

Proposed Changes to Rules: December 12, 2023

Proposed Amendments to the Rules of the Board of Bar Overseers

First Proposal

Amending rule on admonitions to provide more flexibility

Explanation for Proposed Amendment

Under current rules of the board, a respondent who intends to challenge an admonition must do so within fourteen (14) days of receipt, “which time limit is jurisdictional.” Based on experience, the board views the time limit, particularly its jurisdictional limit, as unduly narrow. By providing that the limit is jurisdictional, the rule provides no flexibility to consider good cause for not challenging the admonition within fourteen days. Often, a respondent requires more than fourteen days to decide whether to challenge an admonition. The decision often requires consultation with counsel. There may be other good faith reasons why the respondent may not be able to comply. By removing the “jurisdictional” language, the rule would allow the board to review some challenges outside the fourteen-day window, if the respondent asserts and demonstrates good cause.

In addition, the current rule requires that a hearing on a challenge to an admonition be scheduled within thirty (30) days of the challenge. Given the realities of scheduling a hearing – coordination of a hearing officer, parties, counsel, and witnesses as well as the need for the parties to adequately prepare – the thirty-day limit is unduly tight. Although the current rule allows for a hearing outside the 30-day limit “for good cause,” the preferred time limit is “as soon as practicable,” which would provide all involved persons time to prepare for the hearing in a timely yet realistic manner.

B.B.O. Rule 2.12: Demand by Respondent for Hearing on Admonitions

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Section 2.12 Demand by Respondent for Hearing on Admonition

(1) general provisions. A respondent shall be entitled to demand that an Admonition be vacated and a hearing provided. The demand shall be in writing and shall be filed with the board, and a copy served on bar counsel, within 14 days after the date of Service of the admonition. ~~-, which time limit is jurisdictional.~~ The respondent must submit with the demand a statement of objections to the factual allegations and disciplinary rule violations set forth in the summary served with the admonition pursuant to section 2.11. The statement of objections must specify the reasons in detail for rejecting the admonition and include any matters in mitigation. Failure of the respondent to demand within 14 days that the admonition be vacated and to provide a statement of

objections constitutes consent to the admonition and failure to set forth matters in mitigation constitutes waiver of the right to introduce evidence of mitigation at hearing.

(2) Additional Procedural Requirements:

(a) all proceedings and the record shall be confidential pursuant to section 3.22(b).

(b) no investigatory subpoenas shall be issued after expedited disciplinary proceedings are commenced.

(c) the matter shall be assigned to a special hearing officer and shall be set for hearing as soon as practicable, within 30 days of the filing of proceedings except for good cause shown

(d) in addition to the notice of hearing requirements of section 3.21, the notice of Hearing for expedited hearings shall also set a date for the exchange between or among the parties of witness lists and exhibits that the party intends to use in his or her case-in-chief or for matters in aggravation or mitigation; a date for their exchange of objections to proposed witnesses and identified exhibits and supplemental designation of exhibits and witnesses; and a date for filing with the board of final witness and exhibit lists and objections thereto, agreed exhibits, and any stipulations of the parties.

(e) except for good cause shown, a prehearing conference shall not be held prior to An expedited disciplinary hearing.

(f) the burden of proof in such hearing shall be as set forth in section 3.28.

(g) except for good cause shown, no briefs or requests for findings and rulings shall be filed following an expedited disciplinary hearing.

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Section 2.12 Demand by Respondent for Hearing on Admonition

(1) General Provisions. A Respondent shall be entitled to demand that an admonition be vacated and a hearing provided. The demand shall be in writing and shall be filed with the Board, and a copy served on Bar Counsel, within 14 days after the date of service of the admonition. The Respondent must submit with the demand a statement of objections to the factual allegations and disciplinary rule violations set forth in the summary served with the admonition pursuant to Section 2.11. The statement of objections must specify the reasons in detail for rejecting the admonition and include any matters in mitigation. Failure of the Respondent to demand within 14 days that the admonition be vacated and to provide a statement of objections constitutes consent to the admonition and failure to set forth matters in mitigation constitutes waiver of the right to introduce evidence of mitigation at hearing.

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witnesses; and a date for filing with the Board of final witness and exhibit lists and objections thereto, agreed exhibits, and any stipulations of the parties.

(e) Except for good cause shown, a prehearing conference shall not be held prior to an expedited disciplinary hearing.

(f) The burden of proof in such hearing shall be as set forth in Section 3.28.

(g) Except for good cause shown, no briefs or requests for findings and rulings shall be filed following an expedited disciplinary hearing.

Second Proposal

Amending Rule On Motions to Provide Clarity

Explanation for Proposed Amendment

The current version of Rule 3.18 of the board's rules (governing motions) is wordy and confusing. It also sets up seemingly inconsistent procedures for similar motions. In an effort to streamline the rule and make it more comprehensible, the board proposes changes to its language and organization. In general, the revised rule sets forth the types of motions that are to be decided by the board chair (or their designee), and the types of motions reserved for the chair of a hearing committee. It also allows for the General Counsel of the board to decide motions that are assented or unopposed, thereby relieving the board chair of a time-consuming administrative function. The revised rule also provides a clear procedure for motion practice as well as page limits.

Section 3.18 Motions

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(a) General Provisions

~~(1) Until the appointment of a hearing committee, hearing panel, or special hearing officer, all motions shall be decided by the Board chair or a Board member designated by the Board chair. Thereafter, and excepting motions for issue preclusion, all motions not reserved for action by the Board, as described below, shall be decided by the special hearing officer or the chair of the hearing committee or hearing panel. Motions for issue preclusion are reserved for action by the Board chair or, when so designated by the Board chair, by another Board member, the special hearing officer, the chair of the hearing committee, or the chair of the hearing panel. The following motions shall be reserved for action by the Board Chair or a Board member designated by the Board Chair:~~

- ~~(i) Motions filed before the appointment of a Hearing Committee, Hearing Panel, or Special Hearing Officer and which must be decided prior to the appointment of a Hearing Committee, Hearing Panel, or Special Hearing Officer;~~
- ~~(ii) Motions for Issue Preclusion, unless in the discretion of the Board Chair after the appointment of a Hearing Committee, Hearing Panel, or Special Hearing Officer, the motion may be referred to the Chair of a Hearing Committee or Hearing Panel or a Special Hearing Officer for decision;~~
- ~~(iii) Motions to dismiss all or part of a Petition for Discipline under subsection (d) of this Rule;~~
- ~~(iv) Motions to stay or defer proceedings, including motions under Supreme Judicial Court Rule 4:01, Section 11 and B.B.O. Rules,~~

Section 2.13; and a motion pursuant to B.B.O. Rules, Section 3.16(3);

- (v) Motions for impoundment or to file material under seal and motions for protective order pursuant to BBO Rules Section 3.22;
- (vi) Any other motion, which, in the discretion of the Board Chair shall be decided by the Board Chair.

(2) The General Counsel of the Board of Bar Overseers may rule on assented-to motions, unopposed motions, and joint motions.

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~~(2) Motions reserved for action by the Board shall be decided as set forth in Subsection (b), below.~~

(3) (b) Procedure for Motions and Responses

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(1) All motions shall be filed at least ten days before the hearing, except by leave granted by the Board Chair, the Special Hearing Officer or the Chair of the Hearing Committee or the Hearing Panel.

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~~(4) (2)~~ A party wishing to respond to a motion must file a response within seven days after service of the motion. The time for filing a response shall not be shortened or extended except for good cause shown.

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(3) ~~(5)~~ No motion or response grounded on facts shall be considered unless the facts are verified by affidavit, are established by the pleadings or the record, or are agreed to by the parties in writing.

~~(6) (4)~~ All motions shall be determined on the papers, without hearing or oral argument, except as may be permitted in the discretion of the person authorized by this rule to decide the motion.

5) Memoranda in support of, or in opposition to, motions shall be limited to twenty pages, double spaced with one-inch margins on all sides. Headings and footnotes may be single-spaced. The font shall be no smaller than 12-point type face.

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~~(6) (7)~~ Except as to the allowance of a Respondent's motion to dismiss under Subsection (c) and matters falling within Sections 3.16(3) and 3.22 of these Rules, ~~and rulings that the moving party alleges exceed the jurisdiction or authority of the chair of the hearing committee or panel, special hearing officer, or Board chair (or designee),~~ rulings on motions shall control the subsequent course of the proceeding and shall not be appealed or reviewed prior to the issuance of the hearing report.

(c) Motions to Dismiss

(1) The Respondent’s filing of a motion to dismiss shall not ~~by itself automatically~~ stay a scheduled hearing.

(2) Bar Counsel may appeal from a dismissal of a petition ~~in whole or in part or charge~~ by filing a brief on appeal within seven days after service of the decision. The Respondent may file a response within seven days after service of such appeal. The appeal shall be decided by the Board at its next meeting after the response period has expired. ~~Partial dismissal of a charge~~ does not ~~automatically~~ stay proceedings on other charges in the petition for discipline.

~~(1), (3)~~ A motion by Bar Counsel to dismiss or discontinue an entire petition for discipline, or any charge or set of charges contained therein, shall be determined in accordance with Sections 2.8(b)(1) and 3.16 of these Rules. The dismissal or discontinuance, at the request of Bar Counsel, of a petition, or any charge or set of charges contained therein, shall act as a dismissal with prejudice.

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Section 3.18 Motions

(a) General Provisions

(1) The following motions shall be reserved for action by the Board Chair or a Board member designated by the Board Chair:

- (i) Motions filed before the appointment of a Hearing Committee, Hearing Panel, or Special Hearing Officer and which must be decided prior to the appointment of a Hearing Committee, Hearing Panel, or Special Hearing Officer;
- (ii) Motions for Issue Preclusion, unless in the discretion of the Board Chair after the appointment of a Hearing Committee, Hearing Panel, or Special Hearing Officer, the motion may be referred to the Chair of a Hearing Committee or Hearing Panel or a Special Hearing Officer for decision;
- (iii) Motions to dismiss all or part of a Petition for Discipline under subsection (d) of this Rule;
- (iv) Motions to stay or defer proceedings, including motions under Supreme Judicial Court Rule 4:01, Section 11 and B.B.O. Rules, Section 2.13; and a motion pursuant to B.B.O. Rules, Section 3.16(3);
- (v) Motions for impoundment or to file material under seal and motions for protective order pursuant to BBO Rules Section 3.22;
- (vi) Any other motion, which, in the discretion of the Board Chair shall

be decided by the Board Chair.

(2) The General Counsel of the Board of Bar Overseers may rule on assented-to motions, unopposed motions, and joint motions.

(b) Procedure for Motions and Responses

(1) All motions shall be filed at least ten days before the hearing, except by leave granted by the Board Chair, the Special Hearing Officer or the Chair of the Hearing Committee or the Hearing Panel.

(2) A party wishing to respond to a motion must file a response within seven days after service of the motion. The time for filing a response shall not be shortened or extended except for good cause shown.

(3) No motion or response grounded on facts shall be considered unless the facts are verified by affidavit, are established by the pleadings or the record, or are agreed to by the parties in writing.

(4) All motions shall be determined on the papers, without hearing or oral argument, except as may be permitted in the discretion of the person authorized by this rule to decide the motion.

(5) Memoranda in support of, or in opposition to, motions shall be limited to twenty pages, double spaced with one-inch margins on all sides. Headings and footnotes may be single-spaced. The font shall be no smaller than 12-point type face.

(6) Except as to the allowance of a Respondent's motion to dismiss under Subsection (c) and matters falling within Sections 3.16(3) and 3.22 of these Rules, rulings on motions shall control the subsequent course of the proceedings and shall not be appealed or reviewed prior to the issuance of the hearing report.

(c) Motions to Dismiss

(1) The Respondent's filing of a motion to dismiss shall not automatically stay a scheduled hearing.

(2) Bar Counsel may appeal from a dismissal of a petition in whole or in part by filing a brief on appeal within seven days after service of the decision. The Respondent may file a response within seven days after service of such appeal. The appeal shall be decided by the Board at its next meeting after the response period has expired. Partial dismissal does not automatically stay proceedings on other charges in the petition for discipline.

(3) A motion by Bar Counsel to dismiss or discontinue an entire petition for discipline, or any charge or set of charges contained therein, shall be determined in accordance with Sections 2.8(b)(1) and 3.16 of these Rules. The dismissal or

discontinuance, at the request of Bar Counsel, of a petition, or any charge or set of charges contained therein, shall act as a dismissal with prejudice.

Third Proposal

Adding new sentences to an existing rule: Recusal of Board Members on reinstatement appeals

Explanation for Proposed Amendment

This rule governs the board's proceedings and deliberations, specifically concerning reinstatements. Reinstatement petitions typically are heard by hearing panels of three board members. S.J.C. Rule 4:01, § 18(5). Hearing panelists are recused when the matter is heard by the board, since it is their decision that is being reviewed. On occasion, a suspended or disbarred lawyer is not reinstated on his or her first petition. On a subsequent petition, a new panel is appointed. However, some members who sat on the original panel may be still on the board, sitting in review of the subsequent hearing panel's recommendation. In that situation, the amended rule would provide the petitioner the opportunity to move for recusal of any board member who was a hearing panelist on the prior matter.

Board Rule 4.23 recusal of a board member.

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Section 4.23 recusal of a board member

(a) a board member who has participated as a reviewing board member in the Decision to institute formal proceedings pursuant to section 2.8 of these rules, or as a Member of a hearing committee or hearing panel or as a special hearing officer in an Evidentiary hearing resulting in findings of fact and recommendations, shall be disqualified from participation in subsequent deliberations and voting of the board in such manner. When a petitioner for reinstatement has filed a prior unsuccessful petition, he or she may move for recusal of board members who participated in the prior reinstatement hearing. A decision to recuse shall be made by the board member in his or her discretion whether they may remain impartial and objective as to the subsequent petition.

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Section 4.23 Recusal of a Board Member

(a) A Board member who has participated as a Reviewing Board Member in the decision to institute formal proceedings pursuant to Section 2.8 of these Rules, or as a member of a hearing committee or hearing panel or as a special hearing officer in an evidentiary hearing resulting in findings of fact and recommendations, shall be disqualified from participation in subsequent deliberations and voting of the Board in such manner. When a petitioner for reinstatement has filed a prior unsuccessful petition, he may move for recusal of board members who participated in the prior reinstatement hearing.

A decision to recuse shall be made by the board member in his or her discretion whether they may remain impartial and objective as to the subsequent petition.

Fourth Proposal

Adding a new Rule 4.24: practice by out-of-state lawyers

Explanation for Proposed Change

On occasion, the board receives requests from out-of-state lawyers to represent respondents or petitioners in matters before the board. Currently, the board has no rule that would allow such practice. The proposed rule would allow *pro hac vice* practice, consistent with the rules governing the procedure in the courts of the commonwealth.

Subchapter H. *Pro hac Vice* Practice Before Board

Board Rule: 4.24: General Rule

An attorney not currently registered in Massachusetts and who is in good standing in all jurisdictions in which they are authorized to practice law may represent on a *pro hac vice* basis a respondent at any stage of a disciplinary proceeding (including pre-petition investigations) or a petitioner for reinstatement at any stage of the reinstatement process.

An attorney seeking admission *pro hac vice* must file with the board a motion signed by a member in good standing of the Massachusetts bar ("local counsel"), who may not be the respondent in the particular case for which the out-of-state attorney seeks admission. The motion shall be accompanied by an affidavit signed by the attorney seeking admission stating that he or she is a member of the bar in good standing in every jurisdiction where admitted to practice; there are no disciplinary proceedings pending; and the attorney is familiar with the Massachusetts rules of professional conduct, the rules of the Board of Bar Overseers, and Supreme Judicial Court rule 4:01.

Prior to filing the motion, an attorney seeking admission *pro hac vice* must pay the fee of \$355 set forth in rule 3:15 of the Supreme Judicial Court and comply with all other provisions of rule 3:15, which is incorporated herein. The *pro hac vice* motion must be accompanied by evidence that the fee has been paid or that payment is not required pursuant to the rule.

Local counsel will have an ongoing duty to ensure that the out-of-state attorney complies with all applicable rules and policies. Local counsel shall be served with all filings in the case.

The motion shall be filed no later than 21 days before the first day of the hearing. Bar counsel may file an objection to the motion for *pro hac vice* admission within ten (10) days of the filing of the motion.

The decision whether to admit an attorney *pro hac vice* will be reserved for the board chair or a member of the board designated by the chair. The board chair or designee may impose on local counsel any obligations deemed reasonably necessary for the orderly administration of the case, such

as whether to require the attendance of local counsel at any proceeding. Any party aggrieved by all or part of a decision by the board chair may file an appeal (within ten (10) days of the board chair's decision) with the full board of bar overseers, which shall review the board chair's decision for an abuse of discretion.

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Fifth Proposal

Replacing an old rule: Remote Board Meetings

Explanation for Proposed Amendment

The board needs to update its rules to clarify the ability of the board to meet via teleconference or virtually (for example, Zoom, Microsoft Teams, Skype, WebEx, etc.). The proposed rule would clarify the procedure for meetings that are not conducted in-person.

Board rule 5.2: Conference Telephone Meetings

Replace the current rule with the following:

One or more members of the Board may participate in a meeting of the Board and vote at the meeting by means of telephone conference or video conference (for example, Microsoft Teams, Zoom, or Skype or similar services). Participation in a meeting pursuant to this section shall constitute presence in person at such meeting. All votes by telephone conference or video conference shall constitute votes in person at such meeting.

Sixth Proposal

Amending B.B.O. Rules 3.8, 3.9, and 3.10 to allow for service of documents by email.

Explanation for Proposed Amendment

B.B.O. Rule 3.8 governs service of documents by the Board. Rule 3.9 governs service of documents by a party.

The board requests the flexibility for both the board and parties to serve documents by email as well as the traditional methods of in-person delivery and mail delivery. On occasions, respondents change their physical addresses without notice to the board. Such changes create challenges in providing notice to respondents (or their lawyers). The Court's registration rules require all attorneys to inform the board of their email addresses. S.J.C. Rule 4:02, § 1. In our experience, email addresses change less often than physical addresses. Having the additional option of serving notice on an email address as well as a physical address will assist the board in providing notice to parties. In addition, many parties and lawyers prefer electronic delivery of documents. We include a requirement that email service be accompanied by a request for a delivery receipt, which is generated when the server receives confirmation that the email has been delivered to the recipient. This requirement will provide additional evidence that the email service was successful. To the extent lawyers and parties are concerned about overlooking emails, particularly if emails are mis-directed into a Spam folder, the Board reminds lawyers to vigilantly check their email boxes on a regular basis.

We also propose an amendment to Rule 3.10, which clarifies the date when service is considered complete to include service by email. An additional change to Rule 3.10 is to add delivery by a private carrier such as FedEx or UPS in addition to United States mail.

These changes are consistent with recent changes the Court approved to Rule 5 of the Massachusetts Rules of Civil Procedure.

Board Rule 3.8: Service of Documents by the Board

Replace the current rule with the following:

Orders, notices and document other than subpoenas originating with the Board shall be served by the Board by delivery in person, by mailing a copy thereof to the person to be served or the person's representative at the physical address registered with the Board, or by emailing a copy thereof to the person to be served or the person's representative at the business email address registered with the Board. If the document is emailed, the Board must include a delivery receipt request to confirm that the email was delivered to the recipient. A lawyer or party may inform the Board of a secondary email address to which notices should be sent, and in such cases the Board will serve both the registered business email address and the secondary email address.

Board Rule 3.9: Service of Documents by a Party

Replace the current rule with the following:

All pleadings, briefs, and other documents filed in disciplinary or reinstatement proceedings, when filed or tendered to the Board for filing, shall be served upon all parties to the proceeding or their counsel. Such service shall be made by delivery in person, by mail, or by emailing a copy thereof to the person to be served or the person's representative at the business email address registered with the Board. If the document is emailed, the sending party must include a delivery receipt request to confirm that the email was delivered to the recipient. A lawyer or party may inform the Board of a secondary email address to which documents should be sent, and in such cases the Board will serve both the registered business email address and the secondary email address.

Board Rule 3.10: Date of Service of Documents

The date of service shall be the day when the document served is deposited in the United States mail or with a private delivery service (such as FedEx or UPS), or is delivered in person, as the case may be. Service by e-mail is complete upon pressing "send" or its equivalent, unless the Board receives notice or otherwise reasonably should be aware that the e-mail was not successfully transmitted. If the person making service learns that the e-mail was not successfully transmitted, the person must promptly resend the document to the intended recipients by e-mail or by another means authorized by this rule. Any document served by e-mail by 11:59 P.M. on a business day shall be considered served on that date. Any document served by e-mail on a Saturday, Sunday, or legal holiday shall be considered served the next business day. When service is made other than by in-hand delivery, three days shall be added to any time by which a response is due.