

**MASSACHUSETTS OFFICE OF THE BAR COUNSEL  
OF THE SUPREME JUDICIAL COURT**

**ANNUAL REPORT  
TO THE  
SUPREME JUDICIAL COURT  
FISCAL YEAR 2011**

**SEPTEMBER 1, 2010 - AUGUST 31, 2011**

**99 High Street  
Boston, MA 02110**

**Phone: (617) 728-8750  
Fax: (617) 482-2992  
[www.mass.gov/obcbbo](http://www.mass.gov/obcbbo)**

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# **Bar Counsel's Report to the Supreme Judicial Court**

## **Fiscal Year 2011**

### **Executive Summary**

This is a summary of the key points in the report that follows for the fiscal year that ended on August 31, 2011:

- The overall number of files pending in the Office of Bar Counsel at the end of the fiscal year, as well as the number of files on which petitions for discipline have not been filed, continued to decrease in fiscal 2011 despite an increase in the number of complaints docketed. In addition, for the second year, the Office of Bar Counsel ended the fiscal year with no files over 3 years old that are not in petition or deferred. The number of lawyers with files over 18 months old that are not in petition has also been reduced in the last year and in each year since 2006.
- The Office of Bar Counsel filed 113 petitions for discipline including affidavits of resignation.
- Bar counsel's diversion program for minor disciplinary violations concluded 46 cases by diversion.
- Bar counsel's Attorney and Consumer Assistance Program screened and resolved over 85% of all telephone and written contacts with ACAP without referral for investigation. ACAP disposed of over 97% of all contacts within thirty days and over 98% within 45 days, either by resolving the inquiries or referring the matter for investigation.
- Bar counsel's ethics helpline handled approximately 2200 calls from lawyers seeking information and assistance on issues of professional conduct.

- Bar counsel continues to provide a free monthly “trust account school,” first instituted six years ago. The program provides lawyers with training on the record-keeping requirements of Mass. R. Prof. C. 1.15.
- Bar counsel and assistant bar counsel made 57 presentations on ethics and professional conduct including programs at law schools, bar associations, and continuing legal education organizations.

## **Overview**

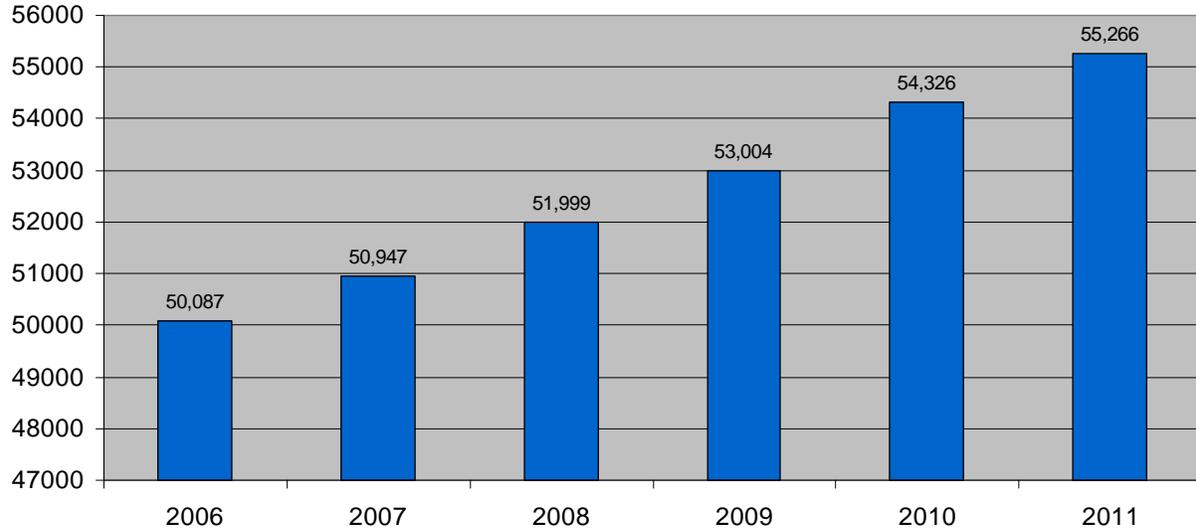
The Justices of the Supreme Judicial Court established the Board of Bar Overseers, the Office of Bar Counsel, and the Clients’ Security Board by rule in 1974. The bar counsel, an independent prosecutor who serves at the pleasure of the Court, investigates complaints alleging professional misconduct against lawyers, and prosecutes formal charges against lawyers before the Board of Bar Overseers. The Board of Bar Overseers may dismiss charges, impose minor discipline, or recommend suspension or disbarment to the Court. In addition, the Board hears petitions for reinstatement to the bar.

The Board of Bar Overseers also collects annual registration fees and uses them to fund its operations and those of the Office of Bar Counsel and the Clients’ Security Board. At the close of FY2011, there were 55,266 Massachusetts lawyers registered on active status and another 11,308 lawyers on inactive status.

Table 1 illustrates the continued growth in the number of attorneys admitted to the bar in Massachusetts and registered for active practice over the last six years.

**TABLE 1**

**Active Registered Lawyers in Massachusetts (2006-2011)**



**Fiscal Year 2011 Caseload**

**ACAP Contacts**

The Attorney and Consumer Assistance Program (ACAP) has operated as the intake unit of the Office of Bar Counsel since March 1999 and, over that time period, has evaluated and processed a total of 70,222 matters. ACAP carries out its gate-keeping function both by addressing and attempting to resolve routine consumer concerns or low-level disciplinary issues and by early identification and referral for investigation of matters that raise questions of significant misconduct.

During FY2011, ACAP responded to 4514 inquiries. Approximately 77% of these inquiries were received as telephone calls; the remainder were in writing. A complaint form is sent immediately where serious unethical conduct might be involved. ACAP screened and

resolved without referral for investigation more than 85% of inquiries. Consistent with time standards agreed upon with the Supreme Judicial Court, over 98% of ACAP contacts reached final disposition within 45 days and over 97% of contacts were processed within 30 days of receipt.

Effective September 1, 2009, amendments to the Rules of the Board of Bar Overseers provide that a matter need not be pursued if the Office of Bar Counsel, in its discretion, determines the complaint to be frivolous, outside the Board's jurisdiction, or to involve allegations that do not warrant further action. In the middle ground between matters that bar counsel staff decline to pursue and the serious cases that are docketed and referred immediately for investigation will be the several thousand matters that the ACAP staff seeks to resolve.

The initial issue faced by ACAP as to any inquiry is to identify whether there is a problem within the jurisdiction of the Board. ACAP resolves many inquiries by providing information; discussing reasonable expectations and timetables in legal cases; suggesting alternative ways of dealing with the dispute; or making referrals to lawyer referral services, fee dispute resolution services, and legal services organizations. ACAP may also assist the consumer by calling the attorney. Some typical results are that the client obtains a return telephone call, an update on the case status along with the lawyer's renewed attention to the case, an itemized bill, or the return of the legal file and unearned retainer.

The problems prompting inquiries to ACAP tend to remain constant from year to year. Approximately 22% of all inquiries in FY2011 concerned lawyers' neglect, lack of diligence, or failure to return client calls. The areas of law that always produce the most inquiries to ACAP are domestic relations, criminal defense, and civil litigation, each comprising over 13% of all

contacts in FY2011. Issues involving real estate, personal injury, and trusts and estates each accounted for approximately 8% of the ACAP caseload, although real estate in particular tends to comprise, and did comprise, a larger percentage of matters ultimately docketed as complaints.

Approximately 10% of the calls to ACAP involved questions about legal fees, a figure also consistent with past years. The Supreme Judicial Court's recent approval of a committee recommendation that Mass. R. Prof. C. 1.5 be revised to require written fee agreements in all instances will, when implemented, be of great assistance in reducing misunderstandings between attorneys and clients. Although the Court also deferred a decision on mandatory fee arbitration at the election of the client, bar counsel hopes that the issue will be revisited at an appropriate time and continues to feel strongly that mandatory fee arbitration would benefit both lawyers and clients by providing an affordable mechanism to resolve fee disputes outside the disciplinary system.

### **Complaints Docketed**

The Office of Bar Counsel opened 935 complaints against attorneys in FY2011, an increase from FY2010 when 854 complaints were opened. Both years, however, reflect a decrease from FY2009, when 1001 complaints were opened.

The decrease of docketed complaints in the last two years occurred primarily as a result of amendments, effective September 1, 2009, to Supreme Judicial Court Rule 4:01, §§ 7(1), 7(2) and 8(1). Under the rules as revised, bar counsel is now permitted to decline to open files on matters that are frivolous, outside the Board's jurisdiction, or do not warrant further action. In FY2011, there were 146 written inquiries that bar counsel declined to open as files in circumstances where it previously would have been required. In 53 of these matters, the

complainants, pursuant to § 8(1), requested and received review of bar counsel's decision by a member of the Board of Bar Overseers. In none of these matters did the Board member determine that a file should be opened.

The 935 files docketed in FY2011 involved 779 attorneys: 682 of the respondent lawyers had one complaint filed against them, 74 had two complaints, and 23 had three or more complaints filed in the fiscal year. Bar counsel initiated the investigation in 139 of the files on 135 lawyers, not including dishonored check matters.

As was also true in FY2010, the legal areas that produced the most complaints in FY2011 were real estate and civil litigation, including personal injury, followed by domestic relations, estates and criminal defense. Consistent with prior years, the misconduct alleged most frequently was incompetence or neglect by the attorney, including failure to communicate, and trust account violations, including notices of dishonored checks.

Tables 2 and 3 report the classification of complaints opened in FY2011 based on an initial assessment of the primary legal area from which the facts arose and on the nature of the misconduct alleged, if any.

**TABLE 2**

**Classification of 935 Complaints Received by Primary Legal Area**

Administrative Law.....	20..... 2%	Industrial Accidents .....	5..... 1%
Bankruptcy.....	47..... 5%	Insurance .....	0..... 0%
Civil Litigation.....	97..... 10%	Intellectual Property.....	1..... <1%
Collections .....	15..... 2%	Labor.....	12..... 1%
Commercial Transactions.....	20..... 2%	Landlord/Tenant .....	11..... 1%
Consumer Law.....	6..... 1%	Malpractice .....	4..... <1%
Conviction of Crime .....	19..... 2%	Municipal Law .....	0..... 0%
Corporations .....	7..... 1%	Personal Injury.....	53..... 6%
Criminal Defense .....	72..... 8%	Reciprocal Discipline .....	16..... 2%
Criminal Prosecution.....	3..... <1%	Real Estate .....	150..... 16%
Domestic Relations.....	84..... 9%	Small Claims.....	0..... 0%
Escrow Accounts .....	0..... 0%	Support .....	1..... <1%
Estates .....	77..... 8%	Taxation.....	6..... 1%
Fiduciary .....	14..... 1%	Torts.....	0..... 0%
Immigration .....	51..... 5%	Trusts.....	5..... 1%
		No Legal Area or Unknown .....	141..... 15%

**TABLE 3**  
**Classification of 935 Complaints Received by Misconduct Alleged**

Rules	Type of Misconduct	Complaints Received	
		Count	Percentage
1.1	Failure to provide competent representation	180	19%
1.2(a)	Failure to abide by a client's decision concerning the representation or taking unauthorized action on the client's behalf	91	10%
1.3	Neglect or lack of diligence	293	31%
1.4	Failure to communicate adequately with client	269	29%
1.5	Fee violations, including excessive or improper fees and failure to refund unearned fees	125	13%
1.6 and 1.9(c)	Failure to preserve client confidences or secrets	27	3%
1.7 and 1.13	Conflicts of interest between current clients or between client and attorney	52	6%
1.8	Conflicts of interest: prohibited transactions with clients including business transactions, financial assistance, and preparation of instruments of which lawyer or relative is beneficiary	20	2%
1.9 and 1.11	Conflicts of interest with former clients, including former government employment	14	1%
1.14	Conflicts of interest or other violations as to client under disability	1	<1%
1.15	Trust account violations including commingling, conversion, record-keeping violations, failure to promptly pay litigation costs or client creditors or issuing dishonored checks	306	33%
1.16	Failure to properly withdraw from representation, including failure to return client files or documents	151	16%
3.1, 3.2, 3.3(b)-(e), 3.5 and 3.6	Improper trial conduct	14	1%
3.3(a), 4.1, 8.4(c), and 1.2(d)	Fraudulent or deceptive activity, including lying to clients, knowing use of false evidence or making a misrepresentation to a tribunal or third party	31	3%
3.4, 3.9 and 4.4	Unfair conduct to opposing party or non-adjudicative body	43	5%
4.2 and 4.3	Improper communications with a party known to be represented by counsel or unrepresented party	16	2%
5.1 and 5.3	Failure to supervise subordinates	1	<1%
5.4 and 5.6	Failure to maintain professional independence including partnership or sharing fees with nonlawyer	1	<1%
5.5	Unauthorized practice of law or assisting in unauthorized practice	25	3%
7.1 through 7.5	Improper communications concerning lawyer's services including improper advertising or solicitation	11	1%
8.1	False statements in a bar admission or disciplinary matter	12	1%
8.3	Failure to report professional misconduct when required	23	2%
8.4(a)	Misconduct through acts of another	5	1%
8.4(b)	Criminal conviction or conduct of attorney	60	6%
8.4(d) and 8.4(h)	Conduct prejudicial to the administration of justice, including conduct that is the subject of a contempt finding or court sanction	79	8%
	No Disciplinary Violation or Summary Dismissal	32	3%

\*Total exceeds number of complaints filed and total percentage exceeds 100% because, in many matters, more than one type of misconduct was alleged.

Mandatory notices sent by financial institutions of dishonored checks drawn on attorney trust accounts resulted in the opening of 152 files on the same number of lawyers in FY2011. This number is a decrease from the 183 files on 179 lawyers opened in FY2010 and the 198 dishonored check files opened on 190 lawyers in FY2009. This year's figure is comparable, however, to the 153 dishonored check files opened against 150 lawyers in FY2008. It is therefore not clear whether the declining numbers of dishonored check reports in the last two years is a trend.

As has been the case in prior years, the main reason why trust account checks are dishonored is still inadequate record keeping that does not comply with the requirements of Mass. R. Prof. C. 1.15(f). Very few of the dishonored checks in this fiscal year or previous years result from bank error or other anomalous problems.

Although it has been 16 years since the Supreme Judicial Court first enacted the dishonored check notification rule, and 7 years since significant changes were implemented to the record-keeping requirements of Mass. R. Prof. C. 1.15, compliance with the record-keeping rules still remains erratic. In the conveyancing field in particular, the results of inadequate record keeping can be catastrophic. *Matter of Scola*, 460 Mass. 1003 (2011). The Court in decisions this year has also acknowledged confusion and misunderstanding among members of the bar as to the application of the record-keeping requirements to retainers and expenses. *Matter of Sharif*, 459 Mass. 558 (2011); *Matter of Pudlo*, 460 Mass. 400 (2011). Amending current Mass. R. Prof. C. 1.15(b) to conform to ABA Model Rule 1.15(c)<sup>1</sup> would assist in ameliorating this confusion. In addition, a committee appointed by the Court is currently considering whether a "bridging the gap" continuing legal education program should be mandatory for new lawyers and what such a program might entail. Bar counsel's view is that, at a minimum, financial record-keeping training should be required for all new admittees.

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<sup>1</sup> ABA Model Rule 1.15(c) provides "A lawyer shall deposit into a trust account legal fees and expenses that have been paid in advance to be withdrawn by the lawyer only as fees are earned or expenses incurred."

Bar counsel, in cooperation with the Boston Bar Association, continues to present a free training program on trust account maintenance on the first Thursday of each month. The program aims to address record-keeping issues both before and after problems arise. It is open to all lawyers, whether or not a BBA member, and to support staff. This course is further described on page 23 of this report. Lawyers seeking help with record-keeping issues might also wish to consult with LCL's Law Office Management Assistance Program (LOMAP), which is also often free of charge.

### **Case Processing**

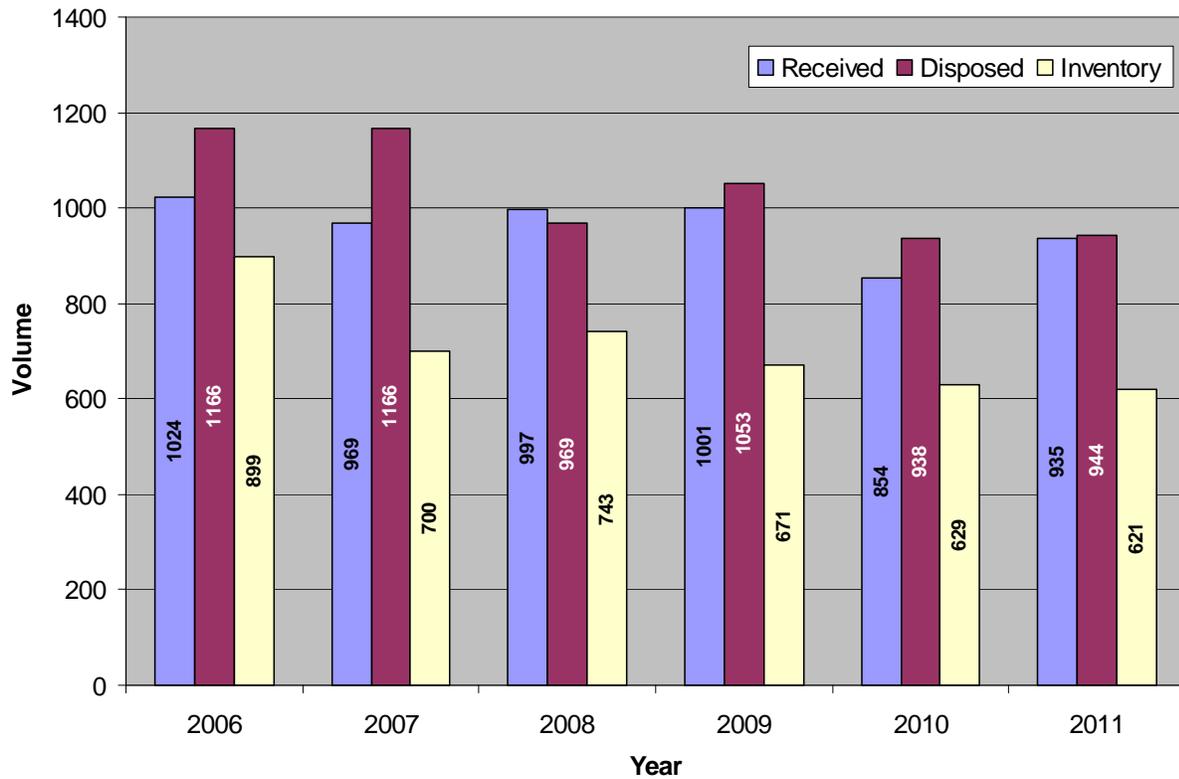
A total of 944 files were brought to an end result by the Office of Bar Counsel in FY2011 either by closing, diversion, or discipline. This number is consistent with the 938 files disposed of in FY2010 and in both years exceeded the number of files opened. The number of files still open at the end of the fiscal year (including files where a petition for discipline has been filed and disciplinary proceedings are ongoing, as well as those still under investigation) decreased slightly from the previous year, despite the increase in files received and docketed.

Table 4 compares, for each of the last 6 fiscal years, the number of files received to the number disposed of by closing, diversion or discipline and to the inventory number of open files remaining at the end of the fiscal year.

**TABLE 4**

**Complaints: Received, Disposed, and Inventory (2006-2011)**

**NOTE: Numbers from past fiscal years may vary from those presented on previous annual reports due to a subsequently discovered computer programming error.**



In FY2011, bar counsel closed 611 files against 554 attorneys. Discipline was imposed on 147 lawyers on 230 files. This number is an increase from the 137 lawyers disciplined in FY2010 and comparable to 151 lawyers disciplined in FY2009. In addition, 6 lawyers were placed on disability status. Another 46 attorneys had their cases referred to the voluntary remedial diversion program.

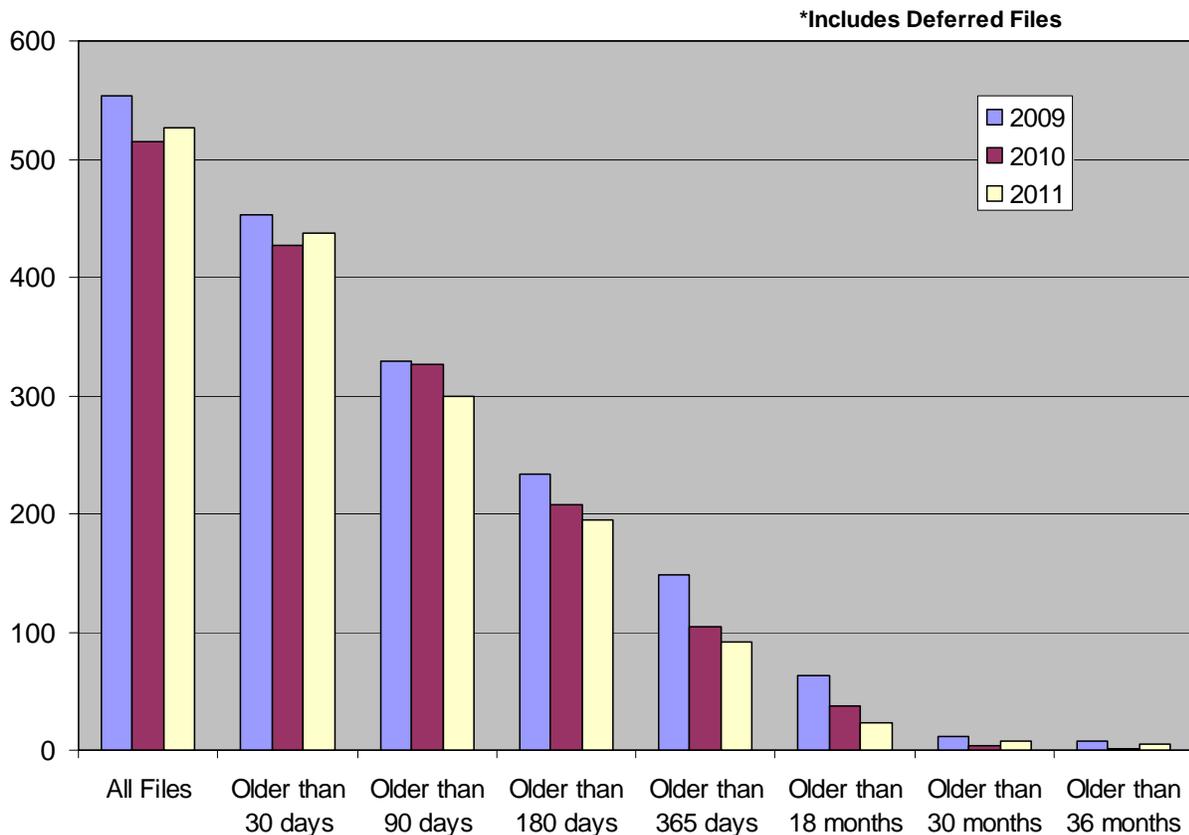
Approximately 33% of the files opened for investigation were concluded in under 100 days and 70% within a year of the date received, either by closing the file, diversion, imposition of a disciplinary sanction or the filing of a petition for discipline. The one-year period is the time standard agreed upon with the Court. These percentages were also affected by the rule changes allowing bar counsel to

decline to open certain types of files, that is, since fewer unwarranted complaints are being docketed, there are also fewer matters that can be dealt with relatively quickly.

The following table shows the numbers of pending files not in petition, by age in days, in FY2011 compared to FY2010 and FY2009.

**TABLE 5**

**Age of Files Not in Petition\***



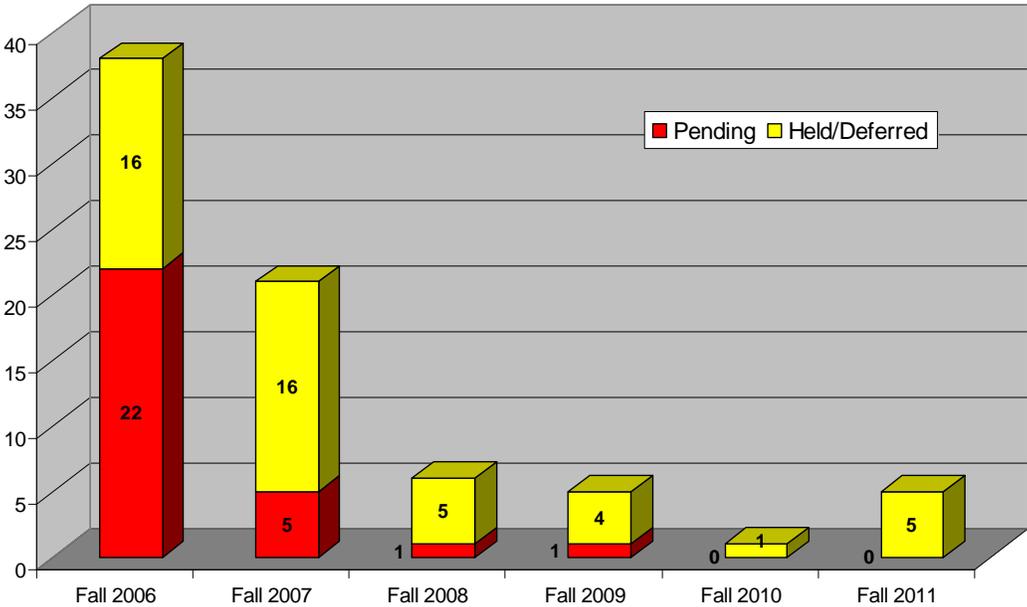
The Office of Bar Counsel continues to make progress in reducing the time that matters remain under investigation before a petition for discipline is filed. The median age of all files pending in the Office of Bar Counsel on which petitions for discipline have not been filed decreased from 193 days in FY2008 (173 days if files deferred pending the outcome of related criminal or civil cases are omitted) down to 113 days in FY2011 (92 days if deferred files are omitted). As of the end of this fiscal year,

and for the second year, there were no lawyers with pending files over 3 years old that were not either in petition or deferred status. Only two lawyers had a file over 2 years old at the end of the fiscal year that was not in petition and not deferred; both are now in petition. Moreover, one of those matters was a conviction case that had been in a deferred status for 2 years while the underlying criminal case against the attorney was pending.

Tables 6A through 6D provide a series of snapshots for each fiscal year since 2006 showing the number of lawyers under investigation without a petition for discipline being filed for more than 3 years, 2 ½ years, 2 years, and 18 months, respectively.

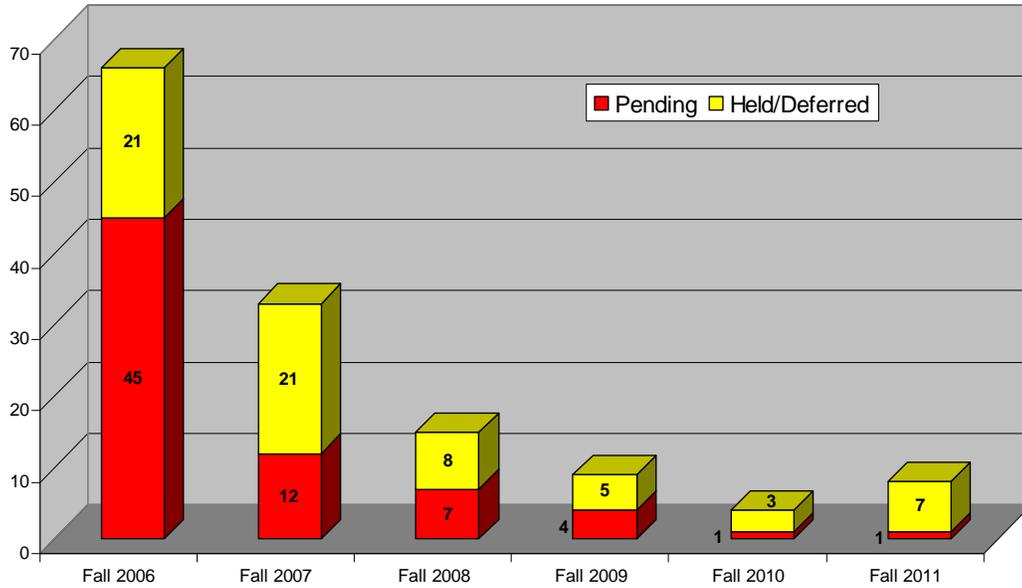
**TABLE 6A**

**Respondents With Pending Files Not In Petition Over 3 Years Old**



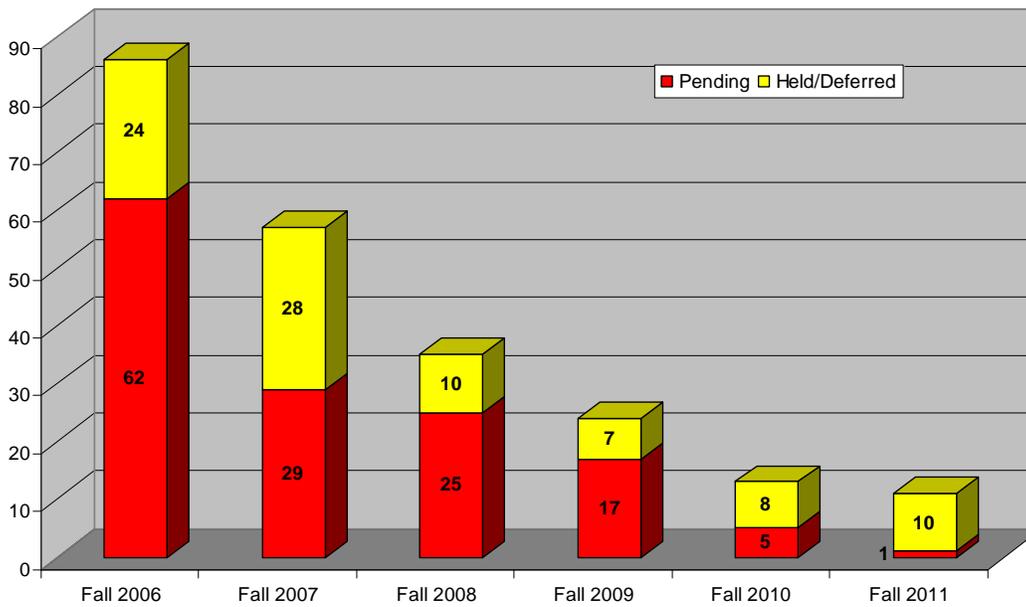
**TABLE 6B**

**Respondents With Pending Files Not In Petition  
Over 2.5 Years Old**



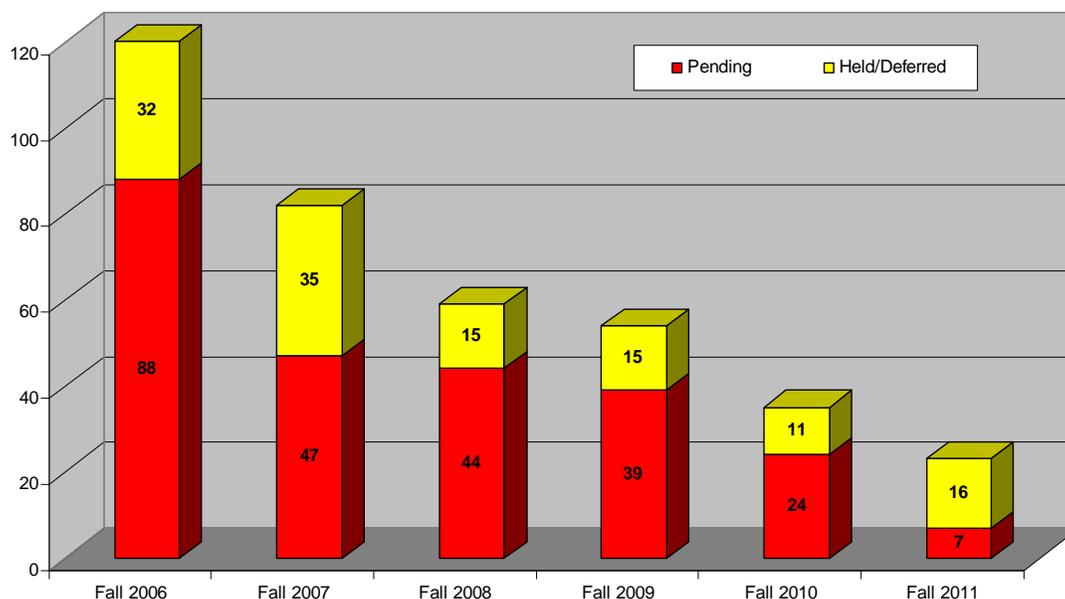
**TABLE 6C**

**Respondents With Pending Files Not In Petition  
Over 2 Years Old**



**TABLE 6D**

**Respondents With Pending Files Not In Petition  
Over 18 Months Old**



## **Diversions**

The diversion program, a recommendation in the 2005 ABA evaluation, became fully operational in early 2009. Its goal is to offer education, evaluation, monitoring or counseling to lawyers to address systemic problems in their practices and to provide training in legal ethics, law practice management, substantive practice areas, and client relations. The concept is that certain types of minor misconduct will be better addressed and, it is hoped, more permanently remedied in this manner than by discipline.

An experienced assistant bar counsel from the ACAP staff acts as diversion coordinator. Diversion in lieu of discipline is voluntary on the part of the lawyer. A lawyer who assents to diversion signs an agreement with the Office of Bar Counsel, describing the lawyer's undertakings and obligations.

During the fiscal year, 46 lawyers executed diversion agreements in lieu of discipline. Of these, 27 matters arose from bar counsel's receipt of notices of dishonored checks that, upon investigation, revealed some level of failure by the attorneys to comply fully with the record-keeping requirements of Mass. R. Prof. C. 1.15. Those lawyers, among other undertakings, were required to attend bar counsel's monthly trust account training and to document that their trust account records were compliant. Other attorneys may be referred to LOMAP for an evaluation of practice management problems, Lawyers Concerned for Lawyers (LCL) or other service providers for substance abuse or mental health issues, fee arbitration, and substantive CLE courses. Lawyers referred to a service provider such as LCL or LOMAP also sign a separate agreement with the provider.

### **Disciplinary Proceedings and Sanctions**

There were 147 lawyers sanctioned by the Board or the Supreme Judicial Court during FY2011. Of these, 24 attorneys received (private) admonitions, with 9 of those attorneys also required to attend a continuing legal education course. An additional 123 lawyers received public discipline: 39 lawyers were publicly reprimanded (including 7 reprimands reciprocal to actions taken in other jurisdictions), 46 received a term suspension including stayed suspensions, 8 were indefinitely suspended, 3 submitted a disciplinary resignation, and 27 were disbarred or resigned and were disbarred. In some instances, public reprimands and reinstatement from suspensions of a year or less (i.e., those eligible for automatic reinstatement without hearing) were subject to conditions such as monitoring by LCL, an evaluation by LOMAP, or a trust account record-keeping reporting requirement. Another 13 lawyers were temporarily suspended from the practice of law pending formal disciplinary proceedings. Six lawyers were placed on disability inactive status.

Tables 7 and 8 show the primary legal area involved in the cases resulting in sanctions in FY2011 and the types of misconduct found.

**TABLE 7**  
**Classification of Lawyers Disciplined by Primary Area of Law\***

Legal Area	Disbarment/ Resignation		Suspension		Public Reprimand		Admonition		All Discipline	
Administrative Law	0	-	1	<1%	0	-	1	<1%	2	1%
Bankruptcy	3	2%	0	-	2	1%	0	-	5	3%
Civil Litigation	7	5%	11	7%	7	5%	6	4%	31	21%
Collections	2	1%	0	-	0	-	0	-	2	1%
Commercial Law	1	<1%	1	<1%	1	<1%	0	-	3	2%
Consumer Law	0	-	1	<1%	0	-	0	-	1	<1%
Corporations	0	-	1	<1%	0	-	2	1%	3	2%
Criminal Defense	2	1%	5	3%	2	1%	1	<1%	10	7%
Criminal Conviction	2	1%	3	2%	2	1%	0	-	7	5%
Criminal Prosecution	0	-	0	-	0	-	0	-	0	-
Domestic Relations	2	1%	5	3%	3	2%	5	3%	15	10%
Escrow Accounts	0	-	0	-	0	-	0	-	0	-
Estates	3	2%	6	4%	3	2%	2	1%	14	10%
Fiduciary	0	-	3	2%	1	<1%	2	1%	6	4%
Immigration	1	<1%	1	<1%	0	-	2	1%	4	3%
Industrial Accidents	1	<1%	3	2%	0	-	0	-	4	3%
Insurance	0	-	0	-	0	-	0	-	0	-
Intellectual Property	1	<1%	1	<1%	0	-	0	-	2	1%
Labor	0	-	3	2%	0	-	0	-	3	2%
Landlord/Tenant	1	<1%	0	-	1	<1%	0	-	2	1%
Malpractice	0	-	1	<1%	1	<1%	0	-	2	1%
Municipal Law	0	-	0	-	0	-	0	-	0	-
Personal Injury	2	1%	6	4%	3	2%	2	1%	13	9%
Reciprocal Discipline	3	2%	8	5%	1	<1%	0	-	12	8%
Real Estate	9	6%	4	3%	11	7%	0	-	24	16%
Small Claims	0	-	0	-	0	-	0	-	0	-
Support	0	-	0	-	0	-	0	-	0	-
Taxation	0	-	0	-	0	-	0	-	0	-
Torts	0	-	0	-	0	-	0	-	0	-
Trusts	0	-	1	<1%	0	-	0	-	1	<1%
Non-Legal, Misc.	6	4%	10	7%	5	3%	1	<1%	22	15%

\*Totals exceed number of sanctions imposed and percentage may exceed 100% because some lawyers had multiple files with different primary legal areas.

**TABLE 8**  
**Classification of Lawyers Disciplined by Type of Misconduct\***

Rules	Type of Misconduct	Disbar/ Resign		Susp		Public Reprmd		Admon		All Discip	
1.1	Failure to provide competent representation	11	7%	15	10%	9	6%	7	5%	42	29%
1.2(a)	Failure to abide by a client's decision concerning the representation or taking unauthorized action on the client's behalf	8	5%	14	10%	6	4%	4	3%	32	22%
1.3	Neglect or lack of diligence	10	7%	21	14%	11	7%	13	9%	55	37%
1.4	Failure to communicate adequately with client	12	8%	21	14%	9	6%	9	6%	51	35%
1.5	Fee violations, including excessive or improper fees and failure to refund unearned fees	5	3%	6	4%	4	3%	0	-	15	10%
1.6 and 1.9(c)	Failure to preserve client confidences or secrets	0	-	2	1%	1	<1%	0	-	3	2%
1.7 and 1.13	Conflicts of interest between current clients or between client and attorney	1	<1%	5	3%	2	1%	4	3%	12	8%
1.8	Conflicts of interest: prohibited transactions with clients including business transactions, financial assistance, and preparation of instruments of which lawyer or relative is beneficiary	1	<1%	4	3%	1	<1%	0	-	6	4%
1.9 and 1.11	Conflicts of interest with former clients, including former government employment	0	-	0	-	1	<1%	1	<1%	2	1%
1.14	Conflicts of interest or other violations as to client under disability	0	-	0	-	0	-	0	-	0	-
1.15	Trust account violations including commingling, conversion, record-keeping violations, failure to promptly pay litigation costs or client creditors or issuing dishonored checks	17	12%	21	14%	15	10%	2	1%	55	37%
1.16	Failure to properly withdraw from representation, including failure to return client files or documents	5	3%	8	5%	4	3%	4	3%	21	14%
3.1, 3.2, 3.3(b) - (e), 3.5, 3.6, and 3.8	Improper trial conduct	0	-	0	-	0	-	0	-	0	-
3.3(a), 4.1, 8.4(c), and 1.2(d)	Fraudulent or deceptive activity, including lying to clients, knowing use of false evidence or making a misrepresentation to a tribunal or third party	1	<1%	6	4%	1	<1%	1	<1%	9	6%
3.4, 3.9 and 4.4	Unfair conduct to opposing party or non-adjudicative body	4	3%	3	2%	4	3%	0	-	11	7%
4.2 and 4.3	Improper communications with a party known to be represented by counsel or unrepresented party	0	-	1	<1%	0	-	0	-	1	<1%
5.1 and 5.3	Failure to supervise subordinates	0	-	1	<1%	0	-	0	-	1	<1%
5.4 and 5.6	Failure to maintain professional independence including partnership or sharing fees with nonlawyer	0	-	1	<1%	0	-	0	-	1	<1%
5.5	Unauthorized practice of law or assisting in unauthorized practice	3	2%	2	1%	3	2%	2	1%	10	7%
7.1 through 7.5	Improper communications concerning lawyer's services including improper advertising or solicitation	0	-	1	<1%	0	-	0	-	1	<1%
8.1	False statements in a bar admission or disciplinary matter	3	2%	5	3%	2	1%	0	-	10	7%
8.3	Failure to report professional misconduct when required	1	<1%	1	<1%	0	-	0	-	2	1%
8.4(a)	Misconduct through acts of another	0	-	1	<1%	1	<1%	0	-	2	1%
8.4(b)	Criminal conviction or conduct of attorney	8	5%	12	8%	3	2%	0	-	23	16%
8.4(d) and 8.4(h)	Conduct prejudicial to the administration of justice, including conduct that is the subject of a contempt finding or court sanction	7	5%	13	9%	5	3%	1	<1%	26	18%

\*Totals exceed number of sanctions imposed and percentage exceeds 100% because more than one rule was violated.

As in prior years, almost all lawyers disciplined had been admitted to the bar for at least five years. The majority of lawyers disciplined were between the ages of 40 and 70 and described themselves as solo practitioners.

The Office of Bar Counsel filed 113 petitions for discipline (including affidavits of resignation) seeking public sanctions. This number is on a par with the 116 petitions filed in FY2010. In addition, 15 petitions for reciprocal discipline (petitions based on suspensions or disbarment in another jurisdiction in which the attorney is also admitted) were filed directly with the Court. Bar counsel also filed 43 post-hearing requests for findings and rulings or appeal briefs, including 3 briefs to the full bench of the Supreme Judicial Court.

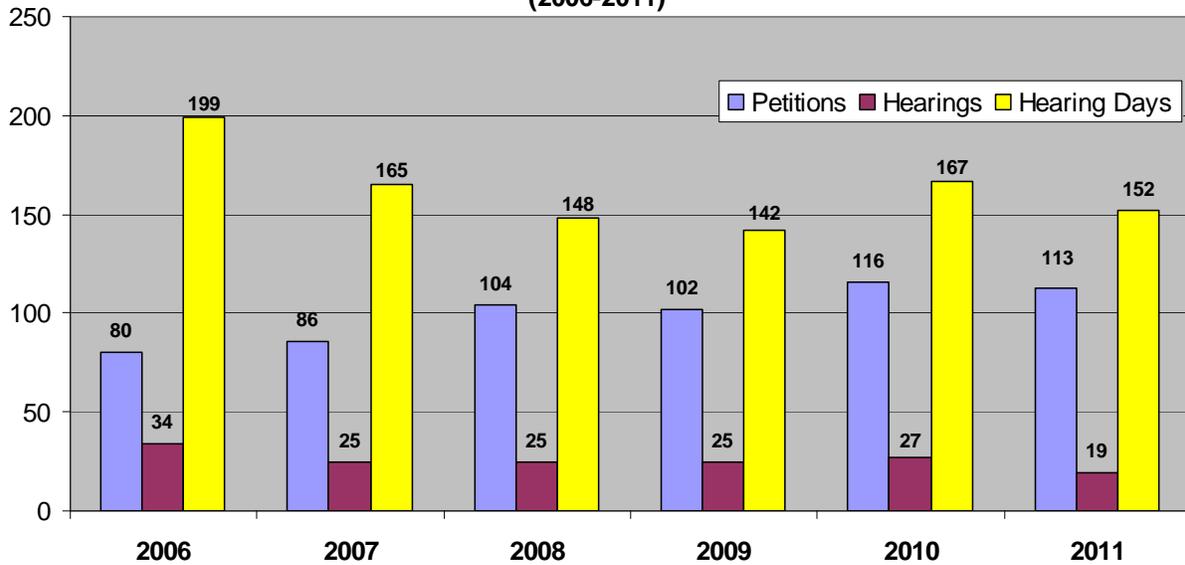
A total of 152 hearing dates were held before hearing committees, the Board, and the Court, a decrease from the 167 hearing dates in FY2010 but more than the 142 hearing dates held in FY2009. Evidentiary hearings were conducted in 19 cases with 51 days of evidentiary hearings, again a decrease from the 76 days of evidentiary hearings in FY2010 but more than the 46 days of evidentiary hearings in FY2009. These numbers should stabilize as bar counsel's backlog of older files is steadily reduced.

Of the petitions pending during the fiscal year and not deferred, 37 matters (including 6 conviction cases) were awaiting evidentiary hearing at the end of the fiscal year. Another 3 cases had evidentiary hearings either in progress or concluded and awaiting hearing reports, with an additional 5 cases on appeal to the Board.

Table 9 provides a comparison of number of petitions filed, matters heard, and hearing dates for this year and the preceding five years.

**TABLE 9**

**Comparison of Petitions, Hearings, and Hearing Days  
(2006-2011)**



In addition to petitions for discipline, there were also 9 petitions for reinstatement filed during FY2011 by suspended or disbarred attorneys. After hearing, 11 lawyers (some of whom had petitions pending at the start of the fiscal year) were reinstated to practice and 4 lawyers were denied reinstatement. Following short suspensions, 7 lawyers were reinstated to practice without petition or hearing.

Considerable staff resources continue to be spent on issues relating to the closing of lawyers' practices following suspension, disbarment, death or disability. In 6 matters where members of the bar were appointed as commissioners pursuant to Supreme Judicial Court Rule 4:01, § 14 or § 17(2), the staff at the Office of Bar Counsel and the commissioners worked together to return files to clients, notify courts and opposing counsel, ensure proper disbursement of trust funds, and arrange for storage of unclaimed files that could not as yet be shredded or for appropriate destruction of files as approved by the Court. In other matters, the staff assisted suspended or disbarred attorneys in

accomplishing these tasks themselves. The assistant bar counsel who acts as the coordinator for diversion matters is now also overseeing commissioner cases with the expectation that this change will give more consistency to the process and perhaps expedite final resolution.

### **Full Bench Decisions**

The Justices issued four full court opinions on bar discipline cases:

- *Matter of Hrones*, 457 Mass. 844 (2010), suspending attorney for a year and a day for assisting nonlawyer in the unauthorized practice of law and additional misconduct including trust account violations, financial assistance to clients, and a business transactions with a client.
- *Matter of Scola*, 460 Mass. 1003 (2011), suspending a conveyancing attorney for inadequate record keeping that led to negligent misuse of trust funds and continuing to conduct closings using the IOLTA account that had the shortfall for several weeks after bar counsel instructed him to cease. Six-month suspension, stayed for one year in light of “significant mitigating factors.”
- *Matter of Sharif*, 459 Mass. 558 (2011), clarifying the disciplinary sanctions for intentional misuse of retainers and holding that the presumptive sanctions for mishandling of client funds do not apply. Mitigating factors; three-year suspension with third year stayed.
- *Matter of Pudlo*, 460 Mass. 400 (2011), reaffirming holding in *Sharif* that presumptive sanctions for mishandling of client funds do not apply to misuse of retainers and expenses, whether negligent or intentional. One-year suspension with six months stayed for negligent misuse of both retainer and advanced case expenses, inadequate record keeping, and neglect of client’s case, with reinstatement conditioned on quarterly audits of trust account.

### **Related Activities and Other News of Note**

#### **Rules Changes**

##### Mass. R. Prof. C. 1.5

Effective March 15, 2011, the Supreme Judicial Court approved major revisions to Rule 1.5 of the Rules of Professional Conduct, making substantial changes to both the

text of the rule and the comments. The amendments address issues raised in the Court's decisions in *Malonis v. Harrington*, 442 Mass. 692 (2004), *Saggese v. Kelley*, 455 Mass. 434 (2005), *Liss v. Studeny*, 450 Mass. 473 (2008), and *Matter of an Attorney*, 451 Mass. 131 (2008).

Among the many changes were several on contingent fees that were of particular interest to the bar. First, Rule 1.5(c) contains two new sections, 1.5(c)(7) and 1.5(c)(8). When the lawyer intends to pursue a claim against the client for expenses or fees if the attorney-client relationship is terminated before the conclusion of the contingent fee case, then the contingent fee agreement has to state the basis on which fees and expenses will be claimed and the method by which they will be calculated. If a lawyer is the successor to counsel who was terminated before the conclusion of the case, then the fee agreement must state whether the client or successor counsel is liable to pay the fees and expenses of prior counsel.

Second, Rule 1.5(f) now includes two alternative forms for contingent fee agreements. Form A is intended to be a version that may be used without any special explanations by the lawyer to the client. Form B contains options in paragraphs 3 and 7 that would require an explanation to the client and a specific designation by the client of his or her choice. The exception is that no additional explanations are required to organizational clients. Both Form A and Form B incorporate certain of the key amendments to Rule 1.5.

#### Out-of-State Depositions

On June 22, 2011, the Supreme Judicial Court approved a new rule, Section 4.5B of the Rules of the Board of Bar Overseers, on taking out-of-state depositions pursuant to subpoena in bar disciplinary proceedings. The rule provides a mechanism through the

Board for bar counsel or the respondent either to seek the issuance of a subpoena from the disciplinary agency in the jurisdiction where the deposition will occur or to apply to a single justice of the SJC for leave to take the deposition pursuant to the Massachusetts Letters Rogatory statute, G.L. c. 223A, § 10.

### Recusals

On June 22, 2011, the Supreme Judicial Court approved amendment of the Rules of the Board of Bar Overseers to clarify issues concerning recusal of members of the Board of Bar Overseers and hearing officers. The revisions, effective September 1, 2011, both consolidate and add to previously existing provisions on recusal. The revised sections are now Subchapter G of Chapter 4 of the Board rules.

### Home addresses

On June 22, 2011, the Supreme Judicial Court amended Supreme Judicial Court Rule 4:02 by adding new section 10. This provision states that residential addresses of attorneys as disclosed on their registration statements shall be treated as confidential and used only by the Board of Bar Overseers and the Office of Bar Counsel to communicate with lawyers or in the course of the business of the Board or bar counsel.

The residence addresses will not be disclosed to third parties except as ordered by a single justice of the Court. This restriction does not apply to any lawyer who designates a home address as a place of business. The office address of any attorney in good standing in Massachusetts will continue to be available on the Board's website.

### **Ethics Helpline and CLE Presentations**

The Office of Bar Counsel through its ethics helpline answers questions from the bar three afternoons each week. The goal is to assist attorneys in avoiding preventable ethical problems or in resolving minor difficulties. Assistant bar counsel in FY2011

received approximately 2200 calls on the ethics helpline. The questions covered a wide range of issues, involved many unique fact patterns including very complex conflict-of-interest problems, and evidenced the bar's increasing sophistication and sensitivity to professional responsibility concerns.

As previously described, in a continuing effort to assist lawyers with the trust account record-keeping requirements of Mass. R. Prof. C. 1.15 and to reduce the number of complaints that raise record-keeping issues (whether from notices of dishonored checks or from clients or other affected parties), bar counsel conducts a free one-hour "trust account school" monthly at the Boston Bar Association. An assistant bar counsel who concentrates on handling complaints arising from dishonored check notices, and on outreach to the bar on record keeping, presents these programs. In FY2011, 162 attorneys and their bookkeepers attended the classes in Boston, an increase from the 136 who attended in FY2010. The same assistant bar counsel also presented trust account programs to the Worcester Bar and the Fitchburg Bar. Materials on trust accounts, including a comprehensive booklet prepared by the IOLTA Committee, are also available at the Office of Bar Counsel website, <http://www.mass.gov/obcbbo/rpc1.htm#Rule%201.15>.

Trust accounting is discussed as well in a full-day program on ethics and law office management offered twice a year in Boston by the Office of Bar Counsel and MCLE. Other topics addressed in the course are creating the attorney-client relationship including social networking, common ethical problems, conflicts and conflict management, billing and collecting, and best practice tips from LOMAP, plus a presentation from LCL on stress management and substance abuse issues.

Bar counsel staff made 44 additional presentations on professional conduct issues at MCLE, law schools, bar associations, LCL, and a legal services agency. Some of the subjects covered included ethical issues relating to the amendments to Mass. R. Prof. C. 1.5, immigration law, insurance law, advertising and marketing, elder law, divorce law, real estate closings, employment law, social media, impaired clients, fees, paralegal issues, cloud computing and computer forensics. One staffer also served as a moot court judge and another organized student Law Day activities for the SJC. Staff also wrote articles on ethics and news updates for the website maintained by the Office of Bar Counsel and updated the professional responsibility aspects of other publications for the Mass. Bar and MCLE.

Assistant bar counsel also served on two other SJC committees, one exploring the viability of mandatory fee arbitration and the other looking at the possibility of a required “bridge the gap” CLE program for new admittees. Staff from the Office of Bar Counsel and Board of Bar Overseers also continue to teach professional responsibility, to participate in Inns of Court, and to serve on bar association, court-appointed and other law-related committees and boards including the Supreme Judicial Court Standing Advisory Committee on the Rules of Professional Conduct, the Board of Directors of Lawyers Concerned for Lawyers, the Greater Boston Legal Services Board of Directors, and a law school alumni/ae Board of Directors.

### **Website Update**

The website maintained by the Office of Bar Counsel, [www.mass.gov/obcbbo](http://www.mass.gov/obcbbo), provides information to the bar and the public on the functions of the Board of Bar Overseers and Office of Bar Counsel, as well as explanations of how to file

complaints and of the disciplinary process. The site includes disciplinary decisions since 1999, links to rules, and a collection of articles by staff on ethical issues including four articles new or updated this fiscal year. In addition, a news section includes updates on matters of interest relating to professional responsibility and the disciplinary process, descriptions of and links to rule changes, and synopses of new disciplinary decisions and other ethics-related cases. The office address and registration status of Massachusetts attorneys can be obtained through a link to the website of the Board of Bar Overseers, <http://massbbo.org/bbolookup.php>.

The Board's website also includes information provided by active status attorneys as to whether or not they carry malpractice insurance. The information was added following a 2006 Supreme Judicial Court order amending S.J.C. Rule 4:02 to require that lawyers certify in their annual registration statements whether or not they are covered by professional liability insurance. As of the end of FY2011, 77% of active status lawyers in private practice report that they maintain malpractice insurance.

### **Facilitating Continuous Improvement**

The most significant changes affecting the bar in the area of professional responsibility in 2011 were the amendments to Mass. R. Prof. C. 1.5 and, in particular, the new requirements concerning contingent fee agreements. These revisions served to codify earlier cases decided by the Court and were well-received by the bar generally and in a number of training programs in which bar counsel staff participated.

This fiscal year also saw the continuing benefits of rules changes implemented in 2009. As a result of the rules authorizing bar counsel to decline to open files on complaints that are not substantive, fewer files are being opened by the Office of Bar Counsel than would have been so in past years, with the consequence that members

of the bar avoid having to respond to such complaints. Lawyers who have committed minor types of misconduct are also benefiting from diversion to educational or supportive services. By providing assistance before serious misconduct occurs, these programs help both the bar and public.

Other revisions made by the Court in 2009 to Supreme Judicial Court Rule 4:01 and the Rules of the Board of Bar Overseers are also working well, including changes to discovery practice in disciplinary proceedings and a number of changes to reinstatement procedures.

The Office of Bar Counsel continues to work with the bar to ensure public confidence in the disciplinary process. Mutual success in this respect is demonstrated by the exceptional cooperation that ACAP receives from attorneys, as well as in bar counsel's and the bar's work together on Court committees and CLE programs and in the participation of lawyers and other volunteers as hearing officers and Board members for disciplinary proceedings.

With the assistance of the bar, the Board, and the Court, the Office of Bar Counsel will continue to pursue its mission of preserving and enhancing the integrity and high standards of the bar and protecting the public from unethical conduct by attorneys.