



## **2015: The Year in Ethics and Bar Discipline**

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

The most significant of such events was the enactment by the Supreme Judicial Court of comprehensive changes to the rules of professional conduct that took effect on July 1, 2015. In the more usual course of events, final disciplinary decisions were entered by the full bench or single justices of the Supreme Judicial Court, or by Board of Bar Overseers, in 99 cases in the calendar year 2015 (109 for the fiscal year that ended August 31, 2015). The SJC also issued several opinions on ethics issues in bar admission and civil cases. Some of these matters are described below.

### **Amendments to the Rules of Professional Conduct**

The wide-ranging amendments to Supreme Judicial Court Rule 3:07, the Massachusetts Rules of Professional Conduct, went into effect in July. The revisions bring the Massachusetts rules current, for the first time in over a decade, with the American Bar Association's Model Rules of Professional Conduct and cover a range of topics both traditional (disclosure and safeguarding of confidential information) and modern (outsourcing and staying current with technology). It is now mandatory that almost all conflict waivers be in writing or confirmed in writing. And it is now mandatory that all advances from clients for expenses, as well as advances for fees, be held in an IOLTA or other trust account and disbursed only as expenses are incurred or fees are earned. The [conflict issues](#) and the [IOLTA issues](#) are described in more detail in two articles on the Office of Bar Counsel/Board of Bar Overseers website. The final version of the amended rules can be found [here](#) and a redlined version can be found [here](#).

## Disciplinary Decisions

The full bench of the Supreme Judicial Court entered only one decision on a case brought by bar counsel in calendar 2015. In *Matter of Dwyer-Jones*, 470 Mass. 582 (2015), a reciprocal case, the full bench affirmed a single justice's order placing the attorney on disability inactive status here based on an order of the Maine Supreme Judicial Court, which had suspended her as a result of mental health and substance abuse issues. The Court held that the Maine order was the "practical equivalent" of disability inactive status under Supreme Judicial Court Rule 4:01, § 13(1) and that the lawyer was not entitled to a separate evidentiary hearing in Massachusetts.

A number of decisions by the Board of Bar Overseers and the single justices of the Supreme Judicial Court also raised interesting individual issues, including:

- *Matter of Zinni*, 31 Mass. Att'y Disc. R. \_\_ (2015) (public reprimand of attorney who prepared estate planning documents for a mother at the behest of, and in favor of, an adult daughter without adequately investigating the mother's competency, where the mother's doctor had provided a letter stating that she was competent but the Board found that attorney could not simply rely on the letter when faced with obvious evidence to the contrary; attorney also failed to recognize the conflict of interests when other siblings later filed suit against him, the mother, and the daughter, challenging the estate planning documents).
- *Matter of O'Toole*, 31 Mass. Att'y Disc. R. \_\_ (2015) (six-month suspension of lawyer who misrepresented to opposing counsel and superior court that funds that he had been holding to pay judgment were still available; the SJC single justice described the misstatements as "close to the hearts of the matters then at stake" and, as to the misstatements to counsel, "not made in the heat of a courtroom battle").
- *Matter of Lang*, 31 Mass. Att'y Disc. R. \_\_ (2015) (interim temporary suspension of a lawyer who misappropriated \$20,000 of client funds but repaid this sum when a disciplinary complaint was filed; in granting the temporary suspension, the single justice took into account that a hearing committee had already made a recommendation for discipline in an unrelated case that was before the BBO).
- *Matter of Kasilowski*, 31 Mass. Att'y Disc. R. \_\_ (2015) (three-month suspension of a lawyer who neglected the filing of estate and fiduciary income tax returns in two related estates, resulting in the assessment of substantial interest and penalties; conditions for automatic reinstatement include restitution and reinstatement from an administrative suspension imposed by the SJC when the lawyer moved out of state

and refused to provide an address other than an email address).

- *Matter of Newman*, 31 Mass. Att'y Disc. R. \_\_ (2015) (four-month suspension of plaintiff's lawyer who, after a civil trial in which the defendant prevailed, learned that a dispositive factual premise of his client's case was incorrect but failed to cause the record to be corrected and instead pursued an appeal that included the erroneous information; after a disciplinary complaint was filed, the lawyer dismissed the appeal before it was decided).
- *Matter of Connell*, 31 Mass. Att'y Disc. R. \_\_ (2015) (public reprimand of lawyer who represented a client in making loans that the lawyer knew were usurious and thus illegal; the lawyer assisted the client in these matters despite the fact that the client had refused the lawyer's advice to register with the attorney general, as required).

### **Bar Admission Cases**

In three unrelated bar admission cases, *Matter of Chalupowski*, 473 Mass. 1008 (2015), *Matter of Panse*, 473 Mass. 1001 (2015), and *Matter of Britton*, 471 Mass. 1015 (2015), the Supreme Judicial Court denied admission to the bar to the applicants, emphasizing their failure to make complete and accurate disclosure of information required by the bar applications and noting that candor with the Board of Bar Examiners is essential. The applicants also had a history of litigiousness that was a factor in the decisions.

### **Civil Cases**

In an important decision on conflicts of interest, the Supreme Judicial Court in *Maling vs. Finnegan, Henderson, Garrett, Farabow & Dunner LLP*, 473 Mass. 336 (2015), concluded that "the simultaneous representation by a law firm in the prosecution of patents for two clients competing in the same technology area for similar inventions is not a per se violation of Mass. R. Prof. Conduct 1.7" and affirmed the superior court's dismissal of the case, determining that, on the facts alleged, the plaintiff did not state a claim for relief. Finding that the interests of the two clients were not directly adverse under (what is now) Mass. R. Prof. C. 1.7(a)(1), and that the firm's representation of the plaintiff was not "materially limited" under Mass. R. Prof. C. 1.7(a)(2) by its representation of the other client, the Court found no actionable conflicts of interest.

The Court in *Maling* repeatedly emphasized, however, that different factual allegations could change the equation and outcome in such cases. The Court also stressed that it is a matter of critical importance, under Mass. R. Prof. C. 1.10 (which imputes a conflict of any one lawyer to the firm as a whole), for law firms to have “robust processes that will detect conflicts of interests,” that is, a conflicts-checking system adequate to the practice and size of the firm.

In another useful decision, this one concerning attorney work product, the Supreme Judicial Court in *DaRosa v. City of New Bedford*, 471 Mass. 446 (2015) revisited an issue raised in *General Electric v. Dept. of Environmental Protection*, 429 Mass. 798, 801 (1999). The Court concluded that both “opinion” and (under limited described circumstances) “fact” work product, prepared in anticipation of litigation and subsequently sought by the opposing party in discovery, may, to the extent provided by Mass. R. Civ. P 26(b)(3), be protected under the “policy deliberation” exemption to the Massachusetts public records law from disclosure that would otherwise be required by the statute. The fact that the documents at issue were prepared for the city by an outside consultant does not by definition place them outside the scope of the statutory exemption.

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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](http://www.mass.gov/obcbbo). And happy new year!