



## **2014: THE YEAR IN ETHICS AND BAR DISCIPLINE**

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With this article, the Office of Bar Counsel undertakes our annual wrap-up of noteworthy events in ethics and bar discipline in the year just past.

Final disciplinary decisions or orders were entered by the full bench or single justices of the Supreme Judicial Court, or by the Board of Bar Overseers, in 110 cases in 2014. The SJC has also approved comprehensive amendments to the Massachusetts Rules of Professional Conduct, based primarily on similar changes to the American Bar Association's model rules. Some matters of interest are highlighted below.

### **Rules**

The Supreme Judicial Court in December announced its intention to adopt wide-ranging revisions to the Massachusetts Rules of Professional Conduct, <http://www.mass.gov/courts/docs/sjc/rule-changes/notice-massachusetts-rules-of-professional-conduct.pdf>. As of this writing in late January 2015, a few changes have not yet been finalized and an effective date has not yet been announced.

The changes are based on proposals by the Court's Standing Advisory Committee on the Rules of Professional Conduct and comments on those proposals by the bar. The amendments will reflect changes to the American Bar Association's model rules including 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 amendments to the rules and comments address issues such as outsourcing, confidentiality, prospective clients, conflict waivers, and conflict screening:

- Rule 1.15 is being amended to require that, in addition to legal fees paid in advance, advances for costs and expenses must now be held in a trust account and withdrawn only as expenses are incurred. The rule will also require attorneys to provide a written notice

to the bank or other depository when opening any account that is a trust account within the meaning of this rule, regardless of whether the account is an IOLTA account or an individual trust account.

- New comments to Model Rule 1.1 and Model Rule 5.3 provide guidance for outsourcing legal work in a manner compatible with the lawyer's professional obligations.
- Amendments to Rule 1.6 on confidential information include changes expanding the permissive exceptions to the requirement of confidentiality in certain situations to prevent or rectify injuries from criminal or fraudulent conduct.
- The ABA term "informed consent" is being adopted 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.
- Amendments to Rules 1.7, 1.9, 1.11, and 1.12 require that conflicts waivers be confirmed in writing.
- Model Rule 1.18, dealing with lawyers' duties to prospective clients as to conflicts and confidentiality, has been adopted for the first time.
- Changes made by the ABA to clarify and strengthen the text and comments to Model Rule 3.3 on candor to the tribunal have, for the most part, been adopted.

### **Reinstatements**

In four reinstatement matters last year, Board of Bar Overseers hearing panels recommended that the SJC deny reinstatement on the ground that, among other matters, the petitioning attorneys either did not understand or did not acknowledge the wrongfulness of their conduct in the underlying disciplinary matters. Three of these cases are still in litigation but each of the panel decisions highlights the importance of the requirement that a petitioning attorney have the moral qualifications for reinstatement, including a credible showing of reformation and rehabilitation.

For example, in the case that has been concluded, *Matter of Wynn*, SJC no. BD-1987-022 (4/17/14), the single justice was "particularly troubled by [the petitioner's] insistence that he did not admit to the allegations set forth in the stipulation, in 1989," when approval of the stipulation had been expressly conditioned by the board on his admitting allegations that

he had previously denied but not contested. In a second case, the panel noted that the petitioner gave “inconsistent and evasive” testimony, purportedly acknowledging “responsibility” for the problems that occurred but “quibbl[ing] with the facts.”

In the two other matters, the panels in addition suggested that the petitioners’ failure to acknowledge their misconduct reflected on competence to practice law as well as moral qualifications. In one case the panel noted that the “forcefulness with which [the petitioner] continues to resist the conclusion that he committed harmful and serious misconduct, and his attempts to blame others, together suggest not only a failure to reform but confusion about both the legal process and the meaning and effect of a stipulation.” In the other case, the panel noted that the petitioner’s “inability to coherently recall and discuss his prior discipline leads us to question whether it has brought about the necessary changes in understanding and behavior, just as it casts doubt on his legal competence.”

### **Retainers and fee modifications**

In *Matter of Weisman*, 30 Mass. Att’y Disc. R. \_\_ (2014), a lawyer received a one-year suspension for failure to segregate, and misuse of, a substantial retainer. The retainer was an advance fee, paid in monthly installments, to be applied to hourly fee charges for litigation of a major matter. The lawyer claimed that, after the parties had signed a fee agreement, the client subsequently waived his right to have the retainer held in a client funds account and permitted the lawyer to use the retainer funds before he earned them. The client, however, did not understand or knowingly consent to the purported waiver. When the litigation concluded, the lawyer owed the client \$175,000, but he closed his firm and failed to repay the client for over two years, until after a complaint was filed with bar counsel.

The board did not need to reach the further issue of whether the prohibition against commingling and use of retainer funds is waivable under any circumstances. The board did, however, find that a lawyer’s ability to modify a fee agreement during the course of the representation is limited by the provisions of Mass. R. Prof. C. 1.8(a), concerning business transactions with clients. Thus, and very importantly, a lawyer who seeks a midstream

modification of a fee agreement must advise the client to consider having it reviewed by independent counsel and obtain the client's informed written consent.

### **Full bench decisions**

The full bench of the Supreme Judicial Court in 2014 decided one disciplinary matter and one discipline-related matter.

In *Matter of Haese*, 468 Mass. 1002 (2014), the full bench affirmed the single justice's order of disbarment. The Court found that the lawyer's due process rights were not violated when the board denied his motion for a continuance after he retained new counsel a week before the scheduled hearing; he had already received three continuances before filing an answer to the petition for discipline and two prior continuances of the hearing date. The Court further found that the hearing committee's credibility determinations and the subsidiary facts found by the board as to intentional misappropriation of trust funds were supported in the record, and that the lawyer's medical problems were not mitigating because there was no evidence that they affected his cognitive functioning.

In *Matter of the Discipline of an Attorney*, 21 N.E. 3d 953 (Mass. 2014), the Supreme Judicial Court once again affirmed that the rules of civil procedure do not apply to bar discipline cases and that private individuals have no right to intervene. In this instance, the individual who sought to intervene was the plaintiff in the underlying civil matter that led to discipline. The putative intervenor's argument was that there was a conspiracy to "vilify" him in the disciplinary proceeding.

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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](http://www.mass.gov/obcbbo). Stay up to date with changes and have a happy new year!