



2013: The Year in Ethics and Bar Discipline

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In this article, bar counsel takes another look at significant developments in ethics and bar discipline in the last twelve months.

Final disciplinary decisions or orders were entered by the single justices of the Supreme Judicial Court, the Board of Bar Overseers, and (in one instance) the United States Court of Appeals for the First Circuit in 123 matters in 2013. The full bench of the SJC also issued four disciplinary decisions, while several other decisions of general interest to the bar relating to professional conduct were issued either by the SJC or the Appeals Court. The SJC's Standing Advisory Committee on the Rules of Professional Conduct has also proposed comprehensive amendments to the Massachusetts Rules of Professional Conduct, based primarily on similar changes to the American Bar Association's model rules. Some of the matters of interest are highlighted below.

Rules

Proposed Amendments to the Massachusetts Rules of Professional Conduct

In July 2013, the SJC's Standing Advisory Committee on the Rules of Professional Conduct submitted to the Court and published for public comment its proposed revisions to the Massachusetts Rules of Professional Conduct, <http://www.mass.gov/courts/sjc/comment-request-rules-professional-conduct.html>.

The committee proposed changes in light of amendments to the American Bar Association's model rules since the Massachusetts rules were adopted in 1998. These amendments include the extensive "Ethics 2000" revisions adopted by the ABA in 2002 and 2003, as well the "Ethics 20/20" amendments adopted by the ABA in 2012

and 2013 to respond to changes in the practice of law resulting from globalization and increased use of technology.

The proposed amendments to the rules and comments address issues such as outsourcing, confidentiality, prospective clients, conflict waivers, conflict screening, and law firm discipline. The major changes are described in the Executive Summary, <http://www.mass.gov/courts/sjc/docs/rules-professional-conduct-executive-summary.pdf>, and include the following:

- Adopting new comments to Model Rule 1.1 and Model Rule 5.3, which provide guidance for outsourcing legal work in a manner compatible with the lawyer's professional obligations.
- Amending Rule 1.6 on confidential information to include changes that would expand the permissive exceptions to the requirement of confidentiality to prevent or rectify injuries from criminal or fraudulent conduct.
- Adopting the ABA term "informed consent" in Rules 1.6, 1.7, 1.9 and elsewhere in the Rules, replacing the current term "consent after consultation," as the standard to be met for waivers of confidentiality or conflicts of interest.
- Adopting the requirement that conflicts waivers permitted by Rules 1.7, 1.9, 1.11, and 1.12 be confirmed in writing.
- Retaining, with some refining, the approach of current Massachusetts Rule 1.10 with respect to screening lawyers who import a conflict of interest when changing firms, rather than opting for the greater latitude for screening that the Model Rule permits.
- Adopting Model Rule 1.18, dealing with the confidentiality obligations of lawyers as to prospective clients.
- Adopting most of the changes made by the ABA to clarify and strengthen the text and Comments to Model Rule 3.3 on candor to the tribunal.
- Adopting, with respect to supervisory obligations under Rules 5.1 and 5.3, the practice of New York and New Jersey in imposing disciplinary responsibility on law firms as well as individual firm lawyers.

To view the committee's full report, including dissents, see

<http://www.mass.gov/courts/sjc/docs/rules-professional-conduct-report.pdf>. To view

the proposed rules changes redlined for comparison with both the current

Massachusetts rules and the ABA Model Rules, see

<http://www.mass.gov/courts/sjc/docs/rules-professional-conduct-comparison-current->

[mass-rules.pdf](#) and <http://www.mass.gov/courts/sjc/docs/rules-professional-conduct-comparison-aba-model-rules.pdf>. Comments are due by March 2, 2014.

Bar Discipline Decisions of Note

Standing

Although bar counsel’s appeal raised issues of “great importance”—the scope of a prosecutor’s ethical obligation timely to turn over exculpatory evidence – the United States Court of Appeals for the First Circuit in *Matter of Auerhahn*, 724 F.3d 103 (2013), determined that bar counsel did not have standing to appeal the district court’s dismissal of bar counsel’s petition for disciplinary sanctions because bar counsel’s “arguable” interest in the matter “expired” when her petition was dismissed.

Required notifications to bar counsel and the bar examiners

Two different disciplinary cases, *Matter of Burnbaum*, 466 Mass. 1024 (2013), and *Matter of D’Amato*, 29 Mass. Att’y Disc. R.__(2013), underscore the critical importance of compliance by both lawyers and would-be lawyers with mandatory self-reporting of information to bar counsel and/or the Board of Bar Examiners –and the disciplinary consequences of failing to do so.

In *Burnbaum*, the attorney was a member of both the Florida and Massachusetts bars. He pleaded guilty in the United States District Court for the Southern District of Florida to one count of possession of cocaine with intent to distribute. The lawyer had met with an incarcerated client, received from the client a map to a warehouse where 145 kilograms of cocaine were located, and sent that map to another client. He was sentenced in 1999 to a term of 105 months of incarceration, ultimately serving six years. He tendered a disciplinary resignation to the Florida bar in 1999, but failed to report the conviction to Massachusetts bar counsel in violation of Supreme Judicial Court Rule 4:01, § 12(8). Bar counsel learned of the conviction in 2011, filed a notice of conviction with the SJC, and commenced a reciprocal disciplinary proceeding. The full bench of the SJC ordered Burnbaum’s disbarment,

retroactive only to December 7, 2012, the date on which he was suspended in Massachusetts by a single justice.

In *D'Amato*, the lawyer had failed to report to the BBE his arrest for operating under the influence prior to being sworn in as a member of the bar in December 2010. After he was sworn in, he was convicted on the OUI charge. This conviction, as well as other prior charges, came to light when the lawyer moved to Illinois and applied for admission to the Illinois bar. Although Illinois bar admission authorities instructed the lawyer to inform Massachusetts of the information, he did not do so until after he finally passed the Illinois bar on his third attempt. D'Amato was suspended for six months from the Massachusetts bar.

Mitigation

On appeal by bar counsel from a decision by a single justice reducing the board's recommendation of disbarment to indefinite suspension based on the county court's assessment of the lawyer's mental health, the full bench of the Supreme Judicial Court in *Matter of Patch*, 466 Mass. 1016 (2013), disbarred the attorney. In so doing, the Court ruled that the lawyer had waived claims of mitigation by not pleading mitigation in the answer to the petition for discipline.

Default judgments

On appeal by bar counsel from a decision by a single justice, the Supreme Judicial Court in *Matter of Gustafson*, 464 Mass. 1021 (2013), upheld the six-month suspension of an attorney who had defaulted in the underlying disciplinary proceedings and failed to appear before the single justice. The full bench held that a six-month suspension, without the further requirement of a hearing on reinstatement, was an appropriate sanction for the disciplinary charges that were deemed admitted.

Reinstatement

In *Matter of Fletcher*, 466 Mass. 1018 (2013), the petitioner in a reinstatement proceeding had appealed the single justice's denial of reinstatement. The full bench found that the petitioner had not practiced law in the Commonwealth for over twenty

years and that the record fell “considerably short” of demonstrating either competency in the law or the necessary moral character to resume practice.

Other ethics-related decisions of interest

Witness Immunity in Bar Discipline Proceedings

In *Bar Counsel v. Peter S. Farber*, 464 Mass. 784 (2013), the full bench of the Supreme Judicial Court confirmed that Supreme Judicial Court Rule 4:01, § 9, provides absolute immunity for a witness’s testimony at a bar disciplinary hearing. The decision arose from an action for declaratory relief brought by bar counsel against an attorney who had filed a civil action in superior court for defamation and other claims against a complainant/witness who had testified against him in an earlier bar discipline proceeding.

Bar Admissions

Under S.J.C. Rule 3:01, § 6.1, a lawyer admitted to the bar of another state for at least five years may apply for admission in Massachusetts upon motion. One of the requirements is that the applicant must have engaged in the active practice (or teaching) of law for five of the seven years preceding the request.

In *Matter of Schomer*, 465 Mass. 55 (2013), the Supreme Judicial Court reversed a decision by the Board of Bar Examiners denying a lawyer’s petition for admission on motion. The lawyer was admitted to practice in New Jersey some time prior to 2005 and was admitted in New York in 2009. The BBE had determined that the lawyer did not meet the five-year active practice requirement because, between 2005 and 2009, he was working in New York, first as a contract attorney who did not appear in court and then as an associate handling New Jersey matters. His practice in New York had been “illegal” and could not count towards the requisite five years. The SJC ruled that New York had ratified the lawyer’s practice there by admitting him and that the “uncertain boundaries of multijurisdictional practice vis-à-vis the unauthorized practice of law” should not impede the petitioner’s admission here.

Contingent fees

In an unpublished decision that is another in a line of Massachusetts appellate cases over the last decade assessing lawyers' contingent fee agreements, the Appeals Court in *Landry v. Haartz*, 83 Mass. App. Ct. 1135 (2013), affirmed a judgment against an attorney who had sued his clients for a balance that he claimed was due on a contingent fee agreement on which the clients had already paid a substantial sum. A jury, on special questions, had previously found that the attorney had not "explain[ed] the contingent fee agreement to the extent reasonably necessary to permit [the clients] to make informed decisions regarding his representation" and had charged them "a clearly excessive fee." Based on that finding, the trial judge on the counterclaims awarded compensatory damages, trebled the damages under G.L.c.93A, awarded attorneys' fees, and added statutory interest.

The Appeals Court upheld the trial court's finding that the lawyer, as fiduciary, had the burden of proof on the client's counterclaim alleging that the fee was unreasonable and clearly excessive. The Court also upheld as proper the trial court's admission of evidence, and instruction to the jury, concerning Mass. R. Prof. C. 1.4, relating to communication with clients.

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