

MEMORANDUM

to: Christine Burak, christine.burak@jud.state.ma.us
from: Jeffrey D. Woolf, j.woolf@massbbo.org
re: proposed changes to SJC Rules and BBO Rules
date: June 15, 2018

Dear Chris,

The Board of Bar Overseers has voted to recommend certain changes to some BBO Rules and to some SJC rules, the latter pertaining to affidavits of resignation and to lawyer registration. The following is a summary of the proposed rules changes. Where applicable, I have attached copies of the current rule, the redline of the proposed changes and a clean copy of the proposed revised rule.

Rules of the Supreme Judicial Court:

Resignation by an attorney while under a disciplinary investigation: The board recommends that SJC Rule 4:01, Section 15, be substantially revised. The proposed revision recognizes that most resignations are submitted pursuant to an agreement with bar counsel, but continues to allow the provision of the current subsection 15(1), whereby the lawyer submits the affidavit of resignation directly to the board and serves it on bar counsel. Another significant change would be to require a recommendation from bar counsel that explains whether the admitted conduct would typically result in disbarment or in a lesser sanction. It also proposes that the board be permitted to order a hearing or investigation, or require a further explanation from the parties. Finally, it retains some of the language of the current subsection 15(2), whereby the board files the affidavit with the Court, but now adds that the entire record of the proceedings is filed if a hearing has been held. It further would expand upon the language of the current subsection 15(4) to specify that the board may recommend that the Court reject the affidavit as submitted, accept the resignation and disbar the attorney, or accept the resignation as a disciplinary sanction. While there has not always been complete consistency, generally a lawyer who resigns but whose conduct would not normally result in disbarment has the affidavit accepted “as a disciplinary sanction,” but the Court order does not say the lawyer has been “disbarred.” See, e.g., *Matter of Lawrence Mehl*, BD-2017-053 (Jan. 11, 2018) (accepting affidavit of resignation as a disciplinary sanction; respondent intentionally misused client funds but made restitution, so it would normally be an indefinite suspension rather than a disbarment, under matter of *Matter of Schoepfer*, 426 Mass. 183 (1997)). However, the sanctions for disciplinary resignations and disbarments are and will remain the same: under SJC Rule 4:01, Section 18(2)(a) a respondent cannot petition for reinstatement for eight years from the effective date of the order (less three months to allow for the time it often takes to process a reinstatement petition and schedule it for a hearing, to avoid adding that three months to the sanction).

In conjunction with this, the board recommends a corresponding change to BBO Rules Section 4.1, “Resignation by Lawyers Under Disciplinary Investigation,” which cross-references SJC Rule 4:01, Section 15. This is set forth below.

Professional liability insurance information. There have been several cases of bar discipline in which lawyers falsely stated they had professional liability insurance and later claimed they “thought” they had insurance or “forgot” it had lapsed, or they had failed to make installment payments. E.g., *Matter of Days*, 30 Mass. Att’y Disc. R. 89 (2014). To avoid this, the board recommends that the registration department require each registering attorney to provide certain specific information on the attorney’s annual registration form that would help ensure that the representation is accurate: the name and address of the insurance carrier, the policy number, and the start and end dates of the policy. Since Rule 4:02, section 2A(a) specifies what information can be collected, if the Court agrees, it would have to be amended in order for additional information to be required. Please note that other professional licensure boards, most notably the Board of Registration in Medicine, have collected this information (and more) for many years.¹

New dues category for attorneys on active duty in the military (but not acting as a military lawyer): Consistent with some other licensing boards, the board proposes that an attorney who is currently on active duty in branch of the United States Armed Forces, but who is not serving as an attorney in the military, may apply to be relieved from the payment of fees imposed pursuant to Rule 4:03 for any registration cycle during which, in whole or in part, the attorney maintains such status. Since Rule 4:02 defines the permissible dues categories, the creation of the proposed category would require a change in Rule 4:02. The board recommends that, if adopted, the new due category be section (10), and that the current sections (10) and (11) be renumbered accordingly.

Rules of the Board of Bar Overseers:

Rule concerning remote live testimony at disciplinary hearings: While parties at bar disciplinary proceedings sometime request that a witness testify live from a remote location, there is no rule that specifically governs this. Fed. R. Civ. P. 43(a) has a general provision permitting remote live testimony and makes broad reference to “appropriate safeguards.” However, the board reviewed a number of scholarly articles and local rules in various jurisdictions; based on that review, it recommends that some of these safeguards be specifically spelled out and further, that a standard of “good cause” be shown. Finally, the board recommends going beyond the federal rule and imposing requirements to facilitate the logistics of hearings, including a notary at the witness’s location, a mechanism for the remote witness to be shown, and asked questions about, proposed exhibits, chalks, or other documents, and securing an interpreter or translator if needed. If adopted, the new rule would be a new subsection (c) to BBO Rules, Section 3.29.

Rule concerning the form and content of briefs on appeal from a hearing committee or panel to the BBO: The board recommends expanding BBO Rules, Section 3.51, to provide more detail and guidance to parties concerning BBO appeals. The proposal also provides a presumptive page limit of thirty pages, establishes font size and margins, and advises parties not to bind or staple their briefs as they will be scanned. It also specifically permits electronic filing as an alternative. As a formatting matter, it creates headings for the subsections within the rule. Some of the proposed new language derives from Mass. R. App. P. 20(a), but it was felt that not as

¹ Please note that Rule 4:01, section 15, refers to “lawyers” while Rules 4:02 and 4:03 both refer to “attorneys.” The proposed amendments do not attempt to reconcile these differences.

much detail was required for bar discipline cases. Please note that if adopted, this would formalize some of what is currently Board Policy #25 as a BBO Rule.

Resignation by an attorney while under a disciplinary investigation: As noted above, the board recommends that Section 4.1 of the BBO Rules be revised to correspond to the recommended change to SJC Rule 4:01, Section 15, which is cross-referenced by the BBO Rule.

Change of title from “the Administrator” to “the Executive Director”: Currently, BBO Rules Section 5.5 refers to an “Administrator.” The board had hired an Executive Director over the former Administrator; however, there is no longer an Administrator and the two positions have merged. Therefore, the board recommends changing the title, as it appears in Section 5.5, from “the Administrator” to “the Executive Director.”