



MASSACHUSETTS

BAR

ASSOCIATION

March 16, 2006

The Honorable Margaret H. Marshall
Chief Justice, Supreme Judicial Court
c/o Ms. Patricia Giblin
John Adams Courthouse
One Pemberton Square
Boston, MA 02108-1750

Dear Chief Justice Marshall:

In September 2004, the Massachusetts Bar Association created a special Task Force to study and make recommendations regarding the system for lawyer discipline in the Commonwealth. After extensive study and deliberation, the Task Force submitted its Report to the Association on April 15, 2005. That Report was then considered and adopted by the House of Delegates on May 25, 2005. A copy of the Report is provided with this letter.

I referred your request for comments on the recommendations contained in the Report of the American Bar Association's Standing Committee on Professional Discipline to the MBA Task Force on Lawyer Discipline. With the assistance of the Task Force, the MBA provides the following comments on the ABA Report.

While there are some differences between the recommendations of the Report and the Task Force, it is noteworthy that these two studies resulted in several of the same recommendations. Indeed, many of the ABA's recommendations were anticipated by our Task Force and are addressed in its report.

Absent from the ABA Report, however, was any reference to the issue of standard of proof. Massachusetts is one of a very small minority of jurisdictions requiring that the preponderance of the evidence standard be applied in bar discipline cases. The ABA Model Rules, as well as the rules of the vast majority of other states, require proof by clear and convincing evidence in these cases. Given this provision of the ABA Model Rules, it was surprising not to find any reference to the standard of proof in the Report by the ABA's Standing Committee on Professional Discipline. Since this may have been an oversight and since this is such a vitally important issue, we ask that the Court refer this issue back to the Committee for further consideration.

Following is a point-by-point analysis of the specific recommendations of the ABA Report:

Recommendation 1: The Court Should Create An Oversight Committee of the Board of Bar Overseers

Response: The MBA does not believe that an Oversight Committee of the type envisioned by the ABA Committee is necessary. However, our Task Force was critical of the manner by which the Office of Bar Counsel submits its Annual Report to the Court in relation to the backlog of undisposed cases. The Task Force recommended a description of the inventory of unresolved cases and recommended either a change in the manner of reporting that inventory or an "audit by an independent outside group." Please see pages 25-27 of the Report. The MBA urges the Court to consider seriously that recommendation.

Recommendation 2: The Office of Bar Counsel Must Continue to Eliminate Delay in the Processing of Cases and Develop Protocols to Ensure Caseload Currency

Response: A large portion of the Task Force's Report identified and made recommendations about the problem of delay. See Report, pages 15-30. While the recommendations of the ABA Committee are a good starting point, they do not go far enough to deal with the problem of delay in Massachusetts lawyer discipline. The Task Force recommended (pages 27-30) that both meaningful time standards and a statute of limitations similar to that utilized in California be implemented to force the Office of Bar Counsel to end the extraordinary investigatory periods that plague Massachusetts lawyer discipline. As the Report noted, "The public understands the concept of the statute of limitations and the need for cases to be heard on fresh evidence. On the other hand, it is doubtful that the public understands the profound delays in our system or respects a system that delays a sanction until ten (10) years after the offense at issue." The MBA urges the Court to adopt and implement a statute of limitations for lawyer discipline.

Recommendation 3: Delay at the Hearing Committee and Board Levels of the System Should be Addressed

Response: The MBA disagrees that a significant component of the delay problem in Massachusetts relates to delay at the Hearing Committee and Board levels of the system. Our study noted, pages 24-25 of the Report and Part II of Appendix D, that delay existed regardless of whether cases proceeded to adjudication by hearing or were resolved by stipulation and resignation. While there were aspects of the adjudicatory system that could be expedited, the predominant problem observed and documented was the investigatory delay in the Office of Bar Counsel. See Report, pages 24-25.

The MBA particularly disagrees with the recommendation of the ABA Committee to eliminate the provisions of Rule 4:01 that now require that hearings occur in the disciplinary district where the Respondent maintains his/her office and that the Hearing Committee Members be drawn

from that district. This recommendation runs directly contrary to the recommendations of the Task Force, pages 44-46 of our Report.

We disagree that present Rule 4:01 - which has existed since 1974 - contributes to public mistrust of the system or creates an image of "home field advantage". Rather, the local hearing panels allow the fact finding function to occur before a hearing panel that understands local community standards and practice norms and is significantly more convenient to the complainants and witnesses and particularly complainants and witnesses in the western part of the State.

Recommendation 4: All Volunteers in the Disciplinary System Should Receive More Formal Training

Response: The MBA agrees with this recommendation.

Recommendation 5: The Court Should Repeal Section 15 and Related Sections of Supreme Judicial Court Rule 4:01 to Eliminate Resignations by Lawyers Under Disciplinary Investigation and Should Amend Rule 4:01 to Consolidate Procedures for Discipline on Consent

Response: The MBA disagrees with the recommendation that the Court repeal Section 15 and related sections of the Supreme Judicial Court Rule 4:01 to eliminate resignations by lawyers under disciplinary investigation. Particularly in a system as plagued by delay and backlog as we have in the Commonwealth, lawyers under investigation should be encouraged, and not discouraged, to resign in lieu of a lengthy hearing. The ABA Committee notes that currently such resignations almost uniformly result in a Board recommendation for an ultimate Order of Disbarment by the Court. Such Orders of Disbarment are sufficient to resolve any problem of negative public perception as discussed by the ABA Committee.

Recommendation 6: The Court Should Consider Amending Supreme Judicial Court Rule 4:01 to Create a Process by Which Petitions for Discipline on Matters Involving Lesser Misconduct are Handled on an Expedited Basis

Response: The MBA disagrees with Recommendation 6. Our position, as noted in the Task Force Report, pages 44-46, is that the practice of assigning disciplinary cases to Special Hearing Officers instead of Hearing Committees should be discouraged and not encouraged. Moreover, the Task Force believes that few, if any, cases for discipline would be designated by Bar Counsel as appropriate for the imagined streamlined procedures. The large majority of disciplinary cases in Massachusetts which ultimately resulted in private discipline or no discipline are cases in which Bar Counsel initially requested more serious discipline but was unable to establish the factual basis for such discipline. See Report, page 30-31, *The Need for Mediation*.

Recommendation 7: The Court Should Eliminate the Use of Private Admonitions After the Filing of a Petition for Discipline and Further Streamline the Rules Relating to Administration of Admonitions

Response: The MBA disagrees with the recommendation that would eliminate the use of Private Admonitions as a form of formal discipline. The ABA Committee may be insensitive to the long existing body of case law in Massachusetts calling for imposition of Admonitions in appropriate cases. The availability of an Admonition as a type of formal discipline maintains flexibility in the system and we note that the Court itself has utilized the Admonition as a form of appropriate discipline in recent years. (See e.g., *In the Matter of Two Attorneys*, SJC-BD-048, March 1, 2005 (Cowan, J)). The elimination of the Admonition as a type of formal discipline will cause confusion in cases where the application of precedent would call for imposition of an Admonition.

Recommendation 8: The Rules of the Board of Bar Overseers Should be Amended to Change the Manner in which Pre-Hearing Motions are Ruled Upon, to Require Pre-Hearing Conferences and to Permit Encouragement of Settlement at Such Pre-Hearing Conferences

Response: The MBA agrees with Recommendation 8 and notes that it follows in many respects the recommendations of the Task Force Report, page 42-44. We disagree, however with the comments in the last paragraph of the ABA Recommendation on this point which seem to denigrate the role that mediation can play in the effective disposition of bar discipline cases. As we noted in our Report, the problem of delay, the increasing number of lengthy hearings, and the disciplinary system's reliance on volunteers indicates that some effort to mediate bar discipline cases is appropriate. This concept did not originate with the MBA Task Force. It existed as early as the 1991 Memorandum Of Understanding Between the Board and the Office of Bar Counsel. See Report, Appendix I.

Recommendation 9: Supreme Judicial Court Rule 4:01 and the Rules of the Board of Bar Overseers Should be Amended to Liberalize Discovery

Response: The MBA agrees with Recommendation 9 for the reasons set forth in the Task Force Report, pages 36-42. The Task Force notes that none of the imagined problems of liberalized discovery have occurred in the many states which follow the ABA Model Rules allowing for pre-hearing discovery.

Recommendation 10: Supreme Judicial Court Rule 4:01 and the Rules of the Board of Bar Overseers Should be Amended to Streamline Appeals at Various Levels of the Disciplinary Process

Response: These recommendations are not necessary. The elimination of the Single Justice Appeal will cause confusion relating to the significant body of case law that currently exists concerning bar discipline and may well result in cases that could be disposed of by the Single Justice being heard by the full bench of the Court. As noted in its Report, the Task Force attributed the problem of delay in Massachusetts to the matter of investigatory delay, particularly in the Office of Bar Counsel. Delay at the appellate stage was not a significant contributing factor to the problem.

Recommendation 11: The Rules Relating to Reinstatement Proceedings Should be Amended to Ensure Decisions are Prompt and to Protect Sensitive Information Contained in the Questionnaire From Public Disclosure

Response: The MBA agrees with this Recommendation.

Recommendation 12: The Court Should Consider Amending Supreme Judicial Court Rule 4:01 Section 18(3) to Eliminate the Ability of Disbarred or Suspended Lawyers to Request Court Permission to Work as a Paralegal

Response: The Task Force did not comment on this Recommendation because it was outside the scope of its mandate from the MBA. The MBA does not have a position on this recommendation.

Recommendation 13: The Supreme Judicial Court Should Adopt a Rule Creating an Alternatives to Discipline Program

Response: The MBA agrees with this Recommendation for the reasons set forth in the Task Force Report, pages 34-35.

Recommendation 14: The Court Should Consider Eliminating Indefinite Suspensions

Response: The MBA disagrees with this Recommendation and finds it somewhat inconsistent with the goal of flexibility in discipline embraced by Recommendation 15 below. The ABA Committee may be unfamiliar with the long existing body of case law in Massachusetts imposing indefinite suspensions and also insensitive to the confusion that will be caused if that form of discipline is eliminated.

Recommendation 15: The Court Should Amend Supreme Judicial Court Rule 4:01 to Provide for Probation and Stayed Suspensions as Sanctions and to Set Forth Specific Requirements for the Imposition, Monitoring and Revocation of Probation

Response: The MBA agrees with this Recommendation and supports a movement towards greater flexibility in various forms of discipline available.

Recommendation 16: The Supreme Judicial Court Should Continue to Use, and the Rules of the Board of Bar Overseers Should be Amended to Require Hearing Committees, Special Hearing Officers and the Board to Use and Cite the ABA Standards for Imposing Lawyer Sanctions

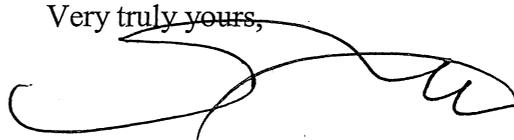
Response: The MBA disagrees with this Recommendation. It would promote confusion in the application of discipline and abandon many years of precedent in bar discipline in the Commonwealth.

Recommendation 17: The Court Should Study Whether to Institute the Mandatory Arbitration of Lawyer/Client Fee Disputes in the Future

Response: The Task Force did not comment on this Recommendation because it was outside the scope of its mandate from the MBA. The MBA has long provided fee arbitration services and would be happy to assist the Court in implementing a mandatory program should the Court decide to proceed in this way.

In conclusion, the MBA thanks the Court for the opportunity to respond to the ABA Standing Committee Recommendations. Please let us know if we can be of further assistance.

Very truly yours,



Warren F. Fitzgerald
President

RAB:dmd

REPORT OF THE ATTORNEY FINANCIAL RESPONSIBILITY
DISCLOSURE TASK FORCE

It is the recommendation of the Attorney Financial Responsibility Disclosure Task Force (a.k.a. the malpractice insurance task force) that the Massachusetts Bar Association oppose the proposed amendment to Rule 1.4 of the Massachusetts Rules of Professional Conduct which amendment would require disclosure of information regarding professional liability insurance.¹

Rather, it is the recommendation of the task force that if Rule 1.4 is to be amended that following language be adopted:

A lawyer should have adequate resources available to compensate a client for any harm (damages) caused by the lawyer in the course of legal representation.

The members of the task force were unanimous in many of their views relative to insurance. No member of the task force would practice law without adequate professional liability insurance. However, the proposed change to Rule 1.4 would be tantamount to an attorney being prohibited from practicing law without malpractice insurance. The task force is equally unanimous in its view that Massachusetts should not, in effect, join Oregon as the only state requiring professional liability insurance especially where its availability and affordability is not guaranteed.

The preamble and scope of the Massachusetts Rules of Professional Conduct as set forth at Rule 3:07 of the Supreme Judicial Court Rules leads the task force to the conclusion that in the event that any rule relative to professional liability insurance is adopted, it should be aspirational. The task force followed the guidance of paragraph [1]

¹ Copies of both of the rule change proposed by the BBO and the ABA Standing Committee on Client Protection are attached.

of the scope in using the word “should” in our proposed language. It was the consensus of the task force that a mandatory rule relative to professional liability insurance along the lines proposed by the Board of Bar Overseers goes beyond the “preamble and scope” of the rules.

The task force is concerned that the language set forth in proposed Rule 1.4(c) relative to informing a client regarding a lack of insurance does not reflect the realities of the current insurance environment and does not properly recognize changes in the insurance marketplace. Legal malpractice insurance consistently transitions from hard to soft markets based on complicated economic and market forces. An attorney’s ability to practice law should not be decided by such forces. The purpose of insurance underwriting is to insure those risks that are profitable. The ability of an attorney to practice the highest standards of our profession does not necessarily correlate to a low loss ratio. The task force is aware of situations where attorneys possess professional liability insurance with limits in excess of those set forth in proposed Rule 1.4(c) but also contain exclusions that could apply to the type of work being done by the attorney. The task force is concerned that situations could arise where an attorney believes who himself to be covered therefore does not send the proposed “Notice to Client” is subsequently denied coverage by his carrier due to a change in policy language at renewal and then would be subject to a disciplinary proceeding. The task force believes that this is a result that should be avoided. The task force does not believe this to be a rare or hypothetical situation, rather, with the changing insurance environment in which we live, this is a situation that is occurring presently. The task force is aware of situations where attorneys

have believed themselves to be covered when performing the work only to learn when the claim is made that due to changes in policy language that the claim is excluded.

The task force is especially concerned about situations where the attorney is (or becomes) uninsured through no fault of his/her own. Again, the task force views that sending the proposed "Notice to Client" will likely result in the client terminating his/her counsel. The proposed rule would place an undue burden on the lawyer to notify past and present clients of a change in coverage that maybe wholly created by an insurance industry that is under no obligation to provide a lawyer with a policy at a fair or reasonable price. The task force is aware of circumstances where an attorney has been nonrenewed and became uninsurable because of a frequency of claims. The fact that the attorney is vindicated in all cases is almost irrelevant to the insurance market. In other cases, attorneys with otherwise unblemished records have performed negligently due to a life-threatening illness or family catastrophe that results in a claim which leads to uninsurability. Once the illness or catastrophe has been resolved, such an attorney should be permitted to return to his or her practice without suffering the death-knell of informing one's clients that he/she lacks insurance coverage. The task force is aware of circumstances where attorneys have been denied coverage because of one claim that results in both civil exposure and a protracted BBO proceeding, only to be resolved in favor of the attorney. The task force is aware of situations where attorneys have had to practice for some five years without coverage until the disciplinary proceeding was no longer considered a blemish to an underwriter. The task force is also concerned about eroding limits based on claims, and the consequences an attorney will suffer by being

forced to inform clients that, as a result of a payment by an insurer, the attorney's limits have been reduced.

The task force is also opposed to the proposed amendment to SJC Rule 4:02 that would require an attorney to include on the annual registration statement a certification as to whether or not the attorney maintains professional liability insurance. As indicated above, the task force is opposed to mandatory professional liability insurance. The task force believes that the registration requirement is simply the first step towards mandatory professional liability insurance.

It is the unanimous opinion of the task force that any rule relative to professional liability insurance should be aspirational. The task force believes that every attorney should have adequate financial resources (including professional liability insurance) available in the event that the attorney makes a mistake. The limits of that insurance should be based upon the scope of the attorneys practice and not figures established by rule. It is the observation of the members of the task force that to the extent that there is a problem relative to professional liability insurance it is not that attorneys are practicing without coverage but that the limits are too low and they are practicing without sufficient coverage. Hence, the task force's recommendation that a lawyer should have "adequate financial resources available to compensate a client."