2016: THE YEAR IN ETHICS AND BAR DISCIPLINE

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With this article, the Office of Bar Counsel undertakes our annual assessment of noteworthy events in ethics and bar discipline in the year just past.

Final disciplinary decisions or orders were entered by the full bench or single justices of the Supreme Judicial Court, or by the Board of Bar Overseers, in 115 cases in 2016. The SJC also issued several ethics-related decisions of general interest. Some of these matters are highlighted below.

Disciplinary Decisions

The full bench of the Supreme Judicial Court decided three cases in calendar 2016 in which the respondent attorneys had appealed decisions of the single justices. Of particular note is *Matter of Diviacchi*, 475 Mass. 1013 (2016), which, for the first time since major amendments to Mass. R. Prof. C. 1.5 on fees were adopted in 2013, addressed violations of Mass. R. Prof. C. 1.5(f).

As revised, Rule 1.5(f) provides lawyers a choice of two models of contingent fee agreements, one that may be used "as is," the other requiring explanations to the client and the client's consent confirmed in writing. In the alternative, a lawyer may use his or her own form, but then must explain and get written client consent to any provisions that differ materially from those of the model forms. These provisions do not apply when the client is an organization, including non-profits and government entities.

In *Diviacchi*, the fee agreement used by the lawyer contained provisions that were not part of either form and that materially differed from provisions of those models. The Court found that he did not explain the different or added provisions to the client or obtain or confirm her informed consent in writing to those provisions, in violation of Mass. R. Prof. C. 1.5(f)(3). It rejected his defense that his client was a sophisticated person, noting that the rule applies uniformly to all individuals who are clients, regardless

of sophistication. The lawyer also violated several other rules of professional conduct and had a prior disciplinary history, resulting in a 27-month suspension of his license.

The other two full bench decisions were *Matter of Evan Greene*, 476 Mass. 1006 (2016), and *Matter of Weiss*, 474 Mass 1001 (2016). In *Greene*, the full bench of the Supreme Judicial Court imposed an indefinite (i.e., five-year minimum) suspension on an attorney who was convicted in federal court of giving real estate kickbacks to brokers and, in addition, was found by a hearing committee and the board to have taken advantage, in some of the same transactions, of homeowners with substantial equity in their properties who were facing foreclosure. Acknowledging that the criminal convictions alone would warrant only a two-year suspension, and that the "multiple HUD violations" would require an additional two-year suspension, the Court nonetheless imposed an indefinite suspension in light of aggravating factors, including that the lawyer was motivated by financial self-interest in taking advantage of vulnerable and unsophisticated individuals.

In *Weiss,* on appeal by the lawyer petitioner from a decision by a single justice denying his third petition for reinstatement from a suspension of a year and a day entered in 2011, the Court held that the single justice properly denied reinstatement. The hearing panel had found that the petitioner had not met his burden of proof and did not show either that he had sufficient understanding of the basis of his discipline to avoid repeating his misconduct or that he had sufficient learning in the law.

A number of decisions by the single justices or the Board of Bar Overseers also raised interesting individual issues, including:

- *Matter of Wilson*, 32 Mass. Att'y Disc. R. __ (2016) (SJC no. BD 2012-059). In this case, a single justice of the Supreme Judicial Court upheld the board's recommendation that a lawyer be suspended for a year and a day for five instances in four cases of intemperate advocacy, conduct intended to disrupt a tribunal, and statements impugning the integrity of a judge, in one instance resulting in a finding of criminal contempt. In upholding the recommended sanction, the single justice cited to the "volume and vitriol of the respondent's attacks, in numerous courtrooms over a span of years, and memorialized in written documents...."

- *Matter of Harsch*, 32 Mass. Att'y Disc. R.__ (2016) (SJC no. BD-2015-056). Issues involving referrals from, and supervision of, a purported paralegal in immigration cases were front and center in his case. The single justice suspended the lawyer for six months for a variety of misconduct in immigration cases, including writing letters of recommendation for a Texas woman's work as a paralegal that falsely implied that she worked for him as a paralegal. In exchange, she referred him clients who were being held out-of-state in detention. The lawyer never communicated directly with the clients and did not explain to them that he intended to limit his representation solely to telephonic bond hearings. In two of these cases, the lawyer did not appear for subsequent hearing dates, did not communicate the hearing dates to the clients, and attempted to withdraw without court permission. The clients were ordered deported.

Ethics-Related Civil Cases

In an important decision clarifying the effect of recent amendments to Mass. R. Prof. C. 3.5(c) that increased the scope of permissible postverdict communications with jurors, the Supreme Judicial Court in *Commonwealth v. Moore*, 474 Mass. 541 (2016), set out new guidelines to implement the amended rule. As an initial matter, the Court indicated that the new rule applies to trials in which the jury was discharged prior to the effective date of the amendments, July 1, 2015, only if the case is on appeal or the appeal period has not run. The new guidelines offer a model jury instruction to comply with the Court's directive that that, upon request, a trial judge must instruct the jury about the rules of attorney contact. The guidelines also mandate that litigants give notice to opposing counsel prior to contacting jurors, and require attorneys' letters to jurors to include a statement indicating that the juror may decline or terminate any contact with attorneys. The Court also noted that the prohibition of "inquiry into the contents of jury deliberations and thought processes of jurors and the impeachment of jury verdicts based on information that might be gained from such inquiry" remains "undisturbed."

In *Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 474 Mass. 381 (2016) the Supreme Judicial Court addressed the issue of self-help discovery by an employee in an employment claim and specifically addressed the question of how to analyze the issue when the employee is an attorney. In this case, the attorney plaintiff alleged that she had been demoted within her firm based on unlawful gender

discrimination. While still working at the firm, on advice of her attorney, she searched the firm's document management system for evidence supporting her claims, and copied confidential documents. When the firm discovered her activity, she was terminated "for cause." She filed suit for discrimination, retaliation, and related claims but her claims were dismissed on summary judgment.

The Court granted direct appellate review and determined that "self-help discovery" such as occurred here may constitute "protected activity" under G.L. c. 151B, but only when an employee's actions are reasonable in the totality of the circumstances when balancing the employer's "need to maintain an orderly workplace and to protect confidential business and client information" with the "equally compelling need of employees to be properly safeguarded against retaliatory actions." The Court dismissed the argument that self-help discovery cannot qualify as protected activity where a plaintiff is an attorney and some of the relevant documents may be subject to attorney-client privilege. Privilege and confidentiality, the Court indicated, are factors to be considered in the reasonableness analysis but are not dispositive.

Finally, in *Bryan Corp. v. Abrano*, 474 Mass. 504 (2016), the Supreme Judicial Court restated and reemphasized an attorney's duty of loyalty to an existing client when a conflict arises. The Court in this case affirmed a superior court judge's disqualification of counsel for a shareholder in an action by a closely held family corporation against the shareholder. The company had previously retained the law firm to defend it in an unrelated action. While the matter was ongoing, the firm took on the plaintiff shareholder as a client, withdrawing from the representation of the company when conflict arose.

The Court ruled that, based on the circumstances at the time the firm took on the shareholder as a client, it should have anticipated that a conflict would arise. The firm's decision to represent the shareholder thus violated Mass. R. Prof. C. 1.7. The Court stated that "a firm may not undertake representation of a new client where the firm can reasonably anticipate that a conflict will develop with an existing client, and then choose

between the two clients when the conflict materializes. Both the duty of loyalty and the rules clearly forbid such conduct."

Disciplinary Rule Amendments

Although extensive revisions to the Massachusetts Rules of Professional Conduct went into effect on July 1, 2015, the Supreme Judicial Court at that time deferred action on Rule 3.8, the rule detailing prosecutors' particular obligations. After further review, that rule was also amended, effective April 1, 2016. See "Prosecution Resolution: Amendments to Mass. R. Prof. C. 3.8 on Special Responsibilities of Prosecutors," on the BBO website. The revisions bring Rule 3.8 current with many of the changes to ABA Model Rule 3.8 since 1998, when the rules of professional conduct were first adopted in Massachusetts, and address additional issues raised by prosecutors, defense counsel, and other members of the bar during the review process. Among other matters of interest, the amended rule includes new comment 3A, addressing the interaction of a prosecutor's obligations of disclosure under Rule 3.8 with a prosecutor's disclosure obligations under substantive law.

Two other disciplinary rules were also amended in 2016, Rules 5.4(a)(4) and 5.5. Rule 5.4(a)(4) allows lawyers or law firms to share a statutory or tribunal-approved fee award or settlement with the qualified legal assistance organization that referred the case if the client consents to the fee sharing and the total fee is reasonable. The rule was revised to omit redundant and unnecessarily burdensome clauses. Rule 5.5 was amended to permit lawyers from foreign countries who are in good standing in their home countries to act as in-house counsel to an employer in Massachusetts.

The full text of the bar discipline decisions, summaries of important cases, and other news and events relating to the rules of professional conduct or the disciplinary process are found at the Office of Bar Counsel website, http://www.mass.gov/obcbbo. Stay up to date with changes and have a happy new year!