

Board of Bar Overseers Policies and Practices

As with any organization of long-standing, policies and practices have evolved over the years which often are not formalized, and are therefore not readily accessible to all who should be aware of them. This memo, approved by the board in October, 2011, serves to collect and formalize BBO's policies and practices. The board's intent is to provide current and incoming board members (as part of the latter's orientation package) and hearing panel members and special hearing officers (as part of their orientation packages) a description of existing policies and practices for guidance purposes, and to provide knowledge of these policies and practices to members of the bar and the public.

It is understood that later boards may choose to modify or amend the board's policies and practices, but until and unless modified, the board's purpose in approving this memo is to insure that the policies and practices described will be followed in all BBO matters to which they are relevant.

The subject matters dealt with are as follows:

- 1. Public and media access to BBO proceedings**
- 2. Publication of decisions**
- 3. Internet search engine reports of discipline**
- 4. Communications with bar counsel by reviewing board members**
- 5. The role of general counsel's staff in reviewing bar counsel's recommendation to a reviewing board member for formal prosecution.**
- 6. Disclosing identity of reviewing board member**
- 7. Redaction of personal identifying data**
- 8. Hearing officer recruitment and training**
- 9. Appointment of hearing committees and special hearing officers**
- 10. "Settlement" of pending disciplinary proceedings**
- 11. The role of general counsel's staff in hearings**
- 12. The relevance and admissibility of expert testimony in BBO proceedings**
- 13. Order of presentation of appellate matters in agenda materials**
- 14. Informing hearing committee members of outcomes**
- 15. Handling complaints against board members or staff**
- 16. Time standards**
- 17. Disciplinary resignations**
- 18. Clearance letters**
- 19. Diversion program**
- 20. Registration of in-house counsel**
- 21. Fee waivers and payment plans**
- 22. Executive sessions at monthly board meetings**

23. The role of public members
24. Reporting Matters for Criminal Prosecution

1. Public and media Access to BBO proceedings: BBO proceedings are open to the public, and, subject to SJC Rule 4:01, § 20, the BBO will permit and make appropriate arrangements for public access to its proceedings. Public access will include making arrangements for members of the public, including media, to view public documents and to attend oral arguments and hearings conducted by the board and its hearing committees. The media normally will be permitted to set up audio-visual equipment at such hearings. The board chair, the chair of the hearing committee or board panel may limit the number of pieces of such equipment, may require that the equipment be set up in advance of the hearing, and may make such other rulings regarding media access as are necessary to avoid disruption and to preserve the dignity of the hearing.

Board members and hearing officers are asked not to comment to the media on any aspect of disciplinary matters, regardless of whether such matters are pending, on appeal, or have finally been decided. All inquiries from the media to a board member should be referred to the board's chair or to general counsel.

When the board's rules were amended in 1993 to allow the public to attend disciplinary hearings, a committee was appointed to come up with a policy on media access to board proceedings. Based on the committee's report, the board formally voted to adopt the above policy.

2. Publication of decisions: The board publishes its decisions as well as the court's disciplinary decisions on the board's website (<http://www.mass.gov/obcbbo/decisions.htm>), in the Massachusetts Attorney Discipline Reports (which the BBO publishes), in Massachusetts Lawyers Weekly, on the Board of Bar Overseers database at the Social Law Library, and via press releases sent to newspapers where the disciplined lawyer lives and works.

A court opinion or memorandum, if it exists, is what is published. If not, then a board memorandum, if there is one, is published. If there is neither a court opinion nor a board memo, a staff-written summary of the disciplinary action is published. Bar counsel prepares summaries for matters that were disposed of by agreement, default, or affidavit of resignation. General counsel's staff prepares summaries for matters on which there was no appeal from the report of a hearing committee, hearing panel, or special hearing officer. The summaries are ministerial functions performed by the staff and not negotiated with respondents or their counsel.

3. Internet Search engine reports of discipline: The board will not interfere with, nor seek to change, the content of any search engine's reporting of discipline of lawyers.

Lawyers who have been suspended and later reinstated have complained that the first information that appears when they are Googled is a reference to their suspension – a reference that makes getting a job difficult. Although there may be a technical fix that would prevent search engines such as Google from crawling over the BBO’s website, the board’s view is that it is more important that members of the public should have easy access to disciplinary information than to address the problem raised.

4. Communication with bar counsel by reviewing board members: Board members who review bar counsel’s requests to prosecute, dismiss or otherwise dispose of grievances are encouraged, in the course of their duty review process, to communicate directly with the Office of Bar Counsel when they have questions about OBC’s recommendation on whether to close, prosecute, or otherwise dispose of a case.

Approval or rejection of the recommendation is an ex parte process. Reviewing board members are recused from participating in later consideration of appeals of the outcome of the matters in which they reviewed bar counsel’s recommendations.

5. Role of general counsel’s staff in reviewing bar counsel’s recommendation to a reviewing board member for formal prosecution: OGC will review bar counsel’s charging memo, the proposed petition for discipline, and the underlying investigatory file to see that the facts uncovered by the investigation support the charges, and that, if proven, public discipline would be warranted. OGC will note for the reviewing board member any factual matters the latter may wish to examine more closely. To assist in this process, the charging memorandum should describe any information obtained during the investigation that supports or detracts from bar counsel’s determination that the respondent has committed the charged violations of the Rules of Professional Conduct (preferably with corresponding tabs in the file).

Despite the availability to the reviewing board member of the file and discussion with the assistant bar counsel involved, there are limits to the time available to a reviewing board member in deciding whether to approve or disapprove a recommendation, and it is important that the reviewing board member receive not only bar counsel’s support for the recommendation, but also the information developed in the course of the investigation that might lead to a different conclusion, that is, information that detracts from bar counsel’s determination that the respondent has committed the violations sought to be charged. Given the importance to the process of the facts and the basis for the factual allegations underlying bar counsel’s recommendations, the assistance of bar counsel and OGC in this way should result in sounder decisions. An OGC staff member involved in this process is not thereby recused from further participation in the matter, as the OGC staff member is assisting the reviewing board member in the performance of his or her duty and has no decision-making authority.

6. Disclosing identity of reviewing board member: The identity of the board member who reviewed requests to prosecute, dismiss, or otherwise dispose of grievances during the duty review process is kept confidential by the board.

The rationale is to prevent complainants or respondents who are unhappy with the decision to contact the individual board member. For similar reasons, board members' home or office addresses and phone numbers are not disclosed to members of the public who ask for them.

7. Redaction of personal identifying data: The board follows the SJC's interim guidelines for the protection of personal identifying data.

The parties are to redact personal identifiers (social security number, taxpayer ID, credit card or financial account number, driver's license number or passport number to the last four digits, birth date to year only) in all pleadings and exhibits. On occasion, the board staff will do this. If there are too many personal identifiers or if the identifiers must be disclosed for some reason, the board will consider issuing a protective order impounding the material in question.

8. Hearing officer recruitment and training: Every year general counsel's staff looks at the list of hearing officers whose terms are about to expire, who might be eligible for a second term, and who need to be replaced, whether lawyer or lay. A list of vacancies and possible renewals is forwarded to the chair of the Hearing Officer Committee, which endeavors to recruit via notices in Lawyers Weekly, letters to bar associations and various civic groups, and by personal solicitation. Staff provides the committee with the disciplinary history, if any, of the applicants, and the committee then vets the applicants.

Lay applicants are asked to fill out a questionnaire adopted by the committee some years ago, and staff interviews them before they are appointed. The committee chair then presents a list of recommended hearing officers to the full board, which formally makes the appointments. Once the appointments have been made, one or two training sessions are set up at which bar counsel and general counsel or staff take them through the investigatory and hearing process and distribute the hearing committee training manual.

9. Appointment of hearing committees and special hearing officers: The process by which the board assigns persons to serve on hearing committees or reinstatement panels, or as a special hearing officer, is described in detail below.

After receiving the answer to a petition for discipline and the parties' estimates of the number of days of hearing, general counsel's staff assigns the matter to a hearing committee. The staff sends an email to all three potential hearing committee members to see if they are available and assigns one – an attorney member – to serve as chair. The staff includes proposed dates or weeks to schedule the hearing and prehearing, then requests a response as to availability. If someone declines, the staff emails another until

the slot is filled and firms up the dates with the three members, working around everyone's schedules.

If the hearing is projected to be very long or very short, or if one of the parties specifically requests it, the staff might ask general counsel whether the matter ought to be assigned to a special hearing officer, in which case general counsel contacts the board's chair to discuss whether and to whom such an assignment should be made.

If the matter is a reinstatement hearing or a disciplinary hearing based on a criminal conviction, the matter is assigned to a hearing panel which consists of board members; in making the assignment, the staff proceeds in the same way as with the assignment of a hearing committee. Substantial efforts are made to assign one public board member to each reinstatement or conviction panel.

10. Settlement of pending disciplinary proceedings: The board prohibits panel members from encouraging bar counsel and the respondent to settle matters assigned to hearing.

The policy is described in a board memo which is part of the hearing committee manual.

11. Role of general counsel's staff in hearings: A member of general counsel's staff is assigned to sit in with and assist the hearing committee or panel with advice, case citations, and drafting.

The purpose of this policy is to provide guidance to hearing officers and OGC staff members regarding their respective roles in the adjudicatory process. Hearing officers are independent decision-makers who alone have responsibility for ruling on motions, admitting evidence, finding facts, drawing conclusions of law, and recommending an appropriate sanction in the matter to which they are assigned. As legal counsel to the board, OGC staff members offer legal advice to hearing officers regarding the board's procedural rules, the elements of the offences charged, and legal precedent relevant to disposition. OGC will also assist in drafting, if requested. All factfinding, including credibility determinations, conclusions of law, and recommendations as to disposition are to be made solely by the hearing officers. In pursuit of their duties, OGC staff will endeavor to preserve the integrity of the record, and they may suggest lines of inquiry for questioning by hearing officers. Because they are not hearing officers, OGC staff may not question witnesses.

12. Relevance and admissibility of expert testimony: In any disciplinary hearing in which the hearing committee determines that the attorney's compliance with the degree of learning and skill required to be possessed by attorneys practicing in a particular area or areas of the law is relevant to the decision of the committee, expert testimony concerning the standard of care applicable to the attorney's conduct may, in the discretion of the committee, be admitted into evidence, subject to the caveat that an expert's opinion to the effect either (1) that there has or has not been a violation of law or (2) that there has or has not been an ethical violation, is

not admissible and must be rejected. As in the case of other evidence, the committee is not required to credit such expert testimony if it is admitted or because it is uncontradicted, Matter of Minkel, 13 Mass. Att'y Disc. R. 548 (1997), and, if credited, may determine what weight is to be given to it. Whether the proposed expert witness qualifies as an expert on the subject matter involved is a preliminary question of fact to be determined by the hearing committee.

Expert testimony may well be required in order to prove allegations that a fee charged or collected was clearly excessive, because the governing rule, Mass. R. Prof. C. 1.5, itself provides that the challenged fee is to be tested against what other lawyers would charge for similar services. See Matter of Fordham, 423 Mass. 481, 12 Mass. Att'y Disc. R. 161 (1996). In other circumstances, the committee, in the exercise of its discretion, may determine that expert testimony concerning the applicable standard of care would be relevant and helpful to the committee in its consideration of the matter or in its deliberations, e.g., in order to prove or rebut an allegation that the conduct alleged constituted neglect, incompetence or failure to keep the client adequately informed, where a key issue may be whether or not the attorney met the degree of learning and skill possessed by attorneys practicing in this area of the law. This is not intended to be an exhaustive list of such circumstances. The governing principle is that stated in G.L. c. 30A, § 11(2), that evidence may be “admitted and given probative effect if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.” .

13. Order of presentation of appellate matters in agenda materials: The order of presentation of materials related to appeals from hearing committee or reinstatement panel decisions and recommendations is as follows: summary memorandum from general counsel’s staff; the committee or panel decision and recommendation; the appeals of bar counsel and/or respondent or petitioner, and material related to the appeals; and other underlying materials pertinent to an understanding of the matter.

14. Informing hearing committee members of outcomes: Hearing committee members (other than current board members) are advised by general counsel’s staff concerning the outcome of further proceedings in, and the ultimate outcome of, a disciplinary matter to which they were assigned.

Included within this practice are those matters assigned to a hearing committee which received pre-hearing material and information but where, for one or another reason, usually a proposed agreed disposition, the matter did not proceed to a hearing or to the stage of a decision and recommendation.

15. Handling complaints against board members and staff: When such grievances are filed by respondents or complainants during the pendency of an investigation or formal proceeding involving those respondents or complainants, the board chair usually defers investigation of the grievance until after the completion of the underlying investigation or formal proceeding.

This policy prevents the filing of a grievance against the prosecutor or adjudicator, as the case may be, from interfering with the orderly disposition of an existing matter. Section 2.4 of the BBO's rules provides that grievances filed against members of the board or its staff or against bar counsel or her staff are to be investigated by the board, not bar counsel.

16. Time Standards. Since the major overhaul of the board's rules and procedures following the ABA's evaluation, the board has been seeking to adhere to Court-approved time standards for the processing and disposition of grievances and formal proceedings.

17. Disciplinary resignations (defined as resignations submitted under SJC Rule 4:01, § 15, while the attorney is (a) the subject of formal proceedings, regardless of the point the proceedings have reached or (b) the subject of a complaint which has not yet resulted in the initiation of formal proceedings): The board will usually accept such a resignation as a matter of course, so long as the attorney has made sufficient factual admissions to warrant acceptance of the resignation. Bar counsel may choose to recommend not only that the resignation be accepted or rejected but also whether the lawyer should be disbarred. The lawyer is to be advised of the policy, and if the lawyer thereafter submits an affidavit of resignation, he or she is also agreeing that the board's recommendation to the Supreme Judicial Court may include disbarment.

This policy concerns how bar counsel's time, and the board's time, should be spent in circumstances in which it is a foregone conclusion that the respondent is no longer going to be a member of the bar. Whether the respondent's resignation is accepted, without disbarment, or whether the respondent is disbarred, makes no practical procedural difference to a possible future petition for reinstatement because the respondent will have to go through the same reinstatement process, after the same period of time, in order to gain reinstatement. What does make a difference is whether the respondent has made sufficient factual admissions binding on him or her in such a future proceeding, thereby obviating the need for bar counsel to prove those facts in a later proceeding.

18. Clearance letters (Certificates of Good Standing): Before the Court issues a certificate of good standing, the board determines that the lawyer is in good standing (i.e., not suspended and license not otherwise restricted) and that bar counsel is not expecting or intending to seek the lawyer's suspension or disbarment in the next thirty days.

This is an SJC practice, not the board's. The board will not disclose the pendency of complaints or proceedings concerning a lawyer otherwise in good standing unless something is about to occur such that the Court would not have wanted to issue the certificate.

19. Diversion Program: In appropriate circumstances (described in bar counsel's "Diversion Program Policy Statement"), bar counsel may recommend,

and the reviewing board member may approve, that a respondent be offered diversion to educational, remedial and rehabilitative programs rather than be subject to formal disciplinary proceedings.

This policy recognizes, and formally adopts as a board policy, the Diversion Program bar counsel has implemented. Because the board has discretion to accept or reject diversion as the ground for closing a grievance, it is appropriate that it be a board policy, rather than only an excellent bar counsel initiative.

20. Registration of in-house counsel: So long as a registrant proposing to practice as in-house counsel within the Commonwealth is in good standing in one United States jurisdiction and can demonstrate that his or her inability to obtain a certificate of good standing in any other jurisdiction is not the result of attorney misconduct or pending disciplinary proceedings alleging attorney misconduct, the board will not object to such registration to practice as in-house counsel within the Commonwealth.

21. Fee waivers and payment plans: The board will not grant fee waivers or permit installment payments as to the annual registration fee.

The board has formally voted not to grant fee waivers or to permit payment on an installment plan for lawyers who can't afford to pay the annual registration fee. The board advised the Court of its intention in this regard and was informed that the Court found it acceptable.

22. Executive session at monthly board meetings: The agenda for each monthly meeting of the board will include an executive session for board members only. It is the responsibility of the board chair to call such executive session, whether on his or her own motion or on the request of any member of the board.

23. Participation by public members: Board members and hearing officers who are not lawyers have full authority to act in all matters to the same extent as lawyer board members and hearing officers. Public members are entitled to participate as fully as lawyers and, where necessary, to vote freely on all matters entrusted to the hearing committees and panels to which they have been assigned, whether those matters involve findings of fact, conclusions of law, evidentiary rulings, or proposed dispositions. The only exception is that public members are not asked to draft hearing committee and hearing panel reports or to serve as the chair of a hearing committee or panel. However, public members participate fully in all proceedings and rulings, including the drafting of reports to the same extent as attorney members.

24. Reporting Matters for Criminal Prosecution: When it comes to the attention of the Board's Reviewing Member that the provable allegations in the file presented to him or her reflect that an attorney has misappropriated client funds to his or her own use, that the funds have not been restored and appropriate arrangements have

not been made for their restoration, the Reviewing Member may recommend to Bar Counsel that the matter be referred to the relevant District Attorney and/or to the Attorney General. If such a matter should come before the Board on appeal, and the Board determines that the matter should be so referred, and has not been, it will direct General Counsel to take the necessary steps to do so.

**David Mackey
Chair, Board of Bar Overseers**