issues." In *Matter of Font*,[123] 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.[124]

- *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.[125] Failure to make restitution, therefore, serves as an aggravating factor in misappropriation

118 2012-DDC-5059 (BBO 2012).
119 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, 1997-DDC-2261 (BBO 1997) (existence of harm raises sanction for neglect to public reprimand); AD 02-13, 2002-ADM-3238 at 8 (BBO 2002) (while unadorned conflict will warrant an admonition, an obvious conflict aggravated by harm will warrant a public reprimand).
120 2023-DDC-6515 at n.24 (SJ 2023).
121 447 Mass. 345, 354, 2006-DDC-3740 (SJC 2006).
122 493 Mass. 1010, 1016 (2023).
123 2014-DDC-5401 at 2 (SJ 2014). *See also* Matter of Cammarano, 2013-DDC-5175 (SJ 2013); Matter of Donaldson, 2012-DDC-5010 (SJ 2012); Matter of Espinosa, 2012-DDC-5022 (SJ 2012).
124 *See also Crossen, supra* note 104, 450 Mass. at 581, 2008-DDC-6871 (SJC 2008) (harm caused to judicial clerk).
125 *Schoepfer, supra* note 69, 426 Mass. at 187–88, 1997-DDC-2042 (SJC 1997).

matters.[126] So, in *Matter of Pasterczyk*,[127] 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, the single justice wrote, "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."[128] By this reasoning, failure to offer or to attempt restitution may 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.[129]

Partial restitution may not necessarily constitute a factor in aggravation, but without full restitution that effort will not qualify as a factor in mitigation. In *Matter of Hughes*,[130] the respondent offered his efforts at restitution as evidence of mitigation, but the single justice determined that without full restitution that evidence did not warrant any leniency. The single justice did not treat that fact as a factor in aggravation. In contrast, in *Matter of Hayes*,[131] the single justice noted several aggravating factors in issuing an order of disbarment, one of which was the failure to make full restitution.

- *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 BBO often cite experience as an aggravating factor and not (as some respondents claim) a mitigating factor. In *Matter of Luongo*,[132] for example, the SJC determined that length of service was aggravating, not mitigating. "An older, experienced

126 *See Bryan, supra* note 74, 411 Mass. at 292, 1991-DDC-1173 at 6 (SJC 1991).
127 2013-DDC-5137 at 21 (SJ 2013).
128 *McCarthy, supra* note 70, 2007-REI-4061 at 1 (SJ 2007).
129 *See* Matter of Cobb, 445 Mass. 452, 480, 2005-DDC-3567 at 14–15 (SJC 2005); *Moore, supra* note 102, 442 Mass. at 295, 2004-DDC-3408 (SJC 2004); Matter of Kerlinsky, 428 Mass. 656, 666, 1999-DDC-2470 at 7 (SJC 1999); Matter of Clooney, 403 Mass. 654, 657, 1988-DDC-655 at 9–10 (SJC 1988); Annotated Standards, *supra* note 67, at § 9.22(g).
130 2023-DDC-6539 (SJ 2023).
131 2023-DDC-6507 (SJ 2023) (single justice opinion), *aff'd*, 493 Mass. 1010, 2023-DDC-6583 (SJC 2023) (respondent's "misconduct was aggravated . . . by his payment of only partial restitution, made after the initiation of disciplinary proceedings"), 2023-DDC-6583 (SJC 2023) (rescript).
132 416 Mass. 308, 1993-DDC-1363 (SJC 1993). The SJC quoted *Luongo* approvingly in *Foster & Others*, 492 Mass. at 751, 2023-DDC-6564, 2023-DDC-6565 (SJC 2023).

attorney should understand ethical obligations to a greater degree than a neophyte."[133] In *Matter of Kelley*,[134] the SJC noted a lawyer's experience as an aggravating factor in ordering a public reprimand instead of the presumptive sanction of an admonition. In *Matter of Bulger*,[135] the respondent received a public reprimand, with the lawyer's long experience influencing the BBO. And in *Matter of Rafferty*,[136] 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.[137] 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.[138] For example, in *Matter of Grayer*,[139] the SJC imposed a suspension of one year and one day for the lawyer's misconduct, aggravated by his failure to cooperate with the bar counsel. A failure to testify at a hearing, however, may not be treated as a factor in aggravation.[140]

- *Uncharged misconduct:* Several board and single justice decisions identify misconduct not charged by the bar counsel but proven at the hearing as a factor in aggravation. The SJC itself supported the use of uncharged misconduct in aggravation.[141]

  However, by 2024 that practice has less support and likely will not be considered as an acceptable aggravating factor in the future. In *Matter of Foster & Others*,[142] the SJC noted, seemingly with approval, the BBO's "discomfort with [relying on uncharged misconduct to aggravate a

133 416 Mass. at 311–12.
134 489 Mass. 300, 307–8, 2022-DDC-6404 (SJC 2022). *See also* Matter of Moran, 479 Mass. 1016, 1022, 2018-DDC-5930 (SJC 2018).
135 2013-DDC-5230 (BBO 2013); *see also* Matter of Brandt, 2010-DDC-4701 (BBO 2010) (public reprimand, experience cited as an aggravating factor).
136 2010-DDC-4593 (SJ 2010).
137 SJC Rule 4:01 § 3(1).
138 Matter of Gustafson, 464 Mass. 1021, 2013-DDC-5093 (SJC 2013); Matter of Jean, 2002-DDC-3107 at 3 (SJ 2002); Matter of Bartlett, 1999-DDC-2520 (SJ 1999).
139 483 Mass. 1013, 1018–19, 2019-DDC-6135 (SJC 2019).
140 Matter of Kelley, 2021-DDC-6319 (BBO 2021).
141 Matter of Strauss, 479 Mass. 294, 300 n.9, 2018-DDC-5927 (SJC 2018) ("we have permitted uncharged misconduct to be considered in aggravation of sanction") (citing Matter of the Discipline of an Attorney, 448 Mass. 819, 825 n.6 (2007)).
142 492 Mass. 724, 762 n.18, 2023-DDC-6564, 2023-DDC-6565 (SJC 2023).

sanction] where bar counsel was in a position to raise the charge in the petition for discipline, but declined to do so."[143] As the BBO had noted in several recent board memoranda, considering uncharged misconduct in aggravation deprives the respondent of notice and an opportunity to defend against the charges, raising due process and fairness concerns.[144]

- *Failure to accept responsibility for misconduct:* A respondent's unwillingness or inability to accept responsibility for the proven misconduct is an aggravating factor. In *Matter of Williams*,[145] the SJC noted "the respondent's failure to recognize her own obligations and her repeated attempts to blame others" as a reason to support a disbarment order. In *Matter of Ablitt*,[146] the SJC agreed that the respondent's "lack of remorse and insincerity with regard to acceptance of responsibility" served as aggravating factors. Also, in *Matter of Knight*,[147] the single justice agreed with the BBO's finding that the "lack of insight into or appreciation of basic ethical obligations" served as a significant aggravating factor.

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 (1) considering a respondent's role as instigator of a fraudulent scheme entered into for personal gain;[148] (2) the extent of an attorney's planning, premeditation, and manipulation in the course of the misconduct;[149] (3) the length of time an attorney allowed a misrepresentation to stand uncorrected;[150] (4) the attorney's failure to appreciate the fundamental obligations of a member of the bar;[151] (5) the decision to involve the client or a third party in dishonest behavior;[152] and (6) the persistence of misconduct after the bar counsel commences an investigation.[153]

143 *Id.* (citing Matter of Parker, 2022-DDC-7023 (BBO 2022)).
144 *See, e.g.*, Matter of Samra, 2023-DDC-6525 (BBO 2023); *McArdle, supra* note 16, 2022-DDC-6457 (BBO 2022); *Parker*, 2022-DDC-7023 (BBO 2022).
145 491 Mass. 1021, 1026, 2023-DDC-6510 (SJC 2023).
146 486 Mass. 1010, 1019, 2021-DDC-6281 (SJC 2021) (citing *Corbett, supra* note 71, 478 Mass. 1004, 1007, 2017-DDC-5848 (SJC 2017).
147 2024-DDC-6633 (SJ 2024). *See also* Matter of Baker, 2024-DDC-6664 (SJ 2024); Matter of Gomez, 2022-DDC-6454 (SJ 2022).
148 Matter of Curry, 450 Mass. 503, 532, 2008-DDC-4145 (SJC 2008).
149 *Foley, supra* note 107, 439 Mass. at 338–39, 2003-DDC-3242 at 5 (SJC 2003).
150 Matter of Griffith, 440 Mass. 500, 508–10, 2003-DDC-3405 at 5 (SJ 2003).
151 *Clooney, supra* note 129, 403 Mass. at 657, 1988-DDC-655 at 5–6 (SJC 1988) (respondent "continues to be unmindful of certain basic ethical precepts of the legal profession").
152 Matter of Gross, 435 Mass. 445, 2001-DDC-2686 (SJC 2001).
153 *Kerlinsky, supra* note 129, 428 Mass. at 665, 1999-DDC-2470 at 6 (SJC 1999); Matter of Shorton, 2000-DDC-2706 at 2–3 (SJ 2000).

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.[154] The *Rules of the Board of Bar Overseers* state the following:

> (f) *Request to Be Heard in Mitigation.* The Respondent shall include in the answer any facts in mitigation and may request that a hearing be held on the issue of mitigation. Failure to include facts in mitigation constitutes a waiver of the right to present evidence of those facts.[155]

If the respondent alleges such facts, the BBO Rules imply that the lawyer is also required to request a hearing on the mitigation claims. As noted, the BBO Rules state that the respondent in the answer "may request that a hearing be held on the issue of mitigation."[156] 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 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).[157]

In *Matter of Patch*,[158] 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.[159] In *Matter of Lonardo*,[160] 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*,[161] 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.

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154 *See* Matter of Patch, 466 Mass. 1016 (2007).
155 Rules of the Board of Bar Overseers [hereinafter BBO Rules] § 3.15(f).
156 *Id.*
157 BBO Rules § 3.19(b).
158 466 Mass. 1016 (2007).
159 *Id.* at 1018.
160 2009-DDC-4366 (SJ 2009).
161 2013-DDC-5153 (SJ 2013).

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.[162]

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 include intentional misconduct), a respondent's alcoholism or drug addiction can account for the missteps and serve as mitigation. Some lawyers have failed to establish that relationship. For instance, in *Matter of (John Arthur) Johnson*,[163] 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.[164] 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.[165]

In *Matter of Early*,[166] 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

162 For a discussion of the process for filing a motion to file an amended answer, *see* chapter 6.
163 444 Mass. 1002, 2005-DDC-3565 (SJC 2005).
164 *See also Johnson, supra* note 58, 452 Mass. 1010, 1011, 2008-DDC-4149 (SJC 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").
165 *See* Matter of Pemstein, 2007-REI-3933 (HP 2007) (committee rejected psychiatrist's contention that respondent suffered from major depression).
166 2005-DDC-3614 (SJ 2005).

committee recommended an eighteen-month suspension. On appeal, the BBO recommended a three-year suspension, in part because it disagreed that the stress-related factors qualified as special mitigation. The single justice affirmed the BBO's actions and its suggested sanction. The single justice noted that the BBO "clearly understood its role" in recognizing that the hearing committee is the "sole judge of credibility of the testimony presented at the hearing" but neither the BBO (nor the court) are "bound by the ultimate conclusions of the hearing committee."[167] In this case, the BBO and the court determined that, while they would not disturb the hearing committee's findings of fact, those facts did not amount to a proper mitigation claim.[168]

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. 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.

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167 *Id.*

168 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 § 5(a), 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. *Discipline of an Attorney, supra* note 141, 448 Mass. 819, 829–30 (2007).

PART V
THE POSTHEARING PROCESS

CHAPTER NINETEEN

Posthearing Review

I. Introduction

Chapter 6 describes 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 BBO 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 BBO 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 step in the process 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 BBO's review of the

[1] For the sake of convenience, the discussion here refers to a hearing committee as the trier of fact and encompasses special hearing officers and hearing panels. If the procedure differs for those other triers of fact, this chapter expressly notes those differences.

hearing committee's findings and recommendation, the BBO may revise any findings of fact that it determines to be erroneous, except for credibility determinations. The BBO 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" (emphasis added),[2] but otherwise the BBO may make its own independent findings of fact based upon the evidence it reviews. The BBO reviews de novo the recommended sanction. If the BBO revises 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 is that which "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] With respect to the BBO's legal analysis and conclusions, the SJC has held that "although 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 BBO's recommendation is "de novo, but tempered with substantial deference to the

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2 Rules of the Board of Bar Overseers [hereinafter BBO Rules] § 3.53; *see* Matter of Saab, 406 Mass. 315, 328 (1989) ("Our rules concerning bar discipline . . . accord to the hearing committee the position of 'the sole judge of the credibility of the testimony presented at the hearing'"); Matter of Hachey, 1995-DDC-1846 at 2 (SJ 1995) (credibility finding may not be rejected unless it can be "said with certainty" that finding was "wholly inconsistent with another implicit finding"); *see also* Matter of an Attorney, 489 Mass. 1018 (2022) (reaffirming hearing committee's role as "sole judge of the credibility of the testimony presented at the hearing" by concluding that BBO's disagreement with hearing committee rested on improper rejection of such credibility determinations, thus interfering with committee's province); Matter of Strauss, 479 Mass. 294, 298–99, 2018-DDC-5927 (SJC 2018) (reiterating "sole judge" and irreconcilable inconsistency standards of review).

3 BBO Rules § 3.53.

4 Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 4:01 § 8(6).

5 Mass. Gen. Laws ch. 30A, § 1(6).

6 Matter of Segal, 430 Mass. 359, 364, 1999-DDC-2473 at 4 (SJC 1999) (while *Segal* was a full bench opinion, the principle expressed there applies to single justice proceedings); Matter of Buck, 2011-DDC-4777 at 1 (SJ 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)).

BBO's recommendation."[8] In practice, the single justice defers to the BBO but, on occasion, orders a sanction different from the BBO recommendation.[9]

III. The Review Process When Neither Party Appeals

The scope of the BBO's review of a hearing report is broader than that of an appellate court over a trial court. As described in chapter 6, after the adjudicatory proceedings close, the hearing committee issues its report, which includes its findings of fact, legal conclusions, and sanction recommendation.[10] Either party may appeal. The notice of appeal must be filed within twenty days of service of the report.[11] Even if neither party appeals the report, the BBO will still review it, because the BBO must review every hearing report even if no appeal is made.[12]

In many instances where neither party appeals, the BBO adopts the committee's findings of fact, conclusions of law, and recommended sanction, although it need not do so. Generally, the BBO does not issue a memorandum of decision if it fully adopts the committee's report. If the proposed sanction is an admonition or a public reprimand, the BBO votes to adopt the findings of fact and conclusions of law and serves the vote and memorandum (if any) on the parties. Such service "shall constitute the admonition or public reprimand."[13] If the proposed sanction is a suspension or disbarment, the BBO must file a pleading known as an Information with the clerk of the SJC for Suffolk County,[14] because only the SJC may impose those sanctions.[15] Section VI describes the procedure that follows the filing of an Information.

The BBO is not required to accept the hearing committee's findings or proposed sanction, even where neither party has filed an appeal. If the BBO does not affirm the committee's recommendation, it must give the parties "appropriate notice" of that decision and the opportunity to file briefs.[16] The matter then

8 *Buck, supra* note 6, 2011-DDC-4777 at 1 (SJ 2011) (quoting Matter of Jackman, 444 Mass. 1013 (2005)).
9 *Segal, supra* note 6, 430 Mass. at 364, 1999-DDC-2473 at 4 (SJC 1999) (although *Segal* was a full bench opinion, the principle expressed there applies to single justice proceedings); *Fordham, supra* note 7, 423 Mass. at 487, *cert. denied*, 519 U.S. 1149 (citing *Hiss, supra* note 7, 368 Mass. at 461); *Buck*, 2011-DDC-4777 at 1 (SJ 2011).
10 *See* chapter 6, section XII; BBO Rules §§ 3.46–3.49.
11 BBO Rules § 3.50(a).
12 BBO Rules § 3.52.
13 BBO Rules § 3.56(a).
14 BBO Rules § 3.58.
15 SJC Rule 4:01 §§ 5(3)(g), 8(6).
16 BBO Rules § 3.52. Note that the BBO Rules § 3.52 process, where the BBO does not affirm a hearing report, is different from when the parties propose a disposition by stipulation to the BBO. For further discussion of the stipulation process, *see* chapter 5, section IV.

proceeds as if a party had appealed. The BBO cannot, and will not, unilaterally change a hearing committee decision without giving the parties the opportunity to be heard.

IV. The Review Process When a Party Appeals

A. The Procedural Steps for Appeal to the BBO

A party seeking to appeal the hearing committee report's findings, conclusions, or recommended sanction must take the following steps to participate in the BBO's review of the report.[17]

1. A dissatisfied party shall, within *twenty days after service of the committee report*, file and serve a notice of appeal, indicating the party appealing and the decision from which the appeal is taken.[18] That deadline, and all briefing deadlines described here, may be extended on motion to the BBO.[19] Note that the pleading due within this time period is simply a notice of appeal—it is *not* the full brief.[20]

> **Practice Tip**
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> BBO Rules § 3.50 was revised in 2022. In the past, a party appealing the hearing committee's findings and recommendations had to act promptly to prepare not just a simple notice of appeal but a full brief within twenty days of receiving the committee report. Now, an appealing party need only file a notice of appeal within twenty days.

2. Within *forty days after filing the notice of appeal*, the appealing party must file its brief.[21] The BBO Rules and the Board of Bar Overseers Policies and Practices govern the format of briefs, including page limits.[22]

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17 The procedure described here is established in BBO Rules § 3.50.

18 BBO Rules § 3.50(a).

19 *Id.* The rule states that the time for filing the notice of appeal is twenty days but "[u]pon good cause shown, the Chair of the Board . . . may fix a longer or shorter time for the filing deadlines within this section." The BBO has never imposed a shorter deadline on a party.

20 This represents a change from practice before the BBO prior to 2022, which required both a notice of appeal *and* the appeal brief to be filed within twenty days. With amendments that became effective on June 1, 2022, only the notice must be filed within twenty days. The appealing party's brief must be filed within forty days of the notice of appeal.

21 BBO Rules § 3.50(a).

22 BBO Rules § 3.51; Board of Bar Overseers Policies and Practices No. 25 (2025).

3. Within *thirty days of filing the opening 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]
4. Further briefing is permitted after the above submissions only by leave of the BBO. A party may file a motion with the BBO requesting leave to file a further response, but additional filings are discouraged.[24]
5. 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 BBO has the discretion to proceed without a hearing, but typically when a party requests oral argument, the BBO allows it.
6. If neither party files a notice of appeal within twenty days of service of the committee report, the parties will have waived the opportunity to participate at that stage in the BBO review of the matter and to object to any of the committee's findings, conclusions, or recommendation for disposition.[26]
7. Upon receipt of an appeal, the BBO hears the matter as a full board.[27]
8. If a party requests oral argument (and if the BBO grants the request), the BBO schedules a hearing, typically in conjunction with a monthly BBO meeting. Otherwise, the BBO reviews the full record and the briefs, and issues its vote and, typically, a memorandum of decision. While the BBO has the discretion to remand the matter to the hearing committee for further evidence, it seldom does so.

Remember, the BBO always reviews the report, whether or not a party appeals, and it allows briefing if it does not affirm the report; the steps described here allow a dissatisfied party to participate in that review process at the outset and to persuade the BBO before it forms an opinion on the matter. However, a party should not assume that the BBO will provide an opportunity for briefing absent an appeal. If a party seeks to challenge any aspect of the hearing report, they must file a notice of appeal.

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23 BBO Rules § 3.50(a).

24 *Id. See also* Board of Bar Overseers Policies and Practices No. 25 (2025).

25 BBO Rules § 3.50(b).

26 BBO Rules § 3.50(c). *But see* § 3.52, discussed in section III (if the BBO modifies or does not affirm the hearing committee report, the parties may file briefs).

27 BBO Rules § 3.50(d) permits the BBO to assign the appeal to a three-member panel, but that is not typically the BBO's practice.

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 BBO 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 BBO has access to the full record, a party may attach parts of the record to its brief for ease of reference.

Briefs are limited to thirty pages, double-spaced, minimum twelve-point font, with one-inch margins all around.[29] A party wishing to file a longer brief must seek permission from the BBO.[30] A record appendix or other supporting documents are not required because the BBO has all the exhibits and the transcripts available to the hearing committee.

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.[31]

The party opposing the appeal has thirty 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 thirty-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.[32]

C. The BBO's Action on Appeal

After considering the appeal, the BBO typically issues a decision with a memorandum. If the BBO issues a decision, and the proposed sanction is an admo-

28 BBO Rules § 3.51(a).
29 BBO Rules § 3.51(c); Board of Bar Overseers Policies and Practices No. 25 (2025).
30 Board of Bar Overseers Policies and Practices No. 25 (2025).
31 BBO Rules § 3.51(a)(3).
32 BBO Rules § 3.51(b).

nition or a public reprimand, the BBO serves its vote and memorandum on the parties, and such service "shall constitute the admonition or public reprimand."[33] If the proposed sanction is a suspension or disbarment, the BBO must file an Information with the clerk of the SJC for Suffolk County.[34] This is the same process that is followed in the event that neither party appeals, as discussed in section III.

V. Appeal from the BBO Decision

A party who disagrees with the BBO's recommendation of an admonition, public reprimand, or dismissal must seek SJC review of that decision. Otherwise, the decision is final. To obtain review of an admonition, public reprimand, or dismissal, a party must, *within twenty days of the date of service of the BBO vote*, file with the BBO a demand that the BBO file an Information with the SJC.[35] The twenty-day time limit is jurisdictional; neither the BBO nor the SJC may extend the time for filing the demand.[36] Upon receipt of the demand, the BBO files the Information.

After BBO review, a proposed suspension or disbarment requires no further action by a party at the BBO level. This is because the BBO 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 BBO recommendation (discussed in the previous section). In each instance, the SJC review process begins with the Information, which is a pleading that the BBO presents to the SJC.[37]

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33 BBO Rules § 3.56(a).
34 BBO Rules § 3.58.
35 BBO Rules § 3.57(a).
36 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.
37 SJC Rule 4:01 § 8(6).

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 BBO, with dates and references to the record, including the proposed sanction the BBO determined as well as the costs the BBO incurred in conducting the proceedings.

Accompanying the Information is "the entire record of [the] proceedings" before the BBO.[38] 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 parties' briefs, and the BBO vote and memorandum, if any. The BBO files all of this material with the clerk of the SJC for Suffolk County. In doing so, the BBO notifies the parties of this filing by serving them with a copy of the Information. The SJC clerk then dockets the matter using a special cover sheet designed for discipline cases. 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. The sole exception to SJC review is when the bar counsel imposes an admonition to which a respondent objects. A respondent who objects to an admonition may request an expedited hearing to review that sanction. After the expedited hearing, either party may request review of the sanction. The BBO order following that hearing is final, and no appeal to the SJC is allowed. The 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,[39] and a hearing date is set. The parties file no further pleadings at this stage and simply await a hearing date.

[38] BBO Rules § 3.58.
[39] SJC Rule 4:01 § 1(2).

The single justice, who has all of the papers from the proceedings before the BBO, may offer the parties the opportunity for oral argument. On occasion, before or after the hearing, one or both parties may submit additional briefs to the court, either upon 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 BBO's recommendation,[40] reject it and order a different 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 BBO 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]

Practice Tip

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 BBO proceedings, the single justice will not have a brief in support of the respondent's position, unless the court allows such a filing.

An order of suspension or disbarment by the single justice will typically set forth a detailed and tight series of deadlines the respondent must meet in order to close their practice. Chapter 22 discusses these requirements and deadlines in detail. These deadlines must be followed even if a party seeks further review by the full court (discussed in the following section). In other words, the order of suspension or disbarment is immediately effective, absent a request for a stay (discussed in the following section).

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[40] *See, e.g.*, Matter of Manoff, 2013-DDC-5157 (SJ 2013) (accepting BBO's recommendation of public reprimand).

[41] *See, e.g.*, Matter of Serpa, 2014-DDC-5327 (SJ 2014) (rejecting BBO's recommendation of six-month suspension in favor of sixty-day suspension); Matter of Sousa, 2009-DDC-4396 (SJ 2009) (rejecting BBO's recommended sanction of indefinite suspension; two-year suspension imposed).

[42] *See, e.g.*, Matter of Greenidge, 2014-DDC-5279 (SJ 2014) (remanding for evidentiary hearing on question of mitigation and appropriate sanction).

[43] SJC Rule 4:01 § 8(6).

2. Appeal from the Single Justice Decision

A party dissatisfied with the single justice's decision (including the bar counsel, the respondent, or in rare circumstances the BBO) may request a full bench review.[44] To expedite appeals, SJC Rule 2:23 establishes the following procedures.

A party dissatisfied with the single justice's 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*. For example, if the single justice issues an order of suspension or disbarment, the sanction will go into effect even if a party appeals from the single justice to the full court. The only (and very rare) exception is if a party requests, and the court grants, a stay of the suspension or disbarment pending appeal to the full court. 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 BBO 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:

[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.

- 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.

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 each 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. If three justices so vote, 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.[45] Reply briefs have the same twenty-page limit as required by the standing order.[46]

VII. Review of an Admonition Through an Expedited Hearing

The procedures described in the previous section apply to reviews of all discipline the BBO 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 BBO recommendations after hearing a petition for reinstatement. See chapter 23 for a discussion of reinstatement procedures.)

If the BBO 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 BBO approval *prior to a petition for discipline being filed*, a different procedure applies. That procedure is known as an expe-

[45] Mass. R. App. P. 20(a)(2)(A).
[46] *Id.*

dited hearing.[47] 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.

You Should Know

The expedited hearing process has rarely been used. Through the middle of 2024, fewer than ten such hearings have occurred.

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 BBO, with a copy served on the bar counsel, that the admonition be vacated and a hearing provided.[48] 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.[49] 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 the admonition summary with the BBO, along with the respondent's demand. The BBO then assigns a special hearing officer (not a hearing committee) to conduct an expedited hearing on the matter.[50]
3. Prior to the expedited hearing, the parties must exchange witness lists, proposed exhibits, and objections, as well as agreed-upon exhibits and stipulations, all by dates specified in the notice of hearing. There is no prehearing conference procedure.[51] The hearing officer then conducts the hearing in the same way as a disciplinary hearing, described in chapter 6, except for the following differences:

47 SJC Rule 4:01 § 8(4); BBO Rules §§ 2.11–2.12.
48 BBO Rules § 2.12.
49 BBO Rules § 2.12(1).
50 BBO Rules § 2.12(2)(c) ("The matter shall be assigned to a special hearing officer and shall be set for hearing as soon as practicable").
51 BBO Rules § 2.12(d) (notice of hearing to set dates for the exchange of exhibits, witness lists, etc.); BBO Rules § 2.12(2)(e) (no prehearing conference except for good cause shown).

- The proceedings and the record are confidential.[52]
- At the conclusion of the hearing, the parties do not file briefs or requests for findings of fact or conclusions of law.[53]

4. The special 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 special hearing officer's report and recommendation may file an appeal brief, as described in section IV or on disciplinary hearings, but the matter will be decided on the papers.[56]

6. The BBO'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 BBO file an Information in order to obtain SJC review.[57]

52 BBO Rules § 2.12(2)(a).
53 BBO Rules § 2.12(2)(g).
54 SJC Rule 4:01 § 8(4)(a).
55 *Id.*
56 SJC Rule 4:01 § 8(4)(b). *See* section IV.
57 *Id.*

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 (USPTO). 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

[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, 2012-DDC-5017 (SJ 2012) (unauthorized practice of law in Georgia, among other misconduct; lawyer suspended for six months and one day); Matter of Marshall, 2000-DDC-2719 (SJ 2000) (respondent used false identity to apply for Arizona bar; indefinite suspension ordered); Matter of Ramos, 2013-DDC-5199 (SJ 2013) (unauthorized practice in Ohio; six-month suspension).

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.

> ***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.**

In addition, a lawyer denied admission to the bar of another jurisdiction, other than for failing the bar examination, must also notify the BBO and the bar counsel within ten days of the order being issued.[2]

Failure to report a sanction in another jurisdiction may serve as an independent basis for discipline in Massachusetts.[3] 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 other sources. 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 Massachusetts reciprocal discipline order be issued nunc pro tunc, retroactive to the original sanction date in the other jurisdiction.[4] A lawyer who fails to timely report the

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2 Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 4:01 § 16(6).

3 SJC Rule 4:01 § 3(1). *Cf.* Matter of Zeolla, 2017-DDC-5828 (SJ 2017) ("In violation of S.J.C. Rule 4:01, §§ 12(8) and 16(6), the respondent did not notify bar counsel or the Board of Bar Overseers (board) that his right to practice law in another jurisdiction had been 'curtailed or limited'").

4 *See, e.g.*, Matter of Rorex, 2018-DDC-5907 (SJ 2018) (reciprocal discipline following suspension order issued by Arizona Supreme Court; reciprocal order nunc pro tunc to effective date of Arizona order); Matter of Dvorak, 2012-DDC-5003 (SJ 2012) (reciprocal discipline after suspension by Board of Immigration Appeals, Immigration Courts, and Department of Homeland Security; suspension order made retroactive to correspond to immigration order); Matter of Rocha, 2014-DDC-5333 (SJ 2014) (suspension in Rhode Island; Massachusetts suspension retroactive to start of Rhode Island order; reinstatement conditioned on Rhode Island reinstatement).

discipline may forfeit the opportunity to obtain nunc pro tunc treatment of the Massachusetts discipline.[5]

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 BBO 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 a lawyer suspends their practice 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.

A. Private Discipline

The SJC requires a lawyer to report private discipline within ten days,[6] 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.

[5] *See, e.g.*, Matter of Sheridan, 449 Mass. 1005, 1008, 2007-DDC-3924 at 3 (SJC 2007) (SJC upheld single justice's refusal to make respondent's suspension retroactive because respondent failed to notify BBO and bar counsel of disciplinary orders against him in New Hampshire).
[6] SJC Rule 4:01 § 16(6).

The SJC rules do not allow a Massachusetts lawyer to challenge, in Massachusetts, 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 BBO and the clerk of the SJC. The order is then filed with the SJC and made public, the same as a public reprimand issued by the BBO or the court,[7] 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, in Massachusetts, the validity of an out-of-state public reprimand.

C. Suspension or Disbarment

Suspensions and disbarments entered in another jurisdiction are usually treated with similar reciprocal discipline in Massachusetts.

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 BBO). 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.[8] 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.[9]

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,[10] unless the bar counsel files a pleading with the court requesting a different sanction. While the SJC rules do not expressly authorize

7 SJC Rule 4:01 § 16(4).
8 SJC Rule 4:01 § 16(1).
9 *Id.*
10 *See, e.g.*, Matter of Jensen, 2024-DDC-6646 (SJ 2024) (respondent disbarred on a reciprocal petition for discipline following his disbarment in Virginia for misuse of client funds and pursuit of frivolous legal theories; respondent received notice of reciprocal proceeding but did not respond).

such a filing by the bar counsel, the court permits it.[11] 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.[12]

Practice Tip

A lawyer who receives a suspension order from the SJC equal in length to the suspension order from another 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 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*

11 *See* Matter of Tunney, 2012-DDC-4971 (SJ 2012) (no appearance by respondent, yet hearing held before single justice, evidencing bar counsel's attempt to impose stricter sanction).
12 Although rare, the single justice may remand the matter to the BBO to resolve a disputed issue, such as whether the lawyer had sufficient notice of the disciplinary proceeding in the originating jurisdiction. *See, e.g.*, Matter of Barrett, 2018-DDC-5985 (SJ 2018).
13 SJC Rule 4:01 § 16(3).
14 SJC Rule 4:01 § 16(1).
15 SJC Rule 4:01 § 16(3).
16 Matter of Correll, 494 Mass. 1002, 2024-DDC-5759 (SJC 2024) (citing Matter of Mitrano, 453 Mass. 1026, 1027, 2009-DDC-4350 (SJC 2009)).

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:

> 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]

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17 411 Mass. 436, 1991-DDC-1169 (SJC 1991).
18 *Id.* at 437.
19 *Id.* at 450.
20 *Id.* at 449.
21 *Id.* at 450.
22 SJC Rule 4:01 § 16(3).
23 Matter of Lebbos, 423 Mass. 753, 756 (1996).
24 Matter of Burnbaum, 466 Mass. 1024, 1025, 2013-DDC-5094 (SJC 2013) (quoting Matter of Steinberg, 448 Mass. 1024, 1025, 2007-DDC-3922 at 2 (SJC 2007)). *See also Correll, supra* note 16, 494 Mass. at 1005, 2024-DDC-5759 (SJC 2024) (finding that, under Massachusetts law, respondent's misconduct warranted lesser sanction than imposed in originating jurisdiction).

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 "exceeds, equals, or falls short of the discipline imposed in another jurisdiction."[26] As with all discipline cases, any single justice decision is subject to review by a full bench of the SJC.[27] The decision will be affirmed unless the respondent demonstrates that "the discipline imposed by the single justice is . . . markedly disparate from that ordered in comparable cases [in Massachusetts]."[28]

Imposing an equivalent sanction is by far the most common form of reciprocal discipline,[29] but in some cases greater[30] or lesser[31] sanctions than the original sanction were imposed. Occasionally, the bar counsel supports a lesser sanction. For example, in *Matter of Correll*,[32] the bar counsel argued that the respondent should receive only a three-year suspension for conduct that led to a five-year suspension imposed by the USPTO, and the court agreed. In *Matter of Watt*,[33] 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. The bar counsel, arguing that the Rhode Island discipline was inadequate, sought an indefinite suspension.[34] A single justice ordered a two-year suspension and the bar counsel appealed. The SJC affirmed the two-year term suspension.[35] The court

25 *See, e.g.*, Matter of Kilduff, 2011-DDC-4872 (SJ 2011); Matter of Brett, 2006-DDC-3828 (SJ 2006).

26 *Burnbaum, supra* note 24, 466 Mass. at 1025, 2013-DDC-5094 at 1 (SJC 2013).

27 *See* SJC Rule 2:23.

28 Matter of Rosenberg, 491 Mass. 1027, 1029, 2023-DDC-6511 (SJC 2023) (entering reciprocal order of disbarment after respondent was permanently disbarred in Florida for practicing law while subject to prior order of disbarment in that jurisdiction because, inter alia, such misconduct would warrant disbarment in Massachusetts).

29 *See, e.g.*, Matter of Faro, 2019-DDC-6101 (SJ 2019) (respondent suspended for eight months following entry of same term suspension by the USPTO because "[e]ight months is not markedly disparate from sanctions imposed for comparable behavior" in Massachusetts); Matter of Contini, 2019-DDC-6075 (SJ 2019) (imposed same sanction as in foreign jurisdiction).

30 Matter of Elcock, 2020-DDC-6227 (SJ 2020) (imposing six-month suspension as reciprocal discipline based on entry of public reprimand issued in Arizona).

31 Matter of Lakin, 2019-DDC-6124 (SJ 2019) (imposing fifteen-month suspension as reciprocal discipline based on entry of two-year suspension issued in Arizona).

32 494 Mass. 1002, 2024-DDC-5759 (SJC 2024). *See also* Matter of Amaral, 2010-DDC-4592 (SJ 2010) (bar counsel argued that respondent should only receive indefinite suspension for conduct that led to disbarment in Rhode Island, and single justice agreed).

33 430 Mass. at 233, 1999-DDC-2472 at 1 (SJC 1999).

34 *Id.* at 234.

35 *Id.* at 236.

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.[36] The SJC declined to impose the presumptive sanction of indefinite suspension or disbarment in Massachusetts, however, "in deference to our sister jurisdiction."[37]

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*,[38] 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 comparison 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.[39]

If the sanction imposed in another jurisdiction has been stayed, any reciprocal discipline given in Massachusetts may, but need not, be deferred as well.[40] For example, in *Matter of Foley*,[41] 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*,[42] 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 BBO led to a suspension without a stay in Massachusetts.[43]

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36 *Id.* at 234.

37 *Id.* at 236. *See also* Matter of Steinberg, 448 Mass. 1024, 2007-DDC-3922 (SJC 2007) (imposing harsher sanction than imposed in District of Columbia because it was more appropriate sanction under Massachusetts law).

38 2007-DDC-3960 (SJ 2007).

39 *Id.* n.3 at 5.

40 SJC Rule 4:01 § 16(2).

41 2013-DDC-5207 (SJ 2013).

42 2008-DDC-4271 (SJ 2008).

43 *See also* Matter of Alcala, 2005-DDC-3647 (SJ 2005) (California suspension stayed there but

For purposes of reinstatement, the SJC has written, "[I]n 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."[44]

D. Disciplinary Resignations

As described in chapter 21, a lawyer may resign during disciplinary proceedings or investigation; that resignation has vastly different implications than those for a lawyer in good standing who is leaving the law through a nondisciplinary resignation.[45] 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 earlier in section III(C), to a lawyer who "has resigned during the pendency of a disciplinary investigation or proceeding" in a foreign jurisdiction.[46] 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.[47] In a 2009 opinion of the full SJC, the court answered those questions.

In *Matter of Ngobeni*,[48] 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."[49] The court wrote:

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not in Massachusetts because of lawyer's failure to report foreign sanction).

44 *Tunney, supra* note 11, 2012-DDC-4971 at 7 (SJ 2012) (citing Matter of Ritzo, 2010-DDC-4621 (SJ 2010); Matter of Carey, 2009-DDC-4438 (SJ 2009); Matter of Anderson, 2007-DDC-3969 (SJ 2007)). *See also* Matter of Lang, 2019-DDC-6096 (SJ 2019); Matter of Kesinger, 2013-DDC-5170 (SJ 2013); Matter of Martin, 2013-DDC-5174 (SJ 2013).

45 Chapter 21, section II(B).

46 SJC Rule 4:01 § 16(1).

47 In Massachusetts, a disciplinary resignation must include an affidavit by the lawyer acknowledging the accuracy of material facts alleged or that the material facts could be proved by a preponderance of the evidence. *See* SJC Rule 4:01 § 15(1)(c). Not every jurisdiction requires lawyers to make such an admission.

48 453 Mass. 233, 237, 2009-DDC-4349 (SJC 2009).

49 *Ngobeni*, 453 Mass. at 241, 2009-DDC-4349 at 5 (SJC 2009). *See also Burnbaum, supra* note 26,

> 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."[50]

The court concluded that the resignation was a form of discipline that supported reciprocal proceedings, noting other states' similar conclusions.[51] A lawyer who resigns from another state bar and who faces reciprocal discipline in Massachusetts may seek to resign here to avoid a disbarment order, and that request may be allowed.[52]

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.[53] However, only a sanction imposed by a tribunal pursuant to lawful bar disciplinary authority, such as a federal court,[54]

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466 Mass. 1024, 1025, 2013-DDC-5094 (SJC 2013) (entering disbarment order as reciprocal discipline for attorney who resigned from Florida bar following felony conviction).

[50] *Ngobeni*, 453 Mass. at 243, 2009-DDC-4349 at 6 (SJC 2009) (quoting *Lebbos, supra* note 23, 423 Mass. 753, 755, 1996-DDC-2025 at 5 (SJC 1996)).

[51] *Ngobeni*, 453 Mass. at 237–38, 2009-DDC-4349 at 3 (SJC 2009). 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 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).

[52] *See* Matter of Hormann, 2010-DDC-4580 (SJ 2010) (resignation accepted; no disbarment order); Matter of Golburgh, 2008-DDC-4291 (SJ 2008) (same); Matter of Tyler, 2006-DDC-3781 (SJ 2006) (same).

[53] *See, e.g.*, *Dvorak, supra* note 4, 2012-DDC-5003 (SJ 2012) (immigration court and agency suspension; discussed *supra* section II, note 4).

[54] *See, e.g.*, Matter of Zeno, 2007-DDC-4037 (SJ 2007).

qualifies as a disciplinary sanction that triggers reciprocity.[55] All the procedures are the same, including the respondent lawyer's obligation to report the tribunal's order to the bar counsel and the BBO.

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 BBO and to the bar counsel.[56] 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 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 BBO and the bar counsel.[57] As previously noted, however, not every sanction by a court or agency constitutes "discipline" with reciprocal effect.[58]
- 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 BBO 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."[59]
- 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*,[60] the United States District Court for the District of Puerto Rico

55 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 department violates state constitution and is invalid).
56 SJC Rule 4:01 § 16(6).
57 *Id.*
58 No BBO 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.
59 SJC Rule 4:01 § 16(4).
60 2007-DDC-4037 (SJ 2007).

> suspended the respondent for three months for engaging in improper behavior during a criminal case in that court. The single 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."[61] The three-month suspension was not retroactive, however, because the respondent reported his sanction to the BBO more than ten days after he had received the order.

However, as in all reciprocal matters, the court ultimately imposes whatever sanction is warranted by the facts under Massachusetts law, whether that discipline "exceeds, equals, or falls short of" what another tribunal imposed.[62]

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. However, reinstatement from reciprocal discipline is likely to be conditioned on reinstatement in the other jurisdiction.[63] For a full discussion of the reinstatement process, see chapter 23.

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61 *Id.* at 2 (quoting Matter of Kersey, 444 Mass. 65, 70, 2005-DDC-3566 (SJC 2005), citing *Lebbos, supra* note 50, 423 Mass. 753, 754–55).

62 *Kilduff, supra* note 25, 2011-DDC-4872 at 9 (SJ 2011) (treating IRS Office of Professional Responsibility (OPR) as federal administrative body under SJC Rule 4:01 § 16(1) and finding that only public reprimand was warranted under disciplinary caselaw in Massachusetts based on OPR's finding that respondent willfully failed to file tax returns). *See also* Matter of Nunheimer, 2022-DDC-6473 (SJ 2022) (respondent received reciprocal public reprimand after accepting, as disciplinary sanction, disqualification from acting as claimant's representative in dealings with Social Security Administration (SSA) based on his incompetent representation of client before SSA and for drafting trust for client in which respondent was beneficiary).

63 *See, e.g.*, Matter of Falusi, 2019-DDC-6095 (SJ 2019); Matter of Doerr-Hicks, 2016-DDC-5613 (SJ 2016); Matter of Hoffman, 2015-DDC-5440 (SJ 2015); *Tunney, supra* note 44, 2012-DDC-4971 (SJ 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 Supreme Judicial Court (SJC) Rule 4:01 § 8(7), is rarely invoked because disbarments by agreement are typically handled by a stipulation for discipline, as discussed in 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. The bar counsel may object, and the Board of Bar Overseers (BBO) 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 BBO stating the desire to resign. The affidavit must include the following statements:[2]

- The resignation is "freely and voluntarily rendered," not the result of coercion or duress, and that the lawyer understands the implications of resigning.
- The lawyer is aware of a pending investigation regarding alleged misconduct, the nature of which must be specifically set forth.
- 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 evidence.[3]
- The lawyer waives the right to the disciplinary hearing otherwise provided under SJC Rule 4:01.

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. For example, in *Matter of Levine*,[4] a lawyer was unsuccessful in his attempt to resign when faced with a temporary suspension petition filed by the bar counsel alleging that he had, among other things, intentionally misused client funds. In refusing to accept the respondent's affidavit, the single justice stated as follows:

> [T]he purpose of the resignation provision is to permit respondent attorneys who wish to 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 . . . . However . . . a respondent cannot claim the benefit of the rule without acknowledging with specificity the misconduct bar counsel can prove. Put another way, a respondent

2 Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 4:01 § 15(1).

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, 1999-DDC-2474 (SJC 1999).

4 2020-DDC-6238 (SJ 2020).

> must set forth in the affidavit of resignation an accurate description of the nature of bar counsel's investigation, i.e., including allegations and predicate facts that may be serious enough to warrant disbarment . . . . While the rule does not require a respondent to admit to the truth of the allegations of misconduct; it does require that a respondent acknowledge that bar counsel could prove the allegations by a preponderance of the evidence (citations omitted).[5]

Because the respondent's affidavit acknowledged only the allegations of negligent (as opposed to intentional) misconduct, the court deemed it to present "an inaccurate picture" and thus unacceptable under SJC Rule 4:01 § 15.[6] The respondent was suspended temporarily pending the outcome of the underlying disciplinary proceedings,[7] which ultimately resulted in his submission of an affidavit of resignation that complied with SJC Rule 4:01 § 15 and was, therefore, accepted by the BBO and court.[8]

Under the applicable rules,[9] the respondent lawyer must file the affidavit with the BBO. Upon receipt, the BBO serves that request and affidavit on the bar counsel, who, *within fourteen days of receipt*, must file a recommendation and the reasons for the recommendation with the BBO.[10] As part of this response to the affidavit, the bar counsel also must state whether the facts admitted would typically result in disbarment or a lesser sanction.[11] The bar counsel must serve the response on the respondent. A BBO member may extend the fourteen-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 BBO usually receives a complete packet from the bar counsel indicating the bar counsel's assent to the resignation along with a statement as to whether disbarment ordinarily would be warranted for the respondent's admissions.

Having received the affidavit and the bar counsel's response thereto, the BBO must vote whether to approve the resignation. If needed, the BBO may order the parties to provide further explanation, or "any hearing or investigation it deems appropriate."[12] While it is conceivable that the hearing ordered would be

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5 *Id.* at 10–11.
6 *Id.*
7 *Id.* at 11.
8 Matter of Levine, 2021-DDC-6284 (SJ 2021).
9 SJC Rule 4:01 § 15; Rules of the Board of Bar Overseers [hereinafter BBO Rules] § 4.1. Technically, these rules require the attorney to file a request to resign supported by affidavit. In practice, the affidavit serves both functions.
10 SJC Rule 4:01 § 15(1).
11 *Id. See also* BBO Rules § 4.1; Board of Bar Overseers Policies and Practices No. 17 (2025).
12 SJC Rule 4:01 § 15(2); BBO Rules § 4.1.

to present witnesses and evidence and, therefore, would follow the procedures described in chapter 6, in practice the BBO 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 on the grounds that the resigning attorney failed to make sufficient factual admissions in the affidavit.[13] Additionally, there are times when the bar counsel will not stand in the way of the resignation but recommends, over the respondent's objection, that the respondent also be disbarred for the facts admitted in the affidavit.[14]

Upon completion of its review, the BBO will file its recommendation and "the entire record of any hearing" with the court.[15] The BBO will make one of three recommendations to the assigned single justice: (1) reject the affidavit of resignation as submitted, (2) accept the resignation and disbar the resigning lawyer, or (3) accept the resignation as a disciplinary sanction only because the admitted matters would not warrant disbarment. A final order from the court will then follow.

Practice Tip

The BBO's records show that it has rejected few resignations lawyers have offered. However, the SJC and BBO rules allow the BBO 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 BBO 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 coun-

13 *See, e.g.*, *Levine, supra* note 8, 2020-DDC-6238 at 8–9 (SJ 2020).

14 Matter of Clark, 2005-DDC-3569 (SJ 2005) (affidavit of resignation accepted and order of disbarment entered).

15 SJC Rule 4:01 § 15(2); BBO Rules § 4.1.

sel or the BBO has occasionally sought to block such resignations,[16] suggests that resignation offers some advantages to the respondent relative to a disbarment order. In *Matter of Orme*,[17] 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 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."[18]

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 BBO 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 BBO's filing of an Information and resignation have some identical consequences. Still, some practical differences exist beyond preserving the lawyer's "modicum of self-respect" and saving the BBO's 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 con-

16 *See, e.g.*, Matter of Lee, 1983-DDC-384 (SJ 1983) (board objection); Matter of Orme, 2011-DDC-4781 (SJ 2011) (bar counsel objection).
17 2011-DDC-4781 (SJ 2011).
18 *Id.* at 3 (quoting Matter of Oates, 1986-DDC-612 at 4 (SJ 1986)).

trol over what public record of misconduct will exist at the conclusion of the disciplinary proceeding.

As noted, not every accepted resignation includes an order of disbarment, because not every resignation is for conduct that warrants disbarment.[19] On occasion, 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.

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." Under SJC Rule 4:01 § 4, "[d]isability proceedings are not disciplinary proceedings [], and a transfer to disability inactive status is not a disciplinary sanction."[20] Nonetheless, the status is intended to serve the public welfare and ensure that "members of the public are served only by attorneys who have both the mental and physical capacity to practice law."[21] Moreover, 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, or (3) when the bar counsel proves the respondents' incapacity and the SJC enters an order transferring them to that status.[22]

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19 *See, e.g.*, Matter of Sirrine, 2022-DDC-6400 (SJ 2022) (affidavit of resignation accepted as disciplinary sanction only with no accompanying order of disbarment); Matter of Shepcaro, 2021-DDC-6300 (SJ 2021) (same); Matter of Sohmer, 2009-DDC-4468 (SJ 2009) (same).

20 Matter of Mayfield, 2025-DDC-7075 (SJ 2025).

21 *Id.*

22 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 BBO

1. Adjudication of Incompetence

Disability inactive status is an issue whenever a lawyer "has been judicially declared incompetent or committed to a mental hospital after a judicial hearing, or where a lawyer has been placed by court order under guardianship or conservatorship, or where a lawyer has been transferred to disability inactive status in another jurisdiction."[23] The SJC, once it has "proper proof" of the order relied upon, "shall enter an order transferring the lawyer to disability inactive status."[24] 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.[25]

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

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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.

[23] SJC Rule 4:01 § 13(1). *See, e.g.*, Matter of Manoil, 2024-DDC-6651 (SJ 2024) (lawyer under guardianship and conservator orders transferred to disability inactive status on petition filed by bar counsel).

[24] SJC Rule 4:01 § 13(1); *see, e.g.*, *Mayfield, supra* note 21, 2025-DDC-7075 (SJ 2025) (lawyer transferred to disability inactive status in accordance with SJC Rule 4:01 § 13 (1), over lawyer's objection, after bar counsel submitted sufficient evidence showing that lawyer had been placed under conservatorship by court order pursuant to Mass. Gen. Laws ch. 190B § 5-412A).

[25] *See* Matter of Gannett, 489 Mass. 1007, 2022-DDC-6403 (SJC 2022) ("Attorneys facing bar discipline proceedings are entitled to due process of law, the hallmarks of which are fair notice of the charged misconduct and the right to be heard").

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 the practice of law pending final disposition of the [underlying disciplinary] matter."[26] If that underlying proceeding does not result in suspension or disbarment, the lawyer may then resume practice.

A respondent who seeks to invoke SJC Rule 4:01 § 13(3) must satisfy the *Dusky* standards of incompetence to stand trial:[27]

> 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 proceedings against him."[28]

3. Petition to Determine Incapacity

Disability inactive status is usually achieved by agreement, including when the attorney admits that he or she is incapacitated due to a physical or mental condition that adversely affects his or her ability to practice law. In such situations, pursuant to SJC Rule 4:01 § 13(2), the bar counsel will file an assented-to petition with the court seeking the entry of an order placing the attorney on disability inactive status. This subsection describes the procedure for the *involuntary* transfer of an attorney to disability inactive status set forth in SJC Rule 4:01 §§ 13(2) and (4).[29]

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26 SJC Rule 4:01 § 13(4)(f).

27 Dusky v. United States, 362 U.S. 402 (1960).

28 Matter of Puglia, 1998-DDC-2430 at 6 (SJ 1998) (quoting *Dusky*, 362 U.S. at 402). *See also* Matter of Margolis, 1999-DDC-2537 at 7 (SJ 1999) (applying *Dusky* standard).

29 Separate from the process described here, under SJC Rule 4:01 § 12A, the bar counsel may, if

Proceedings for an involuntary transfer to disability inactive status would be invoked when the bar counsel determines a claim that a lawyer has lost the ability to function adequately as a lawyer but is unwilling to address that disability. Typically, this possibility 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.[30] If that happens, and the lawyer is unwilling to transfer to disability inactive status by agreement (or, in appropriate circumstances, retire or resign from the bar), the bar counsel is required to seek permission from the BBO to file a petition alleging that the lawyer is incapable of maintaining a legal practice.[31]

Upon the BBO's approval, the bar counsel files a petition the same as it does when seeking to impose discipline for misconduct.[32] The matter is assigned to a hearing committee, special hearing officer, or panel of the BBO the same as other disciplinary proceedings and proceeds in the usual fashion, with two exceptions. First, unlike in disciplinary hearings, the BBO may appoint a lawyer to represent the respondent lawyer if the respondent does not have representation.[33] Second, the rules expressly state that the hearing committee "may require the examination of the respondent-lawyer by qualified medical experts designated by them."[34] The standard that the hearing committee, the BBO, 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.[35] 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)) 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."[36]

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appropriate, seek a temporary suspension of an attorney who presents an immediate threat to clients. *See* chapter 4, section II(F)(5).

30 As noted earlier, if a court has already issued an order declaring the lawyer to be incompetent (e.g., under an order of guardianship or conservatorship), the bar counsel may file a petition for disability status directly with the court. SJC Rule 4:01 § 13(1).

31 SJC Rule 4:01 § 13(2).

32 SJC Rule 4:01 § 13(4)(a). *See* chapter 6 for a discussion of adjudicatory proceedings.

33 SJC Rule 4:01 § 13(4)(c).

34 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 BBO or the court will pay that cost. SJC Rule 4:01 § 13(4)(f).

35 SJC Rule 4:01 §§ 13(2), (4)(e).

36 SJC Rule 4:01 § 13(6)(b).

B. Effect of Disability Inactive Status

The BBO 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 [SJC Rule 4:01] is published."[37] Notwithstanding that quoted language, the SJC typically 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 BBO's published report usually consists of either the court's order of transfer[38] or a short statement 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."[39]

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.[40] 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.[41] Whether to seek appointment of a commissioner pursuant to section 14 rests solely within the discretion of the BBO or the bar counsel.[42] When there is no actual or potential disciplinary matter involving the lawyer (meaning, the only issue is the lawyer's disability), the BBO will seek the appointment of one of its staff members as the commissioner.[43] When the lawyer is also faced with actual or potential discipline due to the effects of their disability (thus posing a possible conflict with the BBO's adjudicatory role in the matter), the bar counsel will request the appointment of an outside attorney to act as commissioner under its

37 SJC Rule 4:01 § 13(5).

38 *See, e.g.*, Matter of Rubin, 2022-DDC-6386 (SJ 2022).

39 *See, e.g.*, Matter of McNamee, 2018-DDC-5928 (SJ 2018).

40 *See* Matter of Kolofolias, 2009-DDC-4480 (SJ 2009) (disabled inactive attorney worked as paralegal; term suspension of six months and one day imposed).

41 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).

42 Board of Bar Overseers Policies and Practices No. 28 (2025).

43 *Id.*

supervision.[44] Once any disciplinary consequences are resolved, the bar counsel or the BBO may elect to terminate the services of the outside commissioner and pursue the remainder of the work in-house by filing a motion with the court.[45]

The commissioner's responsibilities are defined in scope by the court's order of appointment and SJC Rule 4:01 § 14. Among other things, the commissioner may take custody of the inactive lawyer's files, computers, records, and trust accounts, including Interest on Lawyers' Trust Accounts (IOLTA); prepare an inventory of all clients and matters prepared and contact clients; attend to looming deadlines; and refer clients with active matters to successor counsel. In addition, the commissioner may review bank accounts, including IOLTA accounts, and obtain signing authority (by means of the appointment order) to disburse and receive funds. Once all clients have been processed, the commissioner will file a final report with the court.[46] The commissioner may not reveal any information contained in the lawyer's files without client consent.[47]

The inactive lawyer pays the commissioner's reasonable expenses and, if appropriate, reasonable compensation, unless the court orders otherwise.[48] In the event that payment by the lawyer is not available or otherwise forthcoming, the BBO will pay the approved expenses and fees, reserving all rights to pursue reimbursement from the lawyer in the future.[49]

D. Reinstatement from Disability Inactive Status

A lawyer transferred to disability inactive status may seek reinstatement the same way as a 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.[50]

Unless the order transferring the lawyer to disability inactive status states a

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44 *Id.*

45 *Id.*

46 *Id.*

47 SJC Rule 4:01 § 14(2).

48 *Id.*

49 Board of Bar Overseers Policies and Practices No. 28 (2025).

50 In addition to the unique requirements set forth herein, a lawyer seeking reinstatement from disability inactive status is not required to take and pass the Multistate Professional Responsibility Examination, unlike other petitioners for reinstatement under SJC Rule 4:01 § 18(4). *See* Matter of Devlin, 2010-REI-4725 (SJ 2010) ("The apparent reason for this omission is that no finding of ethical wrongdoing is required or implicit in an order of disability inactive status; the only finding required is that the attorney has become incapacitated to practice law as a result of a mental or physical condition. Because the attorney's ethics were not at issue in the order of disability inactive status, passing a professional responsibility examination is not a prerequisite to applying for reinstatement").

different interval, the lawyer is entitled to petition for transfer to active status once a year.[51] 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 from seeking 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 BBO may retain an expert or experts to examine the lawyer and advise the BBO as to the lawyer's current fitness.[52] 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.[53]

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.[54] 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*,[55] 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.[56] At the hearing on his petition for reinstatement, he persuaded the hearing panel that his condition had improved, that he was competent to resume practice, and that he had 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*,[57] 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

51 SJC Rule 4:01 § 13(6)(b). The order from the court may designate a different time frame.
52 SJC Rule 4:01 § 13(6)(c).
53 SJC Rule 4:01 § 13(7).
54 SJC Rule 4:01 § 13(6)(e).
55 2015-REI-5427 (HP 2015).
56 2012-DDC-5021 (SJ 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.
57 2016-REI-5666 (HP 2016).

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 BBO, immediately reinstate the lawyer.[58]

[58] SJC Rule 4:01 § 13(6)(d). *See* Matter of Dwyer-Jones, 470 Mass. 582, 589, 2015-DDC-5404 at 12 (SJC 2015) ("[I]f [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 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.[1]

[1] *See also* Dorothy Anderson, *Loss of License: Rules Governing Suspension or Disbarment*, Board of Bar Overseers (July 2020), https://www.massbbo.org/Files?fileName=lossoflicense.pdf.

Practice Tip

A suspended lawyer who practices within a firm may 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.[2] A solo lawyer's clients, 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.[3] The suspended lawyer is authorized to practice law in a limited fashion during those thirty days (and may not accept any new matters) but must cease all practice at the 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[4] shows, complying with the requirements applicable to suspended lawyers is detailed and time-consuming, especially during the first two weeks.

You Should Know

The steps described here apply to *every* suspension order, no matter how short, unless the order states otherwise. A lawyer suspended for as little as one month must follow all of these steps.[5]

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2 *See, e.g.*, Matter of Kiley, 459 Mass. 645, 649 (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").

3 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.

4 This list is a summary of the requirements in Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 4:01 § 17(1).

5 *See, e.g.*, Matter of Bradley, 2025-DDC-6750 (SJ 2025) (one-month suspension); Matter of Guinane, 2004-DDC-3453 (SJ 2004) (same).

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:[6]

1. Provide a notice (the "client notice") to each active client, ward, heir, and beneficiary,[7] 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 cocounsel, the recipient should act promptly to locate successor counsel.[8]

> **Practice Tip**
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> The client notice, as described above, 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.[9] (This communication is referred to here as the "other counsel notice," but the term refers also to the notice sent to unrepresented parties.) In the litigation context, 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.
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.[10]
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

6 SJC Rule 4:01 § 17(1). 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.
7 The word *beneficiary* refers to any person for whom the lawyer serves as a fiduciary at the time of the order. *See* BBO Rules § 4.17(a).
8 SJC Rule 4:01 § 17(1)(c).
9 SJC Rule 4:01 § 17(1)(d).
10 SJC Rule 4:01 § 17(1)(a).

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.[11]

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.[12]
6. Refund all fees held by the suspended lawyer but not yet earned.[13] The lawyer may earn fees during this thirty-day period and use retained funds to cover those fees, but any fees accepted during this period will receive close scrutiny. Moreover, the lawyer cannot accept any new retainer or, as noted later, accept any new cases or matters.[14]

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.[15]
8. Accept no new matters, even if the lawyer is confident of accomplishing the client's goals before the suspension is effective.[16]

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11 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.

12 SJC Rule 4:01 § 17(1)(g).

13 SJC Rule 4:01 § 17(1)(f).

14 SJC Rule 4:01 § 17(3).

15 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. 1.15A(b): A lawyer may not withhold from a client any materials whose "retention would unfairly prejudice the client." 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.

16 SJC Rule 4:01 § 17(3).

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. And, in all cases, the lawyer may not accept any new retainer or take on any new legal matters.

The suspended lawyer must complete all of these steps in less than two weeks (absent an extension granted by the SJC), given the time period between the entry of the order and the lawyer's notice of it.

2. Within Twenty-One Days: Compliance Affidavit and Reports

Within *twenty-one days* from the date the order is entered, the lawyer must do the following:

1. File with the Office of the Bar Counsel (OBC) 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 section II(A)(1).[17]
2. Append to that affidavit the following items:
   - A copy of the client notice, other counsel 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.[18]
   - 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.[19]
   - A separate schedule tracking the previous schedule, showing the disposition of all fiduciary and client funds identified in the previous schedule.[20]

[17] SJC Rule 4:01 § 17(5).
[18] SJC Rule 4:01 § 17(5)(a).
[19] SJC Rule 4:01 § 17(5)(b).
[20] SJC Rule 4:01 § 17(5)(c).

- Such proof of the distribution of funds and closing of accounts as has been requested by the bar counsel, including copies of checks and other instruments.[21]
- 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).[22]
- A residential or other street address (not a post office box) where the lawyer may receive communications from the bar counsel, the Board of Bar Overseers (BBO), or the court.[23]

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.[24]

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.

a. Appointment of Commissioner

The SJC may, in appropriate circumstances, appoint a commissioner to manage the responsibilities of the suspended lawyer.[25] 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.[26] The suspended lawyer is responsible for paying for the commissioner's time, unless the court orders otherwise.[27]

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21 SJC Rule 4:01 § 17(5)(d).
22 SJC Rule 4:01 § 17(5)(e). *See* chapter 20 for a discussion of reciprocal discipline.
23 SJC Rule 4:01 § 17(5)(f).
24 SJC Rule 4:01 § 17(6).
25 SJC Rule 4:01 § 17(2). The SJC may also appoint a commissioner upon the disability or death of an attorney if there are no responsible parties, including a personal representative of the attorney's estate, available to responsibly close down the law practice. *See* SJC Rule 4:01 § 14.
26 *See, e.g.*, Matter of Laroche-St. Fleur, 2023-DDC-6526 (SJ 2023); Matter of Tariri, 2023-DDC-6561 (SJ 2023); Matter of Maroun, 2022-DDC-6451 (SJ 2022).
27 For more information on the appointment and duties of a commissioner, *see* Board of Bar Overseers Policies and Practices No. 28 (2025).

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.

b. Notice to Courts

After receiving the SJC's order, the BBO must promptly send a copy of that order to the clerk of each state or federal court in the Commonwealth in which the BBO has reason to believe that the excluded lawyer has practiced.[28] 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,[29] SJC Rule 4:01 refers to the concept of a "temporary suspension,"[30] 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 clients, or [whose] whereabouts are unknown,"[31] or, under SJC Rule 4:01 § 12, to a lawyer convicted of a "serious crime."[32] 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.[33]

For present purposes, the noteworthy requirement of a temporary suspension is that it *takes effect immediately* unless otherwise ordered by the court.[34] 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.[35]

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28 SJC Rule 4:01 § 17(4).
29 *See* chapter 4, section II(F)(5).
30 *See, e.g.*, SJC Rule 4:01 §§ 17(1)–(6).
31 SJC Rule 4:01 § 12A.
32 SJC Rule 4:01 §§ 12(3), (4).
33 *See, e.g.*, Matter of Levine, 2020-DDC-6238 (SJ 2020); Matter of Griffin, 2013-DDC-5198 at 2 (SJ 2013); Matter of Pomeroy, 2009-DDC-4463 (SJ 2009); Matter of Kenney, 399 Mass. 431, 437, 1987-DDC-599 (SJC 1987).
34 SJC Rule 4:01 § 17(3) ("[o]rders imposing temporary suspension shall be immediate and forthwith").
35 SJC Rule 4:01 §§ 12(4), 12A.

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 absent an allowance from the court.

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.

C. Required Steps in an Administrative Suspension

A lawyer may receive an administrative suspension for failure to comply with registration renewal requirements[36] or for failure to cooperate with the bar counsel during an investigation.[37] As described more fully in chapter 4,[38] an administratively suspended lawyer has fourteen days after entry of the order 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. However, after that fourteen-day period, the administratively suspended lawyer must cease practicing and take all the steps described in the previous sections.[39]

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

36 SJC Rule 4:03 § 2.
37 SJC Rule 4:01 § 3(2).
38 For a discussion of administrative suspensions generally, *see* chapter 4, section II(F)(6).
39 SJC Rule 4:01 § 3(3).

later seeking reinstatement.[40] Even if the reinstatement qualifies as "automatic" under the SJC rule (which ordinarily includes suspensions of not more than a year[41]), 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 . . . ."[42] 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,[43] as discussed in section III(B). The lawyer's suspension

[40] *See* chapter 23 for a discussion of the reinstatement process.

[41] SJC Rule 4:01 § 18(1) (all lawyers suspended for a year or less shall be reinstated upon submitting an affidavit to the bar counsel and the court demonstrating that the lawyer complied with the suspension order, paid all required fees and costs, and repaid any funds awarded by the Clients' Security Board; however, lawyers suspended for more than six months also must take the Multistate Professional Responsibility Examination during the period of suspension and receive a passing grade as established by the Board of Bar Examiners). *See, e.g.*, Matter of Martin, 2021-REI-6324 (SJ 2021) (lawyer suspended for six months reinstated by court after lawyer filed affidavit of compliance and bar counsel filed notice of nonopposition to automatic reinstatement). *But see, e.g.*, Matter of Saben, 2021-DDC-6291 (SJ 2021) (automatic reinstatement does not apply to lawyer who fails to file required affidavit within six months after original term of suspension has expired). *See also* chapter 23.

[42] SJC Rule 4:01 §§ 18(1)(a)–(b).

[43] *Laroche-St. Fleur, supra* note 26, 2023-DDC-6526 (SJ 2023). After the full bench had imposed an eighteen-month suspension for multiple rule violations (*see* Matter of Laroche-St. Fleur, 490 Mass. 1020, 2022-DDC-6469 (SJC 2022)), the single justice found that Laroche-St. Fleur had committed "text book contempt" by holding herself out as a practicing attorney and stating in open court that she would not take the steps necessary to comply with the court's orders. The single justice imposed a $100 per day fine until Laroche-St. Fleur had purged herself of contempt, lengthened the period of suspension to five years, and ordered the appointment of a commissioner. *See also* Matter of Tariri, 2023-DDC-6523 (SJ 2023). After Tariri had been temporarily suspended by the full court, he continued to practice law and failed to submit the affidavit of compliance required by the suspension order. After the court had held Tariri in contempt, ordered a ninety-day commitment for civil contempt, and affirmed the temporary suspension (*see* Matter of Tariri, 492 Mass. 1009 (2023)), the court appointed a commissioner to work with the bar counsel to notify Tariri's former clients of the suspension and to return client files; 650 such files were processed. In June 2023, Tariri submitted a consent to disbarment pursuant to SJC Rule 4:01 § 8(7), following which the court issued an order of disbarment and ordered that Tariri be released from commitment.

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."[44] The lawyer's failure to comply is also considered in any later reinstatement proceeding.

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
- Work for, volunteer for, or assist a lawyer or law firm in any way[45]

Serving as an assistant or paralegal, a suspended lawyer might be a valuable asset to a sole practitioner or law firm, 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.

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 one of the following time periods:

- After a term suspension expires (but before formal reinstatement)
- After four years of an indefinite suspension
- After seven years of a disbarment order or a disciplinary resignation[46]

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

[44] SJC Rule 4:01 § 17(8). This section applies to a lawyer "who is found by the court to have violated the provisions of this rule by engaging in legal or unauthorized paralegal work prior to reinstatement . . . ." The SJC has held that acting as a fiduciary qualifies as "legal work." Matter of Johnson, 2012-DDC-4948 (SJ 2012). 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.

[45] SJC Rule 4:01 § 17(7).

[46] SJC Rule 4:01 § 18(3) (not listing disability inactive status among exceptions).

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 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."[47]

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.[48]

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,"[49] and several lawyers have been denied reinstatement for failure to prove this.[50] A single justice has described service as a paralegal as a "good step" in preparing for reinstatement.[51]

* * *

Suspended lawyers should attend continuing legal education classes and engage in similar professional development activities. Nothing prevents a suspended lawyer from actively *studying* law; the lawyer is only forbidden from *practicing* law.

47 Matter of Thalheimer, 2012-DDC-5090 (SJ 2012) (quoting Matter of Gonick, 2005-DDC-3667 (SJ 2005) and Matter of Ellis, 2007-DDC-6751 (SJ 2007)).
48 On her second attempt to obtain permission, Thalheimer succeeded. Matter of Thalheimer, 2013-DDC-5264 (SJ 2013).
49 SJC Rule 4:01 § 18(5).
50 *See, e.g.*, Matter of Solomon, 2024-REI-6637 (HP 2024); Matter of Diviacchi, 2022-REI-6401 (SJ 2022); Matter of Parigian, 2022-REI-6429 (SJ 2022).
51 Matter of Sullivan, 2009-REI-4360 (HP 2009).

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 provisions of this rule."[52] 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.[53]

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*,[54] 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).[55]

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*,[56] 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

52 *See supra* note 44 (discussing 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 Johnson, supra* note 44, 2012-DDC-4948 (SJ 2012).
53 SJC Rule 4:01 § 17(8).
54 2013-DDC-5097 (SJ 2013).
55 *See also Johnson, supra* note 52, 2012-DDC-4948 (SJ 2012); Matter of Kafkas, 451 Mass. 1001, 2008-DDC-4148 (SJC 2008) (contempt order confirmed, suspension period doubled based on prior version of SJC Rule 4:01 § 17(8)).
56 2010-DDC-4539 (SJ 2010).

activities that he formerly provided, such as drafting and negotiating purchase and sale agreements and conducting real estate closings, to licensed lawyers.

The single justice concluded that his actions qualified as the practice of law. The court relied on the principle that "[a]n activity that may not constitute practicing law when performed by another category of professional may well become the practice of law when a lawyer, disbarred or not, performs it."[57] Even though nonlawyers engage in similar activities, the single justice concluded that the respondent's work was sufficiently similar to the work he performed as a lawyer and involved "his 'professional judgment in applying legal principles to address [his clients'] individualized needs.'"[58] The respondent was held in contempt, but his added sanction (three additional years before he was permitted to seek reinstatement) was less than that imposed upon an excluded lawyer who directly practiced law.[59]

Suspended lawyers who represent themselves in court proceedings do not qualify as practicing law. In *Matter of Ellis*,[60] the respondent had been disbarred for participating in an insurance fraud scheme with his family's law firm. After disbarment, he brought an action against a former client of the firm seeking to recover legal fees. 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 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.

Practice Tip

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.

57 *Id.* at 3 (citing Matter of Eastwood, 1994-DDC-1635 at 7–8 (SJ 1994) (disbarred real estate lawyer prohibited from work abstracting deeds); Matter of Behenna, 1993-DDC-1356 (SJ 1993) (title examination, without rendering advice, constitutes practice of law); Matter of Levine, 2004-DDC-3417 (SJ 2004) (real estate activity)).

58 *Shanahan*, 2010-DDC-4539 at 2 (SJ 2010) (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)).

59 *Cf.* Matter of McBride, 2013-DDC-5097 (SJ 2013).

60 2008-DDC-4293 (SJ 2008).

In *Matter of Bott*,[61] 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*]."[62] 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.[63]

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).[64] The latter is more likely to qualify as the practice of law; the former is less likely.

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.[65]

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61 462 Mass. 430, 2012-DDC-4920 (SJC 2012), 2012-DDC-4922 (SJ 2012).
62 *Id.* at 434 (citing *Uniform Rules on Dispute Resolution*, SJC Rule 1:18, as amended, 442 Mass. 1301 (2005)).
63 *Id.* at 438.
64 *Id.* at 438–39.
65 *Id.*

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 does not compromise any client matters.

A lawyer who has been suspended, either for a definite term or indefinitely, should also anticipate and prepare for a 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.

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) a 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 (OBC) may oppose any application if the circumstances warrant.

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

[1] *See, e.g.*, Matter of Gustafson, 464 Mass. 1021, 1023 n.4, 2013-DDC-5093 (SJC 2013) ("essentially, automatic reinstatement" after suspension of six months or less); Matter of Ramos, 2013-DDC-5199 (SJ 2013) ("automatic reinstatement" after six-month suspension); Matter of Cullen, 2010-REI-4557 (SJ 2010) (respondent "entitled to seek automatic reinstatement" after one-year suspension).

six months and one day up to and including one year, and one year and one 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, 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]

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[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 McCarthy, 416 Mass. 423, 1993-DDC-1265 (SJC 1993); Matter of Neitlich, 413 Mass. 416, 1992-DDC-1167 (SJC 1992).

[3] *See, e.g.*, Matter of Bradley, 2025-DDC-6750 (SJ 2025) (one-month suspension with reinstatement conditioned on passing Multistate Professional Responsibility Examination); Matter of Beringer, 2024-DDC-6640 (SJ 2024) (six-month suspension with reinstatement conditioned on respondent demonstrating fitness at a reinstatement hearing and complying with order of administrative suspension previously entered for failing to cooperate with bar counsel); Matter of Beery, 2012-DDC-5087 (SJ 2012) (three-month suspension with requirement that respondent file petition for reinstatement).

[4] Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 4:01 § 18(1)(a).

[5] Neither the SJC nor the Rules of the Board of Bar Overseers [hereinafter 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

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 may confer with the bar counsel before serving the affidavit and request that the bar counsel notify the court in writing that the bar counsel does not object to the reinstatement. The bar counsel has accommodated such requests in appropriate circumstances.

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 respondent has submitted the affidavit more than six months after the end of the suspension.[8] In the latter case, the lawyer must file a petition for reinstatement.

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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 SJC Rule 4:01 § 18(1)(b).

8 *See, e.g.*, Matter of Saben, 2022-REI-6475 (SJ 2022) (automatic reinstatement does not apply to lawyer who fails to file required affidavit within six months after original term of suspension has expired).

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 filing late, 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 OBC receives the suspended lawyer's affidavit, the bar counsel has ten days to file with the court and serve on the respondent an objection to the reinstatement.[9] The bar counsel objects when aware of facts that raise concerns about the respondent's return to practice, and where the 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 of 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.

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.[10]

[9] SJC Rule 4:01 § 18(1)(c).

[10] Matter of Gustafson, 2012-DDC-5009 at 8 (SJ 2012), *aff'd*, 464 Mass. 1021, 2013-DDC-5093 (SJC 2013). *See also* Matter of Greenidge, 2014-DDC-5279 at 23 (SJ 2014) (same justice noting bar counsel's ability to prevent automatic suspension if there are concerns).

B. Reinstatement After Suspensions of More than One Year

An order suspending a lawyer from practice for a fixed term implies that, at the end of 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 BBO members, then follows. The BBO then reviews the panel's recommendation and, ultimately, the SJC reviews the BBO's recommendation. Only the court may order a lawyer reinstated.

You Should Know

An SJC order suspending a lawyer for a period of more than one year does not mean that the lawyer presumptively 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 BBO 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 type of order 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.[11]

[11] In very rare situations, a lawyer may petition successfully for reinstatement prior to the expiration of the time periods discussed herein pursuant to SJC Rule 4:01 § 18(2) ("Except as the court by order may direct . . ."). S*ee, e.g.*, Matter of Gueh-Thoronka, 2023-REI-6536 (SJ 2023) (petitioner reinstated, even though only twenty months, not five years, had elapsed since date of her indefinite suspension, to which she had assented, because she had not understood effect of order of indefinite suspension; had she opposed petition for reciprocal discipline, she would have only been suspended for less than one year); *see also* 2023-REI-6508 (SJ 2023) (earlier order denying reinstatement).

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 BBO and OBC, as described in section II(B)(2) of this chapter. The petition must address the following seven conditions:[12]

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 § 23.
3. The extent to which the lawyer has made restitution to, or otherwise made whole, all clients or others injured by the lawyer's 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 Multistate Professional Responsibility Examination (MPRE) after the order of suspension was entered.
6. That the lawyer has posted with the BBO any bond the BBO may have required as a condition of reinstatement.[13]
7. That the lawyer has filed with the BBO and served upon the bar counsel copies of the petition and the completed questionnaire required by the BBO under its rules.

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.[14]

12 SJC Rule 4:01 § 18(4).

13 Under SJC Rule 4:01 § 18(6), the BBO 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.

14 Demonstration of full restitution of misappropriated funds is, for all practical purposes, a requirement for reinstatement. *See, e.g.*, Matter of McPhee, 2018-REI-5913 (HP 2018) (hearing panel found that petitioner had not made genuine effort to meet his obligation to make restitution).

* * *

A lawyer preparing a petition and its two-part questionnaire may share the documents with the bar counsel before filing the petition in order to solicit input and discuss possible concerns. The bar counsel's input may help the lawyer improve the filing. A lawyer who is denied reinstatement must wait a year before filing a new petition, unless the court otherwise allows.[15] 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) after having cured whatever defects or shortcomings 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.[16] The lawyer must sign both questionnaire parts under the penalties of perjury. Part I of the questionnaire must be filed with the BBO 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 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"[17] 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.

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15 *See, e.g.*, Matter of Parigian, 2022-REI-6429 (SJ 2022) (in denying reinstatement, court agreed with BBO and rejected hearing panel recommendation that petitioner be allowed to reapply for reinstatement in six months, concluding that because of petitioner's failure to demonstrate any improvement in his moral character "that the standard one-year period for reapplication is necessary to provide the petitioner sufficient time to reach a clear understanding of his ethical violations and accumulate evidence 'that there has been a substantial change in the facts'"). *But see, e.g.*, Matter of Passalacqua, 2018-REI-5922 (HP 2018) (in assented-to denial of reinstatement, petitioner was allowed to reapply for reinstatement six months after denial, as recommended by hearing panel and BBO); Matter of Heartquist, 2017-REI-5826 (HP 2017) (SJC allowed petitioner to reapply for reinstatement within six months of denial of reinstatement).

16 BBO Rules § 3.63, Appendix.

17 SJC Rule 4:01 § 18(5).

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, honestly, and accurately. Treating this document with less than due care may signal to the BBO 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 BBO 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."[18] It is filed only with the bar counsel, who maintains it as a confidential document, except if any of the information is offered and accepted in evidence at the hearing. (Most hearing panels ask to see Part II, however. See the following Practice Tips.)

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.[19] 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."[20]

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18 *Id.*

19 In Matter of Diviacchi, 480 Mass. 1016, 2018-DDC-5965 at 4–5 (SJC 2018), the SJC dismissed the appeal of a petitioner who had objected to providing information regarding his income, assets, and financial obligations on the reinstatement questionnaire. The court ruled that, although the petitioner had a choice between supplying the information or maintaining his objections, it was incumbent on the BBO to make a recommendation on the petition for reinstatement and "it may be that the board is unable to recommend allowance of the petition if information required by the questionnaire is not provided; that is a matter for the board to decide[.]"

20 BBO Rules § 3.63, Appendix.

Practice Tips

Part II of the reinstatement questionnaire is not filed with the BBO 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 Part II is offered as an exhibit, the petitioner often will seek a protective order from the BBO seeking to impound Part II of the questionnaire.

* * *

A lawyer seeking reinstatement need not complete the "Additional Statement" section in Part II of the reinstatement questionnaire. If completed, 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 there than to hope that the bar counsel or the BBO never learns of it.

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."[21] In practice, the parties and the BBO 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 Part II is offered as an exhibit, the petitioner generally seeks a protective order from the BBO; thus 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.[22] At the same time, the lawyer must file *four copies* of Part I of the reinstatement questionnaire with the BBO along with a certificate of service showing that one copy of the petition and the originals of Parts I and II have been served upon the bar counsel.[23] The lawyer must also provide a $500 deposit

21 BBO Rules § 3.63.
22 SJC Rule 4:01 § 18(4).
23 BBO Rules § 3.62.

with the BBO "for costs" of the reinstatement proceedings.[24] The BBO holds that sum to apply to any payment order requiring the lawyer to pay the costs of the reinstatement hearing.[25]

Practice Tip

If the costs of the reinstatement proceedings are less than the $500, the petitioner is entitled to receive the balance from the BBO 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 BBO. Upon receipt of the petition, as well as the materials detailed in the previous section, the BBO then assigns a date for the hearing. The hearing will take place after the suspension order expires and, in any event, no earlier than sixty days after the BBO receives the petition from the court.[26] 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.

At least two weeks before the hearing date, the BBO 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.[27] While the rule does not require it, the BBO also gives notice to the CSB.

The BBO may hear the petition itself or assign it to a hearing committee, a special hearing officer, or a panel of the BBO.[28] In practice, the BBO assigns the matter to a panel of three board members.[29] 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 BBO, which the

24 BBO Rules § 3.64.
25 BBO Rules § 3.66; SJC Rule 4:01 § 18(6).
26 SJC Rule 4:01 § 18(5).
27 BBO Rules § 3.67.
28 SJC Rule 4:01 § 18(5).
29 *See* Board of Bar Overseers Policies and Practices No. 9 (2025).

BBO reviews and either accepts or revises. The BBO 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, if available), 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 is two pronged; specifically, the petitioner must prove that "he or she has the moral qualifications, competency and learning in law required for admission to practice law in this Commonwealth, and that his or her resumption of the practice of law will not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest."[30] In addition, "[t]he 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.'"[31]

In making these determinations, a hearing 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.'"[32] The panel must also consider the public's perception of the legal profession as a result of the rein-

30 SJC Rule 4:01 § 18(5).

31 Matter of Shyavitz, 2010-REI-4542 (SJ 2010) (citations omitted) (quoting Matter of Prager, 422 Mass. 86, 93 (1996)); *see also* Matter of Diviacchi, 491 Mass. 1003, 2022-REI-6476 (SJC 2022) (reinstatement denied).

32 Matter of Daniels, 442 Mass. 1037, 1038, 2004-REI-3411 at 2 (SJC 2004) (quoting Prager, 422 Mass. 86, 92 (1996); Matter of Hiss, 368 Mass. 447, 460 (1975)).

statement 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 [with] the reaction to his reinstatement by the bar and public."[33] A major concern is "the impact of a reinstatement on public confidence in the bar and in the administration of justice."[34]

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, chance of success.[35]

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).[36] 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,"[37] and that the misconduct "continue[s] to be evidence of his lack of moral character . . . when he petition[s] for reinstatement."[38]

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*,[39] the petitioner, who had been suspended for one year and one day in 2011,[40] was denied reinstatement in 2016, after his third petition for re-

33 Matter of Gordon, 385 Mass. 48, 52 (1982), 1982-REI-102 at 5 (SJC 1982).

34 Matter of Waitz, 416 Mass. 298, 307, 1993-DDC-1432 at 10 (SJC 1993).

35 Matter of Dawkins, 432 Mass. 1009, 1010, 2000-REI-2682 at 2 (SJC 2000) (denying reinstatement because, among other things, Dawkins "failed to reimburse the clients' security board for what it had paid to a former client [and] failed to resolve outstanding Federal and State tax liabilities"); *McPhee, supra* note 14, 2018-REI-5913 at 10 (HP 2018), citing Matter of Fletcher, 466 Mass. 1018, 1020, 2013-DDC-5095 at 2–3 (SJC 2013) (court notes, in upholding denial of reinstatement, that hearing panel properly relied on petitioner's failure to make restitution); Matter of McCarthy, 2007-REI-4061 at 1 (SJ 2007) ("The making of restitution, or arrangements for restitution, is an important consideration on an application for reinstatement"); Matter of Wynn, 1991-REI-1119 at 2 (SJ 1991) (reinstatement denied, single justice notes, among other things, that "[t]he lack of payment of moneys owed for taxes and payment of restitution to wronged clients . . . pose a *substantial impediment* to a finding that reinstatement would be in the interests of the bar and the public") (emphasis added). *Cf. Daniels, supra* note 32, 442 Mass. at 1038, 2004-REI-3411 at 2 (SJC 2004) (reinstated despite not making full restitution but debt was corporate obligation, not product of petitioner's self-enrichment, and he had been making regular payments toward it "consistent with his means").

36 *Fletcher*, 466 Mass. 1018, 1020, 2013-DDC-5095 (SJC 2013).

37 *Dawkins, supra* note 35, 432 Mass. at 1010–11 (citations omitted).

38 *Id.*

39 474 Mass. 1001, 2016-REI-5614 (SJC 2016).

40 Matter of Weiss, 460 Mass. 1012, 2011-DDC-4737 (SJC 2011).

instatement, 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."[41] In *Matter of Shaughnessy*,[42] the lawyer had been suspended for six months and one day for neglect.[43] 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.[44] When he sought reinstatement at the end of that extended suspension, the hearing panel, BBO, 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*,[45] 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 petitioned for reinstatement. Although the BBO's hearing panel recommended reinstatement, the BBO and the single justice refused his request.[46] 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."[47] The BBO and the single justice agreed. The full SJC reversed the finding of the BBO 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 BBO 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,[48] the other major hurdle for reinstate-

41 *Weiss, supra* note 39, 474 Mass. 1001, 1002.
42 456 Mass. 1021, 2010-REI-4728 (SJC 2010).
43 Matter of Shaughnessy, 442 Mass. 1012, 2004-DDC-3407 (SJC 2004).
44 Matter of Shaughnessy, 446 Mass. 1013, 2006-DDC-3739 (SJC 2006).
45 1995-REI-1861 (SJ 1995).
46 Those facts appear in Matter of Wong, 442 Mass. 1016 n.1, 2004-REI-3406 (SJC 2004).
47 *Id.* at 1017.
48 *See, e.g.*, Matter of Lakin, 2021-REI-6311 (HP 2021) (reinstatement denied after hearing panel found that petitioner, who as judge in Florida had requested and accepted baseball tickets from attor-

ment 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*,[49] the lawyer sought reinstatement five years after an indefinite suspension and nine years after last practicing law. His petition was denied 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."[50] In *Matter of Fletcher*,[51] 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."[52] Her claim of having read and studied legal materials was not sufficient to show that she had sufficient learning in law to be trusted with client matters.

On occasion a disbarred lawyer achieves reinstatement. The most noteworthy case of reinstatement after disbarment in the Commonwealth is *Matter of Hiss*.[53] 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

ney whose motion was pending before him, had not achieved requisite moral character; e.g., "he still struggles with accepting that what he did was wrong"); *Parigian, supra* note 15, 2022-REI-6429 (SJ 2022) (reinstatement denied to petitioner who failed to learn ethical lessons from his convictions, as evidenced by his equivocation as to extent of his guilt in insider trading scheme and who did not present any witnesses or letters attesting to his current moral character); Matter of Fingliss, 2020-REI-6185 (HP 2020) (reinstatement denied after hearing panel found that petitioner continued to lie, including in his testimony before hearing panel); Matter of Leo, 484 Mass. 1050, 2020-DDC-6198 (SJC 2020) (affirming single justice's denial of reinstatement, 2019-REI-6112 (HP 2019), the full bench cited the petitioner's failure to make full restitution and lack of insight as to nature and severity of his misconduct, including filing application for criminal complaint against another driver following motor vehicle accident "to work out a 'settlement arrangement'" in violation of Mass. R. Prof. C. 3.4(h)). *See also*, Matter of Molloy, 2018-REI-5911 (HP 2018) (court denied petitioner reinstatement after hearing panel noted that "sobriety by itself falls short of establishing 'reform'"). *Cf.* Matter of Gomez, 2023-REI-6514 (HP 2023) (petitioner reinstated twenty years after his indefinite suspension on his third petition for reinstatement).

49 2009-REI-4360 (HP 2009).

50 *Id.* at 4.

51 466 Mass. at 1020.

52 *Id.*

53 368 Mass. 447, 1975-REI-019 (SJC 1975).

confess guilt to a criminal *act* he honestly believes he did not commit (emphasis in original).[54]

Finding that otherwise the petitioner had proven his qualifications, the court granted the petition for reinstatement.[55]

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 BBO and the court to permit the lawyer to resume practicing law.[56]

C. Proof of Facts in Support of Reinstatement

A suspended lawyer seeking reinstatement must prepare carefully and thoroughly for the reinstatement hearing[57] and understand both the evidence and strategies that are persuasive as well as those that are self-defeating and ineffective. Experienced practitioners offer the following suggestions when developing a reinstatement strategy after a suspension.

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54 *Id.* at 457, 1975-REI-019 at 11.

55 In another case that was highly publicized at the time, William J. Cintolo was disbarred following his conviction in federal court for obstruction of justice. Matter of Cintolo, 1990-DDC-675 (SJ 1990). He was reinstated effective July 1, 1995. 1994-REI-1818 (SJ 1994). At the time, disbarment carried a sanction of only five years, instead of eight years as it has since 1998.

56 *See, e.g.*, *Diviacchi, supra* note 31, 491 Mass. 1003, 1005–6, 2022-REI-6476 (SJC 2022) (SJC denied reinstatement because, among other things, petitioner failed to prove that he had redeemed himself and possessed requisite moral character, noting that, under *Hiss*, petitioner's repentance or lack of repentance is relevant evidence in making such determination); Matter of Gomez, 2019-REI-6127 (HP 2019) (reinstatement denied; hearing panel found that petitioner did not show remorse for abandoning his clients and his practice) (petitioner was later reinstated at 2023-REI-6514 (HP 2023) with finding by hearing panel that he was "frank in acknowledging the wrongfulness of his actions and taking full responsibility for them").

57 A petitioner who fails to approach the requirements of the reinstatement process with appropriate thoroughness and care, including in communications with the bar counsel prior to the hearing, may be grounds for denying reinstatement. *See, e.g.*, Matter of Daniels, 2023-REI-6677 (HP 2023) (reinstatement denied for failure to prove moral reform; petitioner's reinstatement papers were "inadequate and incomplete," which required bar counsel to follow up on multiple occasions for required documents, such as tax returns, and petitioner "cured these defects only at the eleventh hour" just prior to the hearing); *McPhee, supra* note 35, 2018-REI-5913 at 29 (HP 2018) (denying reinstatement; "Whether analyzed as moral shortcomings or failures of competence, we conclude that the petitioner's careless approach to answering the reinstatement questionnaire and his ill-advised monitoring agreement show that he is not ready for readmission").

1. Carefully Prepare 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 to solicit a preliminary assessment of the petition which the bar counsel would explore fully at the reinstatement hearing. Even so, the ultimate decision to file the petition always rests with the suspended lawyer.

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.[58] 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.[59] Petitioners must persuade the panel that they are no longer unfit. To do so, they bear the "difficult burden"[60] 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.[61] However, "sincere remorse, standing alone, does not equal reform."[62]
  - 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 risks of the hearing process. The stipulation and the resulting sanction mean that, for reinstatement purposes, the misconduct occurred.[63]
  - The petitioner must also demonstrate having changed and how, and may call witnesses or submit affidavits from witnesses, whether lay

58 "Passage of time alone is insufficient to warrant reinstatement." *Daniels, supra* note 35, 442 Mass. at 1038, 2004-REI-3411 at 2 (SJC 2004).

59 *See Dawkins, supra* note 38, 432 Mass. at 1010–11, 2000-REI-2682 at 2 (SJC 2000).

60 Matter of Corben, 2015-REI-5414 (HP 2015).

61 *See, e.g.*, *Gomez, supra* note 56, 2019-REI-6127 at 5–20 (HP 2019).

62 *Corben, supra* note 60, 2015-REI-5414 at 5–6 (SJ 2015).

63 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, *Hiss* notwithstanding. *See Hiss, supra* note 56, 368 Mass. 447, 1975-REI-019 (SJC 1975) (petitioner was not disqualified for reinstatement solely because he continued to deny that he had committed crime on which his disbarment had been based); *see also Diviacchi, supra* note 56, 491 Mass. at 1005–6, 2022-REI-6476 at 4–6 (SJC 2022) (petition's repentance or lack of repentance is relevant evidence of fitness for reinstatement).

or professional. Supporters may write letters to the BBO, which are typically considered.[64]

— A witness who testifies about the petitioner's good moral character must be prepared to answer questions about the petitioner's misconduct and to reconcile the present favorable opinion with the facts from the petitioner'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.[65]

— 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.[66]

— 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.[67]

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64 *See, e.g.*, Matter of Solomon, 2024-REI-6637 (HP 2024) (hearing panel found that letters of support that did not distinguish petitioner's conduct before and after underlying discipline shed little light on petitioner's rehabilitation).

65 *Gomez, supra* note 61, 2019-REI-6127 at 18–19 (HP 2019) (hearing panel discounted testimony from character witness who was unable to attest to petitioner's personal growth during his suspension).

66 *See, e.g.*, Matter of Harrington, 2011-DDC-4797 (SJ 2011) (petitioner suspended for making baseless, insulting accusations against judge who presided over his personal divorce; on his petition for reinstatement, BBO took notice of continued pursuit of his claims through civil lawsuits and appeals); *Diviacchi, supra* note 63, 491 Mass. at 1006, 2022-REI-6476 at 6 (SJC 2022) (in affirming single justice's denial of reinstatement, full bench rejected petitioner's arguments that hearing committee was unqualified to decide his moral qualifications and noted that petitioner engaged in "vituperative and hyperbolic" criticism of judicial system, rejecting petitioner's claim that he was unfairly being denied reinstatement due to his protected speech critical of legal system and bar discipline process).

67 "A petitioner's moral character can be illustrated by charitable activities, volunteer activities, commitment to family, or community work." *Sullivan, supra* note 49, 2009-REI-4360 at 3 (HP 2009). In *Wong, supra* note 47, 442 Mass. at 1018, 2004-REI-3406 (SJC 2004), in the "moral qualifications" section, 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

— 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.[68]

— 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.[69] 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 (LCL) can usually assist with sobriety monitoring.[70]

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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.'"

68 *See, e.g.*, Matter of Weekes, 2015-REI-5407 (HP 2015).

69 An example of this having been done well is Matter of Ostrovitz, 2015-REI-5412 (HP 2015). *But see Solomon, supra* note 64, 2024-REI-6637 (HP 2024) (hearing panel found that therapist's opinion that petitioner was fit to be reinstated only if he had continued support of therapy was "too tenuous").

70 *See, e.g.*, Matter of Gilpatric, 2023-REI-6517 (SJ 2023) (as condition of reinstatement, petitioner who showed recovery from his addiction was ordered to continue his biweekly meetings with Lawyers Concerned for Lawyers for one year); Matter of Gomez, 2023-REI-6532 (SJ 2023) (as condition of reinstatement, petitioner, who had demonstrated sustained recovery from his yearslong substance abuse, was ordered by single justice to submit to monthly drug testing and meet with Lawyers Concerned for Lawyers, both for one year and to continue therapy for two years); Matter of Hashem, 2021-REI-6304 (SJ 2021) (as condition of reinstatement, full bench ordered petitioner to continue therapy for two years and allow OBC to monitor compliance).

- *Proving competence:* SJC Rule 4:01 § 18(5) requires the petitioner to prove "competency" to practice law. This is different from, although 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. Sometimes the court will order the petitioner to work with LCL's Law Office Management Assistance Program (LOMAP) as a condition of probation.[71] 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.[72]
  - How a petitioner manages the reinstatement process itself can reflect directly on competence as a lawyer. Presenting an error-free, well-written, and organized professional reinstatement effort will help persuade the hearing panel of the lawyer's skill.[73]
  - Showing a high level of competence as a lawyer prior to being disciplined also can help a petitioner meet the burden of this element. Testimony from prior clients and other lawyers may be useful. Where

71 *See, e.g.*, *Gomez*, 2023-REI-6532 (SJ 2023) (as condition of reinstatement, single justice ordered petitioner to open his practice to LOMAP audit within six months of resuming his practice and implementing any resulting recommendations); Matter of Beaulieu, 2017-REI-5858 (HP 2017) (as condition of reinstatement, petitioner who had overbilled clients ordered to consult with LOMAP regarding billing practices and allow OBC to monitor compliance).

72 *See, e.g.*, *Ostrovitz, supra* note 69, 2015-REI-5412 (HP 2015) (reinstatement allowed after panel "favorably impressed" with petitioner's familiarity with three-way reconciliation required by Rule 1.15 of *Massachusetts Rules of Professional Conduct*). *See* Mass. R. Prof. C. 1.15(f)(1)(E).

73 *See, e.g.*, *Solomon, supra* note 69, 2024-REI-6637 (HP 2024) (hearing panel found that submission of wrong version of reinstatement questionnaire was "careless"); *McPhee, supra* note 57, 2018-REI-5913 (HP 2018) (hearing panel noted that petitioner had made inconsistent, incomplete, and misleading answers on his reinstatement questionnaire). *See also* Matter of Hurley, 2019-REI-6107 (SJ 2019) (reinstatement denied because year of suspension had not taught petitioner, who had misplaced sense of overconfidence, about need to avoid carelessness in his actions as attorney); Matter of Young, 2018-REI-5915 (HP 2018) (reinstatement denied because petitioner's defaults, according to hearing panel "have made it impossible for the board to schedule a hearing with any confidence that it will proceed and hear evidence and determine whether the petitioner has carried his burden of proof"); Matter of Todrin, 2016-REI-5669 (SJ 2016) (petitioner's sloppy presentation, typographical errors, and math mistakes in reinstatement proceeding evidenced lack of competency).

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."[74] Because a suspended or disbarred lawyer may not practice during the suspension period, even as a paralegal, and may ordinarily only act as a paralegal after the suspension period has ended, upon a successful petition to the court,[75] 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,[76] but many others have satisfactorily proven such learning.[77] 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

74 SJC Rule 4:01 § 18(5).

75 *See* discussion in chapter 22, section III.

76 *See, e.g.*, *Solomon, supra* note 73, 2024-REI-6637 (HP 2024) (hearing panel found that lack of knowledge in trust accounting was failure to demonstrate competence and learning in law); *Diviacchi, supra* note 66, 491 Mass. at 1007, 2022-REI-6476 at 7 (SJC 2022) (in affirming single justice's denial of reinstatement, full bench found that petitioner did not establish requisite learning in law after hearing panel found that petitioner's reviewing *Massachusetts Lawyers Weekly* and summarizing recent cases evinced at most "superficial familiarity" with recent decisions); *Parigian, supra* note 48, 2022-REI-6429 (SJ 2022) (court agreed with hearing panel that petitioner's admitted focus on practical skills and lack of equal focus on substantive law during his suspension, even conjoined with his prior practice and recognized competency, was not sufficient to meet his burden); *Passalacqua, supra* note 15, 2018-REI-5922 (HP 2018) (in assented-to denial of reinstatement, hearing panel indicated that petitioner had produced "inadequate evidence" of his competency and learning in law). Occasionally the court will order a petitioner to attend a continuing legal education course as a condition of reinstatement. *See, e.g.*, *Gilpatric, supra* note 70, 2023-REI-6517 (SJ 2023) and *Gomez, supra* note 71, 2023-REI-6532 (SJ 2023).

77 *See, e.g.*, Matter of Owens, 2005-REI-3573 (HP 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").

petitioner mentored others. The longer the suspension, however, the more evidence of continuing study is needed.

- Petitioners who have demonstrated learning in the law often present evidence from attorneys who can vouch for the petitioner's interest, activity, and ongoing curiosity about legal developments.[78]
- 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.
- 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.[79] 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.[80]

- *Proving that reinstatement serves the public interest:* Reinstatement reports regularly address the "public interest prong"[81] 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 [with] the reaction to his reinstatement by the bar and public."[82] This is because "the public welfare, not [a petitioner's] private interest, dominates in considering the reinstatement of a [suspended] applicant."[83]

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78 *See, e.g.*, Matter of Gibson, 2016-REI-5656 (HP 2016); *see also Owens*, 2005-REI-3573 (HP 2005).

79 For a discussion of that process, *see* chapter 22, section III.

80 *See, e.g.*, *Sullivan, supra* note 67, 2009-REI-4360 at 4 (HP 2009) (denying reinstatement; noting petitioner had not worked as paralegal).

81 *See, e.g.*, Matter of O'Sullivan, 2015-REI-5405 (HP 2015); Matter of Pudlo, 2015-REI-5423 (HP 2015).

82 *See, e.g.*, *McPhee, supra* note 73, 2018-REI-5913 (HP 2018) (hearing panel recommended denial of reinstatement because of letters from former clients who vigorously opposed reinstatement despite strong testimony and letters of support from petitioner's witnesses).

83 Matter of Ellis, 457 Mass. 413, 414, 2010-REI-4667 (SJC 2010).

— 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.[84] 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 from members of the community or former clients detailing the petitioner's activities and good character.[85]

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.[86]

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.[87]

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84 *See Dawkins, supra* note 59, 432 Mass. at 1012 ("[The petitioner's] failure to prove the moral qualifications, competency, and learning in law necessary for reinstatement leads us to the inescapable conclusion that he also has failed to prove that the standing and integrity of the bar, the administration of justice, and the public interest would not be compromised if he were to be readmitted"). For one example where this prong was the primary question at the hearing, *see* Matter of Allen, 400 Mass. 417, 420, 1987-REI-586 at 5 (SJC 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 BBO's recommendation and ordered reinstatement.

85 *Cf., e.g.*, *Sullivan, supra* note 80, 2009-REI-4360 at 4 (HP 2009) (citing that after seven years of suspension, petitioner "provided no letters of recommendation from non-lawyers that could have addressed the public's perception of the petitioner's reinstatement").

86 *See* discussion *supra* note 15.

87 *See Shyavitz, supra* note 31, 2010-REI-4542 (SJ 2010) (reconsidering and denying reinstatement because petitioner could not, if reinstated, be trusted to handle client funds).

> 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.[88] Sometimes the court will order, as a condition of reinstatement, the petitioner to enter into a mentoring agreement subject to prior approval by the bar counsel.[89]

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 because the lawyer failed to register with the BBO, the lawyer may be reinstated by registering and paying the past-due annual fees, a late assessment, and a reinstatement fee.[90] The lawyer must also file an affidavit with the BBO confirming compliance with whatever obligations the lawyer failed to meet that led to the suspension.[91] 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 BBO and the court.[92] 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.

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 fourteen 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 noncooperation and who is not reinstated within fourteen days becomes subject to the requirements of a lawyer who has been suspended for disciplinary reasons.[93]

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88 *See, e.g.*, *Sullivan, supra* note 85, 2009-REI-4360 at 4 (HP 2009) (denying reinstatement; noting petitioner had not worked as paralegal, nor had he agreed to have practice mentor if he were reinstated).

89 *See, e.g.*, *Gomez, supra* note 76, 2023-REI-6532 (SJ 2023); *Hashem, supra* note 70, 2021-REI-6304 (SJ 2021); Matter of Veara, 2020-REI-6239 (SJ 2020).

90 SJC Rule 4:03 § 3.

91 *Id.*

92 The petition for reinstatement that the administratively suspended lawyer must file requires court approval by the terms of SJC Rule 4:01.

93 SJC Rule 4:01 §§ 3(3), 17.

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 concurrent Uniform Bar Examination (UBE) administered in another

state,[1] (2) "waiving in" by motion after being a member of the bar of another jurisdiction,[2] 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,[3] successfully complete the Massachusetts Law Component examination,[4] and pass the Multistate Professional Responsibility Examination (MPRE).[5] 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
- As a retired or an inactive member of the Massachusetts bar seeking 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 equivalent[6] 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."[7] 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 pro-

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1 Massachusetts Rules and Orders of the Supreme Judicial Court [hereinafter SJC Rule] 3:01 §§ 1.1, 1.2. Applicants can also transfer a passing UBE score earned in another jurisdiction not more than thirty-six months prior to the date of filing the petition for admission. SJC Rule 3:01 § 1.2.6.

2 SJC Rule 3:01 §§ 1.3, 6.1, 6.2.

3 SJC Rule 3:01 § 1.4.

4 SJC Rule 3:01 §§ 3.3, 6.3.

5 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.

6 SJC Rule 3:01 § 3.1.2.

7 SJC Rule 3:01 § 3.1.3.

gram "similar in nature and quality" to that of an ABA-accredited law school.[8] Graduates 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.[9]

The Supreme Judicial Court (SJC) imposes several other requirements for MBE applicants, including the applicant's law school's certification of 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.[10]

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.[11] 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 UBE in another jurisdiction serve in lieu of taking and passing the MBE.[12]

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 territory[13] for at least five years, with educational credentials equivalent to those required of an applicant seeking to sit for the MBE.[14] A Canadian lawyer may also seek admission on motion, under the same standards.[15] The applicant must have actively practiced for at least five

8 SJC Rule 3:02 § 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 [hereinafter BBE Rule] Rule VI, "Foreign Law School Graduates," https://www.mass.gov/law-library/rules-of-the-board-of-bar-examiners; *see* Wei Jia v. Board of Bar Examiners, 427 Mass. 777 (1998) (applicant denied admission when his law degree from law school in China was not deemed equivalent to accredited U.S. law school, despite his having LLM from accredited U.S. law school and bar admission in two other states).

9 BBE Rule VI.7.

10 SJC Rule 3:01 § 1.1. Those requirements are also described on the BBE website. Massachusetts Board of Bar Examiners, https://www.mass.gov/orgs/massachusetts-board-of-bar-examiners (posting dates for bar exams, FAQs, rules, and other information about BBE).

11 SJC Rule 3:01 § 5.1; BBE Rule V.1; Mass. Gen. Laws ch. 221, § 37.

12 SJC Rule 3:01 § 1.2.

13 For convenience, the discussion uses the term *jurisdiction* to refer to a state, district, or territory as referenced in the SJC's rule.

14 SJC Rule 3:01 §§ 1.2, 6.

15 SJC Rule 3:01 § 6.2.

of the seven years preceding the petition for admission on motion.[16] The BBE 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."[17] The SJC has expressly disapproved of that requirement.[18]

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.[19]

From 1997 through 2023, the SJC has denied admission on motion three times. In *Matter of Application for Admission to the Bar of the Commonwealth*,[20] an attorney who had failed the MBE and 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*,[21] 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.[22] In *Yakah v. Board of Bar*

16 SJC Rule 3:01 § 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 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.

17 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; *see Eligibility for Admission on Motion*, BBE, https://www.mass.gov/info-details/eligibility-for-admission-by-motion.

18 *Schomer*, 465 Mass. at 56 n.2.

19 SJC Rule 3:01 § 1.3. *See also*, *Petition for Admission by Motion*, MASS.GOV, https://www.mass.gov/how-to/petition-for-admission-by-motion.

20 443 Mass. 1010 (2005).

21 424 Mass. 1005 (1997).

22 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 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 reevaluation 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

Examiners,[23] the SJC denied an 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" 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.[24] The "graduate . . . program" referred to in the rule covers an LLM (Master of Laws) degree arrangement in which the participants supervise JD (Juris Doctor) 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.[25]

4. Limited Admission for Certified Law Students and Recent Law Graduates

SJC Rule 3:03 permits certain law students to represent indigent clients or governmental entities while supervised by a Massachusetts lawyer in identified settings. The rule, which was first adopted in 1966, had been amended only occasionally. On September 25, 2025, the court struck the rule and adopted a new Rule 3:03, effective on August 1, 2026. The new rule expands the range of practice opportunities available to law students and recent law school graduates and provides clearer guidance for certifying student practitioners and their court appearances.[26]

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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).

23 448 Mass. 740 (2007).

24 SJC Rule 3:04 § 1.

25 SJC Rule 3:04 § 2.

26 SJC Order Implementing Supreme Judicial Court Rule 3:03 (Sept. 25, 2025) [hereinafter Order Implementing Rule 3:03]; Press release, Massachusetts Supreme Judicial Court, "Supreme Judicial Court Issues Revised Rule 3:03 Governing Law Student Practice in Massachusetts Courts" (Sep. 26, 2025), https://www.mass.gov/news/supreme-judicial-court-issues-revised-rule-303-governing-law-student-practice-in-massachusetts-courts. This discussion describes the revised Rule 3:03, effective August 1, 2026. Interested parties should monitor the "Student Practitioners" web page for more information in advance of the new rule's effective date, https://www.mass.gov/guides/student-practitioners.

The qualified and supervised student practitioners are authorized to represent clients and appear, without compensation, before courts and administrative agencies in the Commonwealth of Massachusetts. After being certified by the clerk of the SJC for Suffolk County, and subject to the provisions of the rule, the student practitioners may appear on behalf of the Commonwealth; any subdivision, municipality, or agency of the Commonwealth; indigent criminal defendants; and indigent parties in civil proceedings.[27] While practicing under this special arrangement, the student practitioners assume all the responsibilities and obligations of any practicing lawyer, and all the standard ethical rules apply to the students' representation of clients.[28] In addition, the rules of law and evidence relating to privileged communications between lawyers and clients govern communications made or received between student practitioners and their clients.[29]

SJC Rule 3:03 distinguishes between currently enrolled law students and law school graduates. Deans of accredited law schools may apply to the clerk of the SJC to certify currently enrolled law students as student practitioners. Among other things, the dean must identify the law school clinical program, the Commonwealth entity, the organization, or the law firm providing pro bono civil legal aid or criminal defense to indigent persons where the law student will be appearing. In addition, the dean must identify the name of the student's supervising attorney and attest to the student's character, legal ability, and training. To be eligible, the law student must have successfully completed the first year of law school at a three-year program or its equivalent. In addition, the law student must have successfully completed a course in legal research and writing, and have completed or be enrolled in courses in evidence or trial practice as well as legal ethics or professional responsibility, or in clinical programs that include those subjects.[30]

A student practitioner's certification expires immediately when the student is no longer enrolled in or associated with the clinical program, Commonwealth entity, organization, or law firm providing civil legal aid or criminal defense to indigent persons through which the student was certified to appear. The student practitioner's certification also expires when the student graduates from law school, unless the graduate meets the requirements of section 3.4 of Rule 3:03, or if the student has been placed on academic probation or has left the law school without graduating.[31] If the student's certification has expired, the dean

27 SJC Rule 3:03 § 1.

28 SJC Rule 3:03 § 5.2(d); *see also* Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. Tex. L. Rev. 815 (2004).

29 SJC Rule 3:03 § 4.8.

30 SJC Rule 3:03 § 3.1.

31 SJC Rule 3:03 § 3.2.

may reapply for the student practitioner's certification if the requirements set forth in section 3.1 of Rule 3:03 are met.[32]

Law school graduates may also obtain certification to practice prior to passing the Massachusetts bar in certain circumstances. First, a law school graduate who was certified as a student practitioner at the time of graduation may continue to appear as a student practitioner after graduation until the expiration of the certification under section 3.4(d). Second, a law school graduate who was previously certified during law school may apply to work in a new placement after graduation. Third, a law school graduate who was previously certified in another jurisdiction may apply for reciprocal certification.[33] The law school graduate's certification automatically expires if the graduate does not sit for or pass the first available bar exam following graduation from law school.[34] If the law school graduate does pass the first available bar exam, the certification continues until the earlier of six months after the date of the bar exam or the date of the graduate's admission to the bar, unless ordered by the SJC.[35]

A student practitioner must file a written notice at the first appearance for a client in each case, except for appearances on behalf of the Commonwealth or any subdivision, municipality, or agency that is exempt from filing a notice of appearance in a pending case or matter.[36] The written notice of appearance must include the student practitioner's name and signature; the supervising attorney's name and BBO number; the expected end date, if known, of the student's enrollment in or participation with the program or organization through which the student was certified; a signed statement by the student and the supervising attorney confirming the student's current certification; and, if applicable, a representation that the student has documented the client's acknowledgment of student representation as required by section 5.2(b).[37] If the student practitioner is representing an agency exempt from filing a notice of appearance in a pending case or matter, the student must nonetheless state on the record for each appearance the student practitioner's name and certification status and the supervising attorney's name.[38]

SJC Rule 3:03 imposes different limitations on and requires different levels of supervision of the student practitioner depending upon the court before which the student practitioner is appearing, whether the student is appearing in a civil

32 SJC Rule 3:03 § 3.3.
33 SJC Rule 3:03 §§ 3.4(a), (b), and (c).
34 SJC Rule 3:03 § 3.4(d).
35 SJC Rule 3:03 § 3.4(e).
36 SJC Rule 3:03 §§ 4.1(a) and (b).
37 SJC Rule 3:03 § 4.1(a).
38 SJC Rule 3:03 § 4.1(b).

or criminal matter, and the extent of the student's legal education.[39] Under Rule 3:03, "general supervision" is construed to require that the supervising attorney be available within a reasonable period of time telephonically or otherwise if needed but does not require that the supervising attorney be present with the student practitioner in the court, tribunal, or agency. By contrast, "direct supervision" requires the attendance of the supervising attorney with the student in a court, tribunal, or agency, unless the student is engaged in a ministerial task, such as filing paperwork or selecting a further date.[40]

For example, a certified student practitioner may appear before the Boston Municipal Court, District Court, Housing Court, Juvenile Court, Land Court, and Probate and Family Court on a *criminal matter* with *general supervision* if the student has successfully completed two-thirds of the requirements of law school *and* a course for credit in criminal procedure or a clinical program that includes instruction in criminal procedure. However, a student practitioner must appear on criminal matters in those courts with *direct supervision* if the student has not successfully completed two-thirds of the requirements of law school, provided the student is currently enrolled in or has successfully completed a law school criminal clinical program and a course for credit in criminal procedure or a clinical program that includes instruction in criminal procedure. Similarly, a student practitioner may appear on *civil matters* in those courts with *general supervision* if the student has successfully completed two-thirds of the requirements of law school *and* a course for credit in civil procedure. However, a student practitioner must appear on civil matters with *direct supervision* if the student has not completed two-thirds of the requirements of law school, provided the student is currently enrolled in or has successfully completed a law school civil clinical program and a course for credit in civil procedure.[41]

Student practitioners must have direct supervision to appear before the Superior Court on either civil or criminal matters. Student practitioners may appear before the Superior Court on any civil matters, provided they have successfully completed a course in civil procedure and are enrolled in or have successfully completed a law school civil clinical program.[42] Student practitioners must address additional requirements and have additional limitations if they wish to appear before the Superior Court on criminal matters. First, a student practitioner must have successfully completed two-thirds of the requirements for law school and be enrolled in or have successfully completed a course in criminal

39 SJC Rule 3:03 § 4.
40 SJC Rule 3:03 § 2.
41 SJC Rule 3:03 § 4.2.
42 SJC Rule 3:03 § 4.3(b).

procedure or a clinical program that includes instruction in criminal procedure. Second, student practitioners may only appear before the Superior Court on certain types of criminal matters, including arraignments where the maximum sentence is less than imprisonment for life, initial probation violation hearings, nonevidentiary pretrial hearings on certain motions, and hearings on motions for a new trial after the time for direct appeal has expired or direct appellate rights have been exhausted. In addition, student practitioners may appear as second seat at any trial or pretrial hearings, but may not argue motions, examine witnesses, or make arguments unless the presiding judge grants permission and after the judge has held a colloquy on the record confirming the client's knowing and voluntary approval of the student's proposed role.[43]

Student practitioners may also appear before the Appeals Court and the SJC provided specified requirements are met. To appear at the Appeals Court, the student practitioner must file an appearance, as required by section 4.1, including an attestation that the student is familiar with the *Massachusetts Rules of Appellate Procedure*. The supervising attorney must be present at any oral argument and be prepared to answer any questions that the student practitioner cannot. In addition, an attorney with a matter pending before the Appeals Court may file a motion seeking permission to allow a law student to argue before the Appeals Court for that particular matter.[44] To appear at the SJC, a student practitioner and supervising attorney must file a timely motion for leave to appear in the case, including information required by section 4.1(a) and attestations that the student is familiar with the *Massachusetts Rules of Appellate Procedure* and that the supervising attorney will be present at any oral argument and prepared to answer questions the student practitioner cannot.[45] Certified student practitioners may also appear before any administrative agency of the Commonwealth if the appearance is not inconsistent with the rules of that agency. In addition, the student practitioner must have successfully completed two-thirds of the requirements of law school to appear with general supervision before an administrative agency. Students may appear before administrative agencies with direct supervision prior to successful completion of two-thirds of the law school requirements.[46]

Student practitioners must be supervised by an attorney affiliated with a law school clinical program, Commonwealth entity, organization providing civil legal aid or criminal defense to indigent persons, or law firm providing pro bono

[43] SJC Rule 3:03 § 4.3(a).
[44] SJC Rule 3:03 §§ 4.4(a) and (b).
[45] SJC Rule 3:03 §§ 4.5(a) and (b).
[46] SJC Rule 3:03 §§ 4.6(a) and (b).

civil legal aid or criminal defense to indigent persons.[47] Rule 3:03 defines "attorney(s) affiliated" to mean that the supervising attorneys must be qualified to appear before the court or forum where the student practitioner will appear, and be employed by the entity or work under the auspices or authority of the entity under which the student practitioner is certified.[48] The supervising attorney must "ensure that the student practitioner is sufficiently prepared and competent to appear and is familiar with the rules, standing orders, and regulations of the court or forum in which the student practitioner will appear."[49] In addition, the supervising attorney must review and sign all pleadings, motions, and memoranda before they are submitted by the student practitioner. If the supervising attorney fails to supervise or properly train the student practitioner, the supervising attorney may face disciplinary action or restrictions of that attorney's ability to serve as a supervising attorney.[50] Supervising attorneys also must notify the clerk of the SJC and the court or agency before which the student practitioner was appearing within seven days when the supervising attorney will no longer be regularly representing a certified student practitioner or the student practitioner ceases to be associated with the organization under which the certification was based.[51]

Student practitioners are obligated to disclose to the client the student practitioner's status as a law student and obtain a signed acknowledgment from the client authorizing the student practitioner to appear and represent the client. The student practitioner must also obtain the signature of the supervising attorney acknowledging the supervising attorney's role. In addition, the student practitioner must comply with rules of professional conduct set forth in Rule 3:03 and SJC Rule 3:07.[52] The student practitioner must notify the clerk of the SJC and the respective court or agency in writing and file a withdrawal of appearance within seven days when the student practitioner ceases to be affiliated with or employed by the agency or organization under which the student's certification was entered.[53] The student's law school dean must also notify the clerk of the SJC in writing within seven days when, before graduation, the student ceases to be enrolled in the law school or associated with the clinical program through which the student practitioner was certified.[54]

47 SJC Rule 3:03 § 5.1.
48 SJC Rule 3:03 § 2.
49 SJC Rule 3:03 § 5.1(a).
50 SJC Rule 3:03 § 5.1.
51 SJC Rule 3:03 §§ 6.1(a) and (b).
52 SJC Rule 3:03 §§ 5.2(a), (b), (c), and (d).
53 SJC Rule 3:03 § 6.2.
54 SJC Rule 3:03 § 6.3.

The revised Rule 3:03 attempts to embrace practical learning for law students and law graduates, while providing greater guidance for the certification of student practitioners and their court appearances. Without limiting the discretion of justices, judges, and presiding officers to protect the orderly administration of justice, Rule 3:03 advises that absent "unusual circumstances" they should permit student practitioners to appear, "provided the student practitioner is sufficiently prepared, knowledgeable, and competent to appear before the particular court or agency and their educational experience will not interfere with the orderly administration of justice."[55]

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."[56] This exception to the usual prohibition on unauthorized practice of law covers in-house counsel providing legal services to a single employer[57] 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 the lawyer does not receive a bar card.[58]

Certain foreign lawyers may also practice law as in-house counsel in Mas-

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55 SJC Rule 3:03 § 4.7.

56 Mass. R. Prof. C. 5.5(d)(1) (2016); SJC Rule 4:02 § 9(b).

57 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 . . . a governmental entity) or its organizational affiliates any legal services that constitute the practice of law") (emphasis added).

58 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 an 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.

sachusetts and offer legal services to an employer as described above,[59] 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."[60]

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 the ABA *Model Rules of Professional Conduct*, which limits the foreign lawyer's legal services authority to advising on matters of the law of that person's country.[61] 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 SJC 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).[62]

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.[63] The lawyer

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59 Mass. R. Prof. C. 5.5(d).

60 Mass. R. Prof. C. 5.5(e).

61 *Cf.* ABA Model Rules of Prof'l Conduct r. 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.

62 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").

63 SJC Rule 4:02 §§ 8(a) and (b).

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.[64]

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.[65] *Pro hac vice* admission is granted at the discretion of the Massachusetts court before which the out-of-state attorney seeks to appear.[66] Only individual attorneys, not law firms, can seek *pro hac vice* admission in Massachusetts.[67]

To apply for *pro hac vice* admission, each attorney must fill out a registration form and pay a fee to the BBO.[68] 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.[69] The nonrefundable fee is not returned if the attorney is not admitted to practice *pro hac vice* in Massachusetts.[70] 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.[71] 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.[72]

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

64 SJC Rule 4:02 §§ 8(a), (b), and (c).
65 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 13.
66 *Id*. *See also* DiLuzio v. United Elec., Radio & Mach. Workers of Am., Local 274, 391 Mass. 211, 215 (1984) (no abuse of discretion in denial of motion for *pro hac vice* appearance); Meschi v. Iverson, 60 Mass. App. Ct. 678 (2004) (same).
67 *See* SJC Rule 3:15 § 1.
68 *Id*.
69 *Board of Bar Overseers Registration Statement for* Pro Hac Vice *Attorneys*, Board of Bar Overseers, https://www.massbbo.org/s/attorney-registration. As of September 2024, the fee for the former courts was $355 per case; for all other courts, the fee was $101 per case. SJC Rule 3:15 § 1. The rule contains exceptions for indigent clients.
70 The fee may be waived for pro bono representation of an indigent client. SJC Rule 3:15 § 1.
71 SJC Rule 3:15 § 1(B).
72 SJC Rule 3:15 § 2.

law.[73] An individual who "is a member in good standing of a recognized legal profession in a foreign country"[74] 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) . . . ."[75] The rule lists other more specific restrictions as well (including a ban on court appearances[76]), 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*,[77] and the attorney-client privilege and work-product doctrines apply to the FLC's communications just as they do for a Massachusetts lawyer.[78] An FLC may work for a law firm and may become a partner, member, or equity owner of a law firm.[79]

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.[80] "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."[81] 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*,[82] *Matter of Panse*,[83] and *Matter of Britton*,[84] 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

73 SJC Rule 3:05.
74 SJC Rule 3:05 § 1.2(a).
75 SJC Rule 3:05 § 5.1(e).
76 SJC Rule 3:05 § 5.1(a).
77 SJC Rule 3:05 § 6.1.
78 SJC Rule 3:05 § 6.3.
79 SJC Rule 3:05 §§ 6.2(b) and (c).
80 Mass. Gen. Laws ch. 221, § 37; SJC Rule 3:01 § 1.4.
81 BBE Rule V.1.
82 473 Mass. 1008 (2015).
83 473 Mass. 1001 (2015).
84 471 Mass. 1015 (2015).

candor with the BBE is essential for admission. The applicants also had a history of litigiousness that was a factor in the decisions.[85]

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.[86] 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.[87]

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.[88]

Some applicants have gained admission to the Massachusetts bar despite being previously convicted of serious crimes. In *Matter of Prager*,[89] 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 (OBC) to intervene, and that office opposed admission. The SJC denied the application in 1996[90] but al-

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85 *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 bar examination); Matter of Application for Admission to the Bar of the Commonwealth, 444 Mass. 393 (2005) (applicant's history included two felonies; SJC denied admission, expressing more concern about record of abusive, accusatory tactics in litigation, including during work as certified law student, than about felony convictions).

86 *See, e.g.*, Matter of Voykhansky, 2008-DDC-4278 at 3 (SJ 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).

87 *Id.*; Matter of Resnick, 2010-DDC-4652 (SJ 2010). As of September 2025, neither Voykhansky (one-year suspension in 2008) nor Resnick (one-year suspension in 2010) had been reinstated.

88 *See, e.g.*, Matter of Betts, 2010-DDC-4596 (SJ 2010) (twelve-month suspension, six months stayed, with conditions, for failure to disclose misdemeanor record on bar admission application).

89 422 Mass. 86 (1996).

90 *Id.* at 95.

lowed admission in 2003.[91] 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.[92] After the applicant was denied admission in Florida because of his criminal history,[93] he successfully applied to the District of Columbia[94] and Massachusetts[95] bars. He ultimately succeeded in gaining admission in Florida, where he was later subject to discipline for misconduct.[96] 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.[97]

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 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 statement. 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,

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91 As of 2025, Attorney Prager appears on the rolls of Massachusetts lawyers, with a 2003 admission date.

92 *In re* Kleppin, 768 A.2d 1010, 1013 (D.C. 2001).

93 *Id*. at 1013.

94 *Id*. at 1018.

95 As of 2025, Attorney Kleppin appears on the rolls of Massachusetts lawyers, with a 2001 admission date.

96 Florida Bar v. Kleppin, 2010 WL 6983305 (Fla. 2010) (admonition for misconduct involving asserting unsubstantiated claims and discovery infractions during litigation).

97 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 BBO's recommendation to reinstate Hiss because of his long record of successful work after release from prison. *See also Prager, supra* note 89, 422 Mass. 86, 92–95 (factors for evaluating reinstatement of attorney after disbarment, as in *Hiss*, also apply to original applicants for admission after conviction of felony).

ongoing moral character or legal competence. Massachusetts does not impose any continuing legal education requirements.[98]

The BBO identifies each attorney's annual registration renewal date.[99] 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.[100] Lawyers must also certify whether they are currently covered by professional liability insurance and provide the name and address of the carrier, the policy number, and the policy's start and end dates.[101] 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.[102]

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 address remains confidential with the BBO and the bar counsel, unless the residential address is the same as the business address.[103]

Since September 2016, all attorneys have been required to provide their an-

98 As of 2024, Massachusetts is one of only five jurisdictions (out of the fifty states, the District of Columbia, and three U.S. territories) that do not require continuing legal education. (The other jurisdictions are Maryland, Michigan, South Dakota, and Washington, D.C.) *See MCLE Rules by Jurisdiction*, American Bar Association, https://www.americanbar.org/events-cle/mcle/. Massachusetts did, however, require every new admittee to complete a one-day, in-person, mandatory Practicing with Professionalism course between 2013 and 2024. SJC Rule 3:16. The court repealed SJC Rule 3:16 effective August 14, 2024, having concluded that the important topics the course addressed are now being addressed in new ways.

99 SJC Rule 4:02 § 1 (suggesting that BBO establish a "system of staggered annual registrations").

100 The online form on the BBO website 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.

101 SJC Rule 4:02 § 2A(a). Each lawyer currently registered as active in Massachusetts must also notify the BBO in writing within thirty days if the insurance policy lapses or terminates for any reason without immediate renewal or replacement. *Id*.

102 *See, e.g.*, Matter of Days, 2014-DDC-5359 (SJ 2014) (two-month suspension for falsely claiming coverage on BBO registration form and application for assignment of cases from Committee for Public Counsel Services (CPCS)); Matter of Durodola, 2012-DDC-5030 (SJ 2012) (two-month suspension for falsely certifying to 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, 2011-DDC-4863 (SJ 2011) (similar facts, same discipline); *cf.* Matter of Powers, 2010-DDC-4632 (SJ 2010) (one-year-and-one-day suspension for falsely claiming to CPCS and altering documents to show liability insurance coverage).

103 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.

nual registration statement online.[104] As of November 1, 2020, pursuant to SJC Rule 4:02, every lawyer registering in Massachusetts is now required to complete a survey about their demographic and employment/professional characteristics. The purpose of the survey is to develop demographic and law practice data on all lawyers in Massachusetts.[105]

The lawyer must submit the annual registration form along with a "periodic assessment," or registration fee.[106] 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, the Clients' Security Fund (Fund), and Lawyers Concerned for Lawyers.[107] In addition to the standard required fee, the BBO includes a separate, voluntary annual fee in its assessment to support access to justice.[108] 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.[109]

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 BBO.[110] 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.[111] An inactive attorney registers the same as an active attorney, but pays a reduced fee.[112] An attorney practicing with an out-of-state license pursuant to SJC Rule 3:04 (limited to indigent representation) must register the same as active bar members.[113]

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104 *Registration Pages*, Board of Bar Overseers, https://www.massbbo.org/s/attorney-registration.
105 The board's website includes a link to the announcement of this requirement as well as to the data collected by the SJC Standing Committee on Lawyer Well-Being. The announcement, data, and rule history are available at https://www.massbbo.org/s/ and https://www.massbbo.org/lawyer-census.
106 SJC Rule 4:03 § 1(a).
107 *Id*.
108 SJC Rule 4:03 § 1(b). The funds contributed are paid to the IOLTA Committee. *See* section III for a discussion of IOLTA funding.
109 SJC Rule 4:02 § 3; SJC Rule 4:03 §§ 2 and 3. For a description of administrative suspension, *see* chapter 4, section II(F)(6).
110 SJC Rule 4:02 § 1A (an FLC is subject to the annual filing requirement and to SJC Rule 4:03, requiring payment of annual registration fees).
111 SJC Rule 4:02 § 8(b); SJC Rule 4:03 § 1(a).
112 SJC Rule 4:02 §§ 4 and 8(a); SJC Rule 4:03 § 1(a).
113 SJC Rule 3:04 § 1.

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 book[114]): the lawyer may *resign* or *retire*. These two choices have different consequences. A nondisciplinary 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 Office of the General Counsel of the BBO, who submits the request to the BBO, which then makes a recommendation to the SJC.[115] The BBO 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.[116] 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.[117] 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.[118] Also, a retired attorney (but not a resigned attorney) may provide pro bono legal services in connection with an authorized legal assistance program[119] and may work as a paralegal.

2. Electing Inactive Status

A lawyer may temporarily cease practice by selecting Inactive on the annual registration filing. An inactive attorney may not practice law but continues to register annually and pays a reduced registration fee.[120] Unlike a retired lawyer, who must pay the full registration fee for each year of retirement to resume prac-

114 *See* chapter 21, section II, and chapter 4, section II(H).
115 No rule addresses nondisciplinary resignation. A 1978 SJC standing order addresses "Nondisciplinary Voluntary Resignations," but offers very little detail about the process.
116 *Id.*
117 SJC Rule 4:02 § 5(a).
118 SJC Rule 4:02 § 5(b).
119 SJC Rule 4:02 §§ 5(a) and 8(b). *See supra* section II(A)(6).
120 SJC Rule 4:02 § 4(a).

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tice, an inactive attorney may be authorized to practice by notifying the BBO and paying the registration fee for the year practice resumes.[121] 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.[122] 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.[123] 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.[124]

The IOLTA Committee publishes a careful, comprehensive manual instructing lawyers about every step of the IOLTA and trust account requirements.[125] 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.[126] Only those banks certified by the SJC's IOLTA Committee may receive trust funds in a designated IOLTA account.[127] To obtain certification, a bank must agree to pay interest at a min-

121 SJC Rule 4:02 § 4(b).

122 Mass. R. Prof. C. 1.15(e)(6) refers to this as a "pooled account ('IOLTA account')."

123 Mass. R. Prof. C. 1.15(e)(3), (e)(6), (g)(2), and (g)(4); *IOLTA Guidelines*, Massachusetts IOLTA (2009), § B, https://maiolta.org/for-attorneys.

124 Under Mass. R. Prof. C. 1.15(g)(4)(i), 67% of IOLTA funding must be distributed to the Massachusetts Legal Assistance Corporation; the remaining 33% goes to other agencies or programs as the SJC orders.

125 *See* Jayne B. Tyrrell and Stephen M. Casey, *Managing Clients' Funds and Avoiding Ethical Problems* (Client Funds Manual 2018), Massachusetts IOLTA (January 2018), https://www.maiolta.org/for-attorneys.

126 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) and 1.15(e)(6).

127 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), Massachusetts

imum level, determined through a complicated formula.[128] Some select banks have agreed to pay interest at a higher rate, and the IOLTA Committee recognizes them as Leadership Institutions.[129]

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.[130] 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.[131]
- While commingling a lawyer's own funds with those held in trust is a serious breach of fiduciary duty,[132] some of the lawyer's own funds may be deposited into the account to pay any required bank charges.[133]
- Once the lawyer deposits funds in a trust account, careful records of the funds and their movement must be kept. The *Massachusetts Rules of Professional Conduct*[134] list 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.[135]
  - The trust account must have a check register with numbered checks, and that register must show, in chronological order, all deposits,

IOLTA, https://maiolta.org/for-attorneys.

128 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), 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. *Eligible Institutions*, Massachusetts IOLTA, https://www.maiolta.org/for-attorneys/approved-iolta-depositories.

129 *Eligible Institutions*, Massachusetts IOLTA, https://www.maiolta.org/for-attorneys/approved-iolta-depositories.

130 Mass. R. Prof. C. 1.15(e)(2).

131 Mass. R. Prof. C. 1.15(e)(3).

132 As noted in chapter 11, commingling funds alone, without deprivation, typically results in an admonition. *See, e.g.*, Matter of O'Driscoll, 2006-DDC-3823 (SJ 2006) (noting admonition in 2005 for commingling funds in IOLTA account); AD 02-29, 2002-ADM-3207 (BBO 2002).

133 *See* Mass. R. Prof. C. 1.15(b)(2)(i). *See also IOLTA Guidelines* B(2), Massachusetts IOLTA, https://www.maiolta.org/for-attorneys (permitting deposits of lawyer funds into trust account to maintain required minimum balance).

134 Mass. R. Prof. C. 1.15(f).

135 Mass. R. Prof. C. 1.15(f)(2).

checks paid, and bank charges paid. No check may be paid to "cash"; all checks must be paid to an identified person or entity.[136]

— 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.[137]

— 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.[138] (This is known as the three-way reconciliation requirement.)

— The accounts, records, and documentation required by the *Rules of Professional Conduct*[139] 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.[140]

— Generally, a lawyer may only distribute funds on behalf of a client or third party for the purposes for which the funds were received.[141] The bank the lawyer uses must have an agreement with the BBO to report to the BBO any instance of a check being returned for insufficient funds.[142] Therefore, if a lawyer writes a check on a trust account and the check is returned for insufficient funds, the BBO receives notice, causing the bar counsel to investigate. In practice, however, notices concerning dishonored trust account checks typically go directly to the bar counsel.

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136 Mass. R. Prof. C. 1.15(e)(4) and 1.15(f)(1)(B).
137 Mass. R. Prof. C. 1.15(f)(1)(C) and 1.15(f)(1)(D).
138 Mass. R. Prof. C. 1.15(f)(1)(E).
139 Mass. R. Prof. C. 1.15(f).
140 Mass. R. Prof. C. 1.15(f) and 1.1(f)(1)(G).
141 Mass. R. Prof. C. 1.15(c). Of course, the client might direct the attorney to use the 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 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.
142 Mass. R. Prof. C. 1.15(h)(1).

IV. The Clients' Security Board and Fund

When the SJC created the BBO and the OBC in 1974 to centralize and unify lawyer discipline, it also created the CSB and the Fund. The CSB is a volunteer body of seven Massachusetts lawyers appointed by the court to serve as public trustees of the Fund. The Fund's purpose is to discharge the collective professional responsibility of Massachusetts bar members for actual losses caused by the theft of client funds or property by attorneys, thereby protecting the bar's reputation and integrity.[143] The annual registration fees that Massachusetts lawyers pay finance much of the Fund,[144] along with any funds recovered from lawyers or other parties responsible for losses. The CSB does not use any public funds or tax dollars for reimbursements.

Since 1974, the CSB has awarded over $61 million to more than 2,600 claimants. In fiscal year 2024, the CSB awarded over $1,750,000 to 65 claimants. However, only 11 of the 73,221 lawyers registered in Massachusetts (0.02%) were responsible for these losses.[145]

As described in the following paragraph, the CSB reimburses a member of the public who has suffered a financial loss only when that loss was caused by the dishonest conduct of a Massachusetts lawyer. The lawyer who caused the loss must have been "a member of the Massachusetts bar who has been disbarred, suspended, has resigned from the bar, or has died."[146] The lawyer's resignation must have occurred during disciplinary proceedings.[147]

Dishonest conduct. Dishonest conduct includes "wrongful acts committed by an attorney such as theft, embezzlement of money, or the wrongful taking or conversion of money, property, or other things of value, regardless of where the conduct occurred . . . ."[148] The lawyer's dishonest conduct must have taken place during the lawyer's legal representation of the client or when the lawyer was acting as a fiduciary.[149] Examples of dishonest conduct include: (1) failing to refund unearned fees received in advance, in violation of the *Massachusetts Rules of Professional Conduct*;[150] (2) borrowing money from a client without intention

143 *See* SJC Rule 4:04 § 1.
144 *See* SJC Rule 4:03 § 1(a).
145 *See Annual Report for Fiscal Year 2024*, Clients' Security Board, https://www.masscsb.org/newsroom-reports (reporting awards totaling $1,750,230.98).
146 SJC Rule 4:05 § 1.
147 *See* SJC Rule 4:01 § 15 (resignations by lawyers under disciplinary investigation).
148 Clients' Security Board Rules [hereinafter CSB Rule], Rule 2(E) https://www.masscsb.org/resources-security-board.
149 SJC Rule 4:04 § 1.
150 Mass. R. Prof. C. 1.16(d).

to repay it, or with disregard of the attorney's ability or reasonably anticipated ability to repay it; and (3) settling a case without authorization and misappropriating the settlement proceeds.[151]

Reimbursable loss. The CSB compensates clients for the loss of money or other property. Fee disputes or allegations of inadequate, negligent, or incompetent legal services do not form the basis of a reimbursable claim.[152] Reimbursable losses also do not include any losses that the client has recovered or may recover from a collateral source, such as a bond, surety agreement, or insurance contract. In addition, any loss arising solely out of an investment, lending, personal, or business relationship with an attorney, or any consequential or incidental damages, such as lost interest, or legal fees or costs incurred in seeking recovery of a loss, are not reimbursable losses.[153] In cases of hardship, the CSB has discretion to recognize as a reimbursable loss a claim the rules would otherwise exclude.[154]

Application process. A claimant seeking an award for a reimbursable loss must file a confidential application with the CSB.[155] The application form requires the claimant to provide:

- Detailed information and documentation about the facts surrounding the loss, how and when the claimant first learned about the loss, and all efforts the claimant or others have made to recover the funds from the lawyer, an insurer, or another source.
- The amount of the loss for which the claimant is seeking an award, and an explanation of how the client calculated the loss.
- Information about any other parties who have an interest in the funds taken by the lawyer.
- A description of any restitution the claimant has received from the lawyer or any other source.
- The amount the claimant paid the lawyer in legal fees, documentation of all payments, and a copy of any fee agreement.
- Details about whether the claimant or the lawyer has filed for bankruptcy protection, as the CSB will likely delay its procedures until the conclusion of the bankruptcy proceedings.

151 CSB Rule 2(E)(1), (2), and (3).
152 *How the Fund Works*, Clients' Security Board, https://www.masscsb.org/about.
153 CSB Rule 2(G)(1), (2), and (3).
154 CSB Rule 2(G).
155 *Claim Form*, Clients' Security Board, https://www.masscsb.org/claim-filing-claim (claim forms are also available by contacting the CSB office at 617-728-8758 or info@masscsb.org).

Claimants can provide forms and supporting documents to the CSB by mail, e-mail, or hand delivery.[156]

Jurisdictional prerequisites. If the CSB receives a claim form before the SJC has disciplined a lawyer, the CSB will notify the claimant of the jurisdictional requirements of SJC Rule 4:05 § 1, and refer the claimant to the OBC if disciplinary proceedings are not pending. The CSB will then maintain the claim in an inactive status until the attorney is suspended, disbarred, or resigns.[157] The CSB also encourages claimants to report the loss to appropriate criminal authorities. In addition, the CSB may require the exhaustion of all reasonably available civil remedies before acting on a claim.[158] Criteria that the CSB considers in requiring exhaustion may include, but are not limited to, the amount of the loss, the likelihood of recovery, the age of the loss, the status of the attorney (that is, incarcerated, deceased, residing out of state), and a claimant's financial status and capacity. A failure to cooperate in the disciplinary proceedings against the lawyer will not bar the granting of relief from the Fund.[159]

Claim investigation and adjudication. Shortly after opening a claim, the CSB sends a copy of the application to the attorney alleged to have caused the loss and asks for a response. The CSB also collects any public information, contacts potential witnesses, and asks the bar counsel for information regarding the matter. The CSB may issue a subpoena requiring the attendance and testimony of a witness, including the disbarred or suspended attorney, and the production of evidence relating to the CSB's investigation of the claim.[160]

After 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. It is CSB policy to hold hearings for claims of more than $25,000 unless the full board votes that a hearing is not necessary. Claimants must appear at the hearing, which the CSB may hold in person or by videoconference. The responsible attorney may attend the hearing, although the CSB rules do not require the attorney's presence. Either party may appear with counsel.

Generally, the hearings begin with brief opening statements by each party. The CSB then asks the parties to respond to questions. The parties do not ask questions of each other and the CSB does not follow formal evidentiary rules. At the end of the hearing, the parties leave the hearing and the CSB considers

156 CSB Rule 5(C).
157 CSB Rule 6(D).
158 CSB Rule 5(B).
159 *Id.*
160 SJC Rule 4:05 § 5.

the claim. The parties are notified promptly after the meeting about the CSB's decision.[161]

Awards. The CSB may "allow or deny . . . claims in whole or in part to the extent that funds are available and in accordance with all applicable rules and principles . . . ."[162] To the extent possible, the CSB attempts to fully reimburse claimants for their actual losses consistent with the CSB's role as a public trustee of the Fund.[163] Unlike many other jurisdictions, and unlike the arrangement the *ABA Model Rules for Lawyers' Funds for Client Protection* suggests,[164] Massachusetts does not impose a cap on the amount of any award paid to a single claimant or for the aggregate of all losses attributable to the conduct of a single respondent. The CSB also does not have a statute of limitations for claims.

In exercising its discretion over whether to allow any claim for reimbursement from the Fund and the amount of an award, the CSB has established and follows "fair, reasonable, and consistent principles for the allowance and denial of claims"[165] including the following factors:

- The amounts available and likely to become available to the Fund for payment of claims
- The size and number of claims likely to be presented in the future
- The amount of the claimant's loss compared with the amount of the losses sustained by other claimants who may merit reimbursement from the Fund
- The unreimbursed amounts of claims recognized by the CSB as meriting reimbursement but for which complete reimbursement has not been made
- The degree of hardship suffered by the claimant compared with that suffered by other claimants
- Any negligence or conduct of the claimant that may have contributed to the loss[166]

Further review. Any awards are "a matter of grace, not right, and no client, beneficiary, employer, organization, or other person shall have any right or in-

161 CSB Rule 7(F).
162 SJC Rule 4:05 § 1.
163 SJC Rule 4:05 § 3.
164 ABA Model Rules for Lawyers' Funds for Client Protection, r. 14(1), https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/rule14.html.
165 SJC Rule 4:05 § 3.
166 *Id*.

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terest in the Fund."[167] Therefore, a claimant has no review or appeal right from an award made by the CSB or a claim that the CSB denies,[168] although the CSB in its discretion may reconsider a decision if it receives new evidence or for other good cause.[169] Unless the CSB extends the time, a claimant or respondent must file a request with the CSB within thirty days after the date of the CSB's adjudication, stating in writing and with particularity the facts on which reconsideration is sought. Except in these circumstances, a CSB adjudication is final, and the CSB will not further consider the current claim or future claims based upon substantially the same allegations.[170]

Subrogation. The CSB pays the approved reimbursements as soon as practicable after its decisions. However, before the CSB pays an award it first must obtain a subrogation agreement or assignment from the claimant authorizing the CSB to recover the amount of the reimbursement from the lawyer or other responsible party. The claimant must also agree, as a condition of reimbursement, to cooperate with the CSB in the prosecution of such an action.[171]

Reinstatement. A lawyer's petition for reinstatement must include a statement whether the CSB has been reimbursed,[172] 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.[173] In determining whether to recommend reinstatement of a lawyer, the BBO considers whether the lawyer has reimbursed the CSB for any award it granted to the lawyer's clients.[174]

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167 SJC Rule 4:05 § 2.

168 *Id.* ("No decision to allow or deny reimbursement shall be subject to judicial review in a court of either appellate or original jurisdiction"). *See* Indeck v. Clients' Security Bd., 450 Mass. 379, 879 N.E.2d 57 (2008) (decision by CSB on reimbursement from Fund was not subject to certiorari review because client did not have justiciable or material right to any payment from Fund, CSB's decision did not give rise to substantial injury or injustice, and CSB's decision did not reflect substantial error of law).

169 CSB Rule 7(H).

170 *Id.*

171 CSB Rule 7(G) and Rule 9; SJC Rule 4:05 § 4 ("The Board may require any claimant, as a condition of any payment from the Fund, to execute such instruments, to take such action, and to enter into such agreements as the Board may direct, including assignments, subrogation agreements, trust agreements, and promises to cooperate with the Board in making and prosecuting claims or charges against any person.") *See* Audoire v. Clients' Security Board, 450 Mass. 388, 879 N.E.2d 52 (2008) (CSB decision to condition reimbursement award from Fund on claimant's execution of assignment agreement is not subject to judicial review).

172 SJC Rule 4:01 § 18(4)(d).

173 Rules of the Board of Bar Overseers [hereinafter BBO Rules], Appendix. Application for Reinstatement, https://www.massbbo.org/s/rules.

174 Matter of McCarthy, 2007-REI-4061 at 1 (SJ 2007) (reinstatement denied; "principal" reason for denial was failure to make restitution).

Confidentiality. The CSB keeps confidential all claim forms, proceedings, investigations, claimants' and respondents' financial information, and reports involving specific claims received and payments from the Fund.[175] The CSB's confidentiality rules do not prohibit the release of relevant information to the BBO, a court or investigative agency of proper jurisdiction, or an authorized agency investigating the qualifications of a judicial candidate or applicant for governmental employment. The confidentiality rules also do not prohibit the release of statistical or summary information that does not disclose the identity of the parties or prohibit the release of publicity after the CSB has made an award.[176] The CSB publishes an annual report that includes summaries of its decisions (these include the respondent's name but not the claimant's) as well as statistical information about the CSB decisions.[177]

Representation. While claimants do not need counsel to file and pursue awards from the CSB, many claimants benefit from the assistance of counsel, especially at the hearing. However, any attorney representing a claimant before the CSB does so as a public service and may not receive any portion of the award or any fee from the claimant for services related to the CSB's proceedings.[178]

175 CSB Rule 8; SJC Rule 4:05 § 6.
176 CSB Rule 8.
177 *CSB Annual Reports*, Clients' Security Board, https://www.masscsb.org/newsroom-reports.
178 CSB Rule 10.

Appendices

APPENDIX A

Sample Petition for Discipline

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

BAR COUNSEL, **Petitioner** **v.** **JOHN DOE,** **Respondent**	**BBO File No. _____**

PETITION FOR DISCIPLINE

1. This petition is brought pursuant to Rule 4:01 § 8(3) of the Rules of the Supreme Judicial Court, and §§ 3.13(a)(2) and 3.14 of the Rules of the Board of Bar Overseers.

2. The respondent, John Doe, was duly admitted to the bar of the Commonwealth on [DATE].

3. On or around June 27, 2016, [CLIENT] called the respondent to discuss the respondent's possible representation of him in a criminal matter relating to an altercation with his ex-wife. The respondent told [CLIENT] that he would charge an hourly fee of $500 and require an advance retainer of $13,000 for the criminal matter. [CLIENT] did not hire the respondent and engaged another lawyer to represent him.

4. On or about February 16, 2017, [CLIENT] called the respondent and told him that he planned to discharge his lawyer and asked the respondent to represent him in the same criminal matter. The respondent told [CLIENT] he would charge an hourly rate of $500 and require an advance retainer of $13,000, as they had previously discussed. [CLIENT] agreed to retain the respondent.

5. The respondent did not communicate to [CLIENT] in writing the scope of the representation and the basis of the rate or fee and expenses for which the [CLIENT] would be responsible.

6. The respondent and [CLIENT] met for the first time about the criminal matter on February 20, 2017. At that time, [CLIENT] paid the respondent the $13,000 retainer by a check in the amount of $10,000 and cash in the amount of $3,000. The respondent knew when he received the $13,000 retainer that those funds represented, at least in substantial part, an advance payment for services yet to be rendered to [CLIENT]. The respondent took the $13,000 retainer and agreed to charge against it on an hourly basis.

7. The respondent did not deposit the $10,000 check and $3,000 cash into a trust account, to be withdrawn by the respondent only as fees were earned or as expenses incurred. The respondent did not deposit the $3,000 cash payment to any account.

8. On February 20, 2017, when the respondent received the $3,000 cash payment from his client, the respondent had not yet performed any work of substance on [CLIENT's] case. The $3,000 cash payment was all or virtually all unearned when the respondent received it. The respondent had not yet sent [CLIENT] any written bill for his legal services. The respondent used the $3,000 cash retainer he received on February 20, 2017, to pay his own personal or business expenses. The respondent intentionally misused the unearned portion of the $3,000 cash retainer by failing to deposit those funds into a client trust account and by using the funds to pay his personal or business expenses prior to earning the fee.

9. On March 20, 2017, the respondent deposited the $10,000 retainer check into his operating account ending in *5996. On that date, the respondent had earned a maximum of $9,700 and had already paid himself the $3,000 cash retainer. On March 20, 2017, at least $3,300 of the retainer funds paid to the respondent by [CLIENT] and deposited by the respondent into his operating account had not yet been earned.

10. On March 20, 2017, the respondent was holding personal funds in his operating account. The respondent failed to keep the unearned retainer funds from [CLIENT] separate from the respondent's own funds in the operating account. By depositing [CLIENT's] retainer into his operating account, the respondent failed to keep the client trust funds appropriately safeguarded.

11. The respondent's representation of [CLIENT] concluded after the trial date on April 26, 2017. By the conclusion of the representation, the respondent had earned the full amount of the retainer he had been paid by [CLIENT].

12. The respondent's conduct in failing to communicate to his client in writing the scope of the representation and the basis of the rate or fee and expenses for which the client would be responsible violated Mass. R. Prof. C. 1.5(b)(1).

13. The respondent's conduct in failing to deposit into a client trust account $13,000 in legal fees and expenses that had been paid in advance, to be withdrawn only as fees were earned or as expenses were incurred, violated Mass. R. Prof. C. 1.15(b)(3).

14. The respondent's failure to hold the retainer funds separate from the respondent's own property and his failure to appropriately safeguard the retainer funds violated Mass. R. Prof. C. 1.15(b), 1.15(b)(1), and 1.15(b)(4).

15. The respondent's intentional misuse of unearned retainer funds for his own personal and business purposes without permanent deprivation to the client violated Mass. R. Prof. C. 1.15(b)(3), 1.15(b)(4), 8.4(c), and 8.4(h).

Disciplinary Rules

16. The Disciplinary Rules applicable to the respondent's conduct provide as follows:

Rule 1.5: FEES

(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.

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.
   (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 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(h) engage in any other conduct that adversely reflects on his or her fitness to practice law.

WHEREFORE, the 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 [RESPONDENT] is required; and

c. File an Information concerning this matter with the Supreme Judicial Court.

RESPECTFULLY SUBMITTED,

Richard C. Abati
Bar Counsel

/s/ [Assistant Bar Counsel e-signature]
[Assistant Bar Counsel name] (BBO No. [insert])
Assistant Bar Counsel
Office of the Bar Counsel
One Beacon Street, 10th Floor
Boston, MA 02108
(617) 728-8750
[ABC's e-mail address]

Date: _____

APPENDIX B

Sample Notice to Respondent Accompanying Petition for Discipline

January 1, 2026

By Certified Mail, Return Receipt Requested
First-Class Mail & E-mail

PERSONAL AND CONFIDENTIAL

John Doe, Esq.
1 Any Road
Sometown, MA 02345

RE: BBO File No(s):_____

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, One Beacon Street, 10th Floor, Boston, MA 02108, 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 § 8(3), of the Rules of the Supreme Judicial Court. Pursuant to Rule 4:01 § 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 § 3.5(e) of the Rules of the Board of Bar Overseers. A copy of each document must be served on the bar counsel.

Section 3.15 of the BBO Rules sets forth the rules governing service of the petition and the respondent's answer. In particular, please note:

1. 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.

2. Failure to file a timely answer shall be deemed an admission of the charges.

3. 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.

4. 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, § 3.17(a) of the BBO Rules, 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 § 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 § 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

Joseph S. Berman
General Counsel

JSB/dl
Enclosure

RESPONDENT'S ESTIMATE OF TIME FOR HEARING

Name of Case: Bar Counsel v. John Doe, Esq.

BBO File No. _____

I estimate that _____ days of hearing will be needed to present the respondent's defense.

_____

Respondent or Respondent's Counsel

Date: _____

APPENDIX C

Sample Answer to Petition for Discipline

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

BAR COUNSEL, **Petitioner** **v.** **JOHN DOE,** **Respondent**	**BBO File No. _____**

ANSWER

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. [RESPONDENT] represented [CLIENT] on a continuous basis on various matters related to his wife and children from approximately 2006, including his divorce in 2008. In all the matters he represented [CLIENT] he always charged him on an hourly basis similar to the engagement agreements described in paragraphs 3 and 4 of the petition for discipline and he treated this matter as part of the continuing matters on which he represented [CLIENT]. The respondent states that he orally explained to [CLIENT] the scope and basis of the fee rate and expenses for this case, just as he did in all of his representations of [CLIENT], and did not believe he needed a new written fee agreement since [CLIENT] was a regularly represented client.

6. Admitted.

7. The respondent admits so much of paragraph 7 as alleges he did not deposit the $10,000 check and the $3,000 cash into a trust account, but he intended not to withdraw the funds until they were earned or as the expenses were incurred. The respondent cannot recall what he did with the $3,000 cash payment and has not been able to account for those funds.

8. The respondent admits to so much of paragraph 8 as alleges that when he received the $3,000 cash payment he had not yet performed any work of substance on [CLIENT's] case and that he had not yet sent [CLIENT] a written bill for his legal services. The respondent cannot recall what happened to the $3,000 and has been unable as yet to locate any record of the $3,000 but denies that he intentionally misused the unearned portion of the $3,000 retainer by failing to deposit those funds into a client trust account and by using the funds to pay his personal and business expenses prior to earning the fee.

9. The respondent admits that on March 20, 2017, he deposited the $10,000 retainer check into his operating account ending in *5996. The respondent believed on that date he had earned the $10,000 and at that time did not know what had happened to the $3,000 cash payment and did not include that amount in what he withdrew as being earned from his operating account. The respondent denies the allegations in the last sentence of paragraph 9.

10. Admitted.

11. Admitted.

12. The allegation in paragraph 12 requires a legal conclusion and cannot be admitted to or denied but to the extent it can be admitted to or denied, it is denied.

13. The allegation in paragraph 13 requires a legal conclusion and cannot be admitted to or denied but to the extent it can be admitted to or denied, it is denied.

14. The allegation in paragraph 14 requires a legal conclusion and cannot be admitted to or denied but to the extent it can be admitted to or denied, it is denied.

15. The allegation in paragraph 15 requires a legal conclusion and cannot be admitted to or denied but to the extent it can be admitted to or denied, it is denied.

Disciplinary Rules

16. The respondent does not deny the accuracy of the disciplinary rules described in paragraph 16.

Mitigation

The respondent has been having substantial medical problems that are described in his accompanying affidavit.

[RESPONDENT]

_____

Date: _____

APPENDIX D

Form Stipulation for Discipline

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

BAR COUNSEL, **Petitioner** **v.** **JOHN DOE,** **Respondent**	**BBO File No. _____**

RESPONDENT'S ANSWER TO PETITION FOR DISCIPLINE AND JOINT STIPULATION OF THE PARTIES

The bar counsel and the respondent, John Doe, Esq., hereby stipulate that this matter may be resolved without hearing. They jointly recommend that the respondent be [SANCTION RECOMMENDATION] for the misconduct set forth in the petition for discipline attached hereto as Exhibit A.

The parties further stipulate as follows:

1. The respondent represents that he is admitted to practice in Massachusetts, [OTHER JURISDICTION], and in no other state or federal jurisdictions.

2. Subject to paragraph 11 below, the respondent admits the truth of the allegations of the petition for discipline, and the parties stipulate to findings that those allegations are established as facts.

3. Subject to paragraph 11 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.

4. Subject to paragraph 11 below, the parties waive their rights to an evidentiary hearing on the facts and disciplinary rule 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. The respondent acknowledges that, upon the filing of the petition for discipline and this answer and stipulation with the Board of Bar Overseers, the petition, the answer and stipulation, and all further disciplinary proceedings thereon will become public and that a summary of the proceedings, including the respondent's name and the factual and legal basis for the sanction, will be published by the board, sent to media outlets, and posted on the board's website.

6. In aggravation, [AGREED-UPON AGGRAVATING FACTORS, IF ANY].

7. In mitigation, [AGREED-UPON MITIGATING FACTORS, IF ANY].

8. The parties stipulate that [SANCTION] is appropriate discipline for the respondent's misconduct and is consistent with sanctions in similar cases. [INSERT DISCUSSION OF THE RESPONDENT'S MISCONDUCT, ANY AGGRAVATING AND/OR MITIGATING CIRCUMSTANCES, AND SANCTIONS ISSUED IN COMPARABLE CASES]

9. 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 any possible 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.

10. The respondent acknowledges that [EITHER he is represented by counsel in this matter OR he has the right to be represented by counsel in this matter but has freely and voluntarily elected to represent himself/herself].

11. The parties acknowledge that the Board of Bar Overseers is not bound by their recommendation for discipline and that either party may appeal from a preliminary determination by the board to recommend discipline that differs from their joint recommendation.

- [OPTION 1] If the board upholds a preliminary determination to recommend discipline that materially differs from the parties' joint recommendation, then the parties reserve their rights to a hearing, and this stipulation will be void. In that event, pursuant to section 3.19(e) of the Rules of the Board of Bar Overseers, the parties may amend their pleadings without prejudice, and the matter will be assigned for hearing to an appropriate hearing committee or special hearing officer, a hearing panel of the board, or the full board.
- [OPTION 2] The parties further stipulate, however, that each party shall be bound by this stipulation of facts and rule violations 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.

Respectfully submitted,

_____	_____
John Doe, Esq. Respondent	Richard C. Abati Bar Counsel
Dated: _____	Dated: _____

APPENDIX E

Form Affidavit of Resignation

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

AFFIDAVIT OF RESIGNATION SUBMITTED BY JOHN DOE
PURSUANT TO SUPREME JUDICIAL COURT RULE 4:01 § 15

I, John Doe, who was duly admitted to practice in the Commonwealth on [DATE], hereby state, freely and voluntarily, that I desire to resign from the practice of law pursuant to SJC Rule 4:01 § 15.

I further aver and attest as follows:

1. 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 understand that by submitting this affidavit of resignation, I have waived evidentiary proceedings before a hearing committee, the Board of Bar Overseers, and the Supreme Judicial Court; my name will be stricken from the roll of attorneys; 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 the identity of the lawyer 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 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.

2. I am aware that there is presently pending an investigation and proceedings as to my conduct as an attorney. The bar counsel is alleging, inter alia, that [INSERT DESCRIPTION OF ALLEGED MISCONDUCT]. The bar counsel further alleges that such conduct violated Mass. R. Prof. C. [INSERT APPLICABLE RULES].

3. I do not wish to contest any bar discipline now pending, and I understand that a judgment for my disbarment would likely result if the matters were litigated.

4. I acknowledge freely and voluntarily that the bar counsel's allegations, as described in paragraph 2 of this affidavit, can be proved by a preponderance of the evidence and that a hearing committee, the board, and the court would conclude that I have violated Mass. R. Prof. C. [INSERT APPLICABLE RULES]. I agree not to contest either the facts or the rule violations set forth in paragraph 2. My agreement not to contest the facts or the violations extends to this or any other bar discipline in this Commonwealth or in any other jurisdiction, to any reinstatement proceeding in this Commonwealth or in any other jurisdiction, and to any admission proceeding in any jurisdiction.

5. I acknowledge that the bar counsel will recommend that the affidavit of resignation be accepted and that an order of disbarment entered [ALTERNATIVE: that the affidavit of resignation be accepted as a disciplinary sanction]; that the effective date of the disbarment [ALTERNATIVE: resignation] be the date of entry of the judgment of disbarment [ALTERNATIVE: resignation]; and that the affidavit of resignation not be impounded. I understand that I may also make recommendations regarding these matters, but that neither the Board of Bar Overseers nor the Supreme Judicial Court is bound to adopt such recommendations or my resignation, that the Board of Bar Overseers may recommend my disbarment, and that the Supreme Judicial Court may disbar me without any further proceedings.

6. I understand and acknowledge that I have the right to be represented by counsel in these proceedings, and I acknowledge that I am represented by counsel in these proceedings [ALTERNATIVE: and I acknowledge that I have voluntarily chosen to proceed without counsel in executing this affidavit and submitting my resignation].

7. I understand and acknowledge that the bar counsel has made no representations or promises to me whatsoever regarding the effects of executing this affidavit other than what is stated in this affidavit.

8. 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.

9. I am not now suffering from any physical 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.

10. I am currently admitted to practice law in the Commonwealth of Massachusetts, [ANY OTHER JURISDICTION], and no other jurisdictions.

11. I hereby request that I be permitted to resign from the practice of law in the Commonwealth of Massachusetts.

12. I understand that this affidavit of resignation will not be impounded.

Signed and sworn to under the penalties of perjury this _____ day of [MONTH], [YEAR].

_____

John Doe

APPENDIX F

Sample Prehearing Conference Order

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

BAR COUNSEL, **Petitioner** **v.** **JOHN DOE,** **Respondent**	**BBO File No. _____**

PREHEARING ORDER

A remote prehearing conference in this matter was held on [DATE], at 10 A.M. Participating were the respondent, [RESPONDENT NAME]; respondent's counsel, [COUNSEL NAME]; Assistant Bar Counsel [ABC NAME]; Bar Counsel investigator [BCI NAME]; the chair of the hearing committee, [CHAIR NAME]; hearing committee members, [NAME] and [NAME]; and Assistant General Counsel [AGC NAME]. As a result of the conference, the following orders are entered:

I. PARTY CONTACT WITH COMMITTEE MEMBERS RESTRICTED

No party or counsel to a party shall communicate directly by e-mail, phone, or otherwise with any hearing committee member.

II. GENERAL PROVISIONS CONCERNING HEARINGS

All materials to be filed with the Board of Bar Overseers, as described under paragraphs A, B, C, and D below (including but not limited to witness lists, motions, and oppositions), shall be filed electronically by e-mail to [OGC administrative staff] and copied to the assistant general counsel.

Unless a motion for a remote hearing has been timely filed and allowed, the hearing shall be conducted in person, and simultaneously live-streamed to interested members of the public.

Whether the hearing is in person or remote, counsel and the respondent must participate in a prehearing Teams videoconference, during which participants will conduct a technology check. That meeting will occur at [LOCATION] on [DATE]. The board will issue an invitation shortly before it. Among other topics, the technology check will involve displaying a few sample exhibits to ensure familiarity with the use of exhibits at the hearing, and advising counsel how to properly prepare their witnesses who might testify remotely.

At least seven calendar days prior to the first day of the scheduled hearing, i.e., [DATE], the parties are required to provide the board, by e-mail to [OGC administrative staff] and to the assistant general counsel then assigned to the case, the names, addresses, telephone numbers (including a number at which the witness may be reached during the hearing), and e-mail addresses of all witnesses.

At least seven calendar days in advance of the first day of either a remote hearing ([DATE], unless notified otherwise), or any testimony by a remote witness at an in-person hearing, all counsel and any pro se parties will be required to sign and file with the board the Remote Proceeding Certification attached to the Supplemental Prehearing Order on Remote Proceedings, issued simultaneously with this order. That supplemental order addresses the conduct of a remote hearing and the testimony of remote witnesses in greater detail.

III. OTHER PROVISIONS

A. Exchanges of Exhibits, Witness Lists, and Expert Disclosures

1. **Preliminary Exchange.** By the close of business on [DATE], the parties shall exchange a list of proposed 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). The parties shall also exchange preliminary lists of all their expected witnesses, including the names, addresses, and e-mail addresses. 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 file with the board, and serve on the opposing party, a copy of their proposed witness list, including any expert disclosure as applicable. The parties are not to file with the board, at this time, their exhibit lists or copies of the exhibits.

2. **Objections.** By the close of business on [DATE] 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 [DATE], the parties shall furnish each other with written lists of any additional witnesses (with expert disclosure as described in paragraph 1, above, for any additional expert witnesses) as well as lists of proposed exhibits in supplementation of their prior disclosures, together with copies of all exhibits not previously provided. Each party shall also file with the board and serve on the opposing party a copy of the supplemental witness list, including any expert disclosure as applicable. The parties are not to file with the board, at this time, their supplemental exhibit lists or copies of the supplemental exhibits.

4. **Supplemental Objections.** By the close of business on [DATE], 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.

5. **Respondent's Final Agreed-Upon Exhibits.** Exhibits are discussed below in detail in section III(D). In addition to what is stated there, the respondent has the following obligation: No later than the close of business on [DATE] (i.e., one week after the deadline for the Supplemental Objections, see paragraph III(A)(4)), the respondent/respondent's counsel must provide bar counsel with a PDF copy of the *final* version of their agreed-upon exhibits. This copy must be redacted in accordance with paragraph 10(c) below and should not include any exhibit that was objected to (and thus disputed) as part of the preliminary and supplemental exchange process set forth above. The handling of such disputed exhibits is addressed in paragraph 10(d) below.

B. Motions in Limine or Other Prehearing Motions Concerning Conduct of the Hearing

6. **Motions.** Motions, oppositions, and briefs shall be filed with the board and served on the opposing party. See, generally, BBO Rules § 3.18 and BBO Policies and Practices No. 26.

(a) By the close of business on [DATE], the parties shall file with the board, and serve on the opposing party, any motions in limine or other prehearing motions concerning the conduct of the hearing, specifying the relief sought and the basis and authority therefor. For in-person hearings, this requirement shall include a motion to present testimony remotely, which will be allowed for good cause, and which should include the names, addresses, and e-mail addresses of any expected remote witnesses. The party calling the remote

witness will be responsible for making sure that the witness has the technology and the capacity to participate in the hearing.

(b) The chair of the hearing committee may entertain motions concerning situations that arise prior to or during the hearing.

7. **Oppositions to Motions.** The parties shall file with the board, and serve on the opposing party, any opposition to a prehearing motion within seven days of service of the motion, but in no event later than [DATE].

C. Hearing Subpoena Requests

8. By the close of business on [DATE], 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 the party's obligation to serve subpoenas, not the board's. Unless the hearing is to be held in person, the hearing subpoena shall say, for a place of appearance, to "testify remotely by videoconference." Further specifications are provided in the supplemental prehearing order. 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, Objections; Handling of Disputed Exhibits; Redaction Requirements

9. In order to expedite the hearing of the matter, the parties are encouraged to stipulate as to the authenticity of documents and/or the purposes for which it is agreed they are admissible. The standard form of stipulation regarding documents is attached to this order.

10. By the close of business on [DATE], bar counsel shall file with the board and serve on the respondent/respondent's counsel any stipulations by the parties and a list of agreed-upon exhibits together with an electronic copy of the agreed-upon exhibits, as described below. The board will provide the hearing committee members with the electronic copy of the parties' agreed-upon exhibits. On this date, each party also shall separately file with the board, and serve on the opposing party, their final witness list.

(a) **Agreed-upon exhibits**: The agreed-upon exhibits shall be filed electronically with the board in PDF format, premarked by number, sequentially, with each exhibit having a colored numeric label (integers only) affixed to it. The agreed-upon exhibits may be submitted in a single PDF file

but, if so, each exhibit shall be separately bookmarked for rapid reference during the hearing. Bar counsel's office will provide a three-hole-punched hard copy to: [ASSISTANT GENERAL COUNSEL NAME] and, upon request, also mailed to: [HEARING COMMITTEE MEMBER, ADDRESS]. Wherever possible, printed pages shall be double-sided, with text appearing on both sides of the page. Exhibit binders must be mailed to those requesting them sufficiently in advance of the due date to ensure they are received on or before the due date, unless otherwise agreed by the requesting hearing committee member(s). Finally, if any witness is appearing in person to testify, one additional "witness copy" binder of the agreed exhibits shall be delivered to the board at or before the commencement of the hearing.

(b) The bar counsel shall Bates-number the parties' final agreed-upon exhibits 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. All 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. Any exhibit that is admitted into evidence or that is accepted *de bene* and requires Bates-numbering may be stricken unless the parties promptly arrange to substitute a properly Bates-numbered version.

(c) **Mandatory Redaction**: All exhibits must, in the absence of an impoundment order, as described below, be redacted so that the document includes at most: (1) the last four digits of any Social Security number, taxpayer identification number (except for an entity's TIN that is already available at www.mass.gov/sec), credit card or other financial account number, driver's license number, state-issued ID card number, passport number, or alien registration number (a dash, X characters, or the phrase "ending in" can be used in place of the omitted digits); (2) the first initial of a person's birth parent's 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.

(i) The obligation to redact a document rests with the offering party.

(ii) Where there is a reason to submit an unredacted document, the party shall obtain an impoundment order prior to offering or submitting the document, and the transmission or filing of the document shall expressly reference the order of impoundment. See SJC Rule 4:01 § 20(4) and BBO Rules §§ 3.18(b) and 3.22(d).

(iii) Exhibits that are not properly redacted may be rejected and returned to the submitting party or parties.

(iv) Any exhibit that is admitted into evidence or that is accepted *de bene* but requires redaction, will not be displayed publicly during the hearing and may, along with any corresponding testimony, be stricken unless the parties promptly arrange to substitute a properly redacted version.

(d) **Disputed exhibits**: Each party shall separately file with the board and serve on the opposing party their lists of disputed exhibits, objections to exhibits with the grounds therefor, and the disputed exhibits themselves in PDF format by the deadline for the submission of agreed exhibits so that they are available for ready use during the hearing as needed. Disputed exhibits shall be sent by the offering party in a separate e-mail to the board and shall not be included with the parties' final agreed-upon exhibits identified above in paragraph 10(a). Any identifying labels, letters, or numbers placed on disputed exhibits by the parties for their convenience shall not constitute marking for identification in the hearing. Exhibit numbers are not to be used, but the parties should assign a letter to each for ease of identification (e.g., [Name of Party] Disputed Ex. A, B, C). Each disputed exhibit should be sent to the board as a separate PDF file, unless another arrangement is made with the assistant general counsel assigned to the case in advance of transmission. Disputed exhibits must also be Bates-numbered and redacted by the offering party, and therefore the parties must coordinate to ensure that there is no duplication with the numbering of the agreed exhibits. A party offering a disputed exhibit at an in-person hearing shall also bring the *original and five copies* to the hearing.

(e) **Other exhibits:** The offering party must send, electronically, to the board and assistant general counsel any exhibit admitted at an in-person hearing that had not previously been sent electronically.

11. 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.

(a) The parties are not required to exchange or list exhibits to be used solely for cross-examination or rebuttal, nor shall they be required to list rebuttal witnesses.

(b) However, for any remote hearing or any remote witness, exhibits to be used for cross-examination or rebuttal must be submitted to the assistant general counsel by e-mail on the day of the hearing on which they are to be used, not later than an hour and a half before the start time, in PDF format, and subject to all the other terms and conditions of paragraph 10(d), above, concerning disputed exhibits. For any in-person witness where a party intends to impeach or rebut testimony, or refresh a witness's recollection, with a document not previously marked as an agreed-upon exhibit, the examining party shall bring the original and five hard copies to the hearing and also send

a PDF of the document to the assistant general counsel assigned to the case, but not to the board.
(c) Unredacted documents intended for use on cross-examination or rebuttal that contain information that must be redacted pursuant to paragraph 10(c), and for which no impoundment order has been issued, will be excluded from evidence and from display during the hearing, whether in person or remote/live-streamed.
(d) During the opening statement, bar counsel shall not refer to any evidence of the respondent's prior discipline. However, the respondent or any witness involved in, or with knowledge of, the prior discipline may be asked and/or may testify about it. While there is no need to introduce evidence of prior discipline as an exhibit, hearing committees shall take administrative notice of it. Even if objected to by the respondent, evidence of prior discipline is admissible and must be considered by the hearing committee and the board. *Matter of Dawkins*, 412 Mass. 90, 96, 1992-DDC-1187 at 7 (SJC 1992).
(e) An admonition, administered to the respondent no earlier than eight years before the filing of the subject petition for discipline, is not entitled to confidentiality, and can be referenced and used as set out above. SJC Rule 4:01 § 20(4). Older admonitions may be used only in accordance with the constraints set out in SJC Rule 4:01 § 8(2)(d).

12. 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 are 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.

13. Any party needing a translator for the presentation of testimony at the hearing shall make this request to [OGC administrative staff] no later than three weeks before the first hearing date.

14. Any pleading or other submission must be signed electronically and filed with the board by e-mail, as described on page 1, above, but need not be in PDF format.

E. Hearing

15. Absent an allowed motion for a remote hearing, the hearing on this matter will take place in person on [DATE], commencing at 10 A.M. and concluding at approximately 4 P.M. daily, at the Board of Bar Overseers, One Beacon Street, 10th Floor, Boston, Massachusetts 02108, and shall not be

rescheduled except for good cause shown. If a motion for a remote hearing has been allowed, the hearing will take place at the same dates and times set forth above but remotely.

16. 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.

17. Please note that the law requires that all witnesses must present or display a form of state or federal photo identification prior to being sworn, and, if appearing remotely, show a copy of the photo identification to the stenographer.

Optional (if at issue)

Bar counsel's/respondent's motion to amend petition/answer is allowed.

By the close of business on [DATE], the respondent shall file and serve his/her revised answer.

The respondent has been advised to seek counsel and has declined to do so.

The respondent has been advised to seek counsel and shall contact the board's general counsel on or before [DATE] to seek assistance in obtaining counsel. There will be no further continuances for the purpose of permitting the respondent to obtain counsel.

[If the respondent has placed his or her medical or psychological condition at issue, then] By the close of business on [DATE], the respondent shall identify and disclose to bar counsel each medical and psychological condition 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, custody, or control; and (2) the name(s) and address(es) of all medical and mental health providers; and (3) executed releases, in a form acceptable to the bar counsel, authorizing the bar counsel or their 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: _____ _____

_____, Esq.
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.

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In 2025, the Board of Bar Overseers changed its reporting for bar discipline cases. As of 2023, we no longer publish the Massachusetts Attorney Discipline Reports (MADR). As of 2026, the BBO website uses a new system to publish and more easily search for cases. Accordingly, the format for case citations has changed. The following Table of Cases uses the new format. Cases may be found on the BBO website by typing in the new format, by typing the case name, or by using search terms. More information about the new format is on the BBO website: decisions.massbbo.org.

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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. While several publications have described the Massachusetts bar discipline process, no work has described it in great detail while also analyzing the sanctions it imposes, and more generally the Massachusetts Rules of Professional Conduct. Here, important cases are reviewed, rules are explained, and practical pointers abound. In this way, this treatise seeks to fill a perceived gap in access to important information—both the substantive and procedural law of bar discipline and the realities of practice before the Board of Bar Overseers—and to make that practice more transparent to participants and observers.

The Board of Bar Overseers was established by the Supreme Judicial Court in 1974 as the regulatory and disciplinary authority for Massachusetts lawyers. The board consists of twelve volunteer members—eight attorneys and four public members—who are appointed by the Supreme Judicial Court. The board's expenses are paid solely from attorneys' annual registration fees; no public funds support it.