

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

**ANNUAL REPORT  
TO THE  
SUPREME JUDICIAL COURT  
FISCAL YEAR 2012**

SEPTEMBER 1, 2011 - AUGUST 31, 2012

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

## **Fiscal Year 2012**

### **Executive Summary**

This is a summary of the key points in the report that follows for the fiscal year that ended on August 31, 2012:

- The overall number of files pending in the Office of Bar Counsel at the end of the fiscal year continued to decrease in fiscal 2012. In addition, for the third year, the Office of Bar Counsel ended the fiscal year with no files over 3 years old that are not in petition or deferred. Eight lawyers had files over 18 months old that were not in petition or deferred.
- The Office of Bar Counsel filed 81 petitions for discipline including affidavits of resignation. In addition, 16 suspended or disbarred lawyers filed petitions for reinstatement requiring reinstatement hearings.
- Bar counsel's diversion program for minor disciplinary violations concluded 49 cases by diversion.
- Bar counsel's Attorney and Consumer Assistance Program screened and resolved over 91% of all telephone and written contacts with ACAP without referral for investigation.
- Bar counsel's ethics helpline handled approximately 2000 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 seven 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 49 presentations on ethics and professional conduct including a monthly “trust account school” as well as programs at law schools, bar associations, and continuing legal education organizations.

## **Overview**

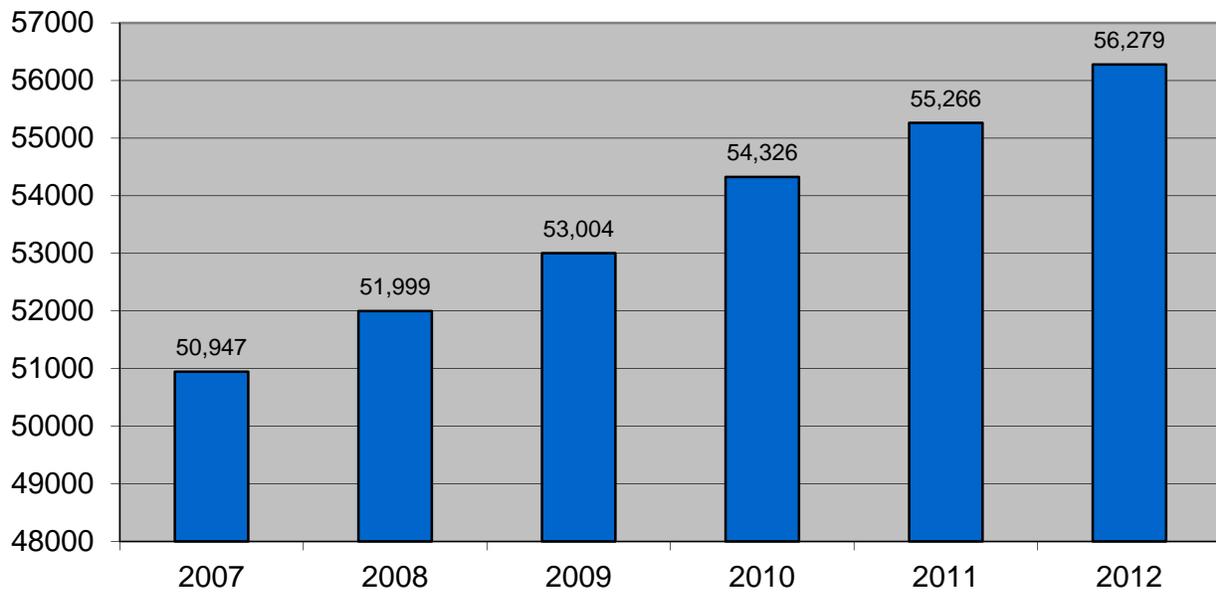
The Justices of the Supreme Judicial Court established the Board of Bar Overseers, the Office of Bar Counsel, and the Clients’ Security Board by rule in 1974. The bar counsel, an independent prosecutor who serves at the pleasure of the Court, investigates complaints alleging professional misconduct against 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. Registration fees also fund Lawyers Concerned for Lawyers, the statewide lawyers’ assistance program that is not part of the BBO, and LCL’s affiliate, the Law Office Management Assistance Program (LOMAP). Starting in 2010, the Board has been collecting the \$51 opt-out “access to justice” fee that is administered by the IOLTA Committee and used in the administration of justice and provision of legal services to those who cannot afford them. Effective in September 2012, the Board is also collecting *pro hac vice* registration fees on behalf of the IOLTA Committee.

At the close of FY2012, there were 56,279 Massachusetts lawyers registered on active status and another 11,465 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 (2007-2012)**



## **Fiscal Year 2012 Caseload**

### **ACAP Contacts**

The Attorney and Consumer Assistance Program (ACAP) is the intake unit of the Office of Bar Counsel. ACAP carries out its screening function both by attempting to resolve routine consumer concerns or minor disciplinary issues and by prompt recognition and referral for investigation of matters that raise issues of more serious misconduct.

During FY2012, ACAP responded to 4326 inquiries. Approximately 79% of these inquiries were received as telephone calls; the remainder were in writing. ACAP resolved more than 88% of inquiries without referral for investigation. Consistent with time standards agreed upon with the Supreme Judicial Court, over 99% of ACAP contacts reached final disposition within 45 days and over 97% of contacts were processed within 30 days of receipt.

The first issue facing 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, which generally serves to refocus the lawyer's attention on the client's matter. Some typical results are that the lawyer returns a legal file requested by a client, or refunds an unearned retainer, or calls the client back to give an update on case status.

The problems prompting inquiries to ACAP remain constant from year to year. Approximately 25% of all inquiries in FY2012 concerned lawyers' neglect, lack of diligence, or

failure to return client calls. The areas of law that produce the most inquiries to ACAP are domestic relations, criminal defense, and civil litigation, comprising 16%, 12.5% and 12%, respectively, of all contacts in FY2012. Issues involving real estate, personal injury, and trusts and estates each accounted for approximately 8% of the ACAP caseload, although real estate comprises a larger percentage of matters ultimately docketed as complaints. Approximately 8% of the calls to ACAP involved questions about legal fees, as compared to 10% in FY2011.

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. On the other end of the spectrum, a complaint form is sent immediately where significant unethical conduct might be involved. In the middle ground are the several thousand matters that the ACAP staff seeks to resolve.

### **Complaints Docketed**

The Office of Bar Counsel opened 834 complaints against attorneys in FY2012, a decrease from FY2011 when 934 complaints were opened but similar to FY2010 when 854 complaints were opened. All three years, however, reflect a decrease from FY2009, when 1001 complaints were opened.

The decrease of docketed complaints in the last several 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), that allowed bar counsel to decline to open files on matters that were frivolous or otherwise not suitable for investigation. In FY2012, there were 209 written inquiries that bar counsel declined to open as files in these circumstances. In 70 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 834 files docketed in FY2012 involved 732 attorneys: 656 of the respondent lawyers had one complaint filed against them, 57 had two complaints, and 19 had three or more complaints filed in the fiscal year. Bar counsel initiated the investigation in 130 of the files on 127 lawyers, not including dishonored check matters.

The legal areas that produced the most complaints in FY2012 were real estate, domestic relations and civil litigation including personal injury, followed by criminal defense and estates. Consistent with prior years, the misconduct most often cited 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 FY2012 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 834 Complaints Received by Primary Legal Area**

Administrative Law.....	23..... 3%	Industrial Accidents .....	12..... 1%
Bankruptcy.....	26..... 3%	Insurance .....	2..... <1%
Civil Litigation.....	71..... 9%	Intellectual Property.....	0..... 0%
Collections .....	13..... 2%	Labor.....	9..... 1%
Commercial Transactions.....	28..... 3%	Landlord/Tenant .....	17..... 2%
Consumer Law.....	4..... <1%	Malpractice .....	2..... <1%
Conviction of Crime .....	24..... 3%	Municipal Law .....	2..... <1%
Corporations .....	10..... 1%	Personal Injury.....	59..... 7%
Criminal Defense .....	68..... 8%	Reciprocal Discipline .....	9..... 1%
Criminal Prosecution.....	2..... <1%	Real Estate .....	107..... 13%
Domestic Relations.....	109..... 13%	Small Claims.....	0..... 0%
Escrow Accounts .....	4..... <1%	Support .....	0..... 0%
Estates .....	61..... 7%	Taxation .....	3..... <1%
Fiduciary .....	13..... 2%	Torts.....	2..... <1%
Immigration .....	40..... 5%	Trusts.....	5..... 1%
		No Legal Area or Unknown .....	109..... 13%

**TABLE 3**  
**Classification of 834 Complaints Received by Misconduct Alleged**

Rules	Type of Misconduct	Complaints Received	
		Count	Percentage
1.1	Failure to provide competent representation	115	14%
1.2(a)	Failure to abide by a client's decision concerning the representation or taking unauthorized action on the client's behalf	49	6%
1.3	Neglect or lack of diligence	238	29%
1.4	Failure to communicate adequately with client	209	25%
1.5	Fee violations, including excessive or improper fees and failure to refund unearned fees	87	10%
1.6 and 1.9(c)	Failure to preserve client confidences or secrets	24	3%
1.7 and 1.13	Conflicts of interest between current clients or between client and attorney	44	5%
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	23	3%
1.9 and 1.11	Conflicts of interest with former clients, including former government employment	11	1%
1.14	Conflicts of interest or other violations as to client under disability	4	<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	292	35%
1.16	Failure to properly withdraw from representation, including failure to return client files or documents	143	17%
3.1, 3.2, 3.3(b)-(e), 3.5 and 3.6	Improper trial conduct	17	2%
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	25	3%
3.4, 3.9 and 4.4	Unfair conduct to opposing party or non-adjudicative body	26	3%
4.2 and 4.3	Improper communications with a party known to be represented by counsel or unrepresented party	7	1%
5.1 and 5.3	Failure to supervise subordinates	7	1%
5.4 and 5.6	Failure to maintain professional independence including partnership or sharing fees with nonlawyer	2	<1%
5.5	Unauthorized practice of law or assisting in unauthorized practice	20	2%
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	2	<1%
8.3	Failure to report professional misconduct when required	16	2%
8.4(a)	Misconduct through acts of another	2	<1%
8.4(b)	Criminal conviction or conduct of attorney	51	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	57	7%
	No Disciplinary Violation or Summary Dismissal	9	1%

\*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 from financial institutions of dishonored checks drawn on attorney trust accounts resulted in the opening of 155 files on 153 lawyers in FY2012. This number is consistent with the 152 files opened on 152 lawyers in FY2011. Both years represent a decrease from the 183 files on 179 lawyers opened in FY2010 and 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.

As has been the case in prior years, the main reason why trust account checks are dishonored is 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.

Uneven compliance with the record-keeping rules remains a major issue, even though it has been 17 years since the Supreme Judicial Court first enacted the dishonored check notification rule and 8 years since significant changes were implemented to the record-keeping requirements of Mass. R. Prof. C. 1.15. In the conveyancing field in particular, inadequate record keeping can lead to calamitous results. See *Matter of Scola*, 460 Mass. 1003 (2011), where the lawyer's record-keeping problems created a substantial deficit in his IOLTA account. Two other full-bench decisions from 2011 additionally illustrated the confusion among members of the bar as to the record-keeping requirements for retainers and expenses. *Matter of Sharif*, 459 Mass. 558 (2011); *Matter of Pudlo*, 460 Mass. 400 (2011).

To address the problem, 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 prior to 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

pages 22-23 of this report. Lawyers seeking help with record-keeping issues might also wish to consult with LOMAP, the law office management assistance program, which is also often free of charge. In addition, the SJC has put out for comment a proposed new Supreme Judicial Court Rule 3:16, requiring newly admitted attorneys to take a full-day education course that would include trust account training as part of the curriculum.

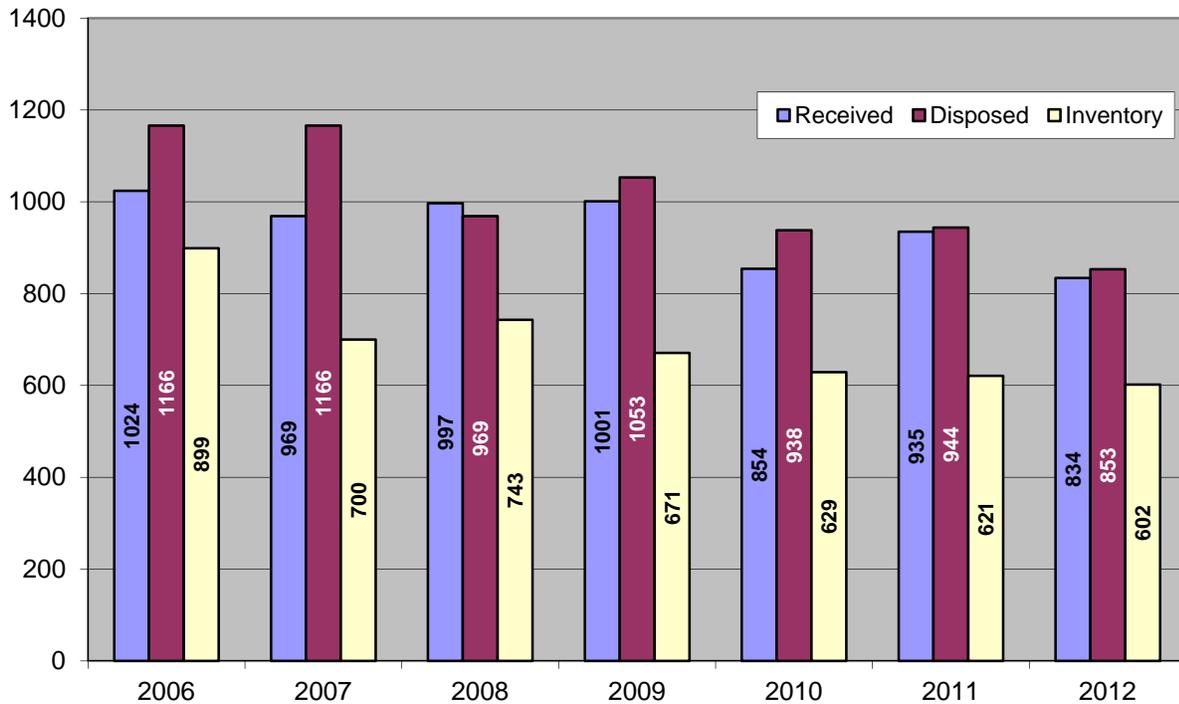
### **Case Processing**

There were 602 files pending at the end of the fiscal year, including files where a petition for discipline has been filed and disciplinary proceedings are ongoing and files still under investigation. This number is a slight decrease from the previous year. A total of 853 files were brought to an end result by the Office of Bar Counsel in FY2012 either by closing, diversion, or discipline. In FY2011, bar counsel disposed of 944 files, but the number of files opened during that fiscal year was also greater. Bar counsel continues to keep pace with the number of files opened.

Table 4 compares, for each of the last 7 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 (2006-2012)**



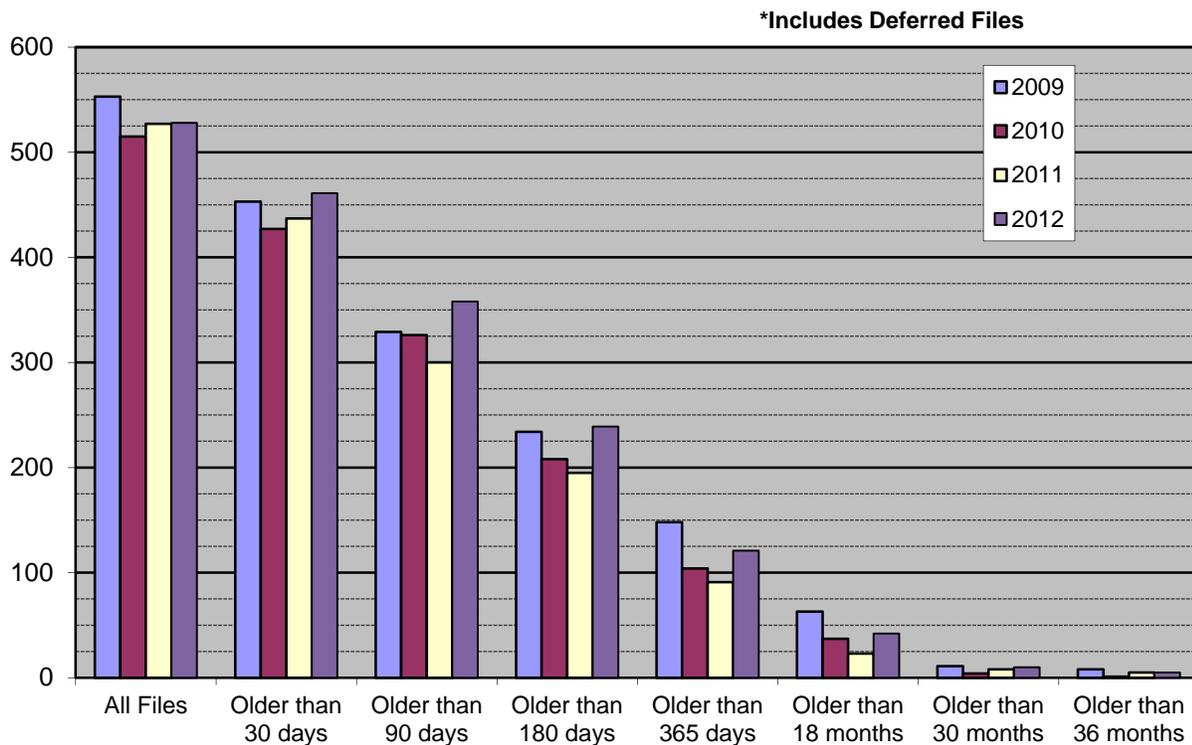
Bar counsel closed 611 files against 555 attorneys in FY2012. Discipline was imposed on 132 lawyers on 178 files. This number is a decrease from the 147 lawyers disciplined in FY2011, but is consistent with the 137 lawyers disciplined in FY2010. In addition, 6 lawyers were placed on disability status. Another 49 attorneys had their cases referred to the voluntary remedial diversion program.

Disposition by closing, diversion, petition, or imposition of a sanction is to be accomplished within one year according to the time standard agreed upon with the Court. Investigations on approximately 30% of the files opened were concluded in under 100 days and 70% within a year of the date received. These percentages are also affected by the 2009 rule changes allowing bar counsel to

decline to open certain types of files; 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 FY2012 compared to FY2011, FY2010 and FY2009.

**TABLE 5**  
**Age of Files Not in Petition\***



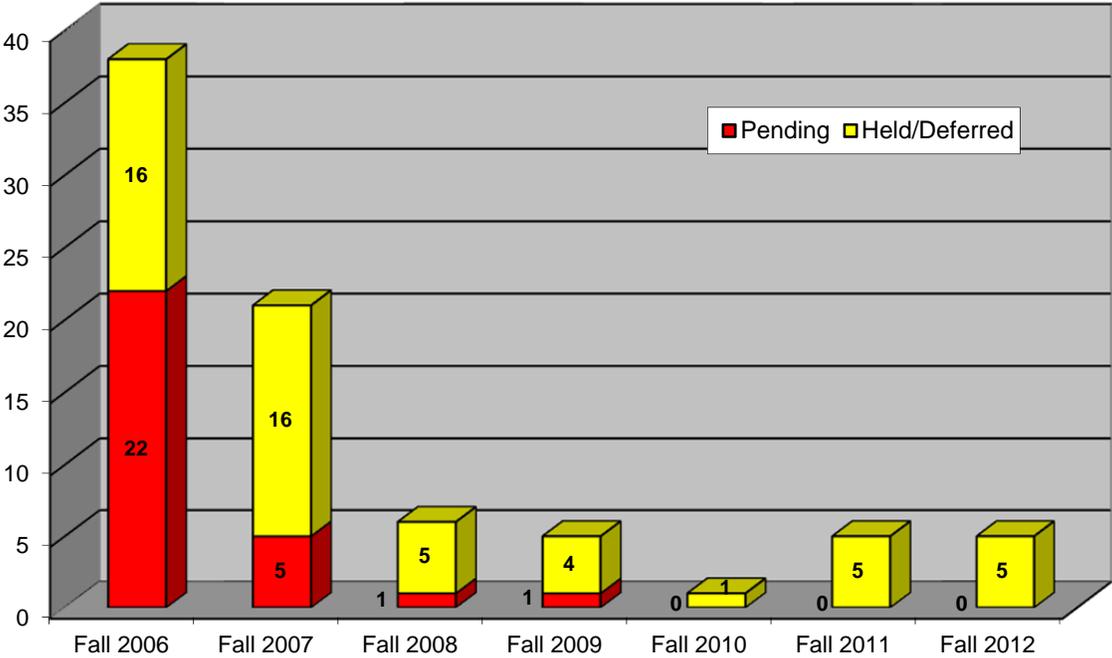
The Office of Bar Counsel has made progress in reducing the time that matters remain under investigation before a petition for discipline is filed. Although there has been some fluctuation over the years, the median age of all files pending in the Office of Bar Counsel on which petitions for discipline 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) to 154 days in FY2012 (120 days if deferred files are omitted). As of the end of this fiscal year, and for the third year, there were no lawyers with

pending files over 3 years old that were not either in petition or deferred status. Four lawyers had a file over 2 years old at the end of the fiscal year that was not in petition and not deferred.

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.

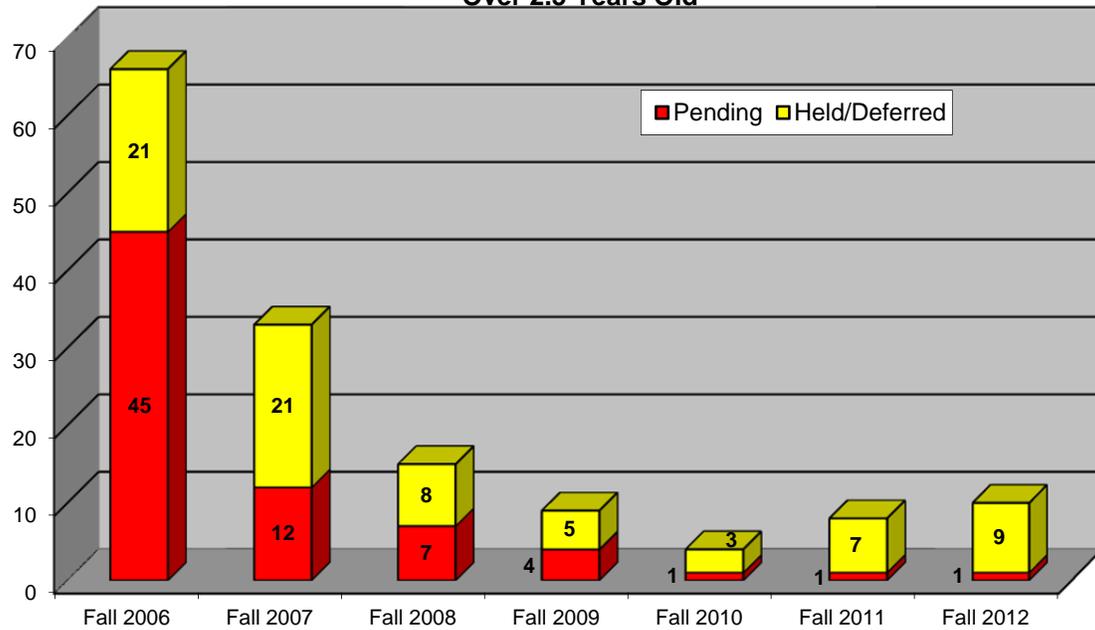
**TABLE 6A**

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



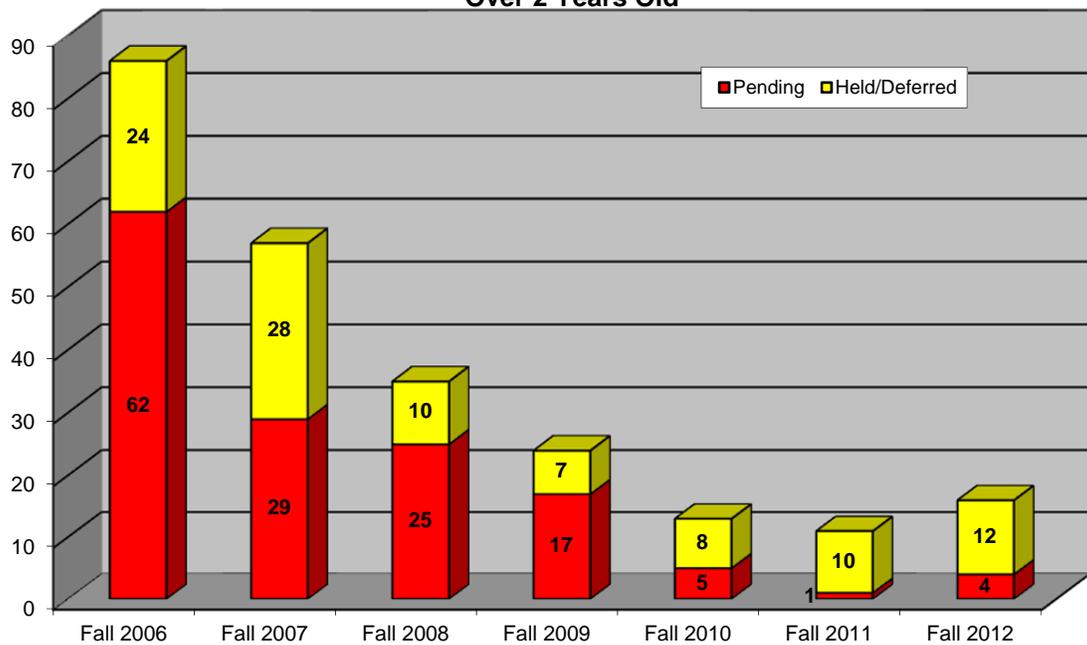
**TABLE 6B**

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



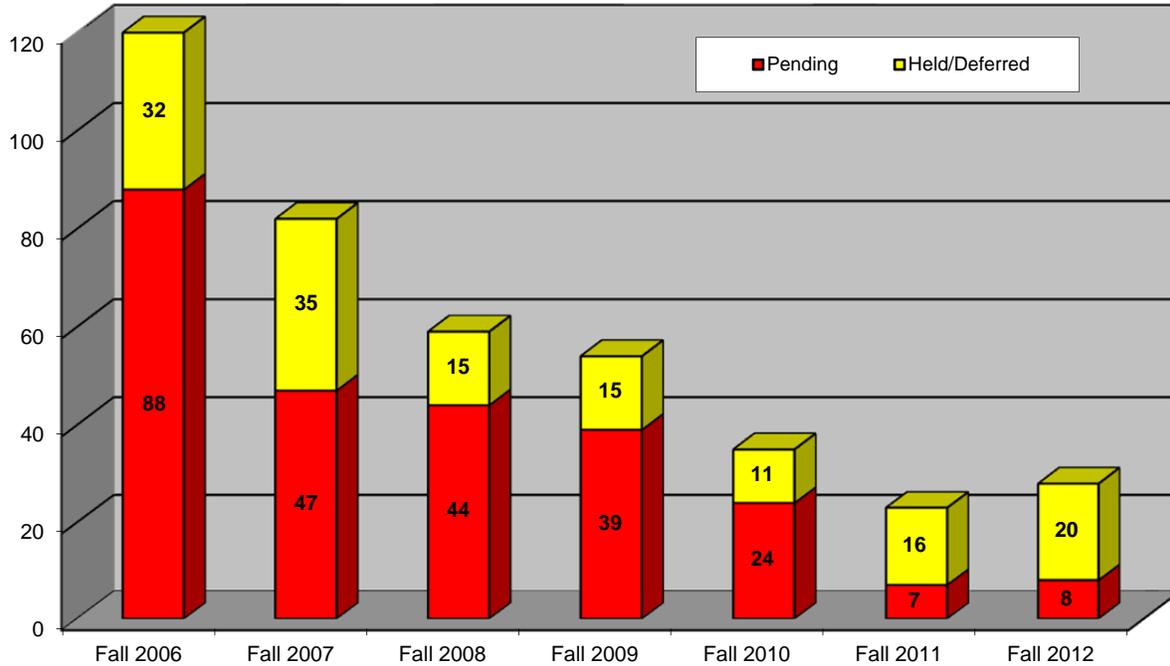
**TABLE 6C**

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



**TABLE 6D**

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



**Diversion**

The diversion program came into existence as a result of a recommendation in the 2005 American Bar Association evaluation of the Massachusetts lawyer disciplinary system. It has been in operation since 2009. The aim 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, with the expectation that some minor misconduct will be better and more permanently addressed by remediation than 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, 49 lawyers executed diversion agreements in lieu of discipline. Of these, 19 matters arose from bar counsel's receipt and investigation of notices of dishonored checks that resulted from the attorneys' failure 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 afterwards that their trust account records were compliant. Other attorneys were referred either to LOMAP for an evaluation of practice management problems, LCL or other service providers for substance abuse or mental health issues, fee arbitration, or 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 132 lawyers sanctioned by the Board or the Supreme Judicial Court during FY2012. Of these, 29 attorneys received (private) admonitions, with 7 of those attorneys also required to attend a continuing legal education course. An additional 103 lawyers received public discipline: 31 lawyers were publicly reprimanded (including 6 reprimands reciprocal to actions taken in other jurisdictions), 45 received a term suspension including stayed suspensions, 7 were indefinitely suspended, 1 submitted a disciplinary resignation, and 19 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 10 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 FY2012 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	
	Count	Percentage	Count	Percentage	Count	Percentage	Count	Percentage	Count	Percentage
Administrative Law	0	0%	1	1%	0	0%	1	1%	1	1%
Bankruptcy	1	1%	3	2%	1	1%	1	1%	5	4%
Civil Litigation	3	2%	6	5%	4	3%	1	1%	13	10%
Collections	0	0%	0	0%	2	2%	0	0%	2	2%
Commercial Law	1	1%	2	2%	0	0%	0	0%	3	2%
Consumer Law	0	0%	0	0%	0	0%	0	0%	0	0%
Corporations	0	0%	0	0%	1	1%	2	2%	1	1%
Criminal Defense	1	1%	2	2%	3	2%	0	0%	6	5%
Criminal Conviction	2	2%	7	5%	2	2%	0	0%	11	8%
Criminal Prosecution	0	0%	0	0%	0	0%	0	0%	0	0%
Domestic Relations	0	0%	6	5%	5	4%	6	5%	11	8%
Escrow Accounts	0	0%	0	0%	0	0%	0	0%	0	0%
Estates	1	1%	4	3%	4	3%	7	5%	9	7%
Fiduciary	1	1%	0	0%	1	1%	1	1%	2	2%
Immigration	0	0%	3	2%	1	1%	1	1%	4	3%
Industrial Accidents	0	0%	1	1%	0	0%	0	0%	1	1%
Insurance	0	0%	0	0%	0	0%	0	0%	0	0%
Intellectual Property	0	0%	0	0%	2	2%	0	0%	2	2%
Labor	0	0%	2	2%	0	0%	0	0%	2	2%
Landlord/Tenant	0	0%	0	0%	0	0%	0	0%	0	0%
Malpractice	0	0%	0	0%	0	0%	1	1%	0	0%
Municipal Law	0	0%	0	0%	0	0%	0	0%	0	0%
Personal Injury	3	2%	3	2%	3	2%	0	0%	9	7%
Reciprocal Discipline	2	2%	8	6%	0	0%	0	0%	10	8%
Real Estate	4	3%	2	2%	0	0%	2	2%	6	5%
Small Claims	0	0%	0	0%	0	0%	0	0%	0	0%
Support	0	0%	0	0%	0	0%	0	0%	0	0%
Taxation	1	1%	0	0%	0	0%	2	2%	1	1%
Torts	0	0%	0	0%	0	0%	0	0%	0	0%
Trusts	0	0%	0	0%	1	1%	0	0%	1	1%
Non-Legal, Misc.	2	2%	9	7%	4	3%	5	4%	15	11%

\*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	3	2%	10	8%	7	5%	5	4%	25	19%
1.2(a)	Failure to abide by a client's decision concerning the representation or taking unauthorized action on the client's behalf	3	2%	6	5%	3	2%	2	2%	14	11%
1.3	Neglect or lack of diligence	5	4%	20	15%	12	9%	6	5%	43	33%
1.4	Failure to communicate adequately with client	5	4%	16	12%	11	8%	6	5%	38	29%
1.5	Fee violations, including excessive or improper fees and failure to refund unearned fees	3	2%	7	5%	3	2%	2	2%	15	11%
1.6 and 1.9(c)	Failure to preserve client confidences or secrets	1	1%	1	1%	0	0%	3	2%	5	4%
1.7 and 1.13	Conflicts of interest between current clients or between client and attorney	1	1%	2	2%	0	0%	2	2%	5	4%
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	2	2%	2	2%	2	2%	3	2%	9	7%
1.9 and 1.11	Conflicts of interest with former clients, including former government employment	0	0%	0	0%	0	0%	0	0%	0	0%
1.14	Conflicts of interest or other violations as to client under disability	0	0%	0	0%	0	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	12	9%	14	11%	11	8%	4	3%	41	31%
1.16	Failure to properly withdraw from representation, including failure to return client files or documents	5	4%	8	6%	5	4%	2	2%	20	15%
3.1, 3.2, 3.3(b) - (e), 3.5, 3.6, and 3.8	Improper trial conduct	0	0%	1	1%	0	0%	0	0%	1	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	1	1%	6	5%	1	1%	0	0%	8	6%
3.4, 3.9 and 4.4	Unfair conduct to opposing party or non-adjudicative body	2	2%	4	3%	3	2%	0	0%	9	7%
4.2 and 4.3	Improper communications with a party known to be represented by counsel or unrepresented party	0	0%	0	0%	0	0%	0	0%	0	0%
5.1 and 5.3	Failure to supervise subordinates	0	0%	0	0%	0	0%	0	0%	0	0%
5.4 and 5.6	Failure to maintain professional independence including partnership or sharing fees with nonlawyer	0	0%	0	0%	0	0%	1	1%	1	1%
5.5	Unauthorized practice of law or assisting in unauthorized practice	1	1%	4	3%	1	1%	5	4%	11	8%
7.1 through 7.5	Improper communications concerning lawyer's services including improper advertising or solicitation	0	0%	1	1%	1	1%	0	0%	2	2%
8.1	False statements in a bar admission or disciplinary matter	2	2%	6	5%	2	2%	1	1%	11	8%
8.3	Failure to report professional misconduct when required	1	1%	0	0%	0	0%	0	0%	1	1%
8.4(a)	Misconduct through acts of another	1	1%	1	1%	1	1%	1	1%	4	3%
8.4(b)	Criminal conviction or conduct of attorney	8	6%	13	10%	3	2%	0	0%	24	18%
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	5	4%	18	14%	11	8%	3	2%	37	28%

\*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 81 petitions for discipline (including affidavits of resignation) seeking public sanctions. In FY2011, there were 113 petitions filed, 37 of which were not heard by the end of the fiscal period. This caused an increase in the number of evidentiary hearing days in FY2012. In addition, the number of hearings held on reinstatement cases doubled in FY2012 over FY2011.

The Office of Bar Counsel filed directly with the Court 8 petitions for reciprocal discipline (petitions based on suspensions or disbarment in another jurisdiction in which the attorney is also admitted). Bar counsel also filed 37 post-hearing requests for findings and rulings or appeal briefs with hearing committees, the Board and the Court, including briefs to the full bench of the Supreme Judicial Court on 3 cases and briefs in a disciplinary case appealed from the United States District Court for Massachusetts to the United States Court of Appeals for the First Circuit.

Hearing committees, the Board, and the Court held hearings (both evidentiary and non-evidentiary) on 159 dates, compared to 152 days of hearing in FY2011. Evidentiary hearings were conducted in 22 disciplinary cases and 18 reinstatement matters, with a combined total of 73 days of evidentiary hearings, an increase from the 51 days of evidentiary hearings in FY2011.

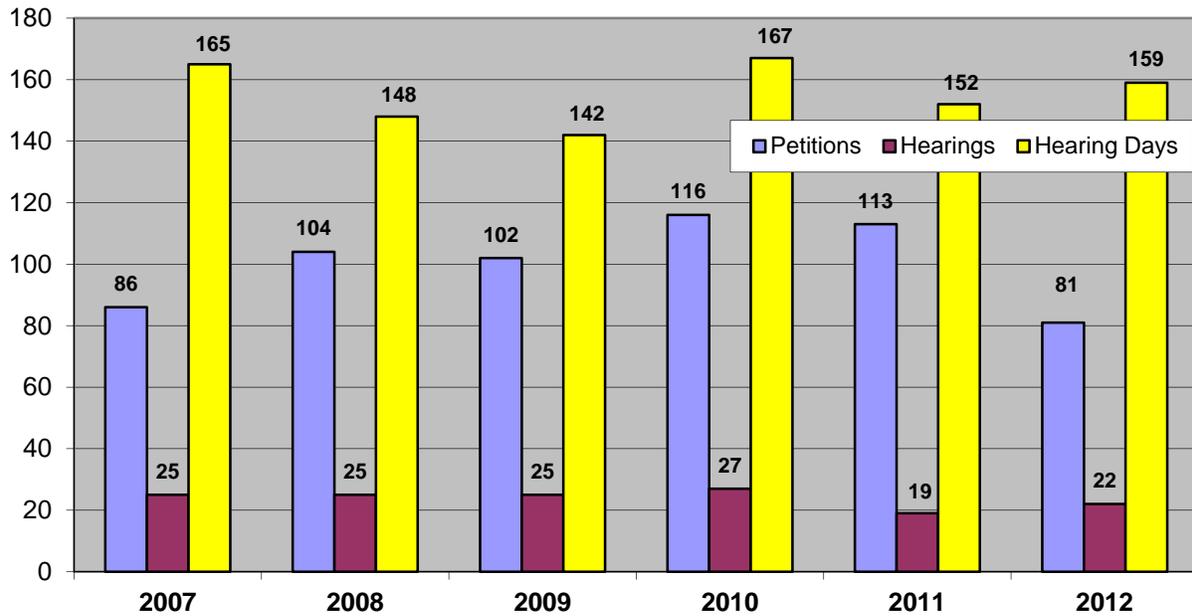
Of the petitions pending during the fiscal year and not deferred, 22 matters (including 3 conviction cases) were awaiting evidentiary hearing at the end of the fiscal year. Another

7 cases had evidentiary hearings either in progress or concluded and awaiting hearing reports, with an additional 9 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  
(2007-2012)**



**Reinstatements**

In addition to petitions for discipline filed by bar counsel, 16 petitions for reinstatement were filed during FY2012 by suspended or disbarred attorneys. After hearing, 12 lawyers (some of whom had petitions pending at the start of the fiscal year) were reinstated to practice and 3 lawyers were denied reinstatement. Following short suspensions, another 12 lawyers were reinstated to practice without petition or hearing.

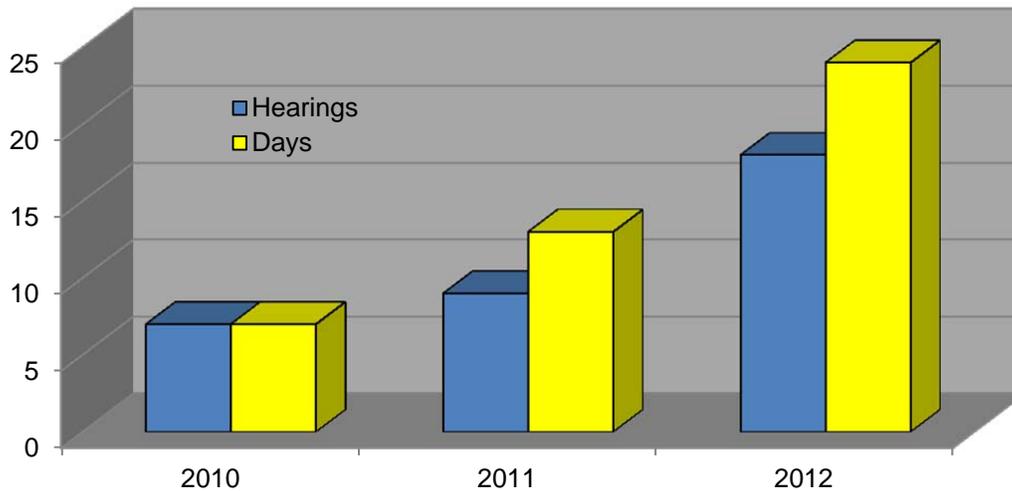
The number of hearings on reinstatement matters increased from 9 hearings over the course of 13 days in FY2011 to 18 petitions over the course of 24 days in FY2012.

This upsurge entailed considerably more investment of time by bar counsel and Board staff, as well as by the Board members who serve as hearing panels.

The table below shows the increase in reinstatement hearings since 2010.

**TABLE 10**

**Reinstatement Hearings and Hearing Days**



### **Commissioners**

Considerable staff resources continue to be spent on issues relating to the closing of lawyers' practices following suspension, disbarment, death or disability.

There were 8 matters open during the fiscal year where members of the bar, either during this fiscal year or earlier, 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 work together to return files to clients, notify courts and opposing counsel, ensure proper disbursement of trust funds, and arrange either for storage of unclaimed files that cannot as yet be shredded or for appropriate destruction of files as

approved by the Court. The staff also assists suspended or disbarred attorneys in accomplishing these tasks themselves.

The disposition of abandoned client files whose poor condition or large number makes inventorying impossible or impractical is a recurring problem that has not had a good solution to date. Programs to raise the awareness of the bar, particularly sole practitioners, for the need to plan for death or disability are one solution. Also critical are proper file storage and regular action by attorneys to return closed files, or at least the important papers in a file such as wills and original documents, to clients. In addition, the assistant bar counsel who acts as the coordinator for diversion matters is now also overseeing commissioner cases in order to provide more consistency to the process.

### **Full Bench Decisions**

The Justices issued three full court opinions on bar discipline or related issues:

- *Matter of Bott*, 462 Mass. 430 (2012), holding that an attorney who has resigned while the subject of disciplinary investigation, or who has been disbarred or suspended from the practice of law, may be prohibited in some circumstances from acting as a mediator even though mediation does not necessarily constitute the practice of law.
- *Matter of Gargano*, 460 Mass. 1022 (2011), holding that due process does not require that an attorney be allowed a jury trial before being suspended or disbarred.
- *Matter of Weiss*, 460 Mass. 1012 (2011), finding that sanctions against an attorney by a court in an underlying case did not preclude subsequent attorney discipline proceedings arising out of the same conduct and that *res judicata* does not apply where bar counsel was not a party to the original case, did not have standing to join as a party, and was not in privity with a party.

## **Related Activities**

The Board of Bar Overseers in October 2011 adopted a memo, <http://www.mass.gov/obcbbo/bbopolicy.pdf>, collecting and formalizing the BBO's practices on a range of topics. Among the 23 items discussed in the memo are public and media access to hearings, publication of disciplinary decisions, and Internet search engine reports of discipline.

One assistant bar counsel served as a member of a Supreme Judicial Court Working Group appointed to study whether an education program for newly admitted lawyers would be effective in enhancing professionalism in the practice of law in Massachusetts. Among other issues, the Working Group examined the challenges facing newly admitted lawyers; evaluated programs, services and resources currently available to Massachusetts lawyers; gathered information on programs offered in other jurisdictions; and drafted proposed S.J.C. Rule 3:16, which would require all newly admitted attorneys to attend a one-day course on practicing with professionalism.

## **Ethics Helpline and CLE Presentations**

The Office of Bar Counsel's ethics helpline in FY2012 received approximately 2000 calls addressing a broad spectrum of issues relating to professional responsibility. The office answers questions from the bar on Mondays, Wednesdays, and Fridays from 2:00 p.m. to 4:00 p.m., with the goal of assisting attorneys in identifying and averting ethical problems.

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 FY2012, there were 143 attorneys and their bookkeepers who attended the classes in Boston. The same assistant bar counsel also presented trust account programs to two title insurance companies and a law school class. 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 and other matters are also discussed 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. Some of the other subjects dealt with in the course are the establishment of an attorney-client relationship including social networking issues, common ethical problems such as withdrawal and return of files, conflicts and conflict management, billing and collecting, and best practice tips from LOMAP, as well as a presentation from LCL on stress management and substance abuse issues.

Bar counsel staff made 35 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 risk management, attorney liens, divorce basics, advertising and social media. One staffer also 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.

As noted earlier, an assistant bar counsel served on the SJC Working Group studying the possibility of requiring newly admitted attorneys to take a professionalism course. 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. 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/bblookup.php>. The BBO website, <http://www.massbbo.org/>, also provides detailed information for attorneys on registration, including online registration. The site currently includes detailed information, links, and FAQs on new

Supreme Judicial Court Rule 3:15, requiring out-of state attorneys to pay a fee through the BBO to the IOLTA Committee prior to filing a motion for admission *pro hac vice*.

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 FY2012, 76.5% of active status lawyers in private practice report that they maintain malpractice insurance, a slight decrease from prior years. It should be noted, however, that one lawyer received term suspension during the fiscal year for misrepresenting on his registration statement that he carried malpractice insurance and that a stipulation to a suspension was pending before the Board at the end of the fiscal year for similar violations by another attorney.

### **Facilitating Continuous Improvement**

While there were no major changes in FY2012 to either the Massachusetts Rules of Professional Conduct or to the disciplinary process generally, bar counsel looks forward to working with the bar on the implementation in January 2013 of the upcoming changes to Mass. R. Prof. C. 1.5, requiring written fee agreements in most circumstances. Staff members will be available to speak to bar groups and at CLE programs, to answer questions by telephone, and to provide written information online and otherwise.

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.