



2012: The Year in Ethics and Bar Discipline

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With this article, the Office of Bar Counsel undertakes our annual year-end roundup of noteworthy issues in ethics and bar discipline in Massachusetts.

There were 156 disciplinary decisions or orders entered by the single justices of the Supreme Judicial Court or the Board of Bar Overseers in 2012. In addition, the SJC approved two significant rules changes involving professional conduct, one amending Mass. R. Prof. C. 1.5(b) to require that fee arrangements be in writing, and the other adding Supreme Judicial Court Rule 3:16 to mandate a “practicing with professionalism” course for new admittees. The full bench of the SJC also issued several ethics-related decisions of general interest to the bar. A few of the matters of interest are highlighted below.

Fees and Client Funds

Amendments to Rules 1.5 and 6.5

The 2012 news with the widest impact in the area of professional responsibility was the order of the Supreme Judicial Court on October 24, 2012, amending Mass. R. Prof. C. 1.5(b), effective January 1, 2013. The rule now requires that, in most circumstances, the scope of the representation and basis or rate of fee and expenses be communicated to the client in writing. No change has been made to Rule 1.5(c), which has always required that contingent fee agreements be in writing. The same SJC order also amends Mass. R. Prof. C. 6.5, concerning non-profit and court-annexed limited legal services programs, to clarify that lawyers providing short-term limited legal services under the auspices of such programs are not subject to Rule 1.5(b). For further details on these amendments, see “Write It Up, Write It Down: Amendment to Mass. R. Prof. C. 1.5 Require Fee Arrangements to be in Writing,” <http://www.mass.gov/obcbbo/WriteItUp.pdf>.

Clearly excessive fees

In *Matter of Murphy*, 28 Mass. Att'y Disc. R. __ (2012), an attorney who had been an associate in a law firm stipulated to a suspension of a year and a day for charging a clearly excessive fee in two unrelated cases. In both instances, the lawyer knowingly spent more time on these matters than was needed in order to increase his billable hours at the firm. In two other cases currently pending before the Supreme Judicial Court for Suffolk County, lawyers have agreed to longer suspensions (2½ years in one instance, 4 years in the other) for fee violations compounded by fraud on the probate court in one case and fraud on the Committee for Public Counsel Services in the other.

Go-Best Assets Limited v. Citizens Bank of Massachusetts

In *Go-Best Assets Limited v. Citizens Bank of Massachusetts*, 463 Mass. 50 (2012), the Supreme Judicial Court found no tort liability from a bank's failure to report to the Board of Bar Overseers under Mass. R. Prof. C. 1.15(h) a number of dishonored checks on a client account in the name of a since-disbarred attorney.

In July, 2000, the plaintiff Go-Best wired \$5 million to an account entitled "Morris M. Goldings client account" at Citizens Bank, based on representations made by Goldings that he would invest the funds on Go-Best's behalf. When Goldings instead converted the funds, Go-Best sued Citizens under various tort theories, including a claim that the bank should have notified the Board when four checks written on the client account were dishonored for insufficient funds in the months prior to Go-Best's investment.

The SJC found for Citizens, concluding that Rule 1.15(h) does not create a private right of action for victims of misappropriation and does not create a duty of care in tort in the absence of legislative intent to create a private right of action. Since the bank had no actual knowledge of the attorney's actual or intended misappropriation of Go-Best's funds, the bank had no duty to take steps to prevent the

theft. The Court did, however, refer to the Standing Advisory Committee on the Rules of Professional Conduct the question of whether an attorney who opens an individual non-IOLTA trust account should be required to deliver to the bank a form notifying the bank that the account is a trust account.

Disqualification

In *Smaland Beach Association, Inc. v. Genova*, 461 Mass. 214 (2012), the Court, among other issues, addressed the question of disqualification of opposing counsel. In the underlying case, the trial judge had disqualified counsel for the plaintiff and third-party defendants because the defendants had listed plaintiff's counsel as a trial witness. In reversing the disqualification order, the Court considered the scope of disqualification orders under Mass. R. Prof. C. 3.7(a).

The Court noted that Rule 3.7(a) is narrower and less restrictive than the prior Disciplinary Rule 5-102(A) and applies only to counsel's conduct "at trial" and not to the broader pretrial preparation of a case. While pretrial disqualification cannot be grounded in Rule 3.7(a) alone, the Court indicated that "combining the roles of advocate and witness may create a conflict of interest" supporting disqualification under Mass. R. Prof. C. 1.7 and 1.9.

Malpractice Insurance

In two separate cases, lawyers in 2012 received short-term suspensions for falsely certifying on their annual BBO registration forms that they carried malpractice insurance, when in fact they knew that they did not. *Matter of O'Meara*, 28 Mass. Att'y Disc. R. __ (2012); *Matter of Durodola*, 28 Mass. Att'y Disc. R. __ (2012). In both cases, the lawyers accepted appointments from the Committee for Public Services to represent indigent defendants and were aware that they were not permitted to do so without malpractice insurance.

Mediation

In *Matter of Bott*, 462 Mass. 430 (2012), the full bench of the Supreme Judicial Court held that an attorney who resigns while the subject of disciplinary investigation, or who is disbarred or suspended from the practice of law, may be prohibited in some circumstances from acting as a mediator, even though mediation does not necessarily constitute the practice of law.

In so holding, the Court considered the following matters relevant to determining “whether mediation or other activities that do not constitute the practice of law when performed by nonlawyers may, in the context of bar discipline cases, nevertheless constitute legal work when performed by a lawyer: (1) whether the type of work is customarily performed by lawyers as part of their legal practice; (2) whether the work was performed by the lawyer prior to suspension, disbarment, or resignation for misconduct; (3) whether, following suspension, disbarment, or resignation for misconduct, the lawyer has performed or seeks leave to perform the work in the same office or community, or for other lawyers; and (4) whether the work as performed by the lawyer invokes the lawyer's professional judgment in applying legal principles to address the individual needs of clients.” On remand to the single justice, an order entered delineating the types of mediation that the petitioner could undertake.

Workplace ethics

In *Matter of the Discipline of an Attorney*, 28 Mass. Att'y Disc. R. __ (2012), a single justice of the Supreme Judicial Court affirmed the Board's dismissal of disciplinary charges against an attorney who, while employed at a major Boston law firm, searched the “public” section of the firm's document management system for documents to support her claims of sex discrimination and retaliatory discharge against the firm. The single justice found that, in acquiring these materials, the lawyer did not invade anyone's privacy, act surreptitiously, or obtain confidential or

privileged documents, and that these distinctions were dispositive in moving the conduct to a gray area that cannot form the basis for discipline: “[t]hat the respondent viewed the documents and found non-privileged, non-confidential information to support her claims may have been frustrating to her employer, but it does not make her an unethical attorney.”

Mandatory CLE

On November 20, 2012, the Supreme Judicial Court issued an order adding new Rule 3:16 to the Rules of the Supreme Judicial Court, with an effective date of September 1, 2013. The rule will require that all persons admitted to the Massachusetts bar after the effective date, whether on motion or after passing the bar exam, complete a one-day, in-person, mandatory “practicing with professionalism” course within 18 months of admission. The rule further provides for administrative suspension of any attorney who does not complete the course within the time allotted. The specifics of the course curriculum have as yet to be approved by the Court.

The full text of the bar discipline decisions, summaries of important cases, and other news and events relating to the rules of professional conduct or the disciplinary process are found at the Office of Bar Counsel website, www.mass.gov/obcbbo. Keep current and have a happy new year!