

2011: The Year in Ethics and Bar Discipline

**By
Constance V. Vecchione, Bar Counsel
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In this article, the Office of Bar Counsel takes a second look at key developments in ethics and bar discipline in the last twelve months.

The full bench of the Supreme Judicial Court issued five disciplinary decisions in 2011, and another 148 public decisions or orders were entered by either the single justices or the Board of Bar Overseers. Other nondisciplinary civil cases decided by the appellate courts also addressed issues relating to the Massachusetts Rules of Professional Conduct. Finally, a number of rules changes, including extensive amendments to Mass. R. Prof. C. 1.5 and revisions to the Rules of the Board of Bar Overseers and Supreme Judicial Court Rule 4:02 on registration, took effect in 2011. Several of the significant court cases, as well as the rule changes, are described below.

Disciplinary decisions

Trust funds

Two full bench decisions, *Matter of Sharif*, 459 Mass. 558 (2011), and *Matter of Pudlo*, 460 Mass. 400 (2011), addressed disciplinary sanctions for misuse of retainers in the form of advance fee payments. The court emphasized that such retainers are client funds that must be deposited to trust accounts and withdrawn only when earned. The court declined, however, to apply the presumptive sanctions for mishandling of trust funds due to the distinction between advance fee retainers and other types of trust funds, citing “the potential for confusion, misunderstanding, or ambiguity as to whether the [retainer] funds belong to the client or the attorney[.]” *Sharif* at 570. In the circumstances, including different findings on intent and evidence in mitigation, Sharif received a three-year suspension with the third year stayed, while Pudlo received a one-year suspension with six months stayed.

In another full bench decision concerning trust funds, *Matter of Scola*, 460 Mass. 1003 (2011), the court sanctioned a conveyancing attorney for inadequate record keeping that led to negligent misuse of trust funds and for continuing to conduct closings using the IOLTA account that had the shortfall for seven weeks after bar counsel instructed him to cease. The deficiency arose from several instances of nonreceipt of closing proceeds, with the result that, unbeknownst to the attorney until bar counsel commenced an investigation, new funding was used on multiple occasions to pay off unrelated obligations. The attorney did not use the funds for his own benefit. The court imposed a six-month suspension, stayed for one year in light of “significant mitigating factors,” including the attorney’s “extraordinary efforts” to make restitution from personal funds.

Appeals

Two other full bench cases, *Matter of Gargano*, 460 Mass. 1022 (2011), and *Matter of Weiss*, 460 Mass. 1012 (2011), are notable as the first two decisions made by the court pursuant to its 2009 order initiating a pilot program modifying the procedure for appeals to the full bench from decisions of the single justice in bar discipline cases. The intent of the modified procedure is to expedite the resolution of bar discipline appeals, while protecting the rights of the litigants. In both *Gargano* and *Weiss*, the court affirmed the judgments of the single justices based on the appellant lawyers’ submissions, without requesting a reply from bar counsel.

Confidentiality of disciplinary proceedings

On petition by a former client of a disbarred attorney, a single justice of the Supreme Judicial Court authorized bar counsel and the Board of Bar Overseers, in their discretion, to disclose to the client information otherwise confidential under Supreme Judicial Court Rule 4:01, § 20. The lawyer had represented the client in a guilty plea to criminal charges. The client was attempting to pursue a claim that the attorney knew he faced suspension of his license to practice and coerced the guilty plea in order to conclude the case and retain his flat fee. Bar counsel and the board

were authorized to provide information to the client's current counsel as to when the disbarred attorney "learned or probably learned" that bar counsel intended to file disciplinary charges or intended to petition for a temporary suspension. *Matter of Taylor*, docket no. BD-2007-065 (2/10/11).

Unauthorized practice of law

Two decisions, one disciplinary by the board and one civil by the Supreme Judicial Court, explored issues involving the unauthorized practice of law. A third case involving related issues was reported to the full bench of the SJC by a single justice and is currently awaiting decision.

In Admonition No. 11-12, the Board of Bar Overseers determined that a lawyer who continued to practice law for 31 months while administratively suspended for failure to register with the BBO engaged in the unauthorized practice of law in violation of Mass. R. Prof. C. 5.5. The lawyer believed incorrectly that his employer had paid his registration fees and was unaware of the administrative suspension until shortly prior to his reinstatement. Acknowledging that the typical discipline would be "at least" a public reprimand for unauthorized practice aggravated by knowledge of an administrative suspension, the board decided in this case that an admonition was appropriate in light of factors found in mitigation.

In *Real Estate Bar Association for Mass., Inc. v. National Real Estate Information Services*, 459 Mass. 512 (2011) (*REBA v. NREIS*), the Supreme Judicial Court considered two questions certified to it by the U.S. Court of Appeals concerning the unauthorized practice of law. *REBA v. NREIS*, 608 F.3d 110 (1st Cir. 2010). REBA had sued NREIS for declaratory and injunctive relief, alleging that NREIS's business of providing lenders with settlement services to close residential real estate mortgage transactions in Massachusetts involved the unauthorized practice of law.

Noting the difficulty in defining "the practice of law," the SJC stated that many activities that could constitute the practice of law are undertaken by nonlawyers

and that the “unauthorized practice of law” therefore must involve activities that fall “wholly within” the practice of law. While declining because of deficiencies in the record to decide whether NREIS had engaged in unauthorized practice (and in particular, whether the Good Funds Statute, G.L.c.183, § 63B, was being violated), the court listed examples of activities related to real estate closings that do constitute the practice of law, such as preparing a deed to real property for another and conducting a closing, and activities that do not, such as preparing HUD-1 settlement statements and other mortgage-related forms. In particular, an attorney must be “involved” and “play a meaningful role” in the conveyancing transaction, which, said the court, is more than simply being present at the closing. The attorney must “direct the proper transfer of title and consideration and...document the transaction” and the attorney’s “professional and ethical responsibilities...require action not only at the closing but before and after it as well.”

A third case that is still pending, *Matter of Bott*, No. SJC-10935, concerns the restrictions imposed by S.J.C. Rule 4:01, § 17(7), on disbarred or suspended lawyers, lawyers who resign as a disciplinary sanction, and lawyers placed on disability inactive status. In *Bott*, a disbarred attorney filed a petition pursuant to G.L. c.211, § 3, with the Supreme Judicial Court for Suffolk County, seeking permission to set up a practice as a mediator. The case was reported by a single justice to the full bench on March 1, 2011 and argued after briefing on January 4, 2012, with bar counsel as appellee. The question to be decided is whether mediation, although not the practice of law, nonetheless constitutes “legal work” prohibited under Supreme Judicial Court Rule 4:01, § 17(7), to lawyers who have lost their licenses.

Ethics-related decisions

In addition to the *REBA* case, three other nondisciplinary cases, two by the SJC and one by the Appeals Court, explored attorneys’ obligations under the Massachusetts Rules of Professional Conduct.

In *In re Kiley, petitioner*, 459 Mass. 645 (2011), the SJC discussed the disciplinary and civil rules relating to withdrawal from representation, Mass. R. Prof. C. 1.16 and Mass. R. Civ. P. 11(c). Kiley filed a petition for interlocutory relief after he was ordered by a superior court judge to enter an appearance for a plaintiff in a civil case when an associate who was counsel of record left the practice of law and withdrew. The court found that the appearance of an attorney who is a member of a firm is binding on both the individual attorney and the law firm. If withdrawal will have a material adverse effect on the client's interests and none of the circumstances listed in Rule 1.16 requiring or permitting withdrawal is present, the law firm may not terminate the agreement simply because the attorney who had been handling the case is unavailable. The trial court could not, however, designate which attorney in the firm would handle the case.

The SJC addressed the safe harbor provisions of the trial publicity rule, Mass. R. Prof. C. 3.6, in *PCG Trading, LLC v. Seyfarth Shaw, LLP*, 460 Mass. 265 (2011). In *PCG Trading*, the defendant had opposed, and a judge of the superior court had denied, pro hac vice admission to an out-of-state attorney for the plaintiff. The denial was primarily based on the attorney's comments to a legal journal that the superior court found violated the prohibitions on prejudicial trial publicity set forth in Rule 3.6(a). On appeal, however, the SJC found that the remarks by the lawyer were "well within" the exceptions in Rule 3.6(b)(1) and (2), which permit lawyers to state the claim or defense and information in the public record without violating Rule 3.6(a).

Finally, *Rubin v. Murray*, 79 Mass. App. Ct. 64 (2011), dealt with the question of whether an attorney who in 1975 received stock in a start-up corporation as partial payment for his legal services violated then DR 5-104(A) on conflicts of interest in business transactions with clients. The attorney's stock in the company was valued at \$2750 in 1975 but had appreciated substantially at the time of the trial. After concluding that the original fee agreement was arrived at fairly and equitably, the

court rejected the defendants' argument that the court should take a second look at the reasonableness of the fee based on the current value of the stock. The court noted, however, that the 1975 transaction would not pass muster under current Mass. R. Prof. C. 1.8(a) because of the lack of both written disclosure of the terms of the transaction and the client's written consent.

Rule changes

Mass. R. Prof. C. 1.15

On March 15, 2011, extensive substantive amendments took effect to the text and comments of Mass. R. Prof. C. 1.5. The changes are discussed in detail in an article posted on the Office of Bar Counsel/Board of Bar Overseers website, "Fees and Feasibility: Amendments to Mass. R. Prof. C. 1.5 on Fees," www.mass.gov/obcbbo/Fees2011.htm.

Among the numerous changes, Rule 1.5(a) now prohibits collecting unreasonable expenses as well as illegal or clearly excessive fees; Rule 1.5(b) now requires communication of the scope of the representation as well as the basis or rate of the fee and expenses; and Rule 1.5(e) on division of fees between lawyers in different firms now expressly includes referral fees and requires the client's consent in writing at the time that the lawyer and client enter into the fee agreement. New provisions in Rule 1.5(c) require contingent fee agreements to state the basis on which fees and expenses will be claimed and calculated if the lawyer is discharged prior to the conclusion of the case and also require successor counsel to state in the fee agreement whether the client or successor counsel is liable to pay the fees and expenses of prior counsel. Finally, two new forms of contingent fee agreements, incorporating certain of the key amendments, are included in Rule 1.5(f).

Other SJC and BBO rules

Supreme Judicial Court Rule 4:02 was amended to add new section 10, which states that residential addresses of attorneys listed on their registration statements shall be treated as confidential and used only by the Board of Bar Overseers and the

Office of Bar Counsel to communicate with lawyers or in the course of the business of the board or bar counsel. The residence addresses will not be disclosed to third parties except as ordered by a single justice of the court. The restriction does not apply to any lawyer who designates a home address as a place of business and the office address of any attorney in good standing in Massachusetts will continue to be available on the board's website.

Section 4.5B of the Rules of the Board of Bar Overseers is a new rule on taking out-of-state depositions pursuant to subpoena in bar disciplinary proceedings. The rule provides a mechanism through the board for bar counsel or the respondent either to seek the issuance of a subpoena from the disciplinary agency in the jurisdiction where the deposition will occur or to apply to a single justice of the SJC for leave to take the deposition pursuant to the Massachusetts Letters Rogatory statute, G.L. c. 223A, § 10.

New subchapter G of Chapter 4 of the BBO rules consolidates and adds to previously existing provisions on recusal, clarifying issues concerning recusal of members of the Board of Bar Overseers and hearing officers.

To stay current with bar discipline decisions, summaries of important cases, and other news and events relating to the rules of professional conduct or the disciplinary process, make sure to check the website of the Office of Bar Counsel and Board of Bar Overseers, www.mass.gov/obcbbo. And happy new year!