

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

**ANNUAL REPORT
TO THE
SUPREME JUDICIAL COURT
FISCAL YEAR 2019**

SEPTEMBER 1, 2018 – JUNE 30, 2019

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Dedication

In the last fiscal year, the Office of Bar Counsel lost to retirement Bar Counsel Constance Vecchione and First Assistant Bar Counsel John Marshall. Since the end of the fiscal year, Assistant Bar Counsels Bruce Eisenhut, Jane Podolski, Jane Rabe and Susan Strauss Weisberg have also retired. Together, these attorneys worked for the office for a total of approximately 170 years.

We cannot overstate the contributions of these individuals to the Office of Bar Counsel; nor their steadfast dedication to our mission of protecting the public from unethical conduct by attorneys and preserving and enhancing the integrity and high standards of the bar. Several of the departing lawyers joined the office in its nascence when disciplinary law in Massachusetts was just starting to be developed. The disciplinary matters they investigated, resolved and prosecuted, and the SJC decisions that resulted from those prosecutions, continue to govern the conduct of lawyers and the sanctions for misconduct today.

Connie led the office from 2006 through 2018, during which time the office prosecuted many ground-breaking cases, eliminated a huge backlog and greatly enhanced its services to consumers and members of the Massachusetts bar. We thank Connie, as well as the other retiring assistants, for everything they brought to the Office of Bar Counsel over the many productive years.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
OVERVIEW	2
STATEMENT OF MISSION	3
ATTORNEY AND CONSUMER ASSISTANCE PROGRAM	3
COMPLAINTS DOCKETED	5
CASE PROCESSING	9
DIVERSION	12
DISCIPLINARY PROCEEDINGS AND SANCTIONS	13
REINSTATEMENTS	18
COMMISSIONERS	18
SUPREME JUDICIAL COURT DECISIONS	19
RELATED ACTIVITIES	21
WEBSITE	24
FACILITATING CONTINUOUS IMPROVEMENT	25

LIST OF TABLES

TABLE 1:	ACTIVE REGISTERED LAWYERS IN MASSACHUSETTS (2014-2019)	3
TABLE 2:	CLASSIFICATION OF 622 COMPLAINTS RECEIVED BY PRIMARY LEGAL AREA	6
TABLE 3:	CLASSIFICATION OF 622 COMPLAINTS RECEIVED BY MISCONDUCT ALLEGED	7
TABLE 4:	COMPLAINTS: RECEIVED, DISPOSED, AND INVENTORY (2015-2019)	9
TABLE 5:	AGE OF FILES NOT IN PETITION	10
TABLE 6:	RESPONDENTS WITH PENDING FILES NOT IN PETITION OVER 18 MONTHS OLD	11
TABLE 6A:	RESPONDENTS WITH PENDING FILES NOT IN PETITION OVER 2 YEARS OLD	12
TABLE 7:	CLASSIFICATION OF LAWYERS DISCIPLINED BY PRIMARY AREA OF LAW	16
TABLE 8:	CLASSIFICATION OF LAWYERS DISCIPLINED BY TYPE OF MISCONDUCT	17

Bar Counsel's Report to the Supreme Judicial Court Fiscal Year 2019

Executive Summary

This is a summary of the key points in the report that follow for the ten-month fiscal year that began on September 1, 2018 and ended on June 30, 2019¹:

- Constance Vecchione, after a highly successful, thirteen-year tenure as bar counsel, retired as of January 4, 2019.
- During the ten-month fiscal year, the Office of Bar Counsel filed 61 petitions for discipline including affidavits of resignation, with charges based on 74 complaints. In addition, 16 petitions for reciprocal discipline were filed directly with the Supreme Judicial Court for Suffolk County. Bar counsel also sought and obtained orders for the immediate temporary suspension of 5 attorneys, where the lawyers posed a threat of substantial harm to clients or prospective clients.
- At the end of the fiscal year there were only 12 lawyers under investigation with files over 18 months old that were not in petition and had not been deferred or held.
- Bar counsel's diversion program for minor disciplinary violations concluded cases involving 15 lawyers.
- Bar counsel's Attorney and Consumer Assistance Program screened and resolved 88% of the 3162 new complaints received by ACAP without referral for investigation.
- Bar counsel's ethics helpline handled more than 1540 calls from lawyers seeking information and assistance on issues of professional conduct.

¹ In 2018, the Board of Bar Overseers changed its fiscal year end from August 31 to June 30. Thus, FY2019 was the period from September 1, 2018 to June 30, 2019. All future fiscal years will run from July 1 to June 30.

- Bar counsel provided a free monthly trust account program, first instituted 14 years ago, that focuses on the record-keeping requirements of Mass. R. Prof. C. 1.15, and her staff made at least 20 additional presentations at CLEs, bar association meetings, law schools and other forums.

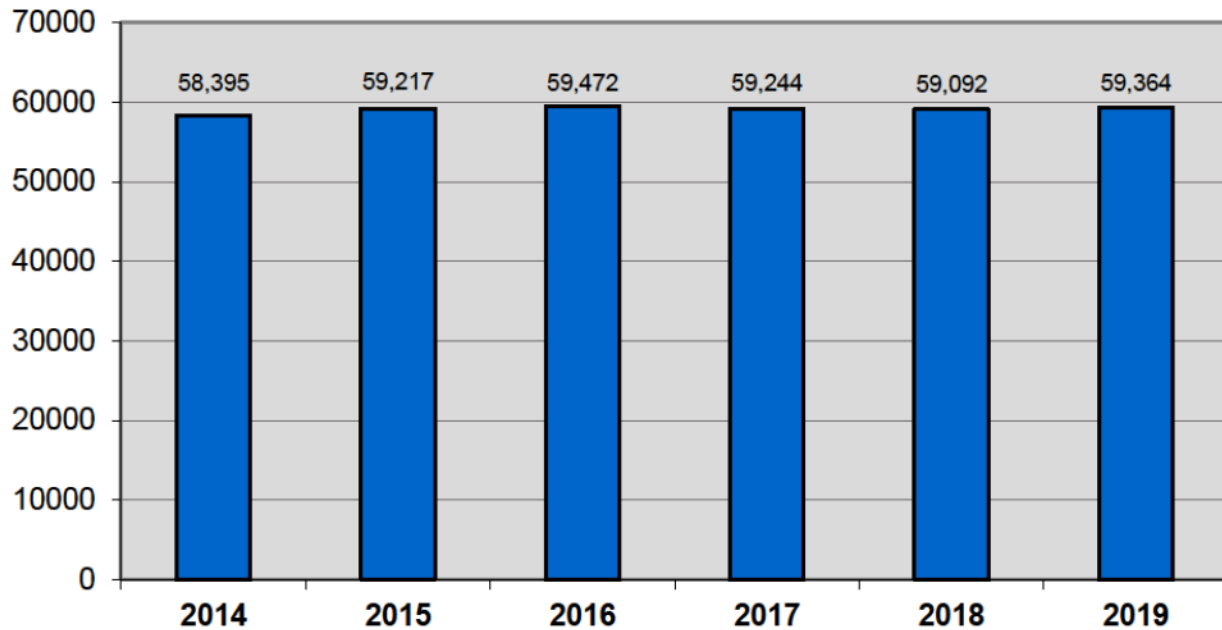
Overview

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, and funded the entities through a portion of the attorney registration fees. 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, bar counsel appears as a party at Board hearings on attorneys' petitions for reinstatement to the bar.

At the close of FY2019, there were 59,364 Massachusetts lawyers registered on active status and another 11,786 lawyers on inactive status. These numbers represent a very slight increase in the number of active attorneys and a very slight decrease in the number on inactive status. Table 1 shows the number of attorneys registered for active practice over the last six years.

TABLE 1

Active Registered Lawyers in Massachusetts (2014-2019)



Statement of Mission

The mission of the Office of Bar Counsel is to protect the public from unethical conduct by attorneys and to preserve and enhance the integrity and high standards of the bar. The Office of Bar Counsel is committed to the efficient and effective performance of its mission and strives for fairness in all its dealings with the public and the bar.

Attorney and Consumer Assistance Program

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 for investigation that raise issues of more serious misconduct.

From its inception in 1999 through the end of FY2019, ACAP had evaluated and processed a total of 100,744 inquiries. During FY2019, ACAP responded to 3162 new inquiries, as well as approximately 1700 further inquiries on matters that had previously been closed. Approximately 78% of the new inquiries were received as telephone calls; almost all the remainder, 22%, were in writing, with a small number of walk-ins. 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 (whether referral for investigation or resolution) within 30 days of receipt.

ACAP's initial step in addressing any new inquiry 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 act as an intermediary by telephoning the attorney. Some typical results are that the lawyer returns a legal file requested by a client, refunds an unearned retainer, or calls the client to give an update on case status.

The nature of the issues that prompt inquiries to ACAP does not vary much from year to year. Approximately 18% of all new ACAP matters in FY2019 concerned allegations of lawyers' neglect of clients or legal matters, or failure to return client calls. The areas of law that produced the most inquiries to ACAP in FY2019 were civil litigation (including personal injury) (18%), domestic relations (14%), trusts and estates (14%), criminal defense (11%), and real estate (7%). Approximately 4% of the calls to ACAP involved questions about legal fees.

Effective September 1, 2009, Supreme Judicial Court Rule 4:01, § 8.1(a) and section 2.1(b)(1) of 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. On the other end of the spectrum, bar counsel sends consumers a complaint form immediately when serious professional misconduct might be involved. In the middle are the several thousand matters that the ACAP staff seeks to resolve.

Complaints Docketed

The Office of Bar Counsel opened 522 complaints against attorneys in the 10-month FY2019.² The number of complaints formally docketed has decreased since FY2009, when 1001 complaints were opened. This decrease is somewhat attributable to the 2009 amendment described above that gives bar counsel discretion not to open files on matters that are frivolous, are outside the Board's jurisdiction, or otherwise do not warrant further action. However, most state jurisdictions have reported a significant decrease in complaints against lawyers during recent years, and bar counsel's numbers are clearly part of that national trend. The reasons for the trend have been a subject of speculation by disciplinary authorities and others.

When review is sought by a consumer, bar counsel's decisions not to open files are almost always affirmed by the Board. In FY2019, 54 complainants requested and received review of bar counsel's decision by a member of the Board pursuant to SJC Rule 4:01, § 8.1(a) and section 2.8(a)(1) of the Rules of the Board of Bar Overseers. The reviewing Board member reversed bar counsel's decision in only one of those matters.

² This represents an average of 52 complaints each month with an actual 12-month total, including July and August 2018, of 622.

The 522 files docketed in the 10-month FY2019 involved 464 attorneys, some of whom had multiple complaints. Bar counsel herself initiated the investigation with respect to 58 lawyers, not including dishonored check matters reported by banks. Some of the files initiated by bar counsel were opened on the basis of news reports and court decisions; others resulted from reports made to bar counsel by judges, district attorney's offices, or other public agencies.

As is true of ACAP inquiries, the legal practice areas that produce the most docketed complaints have been consistent over the years—personal injury, domestic relations, real estate, civil litigation and criminal defense. As has been true in prior years, in FY2019, the misconduct most often cited was lack of diligence, incompetence, failure of the attorney to communicate adequately with the client, trust account violations, and fee violations. Bar counsel also received significant numbers of complaints alleging fraudulent or deceptive conduct, including misuse of client funds and misrepresentations to clients, tribunals and third parties.

Tables 2 and 3 report the classification of complaints opened in FY2019 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 622* Complaints Received by Primary Legal Area

Administrative Law	20..... 3%	Industrial Accidents.....	3..... < 1%
Bankruptcy	6..... < 1%	Insurance	0..... 0%
Civil Litigation	70..... 11%	Intellectual Property	3..... < 1%
Collections.....	4..... < 1%	Employment.....	8..... 1%
Commercial Transactions	10..... 2%	Landlord/Tenant	8..... 1%
Consumer Law	1..... < 1%	Malpractice	4..... < 1%
Conviction of Crime.....	27..... 4%	Municipal Law	0..... 0%
Corporations.....	4..... < 1%	Personal Injury.....	25..... 4%
Criminal Defense.....	48..... 8%	Reciprocal Discipline	9..... 1%
Criminal Prosecution	3..... < 1%	Real Estate	70..... 11%
Domestic Relations	61..... 10%	Small Claims.....	0..... 0%
Escrow Accounts.....	3..... < 1%	Support	0..... 0%
Estates	33..... 5%	Taxation	0..... 0%
Fiduciary.....	11..... 2%	Torts.....	1..... < 1%
Immigration	23..... 4%	Trusts	4..... < 1%
		No Legal Area or Unknown	172..... 28%

*This chart is based on a 12-month reporting period, which includes July and August of 2018.

TABLE 3
Classification of 622 Complaints Received by Misconduct Alleged**

Rules	Type of Misconduct	Complaints Received*
1.1	Failure to provide competent representation	15%
1.2(a)	Failure to abide by a client's decision concerning the representation or taking unauthorized action on the client's behalf	8%
1.3	Neglect or lack of diligence	27%
1.4	Failure to communicate adequately with client	18%
1.5	Fee violations, including excessive or improper fees and failure to refund unearned fees	11%
1.6 and 1.9(c)	Failure to preserve client confidences or secrets	2%
1.7 and 1.13	Conflicts of interest between current clients or between client and attorney	3%
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%
1.9 and 1.11	Conflicts of interest with former clients, including former government employment	< 1%
1.14	Conflicts of interest or other violations as to client under disability	< 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	30%
1.16	Failure to properly withdraw from representation, including failure to return client files or documents	5%
3.1, 3.2, 3.3(b)-(e), 3.5 and 3.6	Improper trial conduct	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	11%
3.4, 3.9 and 4.4	Unfair conduct to opposing party or non-adjudicative body	5%
4.2 and 4.3	Improper communications with a party known to be represented by counsel or unrepresented party	< 1%
5.1 and 5.3	Failure to supervise subordinates	2%
5.4 and 5.6	Failure to maintain professional independence including partnership or sharing fees with non-lawyer	0%
5.5	Unauthorized practice of law or assisting in unauthorized practice	0%
7.1 through 7.5	Improper communications concerning lawyer's services including improper advertising or solicitation	1%
8.1	False statements in a bar admission or disciplinary matter	1%
8.4(a)	Misconduct through acts of another	1%
8.4(b)	Criminal conviction or conduct of attorney	5%
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	6%

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

**This chart is based on a 12-month reporting period that included July and August of 2018.

Mandatory notices from financial institutions of dishonored checks drawn on attorney trust accounts resulted in the opening of 102 of the files opened in FY2019. The number of these notices received from banks fluctuates from year to year but has generally been lower in recent years than in earlier years.

As always, very few dishonored checks in this fiscal year resulted from bank error or other problems outside the lawyer's control. IOLTA checks usually bounce because of inadequate record-keeping by the lawyer or law office that does not comply, or fully comply, with the requirements of Mass. R. Prof. C. 1.15(f). Bar counsel continues to be committed to educating and assisting Massachusetts lawyers with their IOLTA record-keeping. However, given that the record-keeping rules have now been in effect for fifteen years, bar counsel plans going forward to hold more lawyers responsible for violations of the record-keeping rules, particularly when IOLTA accounts are short or the lawyer is unable to account for all IOLTA funds held.

In addition, a 2015 amendment to Rule 1.15 codified decisional law holding that advance fees and retainers must be held in a trust account until earned and that advances for expenses must also be held in a trust account until disbursed. Many lawyers have been disciplined in recent years for withdrawing retainer funds from an IOLTA account before the funds were earned or by failing to deposit retainers into IOLTA accounts at all.

Bar counsel, in cooperation with the Boston Bar Association, presents a free training program on trust account maintenance on the first Thursday of each month between October and May. The course is open to any lawyer, whether or not a BBA member, and to support staff. This course is further described within the Related Activities section of this report. Bar counsel also presents the program in other locations during the year, which programs are publicized by law schools, local bar associations and title insurers.

Case Processing

TABLE 4

Complaints: Received, Disposed, and Inventory (2015-2019)

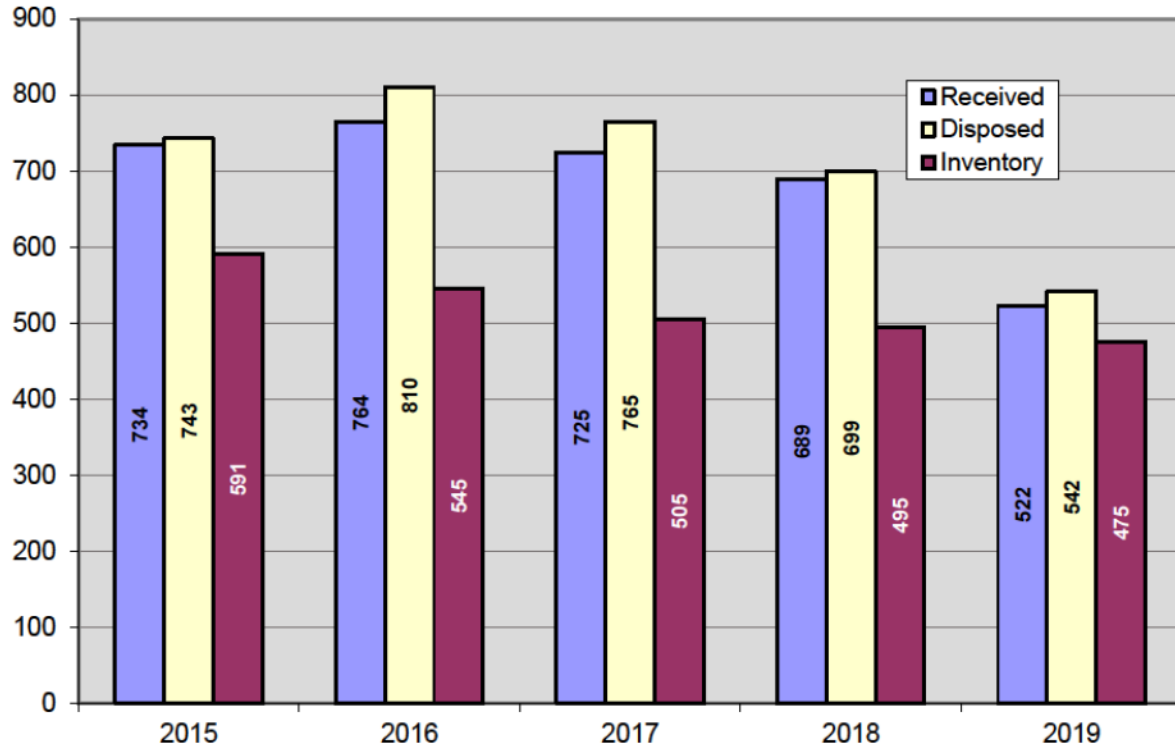


Table 4 shows that there were 475 files pending at the end of the fiscal year, meaning that the allegations were under investigation and no formal disciplinary proceedings had been initiated. The number of pending files has slowly decreased over the last five years, mostly reflecting that fewer files were opened. The number of disposed files for FY2019 appears lower than in the previous year, but when adjusted to a twelve-month year would be approximately 660, only a 4 1/2 % decrease from FY2018's 699.

TABLE 5

Age of Files Not in Petition*

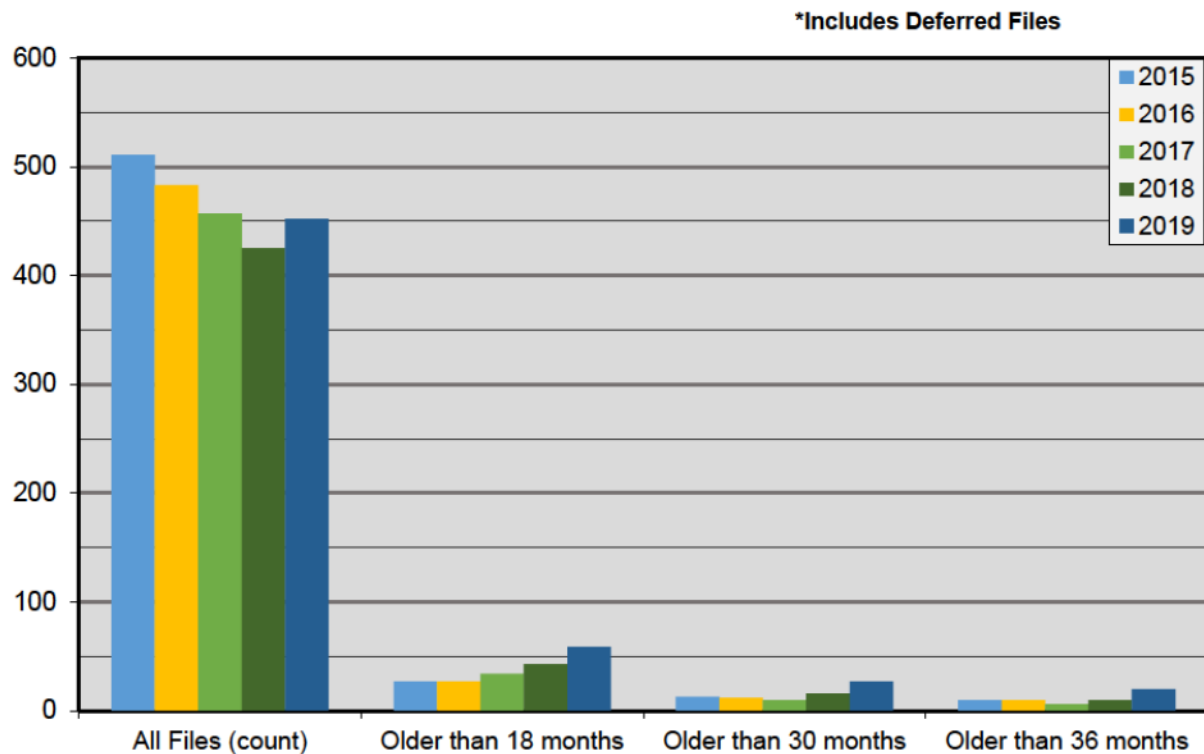


Table 5 shows the number of files 18 months or older pending (including deferred files) that were not in petition at the end of FY2019 compared to each fiscal year back to 2015.

For the past several years, the Office of Bar Counsel has made great progress in reducing the time that matters remain under investigation before they are resolved, or formal disciplinary proceedings are initiated. The age of files increased slightly in FY2019, probably because the Office of Bar Counsel had fewer lawyers and several lawyers on the verge of retirement. Thus, as of the end of FY2019, there were 59 files pending for 18 months or longer that were not in petition, but many of those files had been deferred by the Board, awaiting the outcome of related litigation. The average age at the end of FY2019 of all files pending in the Office of Bar Counsel on which a petition

for discipline had not been filed was 286 days if deferred files are included and 176 days if those files are excluded.

TABLE 6

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

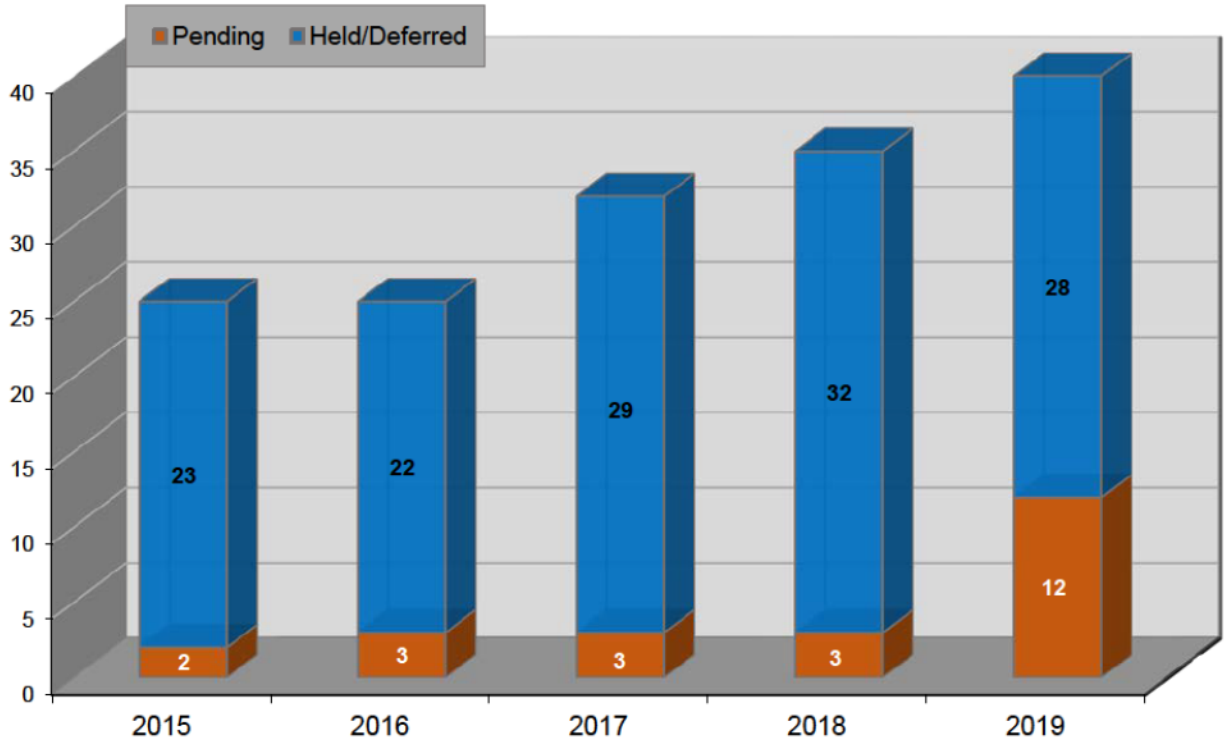
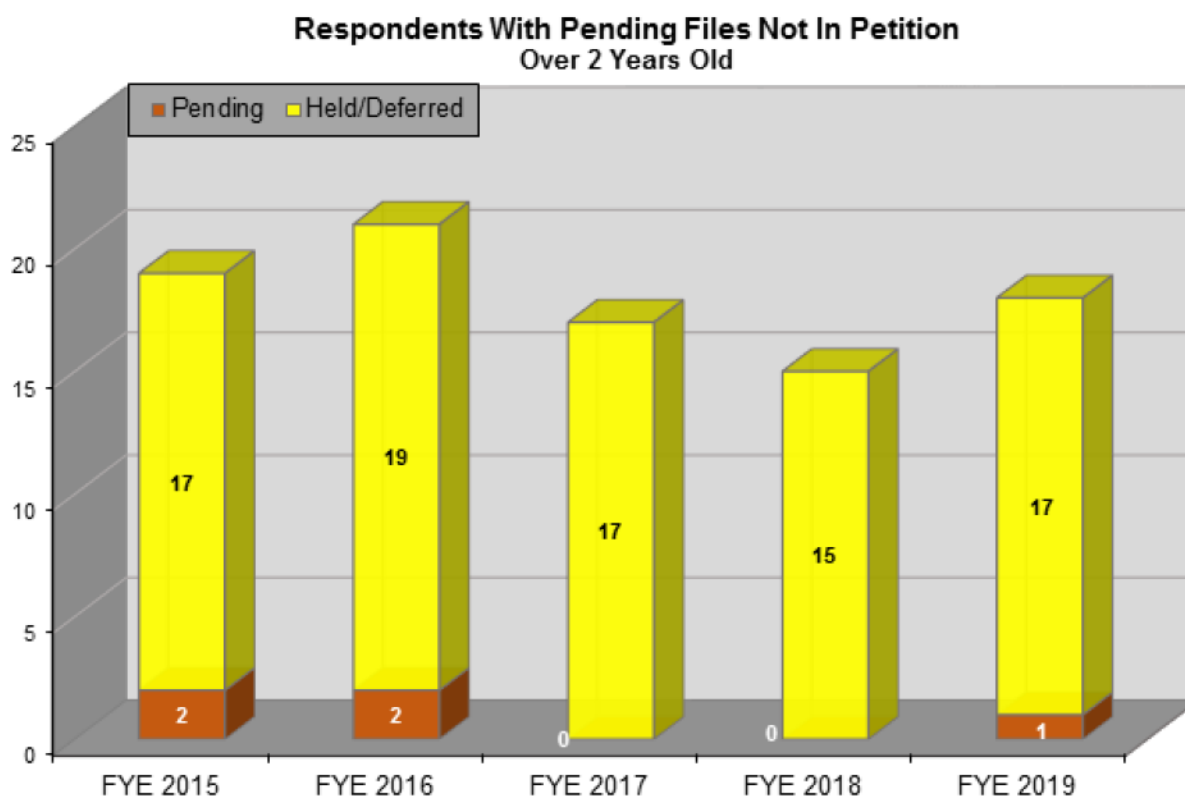


Table 6 is closely related to but slightly different than Table 5, as it shows not the number of files, but the number of attorneys who had open files that were older than 18 months. Because lawyers sometimes have more than one pending complaint, this number is lower. Table 6 demonstrates that at the end of FY2019, 40 lawyers had a pending file older than 18 months. For most of the respondents (28) who had pending files older than 18 months, the file(s) as of the end of the fiscal year were “deferred” or “held”. Of the pending files, only 12 were not held or deferred. Files are held (i.e., not

under active investigation) when the investigation is based upon an open criminal charge; files may be deferred by the Board when civil litigation closely related to the disciplinary complaint is pending.

Although few respondents have matters still pending after 18 months, Table 6A, below, shows the rapid resolution of the remaining respondent matters. In FY2019 there was only 1 respondent with a pending matter after 24 months that was not held or deferred.

TABLE 6A



Diversion

The diversion program in the Office of Bar Counsel, in effect since 2009, is an alternative to discipline for low level misconduct that may be more effectively addressed through remediation than through the imposition of a sanction. Lawyers offered this type of disposition agree to specified

education, evaluation, monitoring or counseling programs to address systemic problems in their practices or personal issues that affect their practices.

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 misconduct and the lawyer's obligation to take remedial measures. The agreement is then submitted to a Board member for approval. Fulfillment of the lawyer's obligations under the agreement results in the closing of the disciplinary matter, but lawyers who fail to fulfill their obligations are still subject to discipline. An experienced assistant bar counsel from the ACAP staff acts as diversion coordinator.

Diversion agreements may include requirements for training in legal ethics, legal practice areas, and practice management or client relations. Depending on the nature of the misconduct and the underlying circumstances, attorneys may be required to obtain a practice-management assessment through LOMAP; consult with LCL as to substance abuse, mental health or stress-related issues; participate in fee arbitration; or attend substantive CLE courses.

During the fiscal year, 15 lawyers entered into diversion agreements in lieu of discipline. Some of those lawyers were diverted as a result of minor problems with 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.

Disciplinary Proceedings and Sanctions

In FY2019, the Office of Bar Counsel filed 61 petitions for discipline (including affidavits of resignation) seeking public sanctions. This is an average of six per month, so that had FY2019 been a 12-month year, the total would have been 73, which is consistent with the 71 petitions filed in FY2018.

Hearing committees and special hearing officers completed full hearings on 9 disciplinary cases during the fiscal year. Hearing reports were submitted on 10 disciplinary cases and Board decisions were issued on 6 disciplinary matters.

Bar counsel appeared before hearing committees, hearing panels, the Board, and the Court at hearings (both evidentiary and non-evidentiary) on a total of 67 dates. Evidentiary hearings were conducted in 9 disciplinary cases and 7 reinstatement matters.

The Board and the Supreme Judicial Court together imposed disciplinary sanctions on 105 lawyers in FY2019. An average of 10.5 lawyers were sanctioned in each of the ten months. Had 2019 been a 12-month year, there would arguably have been twenty-one additional lawyers sanctioned for a total of 126. This number is higher than the number of lawyers disciplined during the past five years (110 in FY2014, 109 in FY2015, 125 in FY2016, 118 in FY2017 and 108 in FY2018).

Of these 105 lawyers, 27 received (private) admonitions, 17 lawyers were publicly reprimanded, 38 lawyers were suspended for a defined term (including stayed suspensions), 4 were indefinitely suspended, 2 resigned as a disciplinary sanction, and 17 were disbarred. Five lawyers were temporarily suspended from the practice of law pending formal disciplinary proceedings.

Public reprimands, stayed suspensions, and reinstatement from suspensions of a year or less (i.e., those eligible for automatic reinstatement without hearing) may be subject to conditions. Typical conditions include such requirements as monitoring by LCL, an evaluation by LOMAP, or submitting compliant trust account records at intervals for a period of time.

The legal areas that produced the most discipline in FY2019 were civil litigation, including personal injury, domestic relations, criminal defense and trusts and estates, followed closely by real estate and immigration. In addition, significant numbers of attorneys were disciplined on the basis of their own criminal convictions and as the result of a disciplinary order from another jurisdiction.

Regardless of the legal area involved, the most pervasive types of misconduct resulting in discipline were neglect of a client matter, failure to communicate adequately with a client, lack of competence, excessive fees and lack of fee agreement, and various types of misrepresentations to clients, courts and third parties.

As in prior years, almost all lawyers disciplined had been admitted to the bar for at least five years³ and more than 80% of those lawyers had practiced for over ten. Almost 90% of the lawyers disciplined were over 40, and 14% were older than 70. Approximately 70% described themselves as solo practitioners. A self-reported 37% of disciplined attorneys were not members of a bar association and 33% reported that they had not attended CLE courses in the prior five years. Approximately one-quarter had prior discipline.

Tables 7 and 8 show the primary legal area involved in the cases resulting in sanctions in FY2019 and the types of misconduct found.

³ The data contained in this paragraph is based on only 70 of the 105 lawyers disciplined. Bar counsel does not maintain these statistics for lawyers who were reciprocally disciplined and does not have complete data on lawyers disciplined as the result of a criminal conviction.

TABLE 7**Classification of Lawyers Disciplined by Primary Area of Law***

Legal Area	Disbarment/ Resignation		Suspension		Public Reprimand		Admonition		All (Public) Discipline**	
Administrative Law	0	0%	1	1%	1	1%	1	1%	3	2%
Bankruptcy	1	1%	1	1%	2	2%	1	1%	5	4%
Civil Litigation	2	2%	8	6%	3	2%	2	2%	15	12%
Collections	0	0%	2	2%	1	1%	0	0%	3	2%
Commercial Law	0	0%	0	0%	0	0%	1	1%	1	1%
Consumer Law	0	0%	1	1%	0	0%	0	0%	1	1%
Corporations	0	0%	0	0%	1	1%	0	0%	1	1%
Criminal Defense	0	0%	3	2%	0	0%	6	5%	9	7%
Criminal Conviction	6	5%	1	1%	2	2%	0	0%	9	7%
Criminal Prosecution	0	0%	1	1%	0	0%	0	0%	1	1%
Domestic Relations	0	0%	7	5%	4	3%	8	6%	19	15%
Escrow Accounts	1	1%	0	0%	0	0%	0	0%	1	1%
Estates	5	4%	4	3%	1	1%	5	4%	15	12%
Fiduciary	1	1%	3	2%	1	1%	0	0%	5	4%
Immigration	0	0%	4	3%	0	0%	3	2%	7	5%
Insurance	0	0%	1	1%	0	0%	1	1%	2	2%
Intellectual Property	0	0%	0	0%	1	1%	0	0%	1	1%
Labor	0	0%	1	1%	0	0%	0	0%	1	1%
Landlord/Tenant	0	0%	0	0%	1	1%	2	2%	3	2%
Municipal Law	0	0%	0	0%	1	1%	0	0%	1	1%
Personal Injury	1	1%	2	2%	1	1%	1	1%	5	4%
Reciprocal Discipline	4	3%	8	6%	0	0%	0	0%	12	9%
Real Estate	0	0%	3	2%	2	2%	5	4%	10	8%
Taxation	0	0%	0	0%	1	1%	0	0%	1	1%
Trusts	0	0%	3	2%	0	0%	2	2%	5	4%
Non-Legal, Misc.	1	1%	4	3%	5	4%	3	2%	13	10%

*Totals exceed number of sanctions imposed and percentage may exceed 100% because some lawyers had multiple files with different primary legal areas.

**Based on a 12-month reporting period that included July and August of 2018.

TABLE 8
Classification of Lawyers Disciplined by Type of Misconduct*

Rules	Type of Misconduct	Disbar/ Resign		Susp		Public Reprimnd		Admon		All Discip**	
1.1	Failure to provide competent representation	1	1%	15	12%	5	4%	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	0	0%	13	10%	7	5%	0	0%	20	16%
1.3	Neglect or lack of diligence	5	4%	23	18%	11	9%	13	10%	52	40%
1.4	Failure to communicate adequately with client	2	2%	18	14%	10	8%	6	5%	36	28%
1.5	Fee violations, including excessive or improper fees and failure to refund unearned fees	1	1%	9	7%	4	3%	10	8%	24	19%
1.6, 1.9(c)	Failure to preserve client confidences or secrets	0	0%	1	1%	1	1%	1	1%	3	2%
1.7, 1.13	Conflicts of interest between current clients or between client and attorney	0	0%	5	4%	2	2%	2	2%	9	7%
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%	1	1%	1	1%	2	2%	4	3%
1.9, 1.11	Conflicts of interest with former clients, including former government employment	0	0%	1	1%	0	0%	0	0%	1	1%
1.14	Conflicts of interest or other violations as to client under disability	0	0%	0	0%	1	1%	0	0%	1	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	6	5%	13	10%	4	3%	4	3%	27	21%
1.16	Failure to properly withdraw from representation, including failure to return client files or documents	0	0%	8	6%	2	2%	2	2%	12	9%
3.1, 3.2, 3.3(b)-(e), 3.5, 3.6, 3.8	Improper trial conduct	0	0%	4	3%	1	1%	1	1%	6	5%
3.3(a), 4.1, 8.4(c), 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	9	7%	17	13%	3	2%	5	4%	34	26%
3.4, 3.9, 4.4	Unfair conduct to opposing party or non-adjudicative body	0	0%	4	3%	6	5%	3	2%	13	10%
4.2 and 4.3	Improper communications with a party known to be represented by counsel or unrepresented party	0	0%	0	0%	1	1%	0	0%	1	1%
5.1, 5.3	Failure to supervise subordinates	0	0%	3	2%	1	1%	2	2%	6	5%
5.4, 5.6	Failure to maintain professional independence including partnership or sharing fees with nonlawyer	0	0%	0	0%	0	0%	0	0%	0	0%
5.5	Unauthorized practice of law or assisting in unauthorized practice	0	0%	1	1%	0	0%	0	0%	1	1%
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	1	1%	1	1%	3	2%	0	0%	5	4%
8.4(a)	Misconduct through acts of another	2	2%	1	1%	1	1%	0	0%	4	3%
8.4(b)	Criminal conviction or conduct of attorney	7	5%	2	2%	2	2%	0	0%	11	9%
8.4(d), 8.4(h)	Conduct prejudicial to the administration of justice, including conduct that is the subject of a contempt finding or court sanction	7	5%	14	11%	7	5%	6	5%	34	26%

*Totals exceed number of sanctions imposed and percentage exceeds 100% because more than one rule was violated.

**Based on a 12-month reporting period that included July and August of 2018.

Reinstatements

In addition to petitions for discipline filed by bar counsel, 7 petitions for reinstatement were filed during FY2019 by suspended or disbarred attorneys. After hearing, 7 lawyers were reinstated to practice, and 4 lawyers were denied reinstatement.⁴ Following short suspensions, another 7 lawyers were reinstated to practice without petition or hearing.

Commissioners

A commissioner is typically appointed when an attorney dies, becomes disabled, or unexpectedly disappears without a succession plan in place or is suspended or disbarred and fails properly to close a law practice. Whether the underlying cause is the lawyer's loss of license, death, or disability, the resulting abandoned client files remain a persistent problem, especially where the files are numerous and have not been properly preserved or inventoried. Related problems exist with the IOLTA accounts of these lawyers when inadequate record keeping makes it difficult or impossible to identify the owners of the remaining funds. In the past, bar counsel was responsible for seeking and supervising commissioners in numerous cases each year.

In 2019, the Board implemented a program that relieved bar counsel from the task of seeking commissioners for attorneys who, while they still were operating an active practice, died without a succession plan. The Board hired an attorney who was formerly a member of bar counsel's staff, to handle the day-to-day operations of the commissioner program.

⁴ Some of the decisions pertained to lawyers who had applied for reinstatement in FY18.

Bar counsel, however, continued her role in seeking the appointment of commissioners, pursuant to Supreme Judicial Court Rule 4:01, § 14 or § 17(2), when lawyers who were suspended or disbarred failed to appropriately dispose of their client matters, or were placed on disability status and were unable to wind down their practice. In FY 2019, bar counsel was required to seek the appointment of a commissioner in three such matters.

In addition, the adoption by the SJC in 2018 of new Mass. R. Prof. C. 1.15A on retention and destruction of client files provides needed direction on dealing with old, closed files, both for the bar in general and for commissioners in particular. For more information on this important rule change, see the article [New Rules on Client Files Will Provide Clear Guidance for Attorneys](#) on the Board's website, www.massbbo.org.

Supreme Judicial Court Decisions

The following decisions were rendered by single justices of the Supreme Judicial Court in FY2019, on disciplinary matters prosecuted by bar counsel.

In re: Zoe Falken, BD-2017-024 (February 21, 2019)

In this decision, the single justice affirmed the recommendation of the Board of Bar Overseers that the respondent be disbarred on four counts of misconduct: 1) the respondent failed to maintain an IOLTA account register with client identifiers after every transaction, a list of every transaction and a running balance; 2) the respondent withdrew funds from her IOLTA account in cash, left earned fees in her IOLTA account while holding client funds, failed to promptly pay funds due to clients and intentionally misused client funds; 3) the respondent intentionally made false statements to bar counsel in letters and affidavits; and 4) the respondent failed to respond to bar counsel's requests for information and failed to comply with a subpoena.

Because the respondent failed to file an answer to bar counsel's petition for discipline that set forth the charges outlined above, all of the allegations were deemed admitted.

In re: Claude D. Grayer, BD-2018-024 (October 16, 2018)

Noting that "a suspension is warranted for misconduct involving repeated failures to act with reasonable diligence, or when a lawyer has engaged in a pattern of neglect, and

the lawyer's misconduct causes serious injury or potentially serious injury to a client or others," the single justice suspended the respondent for a year and a day. The respondent's misconduct included misadvising a client about the immigration consequences of a continuance without a finding in a criminal matter, failing to make payments and appear in court in accordance with court orders issued against him personally, failing to diligently and competently represent a divorce client, failing to communicate to a client the basis or rate of a legal fee in writing and failing to cooperate in bar counsel's investigation.

In re: Joseph P. Lussier, BD-2018-092 (February 6, 2019)

The single justice indefinitely suspended the respondent in this unique matter involving a lawyer's misuse of funds withheld from his employee's paycheck that were to be deposited to her retirement account.

The respondent established a Saving Incentive Match Plan for Employees of Small Employers IRA Plan ("SIMPLE IRA") and gave his employees the opportunity to enroll. One of the respondent's employees, who was also intermittently his client, enrolled and directed the respondent to withhold \$100 from each of her paychecks. For approximately seven years, the respondent withheld the funds from each of the employee's paychecks but often failed to deposit the funds into the SIMPLE IRA and often failed to pay the required employer matching contributions. In total, the respondent failed to deposit \$24,471 that he had deducted from the employee's paycheck and used that money for his own personal and business reasons.

The Court determined that the respondent had misused the employee's funds. It went on to analyze whether he should be sanctioned in accordance with precedent involving the misuse of classic client funds or should receive a lighter sanction applicable to a lawyer who misuses a third party's funds while acting as a "private citizen" engaging in misuse outside of the practice of law. The Court decided that the respondent's misconduct, as the manager of his law practice, was very much intertwined with his practice of law. Thus, it declined to discipline him as a "private-citizen", and imposed discipline consistent with the standards pronounced in the 1997 decision in *Matter of Schoepfer*, pertaining to attorneys' misuse of client funds. The court indefinitely suspended the respondent, rather than disbar him, only because he ultimately made full restitution to his employee.

In re: Desmond Fitzgerald, BD-2018-038 (January 30, 2019)

This matter involved a multitude of misconduct by a lawyer representing a client in post-conviction matters both in the trial court and appeals court. The client was convicted of several criminal charges in 2006 and sentenced to a long state prison term. The respondent was engaged both to appeal and move to vacate the convictions.

In that undertaking, the respondent *inter alia* failed to file a timely and competent motion to vacate the conviction, failed to preserve his client's appellate rights, filed an inadequate appellate brief, misrepresented facts to the court and charged a clearly excessive fee.

The Court imposed a four-month suspension, with two months of the suspension stayed for a year, with conditions.

In re: John Patrick Contini, BD-2018-102 (April 5, 2019)

This reciprocal disciplinary matter arose out of the disbarment in Florida of a former Florida judge who was also admitted to practice in Massachusetts. The respondent, in his role as a judge of the 17th Judicial Circuit in Florida, made inaccurate representations of the time he was spending in the performance of his duties, used his personal assistant to perform personal tasks and entered orders in some matters without an adequate basis to do so.

The court found that the respondent's misconduct, to which he had stipulated in Florida, violated Mass. R. Prof. C. 8.4(d) (conduct prejudicial to the administration of justice) and warranted a five-year suspension from the practice of law in Massachusetts.

In re: Sybil Barrett, BD 2015-104 (October 22, 2018)

In this reciprocal matter arising out of North Carolina, the single justice imposed a year and a day suspension on the respondent for her negligent misuse of client funds, in connection with two real estate transactions. The North Carolina State Bar had disbarred the respondent for intentional misuse of client funds. The single justice, however, found that there was a factual dispute as to whether the respondent had received sufficient notice of the North Carolina disciplinary proceedings, and declined to impose a reciprocal order of disbarment. She remanded the matter to the Board for an evidentiary hearing concerning notice and another issue.

Following the evidentiary hearing before a special hearing officer, the Court was not satisfied that bar counsel had proven that the respondent was actually or constructively served with notice of the North Carolina proceeding. The Judge determined, however, that in the hearing before the special hearing officer, the respondent had admitted that she failed to timely transmit funds she had received at a closing to pay outstanding real estate taxes. She thus admitted to the negligent misuse of those funds. The Court determined on the basis of Massachusetts precedent, that a year and a day suspension was the appropriate sanction.

Related Activities

- Staff at the Office of Bar Counsel served as members of the Supreme Judicial Court Standing Advisory Committee on Professionalism and made presentations at six Practicing with Professionalism programs. Attendance at one of those programs is mandatory for all newly admitted attorneys.

- Staff at the Office of Bar Counsel served as members of the Supreme Judicial Court Standing Advisory Committee on the Rules of Professional Conduct, which continues to review, draft and propose to the Court various amendments to those rules and their comments.
- Staff at the Board of Bar Overseers and Office of Bar Counsel served as members of the Supreme Judicial Court's steering committee on lawyer well-being, which was created to consider and make recommendations about issues raised by the August 2017 report of the National Task Force on Lawyer Well-Being. In June of 2019, the committee issued a report based on the recommendations of its various constituents (including regulators, law schools, small firms, large firms, and public sector organizations) as to concrete steps that should be considered in Massachusetts. As members of the regulator's subcommittee, bar counsel and Board staff contributed proposals to promote attorney wellness in Massachusetts that could potentially be implemented by bar counsel and the Board. Bar counsel will begin work to implement some of the proposals in FY2020.
- Staff at the Board of Bar Overseers and the Office of Bar Counsel in FY2019 also participated with the Board of Bar Examiners and the Supreme Judicial Court in drafting rule-based examination questions for an ethics module that will be added to the Massachusetts component of the Uniform Bar Examination.
- The Office of Bar Counsel also continued its outreach initiative to the public that began in FY2018 and was intended to help Massachusetts residents in their relationships with lawyers and develop and enhance public understanding of bar counsel's role. During FY2019, members of the outreach committee contacted and communicated with numerous senior centers, libraries, community centers

and other venues and organizations that provide information to the public. Staff then arranged and participated in many meetings and speaking engagements, during which outreach committee members discussed and answered questions about hiring attorneys, entering into representation agreements, and managing the attorney-client relationship, as well as contacting bar counsel when concerns arise.

- As it has done for many years, the Office of Bar Counsel through its ethics helpline answers questions from Massachusetts lawyers three afternoons each week and when a lawyer seeks ethical guidance on an emergency basis. The assistant bar counsel who take the calls endeavors to guide lawyers facing ethical issues to identify and apply the relevant rules of professional conduct to the facts presented. Assistant bar counsel in FY2019 responded to more than 1540 calls on the ethics helpline covering a multitude of issues relating to the rules of professional conduct, including, in particular, questions concerning new Mass. R. Prof. C. 1.15A effective September 1, 2018, discussed above.
- Bar counsel staff made at least 20 presentations on professional conduct issues at MCLE, law schools and bar associations, including the Boston Bar Association, Massachusetts Bar Association, Women's Bar Association, Worcester Bar Association, and Business Lawyers' Network, as well as Suffolk Law School, the New England School of Law, Boston University and Boston College.
- In addition, as previously described, in an ongoing effort to assist lawyers with the trust account record-keeping requirements of Mass. R. Prof. C. 1.15, bar counsel conducts a free one-hour trust account program monthly at the Boston Bar Association. The program is presented by an assistant bar counsel who

concentrates on handling complaints arising from dishonored check notices. In FY2019, there were 96 attorneys or bookkeepers who attended the classes in Boston. The same assistant bar counsel also presented additional trust account programs in other locations in Massachusetts, including for local bar associations, title insurance companies and at Western New England School of Law and the Massachusetts School of Law.

- Trust accounting and other matters are also discussed in a full-day program on ethics and law office management, entitled “How to Make Money and Stay Out of Trouble”, that is offered twice a year in Boston by the Office of Bar Counsel and MCLE. The course also addresses, among other issues, the establishment of an attorney-client relationship, social media issues, withdrawal from representation and return of files, conflicts and conflict management, billing and collecting, as well as best practice tips from LOMAP and a presentation from LCL on stress management and substance abuse issues.
- Staff from the Office of Bar Counsel and Board of Bar Overseers also continue to participate in Inns of Court and served on the boards of directors of Lawyers Concerned for Lawyers and of Greater Boston Legal Services.

Website

The website of the Board of Bar Overseers and Office of Bar Counsel 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 on how to file complaints (including a downloadable complaint form) and of the disciplinary process.

The site includes a “look up a lawyer” function, with links to the lawyer’s contact information and disciplinary history. This section of the site also includes the

declarations of active status attorneys as to whether they carry malpractice insurance. Supreme Judicial Court Rule 4:02 requires that lawyers certify in their annual registration statements whether they are covered by professional liability insurance and whether coverage has lapsed.

Also found on the site are all disciplinary decisions since 1999; the Board's treatise on professional ethics; links to the Rules of Professional Conduct and the procedural rules governing disciplinary proceedings and registration; bar counsel's annual reports; and the collection of articles by staff on ethical issues. In addition, a "News and Announcements" section includes updates on matters of interest relating to professional responsibility and the disciplinary process, including recent articles and descriptions of and links to rule changes.

Finally, with online registration having become mandatory at the start of FY2017, the website provides links for registration renewal, registration for new attorneys, registration for in-house counsel, and registration for those seeking admission *pro hac vice*. The website also provides forms for the less frequently used categories of attorneys on *pro bono* inactive and retired status, foreign legal consultants and admission pursuant to Supreme Judicial Court Rule 3:04.

Facilitating Continuous Improvement

The Office of Bar Counsel and the Board of Bar Overseers remain committed to fairness to both lawyers and consumers. With the assistance of the Board and the Court, bar counsel works with the bar to ensure public confidence in the disciplinary process. Mutual success in this respect is shown by the exceptional cooperation that ACAP receives from attorneys, and by the participation of lawyers and other volunteers as Board members, as hearing officers for disciplinary proceedings, and as commissioners for

deceased, disabled or disciplined attorneys. Bar counsel seeks feedback from consumers and members of the legal profession concerning the efficacy of his office's procedures and the responsiveness, professionalism and competence of his staff.