MASSACHUSETTS OFFICE OF THE BAR COUNSEL OF THE SUPREME JUDICIAL COURT

ANNUAL REPORT

TO THE

SUPREME JUDICIAL COURT

FISCAL YEAR 2013

SEPTEMBER 1, 2012 - AUGUST 31, 2013

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Bar Counsel's Report to the Supreme Judicial Court

Fiscal Year 2013

Executive Summary

This is a summary of the key points in the report that follows for the fiscal year that ended on August 31, 2013:

- For the fourth year, the Office of Bar Counsel ended the fiscal year with no files over 3 years old that are not in petition or deferred and, for the first time, with no such files over 2 1/2 years old. Only 6 lawyers had files over 18 months old that were not in petition and that had not been deferred.
- The Office of Bar Counsel filed 103 petitions for discipline including affidavits of resignation, a sharp increase from the previous fiscal year. In addition, 15 petitions for reciprocal discipline were filed directly with the Supreme Judicial Court for Suffolk County and 7 suspended or disbarred lawyers filed petitions for reinstatement in circumstances that require reinstatement hearings.
- Bar counsel's diversion program for minor disciplinary violations concluded 37 cases by diversion.
- Bar counsel's Attorney and Consumer Assistance Program screened and resolved 91% of all telephone and written contacts with ACAP without referral for investigation.
- Bar counsel's ethics helpline handled approximately 2100 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 eight years ago. The program provides lawyers with training on the record-keeping requirements of Mass. R. Prof. C. 1.15.

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.

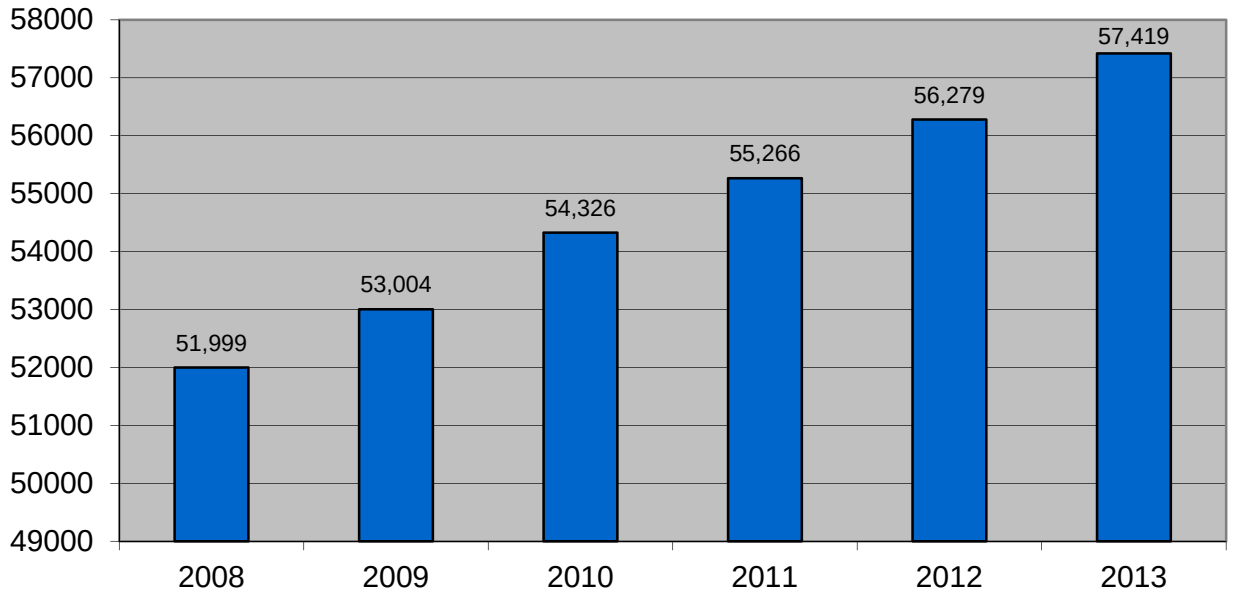
The Board of Bar Overseers also collects annual registration fees and uses them to fund its operations and those of the Office of Bar Counsel and the Clients' Security Board. Registration fees also fund Lawyers Concerned for Lawyers, a statewide lawyers' assistance program that is not part of the BBO, as well as LCL's affiliate, the Law Office Management Assistance Program (LOMAP). Since 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. As of September 2012, the Board is also collecting pro hac vice registration fees on behalf of the IOLTA Committee.

At the close of FY2013, there were 57,419 Massachusetts lawyers registered on active status and another 11,587 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 (2008-2013)



Fiscal Year 2013 Caseload

ACAP Contacts

The Attorney and Consumer Assistance Program (ACAP) is the intake unit of the Office of Bar Counsel. ACAP screens inquiries from consumers both by attempting to resolve routine concerns or minor disciplinary issues without opening a disciplinary file and by promptly referring matters that raise issues of more serious misconduct for investigation.

Since its inception in 1999, ACAP has evaluated and processed a total of 78,756 inquiries. During FY2013, ACAP responded to 4208 inquiries. Approximately 78% of these inquiries were received as telephone calls; the remainder were in writing. ACAP resolved more than 91% of inquiries without referral for investigation. Consistent with time standards agreed upon with the Supreme Judicial Court, over 98% of ACAP contacts reached final disposition (whether referral for investigation or resolution) within 45 days and over 96% of contacts were processed within 30 days of receipt.

With any new inquiry, ACAP's initial task is to determine whether the problem is within the jurisdiction of the Board. ACAP resolves many consumer 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. At the consumer's request, ACAP may also help get matters back on track by telephoning the attorney. Some typical results are that the lawyer returns a legal file requested by a client, or refunds an unearned retainer, or calls the client to give an update on case status.

The problems prompting inquiries to ACAP do not vary much from year to year. Approximately 27% of all inquiries in FY2013 concerned lawyers' neglect including lack of diligence and 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, comprising 15%, 13.5% and 13%, respectively, of all contacts in FY2013. Issues involving real estate, personal injury, and trusts and estates accounted for approximately 8%, 7%, and 10%, respectively, of the ACAP caseload, although real estate in particular, this year and generally, comprises a larger percentage of matters ultimately docketed as complaints. Approximately 10% of the calls to

ACAP involved questions about legal fees, which is a higher percentage than in FY2012 but consistent with FY2011.

Effective September 1, 2009, 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; the effects of these changes are described further in the next section of this report. By contrast, a complaint form is sent immediately when significant unethical conduct might be involved. In between these extremes are the several thousand matters that the ACAP staff seeks to resolve.

Complaints Docketed

The Office of Bar Counsel opened 827 complaints against attorneys in FY2013, consistent with FY2012 when 834 complaints were opened. The number of complaints has decreased since FY 2009, when 1001 complaints were opened. This decrease in docketed complaints is attributed primarily to the 2009 amendment described above that gives bar counsel discretion not to open files on matters that are frivolous, outside the Board's jurisdiction, or do not warrant further action. For example, in FY2013, bar counsel declined to open as complaints 191 written inquiries deemed to fall within these guidelines. In 78 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 827 files docketed in FY2013 involved 724 attorneys: 672 of the respondent lawyers had one complaint filed against them, 37 had two complaints, and 15 had three or more

complaints filed in the fiscal year. Bar counsel initiated the investigation in 135 of the files on 131 lawyers, not including dishonored check matters; some of these files were opened based on news reports, others because of information received from judges, district attorneys' offices, or other public agencies.

The legal areas that produced the most complaints in FY2013 were civil litigation including personal injury, real estate, and domestic relations, followed by criminal defense, immigration, and estates. As has been true in 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 FY2013 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 827 Complaints Received by Primary Legal Area

Administrative Law	6	1%	Industrial Accidents	2	<1%
Bankruptcy	22	3%	Insurance	2	<1%
Civil Litigation	72	9%	Intellectual Property	2	<1%
Collections	7	1%	Labor	7	1%
Commercial Transactions	12	1%	Landlord/Tenant	11	1%
Consumer Law	7	1%	Malpractice	6	1%
Conviction of Crime	19	2%	Municipal Law	3	<1%
Corporations	5	1%	Personal Injury	61	7%
Criminal Defense	54	7%	Reciprocal Discipline	13	2%
Criminal Prosecution	4	<1%	Real Estate	89	11%
Domestic Relations	87	11%	Small Claims	1	<1%
Escrow Accounts	1	<1%	Support	0	0%
Estates	41	5%	Taxation	4	<1%
Fiduciary	14	2%	Torts	0	0%
Immigration	44	5%	Trusts	11	1%
			No Legal Area or Unknown	220	27%

TABLE 3
Classification of 827 Complaints Received by Misconduct Alleged

Rules	Type of Misconduct	Complaints Received	
1.1	Failure to provide competent representation	103	12%
1.2(a)	Failure to abide by a client's decision concerning the representation or taking unauthorized action on the client's behalf	26	3%
1.3	Neglect or lack of diligence	206	25%
1.4	Failure to communicate adequately with client	185	22%
1.5	Fee violations, including excessive or improper fees and failure to refund unearned fees	62	7%
1.6 and 1.9(c)	Failure to preserve client confidences or secrets	13	2%
1.7 and 1.13	Conflicts of interest between current clients or between client and attorney	31	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	14	2%
1.9 and 1.11	Conflicts of interest with former clients, including former government employment	8	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	324	39%
1.16	Failure to properly withdraw from representation, including failure to return client files or documents	85	10%
3.1, 3.2, 3.3(b)-(e), 3.5 and 3.6	Improper trial conduct	13	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	23	3%
3.4, 3.9 and 4.4	Unfair conduct to opposing party or non-adjudicative body	23	3%
4.2 and 4.3	Improper communications with a party known to be represented by counsel or unrepresented party	2	<1%
5.1 and 5.3	Failure to supervise subordinates	4	<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	18	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	5	1%
8.4(a)	Misconduct through acts of another	11	1%
8.4(b)	Criminal conviction or conduct of attorney	47	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	53	6%
	No Disciplinary Violation or Summary Dismissal	52	6%

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

It has been 18 years since the Supreme Judicial Court first enacted the dishonored check notification rule and 9 years since significant changes were implemented to the record-keeping requirements of Mass. R. Prof. C. 1.15. Nevertheless, mandatory notices from financial institutions of dishonored checks drawn on attorney trust accounts resulted in the opening of 216 files in FY2013. This number is a substantial increase from FY2012 and FY2011 in which, respectively, 155 and 152 files were opened. While the numbers have gone up and down since FY2008, the only clear trend is that the problem is not disappearing.

Very few dishonored checks in this fiscal year or previous years resulted from bank error or other anomalous problems. The primary reason why trust account checks are dishonored remains inadequate record keeping that does not comply with the requirements of Mass. R. Prof. C. 1.15(f). In the conveyancing field in particular, inadequate record keeping alone can lead to large deficits in a trust account. *Matter of Scola*, 460 Mass. 1003 (2011). Members of the bar continue to be confused as to proper handling of advances for fees and expenses. See *Matter of Sharif*, 459 Mass. 558 (2011); *Matter of Pudlo*, 460 Mass. 400 (2011).

Several recent rules changes and proposed changes may assist with reducing problems with trust account record keeping. First, consistent with the ABA Model Rules of Professional Conduct, the Court's Standing Advisory Committee on the Rules of Professional Conduct has proposed as one amendment to Rule 1.15 a requirement that legal fees and expenses paid in advance be deposited to a trust account and withdrawn only as fees are earned and expenses incurred. The current exception permitting advances for costs and expenses to be deposited to a business account would be deleted.

Second, effective January 1, 2013, an amendment to Mass. R. Prof. C. 1.5 requires arrangements with clients as to fees and expenses to be in writing in most situations not involving regularly represented clients. These revisions should help reduce misunderstandings between attorneys

and clients over whether the lawyer has received a retainer against which fees are to be charged or a flat fee and how funds advanced for expenses will be treated. In addition, effective January 2014, new Supreme Judicial Court Rule 3:16 requires newly admitted attorneys to take a full-day education course on practicing with professionalism. Law office management, including trust account management, will be part of the curriculum.

Members of the bar may also continue to take advantage of a free training program provided by bar counsel in cooperation with the Boston Bar Association on trust account maintenance held on the first Thursday of each month between October and June. The program addresses 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 page 24 of this report.

Finally, bar counsel has suggested to the Court that Supreme Judicial Court Rule 4:02, § 2, be amended to require attorneys to certify on their annual registration statement filed with the Board of Bar Overseers that they are familiar with, and maintaining their trust accounts in compliance with, Rule 1.15 of the Massachusetts Rules of Professional Conduct. Other jurisdictions have such a requirement. Bar counsel's view is that this change would be extremely helpful in focusing the bar's attention on the requirements of Rule 1.15 and facilitating compliant record keeping.

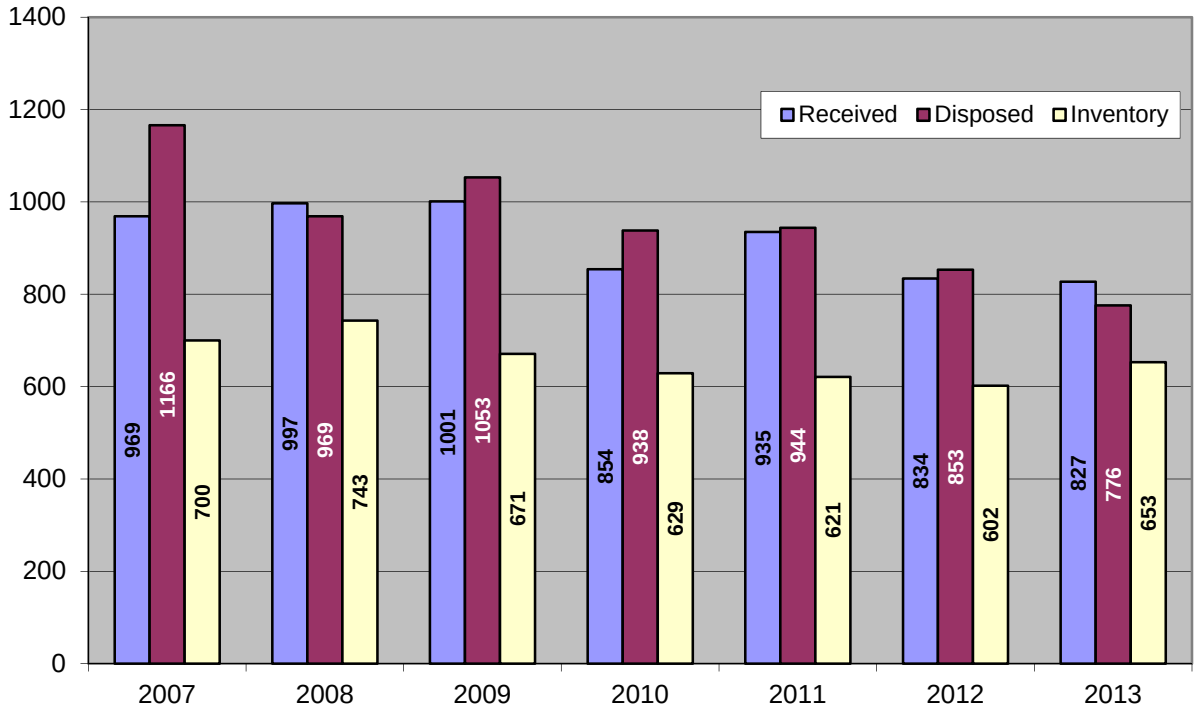
Case Processing

There were 653 files pending 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 files still under investigation. This number is up from the previous year's number, 602. A total of 776 files were brought to an end result by the Office of Bar Counsel in FY2013 either by closing, diversion, or discipline, which is fewer than in FY2012. Both numbers (files pending and files disposed) were affected by the fact that the Office of Bar Counsel was minus one staff lawyer for much of the year.

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 (2007-2013)



Bar counsel closed 532 files against 487 attorneys in FY2013. Discipline was imposed on 131 lawyers on 180 files. This number is almost identical to the 132 lawyers disciplined in FY2012. In addition, 4 lawyers were placed on disability status. Another 37 attorneys had their cases referred to the voluntary remedial diversion program.

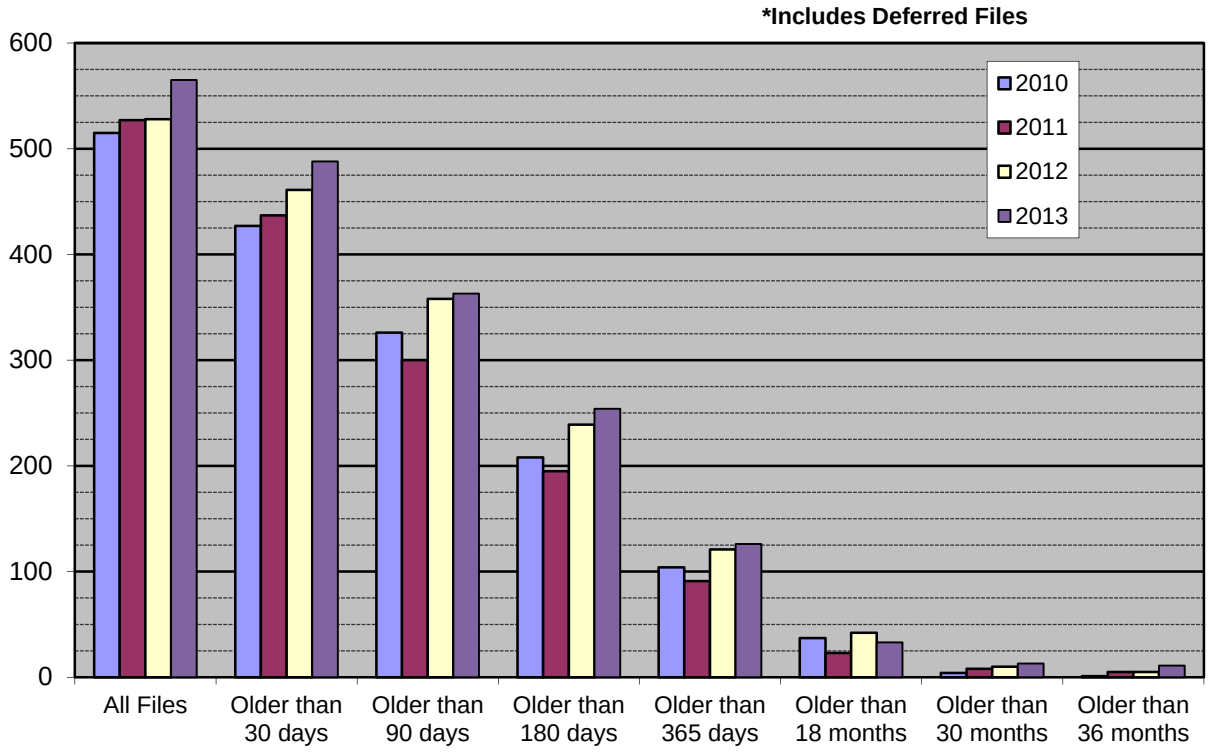
Investigations on 28% of the files opened were concluded in under 100 days and 67% within a year of the date received, either by closing the file, diversion, imposition of a disciplinary sanction or

the filing of a petition for discipline. The one-year period is the time standard agreed upon with the Court.

The following table shows the numbers of files pending (including deferred files) that are not in petition, by age in days, at the end of FY2013 compared to FY2012, FY2011 and FY2010.

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 155 days in FY2013 (137 days if deferred files are omitted). As of the end of this fiscal year, for the fourth year, there were no lawyers with

pending files over 3 years old that were not in petition or had not been in deferred status and, for the first time, no such files over 2 1/2 years old. Only two lawyers had a file over 2 years old at the end of the fiscal year that was not in petition and never deferred. Only six lawyers had files over 18 months old at the end of the fiscal year that were not in petition or deferred and five of these six matters are now in petition or otherwise concluded.

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

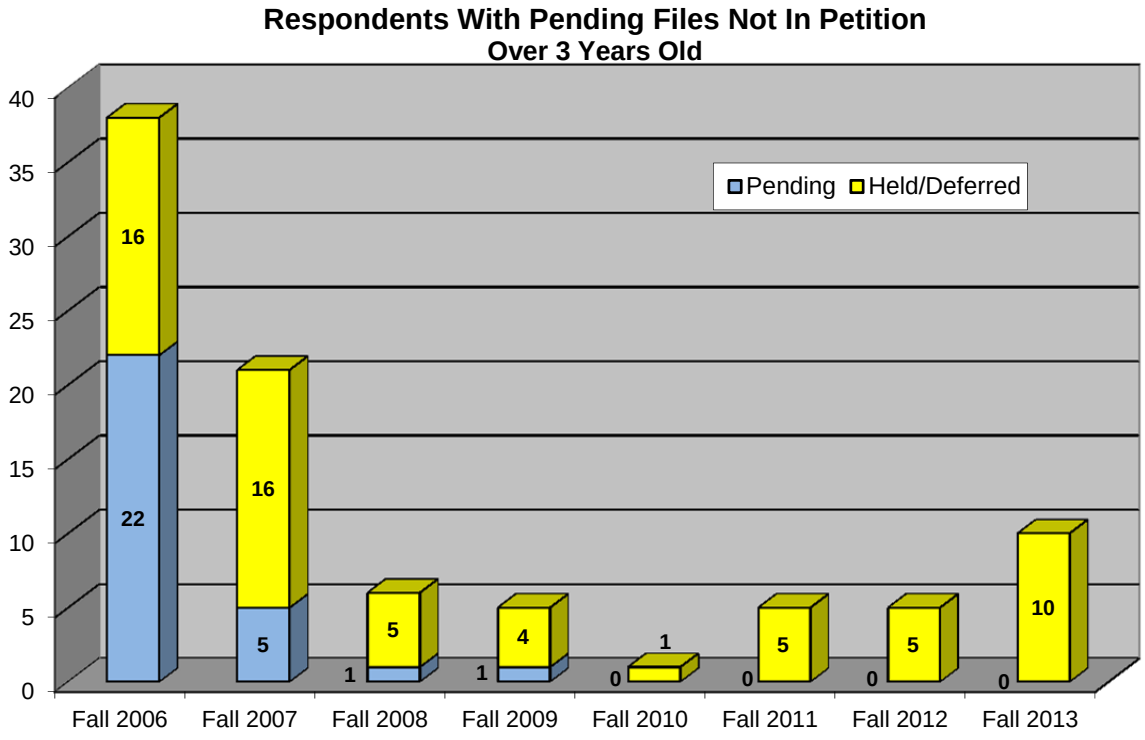


TABLE 6B

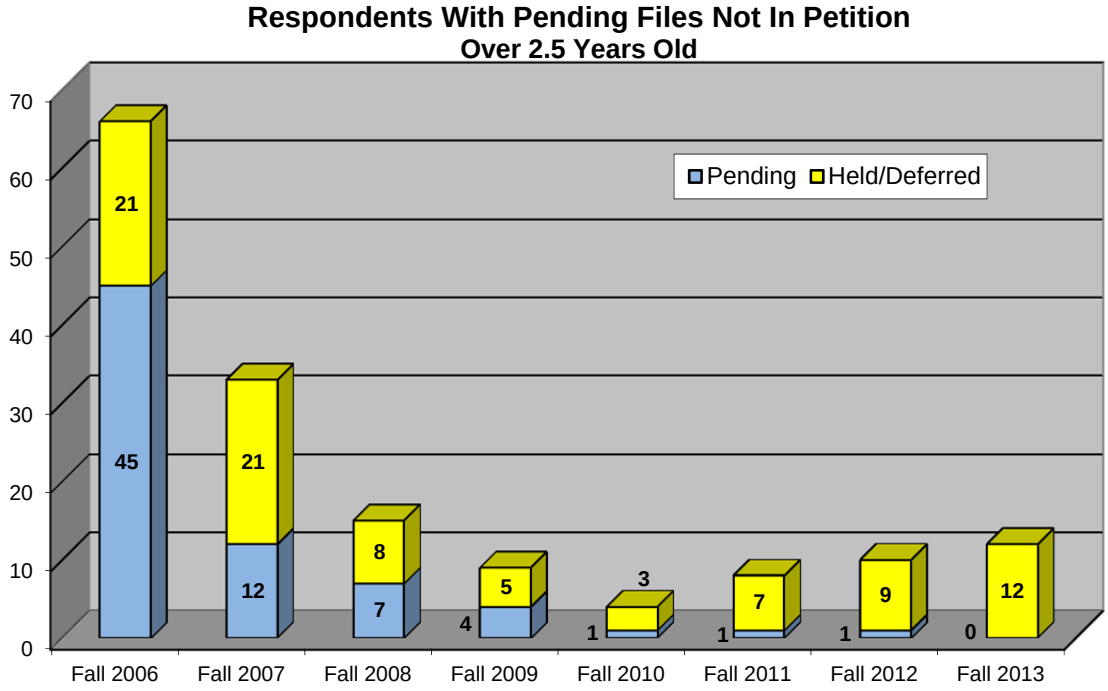


TABLE 6C

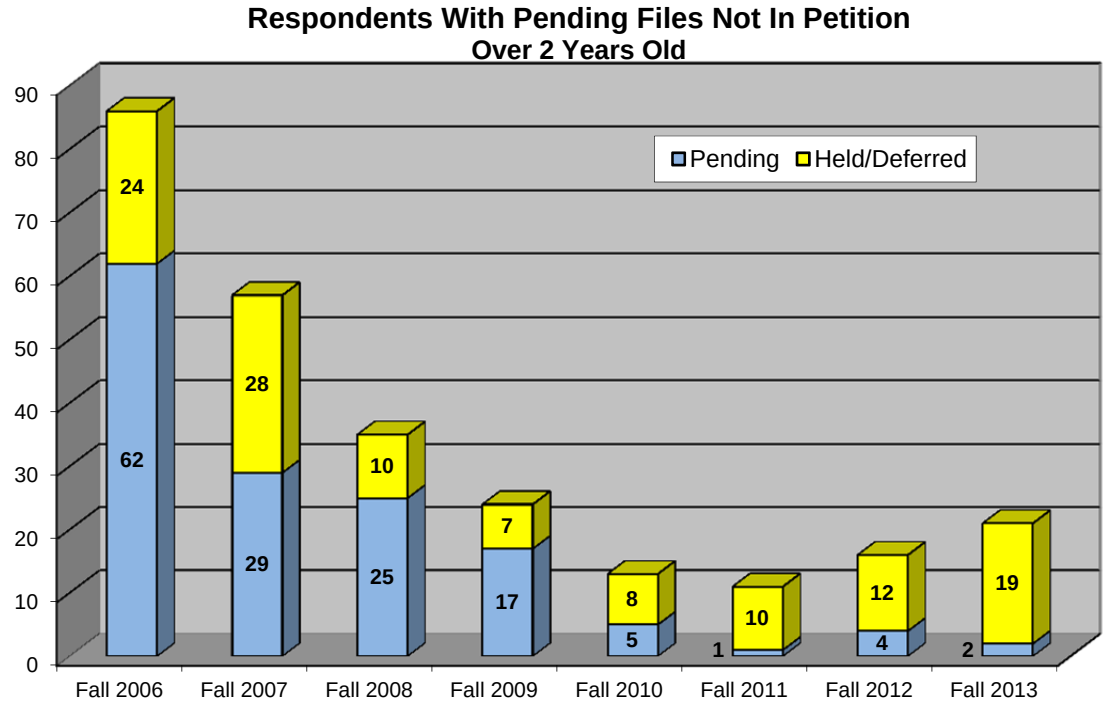
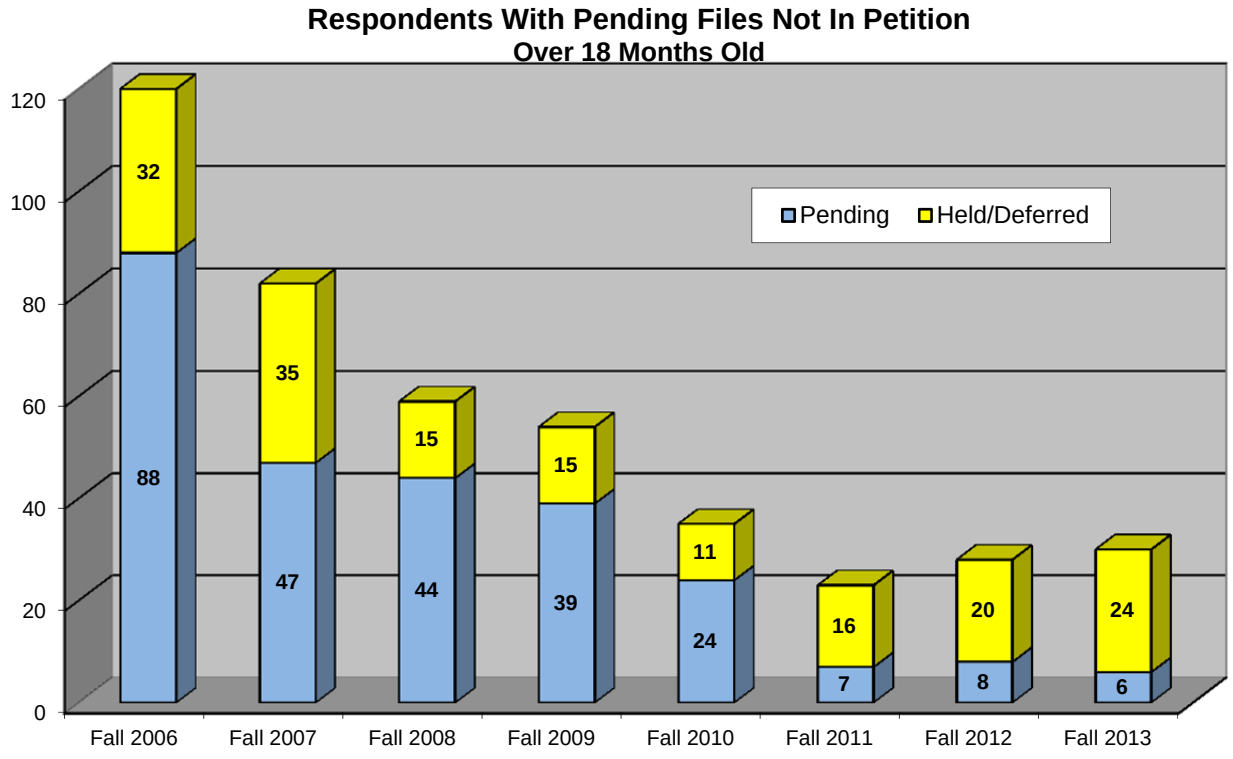


TABLE 6D



Diversion

The diversion program in the Office to Bar Counsel 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, 37 lawyers executed diversion agreements in lieu of discipline. Of these, 16 matters arose from bar counsel's receipt of notices of dishonored checks that, upon investigation, exposed some concerns about the lawyer's trust account record keeping. 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 fully compliant. Other attorneys may be referred either to LOMAP for an evaluation of practice management problems, to LCL or other service providers for substance abuse or mental health issues, fee arbitration, or to 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 131 lawyers who were sanctioned by the Board or the Supreme Judicial Court during FY2013. Of these, 19 attorneys received (private) admonitions. An additional 112 lawyers received public discipline: 32 lawyers were publicly reprimanded (including 4 reprimands reciprocal to actions taken in other jurisdictions), 53 received a term suspension including stayed suspensions, 7 were indefinitely suspended, 4 submitted a disciplinary resignation, and 17 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 15 lawyers were temporarily suspended from the practice of law pending formal disciplinary proceedings. Four lawyers were placed on disability inactive status.

Tables 7 and 8 show the primary legal area involved in the cases resulting in sanctions in FY2013 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 (Public) Discipline	
Administrative Law	1	1%	1	1%	0	0%	0	0%	2	2%
Bankruptcy	1	1%	5	4%	0	0%	2	2%	6	5%
Civil Litigation	1	1%	6	5%	5	4%	1	1%	12	9%
Collections	2	2%	0	0%	1	1%	0	0%	3	2%
Commercial Law	0	0%	0	0%	1	1%	0	0%	1	1%
Consumer Law	1	1%	0	0%	0	0%	0	0%	1	1%
Corporations	0	0%	1	1%	1	1%	0	0%	2	2%
Criminal Defense	1	1%	4	3%	2	2%	3	2%	7	5%
Criminal Conviction	1	1%	0	0%	0	0%	0	0%	1	1%
Criminal Prosecution	0	0%	0	0%	0	0%	0	0%	0	0%
Domestic Relations	3	2%	3	2%	4	3%	3	2%	10	8%
Escrow Accounts	1	1%	0	0%	1	1%	0	0%	2	2%
Estates	4	3%	6	5%	0	0%	3	2%	10	8%
Fiduciary	1	1%	1	1%	0	0%	0	0%	2	2%
Immigration	1	1%	2	2%	1	1%	0	0%	4	3%
Industrial Accidents	0	0%	1	1%	0	0%	0	0%	1	1%
Insurance	0	0%	1	1%	0	0%	0	0%	1	1%
Intellectual Property	0	0%	1	1%	0	0%	0	0%	1	1%
Labor	0	0%	0	0%	1	1%	0	0%	1	1%
Landlord/Tenant	1	1%	0	0%	2	2%	0	0%	3	2%
Malpractice	1	1%	0	0%	0	0%	0	0%	1	1%
Municipal Law	0	0%	0	0%	0	0%	0	0%	0	0%
Personal Injury	5	4%	6	5%	5	4%	2	2%	16	12%
Reciprocal Discipline	1	1%	11	8%	0	0%	0	0%	12	9%
Real Estate	1	1%	7	5%	3	2%	4	3%	11	8%
Small Claims	0	0%	1	1%	0	0%	0	0%	1	1%
Support	0	0%	0	0%	0	0%	0	0%	0	0%
Taxation	0	0%	0	0%	0	0%	0	0%	0	0%
Torts	0	0%	0	0%	0	0%	0	0%	0	0%
Trusts	1	1%	0	0%	0	0%	0	0%	1	1%
Non-Legal, Misc.	6	5%	8	6%	4	3%	1	1%	18	14%

*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 Reprmnd		Admon		All Discip	
1.1	Failure to provide competent representation	4	3%	10	8%	7	5%	6	5%	27	21%
1.2(a)	Failure to abide by a client's decision concerning the representation or taking unauthorized action on the client's behalf	1	1%	7	5%	4	3%	0	0%	12	9%
1.3	Neglect or lack of diligence	8	6%	21	16%	11	8%	8	6%	48	37%
1.4	Failure to communicate adequately with client	9	7%	18	14%	9	7%	7	5%	43	33%
1.5	Fee violations, including excessive or improper fees and failure to refund unearned fees	6	5%	7	5%	5	4%	2	2%	20	15%
1.6 and 1.9(c)	Failure to preserve client confidences or secrets	0	0%	2	2%	1	1%	0	0%	3	2%
1.7 and 1.13	Conflicts of interest between current clients or between client and attorney	0	0%	5	4%	1	1%	2	2%	8	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	0	0%	3	2%	2	2%	1	1%	6	5%
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	15	11%	18	14%	12	9%	4	3%	49	37%
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%	0	0%	0	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%	4	3%	0	0%	2	2%	7	5%
3.4, 3.9 and 4.4	Unfair conduct to opposing party or non-adjudicative body	1	1%	4	3%	0	0%	2	2%	7	5%
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%	1	1%	0	0%	1	1%
5.4 and 5.6	Failure to maintain professional independence including partnership or sharing fees with nonlawyer	0	0%	1	1%	0	0%	0	0%	1	1%
5.5	Unauthorized practice of law or assisting in unauthorized practice	0	0%	4	3%	4	3%	2	2%	10	8%
7.1 through 7.5	Improper communications concerning lawyer's services including improper advertising or solicitation	0	0%	1	1%	1	1%	1	1%	3	2%
8.1	False statements in a bar admission or disciplinary matter	1	1%	4	3%	0	0%	0	0%	5	4%
8.4(a)	Misconduct through acts of another	0	0%	0	0%	0	0%	0	0%	0	0%
8.4(b)	Criminal conviction or conduct of attorney	4	3%	9	7%	2	2%	0	0%	15	11%
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%	12	9%	2	2%	2	2%	21	16%

*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 and most for over 10. 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 103 petitions for discipline (including affidavits of resignation) seeking public sanctions. This number is a substantial increase from 81 petitions filed in FY2012 but is similar to FY2011.

The Office of Bar Counsel filed directly with the Court a total of 15 petitions for reciprocal discipline (petitions based on suspensions or disbarment in another jurisdiction in which the attorney is also admitted) as compared to 8 in FY2012. Bar counsel also filed 34 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 4 cases.

Hearing committees and special hearing officers completed full hearings on 14 cases during the fiscal year and submitted hearing reports on 15 cases. Board and appeal panel decisions were completed on another 20 matters.

Hearing committees, the Board, and the Court held hearings (both evidentiary and non-evidentiary) on 116 dates, a decrease from 159 hearing dates in FY2012 likely attributable to the fact that fewer petitions for discipline were filed in FY2012 than in FY2011. It is expected that there will be an increase in hearing dates in the next fiscal year as a result of the increase in petitions filed this year.

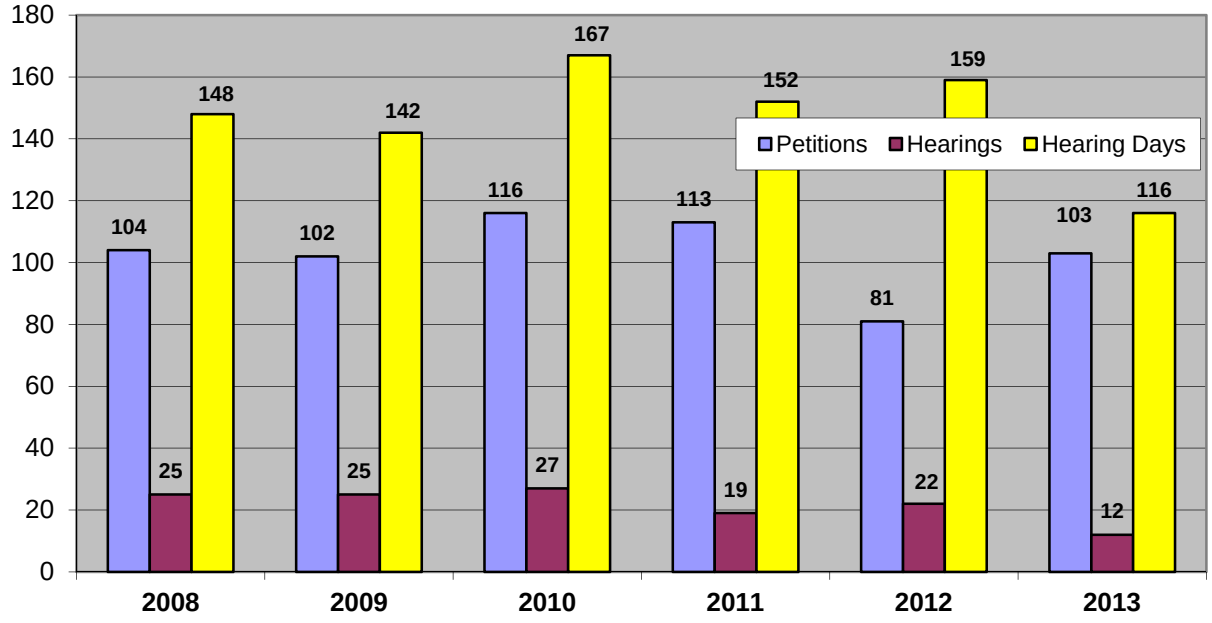
Evidentiary hearings were conducted in 14 disciplinary cases and 7 reinstatement matters, with a combined total of 42 days of evidentiary hearings. This number is less than the 73 days of evidentiary hearings in FY2012 but consistent with the fact that fewer petitions for discipline were filed in FY2012 and fewer cases were awaiting hearing at the close of the FY2012.

Of the petitions pending during the fiscal year and not deferred, 35 matters (including 7 conviction cases) were awaiting evidentiary hearing at the end of the fiscal year, as opposed to 22 in FY2012. Another 6 cases had evidentiary hearings awaiting hearing reports, with an additional 5 cases awaiting a Board or panel decision or the filing of an information.

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 (2008-2013)



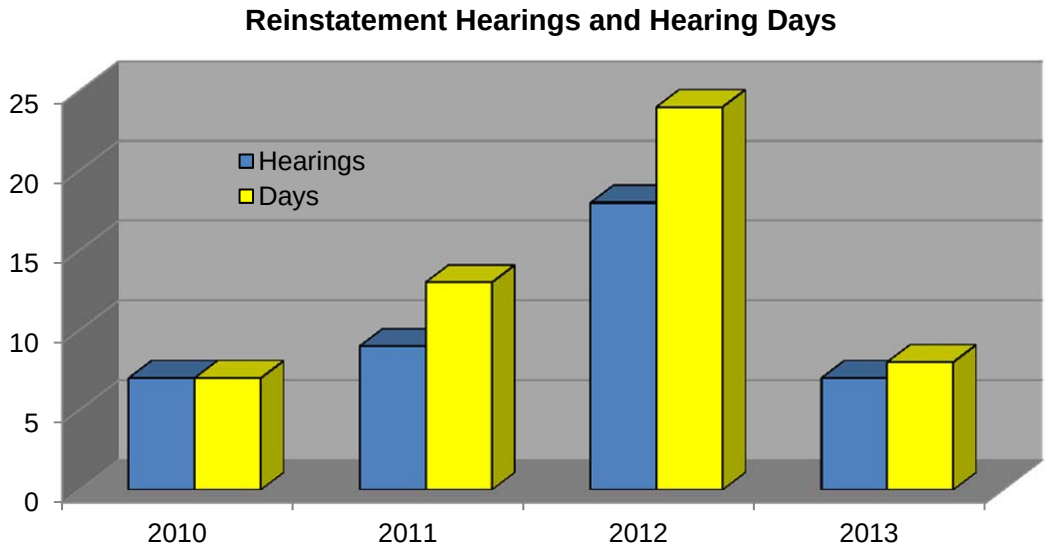
Reinstatements

In addition to petitions for discipline filed by bar counsel, 10 petitions for reinstatement were filed during FY2013 by suspended or disbarred attorneys. After hearing, 13 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, another 12 lawyers were reinstated to practice without petition or hearing.

After the sharp increase in the number of reinstatement hearings and hearing days in the previous fiscal year, the numbers in this fiscal year dropped to figures more consistent with earlier years. In this fiscal year, hearings were held on 7 petitions over the course of 8 days, while in FY2011, 9 hearings were held and in FY2010, 7 hearings. By contrast, in FY2012, 18 hearings were held over 24 days.

The chart below shows the numbers of reinstatement hearings and hearing days since 2010.

TABLE 10



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 9 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). In other matters, bar counsel may

oversee the return of files of deceased attorneys without the appointment of a commissioner if the quantity of files is limited. The assistant bar counsel who acts as the coordinator for diversion matters also oversees commissioner cases in order to provide more consistency to the process.

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.

Whether the underlying cause is the lawyer's loss of license, death, or disability, the disposition of abandoned client files whose poor condition or large number makes inventorying problematic is a recurring problem without a good solution. Bar counsel is working with the Board and the Court to attempt to find some solutions to this concern, but there are prophylactic measures that every lawyer can take.

A lawyer's duty pursuant to Mass. R. Prof. C. 1.1 and 1.6 to represent clients competently and to preserve client confidentiality includes planning ahead to safeguard clients' interests in the event of unexpected illness, incapacity or death. This is especially important when the lawyer has no partners who will carry on the practice. Easy steps that every lawyer can take in this respect include returning original documents, especially wills, to clients rather than retaining them in the file or a "will box;" ensuring, when funds have been received for this purpose, that all liens and other obligations have been paid and discharges secured and recorded prior to closing a file; having a second signatory on trust accounts so that the accounts can be accessed and funds disbursed; and maintaining compliant trust account records in order that the owners of funds on deposit

can be identified. Whenever feasible, every lawyer without a partner to carry on his or her law practice should also arrange, preferably in writing, for another lawyer to be the "backup attorney" who, at a minimum, will contact clients with active matters, ensure the return or transfer of files, and see to or assist with the refund or transfer of trust funds.

Full Bench Decisions

The Justices issued 2 full court opinions on bar discipline or related issues in FY2013:

- *Bar Counsel v. Farber*, 464 Mass. 784 (2013). A single justice of the Supreme Judicial Court reserved and reported to the full bench an action for declaratory relief brought by bar counsel in the county court against an attorney who had filed a civil action for defamation and other claims against a complainant/witness who testified against him in an earlier bar discipline proceeding. The Court, among other matters, held 1) that Supreme Judicial Court Rule 4:01, § 9, provides absolute immunity to complainants and witnesses in bar discipline matters including immunity for their testimony at public disciplinary hearings and 2) that the word "Board" as used in the context of the rule includes testimony before hearing committees, special hearing officers, and hearing panels.

- *Matter of Gustafson*, 464 Mass. 1021 (2013). On appeal by bar counsel from a decision by a single justice, the Supreme Judicial Court upheld the six-month suspension of an attorney who had defaulted in the underlying disciplinary proceedings and failed to appear before the single justice, with the full bench holding that a six-month suspension, without the further requirement of a hearing on reinstatement, was an appropriate sanction for the disciplinary charges that were deemed admitted.

Related Activities

Supreme Judicial Court Working Groups

An assistant bar counsel has continued to serve as a member of a Supreme Judicial Court working group that was appointed to study whether an education program for newly admitted lawyers would be effective in enhancing professionalism in

the practice of law in Massachusetts. The result of the group's work has been the enactment of the new Supreme Judicial Court Rule 3:16, mandating all newly admitted attorneys to attend a one-day course on practicing with professionalism. More information on the program is available at the Court's website, http://www.mass.gov/courts/sjc/professionalism-course.html. Both the Board of Bar Overseers and the Office of Bar Counsel will participate in the program in 2014.

Another assistant bar counsel is a member of the Supreme Judicial Court's newly appointed working group on online publication of disciplinary history. The current policy of the Board is not to interfere with or seek to change any search engine's reporting of lawyer discipline. The committee appointed by the Court will consider this issue in a comprehensive way, including studying the practices in other jurisdictions.

A third assistant bar counsel, along with designees from both the Board of Bar Overseers and the Board of Bar Examiners, has been a member of a study group appointed by the Supreme Judicial Court to consider ways to accommodate the needs of lawyer spouses of members of the military who move frequently, including admission to the bar without examination if in good standing in another jurisdiction. The group will be making recommendations to the Court in this respect.

Ethics Helpline and CLE Presentations

The Office of Bar Counsel through its ethics helpline answers questions from the bar three afternoons each week, as well as whenever there is a problem that needs an immediate consultation. The goal is to assist attorneys in averting ethical problems or resolving minor disputes. Assistant bar counsel in FY2013 received approximately 2100 calls on the ethics helpline, addressing a broad spectrum of issues relating to professional responsibility.

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 FY2013, there were 126 attorneys and their bookkeepers who attended the classes in Boston. The same assistant bar counsel also presented trust account programs to specialty and local bar groups and a title company. 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 additional presentations on professional conduct issues at MCLE, law schools and bar associations. Staff also wrote articles on ethics and news updates for the website maintained by the Office of Bar Counsel.

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 the

Supreme Judicial Court Standing Advisory Committee on the Rules of Professional Conduct and the three Court working groups described on pages 22-23. Staff members also serve on the boards of directors of Lawyers Concerned for Lawyers and of Greater Boston Legal Services, and a law school alumni/ae board of directors.

Website Update

The website maintained by the Office of Bar Counsel, *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/bbolookup.php*. The Board's website, *http://www.massbbo.org/*, also provides detailed information for attorneys on registration, including online registration and address or other status changes. The site currently includes detailed information, links, and FAQs on Supreme Judicial Court Rule 3:15, requiring out-of state attorneys to pay a fee through the Board to the IOLTA Committee prior to filing a motion for admission *pro hac vice*, and on new Supreme Judicial Court Rule 3:16, mandating a one-day "Practicing with Professionalism" course for attorneys admitted on and after September 1, 2013.

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 and to report lapses in coverage. As of the end of FY2013, 76.2% of active status lawyers in private practice report that they maintain malpractice insurance, approximately the same percentage as the year before. Accurate reporting is mandatory. Two lawyers in the last two fiscal years have received suspensions for misrepresenting on their registration statements that they carried malpractice insurance when they did not, and other such cases are in petition.

Facilitating Continuous Improvement

Staff members at the Office of Bar Counsel this year have worked with the bar to explain and answer questions concerning the amendments effective January 1, 2013 to Mass. R. Prof. C. 1.5, which now requires written fee arrangements in most circumstances. The Board and bar counsel in December 2012 used "e-blast" technology to notify all members of the bar of the amendments. Staff have since addressed the issues arising from the changes with bar groups and at CLE programs, answered helpline and other questions by telephone, and published two articles on this subject, both available online at the OBC/BBO website.

In July 2013, the Court's Standing Advisory Committee on the Rules of Professional Conduct proposed extensive revisions to the rules based on amendments since 2002 to the ABA Model Rules of Professional Conduct. See http://www.mass.gov/courts/sjc/comment-request-rules-professional-conduct.html. As with the changes to Rule 1.5, bar counsel staff expect to work with the bar to publicize

any changes that the Court ultimately adopts. Similarly, the staff is pleased to be working with the providers selected to present the new "practicing with professionalism" courses to recent admittees.

The Office of Bar Counsel remains committed to fairness in all dealings with both lawyers and consumers, while carrying out its mission of preserving and enhancing the integrity and high standards of the bar and protecting the public from unethical conduct by attorneys.