

SUPREME JUDICIAL COURT
Boston, Massachusetts 02108

NOTICE OF APPROVAL

Notice is hereby given that the Supreme Judicial Court has approved and promulgated rules as further indicated below.

MARGARET MARSHALL
Chief Justice

1. Court Submitting Rules for Approval:

Board of Bar Overseers

2. Date Rules Submitted for Approval:

February 10, 2009

3. Date Approved and Promulgated by the Supreme Judicial Court:

April 9, 2009

4. Rules or Rules, or Amendments Thereto, Approved and Promulgated:

By striking out the Rules of the Board of Bar Overseers and inserting in lieu thereof the Rules of the Board of Bar Overseers attached hereto.

(The original of this notice is to be filed in the office of the Clerk of the Supreme Judicial Court for the Commonwealth, and a copy to be sent by the Clerk to the court which requested approval of the rules.)

BOARD OF BAR OVERSEERS RULES

CHAPTER 1. GENERAL PROVISIONS

Section 1.1 Title

These rules shall be known and may be cited as the “Rules of the Board of Bar Overseers”, and are hereby promulgated pursuant to Supreme Judicial Court Rule 4:01, Section 5(3)(h).

Section 1.2 Definitions

Subject to additional definitions contained in subsequent provisions of these Rules, the following words and phrases shall have, unless the context clearly indicates otherwise, the meanings given to them in this section.

ADMINISTRATOR: The Administrator as established by Section 5.5 of these Board Rules.

BAR COUNSEL: Bar Counsel or Bar Counsel’s designee.

BOARD: The Board of Bar Overseers as appointed from time to time by the Supreme Judicial Court.

BOARD CHAIR: The Chair of the Board of Bar Overseers.

BOARD RULES: The provisions of the Rules of the Board of Bar Overseers of the Commonwealth of Massachusetts. Also referred to as "these Rules."

CHARGING MEMORANDUM: A confidential memorandum prepared by Bar Counsel solely for the consideration of a Reviewing Board Member when discipline is recommended which describes the investigation undertaken, the disciplinary charges to be brought, the facts uncovered by the investigation which support the charges, the Respondent's disciplinary history, if any, and Bar Counsel’s reasons for recommending that discipline be imposed.

COMPLAINANT: Any person who has filed a complaint.

COMPLAINT: A statement of alleged misconduct or request for investigation filed with the Board or Bar Counsel pursuant to Sections 2.1 through 2.4 of these Rules.

COURT: Supreme Judicial Court of the Commonwealth of Massachusetts.

DISCIPLINARY RULES: S.J.C. Rules 3:07 and Chapter 4.

EXPEDITED HEARING: A proceeding under section 8(4) of S.J.C. Rule 4:01 following a lawyer’s rejection of an admonition.

FORMAL CHARGES: Charges filed pursuant to Chapter 3 of these Rules in which Bar Counsel seeks public discipline.

FORMAL PROCEEDING: A proceeding subject to Chapter 3 of these Board Rules in which Bar Counsel seeks public discipline.

HEARING COMMITTEE: A hearing committee appointed by the Board under section 5(3)(c) of S.J.C. Rule 4:01. Unless otherwise provided herein, the words "hearing committee" used throughout this rule shall also mean a hearing panel of the Board or a special hearing officer.

INFORMATION: Proceedings filed by the Board in the Supreme Judicial Court in any case where disbarment or suspension of a lawyer is sought or recommended or when a lawyer or Bar Counsel has appealed from a Board decision to administer a public reprimand or to dismiss a case or to administer an admonition after formal proceedings.

INVESTIGATION: Inquiry into facts under the direction of Bar Counsel or the Board with respect to alleged misconduct or to reinstatement.

NOTARIAL OFFICER: An officer authorized under Section 4.12 of these Rules to take depositions for use before a hearing committee, hearing panel, or special hearing officer.

PARTIES: The parties to a proceeding under these Rules are Bar Counsel and the Respondent.

PETITION FOR DISCIPLINE: A formal pleading filed by Bar Counsel with the Board pursuant to section 8(3) of the Supreme Judicial Court Rule 4:01 requesting disciplinary action by the Board for alleged violations of the Rules of Professional Conduct or Supreme Judicial Court Rule 4:01.

PROOF OF SERVICE: A certificate of service complying with Sections 3.11 and 3.12 of these Board Rules.

RESPONDENT: A lawyer admitted to or engaging in the practice of law in this Commonwealth or any lawyer specially admitted by a Court of this Commonwealth for a particular proceeding, who in either case is alleged to have been guilty of misconduct in a complaint.

REVIEWING BOARD MEMBER: A member of the Board who has been designated by the Board Chair to review recommendations submitted by Bar Counsel.

SPECIAL HEARING OFFICER: A lawyer appointed by the Board to hear charges of misconduct when, in view of the anticipated length of the hearing or for other reasons, the Board determines that a speedy and just disposition would be better accomplished by such appointment than by referring the matter to a hearing committee or panel of the Board.

CHAPTER 2. INVESTIGATIONS AND INFORMAL PROCEEDINGS

SUBCHAPTER A. PRELIMINARY PROVISIONS

Section 2.1 Initiation of Investigations

(a) **At Direction of Board.** Upon the order of the Board, Bar Counsel shall undertake and complete an investigation of the conduct of any lawyer as may be specified in the order.

(b) **By Bar Counsel**

(1) Bar Counsel shall undertake and complete an investigation of all matters involving alleged violations of the Rules of Professional Conduct filed in accordance with Section 2.2 of

these Rules, provided that Bar Counsel need not pursue any matter that Bar Counsel in his or her discretion determines to be frivolous or to fall outside the Board's jurisdiction or to involve allegations that do not warrant further action. 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.

(2) Bar Counsel may undertake an investigation of any conduct by a lawyer which may violate the Rules of Professional Conduct.

Section 2.2 Contents of Complaint

Each complaint relating to alleged misconduct of a lawyer shall be in writing and signed by the complainant and shall contain a brief statement of the facts upon which the complaint is based. Verifications of the complaint shall not be required. If necessary, Bar Counsel will assist the complainant in reducing the complaint to writing.

Section 2.3 [Reserved]

Section 2.4 Complaints Against Bar Counsel and the Board

Complaints against the Bar Counsel, Assistant Bar Counsel or any member of the Board involving alleged violations of the Rules of Professional Conduct shall be submitted directly to the Board for disposition pursuant to Section 5.6(c)(2) of these Rules.

Section 2.5 [Reserved]

Section 2.6 Notification to Respondent

Before making a recommendation of admonition or prosecution of formal charges as provided in Sections 2.7(3)(A) or 2.7(3)(C) of these Rules, Bar Counsel shall forward to the Respondent a request for a statement of the Respondent's position, notifying the Respondent of:

- (1) the nature of the complaint, and, if the investigation has been initiated by the filing of a written complaint and unless Bar Counsel determines otherwise for good cause, the name and address of the complainant;
- (2) the Respondent's right and obligation to state his or her position with respect to the allegations against him or her within 20 days from the date of such notice unless a shorter time is fixed by Bar Counsel in such notice, and
- (3) the fact that a copy of the Respondent's reply to the complaint may be forwarded to the complainant.

Failure of the Respondent to cooperate with Bar Counsel's request and any subsequent investigation may result in disciplinary action or administrative suspension under Supreme Judicial Court Rule 4:01, section 3.

Section 2.7 Bar Counsel's Recommendation

Following completion of any investigation of the complaint that he or she deems appropriate and after consideration of any statement of position filed by the Respondent, Bar Counsel may take any one of the following actions:

- (1) Close the complaint or make a determination that a complaint need not be pursued, subject to the notification requirements of Section 2.10.
- (2) Close a matter after adjustment, informal conference, or reference to and completion of diversion to an alternative educational, remedial, or rehabilitative program.
- (3) Recommend to the Board:
 - (A) that an admonition be administered in those cases in which a violation of the Rules of Professional Conduct is found which is determined to be of insufficient gravity to warrant the prosecution of formal charges; or
 - (B) that public discipline be imposed by agreement; or
 - (C) that formal charges be instituted.

Section 2.8 Review of Bar Counsel's Recommendation

(a) Recommendation Other Than That Formal Charges Be Prosecuted.

(1) Bar Counsel shall submit to a Reviewing Board Member, along with the file, Bar Counsel's recommendation that an admonition be administered, or any request from a complainant for review of Bar Counsel's determination not to pursue or to close a complaint pursuant to Section 2.7(1) and 2.10(1) of these Rules. When Bar Counsel's recommendation is to administer an admonition, Bar Counsel shall prepare and provide to the Reviewing Board Member a charging memorandum.

(2) The Reviewing Board Member may adopt, reject, or modify Bar Counsel's recommendation. If the Reviewing Board Member modifies or rejects the recommendation of Bar Counsel, he or she shall set forth this determination and the reasons therefor on the recommendation form. The Reviewing Board Member may confer with Bar Counsel in making his or her determination.

(b) Recommendation That Formal Charges Be Prosecuted (No Agreement).

(1) *Bar Counsel's Recommendation.* When the prosecution of formal charges is recommended pursuant to Section 2.7(3)(C) or when Bar Counsel seeks to amend a previously approved petition for discipline by adding or deleting charges, Bar Counsel shall prepare a petition for discipline or an amended petition for discipline and a charging memorandum or revised charging memorandum.

(2) *Transmission of File.* Bar Counsel shall forward to the Reviewing Board Member the documents set forth in subsection (b)(1) and the file.

(3) *Standard of Review.* In reviewing a recommendation to prosecute formal charges or to add or delete previously approved charges, the Reviewing Board Member shall make a determination

- (A) whether the charging memorandum or revised charging memorandum supports the charges in the petition for discipline or the amended petition for discipline, and, if applicable, whether the revised charging memorandum adequately justifies the deletion of previously approved charges, and

(B) whether, if the charges in the petition for discipline or amended petition for discipline were to be proved by a preponderance of the evidence, the case would warrant public discipline.

(4) *Action by Reviewing Board Member.* The Reviewing Board Member may approve, modify, or reject Bar Counsel's recommendations under subsection (b)(1). If the Reviewing Board Member modifies or rejects Bar Counsel's recommendation, he or she shall set forth this determination and the reasons therefor on the recommendation forms. The Reviewing Board Member may confer with Bar Counsel in making his or her determination.

(5) *Use of Charging Memorandum.* The Charging Memorandum shall be considered only by the Reviewing Board Member and by the Board Chair on appeal pursuant to Section 2.9 of these Rules and shall not be provided to the hearing committee, hearing panel, or special hearing officer, or to the Board.

(c) Recommendation that Public Discipline be Imposed by Agreement. When the parties recommend under Section 2.7(3)(B) of these Rules that public discipline be imposed by agreement, Bar Counsel shall prepare a petition for discipline and the matter shall be referred directly to the Board under the procedures set forth in Section 3.19(d) and (e).

Section 2.9 Appeal by Bar Counsel from Modification or Rejection of Recommendation

(a) General Rule. Bar Counsel may appeal to the Board Chair from a modification or rejection of his or her recommendation by the Reviewing Board Member.

The appeal shall state briefly the grounds relied upon by Bar Counsel for the appeal and shall be filed with the Board within 14 days after the decision by the Reviewing Board Member was noted, which time limit is jurisdictional.

(b) Action by Chair. The Board Chair shall consider the appeal and may in his or her discretion adopt, modify, or reject any action recommended by Bar Counsel or by the Reviewing Board Member.

(c) Review by Board. When Bar Counsel's recommendation is that formal charges be prosecuted, Bar Counsel may appeal the decision of the Board Chair to the full Board. The appeal shall state briefly the grounds relied upon by Bar Counsel for the appeal and shall be filed with the Board within 14 days after the decision of the Board Chair is filed, which time limit is jurisdictional. The Board Chair's determination as to Bar Counsel's recommendation of an admonition shall be final and not subject to objection under Section 2.9(e).

(d) Appeals Administrative. Appeals under this section shall be administrative and not adversary in nature. Copies of the appeal shall be available only to the Board, and the Respondent shall not be deemed a party to the appeal or have any right to be heard with respect thereto.

(e) Filing of Information. If Bar Counsel objects to having the matter concluded by dismissal, the Board shall file an Information pursuant to Section 3.58 of these Rules.

Section 2.10 Notification of Disposition of Complaint

(1) When Bar Counsel determines not to investigate a complaint or to close a complaint, Bar Counsel shall notify the complainant that the complaint is not being pursued, or, if a file has been opened, the complainant and the Respondent that the complaint has been closed.

(A) Bar Counsel's notice to the complainant shall include (i) the reasons for not investigating a complaint or for closing the file and (ii) a letter from the Board advising the complainant that he or she has a right to request review of Bar Counsel's decision by a member of the Board and that such request must be made in writing no later than 14 days after the date of notification by Bar Counsel. Bar Counsel's notice may include, if appropriate, information concerning other forums for consideration of the complaint.

(B) If the complainant requests review of Bar Counsel's decision under this section, Bar Counsel shall transmit the file to the Board for review pursuant to Section 2.8 of these Rules.

(2) When the matter has been disposed of after adjustment, informal conference, or diversion to an alternative educational, remedial, or rehabilitative program, Bar Counsel shall so notify the complainant and the Respondent.

(3) In any event, Bar Counsel may notify the complainant, if appropriate, that the complainant may present his or her complaint to another jurisdiction, to a fee disputes committee or to any other duly constituted forum for the consideration of the complaint.

(4) If an admonition is administered, the complainant shall be notified after the admonition becomes final. If a public reprimand by agreement is imposed, an Information is filed by agreement of the parties with approval of the Board, or formal proceedings are commenced, the complainant shall be notified at the time that occurs.

SUBCHAPTER B. FINAL DISPOSITION WITHOUT FORMAL PROCEEDINGS

Section 2.11 Admonition

When the matter is being disposed of by an admonition, Bar Counsel shall make service of the admonition on the Respondent, together with a summary of the basis for the admonition and written notice of the Respondent's right to demand in writing within 14 days of the date of service that the admonition be vacated and a hearing provided, as set forth in Section 2.12. The notice served with the admonition shall advise the Respondent that failure to demand within 14 days that the admonition be vacated and to submit a written statement of objections as provided in Section 2.12 constitutes consent to the admonition and that failure to set forth matters in mitigation constitutes waiver of the right to introduce evidence of mitigation at the hearing. A record shall be made of the fact of and basis for the admonition, which record shall be retained as provided in Section 5.10 of these Rules.

Section 2.12 Demand by Respondent for Hearing on Admonition

(1) *General Provisions:* A Respondent shall be entitled to demand that an admonition be vacated and a hearing provided. The demand shall be in writing and shall be filed with the Board, and a copy served on Bar Counsel, within 14 days after the date of service of the admonition, which time limit is jurisdictional. The Respondent must submit with the demand a statement of objections to the factual allegations and disciplinary rule violations set forth in the summary served with the admonition pursuant to Section 2.11. The statement of objections must

specify the reasons in detail for rejecting the admonition and include any matters in mitigation. Failure of the Respondent to demand within 14 days that the admonition be vacated and to provide a statement of objections constitutes consent to the admonition and failure to set forth matters in mitigation constitutes waiver of the right to introduce evidence of mitigation at hearing.

(2) Additional Procedural Requirements:

- (a) All proceedings and the record shall be confidential pursuant to Section 3.22(b).
- (b) No investigatory subpoenas shall be issued after expedited disciplinary proceedings are commenced.
- (c) The matter shall be assigned to a special hearing officer and shall be set for hearing within 30 days of the filing of proceedings except for good cause shown.
- (d) In addition to the notice of hearing requirements of Section 3.21, the notice of hearing for expedited hearings shall also set a date for the exchange between or among the parties of witness lists and exhibits that the party intends to use in his or her case-in-chief or for matters in aggravation or mitigation; a date for their exchange of objections to proposed witnesses and identified exhibits and supplemental designation of exhibits and witnesses; and a date for filing with the Board of final witness and exhibit lists and objections thereto, agreed exhibits, and any stipulations of the parties.
- (e) Except for good cause shown, a prehearing conference shall not be held prior to an expedited disciplinary hearing.
- (f) The burden of proof in such hearing shall be as set forth in Section 3.28.
- (g) Except for good cause shown, no briefs or requests for findings and rulings shall be filed following an expedited disciplinary hearing.

SUBCHAPTER C. DEFERMENTS

Section 2.13 Deferment of Matters Involving Related Pending Civil or Criminal Litigation.

An application for deferment of action under Supreme Judicial Court Rule 4:01, Section 11, may be made by the respondent or Bar Counsel. Such application shall be filed in the office of the Board and served on the opposing party. The other party may file and serve a written response thereto within 7 days thereafter.

After the response to a motion for deferment has been filed, or after the time for filing a response has elapsed, the matter shall be referred for determination to a Reviewing Board Member.

CHAPTER 3. DISCIPLINARY PROCEEDINGS

SUBCHAPTER A. PRELIMINARY PROVISIONS

Section 3.1 Construction of Chapter

This chapter is promulgated for the purpose of assisting Bar Counsel, the Respondent and the Board to develop the facts relating to, and to reach a just and proper determination of complaints. The Board will not hold any action of a hearing committee, hearing panel, or special hearing officer invalid by reason of any nonprejudicial irregularity, or for any error not resulting in a miscarriage of justice.

Section 3.2 Procedure to Apply

Except where inconsistent with these Rules, proceedings before hearing committees, hearing panels, special hearing officers and the Board shall conform generally to the practice in adjudicatory proceedings under Chapter 30A of the General Laws (State Administrative Procedure).

Section 3.3 Filing; Timely Filing Required

Pleadings or other papers in formal proceedings shall be filed at the office of the Board and copies sent or delivered by the filing party to each member of the hearing committee or panel or special hearing officer unless otherwise directed. If the filing of a pleading or paper is subject to a time limit, it must be received at the office of the Board within the time limit. Except as otherwise provided by these Rules, on motion filed within the time limits established by this section, the Board Chair may shorten or extend the time for filing for good cause shown. The date of receipt by the office of the Board, and not the date of deposit in the mails, is determinative.

Section 3.4 Representation of Respondent

(a) Appearance Pro Se. When a Respondent appears in his or her own behalf in a disciplinary proceeding, the Respondent shall file with the Board, with proof of service upon Bar Counsel, an address, including a street address, at which any notice or other written communication may be sent and a telephone number where the Respondent can be reached.

(b) Representation of Respondent by Counsel. When a Respondent is represented by counsel in a disciplinary proceeding, counsel shall file with the Board, with proof of service upon Bar Counsel, a written notice of such appearance, which shall state his or her name, address and telephone number, the name and address of the Respondent on whose behalf he or she appears, and the caption and file number of the subject proceeding. Thereafter, any notice or other written communication required to be served on or furnished to a Respondent may be sent to the counsel of record for such Respondent at the stated address of the counsel in lieu of transmission to the Respondent.

(c) Service. Any notice or pleading required to be served on the Respondent personally under these Rules may be served in hand or by addressing it by certified, registered, or first class mail to the address furnished by the Respondent during the proceeding. If the Respondent has not furnished an address during the proceeding, service may be made by addressing it by

certified, registered, or first class mail to the address furnished in the last registration statement filed by the Respondent in accordance with Supreme Judicial Court Rule 4:02. Service by mail is complete upon mailing.

(d) Assistance in Obtaining Counsel for a Respondent. If a Respondent in a disciplinary proceeding desires counsel and cannot afford to retain counsel, then, upon application, the Board will seek to assist the Respondent to obtain counsel either at a reduced or no cost. Nothing in this subsection (d) accords any substantive right to the Respondent with respect to the appointment or payment of counsel.

(e) Policies Relating to Conflicts of Interest.

(1) No member of the Board, or partner or associate of a Board member, shall appear as counsel for a Respondent in a disciplinary proceeding, provided that no partner or associate of a Board member shall be required to withdraw from a disciplinary proceeding pending at the time the Board member commences his or her term.

(2) No member of any hearing committee or hearing panel, and no special hearing officer shall appear as counsel for a Respondent in a disciplinary proceeding.

(3) No partner or associate of a hearing committee member shall appear as counsel for a Respondent in a disciplinary proceeding before the hearing committee on which the said hearing committee member serves. No partner or associate of a special hearing officer shall appear as counsel for a Respondent in a disciplinary proceeding before the special hearing officer.

(4) No member of the Board or of any hearing committee shall appear voluntarily or make a submission as a character witness in a disciplinary or reinstatement proceeding.

Section 3.5 Format of Pleadings and Documents

(a) Format. Pleadings or other documents filed in disciplinary proceedings shall be typed on letter size paper, 8½ inches wide by 11 inches long.

(b) Binding. Pleadings and other documents, other than correspondence, shall be bound by staples only.

(c) Incorporation by Reference. Any document on file with the Board in a disciplinary proceeding may be incorporated by reference into a subsequently filed pleading or other document.

(d) Identification. Pleadings or other documents filed in a disciplinary proceeding shall set forth:

- (1) The caption and docket number of the proceeding.
- (2) A brief descriptive title of the pleading or document.

(e) Copies. All pleadings or other documents filed in a disciplinary proceeding (other than correspondence) shall be filed with the Board. In any matter pending before a hearing committee, a hearing panel, or a special hearing officer, a conformed copy of each such paper, including all exhibits, if any, shall be furnished to the special hearing officer and to each member of the hearing committee or hearing panel. Whenever necessary or convenient, the Board, the

hearing committee, the hearing panel, or the special hearing officer may order that a greater or lesser number of copies be filed.

Section 3.6 Execution

(a) **Signature.** Except as may be otherwise ordered or requested by the Board the original of each pleading or other document shall be signed in ink by the party or the party's counsel, and shall show the office address and telephone number of such party or counsel. All other copies filed shall be fully conformed thereto.

(b) **Effect.** The signature of the person subscribing any document filed in a disciplinary proceeding constitutes a certificate that the signer has read the document being subscribed and filed, and knows the contents thereof; that if executed in any representative capacity, the document has been subscribed and executed in the capacity specified upon the document with full power and authority to do so; that the contents are true as stated, except as to matters and things, if any, stated on information and belief, and that as to those matters and things, the signer believes them to be true.

(c) **Verification.** No written statement in any proceeding required to be verified by affidavit shall be required to be verified by oath or affirmation if it contains or is verified by a written declaration that it is made under the penalties of perjury.

Section 3.7 Continuances

(a) **Avoidance of Delay.** All disciplinary proceedings under these Rules shall be as expeditious as possible, and all time limits shall be mandatory and not discretionary.

(b) **Continuances.** The chair of a hearing committee or hearing panel, or a special hearing officer, may grant an extension of time in a disciplinary proceeding.

(c) **Absence of Hearing Committee or Hearing Panel Member.** The absence of a committee or panel member from any hearing shall not be cause for continuing the hearing as long as a quorum of the hearing committee or panel is present. Such member may participate fully in all deliberations of the committee so long as the transcript of the hearing at which he or she was absent is available to him or her.

Section 3.8 Service of Documents by the Board

Orders, notices and documents other than subpoenas originating with the Board shall be served by the Board by delivery in person or by mailing a copy thereof to the person to be served or the person's counsel.

Section 3.9 Service of Documents by a Party

All pleadings, briefs and other documents filed in disciplinary proceedings, when filed or tendered to the Board for filing, shall be served upon all parties to the proceeding. Such service shall be made by delivery in person or by mail.

Section 3.10 Date of Service of Documents

The date of service shall be the day when the document served is deposited in the United States mail, or is delivered in person, as the case may be.

Section 3.11 Proof of Service of Documents

There shall accompany and be attached to the original of each pleading or other document filed with the Board, when service is required to be made by the parties, a certificate of service substantially in the form prescribed by Section 3.12 of these Rules. All other copies filed shall be fully conformed thereto.

Section 3.12 Form of Certificate of Service

I hereby certify that I have this day served by (indicate method of service) the foregoing document upon all parties of record in this proceeding. Dated this _____ day of _____, ____.

(Signature)

Counsel for _____

SUBCHAPTER B. PREHEARING AND HEARING PROCEEDINGS

Section 3.13 Institution of Disciplinary Proceedings

(a) Bar Counsel shall institute formal disciplinary proceedings by filing with the Board a petition under Section 3.14 of these Rules in either of the following cases:

(1) Pursuant to a referral from the Supreme Judicial Court under Bar Disciplinary Rule 4:01, sections 12(4) and (5), following the conviction of the Respondent for a crime.

(2) Pursuant to a determination to institute formal proceedings made under Chapter 2 of these Rules.

(b) When the Respondent vacates an admonition and demands a hearing, Bar Counsel shall institute expedited disciplinary proceedings under section 8(4) of S.J.C. Rule 4:01 and Section 2.12 of these Rules.

Section 3.14 Petition for Discipline

(a) **Caption.** A petition for discipline shall be captioned as follows:

**COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT**

<p>BAR COUNSEL,</p> <p>Petitioner</p> <p>vs.</p> <p>James Roe,</p> <p>Respondent</p>
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File No.

(b) **Contents.** The petition shall set forth specific charges of alleged misconduct.

Section 3.15 Service of Petition On Respondent and Answer

(a) A copy of the petition shall be served together with a notice from the Board which shall

(1) Set twenty days after such service upon the respondent as the time for answering.

(2) Advise the respondent that failure to file a timely answer to the petition shall be deemed an admission of the charges and that averments in the petition are admitted when not denied in the answer.

(3) Advise the respondent that failure without good cause to file a timely answer shall be deemed an act of professional misconduct in violation of Supreme Judicial Court Rule 4:01, Section 3(1)(c), and shall be grounds for administrative suspension pursuant to Supreme Judicial Court Rule 4:01, Section 3(2).

(b) Service of the petition shall be made by Bar Counsel.

(c) The respondent shall file an answer with the Board and serve a copy on Bar Counsel.

(d) **Contents of Answer.** The answer shall be in writing, and shall state fully and completely the nature of the defense. The answer shall 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. Averments in the petition are admitted when not denied in the answer in accordance with this section.

(e) **Failure to Answer In Accordance With the Rules.** The allegations in the petition for discipline shall be deemed admitted if the respondent fails to file a timely answer.

(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.

(g) **Procedure upon Failure to Answer.** If no answer is filed within the time limit established by this section, the Board shall promptly notify the respondent that the allegations of the petition have been deemed admitted and that the opportunity to present evidence in mitigation has been waived. Unless Bar Counsel requests a hearing on matters in aggravation, the Board shall consider the matter of disposition on the basis of the admitted charges. The Board may order the parties to submit briefs.

(h) **Motion for Relief from Default.** Within twenty days of the date of the notice required by subsection (g) of this section, the respondent may file and serve a motion for relief from default. For good cause shown, the Board Chair may order that the default be removed and that the respondent be permitted to file an answer on or before a date determined by the Board Chair.

Section 3.16 Amendment of Pleadings

An amendment of any petition for discipline or other pleading may be made only on leave granted by a Board member or the hearing committee, hearing panel, or special hearing officer before which the matter is then pending.

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.

(b) **Resolution of Disputes.** Any dispute arising under this rule shall be resolved by the chair of the hearing committee or hearing panel or by the special hearing officer, as the case may be, upon written application. All discovery orders by the chair or special hearing officer are interlocutory and may not be appealed or reviewed prior to the filing of a hearing report.

Section 3.18 Motions

(a) General Provisions.

(1) All motions shall be filed at least 10 days before the hearing, except upon a showing that the basis for the motion was not earlier known to or ascertainable by the moving party.

(2) A party wishing to respond to a motion must file a response within 7 days after service of the motion. The time for filing a response shall not be shortened or extended except for good cause shown.

(3) No motion or response grounded on facts shall be considered unless the facts are verified by affidavit, are established by the pleadings or the record, or are agreed to by the parties in writing.

(4) All motions other than motions filed pursuant to subsections (b) or (c) of this section shall be determined by the chair of the hearing committee or hearing panel or special hearing officer.

(5) All motions shall be determined on the papers, without hearing or oral argument.

(6) Except as to the allowance of a motion to dismiss under subsection (b) and as to rulings that the moving party alleges exceed the jurisdiction or authority of the chair of the hearing committee or panel, special hearing officer, or Board Chair, rulings on motions shall control the subsequent course of the proceeding and shall not be appealed or reviewed prior to the issuance of the hearing report.

(b) Motions to Dismiss.

(1) Motions to dismiss the petition for discipline or any charges contained therein shall be determined by the Chair of the Board or another member of the Board designated by the Board Chair.

(2) The filing of a motion to dismiss shall not stay a scheduled hearing except by order of the Board Chair or other member of the Board designated by the Board Chair for good cause shown.

(3) A party may appeal from a dismissal of a petition or charge by filing a brief on appeal within 7 days after service of the decision. An opposing party may file a response within 7 days after service of such appeal. The appeal shall be decided by the Board at its next meeting after the response period has expired. Dismissal of a charge does not stay proceedings on other charges in the petition for discipline.

(c) Motions for Issue Preclusion. Motions for the application of issue preclusion shall be determined by the Chair of the Board or the Board Chair's designee.

Section 3.19 Assignment for Hearing

(a) Hearing shall be held before a hearing committee, a hearing panel, a special hearing officer, or the full Board, at the discretion of the Board Chair. Unless otherwise stated the words "hearing committee" as appearing in Sections 3.20 through 3.49 of the Rules shall also mean a special hearing officer, a hearing panel or the full Board, where appropriate.

(b) If there are any contested issues raised by the answer, or if the respondent requests the opportunity to be heard in mitigation, the matter shall be assigned for hearing to an appropriate hearing committee, hearing panel, special hearing officer, or to the full Board.

(c) In the event the respondent files an answer admitting the charges, and does not therein request the opportunity to be heard in mitigation, but does not reach agreement with Bar Counsel on disposition, then the matter shall be assigned to a hearing committee, a panel of the Board or the full Board for hearing on disposition at which the parties shall be given the opportunity to present recommendations and argument on disposition, and evidence of prior disciplinary action or the lack thereof.

(d) In the event the respondent files an answer admitting the charges, does not therein request the opportunity to be heard in mitigation, and reaches agreement with Bar Counsel on a joint recommendation that the matter be concluded by a public reprimand or a suspension, then

the matter shall be referred directly to the Board. If the Board agrees that a joint recommendation for a public reprimand is appropriate under the circumstances, the Board shall order a public reprimand without further proceedings. If the Board agrees that a joint recommendation for suspension is appropriate under the circumstances, it shall file an Information against the respondent in accordance with Section 3.58 of these Rules. A tie vote by the Board on a joint recommendation shall constitute a rejection of the recommendation.

(e) If the Board rejects the parties' joint recommendation filed under Section 3.19(d) of these rules, it shall issue a preliminary decision explaining the reasons for such rejection, and the parties shall have fourteen days from the date of service of the vote on the parties to file further briefs in support of the recommended disposition. If the Board thereafter upholds its preliminary decision to reject the joint recommendation of the parties, the Board shall state the reasons for its vote and the matter shall proceed pursuant to the provisions of Disciplinary Rule 4:01, Section 8(6), and Sections 3.55-3.58 of these rules unless the parties have reserved the right to a hearing on the charges or on discipline. If the parties have reserved the right to a hearing, they may, unless they have otherwise agreed, then amend their pleadings without prejudice, and the matter shall be assigned for hearing to an appropriate hearing committee, special hearing officer, a hearing panel of the Board, or to the full Board.

(f) Composition of Committee. If the matter is assigned to a hearing committee or hearing panel, the Board Chair or his or her designee shall designate the one of the members of the hearing committee or hearing panel to serve as chair.

Section 3.20 Place of Hearing

Unless the Board Chair or the Chair's designee specifies a different venue, a hearing on a petition for discipline shall take place at the offices of the Board. The Board chair or the chair's designee shall consider the convenience of the complainant, witnesses, the respondent and hearing committee in selecting a hearing location.

Section 3.21 Notice of Hearing

The Board Chair or the Chair's designee shall give notice to the parties of the date and place set for hearing.

The notice of hearing shall be served at least 15 days in advance thereof and shall advise the Respondent that the Respondent is entitled to be represented by counsel, to cross-examine witnesses, and to present evidence in his or her own behalf. The notice shall further advise the Respondent that failure to appear at a hearing shall be deemed an act of professional misconduct in violation of Supreme Judicial Court Rule 4:01, section 3(1)(c), and shall be grounds for administrative suspension pursuant to Supreme Judicial Court Rule 4:01, section 3(2).

SUBCHAPTER C. HEARINGS

Section 3.22 Public Access to Proceedings; Protective Orders

(a) Except as otherwise provided in this section and in Supreme Judicial Court Rule 4:01, section 20, the Board and Bar Counsel shall keep confidential all information involving allegations of misconduct by a lawyer.

(b) Expedited disciplinary hearings pursuant to Supreme Judicial Court Rule 4:01, section 8(4) and Section 2.12 of these Rules shall be confidential. If, after hearing, the special hearing officer recommends that the matter be remanded for formal proceedings, the matter becomes public when a petition for discipline is served as set forth in subsection (c) of this rule.

(c) Upon the service of a petition for discipline pursuant to Section 3.15 of these Rules, the Board's proceedings are open to the public, except for:

(1) deliberations of the hearing committee, the hearing panel, the special hearing officer or the Board, and documents reflective of those deliberations, including without limitation charging memoranda, draft reports, and minutes of Board meetings;

(2) information with respect to which the Board has issued a protective order under paragraph (d) hereof;

(3) information with respect to which the Supreme Judicial Court has issued a protective order on appeal from a Board decision denying such order; or

(4) further proceedings following the recommendation by a hearing committee, a hearing panel, a special hearing officer or an appeal panel, or following an order of the Board or the Supreme Judicial Court, that an admonition be imposed or that a petition for discipline be dismissed. In such event, the record shall be sealed and the proceedings shall be closed until and unless the Board or the Supreme Judicial Court orders otherwise.

(d) In order to protect the interests of a complainant, witness, third party, or Respondent-attorney, the Board may, upon application of Bar Counsel or any affected person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application. If bar discipline or other professional discipline has been imposed on the Respondent on a prior occasion, in this Commonwealth or elsewhere, the fact that the discipline imposed is or has been confidential shall not constitute good cause for the issuance of a protective order. Bar Counsel or any affected person may appeal from an order granting or denying an application for a protective order by filing a notice of appeal with the Clerk of the Supreme Judicial Court for Suffolk County within 7 days after the date of the notice of the Board's action, which time limit shall be jurisdictional. The pendency of such an appeal shall not be grounds to stay proceedings before a hearing committee, a hearing panel, a special hearing officer, or any panel of the Board.

Section 3.23 Mandatory Prehearing Conferences

(a) General Provisions.

(1) In all cases, except for matters arising from a conviction of a crime and expedited hearings pursuant to Section 2.12, a prehearing conference shall be held. A prehearing conference shall be held in conviction cases if a party requests such a conference within 30 days after the answer is filed. Except for good cause shown, a prehearing conference shall not be held prior to an expedited disciplinary hearing pursuant to Section 2.12 of these Rules.

(2) The conference shall be conducted by the chair of the hearing committee or hearing panel or the special hearing officer. Additional conferences may be held as necessary.

(3) The Respondent, the Respondent's attorney if the Respondent is represented by counsel, and Bar Counsel shall attend the prehearing conference.

(4) The parties and counsel shall be fully prepared for a useful discussion and resolution, to the extent possible, of all procedural and substantive issues in the proceeding and shall be fully authorized to make commitments regarding those matters.

(5) Except as to orders that the moving party alleges exceed the jurisdiction or authority of the chair of the hearing committee or panel, special hearing officer, or Board Chair, orders entered at a prehearing conference shall control the subsequent course of the proceeding and shall not be appealed or reviewed prior to the issuance of the hearing report.

(6) Prehearing deadlines set at a prehearing conference shall not be extended except for good cause shown.

(b) Purpose of Prehearing Conference and Action at Conference. At the mandatory prehearing conference, the following matters may be considered and orders thereon entered:

(1) Settling any discovery disputes within the jurisdiction of the hearing committee, hearing panel or special hearing officer.

(2) Identifying contested issues.

(3) Obtaining admissions or stipulations as to facts not in dispute, the authenticity of documents, and other matters that might properly shorten the hearing.

(4) Limiting the number of witnesses.

(5) Setting deadlines for the completion of any approved depositions ordered by or under the supervision of the chair of the hearing committee or panel or special hearing officer and for filing motions in limine and other prehearing motions.

(6) Establishing a date for the exchange between or among the parties of witness and exhibit lists and exhibits intended for use in the party's case-in-chief or for matters in aggravation and mitigation; a date for the parties' exchange of objections to proposed witnesses and exhibits and supplemental designation of witnesses and exhibits; and a date for filing final witness and exhibit lists and objections thereto, agreed exhibits, and any stipulations of the parties.

(a) When a party proposes to introduce testimony from an expert witness, the party shall be required to disclose the qualifications of the expert and the subject matter on which the expert is expected to testify and to state the substance of facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(b) When the Respondent has placed his or her physical or mental status in issue, the Respondent shall identify and disclose to Bar Counsel in writing the dates and nature of every 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, treatment, counseling or other services. For each such condition, the Respondent shall provide to Bar Counsel (1) the name and address of every hospital, doctor, therapist, counselor and other provider from whom the Respondent received any services, (2) all hospital, medical, psychiatric, psychological, counseling and other records and reports in the Respondent's possession and control, (3) an executed release,

in a form acceptable to the provider, authorizing Bar Counsel or Bar Counsel's representatives to communicate with and received all available records and information from each provider.

(c) The objections to a witness or exhibit must be specified, and, if an objection is made to the authenticity of a proposed exhibit, must be further supported by a specified good faith basis questioning the authenticity of the document. Objections not made timely and in accordance with these requirements and the prehearing orders are waived. A party shall be precluded from calling any witness and introducing in evidence any document not disclosed by that party in accordance with these requirements and the prehearing orders, except upon a showing that the witness or exhibit was not earlier known to or ascertainable by the party or for other good cause shown.

(7) Confirming or rescheduling the hearing date.

(8) Such other matters as may properly be dealt with to assist in the prompt and orderly conduct and disposition of the proceeding.

Section 3.24 [Reserved]

Section 3.25 Authority of Hearing Committee, Hearing Panel, or Special Hearing Officer at Prehearing Conferences

The person presiding at any prehearing conference may make rulings as to procedural matters which the committee would be authorized to rule upon during the course of the proceeding and which it appears may appropriately and usefully be disposed of at an early stage. In addition, where it appears that the proceeding would be substantially expedited by distribution of proposed exhibits reasonably in advance of the hearing session, the person presiding may, with due regard for the convenience of the respondent and Bar Counsel, direct such advance distribution by a prescribed date.

Section 3.26 Rulings of Hearing Committee, Hearing Panel, or Special Hearing Officer at Prehearing Conferences

The rulings made at such conference shall control the subsequent course of the hearing, unless modified by the Board chair for good cause shown.

Section 3.27 Appearances

The hearing committee, hearing panel, or special hearing officer shall cause to be entered upon the record all appearances, with a notation in whose behalf each appearance is made.

Section 3.28 Burden of Proof

In all disciplinary proceedings Bar Counsel shall have the burden of proof by a preponderance of the evidence, shall initiate the presentation of evidence, and may present rebuttal evidence. The Respondent shall have the burden of proof by a preponderance of the evidence on affirmative defenses and matters in mitigation.

Section 3.29 Presentation by the Parties

(a) General Rule. Respondent and Bar Counsel shall have the right to present evidence, cross-examine, object, argue, and make appropriate motions. The hearing and other proceedings shall proceed with all reasonable diligence and with the least practicable delay.

(b) Objections. When objections to the admission or exclusion of evidence or other procedural objections are made, the grounds relied upon shall be stated briefly, if so requested by the hearing committee, hearing panel, or special hearing officer, and may be stated briefly if no such request is made. Formal exceptions are unnecessary.

Section 3.30 Limiting Number of Witnesses

The hearing committee, hearing panel, or special hearing officer may limit appropriately the number of witnesses who may be heard upon any issue to eliminate unduly repetitious or cumulative evidence without prejudice to the substantive rights of any party.

Section 3.31 Additional Evidence

At the hearing, the hearing committee, hearing panel, or special hearing officer may, if deemed advisable, and subject to appropriate order to protect the substantive rights of any party, authorize any party to file specific documentary evidence as a part of the record within a fixed time, expiring not less than ten days before the date fixed for filing and serving briefs.

Section 3.32 Motions

Motions made during the hearing shall be filed with the Board, with a copy provided to each member of the hearing committee or hearing panel, or to the special hearing officer, and shall be served upon the opposing party, who shall have such time to respond as the hearing committee, hearing panel, or special hearing officer allows. The hearing committee, hearing panel, or special hearing officer shall determine all such motions, except motions to dismiss filed by a respondent which shall be forwarded to the Board with the hearing committee's, hearing panel's, or special hearing officer's report and the record at the conclusion of the proceedings.

Section 3.33 Transcript

(a) General Rule. Except as may be ordered by the hearing committee, hearing panel, or special hearing officer for good cause shown, hearings shall be reported by a reporter designated by the office of the Board or by the chair of the committee hearing the case. A transcript of the proceedings shall be a part of the record. Such transcript shall include a verbatim report of the hearings including oral argument, if any, and nothing shall be omitted therefrom, except as may be directed on the record by the hearing committee, hearing panel, or special hearing officer. After the closing of the record, there shall not be received in evidence or considered as part of the record any document submitted after the close of testimony except as provided in Section 3.31 of these Rules.

(b) Waiver of Transcript. By agreement of Bar Counsel, the respondent or the respondent's counsel and the hearing committee, hearing panel, or special hearing officer, a transcript of the proceedings may be waived and in that event the stenographic notes or other recording shall be a part of the record.

(c) Order by Board for Transcript. Notwithstanding a waiver pursuant to paragraph (b) of this section, the Board may in its discretion direct that a transcript be prepared.

Section 3.34 Transcript Corrections

Corrections in the official transcript may be made only to make it conform to the evidence presented at the hearing. No corrections or physical changes shall be made in or upon the official transcript of the hearing, except as provided in this section. Transcript corrections agreed to by all parties shall be made on the transcript by the special hearing officer or the hearing committee or panel chair, if and when approved by the hearing committee, hearing panel, or special hearing officer, at any time during the hearing or after the close of the hearing, as may be permitted by the hearing committee, hearing panel, or special hearing officer, but not less than ten days in advance of the time fixed for filing briefs. The hearing committee, hearing panel, or special hearing officer may call for the submission of proposed corrections and may make disposition thereof at appropriate times during the course of a proceeding.

Section 3.35 Copies of Transcripts

The Board will obtain an original of the transcript. A respondent desiring a copy of such transcript may obtain such copy at his or her own expense from the official reporter. Any witness may obtain from the official reporter at his or her own expense a copy of the transcript of his or her own testimony.

Section 3.36 Oral Examination

Witnesses shall be examined orally under oath or affirmation unless the testimony is taken by deposition as provided in Section 4.10 of these Rules or the facts are stipulated in the manner provided in Section 3.23 of these Rules and in Section 3.38 of these Rules.

Section 3.37 [Reserved]

Section 3.38 Presentation and Effect of Stipulations

Independently of the orders or rulings issued as provided by Section 3.23 of these Rules, the parties may stipulate as to any relevant matters of fact or the authenticity of any relevant documents. Such stipulations may be received in evidence at a hearing, and when so received shall be binding on the parties with respect to the matters therein stipulated.

Section 3.39 Admissibility of Evidence

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).

Section 3.40 Reception and Ruling on Evidence

The hearing committee, hearing panel, or special hearing officer shall rule on the admissibility of all evidence. The number of witnesses to be heard on any issue may be limited appropriately as provided in Section 3.30 of these Rules.

Section 3.41 Copies of Exhibits to Parties, Special Hearing Officers, and Hearing Committee or Panel Members

Except as otherwise provided in these Rules, when exhibits of a documentary character are offered in evidence, copies shall be furnished to the parties present at the hearing, and copies of each exhibit of documentary character shall be furnished for the use of the special hearing officer and for each member of the hearing committee or hearing panel, unless the parties and the hearing committee, hearing panel, or special hearing officer waive the receipt of such copies.

Section 3.42 Closing Argument

If the hearing committee, hearing panel, or special hearing officer decides to entertain closing argument, it shall do so directly following the taking of testimony in each proceeding except for good cause shown.

Section 3.43 Time for Filing of Briefs

After a formal disciplinary proceeding, any party may file a brief and requests for findings and rulings with the hearing committee, hearing panel, or special hearing officer within 30 days of the receipt of the final transcript of the hearing or such other shorter period of time as may be fixed by the chair or the special hearing officer. No extensions shall be granted for the filing of proposed findings and rulings or briefs except for good cause shown.

Section 3.44 Content and Form of Briefs

(a) General Rule. Briefs should normally contain:

- (1) A concise statement of the case.
- (2) A discussion or statement of the evidence relied upon by the party filing, with specific reference to the pages of the record or exhibits where such evidence appears.
- (3) Proposed findings and conclusions together with the reasons and authorities therefor, separately stated.

(b) Exhibits. Exhibits shall not be reproduced in the brief, but may, if desired, be reproduced in an appendix to the brief.

Section 3.45 Filing and Service of Briefs

Briefs not filed and served on or before the date fixed therefor shall not be accepted for filing except by special permission of the hearing committee, hearing panel, or special hearing officer. Except where filing of a different number is permitted or directed by the hearing committee, hearing panel, or special hearing officer, a copy of each brief shall be furnished for the use of each member of the committee or panel.

Section 3.46 Filing of Report

The hearing committee, hearing panel, or special hearing officer shall report promptly to the Board its findings, conclusions and recommendations, together with a record of the proceedings before it.

Section 3.47 Contents of Report

The report of the hearing committee, hearing panel, or special hearing officer shall be accompanied by Form BBO-11 and shall set forth:

- (1) A concise statement of the case, including a citation of each rule of the Disciplinary Rules found to have been violated by the respondent;
- (2) Its rulings on admission of evidence and other procedural matters, which may be set forth by reference to the pages of the transcript wherein such rulings are recorded;
- (3) Findings of fact;
- (4) Conclusions of law; and
- (5) Recommended disposition of the petition.

Section 3.48 Report a Part of the Record

All reports shall become a part of the record.

Section 3.49 Service of Report

All reports shall be filed with the Board, which shall serve copies thereof upon respondent and Bar Counsel.

SUBCHAPTER D. REVIEW BY BOARD

Section 3.50 Procedure on Appeal

(a) Procedure to Object to Report of Hearing Committee, Hearing Panel, or Special Hearing Officer. Any party objecting to the findings or recommendations of a hearing committee, hearing panel, or special hearing officer shall, within 20 days after the service of a copy of the report or within such other longer or shorter time as may reasonably be fixed by a Board member, file a brief on appeal. A brief opposing the appeal, and raising any cross-appeal, may be filed in response to a brief on appeal within 20 days after the filing of a brief on appeal or within such other longer or shorter time as may reasonably be fixed by a Board member. If a cross-appeal is claimed in a brief opposing the appeal, the party filing the original appeal may file a brief in response to the cross-appeal within 20 days after the filing of the cross-appeal or within such other longer or shorter time as may reasonably be fixed by a Board member. No further response will be entertained unless allowed or requested by the Board or a Board member.

(b) Oral Argument. Appeals from expedited hearings shall be decided upon the papers. For formal proceedings, oral argument shall be deemed waived unless expressly requested in a

brief on appeal or brief opposing appeal. Oral argument shall be permitted at the discretion of the Board. The Board or the Appeal Panel may restrict the issues which may be argued orally.

(c) Waiver of Objections. A party will be conclusively deemed to have waived all objections to the findings, conclusions and recommendations of the hearing committee, hearing panel, or special hearing officer and to have stipulated to the waiver of oral argument and submission of briefs unless the party files an appeal as provided in subsection (a) of this section.

(d) Assignment of Appeals. If there is an appeal from the findings and recommendations of a hearing committee, hearing panel, or special hearing officer, the Board shall either hear the matter itself or assign it to an appeal panel of three members of the Board to be designated by the Board or the Chair of the Board.

(e) Procedure Before an Appeal Panel of the Board. If a matter is heard before an appeal panel of the Board, such panel may determine the matter upon the record and the briefs before it or after any oral argument or may remand the case to the hearing committee, hearing panel, or special hearing officer for the taking of further evidence. The appeal panel shall promptly report its findings of fact, conclusions of law and recommendations to the Board. Such report shall be served upon the Bar Counsel and the Respondent, either of whom may, within 7 days thereafter, file with the Board objections to such report. Opposition to such objections may be filed with the Board within 7 days after the service of said objections on the opposing party.

(f) Review of the Appeal Panel Report by the Board. Following the filing of a panel report and the expiration of the time allowed for the filing of objections thereto, the Board shall review the matter on the entire record including previously filed briefs and objections. Members of the appeal panel shall not be disqualified from participation in the deliberations and voting of the Board. The Board may remand the matter to the hearing committee, the hearing panel, or the special hearing officer for the taking of further evidence.

(g) Procedure on Appeal When the Matter Has Been Heard by a Hearing Panel of the Board. If an appeal has been filed from the findings and recommendations of a hearing panel of the Board, the Board may determine such appeal on the record and briefs before it or after any oral argument that it in its own discretion deems necessary. Members of the panel shall be disqualified from participation in the deliberations and voting of the Board. The Board may remand the matter to the hearing panel for the taking of further evidence.

Section 3.51 Content and Form of Briefs on Appeal

(a) Briefs on Appeal.

(1) The briefs on appeal shall contain:

- (i) A short statement of the case.
- (ii) A summary of the basic position of the party filing.
- (iii) The grounds upon which the appeal rests.

(iv) The argument in support of the appeal with appropriate references to the record and legal authorities.

(2) There may also be included specific findings and conclusions proposed in lieu of those from which the appeal is being taken and any proposed additional findings and conclusions.

(3) Appeal from a recommended disposition shall specify the portions thereof from which the appeal is being taken, and may set forth a disposition suggested in lieu of that recommended by the hearing committee, hearing panel, or special hearing officer.

(b) Briefs Opposing Appeals. Briefs opposing appeals shall generally follow the same style prescribed for briefs on appeal, but may omit a statement of the case so far as it is correctly stated in the brief on appeal.

(c) Format and Number of Briefs. One original of each brief shall be filed with the Board and a copy served on the opposing party. Briefs shall be stapled, not bound.

Section 3.52 Review by Board When There Has Been No Appeal

When the time for filing an appeal under Section 3.50 has expired and neither the Bar Counsel nor the respondent has filed an appeal with the Board, the Board shall review the case. In the event the Board makes a preliminary determination that the decision of the hearing committee, hearing panel, or special hearing officer should not be affirmed, it shall give the parties appropriate notice thereof and an opportunity to file briefs, and the Board may then proceed to take such action as it could have taken had an appeal been filed.

Section 3.53 Action by Board

The Board shall review and may adopt the findings of fact made by the hearing committee, hearing panel, or special hearing officer or revise any findings which it determines to be erroneous, paying due respect to the role of the hearing committee, hearing panel, or special hearing officer as the sole judge of the credibility of the testimony presented at the hearing. The Board may adopt or modify the recommendation of the hearing committee, hearing or appeal panel, or special hearing officer. Whenever the Board modifies the findings or recommendations, it shall state the reasons therefor in its vote or in a memorandum.

Section 3.54 Recusal of Reviewing Board Member

The Board member or members, if any, who participated pursuant to Section 2.8 of these Rules in the decision to institute formal proceedings shall not participate in any subsequent consideration or decision of the matter. The Chair shall not be disqualified from subsequent consideration or decision of a matter solely on the ground that he or she ruled on a motion or an appeal in his or her capacity as Chair.

Section 3.55 Dismissal of Proceeding

In the event that the Board determines that a proceeding should be dismissed, it shall so notify the parties and Bar Counsel shall notify the complainant.

Section 3.56 Admonition and Public Reprimand

(a) Notice to Respondent. In the event that the Board determines that the proceedings should be concluded by admonition or public reprimand, it shall serve a copy of the vote and memorandum (if any) on the parties. The vote and memorandum shall constitute the admonition or public reprimand. In the event that the court orders an admonition or a public reprimand, the order of the court shall constitute the admonition or public reprimand.

(b) Permanent Record. A permanent record shall be made of the fact of and basis for the admonition or public reprimand. The fact of the receipt of an admonition or public reprimand shall not affect the good standing of the respondent as a lawyer.

(c) Confidentiality of Admonition. The Board and the bar counsel shall keep the fact of the receipt of an admonition confidential; provided, however, that in response to specific inquiry as to the outcome of a public hearing which has been concluded by admonition, the Board or Bar Counsel may disclose that an admonition was imposed. The admonition shall be subject to limited disclosure under Supreme Judicial Court Rule 4:01, Section 20(2).

Section 3.57 Demand for Filing of Information

(a) In the event the Respondent or Bar Counsel is unwilling to accede to the determination of the Board that formal proceedings should be concluded by dismissal, admonition, or public reprimand, the party aggrieved may demand that the Board file an Information. The demand shall be in writing and shall be filed with the Board within 20 days after the date of service of the Board's vote and memorandum, which time limit is jurisdictional.

(b) The decision of the Board following an appeal by either party from the determination of a special hearing officer after an expedited disciplinary hearing shall be final and there shall be no right by either Bar Counsel or the Respondent to demand that an Information be filed.

Section 3.58 Filing an Information

In the event that the Board shall determine that the matter should be concluded by suspension or disbarment, or in the event the respondent or Bar Counsel files a written demand for the filing of an Information as authorized by Section 3.57 of these rules, the Board shall file with the Clerk of the Supreme Judicial Court for Suffolk County an Information, together with the entire record of its proceedings.

SUBCHAPTER E. REOPENING OF RECORD

Section 3.59 Reopening on Application of Party

(a) Petition to Reopen. At any time after the conclusion of a hearing in a proceeding, and before a report has been issued, any party may file with the hearing committee, hearing panel, or special hearing officer a petition to reopen the proceeding for the purpose of taking additional evidence. If a petition to reopen is filed after the issuance of a report by the hearing committee, hearing panel, or special hearing officer, it shall be filed with the Board. Such petition shall set forth clearly the material changes of fact or of law alleged to have occurred since the conclusion of the hearing or other good cause justifying reopening the hearing.

(b) Responses. Within ten days following the service of such petition, any other party may file an answer thereto, and in default thereof shall be deemed to have waived any objection to the granting of such petition.

(c) Action on Petition. As soon as practicable after the filing of responses to such petitions or default thereof, as the case may be, the hearing committee, hearing panel, the special hearing officer, or the Board shall grant or deny such petition. There shall be no hearing on such petition unless the hearing committee, hearing panel, the special hearing officer, or the Board shall so direct.

Section 3.60 Reopening by Hearing Committee or Panel

At any time prior to the filing of its report a hearing committee, hearing panel, or special hearing officer may reopen the proceeding sua sponte to receive further evidence if there is reason to believe that facts or law require, or that the public interest requires, the reopening of such proceeding.

Section 3.61 Reopening by Board Action

At any time prior to the issuance by the Board of its decision in a proceeding, the Board may, without motion, reopen the proceeding and remand to a hearing committee, hearing panel, or special hearing officer to receive further evidence if the Board has reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, the reopening of such proceeding.

SUBCHAPTER F. REINSTATEMENT

Section 3.62 Procedure on Petitions for Reinstatement Generally.

The Board will assign a reinstatement petition for hearing upon receipt of (a) a copy of the petition from the Clerk of the Supreme Judicial Court for Suffolk County; (b) four fully completed copies of Part I of the reinstatement questionnaire set out in section 3.63; (c) a certificate of service showing that one copy of the petition and the originals of both Part I and Part II of the reinstatement questionnaire have been served upon Bar Counsel; and (d) the costs deposit required under section 3.64.

Section 3.63 Reinstatement Questionnaire

The petitioner shall set forth, fully and accurately under the penalties of perjury, the information requested in Parts I and II of the reinstatement questionnaire set out as an appendix to these rules. Part I of the questionnaire shall become a part of the record in the reinstatement proceedings. Information contained in Part II, filed with Bar Counsel, shall be admitted in evidence at either party's request during the reinstatement proceedings subject to redaction or protective order where warranted.

Section 3.64 Costs Deposit

The reinstatement questionnaire shall be accompanied by a deposit of \$500 for costs. No hearing shall be scheduled until the costs deposit is paid in full.

Section 3.65 Hearing Procedures

The provisions of these Rules applicable to formal proceedings shall, so far as relevant, govern the procedures before hearing committees, hearing panels, special hearing officers, and the Board upon petitions for reinstatement, except that the petitioner shall have the burden of demonstrating that he or she has the moral qualifications, competency and learning in the law required for admission to practice law in the Commonwealth, and that his or her resumption of the practice of law shall not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest.

Section 3.66 Expenses of Reinstatement Proceedings

The Board may recommend that the Court direct that the petitioner pay all necessary expenses incurred in connection with a petition for reinstatement, including the cost of notices published pursuant to Section 3.67 of these Rules. The expenses a petitioner is required to pay pursuant to this section shall be reduced by the costs deposit payment required by Section 3.64 above.

Section 3.67 Public Notice of Reinstatement Proceedings

Hearings on petitions for reinstatement shall be open to the public. At least two weeks prior to a scheduled hearing, the Board shall cause notices of the filing of the petition and of the time, date, and place of the hearing to be published in a newspaper designated by the Court as an authorized source for the publication of all rules of court and other notices and in newspapers of general circulation serving the community in which the petitioner resides and the community in which the office listed on the petitioner's last registration statement was located.

CHAPTER 4. MISCELLANEOUS MATTERS

SUBCHAPTER A. RESIGNATIONS

Section 4.1 Resignation by Lawyers under Disciplinary Investigation

A lawyer who wishes to resign in accordance with Supreme Judicial Court Rule 4:01, Section 15, shall file a request for resignation and an affidavit with the Board. The Board shall serve the request and affidavit on Bar Counsel, who shall within seven days, or such further time as may be allowed by a Board member, file with the Board a statement containing Bar Counsel's recommendation and the reasons therefor, such statement to be served upon the respondent.

The Board may order any hearing or investigation it deems appropriate. Upon reaching its determination, the Board shall file its recommendation and the entire record of any hearing held with the Court.

SUBCHAPTER B. EXPUNCTION

Section 4.2 Expunction of Records

(a) Expunction Upon the Expiration of Six Years. The records of a matter that Bar Counsel in his or her discretion has determined does not warrant investigation pursuant to Section 2.1(b)(1), and of a complaint against a lawyer that has been closed and not subsequently reopened shall be destroyed and expunged following the expiration of six years from the date the complaint was closed unless a complaint has been filed in the intervening six-year period. In the event a complaint is so filed or reopened, the records shall not be destroyed and expunged until the expiration of six years from the date on which all complaints have been closed and not reopened.

(b) Reserved.

(c) Expunction for Bank Error. In the event a complaint has been docketed solely on account of a report made by a financial institution that it has dishonored an instrument presented against a lawyer's trust account and it is established that the instrument was dishonored solely

due to error on the part of the financial institution, the lawyer shall be entitled, upon request made after the closing of the complaint, to have the records of the complaint destroyed and expunged.

(d) Procedure. Whenever, pursuant to the preceding subparagraphs (a) and (c), records are to be destroyed and expunged, Bar Counsel shall destroy all records within Bar Counsel's custody and control that indicate that the complaint was filed against the lawyer, and shall destroy all records and files pertaining thereto. Bar Counsel may separately maintain any investigative records that may pertain to matters other than the specific complaint against the lawyer, but such records shall not bear any indication of the specific complaint expunged.

(e) Nonapplicability. This section does not apply to the records of a complaint which gave rise to an admonition even if such complaint has been dismissed pursuant to Section 4.3(a) of these Rules.

SUBCHAPTER C. VACATING AN ADMONITION

Section 4.3 Vacating an Admonition and Dismissal of the Underlying Complaint

(a) Vacating and Dismissal Upon the Expiration of Eight Years. Upon the expiration of eight years from the receipt of an admonition by a lawyer, if Bar Counsel determines that there has been no intervening disciplinary action taken with reference to the lawyer and there is no complaint then pending against him or her, Bar Counsel shall vacate the admonition and dismiss the complaint which gave rise to it.

SUBCHAPTER D. SUBPOENAS

Section 4.4 Investigatory Subpoenas

(a) At any stage of the investigation, Bar Counsel may request that the Board 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.

(b) The request shall be made in writing to a member of the Board, who may forthwith issue the subpoena.

(c) The subpoena shall require a witness to appear before Bar Counsel at a specified date and time and shall specify any evidence to be produced. Bar Counsel may take the testimony electronically or otherwise. Respondent shall not be entitled to be present, but Bar Counsel shall provide Respondent with a copy of any recorded testimony prior to any hearing on a petition for discipline.

(d) If a subpoena is issued subsequent to the filing of a petition for discipline and if the testimony is to be recorded electronically or otherwise, the Respondent shall be entitled to be present and participate in the examination of any such witness whose testimony is to be recorded and in the examination of any documents produced by such subpoena. No investigatory subpoenas shall be issued after expedited disciplinary proceedings are commenced pursuant to Section 2.12 of these Rules.

Section 4.5 Hearing Subpoenas

(a) Bar Counsel and the Respondent may request that the hearing committee, hearing panel, special hearing officer, or the Board 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 proceeding.

(b) The request shall be made in writing to a member of the hearing committee or panel, or to the special hearing officer, or to a member of the Board who may forthwith issue the subpoena.

(c) The subpoena shall require a witness to appear before the Board, a hearing panel, the hearing committee, or the special hearing officer, or at a deposition conducted pursuant to Sections 4.9 to 4.15 of these Rules, at a specified date and time. The subpoena shall also specify the evidence, if any, to be produced and the date for production, which may be prior to the hearing. The parties shall each be entitled to inspect or copy any materials produced pursuant to such subpoena.

(d) The Board, the hearing committee, hearing panel, or special hearing officer may, on its own motion, subpoena any witness to appear and give testimony or produce evidence at any hearing.

Section 4.5A Reciprocal Subpoenas

(a) Whenever a subpoena has been duly approved under the law of another jurisdiction for use in lawyer discipline or disability proceedings, Bar Counsel may request that the Board issue a subpoena requiring the attendance and testimony of the witness in this Commonwealth and the production of any evidence, including books, records, correspondence or documents, relating to the matter in question.

(b) The request shall be made in writing to a member of the Board, who may forthwith issue the subpoena.

(c) The subpoena shall require a witness to appear before Bar Counsel at a specified date and time and shall specify any evidence to be produced. Bar Counsel may take the testimony electronically or otherwise.

Section 4.6 Service

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. Alternatively, service may be made upon any lawyer in hand or by certified, registered, or first class mail addressed to the lawyer at either the residence or office address furnished in the last registration statement filed by the lawyer in accordance with S. J. C. Rule 4:02. A copy of each investigative subpoena served on a person other than the respondent shall be mailed to the respondent. No witness fee or travel allowance shall be paid or tendered to any respondent subpoenaed hereunder.

Section 4.7 Confidentiality of Investigatory Subpoenas

(a) Each investigatory subpoena shall clearly indicate on its face that it is issued in connection with a confidential investigation under Bar Disciplinary Rules of Chapter Four of the Supreme Judicial Court, and the Board and the Office of Bar Counsel will conduct themselves so as to maintain the absolute confidentiality of the investigation.

(b) Each subpoena shall state on its face that a person subpoenaed may consult with counsel.

(c) Whenever records of a lawyer's clients' trust fund account are subpoenaed, all steps necessary to maintain the confidentiality to which clients are entitled shall be taken by Bar Counsel and the Board, hearing committee, hearing panel, or special hearing officer.

Section 4.8 Motions to Quash

A motion to quash any subpoena issued hereunder may be filed with the Board. The motion shall state the grounds on which it is based, and any fact alleged shall be supported by affidavit filed with the motion. The motion and affidavit shall be served upon the respondent or Bar Counsel or both as the case may be, who shall within seven days after receipt thereof file any opposition thereto with the Board. The motion shall be promptly decided by the Chair of the Board, the Chair of the hearing committee or the hearing panel, or the special hearing officer, either upon the documents or after any hearing held.

SUBCHAPTER E. DEPOSITIONS

Section 4.9 Availability of Depositions

(a) **Discovery Depositions.** After the institution of formal disciplinary proceedings pursuant to Rule 4:01, section 8(3), and the filing of an answer by the Respondent, a party may obtain discovery by deposition upon oral examination, subject to the following terms and conditions:

- (1) Any party may file a written notice and application with the Board Chair or the Chair's designee pursuant to Section 4.11(a), requesting the deposition upon oral examination, or by telephone or audio-visual means, of any person and that any evidence, including books, records, correspondence or documents, relating to the matter be produced at the same time. Any other party may file and serve a response to an application within 7 days after service of the application.
- (2) The Board Chair or the Chair's designee may allow an application to take a discovery deposition only upon a showing of a substantial need for the deposition in the preparation of the applicant's case, taking into consideration:
 - (A) The nature and complexity of the case and the need to assure an expeditious, economical and fair proceeding.
 - (B) Whether the information sought or its substantial equivalent has been provided or was available by other means, taking into consideration the formal or informal discovery that has already occurred.

- (C) The prevention of embarrassment, oppression, or undue burden, including economic burden, that the deposition may cause the deponent.

The order permitting the deposition may specify or restrict the subject matter upon which the deponent may be examined.

(b) Discovery depositions shall be conducted as set forth in Sections 4.11 through 4.15, subject to such terms and conditions as the Board Chair or the Chair's designee may order, including supervision, length, location, and timing of the deposition. Depositions must be completed within 21 days prior to the commencement of hearing, unless otherwise ordered for good cause shown.

Section 4.10 Testimonial Depositions of Unavailable Witnesses.

- (a) **Depositions Prior to the Commencement of Formal Proceedings.** If at any stage of the investigation by Bar Counsel prior to the filing of a petition for discipline it appears that a prospective witness may no longer be subject to service of a subpoena or may become unable to attend or testify at a hearing because of age, illness or other infirmity, Bar Counsel or the Respondent may request that the Board order a deposition to preserve the testimony of the witness. The request shall be made in writing to the Board Chair or the Chair's designee pursuant to Section 4.11(a). If the Chair or the Chair's designee deems it to be in the interest of justice that the testimony of the prospective witness be taken and preserved, he or she shall order that the testimony of the witness be taken by deposition and that any evidence, including books, records, correspondence or documents, relating to any matter in question in the investigation be produced at the same time.
- (b) **Depositions After Commencement of Formal Proceedings.** After the institution of formal disciplinary proceedings pursuant to Rule 4:01, section 8(3), and the filing of an answer by the Respondent, applications for the taking of testimony by deposition of those witnesses not subject to service of a subpoena or unable to attend a hearing due to age, illness or other infirmity shall be approved by the Board Chair or the Chair's designee or by the hearing committee, hearing panel, or special hearing officer to which the matter has been referred. Depositions must be completed within 21 days prior to the commencement of the hearing, unless otherwise ordered for good cause shown.
- (c) **Notice and Application.** A written notice and application to take a testimonial deposition pursuant to subsections (a) and (b) when the matter has not been referred to a special hearing officer, hearing committee, or hearing panel shall be submitted by the party proposing to take such deposition to the other parties and to the Board Chair. Otherwise, written notice and application shall be submitted to the other parties and to the special hearing officer, hearing committee or hearing panel.

- (d) **Testimonial Depositions** under this section shall be conducted as set forth in Sections 4.11 through 4.15.

Section 4.11 Application for and Authorization of Taking Deposition

- (a) In any application to take a deposition filed pursuant to Sections 4.9 or 4.10 and in addition to any other requirements specified by these Rules, the party desiring to take the deposition shall state the name and post office address of the witness, the subject matter concerning which the witness is expected to testify, the time and place of taking the deposition, the name and post office address of the notarial officer before whom it is desired that the deposition be taken, and the reason that such deposition should be taken. Any other party may file and serve a response to an application within seven days after service of the application.
- (b) If an application for the taking of a deposition is allowed, the Board Chair or the Chair's designee, or the special hearing officer, hearing committee, or hearing panel to which application was made under Section 4.10(c), within a reasonable time in advance of the time fixed for taking testimony, will issue and serve upon the parties an authorization form naming the witness whose deposition is to be taken, and the time, place and notarial officer before whom the witness is to testify, but such time, place and notarial officer so specified may or may not be the same as those named in the notice and application. If required, the Board Chair or the Chair's designee shall issue a subpoena to compel the witness's attendance at the deposition.
- (c) Upon motion, the Board Chair or the Chair's designee may enter protective orders regarding further terms and conditions under which depositions may be taken, including without limitation, the number, length, time and place, the scope or subject matter and the allocation of expenses. The Board Chair or the Chair's designee may also order that depositions cease. After the petition for discipline and answer have been referred to a special hearing officer, hearing committee or hearing panel, the special hearing officer or chair of the committee or panel may enter the same orders and take the same actions pursuant to this paragraph as the Board Chair.

Section 4.12 Officer Before Whom Deposition is Taken

- (a) **Within the United States.** A deposition may be taken before the Board Chair or the Chair's designee, a single member of the hearing committee or hearing panel, or before the special hearing officer, or before a person authorized under either section 2(a) or section 2(b) of Rule 1:02(A) of the Supreme Judicial Court insofar as these sections deal with depositions to be taken within the United States or before any other person authorized to administer oaths not being counsel for any of the parties, or interested in the proceeding or investigation, according to such designation as may be made in the authorization form.
- (b) **In Foreign Countries.** Where such deposition is taken in a foreign country, it may be taken before a secretary of an embassy or legation, consul general, consul, vice-consul or consular agent of the United States or before such persons as authorized by section 2(b) of Rule 1:02(A) of the Supreme Judicial Court insofar as this section deals with depositions to be taken in foreign countries, or before such person or officer as may be designated in the authorization form or

agreed upon by the parties by stipulation in writing filed with and approved by the hearing committee, hearing panel, or special hearing officer.

Section 4.13 Oath and Reduction to Writing

(a) General Rule. Every person whose testimony is taken by deposition shall be sworn, or shall affirm concerning the matter about which he or she shall testify, before any questions are put or testimony given. The testimony shall be reduced to writing by the notarial officer, or under the notarial officer's direction. When the testimony is fully transcribed the deposition shall be submitted to the witness for inspection and signing and shall be read to or by the witness and shall be signed by the witness, unless the inspection, reading and signing are waived by the witness and by all parties who attended the taking of the deposition, or the witness is ill or cannot be found or refuses to sign. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the notarial officer with a statement of the reasons given by the witness for making the changes. If the deposition is not signed by the witness, the notarial officer shall certify it in the usual form and state on the record the fact of the waiver or of the illness or absence of the witness or the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless the hearing committee, hearing panel, or special hearing officer or the Board holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(b) Transmission.

(1) For depositions taken pursuant to Section 4.10(b) and unless otherwise directed in the authorization form, after the deposition has been certified, it shall, together with the number of copies specified in the authorization, the copies being made by such notarial officer or under the notarial officer's direction, be forwarded by such notarial officer in a sealed envelope addressed to the office of the Board at Boston, Massachusetts, with sufficient stamps for postage affixed. Upon receipt thereof, the Board shall file the original in the proceeding and shall forward a copy to each party, the special hearing officer, and to each member of the hearing committee or panel.

(2) For all other depositions, the party taking the deposition shall give prompt notice of its receipt to all other parties. Upon payment of the reasonable charges therefor, the notarial officer shall furnish a copy of the deposition to any party or the deponent.

Section 4.14 Scope and Conduct of Examination

The witness may be examined regarding any matter not privileged that is relevant to the subject matter of the proceedings and is within the areas of inquiry specified by the order permitting the deposition. Parties shall have the right of cross-examination and objection. In making objections to questions or evidence, the grounds relied upon shall be stated briefly, but no transcript filed by the notarial officer shall include argument or debate.

(a) If a deposition is not being taken in the presence of the special hearing officer, member of the hearing committee or member of the Board, objections to questions or evidence shall be noted by the notarial officer upon the deposition, but the notarial officer shall not have the power

to decide on the competency, materiality or relevancy of the evidence. In such case, objections to the competency of a 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.

(b) If a deposition is being taken in the presence of the special hearing officer, member of the hearing committee or member of the Board, the individual so presiding shall rule on all objections. It is not grounds for objection at a discovery deposition that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence and is within the scope of the order permitting the deposition. The fact that an objection is overruled will not preclude a party from raising the same objection at hearing and the fact that an objection is allowed will not preclude a party from examining the witness on the same subject matter at hearing.

Section 4.15 Status of Deposition as Part of Record

No part of a deposition taken pursuant to Section 4.9 of this rule shall constitute a part of the record in the proceeding, unless offered in evidence before the hearing committee, hearing panel, or special hearing officer. At the hearing, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be admitted in evidence.

Section 4.16 [Reserved]

SUBCHAPTER F. NOTIFICATION OF DISBARMENT, RESIGNATION, SUSPENSION, TEMPORARY SUSPENSION, OR DISABILITY INACTIVE STATUS

Section 4.17 Form of Notification

(a) A lawyer who has been disbarred, suspended, temporarily suspended, or placed on disability inactive status, or a lawyer who has resigned pursuant to the provisions of section 15 of Supreme Judicial Court Rule 4:01, shall

Complete and send to each court or agency in which the lawyer appears for any party a copy of the form Notification to Court or Agency prepared by the Board.

Complete and send to all clients being represented in pending matters and to all wards, heirs, and beneficiaries for whom the lawyer serves as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary a copy of the form Notification to Clients, Wards, Heirs, and Beneficiaries prepared by the Board.

Complete and send to the lawyer or lawyers for each party in each pending litigation matter or administrative proceeding a copy of the form Notification to Counsel in Litigation Matters prepared by the Board.

(b) A notice substantially in the language of the form prepared by the Board may be used in lieu of a copy of the form.

Section 4.18 [Reserved]

Section 4.19 [Reserved]

Section 4.20 Affidavit of Compliance

The affidavit of compliance required by S.J.C. Rule 4:01, Section 17(5), shall be submitted on the form Affidavit of Compliance prepared by the Board or in substantially the language that form.

CHAPTER 5. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER A. THE BOARD OF BAR OVERSEERS

Section 5.1 Meetings of the Board

(a) Call and Notice. Meetings shall be held upon the call in writing of the Chair or of any two members of the Board at any place in the City of Boston designated for such purpose by resolution of the Board or in the absence of such resolution as designated by the Chair. Notice of special meetings shall be given in person or by telephone or telegraph to each member of the Board (at the address furnished to the office of the Board for that purpose) at least 24 hours prior to the time fixed for the special meeting. Notice of a special meeting may be waived in writing and shall be waived by attendance at the meeting.

(b) Organization. The Chair shall preside at meetings of the Board. In his or her absence, disqualification, or recusal, one of the following persons in the order stated shall preside or rule, as the case may be:

- (1) The Vice-Chair.
- (2) An Acting Chair selected by the Board for such purpose.

Section 5.2 Conference Telephone Meetings

One or more members of the Board may participate in a meeting of the Board by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other. Participation in a meeting pursuant to this section shall constitute presence in person at such meeting.

Section 5.3 Agenda

An agenda for each meeting of the Board shall be prepared by the Chair, or in his or her absence by the Vice-Chair or Acting Chair.

Section 5.4 Members not to be Voluntary Character Witnesses

No member of the Board shall appear voluntarily as a character witness in a disciplinary proceeding.

SUBCHAPTER B. ADMINISTRATION

Section 5.5 The Administrator

The Board shall appoint an Administrator who shall perform the duties assigned by the Board and imposed by these Rules.

Section 5.6 Communications and Filings Generally

(a) General Rule. All communications to the Board and pleadings should be addressed to the Board at its office. Except as authorized by Sections 2.8(a)(2) and 2.8(b)(4) of these rules, parties shall not communicate regarding a disciplinary matter with members of the Board, hearing committee members, or special hearing officers on an *ex parte* basis. All communications should clearly designate the file number, or similar identifying symbols, if any, employed by the Board or Bar Counsel, and should set forth a short title, the address of the person communicating, the party represented, and how responses should be sent if not by first class mail.

(b) Pleadings. All pleadings and other documents filed pursuant to any provisions of Chapter 3 of these Rules shall comply with the applicable provisions of such section.

(c) Transmission of Complaints.

(1) Except as otherwise provided in this subsection, all complaints received by the Board against lawyers shall be transmitted forthwith to the Bar Counsel.

(2) Complaints received against Bar Counsel, Assistant Bar Counsel or any member of the Board or its staff involving alleged violations of the Disciplinary Rules shall be transmitted directly to the Board.

Section 5.7 Dockets

(a) Numbering. Complaints submitted to the Board pursuant to Section 5.6(c)(2) of these Rules shall be assigned a docket number consisting of the letters “BBO” and the last two digits of the calendar year in which the matter is docketed, which shall be preceded by the serial number of the matter in such calendar year, e.g.: 1 BBO 97 et seq.

(b) Petitions for Reinstatement. Petitions for reinstatement shall be docketed to the number assigned by the Supreme Judicial Court

Section 5.8 Records

The Administrator shall maintain permanent records of all matters processed by the Board and the disposition thereof. This paragraph shall not be construed to require the permanent retention of correspondence, transcripts, briefs and other similar documents which underlie the final disposition of a matter by the Board, but shall include the findings of any hearing committee, hearing panel, or special hearing officer and the action and any related opinion or opinions of the Board with respect thereto, and any other information which these Rules expressly require to be made a matter of record.

SUBCHAPTER C. BAR COUNSEL

Section 5.9 Practice of Law by Bar Counsel Prohibited

Bar Counsel, Assistant Bar Counsel, and Board staff shall not engage in private practice, except that the Board may agree to a reasonable period of transition after appointment.

Section 5.10 Retention of Records by Bar Counsel

Subject to the provisions of Supreme Judicial Court Rule 4:01, Section 7(5), and Section 4.2 of these Rules relating to the expunction of certain closed and dismissed matters, Bar Counsel shall maintain permanent records of all matters presented to the Office of the Bar Counsel and the disposition thereof, provided that Bar Counsel need not permanently retain correspondence, memoranda, transcripts and other similar documents which underlie the final disposition of a matter by dismissal or closing.

SUBCHAPTER D. HEARING COMMITTEES

Section 5.11 Service on Other Hearing Committees

Members of any one hearing committee may serve on any other hearing committee in specific cases as need arises as determined by the Board Chair or the Chair's designee.

Section 5.12 Duties of Chair

The Chair of a hearing committee shall be the presiding officer at all hearings held by the committee and, unless otherwise directed by the committee with respect to particular questions or issues, shall make all rulings on admissibility of evidence and other procedural matters arising in connection with formal proceedings.

Section 5.13 Meetings of Hearing Committees

Except as otherwise provided by these Rules, meetings and proceedings of a hearing committee shall be governed insofar as applicable by the provisions of these Rules governing meetings and proceedings of the Board.

APPENDIX. APPLICATION FOR REINSTATEMENT

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

_____)	
IN THE MATTER OF)	SUPREME JUDICIAL COURT
_____)	APPLICATION FOR REINSTATEMENT
PETITIONER,)	AS AN ATTORNEY AT LAW
_____)	
_____)	SJC No.

REINSTATEMENT QUESTIONNAIRE Part I

Filing and Service Instructions

In accordance with the provisions of Sections 3.62 and 3.63 of the Rules of the Board of Bar Overseers, the petitioner shall complete the Reinstatement Questionnaire, setting forth fully and accurately the information requested under the pains and penalties of perjury. Part I of this Questionnaire, as filed with the Board, shall become part of the record in the reinstatement proceeding.

1. **File with the Court.** The petitioner must file the Petition for Reinstatement with the Clerk of the Supreme Judicial court for Suffolk County. The Reinstatement Questionnaire should not be part of this filing.
2. **File with the Board.** When the Petition for Reinstatement is filed with the Court, the petitioner must also file one copy with the Board of Bar Overseers, along with four copies of Part I only of the Reinstatement Questionnaire and a check in the amount of \$500.
3. **Serve Upon Bar Counsel.** When the Petition for Reinstatement is filed with the Board and the Court, the petitioner must also serve one copy on Bar Counsel, along with the originals of Part I and Part II of the Reinstatement Questionnaire.

1. Personal Information

- A. Full Name:
- B. Current Mailing Address:
- C. Telephone Number(s):
- D. E-mail address:

2. Professional Status

A. List each jurisdiction, court, and tribunal to which you have been admitted to practice with the dates of each admission. State your current status in each jurisdiction listed and state whether or not the jurisdiction was advised of the disciplinary action or transfer to disability inactive status ordered by the Supreme Judicial Court for the Commonwealth of Massachusetts.

B. Describe the misconduct that led to your suspension, disbarment, or resignation from the practice of law. If you were transferred to disability inactive status, describe the physical or mental disability which led to your transfer to disability inactive status. Attach to this Questionnaire a copy of the order of disbarment, suspension, acceptance of resignation, or transfer to disability inactive status entered by the Supreme Judicial Court together with the opinion of the Court or the summary published by the Board of Bar Overseers.

C. Attach to this Questionnaire a copy of all orders of reprimand, suspension, disbarment, acceptance of resignation, or transfer to disability inactive status entered by any other jurisdiction or tribunal together with the published opinion or summary.

D. If the sanction was imposed following the conviction of a crime, attach a copy of the judgment of conviction. Provide the name and address of your probation or parole officer, if any. If you have been discharged from probation or parole, attach the order or certificate of release.

3. Conduct since sanction imposed

Unless otherwise specified, this section pertains to conduct during the period of disbarment, suspension, resignation or disability in active status

A. Describe in detail your occupation or employment and provide the name and address of each employer, together with the name of each of your immediate supervisor(s), a description of each employment, the dates of each, and the reason(s) for leaving;

(1) If self-employed, provide the name and address of each business or occupation, together with a description of each such business or occupation and the dates of each.

B. List and describe all charitable endeavors, community work, and other activities in which you have engaged which you consider relevant to your current moral character and fitness to practice law.

C. State whether any charges, formal or informal, of fraud, malpractice, or errors or omissions were made or claimed against you. For each such charge or claim, state the date it was made, the name and current address of the claimant(s), the substance of the claims or charge, the forum where the charges are being or were considered, if any, and its current status.

D. List all claims paid by the Clients' Security Board as restitution on your account. As to each claim, list the name of the claimant, the CSB docket number, the amount of the award, the date of the award, and the date of your reimbursement to the Clients' Security Board. This information may be obtained by calling the Clients' Security Board at (617) 728-8700.

E. Describe all financial or other actions taken by you or on your behalf to make restitution or provide other appropriate compensation or payment to persons injured by your professional misconduct. If you have not made restitution, compensation, or payment, please set forth your reasons for not doing so.

F. Give the date(s) you took the MPRE and attach a certification that you obtained a passing score to this Questionnaire.

G. List all courses taken by you to acquire or maintain learning in the law and knowledge of your ethical obligations. As to each, list the name of the course, the school or program sponsoring the course, the date or dates of attendance, and, if applicable, the grade you received in the course. Please attach to the Questionnaire certificates of attendance.

H. List by name and author, if applicable, all periodicals, newspapers, and books to which you have regularly subscribed or which you have read which you believe have assisted you in acquiring or maintaining learning in the law and knowledge of your ethical obligations.

I. List every civil or administrative action commenced or pending in any jurisdiction in which you were a party or in which you had or claimed an interest, and for each such action list the date on which it was commenced, the case caption, court, and docket number. Provide a summary of the allegations made in each such action, its final disposition if any, and its current status. If judgment entered against you, state the amount of the judgment and whether or not you have paid the judgment.

J. Criminal, administrative, or investigative proceedings.

(1) List every matter involving your arrest or prosecution in any jurisdiction for any crime, whether felony or misdemeanor. Identify each charge brought, the disposition of the charge, if any, and its current status.

(2) State whether or not you have been a target of a Federal or State investigation into alleged criminal conduct and state whether or not you gave testimony or information to any such authority under a grant of immunity. If so, please identify the authority conducting each investigation; the name, title, and address of the prosecutor conducting each investigation; and the date and the matter in which you testified.

K. State whether you have made any application for reinstatement or original admission as an attorney at law in any jurisdiction, or any application for other license requiring proof of good character for its procurement. For each such application, please state the date of the application, the name and address of the authority to whom it was addressed, whether or not any hearing was held in connection with you application, and the disposition thereof.

L. List all procedures or inquiries held concerning your standing as a member of any profession or organization, or holder of any license or office, which involved your censure, removal, suspension, revocation of license, or discipline; and as to each such procedure or inquiry, state the dates, facts, and the disposition thereof, and the name and address of the authority in possession of the record thereof.

4. Practice after Reinstatement

A. Describe your plans for practicing law if you are reinstated. Include the nature of the intended practice; the type and volume of cases you intend or expect to handle; the field or fields in which you intend to concentrate, if any; whether you intend to be a sole practitioner or to be associated with others; the intended location of your practice; your intended procedures for docket control and office management; and your intended procedures for maintaining client and other trust funds.

B. Identify by name and address all persons with whom you plan to associate as well as those on whom you intend to rely as mentors, supervisors, monitors, or accountants if you are reinstated. Explain how you expect each person so identified to function or assist you in connection with your practice of law.

C. Describe the efforts you have undertaken to be covered by professional liability insurance if you are reinstated and state the results of those efforts.

5. References

A. List names, address, and telephone numbers of three references, at least two of whom are members in good standing of the Massachusetts Bar, who would recommend your

reinstatement to the Bar of this Commonwealth and who would attest to your character and conduct since disbarment or suspension.

1. _____

2. _____

3. _____

6. Personal Statement

Provide a concise statement of facts to justify your reinstatement to the Bar of this Commonwealth.

I, _____, being duly sworn, state as follows:

That all of the information contained in the foregoing Reinstatement Questionnaire is true and correct to the best of my knowledge;

That I have fully abided by the terms of the order of discipline or disability inactive status; I have not practiced law, identified myself as “Esq.” or “Esquire,” or otherwise held myself out as an attorney during the term of my disbarment, resignation, suspension, or disability inactive status; I have not listed myself as a lawyer on any sign, letterhead or stationery, or in any directory, or in any electronic or computer-accessed media; I have not engaged in paralegal work during the term of my disbarment, resignation, suspension, or disability inactive status; and I have not been employed by a lawyer in any capacity during said term, except as authorized by the Supreme Judicial Court on [date] or as described above.

_____ (signature)

Sworn to and subscribed before me this ____ day of _____, 20__.

_____ Notary Public

(SEAL) My Commission Expires: _____

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

_____))
IN THE MATTER OF))
))
_____,))
PETITIONER))
_____))
))
SJC No.

REINSTATEMENT QUESTIONNAIRE Part II

Filing and Service Instructions

In accordance with the provisions of Sections 3.62 and 3.63 of the Rules of the Board of Bar Overseers, the petitioner shall complete the Reinstatement Questionnaire, setting forth fully and accurately the information requested under the pains and penalties of perjury. Part I of this Questionnaire, as filed with the Board, shall become part of the record in the reinstatement proceeding.

1. **File with the Court.** The petitioner must file the Petition for Reinstatement with the Clerk of the Supreme Judicial court for Suffolk County. The Reinstatement Questionnaire should not be part of this filing.
2. **File with the Board.** When the Petition for Reinstatement is filed with the Court, the petitioner must also file one copy with the Board of Bar Overseers, along with four copies of Part I only of the Reinstatement Questionnaire and a check in the amount of \$500.
3. **Serve Upon Bar Counsel.** When the Petition for Reinstatement is filed with the Board and the Court, the petitioner must also serve one copy on Bar Counsel, along with the originals of Part I and Part II of the Reinstatement Questionnaire.

1. Personal Information

- A. Full Name:
- B. Current Mailing Address and Street Address:
- C. Social Security Number:
- D. Date of Birth:
- E. Marital Status:
- F. For each of your dependents, state the full name, address, date of birth, and relationship:

G. List all residences maintained by you during the period of discipline or disability inactive status, with the names and addresses of landlords, if any.

2. Financial Information

A. List your gross monthly salary, commissions, or earnings from each employment, occupation, or business that you have engaged in during the period of your disbarment, suspension, resignation, or disability inactive status.

B. List your monthly income from all sources other than employment, occupation, or business, including gifts and loans, and the sources from which all such earnings and income were derived, during the period of your disbarment, suspension, resignation, or disability inactive status, or during the eight (8) years preceding the filing of the petition for reinstatement, whichever is less.

C. List all monthly expenses during the period of your disbarment, suspension, resignation, or disability inactive status, or during the eight (8) years preceding the filing of the petition for reinstatement, whichever is less.

D. Are you subject to an order or agreement to pay child and /or spousal support? If yes, attach a copy of the support order or agreement and proof that such payments are current.

E. Since the date of your disbarment, suspension, resignation, or transfer to disability inactive status, have you commenced proceedings in any capacity in bankruptcy or given an assignment for the benefit of creditors? If so, please give the case name(s), docket number(s), the name and address of assignee, and identify the court(s) where the proceedings related to such action were commenced, and describe the status of each.

F. Tax returns

- (1) State whether or not you have filed all State and Federal income tax returns for the previous eight (8) years.
- (2) Attach to Part II (not Part I) of this Questionnaire copies of all Federal income tax returns filed by you or on your behalf in any capacity for eight (8) years preceding the filing of the petition for reinstatement or for all tax years including and since the date of your suspension, disbarment, resignation, or transfer to disability inactive status, whichever is less.
- (3) State whether or not you will provide the Board or Bar Counsel upon demand the authorization required by governmental taxing authorities to release the original returns.

G. Assets

- (1) List all real estate which you owned or record or in which you have or had a beneficial interest at any time from the date of the order of disbarment, resignation, suspension, or transfer to disability inactive status to the present. For each such property, list its location, and current fair market value, or, if disposed of, the fair market value as

of the date of the order of discipline or transfer to disability inactive status, the date of its disposition, and the consideration paid.

(2) List all other assets of a value of or exceeding \$1,000 to which you have or held title or in which you have had a beneficial interest at any time during the period of disbarment, resignation, suspension, or disability inactive status. For each, identify the nature of the asset, its location, and its current value, or, if disposed of, the value of the asset as of the date of the order imposing discipline or transferring you to disability inactive status, the date of disposition of the asset, and the amount received for it.

H. Financial obligations

(1) List all your financial obligations not previously listed, above, as of the date of the filing of the petition for reinstatement. For each such obligation, list the name and address of the creditor or obligee, the amount of the obligation, the date the obligation was incurred, whether the obligation is fixed or disputed, and whether any agreement or judgment exists regarding the obligation. Please attach a copy of any such agreement or judgment. If no writing exists regarding the agreement for payment, please provide the name and address of the individual with whom the agreement was made and set forth the terms of the agreement and the date on which it was made. If the creditor is either the Massachusetts Department of Revenue (DOR) or the Internal Revenue Service (IRS), please provide a release on a form approved by the IRS and the DOR which will permit the Office of Bar Counsel and the Board of Bar Overseers to obtain information regarding your tax or support obligations.

(2)(a) List the names of all financial institutions in which you are or were signatory to accounts, safe deposit boxes, deposits or loans during the period of discipline or disability inactive status.

(b) Please state the number of each account, box, deposit, or loan; the date each account, box, deposit, or loan was opened, approved, or made; and the date each account, box, or loan was closed, discharged, or paid.

3. Professional Status Information

List the names and addresses of all persons who complained or testified against you in the proceeding which resulted in your resignation, disbarment, or suspension in this Commonwealth and in any other jurisdiction or court.

4. Emotional Disorder/Addiction/Substance Abuse Information

If you have been incapacitated from employment or from carrying out employment due to any physical or emotional impairment, alcoholism, use of prescription or non-prescription drugs, or other reason since the effective date of the discipline; or if you are seeking reinstatement from an order transferring you to disability inactive status; or if you raised in mitigation during any proceeding regarding your license to practice law or any other profession a claim that your physical or mental condition caused or contributed to the alleged misconduct. Describe the nature of the impairment or disability, its effect on your ability to obtain or maintain employment, and the treatment sought to address the impairment or disability. Provide the name

and address of each institution and provider who has provided or who is providing treatment or consultation to you, the dates of treatment, and your current diagnosis or prognosis.

Additional Statement:

Provide a statement as to 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.

I, _____, being duly sworn, state as follows:

That all of the information contained in the foregoing Reinstatement Questionnaire is true and correct to the best of my knowledge;

That I authorize all providers who have examined or treated me and all institutions in which I have been examined or treated for any physical or mental disorder or addiction since the date of the order imposing discipline or transferring me to disability inactive status to provide to agents and employees of the Office of Bar Counsel and the Board of Bar Overseers all hospital and medical records, reports, treatment notes, and information regarding care, consultation, evaluation, diagnosis and prognosis, and I will cooperate with the Office of Bar Counsel and the Board of Bar Overseers in providing such further information and authorizations as required to release information to the Office of Bar Counsel and the Board of Bar Overseers;

That I further authorize all financial institutions listed in response to question 2(H)(2) to provide to agents or employees of the Office of Bar Counsel and the Board of Bar Overseers copies of statements of account, canceled checks, box records, and loan records, and I will cooperate with the Office of Bar Counsel and the Board of Bar Overseers in providing such further information and authorizations as required to release information to the Office of Bar Counsel and the Board of Bar Overseers.

(signature)

Sworn to and subscribed before me this ____ day of _____, 20__.

Notary Public

(SEAL) My commission expires: _____