No. 08-

In the
Supreme Court of the United States

In the Matter of Disbarment of Barbara C. Johnson
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Disciplinary actions are "adversary proceedings of a quasi-criminal nature." *In re Ruffalo*, 390 U.S. 544, 551 (1968). In some State jurisdictions, disciplinary actions are neither civil nor criminal but *sui generis*. In some States, such actions are judicial in nature, and in other States, they are administrative in nature. Massachusetts is one of the latter States. In the action against Petitioner, her Fourteenth Amendment rights to due process and equal protection were denied; e.g.. ***lacking*** was sufficient notice, prosecution witnesses, opportunity to be heard, a public trial, compliance with well-established rules of practice and procedure and of evidence, and a fair and impartial tribunal. The genesis of the disciplinary action arose out of Petitioner's exercise, during her gubernatorial campaign in 2002 and on her website, of her First Amendment right to free, political speech, which the Massachusetts Supreme Judicial Court ["SJC"] found was prejudicial to the administration of justice and thus violative of Mass.R.Prof.C. 8.4(d). The question presented is:

1. Whether lawyers may be stripped of both their First Amendment rights and the full sweep of their Fourteenth Amendment rights to due process and equal protection.

The Massachusetts SJC created the Board of Bar Overseers ["BBO"] and the Office of Bar Counsel ["OBC"] as independent administrative bodies to act in unison as the SJC's disciplinary arm. Given that the BBO and OBC lack an enabling statute and bylaws, the SJC identifies them as "affiliated entities." The SJC also appoints both the BBO General Counsel and the OBC Bar Counsel, and although attorneys' annual licensing fees finance the BBO and OBC, the SJC retains the control and supervision of the Siamese entities. When a final determination of a disciplinary action is contested, the BBO files a recommendation of discipline in the single-justice session of the SJC. In the instant case, the single justice adopted the BBO's recommendation. The full panel of the SJC affirmed the judgment of disbarment by the single-justice. The questions presented are:

2. Whether, by adjudicating an action brought by their agents and in which one agent is a named party, the SJC has a conflict of interest that makes such a scheme for the discipline of attorneys unconstitutional.
3. Whether the BBO and OBC are unconstitutional entities.

The single justice disbarred and ordered Petitioner to withdraw, prior to her appeal, from her then-existing cases. Arguing that compliance with the order would deprive her clients of their right to have counsel of their choice, interfere with the orderly prosecution of their cases, cause her clients harm and damage, and interfere with her obligation to them, Petitioner did not comply and was held in contempt. The question presented is:

4. Whether Petitioner's noncompliance was justified.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Massachusetts Supreme Judicial Court were petitioner Barbara C. Johnson and respondents Board of Bar Overseers of Massachusetts and/or the Office of Bar Counsel of Massachusetts.

Johnson uses the expression "and/or," for there is a legal conundrum as to whether the entities are separate entities or whether one is subservient to the other. That is, on the Massachusetts Supreme Judicial Court website, they are described as "affiliated entities." Yet, in an SJC opinion re some other matter, the Office of Bar Counsel was deemed to be a subordinate of the Board of Bar Overseers.

There is no enabling statute to clarify the issue.

The Board of Bar Overseers and the Office of Bar Counsel also have no bylaws.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Barbara Johnson respectfully petitions for a writ of certiorari to review the judgments of disbarment and of contempt and the affirmance thereof by the Massachusetts Supreme Judicial Court. In plain contravention of the requirements of the Constitutions of the United States and of the Commonwealth of Massachusetts, the Board of Bar Overseers and Office of Bar Counsel embarked on an *ad hoc*, standardless, subjective, arbitrary, and capricious exercise that deprived the petitioner of her rights to due process and equal rights guaranteed by the Fourteenth Amendment, and ultimately recommended to the SJC that the Petitioner be disbarred, a recommendation that the SJC adopted.

OPINIONS BELOW

Johnson filed two appeals, one from the judgment of disbarment, another from the finding and rulings on contempt. The former was entered into the Massachusetts Supreme Judicial Court for the Commonwealth as SJC-09820. The latter was entered into same court as SJC-09866.

On 5 December 2007, the Massachusetts Supreme Judicial Court for the Commonwealth ["SJC"] consolidated the appeals and affirmed both of the judgments issued by Justice Francis X. Spina, who sat as a single justice in the Massachusetts Supreme Judicial Court for Suffolk County [aka the "County Court"].

The consolidated opinion by the full panel of the SJC entered on that same date, 5 December 2007. The opinion was published as In re Johnson, 450 Mass.

165, 877 N.E.2d 249 (2007) [**APPENDIX-A at APP-1**].

The entry of judgment of disbarment after rescript was entered into the Massachusetts Supreme Judicial Court for Suffolk County on 4 January 2008.

In Massachusetts, an appeal from an attorney-disciplinary proceeding at the Board of Bar Overseers, identified by the SJC as an "affiliated entity," is taken in the single-justice session of the County Court, not the Appeals Court.

On 9 August 2006, the Judgment of Disbarment [**APPENDIX-D at APP-21**] issued from the County Court (Spina, F.X., J.). This judgment appears not to have been published. On the same day, Justice Spina also issued a Memorandum and Judgment of Disbarment [**APPENDIX-E at APP-26**]. This document was published in the Massachusetts Lawyers Weekly, but does not appear in Westlaw's database, so Petitioner assumes that it was not published in the Commonwealth's official reporter.

On 19 October 2006, Justice Spina issued his Findings and Rulings on Bar Counsel's Petition for Contempt against Johnson [**APPENDIX-C at APP-14**], again in the County Court. On 20 October 2006, Justice Spina amended a sentence in his findings and issued the document entitled Amended Findings and Rulings on Bar Counsel's Petition for Contempt [**APPENDIX-B at APP-7**].\[1]/

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[1] Justice Spina's amendment consisted of a change in one sentence.
On October 19th, the sentence read,

> "There is nothing remotely flimsy or whimsical about the findings of the Board of Bar Overseers as to the respondent's misconduct" [**APP-19**].

On October 20th, the sentence read,

> "There is nothing facially flimsy or whimsical about the findings of the Board of Bar Overseers that might render the judgment of disbarment transparently invalid" [**APP-12**].

JURISDICTION

The Board of Bar Overseers recommended disbarment on 20 March 2006. Subsequently, the BBO general counsel filed an Information seeking disbarment on 16 May 2006 with the Supreme Judicial Court for Suffolk County (single-justice session). The County Court adopted the BBO's recommendation of disbarment and issued the judgment of disbarment on 9 August 2006, the judgment of contempt on 19 October 2006, and the amended judgment of contempt on 20 October 2006. The affirming judgments of the Massachusetts Supreme Judicial Court for the Commonwealth entered into the Full Court on 5 December 2007 and the rescript entered into the County Court on 4 January 2008.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

U.S. Const., Article 6, cl. 2. Clause 2 of Article VI reads in pertinent part, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. Const., First Amendment. The First Amendment provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances."

U.S. Const., Fifth Amendment. The Fifth Amendment provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

U.S. Const., Ninth Amendment. The Ninth Amendment provides, in pertinent part: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U.S. Const., Fourteenth Amendment, Section 1. Section 1 of the Fourteenth Amendment reads in pertinent part, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the Commonwealth of Massachusetts

Mass. Const., Part the First, Declaration of Rights, art. XII. Regulation of prosecutions; right of trial by jury in criminal cases. Article XII reads: "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. . . ."

Mass. Const., Part the First, Declaration of Rights, art. XXIX. Article XXIX reads in pertinent part, "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. . . .

STATUTES INVOLVED

Federal Statutes

28 U.S.C. §1257(a). JURISDICTION AND VENUE: State courts; certiorari. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. §2201(a). DECLARATORY JUDGMENTS: Creation of remedy. In a case of actual controversy within its jurisdiction, . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further

relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Massachusetts Statutes

M.G.L. c. 30A. State Administrative Procedure. [See BBO Rules 3.2 and 3.39]. Section 11A. Definitions The following terms as used in section eleven A1/2 shall have the following meanings: . . . "'Governmental body', a state board, committee, special committee, subcommittee or commission, however created or constituted within the executive or legislative branch of the commonwealth or the governing board or body of any authority established by the general court to serve a public purpose in the commonwealth or any part thereof, **but shall not include the general court or the committees or recess commissions thereof, or bodies of the judicial branch, or any meeting of a quasi-judicial board or commission** held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it. . . . [emphasis supplied].

M.G.L. c. 209C, §13. Children Born out of Wedlock: Inspection of documents; copies; segregation of records. In an action to establish paternity or in which paternity of a child is an issue, all complaints, pleadings, papers, documents or reports filed in connection therewith, docket entries in the permanent docket and record books shall be segregated and unavailable for inspection only if the judge of the court where such records are kept, for good cause shown, so orders. . . .

M.G.L. c. 233, §1, Issuance of summonses for witnesses. A clerk of a court of record, a notary public or a justice of the peace may issue summonses for witnesses in all cases pending before courts, magistrates, auditors, referees, arbitrators or other persons authorized to examine witnesses, and at all hearings upon applications for complaints wherein a person may be charged with the commission of a crime. . . .

RULES INVOLVED

Former Massachusetts Supreme Judicial Court Rule 3:07. Massachusetts Rules of Professional Conduct\[FN2]/

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[2] The Rules of Professional Conduct were revised and the Canons were subsumed by them; e.g., Canon 1, DR 1-102(A)(5), was subsumed in Mass.R.Prof.C 8.4(d). The OBC had charged Johnson under the new rules, but the special hearing officer added the former Canons to his written findings, resulting in the duplication of alleged violations. The SJC also used both the former Canons and the new rules, continuing the duplication of alleged violations.

Notwithstanding that the words "prejudicial to the administration of justice" do not appear in the SJC opinion [**APP-1 *et seq***], there are several references to Rule 8.4(d) [**APP-3-4; *see also* APP-17, 21-22, 29**], which was the subject of two motions filed by Petitioner in the BBO: **(1)** Motion to Dismiss Charges of Violation of Mass. Rules of Professional Conduct 8.4(c), (d), and (h); **(2)** Sec-

Former Canon 1, DR 1-102(A)(5) and (6). **(A)** A lawyer shall not: . . . **(5)** Engage in conduct that is prejudicial to the administration of justice. **(6)** Engage in any other conduct that adversely reflects on his fitness to practice law.

Former Canon 6, DR 6-101(A)(1)-(3).\[FN3]/ **(A)** A lawyer shall not: **(1)** Handle a legal matter which he knows or should know that he is not competent to handle without associating with him a lawyer who is competent to handle it. **(2)** Handle a legal matter without preparation adequate in the circumstances. **(3)** Neglect a legal matter entrusted to him.

Former Canon 7, DR 7-101(A)(3). **(A)** A lawyer shall not: **(3)** Prejudice or damage his client during the course of the professional relationship except as required under DR 7-102(B)

Supreme Judicial Court Rule 3:07. Massachusetts Rules of Professional Conduct

Mass.R.Prof.C. 1.6(a, b(2)). Confidentiality of Information. **(a)** A lawyer shall not reveal confidential information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b). **(b)** A lawyer may reveal, and to the extent required by Rule 3.3, Rule 4.1(b), or Rule 8.3 must reveal, such information: . . . **(2)** to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a . . . civil claim against the lawyer . . . , or to respond to allegations in any proceeding concerning the lawyer's representation of the client. . . .

Mass.R.Prof.C. 1.9(c). Conflict of Interest: Former Client. **(c)** A lawyer who has formerly represented a client in a matter . . . shall not thereafter, unless the former

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ond Motion for More Definite Statement or in the Alternative Dismiss the Petition for Discipline.

[3] The SJC opinion did not state explicitly how Petitioner violated Canon 6, DR 6-101. The only hint is the Court saying Petitioner should have appealed certain orders. Because one order arose out of a closed case without anything cognizable as a Complaint and no notice of any Complaint and/or hearing was served on either Petitioner's client or Petitioner, there was no possibility of an appeal. That order commanded Johnson to remove from her website webfiles that never existed on her website.

A second order by a retired judge was in a letter to Johnson. Given that the order was invalid on its face and was filed in no court, no appeal was possible.

A third judgment merely allowed the OBC prosecutor to obtain files from a closed case in Bristol County Probate & Family Court. Petitioner's client had previously unsuccessfully tried to open that case. This judgment implicated M.G.L. c. 209C, §13, amended and effective as of 30 March 1998, several years before Johnson filed an appearance. Johnson fought this in the lower court, at the BBO, and attempted to persuade the higher appellate courts in the Commonwealth to review the matter and interpret §13 as amended. The higher courts declined the invitation to interpret the amended statute.

client consents after consultation: **(1)** use confidential information relating to the representation to the disadvantage of the former client, to the lawyer's advantage, . . . except as Rule 1.6, Rule 3.3, or Rule 4.1 would permit or require with respect to a client; or **(2)** reveal confidential information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Mass.R.Prof.C. 1.15(a-c), Safekeeping Property (in effect through 12/31/03).\[FN4]/ **(a)** A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the State where the lawyer's office is situated, or elsewhere with the consent of the client or third person. . . . **(b)** Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. . . . **(c)** When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

Mass.R.Prof.C. 1.16(d), Declining or Terminating Representation\[FN5]/ **(d)** Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned.

Mass.R.Prof.C. 3.4(c). Fairness to Opposing Party and Counsel. A lawyer shall not: **(c)** knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

Mass.R.Prof.C. 8.3(b). Reporting Professional Misconduct. A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Commission on Judicial Conduct.

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[4] Despite .the BBO having found ***no*** violation of Mass. R. Prof C. 1.15(a) and 1.16(d) **[BBO Decision, n. 7], b**oth the single justice and the full panel of the Mass. SJC found that Johnson had violated Mass.R.Prof C. 1.15(a)-(c) and 1.16(d) [**APP-3-4**]. The BBO findings read:

> We agree with the parties (see Bar Counsel's opposition to the Respondent's appeal) that, on the facts presented here, the respondent did not violate Mass. R. Prof C. 1.15(a) (safekeeping trust property) and 1.16(d) (upon termination of representation, taking steps to protect client's interests and refunding any unearned fee), **since the special hearing officer did not find that the respondent charged an excessive fee or that she owed her former clients a refund of an unearned fee.**

[5] *See* note 4, *supra.*

Mass.R.Prof.C. 8.4(c, d, h). Misconduct. It is professional misconduct for a lawyer to: **(c)** engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; **(d)** engage in conduct that is prejudicial to the administration of justice; **(h)** engage in any other conduct that adversely reflects on his or her fitness to practice law.

Supreme Judicial Court Rule 4:01. Bar Discipline

§5(3)(i). The Board of Bar Overseers. **(3)** The Board of Bar Overseers . . . **(i)** with the approval of this court, may adopt and publish rules of procedure and other regulations not inconsistent with this rule…

§10. Refusal of Complainant to Proceed; Compromise; or Restitution. . . . A lawyer shall not, as a condition of settlement, compromise or restitution, require the complainant to refrain from filing a complaint, to withdraw the complaint, or to fail to cooperate with the bar counsel.\[FN6]/

Board of Bar Overseers Rules

BBO Rules, §3.2. Procedure to Apply. Except where inconsistent with these Rules, formal proceedings before hearing committees, hearing panels, special hearing officers and the Board shall conform generally to the practice in adjudicatory proceedings under Chapter 30A of the General Laws (State Administrative Procedure).

BBO Rules, §3.15(f). Service of Petition on Respondent and Answer. **(f)** Request to Be Heard in Mitigation. The respondent shall include in the answer any facts in mitigation and may request that a hearing be held on the issue of mitigation. Failure to include facts in mitigation constitutes a waiver of the right to present evidence of those facts.

BBO Rules, §3.18(a). Prehearing Motions. **(a)** Motions Other Than Motions to Dismiss. . . . the motion shall be submitted to a member of the Board for determination. The Board member may refer the motion to . . . or to the special hearing officer for determination. A hearing on the motion may be held at the discretion of the . . . special hearing officer. . . .

BBO Rules, §3.22(b). Public Access to Proceedings; Protective Orders. **(b)** Upon the service of a petition for discipline, the Board's proceedings are open to the public…

BBO Rules, §3.39. Admissibility of Evidence. In any proceeding the admissibility of evidence shall be governed by the Rules of Evidence observed in adjudicatory pro-

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[6] This arose out of the retired judge's complaint to the OBC prosecutor. Petitioner assumes the complaint was oral, given that she has not seen a writing containing the alleged complaint.

ceedings under Chapter 30A of the General Laws (State Administrative Procedure).

BBO Rules, §4.5(a-b). Hearing Subpoenas. **(a)** Bar Counsel and the respondent may request that the . . . special hearing officer or the Board issue a subpoena requiring the attendance and testimony of a witness, including the respondent, and the production of any evidence, including books, records, correspondence or documents, relating to any matter in question in the proceeding. **(b)** The request shall be made in writing . . . to the special hearing officer, or to a member of the Board who may forthwith issue the subpoena.

SINGLE JUSTICE PRACTICE AND PROCEDURE

published at
http://www.sjccountyclerk.com/singjusprpr.html

SJC Rule 4:01 of the Supreme Judicial Court grants the county court jurisdiction over bar discipline matters involving Any lawyer admitted to, or engaging in, the practice of law in the Commonwealth and empowers the Board of Bar Overseers (board) with the responsibility to investigate and prosecute such matters. Those actions most frequently filed by the Office of Bar Counsel (bar counsel) are petitions for suspension (temporary, term or indefinite), disbarment and reciprocal discipline. The grounds upon which bar counsel may petition the single justice for disciplinary action against an attorney include:

- misuse or loss of client funds,
- neglect of client interests,
- fraudulent conduct,
- sanction in another jurisdiction,
- conviction of a crime and
- misrepresentation to the court.

. . . An order of the single justice in bar docket matters is appealable to the full court and the standard by which the sanction imposed is reviewed is whether the sanction is markedly disparate from those ordinarily entered in similar cases.\[FN7]/

STATEMENT OF THE CASE

I. Nature of the Case: The Underlying Attorney Disciplinary Proceeding

This case involves a litigator, Barbara C. Johnson [“Johnson”], against whom

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7 Matter of Kerlinsky, 428 Mass 656, 664 (1999).

the Massachusetts Office of Bar Counsel ["OBC"] brought disciplinary charges before the Massachusetts Board of Bar Overseers ["BBO"] two months after the November 2002 election, in which she ran for governor on a platform of court reform, the need for judicial accountability, particularly in the family-law court, and the abolishment of judicial and quasi-judicial immunity.

Johnson also maintains a website, falseallegations.com, which has drawn the attention of millions across our nation and on which she publishes fundamental legal "how-to" and "what-is" information, some of her state and federal pleadings, and opinions—hers and occasionally some of diverse courts. A few dozen of her website files were the primary evidence in the disciplinary action against her.\FN8/

How the Federal Question Was Presented

The federal question arose out of the OBC charging that Johnson violated Mass.R.Prof.C 8.4(d) by "engag[ing] in conduct that is prejudicial to the administration of justice."

Constituting the conduct that was allegedly "prejudicial to the administration of justice" was **(a)** Johnson's run for governor in 2002 on the afore-mentioned platform, **(b)** the website publication of pleadings that criticized judges, and **(c)** filing

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8 In her Motion to Dismiss Count I on the Grounds That Without an Adjudication by an Article III Court, There Can Be No Ethical Violation of Professional Ethics (dated 28 November 2003), she argued that that the BBO does not have jurisdiction over First Amendment matters.

She also argued that the disciplinary action was in retaliation for exercising her right to political speech and free expression, to wit, for exercising both her right and her obligation to criticize the judicial system where she saw wrongdoing and those judges who intentionally deprived parties of their rights to constitutional due process and equal protection. The First Amendment issue was a recurring theme in the proceedings and pleadings below.

appeals when she believed judges had controverted existing law, abused their discretion, and deprived her clients of their constitutional and statutory rights.\FN9/

Case law in Massachusetts and in other state and federal jurisdictions is overwhelmingly in favor of Johnson, i.e., supports her positions that lawyers have a duty to report judicial wrongdoing and judicial inequities and that the First Amendment guaranteed free, political speech.\FN10/

References to Johnson's rights to free, political speech, the First Amendment, and retaliation for exercising her First Amendment rights are throughout the pleadings below—beginning with her Amended Answer to the Petition through 6 November 2007, when she orally argued her appeal to the full panel of the SJC.\FN11/

How the BBO Avoided "Spelling Out" the Federal Question

To camouflage the Court's admitted dismay at Johnson's free, political speech about the judiciary, the OBC— supervised and controlled by the SJC—brought

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9 . . . Time, place and circumstances determine the constitutional protection of utterance. The First Amendment and the Fourteenth Amendment, insofar as it protects freedom of speech, are no exception to the law of life enunciated by Ecclesiastes: . . . "(A) time to keep silence, and a time to speak." Eccles. 3:1, 7. Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice.

In re Sawyer, 360 U.S. 622, 666 (1959) (Frankfurter, J. with Clark, Harlan, and Whittaker, JJ., joined, dissenting).

10 Republican Party of Minnesota v. White, 536 U.S. 765 (2002) (protection afforded campaign speech). "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." Thornhill v. Alabama, 310 U.S. 88, 101-102 (1940). The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). Meyer v. Grant, 486 U.S. 414, 421 (1988).

11 Johnson's arguments against the judgments of disbarment and contempt are memorialized in webcasts archived at http://www.suffolk.edu/sjc/archive/2007/SJC_09820.html and http://www.suffolk.edu/sjc/archive/2007/SJC_09866.html.

three counts of charges for which there was no supporting, evidence. The purpose: to deflect Johnson's criticism of the judiciary, particularly in family-law cases.

The OBC and BBO also improperly used the doctrine of offensive collateral estoppel to deprive Johnson of a defense to Count III. By so doing, the BBO precluded the use by Johnson of a clearly fabricated document supplied her by the OBC prosecutor or of any other document to defend against that count.

On 2 December 2003, the OBC prosecutor declared during her opening statement that she would establish Count III "largely but not totally . . . by the Chair's ruling on issue preclusion, and by certain admissions by the respondent in her answer." The so-called admissions by Johnson were ***never*** identified by the prosecutor before, during, or after the so-called trial.

Because the SJC affirming decision contains a very different version of the facts of Counts I, II, and III, Johnson has appended to the decision in the Appendix summaries of the facts of those counts at **APP-41** and a second copy of the SJC decision with her own commentary ***interleaved*** at **APP-44**, which she incorporates in entirety herein by reference.

II. Proceedings in the Massachusetts Board of Bar Overseers

In the BBO, Petitioner filed diverse motions, including motions to dismiss, motions for protection orders, motions to preclude.\[FN12]/ All of Petitioner's motions,

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12 A detailed discussion of them may be seen on Petitioner's website at Drano Series #102 at http://www.falseallegations.com/drano102-bbo-star-chamber-92503-forum.htm. The actual motions she filed at the BBO appear (albeit without the repetition of the caption of the disciplinary action . . . which would make for boring reading for the visitors to the site) were gathered and uploaded to

without hearings, were summarily endorsed "Denied" and all the OBC prosecutor's motions were, without hearings, summarily endorsed "Allowed."

Motions to Dismiss

Specifically, Johnson filed **(a)** a motion to dismiss Count II on the grounds that the Parkers' (pseudonym) consent to the website publication of their story constituted a waiver of confidentiality, **(b)** a motion to dismiss Count III on the grounds that during the 5-8 year delay in bringing a disciplinary action, the tape of a necessary hearing was overwritten by the Commonwealth and an eyewitness had passed away, and **(c)** a motion to dismiss Count III based both on the admission by the prosecutor that an *ex parte* communication occurred between the judge and opposing counsel, and on a material document having been physically altered.

OBC's Motion for Protection Order and Impoundment

The OBC prosecutor moved for a protective order, but her motion was not only a motion for a "protective order" but also

- a motion for impoundment
- a motion to censor Johnson's website
- a motion to enjoin Johnson's political and free speech and
- a motion for secret hearings

The OBC also failed to acknowledge and identify the standards to be followed when determining such potpourri motions as Bar Counsel's, failed to show good cause,

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Drano Series #106 at http://www.falseallegations.com/drano106-motions-filed-at-bbo-n0603.htm. The pleadings in the latter file ought to be in one of the 12 volumes comprising the BBO's appendix.

failed to follow the procedures for impoundment, failed to state the scope of the website censorship sought, failed to state how the censorship was to be implemented, failed to state the authority giving the Bar the right to censor Johnson's website and stifle her political speech and free expression and to override Johnson's First Amendment rights, and failed to identify with sufficient particularity that which Bar Counsel wanted to prevent disclosure and that which he wanted to impound.

Despite the flaws in Bar Counsel's motion, the BBO summarily allowed it.

Motion to Preclude

The BBO Chair did with Bar Counsel's motion for issue preclusion that which she did with Bar Counsel's motion for a protective order: she usurped the power of the special hearing officer [*see* BBO Rule 3.18(a)] and precluded Johnson from showing that the lower-court orders were based on fabricated facts and findings and on, literally, a materially altered document.

Other examples of OBC's bad behavior in the disciplinary action are **(1)** that the charges were never clear or identified, **(2)** that Johnson was never given an opportunity to be heard, **(3)** that Johnson was told she would be precluded from presenting any exculpatory facts to the court, and **(4)** that at a pretrial hearing, the hearing officer repeatedly ordered the transcriptionist not to record when Johnson spoke. [***See* on APP-63 Figure 1,** an image excerpted from a transcript of the first and final pretrial conference. Johnson believes the instruction to manipulate the

record was inadvertently left in the transcript].\[FN13]/

Mitigation

Johnson pled mitigation, as allowed by Rule 3.15(f).

The Day of "Trial"

On the day of the scheduled trial, 2 December 2003, the OBC prosecutor confirmed that she had no witnesses and the BBO hearing officer quashed all of Johnson's trial witness subpoenas. *See, supra,* M.G.L. c. 233, §1, and BBO Rules, §4.5.\[FN14]/ Johnson also learned that the prosecutor's primary documentary evidence were unauthenticated copies of dozens of Petitioner's website files, again raising First Amendment free, political speech issues.

During Johnson's opening statement, the hearing officer ordered the public out of the hearing room [**Appendix A at APP-4**]. Johnson left with the public [**Appendix A at APP-4 and Appendix G at 62-63**]. The stated reason for excluding the public was that Johnson had used the given name of a complainant and that by so doing, she had violated an order commanding her to use pseudonyms. That was untrue. There was no such order. The prosecutor, confirming what Johnson said, also told the hearing officer there was no such order, but he refused to reverse

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13 Johnson was further hampered during the BBO proceedings by there being **(a)** no predictable rules of evidence, **(b)** no available records as to the admissibility of documents in past cases, and **(c)** a unique interpretation of the scope of confidentiality and entitlement at the Bar.

14 Massachusetts caselaw regarding the applicability of the Administrative Procedures Act, M.G.L. c. 233, to disciplinary proceedings at the BBO conflicts with the common-law interpretation of the applicability of the APA in nondisciplinary cases. See **APPENDIX A at APP-4, APPENDIX E at APP-37, and APPENDIX G at APP-60, 64-65**, where this issue is discussed.

himself. [***See* Appendix G, APP-62,** on which there is **an** excerpt from the trial transcript of the conversation between the prosecutor and the hearing officer regarding the non-existent order].

Remembering that the hearing officer had previously ordered the stenographer to go off the record when the petitioner spoke and to go back on when he spoke (as memorialized in the excerpted image at **Appendix G at APP-63**) and fearing that were the hearing officer to manipulate the tape and transcript again, she would have no proof of what she said and did not say at the hearing, Petitioner left with the public. The "trial" went on in the absence of both the petitioner and the public. Only an assistant general counsel for the BBO, the BBO's hearing officer, and the OBC prosecutor attended.

From the transcript provided her, she learned that as long as two weeks after the so-called trial ended, the prosecutor offered and the hearing officer marked admissible even more exhibits . . . and chalks . . . which Johnson had never seen. Even the prosecutor's exhibit numbers were changed.\[15]/

Deprived of her right to a fair and impartial trial, Johnson moved for a rehearing. That, too, was denied.

Because historically, in Massachusetts, attorney-discipline cases have been identified as being on the common-law side of the court, Johnson had moved for a

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[15] Never having been served with a copy of the 12-volume Appendix subsequently both filed by the BBO with the County Court in support of the "Information" recommending disbarment and relied upon by the full panel of the SJC . . . and never having been served a Table of Contents to the 12 volumes, Petitioner does not know whether the exhibits and chalks were included in the volumes. Given, however, that there were 12 volumes, a reasonable inference can be drawn that they were.

jury trial, and was promised a hearing on the motion, but ultimately she was, without a hearing, denied the jury trial she sought.

III. Proceedings in the Massachusetts Supreme Judicial Court for Suffolk County

After "trial," the BBO filed in the SJC single-justice session an "Information," recommending that Johnson be disbarred. None of the grounds which are listed in the "Single Justice Practice and Procedure" and upon which Bar Counsel may petition the single justice to discipline an attorney was charged against Johnson.\FN16/ In the SJC single-justice session, Johnson was entitled to a trial *de novo*, but that, too, was denied her. She was, however, during the contempt hearing allowed to call the prosecutor to the stand.\FN17/

On 9 August 2006, the SJC single justice issued a judgment of disbarment and ordered Johnson to withdraw from her existing cases. Johnson immediately filed a notice of appeal and a motion to stay the disbarment, which was denied.

Johnson filed a second motion to stay with the Full Court. Waiting for the Full Court's decision on that motion, believing that her obligation to her clients was

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16 The full panel of the SJC did not address this issue (raised below) in its opinion affirming the judgment of Petitioner's disbarment.

17 By calling the OBC prosecutor to the stand, Johnson's hoped to prove that the BBO recommendation was transparently invalid. Johnson asked the prosecutor, in words for all intents and purposes, What was the URL on which the psychologist's report exists? The prosecutor's counsel objected. The Court sustained the objection. Johnson asked, Who was the psychiatrist or psychologist whose report the prosecutor had alleged Johnson had uploaded to her website? Objection. Sustained. Johnson asked, Who was the person who was the subject of the report? Objection. Sustained. Johnson called attention to the funds the prosecutor had alleged Johnson commingled, and asked, Whose funds were commingled with Johnson's personal funds? Objection. Sustained. Johnson asked, What was the amount of the funds allegedly commingled? Objection. Sustained.

Johnson was not provided a transcript of that miniature evidentiary hearing.

greater than to the single justice, and not wanting to abandon them, Johnson did not comply with the order.\[FN18]/

The prosecutor filed a complaint for contempt.

On 19 October 2006, Johnson was held in civil contempt and jailed to force her compliance with the disbarment order. Because Johnson could not comply from jail, and therefore did not hold the key to her cell, four human angels graciously came to her assistance and ran errands for 5 days in order to get her released from jail, where she had been held from the morning of October 19th until the evening of October 23d, 2006.

IV. Proceedings in the Massachusetts Supreme Judicial Court for the Commonwealth

Johnson filed two appeals from the judgments of disbarment and of contempt. In the appeal of the contempt judgment, Johnson argued **(1)** given that she had filed a notice of appeal, the SJC single justice did not have the jurisdiction to find her in contempt of the disbarment order and **(2)** given that the contempt was in actuality criminal contempt, Johnson had been entitled to a jury trial, which she had been denied.

She also filed a half-dozen motions regarding procedural due process. The SJC acted on none of them.

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[18] An attorney owes devotion to the interests of his clients. He should be zealous in the maintenance and defense of their rights, and should be in no way restrained in the discharge of such duty by fear of judicial disfavor. But at the same time he should be at all times imbued with the respect which he owes to the court before whom he is practicing.

Grievance Adm'r v. Fieger, 476 Mich. 231, 263, 719 N.W.2d 123, 143 (2006).

Prior to the day for oral argument, the court clerk notified Johnson that she would be allowed 10 minutes for argument rather than the 15 minutes allowed other parties. Upon arriving at the SJC on 6 November 2007, she was informed that she would be allowed only 5 minutes in which to argue ***both*** appeals. The Court had no questions of her. Standing her ground, she complained. Ultimately, the SJC panel relented and Johnson was allowed 10 minutes for each argument. The arguments are memorialized in webcasts, which are available at the URLs identified in note 11, *supra.*

On 5 December 2007, the Full Court affirmed both the judgment of disbarment and the judgment of contempt.

The SJC's opinion speaks for itself **[APP-1].** Because Johnson disagrees with the panel's iteration of facts, which standing alone would be tantamount to an *ex parte* communication with this Court, she has interleaved her comments with the opinion [**APPENDIX G at APP-44**].

REASONS FOR GRANTING THE WRIT

I. Review is warranted because attorney disciplinary proceedings that are administrative in nature conflict with such actions that are quasi-criminal or judicial in nature, depriving attorneys in those States where such actions are administrative in nature of their Fourteenth Amendment rights to due process and equal protection

The dispute as to the nature of these "adversary proceedings" adds another dimension legally. The U.S. Supreme Court declared disbarment proceedings to be of a "quasi-criminal nature." In re Ruffalo, 390 U.S. (Ohio) 544, 551 (1968); Middle-

sex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. (N.J.) 423, 438 (1982) (Brennan, J., concurring).

In some State jurisdictions, disciplinary actions are neither civil nor criminal but *sui generis*. In some States, such actions are judicial in nature, and in other States, they are administrative in nature. Massachusetts is one of the latter States.

The Massachusetts scheme allowed Petitioner's Fourteenth Amendment rights to due process and equal protection to be denied; e.g.. it allowed insufficient notice, no prosecution witnesses and therefore no opportunity to cross-examine complainants, the quashing of her trial witness subpoenas and the preclusion of documents necessary to her defense and therefore no opportunity to be heard, no public trial as allowed by BBO rules, no compliance with well-established rules of practice and procedure and of evidence, and no fair and impartial tribunal.

The genesis of the disciplinary action arose out of Petitioner's exercise, during her gubernatorial campaign in 2002 and on her website, of her First Amendment right to free, political speech, which the Massachusetts SJC found was prejudicial to the administration of justice and thus violative of Mass.R.Prof.C. 8.4(d).

If these deprivations happened to Petitioner, the likelihood of such deprivations happening to other attorneys is high.

Were Massachusetts proceedings been deemed quasi-criminal in nature, article XII of the Massachusetts Declaration of Rights would have been triggered. She would have had to be allowed to present all proofs favorable to her, to meet wit-

nesses against her face to face, to be fully heard in her defense, and not to be deprived of her property but by the judgment of her peers.

The disbarment proceedings in Pennsylvania, too, are "of an "unusual nature." Suber v. Pennsylvania Com'n on Crime and Delinquency. 885 A.2d 678, 683 (2005). They are "outside of the normal administrative process [and] do not involve the Administrative Agency Law in any way" [id. at 682], ***but*** "the application of the 'clear and convincing' standard [ ] appl[ies] because . . . our Supreme Court decides the case as fact-finder from which there is no appeal." Id. at 683 (internal cite omitted).

California "State Bar disciplinary proceedings are administrative in nature but have been denominated 'quasi-criminal' adversary proceedings. . . . These proceedings are not governed by the rules of civil or criminal procedure." Giddens v. State Bar, 28 Cal.3d 730, 734, 621 P.2d 851, 853-854 (1981) (internal cites omitted). The Court in Giddens made it clear that an attorney facing discipline "shall also have the right to the issuance of subpoenas for attendance of witnesses to appear and testify or produce books and papers" [id., 28 Cal.3d at 735, 621 P.2d at 854] by ruling "that a fair hearing did not take place [because] Petitioner was not afforded the right to 'defend against the charge by the introduction of evidence.'" Id., 28 Cal.3d at 735, 621 P.2d at 854. He also never had an opportunity to cross-examine the complainants' testimony. Id.

> "California provides [notice, an opportunity to be heard,] and other protections. It allows the lawyer to call witnesses and cross-examine them. . . . At the hearing, the burden is on the state to establish culpability 'by convincing

> proof and to a reasonable certainty'; 'all reasonable doubts must be resolved in favor of the accused.' The California Supreme Court, in deciding whether to accept the bar's recommendation, grants the bar's findings 'great weight' but is not bound by them. . . . It must 'independently examine the record, re-weigh the evidence and pass on the sufficiency.' . . . "

In re Rose, 22 Cal.4th 430, 458, 993 P.2d 956, 974-975 (Calif. 2000) (internal cites omitted). The California safeguards do not exist in Massachusetts, at least in the experience of Petitioner . . . and the standard used is capricious, inconsistent, and sometimes absent.\[19]/

Unlike California, Texas deemed a jury trial fair although the attorney involved in the disciplinary proceeding was in the hospital. The court's rationale was that the counsel of the attorney being disciplined had informed the court that his client was in the hospital but invited the court to go ahead with the trial. Drake v.

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[19] In 2006, the SJC declared, " 'While we review the entire record and consider whatever detracts from the weight of the board's conclusion, as long as there is substantial evidence, we do not disturb the board's finding, even if we would have come to a different conclusion if considering the matter de novo.' " In re Driscoll, 447 Mass. 678, 683-684, 856 N.E.2d 840, 846, quoting Matter of Segal, 430 Mass. 359, 364, 719 N.E.2d 480 (1999). The Court then cited the Massachusetts Administrative Procedures Act, M.G.L. c, 30A, §1(6), as the source of the definition of "substantial evidence," to wit, "'such evidence as a reasonable mind might accept as adequate to support a conclusion.' " In re Curry, 450 Mass. 503, 880 N.E.2d 388 (2008) (same as In re Driscoll).

One problem is not only that the SJC arbitrarily chooses some sections of the APA to follow and other sections to ignore or deem inapplicable, but that the APA itself declares it does not apply to "bodies of the judicial branch, or any meeting of a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it." [**page 4, *supra***].

And in the opinion in the case below [**APP-1 *et seq.***], there is no mention of the standard applied.

Three years earlier, in In re Bailey, 439 Mass. 134, 786 N.E.2d 337 (2003), when declaring the standard to be used in a "reciprocal discipline" action, the SJC wrote that the standard used by Florida in the Bailey case was "clear and convincing evidence, a higher standard of proof than the preponderance of evidence standard applied to disciplinary proceedings in this Commonwealth". Id., 439 Mass. at 137, 786 N.E.2d at 341, citing Matter of Kerlinsky, 428 Mass. 656, 664 n. 10, 704 N.E.2d 503 (1999); Matter of Budnitz, 425 Mass. 1018, 1018 n. 1, 681 N.E.2d 813, cert. denied, 526 U.S. 1160, 119 S.Ct. 2052, 144 L.Ed.2d 218 (1997).

So, at the very least, the Massachusetts SJC abides by no particular standard. The standard it used varies from one case to another. Petitioner shall not speculate as to the reason for the apparent caprice. Matter of Schoepfer, 426 Mass. 183, 687 N.E.2d 391 (December 3, 1997) (clear and convincing); Matter of Ellis, 425 Mass. 332, 680 N.E.2d 1154 (June 27, 1997) (preponderance of the evidence: "We decline to adopt the somewhat amorphous stan-

State, 488 S.W.2d 534, 538 (Tex.Civ.App. Dallas 1972, writ ref'd n.r.e.) "Having exercised his right to refuse the three-year suspension given him by the Grievance Committee appellant became subject to the State Bar rules which permitted the institution of a formal complaint seeking disbarment." Id. at 537.

Texas "requires only a preponderance of the evidence standard" in disbarment proceedings. Pretzer v. Motor Vehicle Bd.. 125 S.W.3d 23, 39 (2003), citing Drake, 488 S.W.2d at 538. Texas "administrative system include[s] substantial evidence review, as an alternative to trial in district court." Pretzer, at 39. That there is no imposition of a right to a trial *de novo* in the Texas Code appears to arise out of a desire to conserve judicial resources. *See* id., at 40.

Had Johnson been a California attorney, it is likely her trial would have been deemed unfair . . . given that she had been entitled to a public trial, the public was commanded to leave the hearing room, no complainants were called as trial witnesses, and her trial witness subpoenas were quashed. Those circumstances would likely have increased the likelihood that her motion for a rehearing would have been allowed.

Had Johnson been a Texas attorney, it is likely she would have been granted a jury trial. If not, under the circumstances of her case, she might not have been granted a new trial, but she very likely would have obtained a "substantial evidence review," something her case was not given in Massachusetts.

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dard of "clear and convincing proof"); Matter of Saab, 406 Mass. 315, 324 n. 13, 547 N.E.2d 919, 924, n. 13 (1989) (absence of codified standards to govern attorney discipline proceedings does not offend due process), and so on.

In further contrast, the Massachusetts SJC deems, as do many other States, disciplinary proceedings to be civil ***and*** administrative in nature, where live witnesses are considered superfluous and unnecessary, where hearsay and totem-pole hearsay are admissible, where a prosecutor's argument is deemed evidence, where the prosecutorial and adjudicative functions of the OBC and BBO, respectively, are commingled within a multi-administrative board, and where the Article III court (the SJC) not only appoints the heads of the OBC and BBO, which together comprise the disciplinary arm of the judicial branch, but also controls and supervises the entities and the appointees, leaving no walls of division between the functions. In this scheme, which is found other States as well (for instance, Montana), the appearance of bias exists and with that appearance the failure of due process. It is a flaw inherent in the process, in the scheme, itself. *Cf.* Goldstein v. Commission on Practice of Supreme Court, 297 Mont. 493,513-514, 995 P.2d 923, 936-937 (2000). *In re Murchison*, 349 U.S. 133 (1955) (ruling, combining the functions of prosecutor, judge, and jury in an attorney disciplinary proceeding violates due process).

The case against Johnson below is definitive proof of the latter assertions: she was entitled to but was **denied** **(a)** procedural due process, **(b)** fair notice of the charge (e.g., including but not limited to the identification of the offending published criticism of judges, the psychologist's report, the funds commingled), and **(c)** an opportunity afforded for explanation and defense. The infirmity of proof and the deprivations result in only one reasonable conclusion, to wit, that the "state procedure was wanting in due process" [Ruffalo, 390 U.S. at 550, quoting Selling v. Rad-

ford, 243 U.S. 46, 51], making the disbarment of Johnson unlawful**.**

Under Randall v. Brigham, 74 U.S. (Mass.) 523 (1868), in which this Court wrote,"[I]n any *essential* particular, *the proceeding* is irregular or defective, *the conviction* will not be by 'due process of law,' and the judgment will be a nullity. FN9," the judgment of disbarment against Johnson should be deemed a nullity. Id., 74 U.S. at 529 (italic emphases in original case). *See also* FN9 at 529 in Randall for the more than two dozen cases in which judgments were deemed a nullity.

Administrative procedures that have no safeguards against "[s]uch procedural violation of [even minimal] due process would never pass muster in any normal civil or criminal litigation." Ruffalo, 390 U.S. at 551. "Confrontation and cross-examination are so basic to our concept of due process that no proceeding by an administrative agency is a fair one that denies these rights." Hannah v. Larche, 363 U.S. 420, 504 (1960) (involving the form and extent of due process and the procedural rules in proceedings under the Civil Rights Act of 1957), citing (Peters v. Hobby, 349 U.S. 331, 351-352 (concurring opinion).

Further, where this Court has held that "federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process" [Butz v. Economou, 438 U.S. 478, 513 (1978)], what reasons ***can*** justify the absence of those safeguards in the Massachusetts attorney-disciplinary scheme or in those of other State jurisdictions? Why should Massachusetts and other States be allowed to circumvent the due process clause of the Fourteenth Amendment, creating a conflict with jurisdictions whose disciplinary

schemes are judicial or quasi-criminal in nature and with this, the United States Supreme Court?

Moreover, notwithstanding the controversy over whether bar disciplinary proceedings are civil, criminal, or quasi-criminal in nature, so long as they are on the common-law side of the court, attorneys are entitled to a jury trial in a disciplinary prosecution, which the Massachusetts administrative scheme circumvents and thereby deprives its attorneys rights they would have in other jurisdictions, including the right to appeal a ruling by the BBO. In Massachusetts, it would be a futile gesture to request the SJC, which created, controls, and supervises the BBO, to declare the BBO's, or its own pronouncements, to be unconstitutional. See Middlesex County Ethics Committee v. Garden State Bar Ass'n, 1981 WL 389660 (Petitioner's brief), opinion at 457 U.S. (N.J.) 423 (1982).

"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Paul v. Davis, 424 U.S. (Ky.) 693, 708 (1976), quoting Wisconsin v. Constantineau, 400 U.S. (Wis.) 433, 437 (1971). A person's livelihood should also be of sufficient concern to be deemed "essential."

Remaining unanswered by the Court is the question, whether under the Fourteenth Amendment, not only notice and opportunity to be heard but also the totality of procedural due process must be uniformly applied in attorney-discipline actions across our nation.\[20]/

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[20] "[C]ourts . . . have carefully delineated elements of due process specifically for attorney discipli-

II. Review is warranted because attorney disciplinary proceedings that are administrative in nature contravene the due process or equal protection clauses of the Fourteenth Amendment and thereby deprive attorneys of their secured constitutional rights\FN21/

The BBO proceedings **(a)** were administrative, not judicial in nature, **(b)** did not implicate important state interests, **(c)** did not provide an adequate opportunity to raise federal claims, and **(d)** grew out of exceptional circumstances and ire, if not

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nary proceedings. *See* Wilburn Brewer, Jr., *Due process in Lawyer Disciplinary Cases: From the Cradle to the Grave,* 42 S.C.L.Rev. 925 (1991) (identifying seven elements of due process in attorney disciplinary proceedings). *See also* *In re Robson* (Alaska 1978), 575 P.2d 771 (discussing right to neutral decision-maker and holding that counsel associated with either the prosecution or defense of attorney disciplinary proceeding should not be present during deliberations); *State v. Turner* (1975), 217 Kan. 574, 538 P.2d 966 (discussing right to public hearing); *People v. Morley* (Colo.1986), 725 P.2d 510 (identifying right to call and cross-examine witnesses); *In re Meade* (1985), 103 Wash.2d 374, 693 P.2d 713 (examining right to counsel); *Kentucky Bar Ass'n v. Shewmaker* (Ky.1992), 842 S.W.2d 520 (discussing right to pretrial discovery and taking of depositions); *Matter of Jaques* (E.D.Tex.1997), 972 F.Supp. 1070 (requiring burden of clear and convincing evidence).

¶ 86 Similarly, in *In re Schlesinger* (1961), 404 Pa. 584, 172 A.2d 835, the Pennsylvania Supreme Court, relying on the U.S. Supreme Court's decision in *In re Murchison* (1955), 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942, expressly ruled that the combination of the functions of prosecutor, judge and jury in an attorney disciplinary proceeding violated due process. One of the concerns addressed by the Pennsylvania Court was that the Committee on Offenses (like the COP in Montana) appointed counsel to prosecute on its behalf. *Schlesinger*, 172 A.2d at 840. The court stated:

> Here, a member of the bar, charged with unprofessional conduct by a bar Committee on Offenses, was prosecuted on the Committee's complaint before a Subcommittee, composed of three members of the Committee, sitting as the trial tribunal. In such a procedure, so contrary to traditional American judicial concepts, unfairness was, ipso facto, inherent; it was fraught with the possibility of temptation to each member of the trial tribunal to favor, consciously or unconsciously, the prosecuting body which appointed him and of which he was a member. The record as a whole contains a reasonable basis for doubt as to whether impartiality on the part of the members of the tribunal was completely absent and suggests an unsympathetic predisposition toward the appellant.

Schlesinger, 172 A.2d at 841. The *Schlesinger* court concluded that an actual "predilection to favor one side over the other is not required in order to vitiate a judicial proceeding as being violative of due process." *Schlesinger*, 172 A.2d at 841. Rather, the respondent need merely show that a "possible temptation" exists. *Schlesinger*, 172 A.2d at 841

Goldstein, 297 Mont. at 520-521, 995 P.2d at 940-941 (Hunt, Regnier, and Gray, JJ., concurring, and Nelson, J., dissenting).

21 "[L]awyers also enjoy first-class citizenship." Spevack v. Klein, 385 U.S. 511, 516 (1967).

bias, against Johnson fulfilling her duty to report professional misconduct,\FN22/ exercising her right to free speech during her gubernatorial campaign, and publishing her work on her Internet website.\FN23/

The decision of disbarment is wrong and affects not only the petitioner but also other attorneys and laymen as well. Attorneys will fear retaliation for speaking out when they should, and the public as a whole, which relies on zealous representation, will be deprived of that zealous representation when seeking a remedy or relief from the courts. "It is . . . important both to society and the bar itself that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar." Konigsberg v. State Bar of California, 353 U.S. 252, 273 (1957).

> The American Colonists were not willing, nor should we be, to take the risk that '(m)en who injure and oppress the people under their administration

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22 Mass.R.Prof.C. 8.3(b), "requir[ing] lawyers to report serious violations of ethical duty by lawyers and judges." Id. at Comment.

23 "There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1034 (1991) (involving "classic political speech"). "'[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' " Burson v. Freeman, 504 U.S. 191, 196 (1992), quoting Mills v. Alabama, 384 U.S. 214, 218(1966).

> "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). "… [C]ommunication of this kind is entitled to the most exacting degree of First Amendment protection." [*FCC v]. League of Women Voters [of California*, 468 U.S. 364,] 375-376 [(1984)].] …. P]olitical speech 'occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983), quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982). … Rules inhibiting unhampered comment, thus shackling the right to freely express opinion, must be justified, "[i]f they can be justified at all, ... in terms of some *serious substantive evil* which they are designed to avert." *Bridges [v. California*, 314 U.S. 252,] 270 [62 S.Ct. 190 (1941)] (emphasis added); see also *id*. at 262. ("[T]he likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press."). And protecting the judiciary or other public actors from derision, however crudely or distastefully expressed, has consistently been rejected as a "serious substantive evil" that would justify restrictions on speech."

Grievance Adm'r v. Fieger, 476 Mich. at 309-310, 719 N.W. at 167-168.

> (and) provoke them to cry out and complain' will also be empowered to 'make that very complaint the foundation for new oppressions and prosecutions.' The Trial of John Peter Zenger, 17 Howell's St. Tr. 675, 721-722 (1735) (argument of counsel to the jury). To impose liability for critical, albeit erroneous or even malicious, comments on official conduct would effectively resurrect 'the obsolete doctrine that the governed must not criticize their governors.'

New York Times Co. v. Sullivan, 376 U.S. 254, 300 (1964) (citations omitted).

The reason is starkly clear and important. If attorney discipline proceedings were judicial in nature, the OBC, BBO, and SJC would have to acknowledge that they blithely ignore the well-settled rules of procedure and evidence and constitutional safeguards.\[FN24]/

Although unwritten in its opinion, the SJC must find solace in Randall v. Brigham, 74 U.S. (Mass.) 523, 7 Wall. 523 (1868) (action by attorney for damages against judge for disbarring him), in which this Court wrote 140 years ago "that it was not essential to the validity of the order of removal that it should be founded on legal process according to the signification of the words '*per legem terrae*' as used in Magna Charta, or in the Declaration of Rights." Id. at 541. Those words are out of fashion today. The public wants their constitutions and declarations of rights restored. The Law of the Land is what made this country great.

Justice Black's words still reflect the pulse of our people today:

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[24] In Massachusetts—and in some other States, e.g., Colorado—the BBO/OBC prosecutor is appointed by the State's High Court, and being created without bylaws, controlled, and supervised by that court, is part of the judicial rather than part of the executive branch. Such a scheme evades the safeguards provided by the constitutional provisions for the separation of powers. Further, by deeming the scheme administrative when in actual fact, it is *sui generis*—for many aspects of the Administrative Procedures Act, M.G.L. c. 30A, are not followed—the scheme deprives the petitioner of his or her constitutional right to a jury.

> The majority is holding . . . that lawyers are not entitled to the full sweep of due process protections because they had no such protections against judges or their fellow lawyers in England. But I see no reason why this generation of Americans should be deprived of a part of its Bill of Rights on the basis of medieval English practices that our Forefathers left England, fought a revolution and wrote a Constitution to get rid of.

Cohen v. Hurley, 366 U.S. 117, 142 (1961), , at 142 (Black, J., with whom Warren. C.J., and Douglas, J., concurred, dissenting). Fearing that the majority opinion in Cohen implied that "a lawyer is not to have the protection of the First Amendment with regard to his private beliefs and associations whenever his exercise of those freedoms might interfere with his duty to 'cooperate' with a judge'" [id. at 145], Judge Black continued:

> It seems to me that the majority takes a fundamentally unsound position when it endorses a practice based upon the artificial notion that rights and privileges can be stripped from a man in his capacity as a lawyer without affecting the rights and privileges of that man as a man.

Id. at 145 (dissent).

In Petitioner's case, the absence of due process was admitted and blatant, statutes and well-settled common law were ignored or deemed, inappropriately, inadmissible, and the BBO and OBC failed to follow the rules promulgated by an SJC committee without statutory authority—all of which worked to deprive Petitioner of her constitutional rights.

III. **Review is warranted where the BBO's findings were transparently invalid, the SJC single justice adopted them, causing the judgment of disbarment to be void, and the subsequent affirmance by the SJC full panel of that void judgment imparted to it no validity, making Petitioner's disbarment unconstitutional.**

Where the BBO's proceedings were devoid of due process—insufficient notice and no opportunity to be heard, e.g., no prosecutorial trial witnesses, the quashing of all of Johnson trial witness subpoenas, and the preclusion of her documents bearing on the issues at the time of trial—the BBO findings and conclusions were transparently invalid.

"[A] departure from established modes of procedure will often render the judgment void." Windsor v. McVeigh, 93 US 274, 282 (1876).

> The commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

Snyder v. Com. of Mass., 291 U.S. 97, 105 (1934). Due process is one of those principles of justice.

> To conform to modern conditions, [states] may substitute a new form of procedure for one long practiced and recognized. But, whatever the form or method of procedure adopted, they remain always subject to the prohibition against that which is commonly thought essentially unfair to him who is to be afforded a hearing. Tested by this principle, . . . the deprivation of the right to present evidence bearing on the issue [has] been adjudged to deny due process.

Snyder, 291 U.S. at 128, citing Saunders v. Shaw, 244 U.S. (La.) 317 (1917) (judgment reversed).

As the SJC noted in its opinion: "The single justice adopted the findings and conclusions as adopted by the board and entered a judgment ordering that the respondent be disbarred" [**APP-2**].

Given that the BBO's findings and conclusions, having been reached in a vacuum devoid of due process, were transparently invalid, the SJC single justice's subsequent judgment of disbarment must be deemed to have had no legal force or effect. *See Black's Law Dictionary* 861 (8th ed 2004)

> That a void order is appealable does not permit us to consider the appeal on its merits and to affirm the order if we were so disposed, because our affirmance would impart it no validity and would be similarly void. [Citations.] One of the cases mentioned (Pioneer Land Co. v. Maddux, [109 Cal. 633 (1895)])) has been cited for the further proposition that the dismissal of an appeal from a void order imparts it no validity, either.

Adohr Milk Farm, Inc. v. Love, 255 Cal.App.2d 366, 371 (1967). Sullivan v. Gage, 145 Cal. 759, 771, 79 P. 537, 542 (1905) ("[T]he affirmance by an appellate court of a *void* judgment imparts to it no validity. . . ."), also quoting Pioneer Land Co. *See also* Butler v. Eaton, 141 U.S. (Mass.) 240, 242-243 (1891) (judgment of Mass. SJC "subverted and rendered null and void." . . . Execution in force prior to judgment being found null and void and reversed became entirely annulled. "[T]he whole foundation of that part of the judgment which is in favor of the defendant is . . . without any validity, force, or effect, and ought never to have existed").

Lastly, and significantly, were proceedings in Massachusetts deemed to be quasi-criminal, as in Ruffalo, the judgment and order of disbarment would be void of the grounds that under Article XII of the Massachusetts Declaration of Rights, Petitioner was entitled to a trial by jury, which she was denied.

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant a writ of

certiorari to review the affirmance of both the judgment of disbarment and judgment of contempt—with consideration of the validity of the judgments themselves and the proceedings at the BBO—by the Massachusetts Supreme Judicial Court issued on 5 December 2007 and rescript entered on 4 January 2008.

Respectfully submitted,

Barbara C. Johnson, Pro Se
6 Appletree Lane
Andover, MA 01810-4102
978-474-0833
First Circuit Bar No. 36719

27 February 2008

450 Mass. 165, 877 N.E.2d 249

Supreme Judicial Court of Massachusetts, Suffolk.

In the Matter of Barbara C. Johnson.

SJC-09820, SJC-09866.

Argued Nov. 6, 2007.
Decided Dec. 5, 2007.

Attorney at Law, Disbarment. *Contempt.*

INFORMATION filed in the Supreme Judicial Court for the county of Suffolk on May 16, 2006.

The case was heard by *Francis X. Spina,* J., and a petition for contempt, filed on September 27, 2006, was also heard by him.

****250** Barbara C. Johnson, pro se.
Susan A. Strauss Weisberg, Assistant Bar Counsel.

****251** Present: MARSHALL, C.J., GREANEY, IRELAND, COWIN, CORDY, & BOTSFORD, JJ.

RESCRIPT.

***165** BY THE COURT. Barbara C. Johnson (respondent) appeals from judgments of a single justice of this court disbarring her from the practice of law and finding her in contempt of the judgment of disbarment. We affirm both judgments.

***166** 1. *Disbarment.* a. *Background.* Following a hearing on a three-count petition for discipline, a special hearing officer made findings of fact and conclusions of law culminating in a recommendation that the respondent be disbarred. The Board of Bar Overseers (board) adopted those findings and conclusions, and filed an information in the county court recommending disbarment. The single justice adopted the findings and conclusions as adopted by the board and entered a judgment ordering that the respondent be disbarred. The findings and conclusions as adopted by the board are summarized as follows.

i. *Count one.* The respondent owns and maintains a Web site on which she posts information about allegations of child sexual abuse. In 2001, the respondent represented a father in a paternity and custody action in the Probate and Family Court who had been accused of sexually abusing his minor son. The son had also been the subject of a care and protection proceeding in the Juvenile Court. The respondent posted on her Web site information that had been impounded in the care and protection action, e.g., information identifying the son as having been allegedly sexually abused by his father, including the son's full name and photographs of him. The respondent also posted the full names of the son's mother and a half-brother (the product of the mother's

partnership with a man whom she married and later divorced); pleadings from the mother's divorce action; and comments by the respondent characterizing the mother as a perjurer who had conceived both children out of wedlock and who had falsely accused both fathers of sexual abuse.

The mother and son filed complaints with bar counsel requesting that the respondent remove the material from her Web site. In addition, a judge in the Juvenile Court ordered the respondent to return any impounded material to the court and remove all references to that material from her Web site. The respondent ignored the court orders. A subsequent order by a judge in the Probate and Family Court declared that the materials filed in that action were also impounded.

The board adopted the hearing officer's conclusions that by engaging in the foregoing activities, the respondent violated Mass. R. Prof. C. 3.4(c), 426 Mass. 1389 (1998); Mass. R. Prof. C. 4.4, 426 Mass. 1405 (1998); and Mass. R. Prof. C. 8.4(d) and (h), 426 Mass. 1429 (1998).

***167** ii. *Count two.* In 1999, the parents of a mentally retarded adult daughter paid the respondent a $10,000 retainer to represent them in connection with criminal and protective services proceedings arising from allegations that the father had sexually abused his daughter. The respondent deposited the retainer in her personal account rather than in a trust account. The clients subsequently discharged the respondent and requested a refund of a portion of the retainer. The respondent refunded less than the clients had expected. When the clients disputed the amount of the refund, the respondent failed to place the disputed sum in a trust account. Thereafter, the clients filed a complaint with bar counsel.

In 2002, the respondent posted on her Web site the identities of her former ****252** clients and their daughter without their permission; details of the sexual abuse allegations; and information regarding the fee dispute. The clients demanded that the respondent remove the information from her Web site. In a telephone message, the respondent said that she might remove the information but only if the clients withdrew their complaint with bar counsel.

The board adopted the hearing officer's conclusions that by engaging in the foregoing activities, the respondent violated Mass. R. Prof. C. 1.6(a), 426 Mass. 1322 (1998); Mass. R. Prof. C. 1.9(c)(1) and (2), 426 Mass. 1342 (1998); Mass. R. Prof. C. 1.15(a)-(c), 426 Mass. 1363 (1998); Mass. R. Prof. C. 1.16(d), 426 Mass. 1369 (1998); Mass. R. Prof. C. 8.4(c), (d), and (h), 426 Mass. 1429 (1998); and S.J.C. Rule 4:01, § 10, as appearing in 425 Mass. 1313 (1997).

iii. *Count three.* In 1995, in connection with representing a plaintiff in a wrongful termination action in the District Court, the respondent filed motions for leave to depose nonparty witnesses out of the presence of defendants' counsel. The judge denied the motions, found that they lacked a legal or factual basis and were filed in bad faith, and ordered that the respondent or plaintiff pay the defendants' legal fees incurred in opposing the motions. When the payments were not made, the judge imposed civil penalties on the respondent and found the respondent and the plaintiff in contempt, warning them that failure to pay the fees would lead to dismissal of the plaintiff's ***168** action. Following further nonpayment, judgment entered dismissing the plaintiff's action and ordering costs to be paid to the defendants. The respondent did not file a notice of appeal following the dismissal but filed a motion for retransfer of the case to the Superior Court. The motion was struck with instructions to the respondent that an appeal from the dismissal was the proper

avenue of relief. Following the entry of an amended final judgment dismissing the plaintiff's action, the respondent again sought to retransfer the case to the Superior Court rather than appeal from the dismissal; the request for retransfer was again struck. The respondent filed a notice of appeal from the order striking the motion for retransfer. The Appeals Court dismissed the appeal as frivolous.

Meanwhile, the judge in the District Court, following reconsideration of his earlier judgment of contempt against the respondent, entered a final judgment of contempt against her. She appealed and the Appeals Court affirmed the judgment. *HMM Assocs., Inc. v. Johnson,* 44 Mass.App.Ct. 1126, 694 N.E.2d 1318 (1998). Thereafter, the District Court judge gave the respondent a deadline for paying the outstanding fees and penalties, warning her that failure to comply would result in further penalties and referral to the board. The respondent violated the order. Following a hearing, the judge held her in continuing contempt and ordered her jailed until she purged herself of contempt. The respondent did not appeal from those orders, but the following day she purged herself of contempt and was released.

The board adopted the hearing officer's conclusions that by engaging in the foregoing activities, the respondent violated Mass. R. Prof. C. 3.4(c); Mass. R. Prof. C. 8.4(d) and (h); S.J.C. Rule 3:07, Canon 1, DR 1-102(A)(5) and (6), as appearing in 382 Mass. 769 (1981); Canon 6, DR 6-101(A)(1)-(3), as appearing in 382 Mass. 783 (1981); and Canon 7, DR 7-101(A)(3), as appearing in 382 Mass. 784 (1981).

b. *Discussion.*The respondent raises constitutional, procedural, and substantive challenges to the disciplinary proceedings. We address them in turn.

****253**[1][2][3] i. The respondent claims that, under a "class of one" theory, see *Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), the board violated her right to equal protection under the Fourteenth ***169** Amendment to the United States Constitution by improperly singling her out for discipline while failing to pursue disciplinary action against other attorneys involved in the underlying cases. Generally, "[w]hether bar counsel pursues discipline of others is irrelevant ... to the respondent's current disciplinary action." *Matter of Tobin,* 417 Mass. 92, 103, 628 N.E.2d 1273 (1994). Moreover, the respondent fails to point to any evidence adduced before the board showing that she was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Willowbrook v. Olech, supra.* Cf. *Matter of Cobb,* 445 Mass. 452, 479, 838 N.E.2d 1197 (2005) (no support for attorney's claim that bar counsel vindictively sought to punish him for reporting acts of judges). We need not address the respondent's bald accusation-unsupported by anything in the record of this case-that the disciplinary process suffers from inherent bias, nor do we address other claims in which she seeks merely to incorporate arguments from prior memoranda. See *Matter of London,* 427 Mass. 477, 483, 694 N.E.2d 337 (1998).

[4] ii. The respondent argues that the board chair improperly allowed bar counsel's motion for a protective order in connection with the disciplinary proceeding. The respondent failed to challenge the order. See S.J.C. Rule 4:01, § 20(4), appearing in 425 Mass. 1302 (1997); Rule 3.22(c) of the Rules of the Board of Bar Overseers (2007). In any event, the protective order was appropriately entered where impounded material was at issue in the disciplinary proceeding. Con-

sistent with the protective order, the hearing officer instructed the parties to use pseudonyms during the hearing. When the respondent repeatedly violated the protective order by using the parties' real names, the hearing officer properly cleared the public from the forum.[FN1] In such circumstances, the respondent cannot be heard to complain about being deprived of a public hearing.

> FN1. With members of the public gone, the respondent refused to participate in the hearing and left. The hearing officer considered the matter solely on documentary evidence submitted by the parties (exhibits submitted by bar counsel and the respondent's amended answer to the petition for discipline). The respondent was furnished with copies of bar counsel's exhibits and transcripts of the hearing, which she used to prepare her appeal to the board.

[5] iii. The respondent contends that the hearing officer wrongly quashed subpoenas that the respondent had issued on her own, ***170** arguing that she was entitled to issue them under G.L. c. 233, § 8. We need not decide whether the statute applies to bar discipline proceedings because the hearing officer properly quashed the subpoenas on grounds of irrelevance: through the subpoenaed witnesses, the respondent had sought to relitigate issues in the underlying cases and attack the disciplinary process itself. See *Matter of Tobin, supra* at 102-103, 628 N.E.2d 1273 (refusal to issue subpoenas appropriate where attorney sought to relitigate underlying matters in disciplinary proceeding).

[6][7][8] iv. With respect to count one, the respondent claims that she cannot be disciplined for having posted impounded material on her Web site for the following reasons: (1) the Juvenile Court orders were invalid because she never obtained material from the care and protection proceeding and thus never posted impounded ****254** material from that case; (2) the Probate and Family Court order was invalid because material related to the paternity and custody matter was open to the public pursuant to G.L. c. 209C, § 13, as appearing in St.1998, c. 64, § 229; (3) her Web site postings are protected by the First Amendment to the United States Constitution; and (4) there was insufficient evidence to conclude that she had posted confidential information with no substantial purpose other than to embarrass the third parties involved-she claims that she intended only to educate the public about her client's plight. The problem with the first three claims is that the respondent neither sought to appeal from nor otherwise legally challenge the courts' orders, and she was not free to ignore them and challenge them for the first time in the disciplinary proceeding.[FN2,FN3] See ***171***Florida Bar v.Gersten,* 707 So.2d 711, 713 (Fla.1998); *Florida Bar v. Rubin,* 549 So.2d 1000, 1003 (Fla.1989); *Florida Bar v. Wishart,* 543 So.2d 1250, 1252 (Fla.1989), cert. denied, 493 U.S. 1044, 110 S.Ct. 839, 107 L.Ed.2d 834 (1990). As for the fourth claim, it was reasonably inferable from the mother's having complained to bar counsel about the respondent's postings that the mother was embarrassed by them. Moreover, the respondent went far beyond merely educating the public about her client's case-she violated the confidences of third parties by publicizing information that she knew was impounded. See *Matter of Comfort,* 284 Kan. 183, 191-195, 159 P.3d 1011 (2007) (under disciplinary rule identical to Mass. R. Prof. C. 4.4, court held that objective evaluation of conduct would lead reasonable person to conclude that publishing of disparaging information about third party was done for no substantial purpose other than to embarrass).

> FN2. While the respondent claims that she filed a petition in the county court seeking

relief from the order entered in the Probate and Family Court, she has shown neither that she actually filed such a petition nor that, if she had, she obtained any relief; she was not free to disobey the order. See *Florida Bar v. Wishart,* 543 So.2d 1250, 1252 (Fla.1989), cert. denied, 493 U.S. 1044, 110 S.Ct. 839, 107 L.Ed.2d 834 (1990).

FN3. With respect to count two, we reject the respondent's claim that her posting of confidential information about her former clients was protected under the First Amendment to the United States Constitution. Whatever rights she may have had to "defend herself against false accusations" regarding the fee dispute, those rights did not include publishing highly sensitive personal information regarding allegations that the father had sexually abused his mentally retarded daughter.

c. *Sanction.*"We do not conclude, and the respondent makes no argument, that the sanction imposed by the single justice is 'markedly disparate' from sanctions in similar cases." *Matter of Tobin, supra* at 103, 628 N.E.2d 1273. Cf. *Matter of Cobb, supra* at 479, 838 N.E.2d 1197.

2. *Contempt.*Pursuant to a petition filed by bar counsel and following a hearing, the single justice found the respondent in civil contempt for failing timely to comply with the following provisions of the judgment of disbarment: close her IOLTA account, give notice of her disbarment, and submit an affidavit of compliance pursuant to S.J.C. Rule 4:02, § 17, as amended, 426 Mass. 1301 (1997). He ordered her jailed until she purged herself of contempt, which she did four days later and was released.

[9][10][11][12] We reject the respondent's challenges to the contempt judgment as follows. (a) She was not entitled to ignore the underlying judgment of disbarment on the ground that it was "transparently invalid"; that she needed to fulfil her clients' right to counsel of their choice; or that she had a property interest in continuing to ****255** receive fees from her clients. She presents no persuasive factual or legal grounds to substantiate any of those claims. (b) The respondent's argument that she was found in criminal rather than civil contempt because she did not "hold the key to the cell door" (and that she was denied the right to a jury trial for criminal contempt) is belied by the fact that she eventually complied with the terms of the judgment of disbarment***172** and was released.[FN4] (c) We reject the respondent's claim that the single justice lacked jurisdiction to find her in contempt where she had appealed from the disbarment judgment. She had moved unsuccessfully for a stay of the judgment pending appeal. The cases relied on by the respondent-a criminal case holding that an appeal divests a lower court of jurisdiction to rule on motions "to rehear or vacate," *Commonwealth v. Cronk,* 396 Mass. 194, 197, 484 N.E.2d 1330 (1985), and a divorce case holding that, absent a specific order to the contrary, a husband's obligation to make installment payments pursuant to a judgment dividing marital property was stayed by the husband's appeal, *Huber v. Huber,* 408 Mass. 495, 499-500, 561 N.E.2d 863 (1990)-are inapposite. Here the single justice merely acted to enforce the disbarment judgment. Cf. Mass. R. Civ. P. 62(a), as amended, 423 Mass. 1409 (1996).(d) Finally, the respondent's argument that the single justice erred in "implicit[ly]" finding that she had engaged in the unauthorized practice of law is misplaced because the finding of contempt was based on other violations of the terms of the judgment of disbarment.[FN5]

FN4. Generally, a civil contempt proceeding is " 'remedial and coercive,' intended to

achieve compliance with the court's orders," while a criminal contempt proceeding is "exclusively punitive. It is designed wholly to punish an attempt to prevent the course of justice." *Furtado v. Furtado,* 380 Mass. 137, 141, 402 N.E.2d 1024 (1980), quoting *Cherry v. Cherry,* 253 Mass. 172, 174, 148 N.E. 570 (1925), and *Blankenburg v. Commonwealth,* 260 Mass. 369, 373, 157 N.E. 693 (1927). See *Matter of DeSaulnier (No. 3),* 360 Mass. 769, 772-773, 279 N.E.2d 287 (1971), quoting *Shillitani v. United States,* 384 U.S. 364, 368, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966) (discussing features of criminal contempt, including that contemnor does not hold "the keys of ... [his] prison in ... [his] own pockets"); *Commonwealth v. Raczkowski,* 19 Mass.App.Ct. 991, 992, 475 N.E.2d 417 (1985), and cases cited (constitutional right to jury trial attaches to certain criminal contempts but not to civil contempts).

FN5. Both parties have filed motions regarding the proper scope of the record on appeal, and the respondent has filed motions that repeat or add to arguments that she raised in her briefs. We have considered only those materials that were part of the record below and decline to address legal arguments not raised in the respondent's briefs.

Judgments affirmed.

Mass., 2007.
In re Johnson
450 Mass. 165, 877 N.E.2d 249

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APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR THE COUNTY OF SUFFOLK
DOCKET No. SJ-BD-2006-039

IN RE: BARBARA C. JOHNSON

AMENDED FINDINGS AND RULINGS
ON BAR COUNSEL'S PETITION FOR CONTEMPT

Bar counsel has filed a petition seeking that the respondent be held in contempt of the judgment of disbarment that was entered against the respondent on August 9, 2006. In order to establish her petition for contempt, bar counsel must show by a preponderance of the evidence the respondent's "clear and undoubted disobedience of a clear and unequivocal command." *Nicholas v. Dowd,* 342 Mass. 462, 464 (1961).

The judgment that entered in this matter ordered the disbarment of the respondent from the practice of law effective September 8, 2006. The judgment also ordered the respondent to do the following:

1. Cease practicing law by September 8, 2006.

2. By August 23, 2006,

   (a) file a notice of withdrawal effective September 8, 2006, with every court, agency, or tribunal before which a matter is pending, together with a copy of the notices sent pursuant to paragraphs 2 (c) and 2 (d) hereinbelow, the client's or clients' place of residence, and the case caption and docket

number of the client's or clients' proceedings;

(b) resign effective September 8, 2006, from all appointments as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary, attaching to the resignation a copy of the notices sent to the wards, heirs, or beneficiaries pursuant to paragraphs 2 (c) and 2 (d) hereinbelow, the place of residence of the wards, heirs, or beneficiaries, and the case caption and docket number of the proceedings, if any;

(c) provide notice to all clients and to all wards, heirs, and beneficiaries that she has been disbarred, that she is disqualified from acting as a lawyer after September 8,2006; and that, if not represented by co-counsel, the client, ward, heir, or beneficiary should act promptly to substitute another lawyer or fiduciary or to seek legal advice elsewhere, calling attention to any urgency arising from the circumstances of the case;

(d) provide notice to counsel for all parties (or, in the absence of counsel, the parties) in pending matters that she has been disbarred and, as a consequence, is disqualified from acting as a lawyer after September 8,2006;

(e) make available to all clients being represented in pending matters any papers or other property to which they are entitled, calling attention to any urgency for obtaining the papers or other property;

(f) refund any part of any fees paid in advance that have not been earned; and

(g) close every IOLTA, client, trust, or other fiduciary account and properly disburse or otherwise transfer all client and fiduciary funds in her possession, custody, or control.

The aforesaid notices were ordered to be served by certified mail, return receipt requested, in a form approved by the board.

3. By August 30, 2006, file with the Office of Bar Counsel an affidavit certifying that she has fully complied with the provisions of the judgment of disbarment and with bar disciplinary rules. She was further ordered to append to the affidavit of compliance:

(a) a copy of each form of notice, the names and addresses of the clients, wards, heirs, beneficiaries, attorneys, courts, and agencies to which notices were sent, and all return receipts or returned mail received up to the date of the affidavit. The respondent was ordered to file supplemental affidavits covering subsequent return receipts and returned mail. Such names and addresses of clients were ordered to be kept confidential unless otherwise requested in writing by the respondent or ordered by the court;

(b) a schedule showing the location, title, and account number of every bank account designated as an IOLTA, client, trust, or other fiduciary account and of every account in which the respondent holds or held as of August 9, 2006, any client, trust, or fiduciary funds;

(c) a schedule describing the respondent's disposition of all client and

fiduciary funds in her possession, custody, or control as of August 9, 2006, or thereafter;

(d) such proof of the proper distribution of such funds and the closing of such accounts as has been requested by bar counsel, including copies of checks and other instruments;

(e) a list of all other State, Federal, and administrative jurisdictions to which the respondent is admitted to practice; and

(f) the residence or other street address where communications to the respondent may thereafter be directed.

The respondent was ordered to retain copies of all notices sent and shall maintain complete records of the steps taken to comply with the notice requirements of S.J.C. Rule 4:01, § 17.

4. By August 30, 2006, file with the clerk of the Supreme Judicial Court for Suffolk County:

(a) a copy of the affidavit of compliance required by paragraph 3 hereinabove;

(b) a list of all other State, Federal, and administrative jurisdictions to which the respondent is admitted to practice; and

(c) the residence or other street address where communications to the respondent may thereafter be directed.

The respondent was aware of the judgment of disbarment and its terms. She

acknowledged as much during the hearing held on the petition for contempt. She also filed on August 23, 2006, a motion to stay the judgment of disbarment, in which she expressed familiarity with the terms of the judgment She understood its significance. The motion seeking a stay was denied, without hearing, on August 25, 2006.

The respondent has failed to serve any of the notices to clients and opposing counsel, as required. She has failed to file notices of withdrawal in matters pending in courts. She has failed to close her IOLTA account(s). Indeed, on September 14, 2006, the respondent appeared in Hampshire County Superior Court on behalf of the plaintiff in a civil action entitled Fran9ois Gouin, Jr. vs. Deborah Ann Chandler, docket number 01-00065, and filed a pretrial memorandum over her signature and Board of Bar Overseers registration number on September 11, 2006. She has not filed a notice of withdrawal in that case. On September 5, 2006, the respondent filed a brief on behalf of the defendant-appellant in the Massachusetts Appeals Court in a matter captioned Eyal Court Reporting Service, Inc. *vs.* Fran9ois Gouin, Jr., docket number 2006-P-1324. As of September 25, 2006, she had not filed a notice of withdrawal in that case. The respondent had not filed a notice of withdrawal in an action entitled Franfois Gouin, Jr. *vs.* White Inker Aronson PC., *et al,* Suffolk County Superior Court, docket number SUC V2005-01626, as of September 26,2006, or in an action entitled Susan Payne *vs.* Brian Meuse, Essex County Probate Court, docket number 99W1466PA1, as of September 18, 2006. The respondent appeared in the Palmer Division of the District Court Department on August 28,2006, on behalf of the defendant in the case of Commonwealth *vs.* Philip B. Rayder, docket number 0643CR000712, and requested

additional time to investigate the case. She obtained a continuance of the case until November 30, 2006, and continues to represent him.

The respondent has admitted she failed to comply with the terms of the judgment of disbarment, but she claims by way of defense that she has an overriding duty to her clients. That duty ended on September 8, 2006. Moreover, she had a duty to obey the court's order of August 9,2006. She knowingly disobeyed that order. The respondent also contends that she is unable to comply with the terms of the judgment of disbarment because she lacks the financial resources to send the required notices by certified mail. This argument is unavailing because she failed to prepare the requisite notices and affidavits and she has made no request for funds for certified mailing based on her alleged indigency. Finally, the respondent claims that the judgment of disbarment is "transparently invalid." See, *e.g., City of Fitchburg* v. *707 Main Corp.,* 369 Mass. 748, 754-755 (1976). There is nothing facially flimsy or whimsical about the findings of the Board of Bar Overseers that might render the judgment of disbarment transparently invalid.

I find that the respondent has clearly and undoubtedly disobeyed a clear and unequivocal command as set forth in the August 9, 2006, judgment of disbarment, and that she is in contempt of that judgment.

The respondent has indicated that she would refuse to cooperate with a commissioner who may be appointed to assist her. The only remedy, therefore, is incarceration.

The respondent, Barbara C. Johnson, is hereby adjudged in contempt of this court's judgment of disbarment dated August 9,2006. She is remanded to the custody of the Sheriff

of Suffolk County until such time as she purges herself of such contempt, which she may do by serving the requisite notices, by filing the requisite affidavits and withdrawals described in the aforesaid judgment, and by complying with the other directives of said judgment (*e.g.*, close all IOLTA account(s)).

I would be remiss if I did not comment on the respondent's conduct in the contempt proceeding before me. She was openly rude, crass, and contemptuous of assistant bar counsel, whose conduct toward the respondent was always remarkably controlled, reserved, and courteous.

By the Court,

Francis X Spina

Francis X. Spina
Associate Justice
Supreme Judicial Court

ENTERED: October 20, 2006

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR THE COUNTY OF SUFFOLK
DOCKET NO. SJ-BD-2006-039

IN RE: BARBARA C. JOHNSON

FINDINGS AND RULINGS ON BAR COUNSEL'S
PETITION FOR CONTEMPT

Bar counsel has filed a petition seeking that the respondent be held in contempt of the judgment of disbarment that was entered against the respondent on August 9, 2006. In order to establish her petition for contempt, bar counsel must show by a preponderance of the evidence the respondent's "clear and undoubted disobedience of a clear and unequivocal command." *Nicholas* v. *Dowd*, 342 Mass. 462, 464 (1961).

The judgment that entered in this matter ordered the disbarment of the respondent from the practice of law effective September 8, 2006. The judgment also ordered the respondent to do the following:

1. Cease practicing law by September 8, 2006.

2. By August 23, 2006,

   (a) file a notice of withdrawal effective September 8, 2006, with every court, agency, or tribunal before which a matter is pending, together with a copy of the notices sent pursuant to paragraphs 2 (c) and 2 (d) hereinbelow, the client's or clients' place of residence, and the case caption and docket

number of the client's or clients' proceedings;

(b) resign effective September 8, 2006, from all appointments as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary, attaching to the resignation a copy of the notices sent to the wards, heirs, or beneficiaries pursuant to paragraphs 2 (c) and 2 (d) hereinbelow, the place of residence of the wards, heirs, or beneficiaries, and the case caption and docket number of the proceedings, if any;

(c) provide notice to all clients and to all wards, heirs, and beneficiaries that she has been disbarred, that she is disqualified from acting as a lawyer after September 8, 2006; and that, if not represented by co-counsel, the client, ward, heir, or beneficiary should act promptly to substitute another lawyer or fiduciary or to seek legal advice elsewhere, calling attention to any urgency arising from the circumstances of the case;

(d) provide notice to counsel for all parties (or, in the absence of counsel, the parties) in pending matters that she has been disbarred and, as a consequence, is disqualified from acting as a lawyer after September 8, 2006;

(e) make available to all clients being represented in pending matters any papers or other property to which they are entitled, calling attention to any urgency for obtaining the papers or other property;

(f) refund any part of any fees paid in advance that have not been earned; and

(g) close every IOLTA, client, trust, or other fiduciary account and properly disburse or otherwise transfer all client and fiduciary funds in her possession, custody, or control.

The aforesaid notices were ordered to be served by certified mail, return receipt requested, in a form approved by the board.

3. By August 30, 2006, file with the Office of Bar Counsel an affidavit certifying that she has fully complied with the provisions of the judgment of disbarment and with bar disciplinary rules. She was further ordered to append to the affidavit of compliance:

(a) a copy of each form of notice, the names and addresses of the clients, wards, heirs, beneficiaries, attorneys, courts, and agencies to which notices were sent, and all return receipts or returned mail received up to the date of the affidavit. The respondent was ordered to file supplemental affidavits covering subsequent return receipts and returned mail. Such names and addresses of clients were ordered to be kept confidential unless otherwise requested in writing by the respondent or ordered by the court;

(b) a schedule showing the location, title, and account number of every bank account designated as an IOLTA, client, trust, or other fiduciary account and of every account in which the respondent holds or held as of August 9, 2006, any client, trust, or fiduciary funds;

(c) a schedule describing the respondent's disposition of all client and

fiduciary funds in her possession, custody, or control as of August 9, 2006, or thereafter;

(d) such proof of the proper distribution of such funds and the closing of such accounts as has been requested by bar counsel, including copies of checks and other instruments;

(e) a list of all other State, Federal, and administrative jurisdictions to which the respondent is admitted to practice; and

(f) the residence or other street address where communications to the respondent may thereafter be directed.

The respondent was ordered to retain copies of all notices sent and shall maintain complete records of the steps taken to comply with the notice requirements of S.J.C. Rule 4:01, § 17.

4. By August 30, 2006, file with the clerk of the Supreme Judicial Court for Suffolk County

(a) a copy of the affidavit of compliance required by paragraph 3 hereinabove;

(b) a list of all other State, Federal, and administrative jurisdictions to which the respondent is admitted to practice; and

(c) the residence or other street address where communications to the respondent may thereafter be directed.

The respondent was aware of the judgment of disbarment and its terms. She

acknowledged as much during the hearing held on the petition for contempt. She also filed on August 23, 2006, a motion to stay the judgment of disbarment, in which she expressed familiarity with the terms of the judgment. The motion seeking a stay was denied, without hearing, on August 25, 2006.

The respondent has failed to serve any of the notices to clients and opposing counsel, as required. She has failed to file notices of withdrawal in matters pending in courts. She has failed to close her IOLTA account(s) Indeed, on September 14, 2006, the respondent appeared in Hampshire County Superior Court on behalf of the plaintiff in a civil action entitled François Gouin, Jr. *vs.* Deborah Ann Chandler, docket number 01-00065, and filed a pretrial memorandum over her signature and Board of Bar Overseers registration number on September 11, 2006. She has not filed a notice of withdrawal in that case. On September 5, 2006, the respondent filed a brief on behalf of the defendant-appellant in the Massachusetts Appeals Court in a matter captioned Eyal Court Reporting Service, Inc. *vs.* François Gouin, Jr., docket number 2006-P-1324. As of September 25, 2006, she had not filed a notice of withdrawal in that case. The respondent had not filed a notice of withdrawal in an action entitled François Gouin, Jr. *vs.* White Inker Aronson PC., *et al.*, Suffolk County Superior Court, docket number SUCV2005-01626, as of September 26, 2006, or in an action entitled Susan Payne *vs.* Brian Meuse, Essex County Probate Court, docket number 99W1466PA1, as of September 18, 2006. The respondent appeared in the Palmer Division of the District Court Department on August 28, 2006, on behalf of the defendant in the case of Commonwealth *vs.* Philip B. Rayder, docket number 0643CR000712, and requested

additional time to investigate the case. She obtained a continuance of the case until November 30, 2006, and continues to represent him.

The respondent has admitted she failed to comply with the terms of the judgment of disbarment, but she claims by way of defense that she has an overriding duty to her clients. That duty ended on September 8, 2006. Moreover, she had a duty to obey the court's order of August 9, 2006. She knowingly disobeyed that order. The respondent also contends that she is unable to comply with the terms of the judgment of disbarment because she lacks the financial resources to send the required notices by certified mail. This argument is unavailing because she failed to prepare the requisite notices and affidavits and she has made no request for funds for certified mailing based on her alleged indigency. Finally, the respondent claims that the judgment of disbarment is "transparently invalid." See, *e.g.*, *City of Fitchburg* v. *707 Main Corp.*, 369 Mass. 748, 754-755 (1976). There is nothing remotely flimsy or whimsical about the findings of the Board of Bar Overseers as to the respondent's misconduct.

I find that the respondent has clearly and undoubtedly disobeyed a clear and unequivocal command as set forth in the August 9, 2006, judgment of disbarment, and that she is in contempt of that judgment.

The respondent has indicated that she would refuse to cooperate with a commissioner who may be appointed to assist her. The only remedy, therefore, is incarceration.

The respondent, Barbara C. Johnson, is hereby adjudged in contempt of this court's judgment of disbarment dated August 9, 2006. She is remanded to the custody of the Sheriff

of Suffolk County until such time as she purges herself of such contempt, which she may do by serving the requisite notices, by filing the requisite affidavits and withdrawals described in the aforesaid judgment, and by complying with the other directives of said judgment (*e.g.*, close all IOLTA account(s)).

I would be remiss if I did not comment on the respondent's conduct in the contempt proceeding before me. She was openly rude, crass, and contemptuous of assistant bar counsel, whose conduct toward the respondent was always remarkably controlled, reserved, and courteous.

By the Court,

Francis X. Spina
Associate Justice
Supreme Judicial Court

ENTERED: 19 October 2006

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: BD-2006-039

IN RE: BARBARA C. JOHNSON

JUDGMENT OF DISBARMENT

This matter came before the Court, Spina, J., on an Information and Record of Proceedings with the Recommendation and Vote of the Board of Bar Overseers filed by the Board on May 16, 2006. After hearing and for reasons stated in the Memorandum and Judgment of this date, it is ORDERED and ADJUDGED that:

1. BARBARA C. JOHNSON is hereby disbarred from the practice of law in the Commonwealth of Massachusetts and the lawyer's name is stricken from the Roll of Attorneys. In accordance with S.J.C. Rule 4:01, sec. 17(3), the disbarment shall be effective thirty days from the date of the entry of this Judgment. The lawyer, after the entry of this Judgment, shall not accept any new retainer or engage as a lawyer for another in any new case or legal matter of any nature. During the period between the entry date of this Judgment and its effective date, however, the lawyer may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

It is FURTHER ORDERED that:

2. Within fourteen (14) days of the date of entry of this

Judgment, the lawyer shall:

a) file a notice of withdrawal as of the effective date of the disbarment with every court, agency, or tribunal before which a matter is pending, together with a copy of the notices sent pursuant to paragraphs 2 (c) and 2(d) of this Judgment, the client's or clients' place of residence, and the case caption and docket number of the client's or clients' proceedings;

b) resign as of the effective date of the disbarment all appointments as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary, attaching to the resignation a copy of the notices sent to the wards, heirs, or beneficiaries pursuant to paragraphs 2(c) and 2(d) of this Judgment, the place of residence of the wards, heirs, or beneficiaries, and the case caption and docket number of the proceedings, if any;

c) provide notice to all clients and to all wards, heirs, and beneficiaries that the lawyer has been disbarred; that she is disqualified from acting as a lawyer after the effective date of the disbarment; and that, if not represented by co-counsel, the client, ward, heir, or beneficiary should act promptly to substitute another lawyer or fiduciary or to seek legal advice elsewhere, calling attention to any urgency arising from the circumstances of the case;

d) provide notice to counsel for all parties (or, in

the absence of counsel, the parties) in pending matters that the lawyer has been disbarred and, as a consequence, is disqualified from acting as a lawyer after the effective date of the disbarment;

e) make available to all clients being represented in pending matters any papers or other property to which they are entitled, calling attention to any urgency for obtaining the papers or other property;

f) refund any part of any fees paid in advance that have not been earned; and

g) close every IOLTA, client, trust or other fiduciary account and properly disburse or otherwise transfer all client and fiduciary funds in her possession, custody or control.

All notices required by this paragraph shall be served by certified mail, return receipt requested, in a form approved by the Board.

3. Within twenty-one (21) days after the date of entry of this Judgment, the lawyer shall file with the Office of the Bar Counsel an affidavit certifying that the lawyer has fully complied with the provisions of this Judgment and with bar disciplinary rules. Appended to the affidavit of compliance shall be:

a) a copy of each form of notice, the names and addresses of the clients, wards, heirs, beneficiaries, attorneys, courts and agencies to which notices were sent,

and all return receipts or returned mail received up to the date of the affidavit. Supplemental affidavits shall be filed covering subsequent return receipts and returned mail. Such names and addresses of clients shall remain confidential unless otherwise requested in writing by the lawyer or ordered by the court;

b) a schedule showing the location, title and account number of every bank account designated as an IOLTA, client, trust or other fiduciary account and of every account in which the lawyer holds or held as of the entry date of this Judgment any client, trust or^ fiduciary funds;

c) a schedule describing the lawyer's disposition of all client and fiduciary funds in the lawyer's possession, custody or control as of the entry date of this Judgment or thereafter;

d) such proof of the proper distribution of such funds and the closing of such accounts as has been requested by the bar counsel, including copies of checks and other instruments;

e) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice; and

f) the residence or other street address where communications to the lawyer may thereafter be directed.

The lawyer shall retain copies of all notices sent and shall maintain complete records of the steps taken to comply with the n

notice requirements of S.J.C. Rule 4:01, Section 17.

4. Within twenty-one (21) days after the entry date of this Judgment, the lawyer shall file with the Clerk of the Supreme Judicial Court for Suffolk County:

a) a copy of the affidavit of compliance required by paragraph 3 of this Judgment;

b) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice; and

c) the residence or other street address where communications to the lawyer may thereafter be directed.

By the Court (Spina, J,),

Maura S. Doyle, Clerk

Entered: August 9, 2006

Supreme Judicial Court For Suffolk County

Fee Waived Only

8-10-06 Date

Assistant Clerk

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPREME JUDICIAL COURT

FOR SUFFOLK COUNTY
NO: BD-2006-039

IN RE: BARBARA C. JOHNSON MEMORANDUM AND JUDGMENT

The Board of Bar Overseers (board) filed an information recommending the disbarment of Attorney Barbara C. Johnson (respondent) from the practice of law. The board adopted the special hearing officer's findings of fact and conclusions of law, with two minor exceptions. I adopt those findings and conclusions. The findings, supported by substantial evidence, see Matter of Segal, 430 Mass. 359, 364 (1999); S.J.C. Rule 4:01, § 8 (4), as appearing in 425 Mass. 1311 (1997), and the conclusions of law, are summarized as follows.

Count I. William Jones,[1] bom in 1985, was the subject of a care and protection proceeding in the Juvenile Court in which it was alleged that his father, John Jones, had physically, sexually, and emotionally abused him. John Jones filed a paternity action in the Probate Court Department alleging that he was William's father. The two matters were assigned specially to a judge in the Juvenile Court. In 1989, John Jones's custody and

[1] The names used are pseudonyms, as Count I arises out of a matter decided in the Juvenile Court Department. Standing Order 1-84 of the Juvenile Court, adopted May 8, 1984, states: "All juvenile court case records and reports are confidential and are the property of the court.

"Reports loaned to or copied for attorneys of record, or such other persons as the court may permit, shall be returned to the court after their use or at the conclusion of the litigation, whichever occurs first.

"Said reports shall not be further copied or released without permission of the court."

visitation rights as to William were terminated. The respondent was not involved in those proceedings.

William's mother, Jane Doe, married Robert Brown in 1989, and William thereafter was known as William Brown. The Browns had a son, David, who was born in 1990. The Browns subsequently divorced, and William and David lived with their mother.

In May, 2000, eleven years after his visitation and custody rights were terminated, John Jones, represented by the respondent, filed a complaint for modification of the judgment in the paternity action. The respondent also filed a separate action on behalf of John Jones against a doctor who had concluded that Jones had sexually abused his son, the hospital where the doctor practiced, the court-appointed investigator, the Department of Social Services, and others involved in the original care and protection matter. The respondent had obtained copies of psychological and other reports, as well as deposition transcripts filed in the care and protection matter. The respondent had not sought or obtained the permission of the Juvenile Court judge before taking possession of these materials, which contained confidential, privileged, or personal information about Jane, William, and David Brown, including references to findings that William had been sexually abused by his father. At the time, the respondent knew that these records were confidential and that she could not obtain or release them without the judge's authorization.

In early 2001, the respondent posted on her website various items about Jane, William, and David Brown, including pleadings from the two actions she filed on behalf of John Jones, pleadings from Jane's divorce action, and part of a report by a psychologist who treated Jane and William. These papers contained material that had been quoted from, and summarized from, Juvenile Court records that were impounded, including Jane, William, and David's names and addresses, and the additional identification of William as William Jones. The respondent identified both boys as illegitimate, and as victims of sexual abuse by their respective fathers. She referred to Jane Brown as a perjurer. In mid February, 2001, the

judge allowed bar counsel's motion for limited release of the paternity action records for purposes of bar discipline proceedings against the respondent. As of August, 2003, the respondent had not complied with the Juvenile Court order of May, 2001.

By disseminating impounded material from the care and protection and paternity actions, by failing to return to the Juvenile Court impounded reports belonging to the court, as ordered by the judge, and by failing to remove impounded material from her website, again as ordered by the judge, the respondent violated Mass. R. Prof. C. 8.4 (d) and (h). In addition, by deliberately disobeying the Juvenile Court judge's May 1, 2001, order and by engaging in knowing violations of Juvenile Court Standing Order 1-84 and G. L. c. 209C, § 13, the respondent violated Mass. R. Prof. C. 3.4 (c) and 8.4 (d) and (h). Finally, by disseminating information about William, David, and Jane on her website with no substantial purpose other than to embarrass or burden them, the respondent violated Mass. R. Prof. C. 4.4 and 8.4 (h).

Count II. In October, 1999, Mary Parker consulted the respondent concerning criminal charges her husband was facing that arose out of allegations that Mr. Parker had sexually abused their adult daughter, who was mentally retarded and living in a residential facility supervised by the Department of Mental Retardation (department). The department brought a protective services action against the Parkers. At the time, the Parkers suspected someone at the facility had done what Mr. Parker was accused of doing. They were represented by other counsel. Mrs. Parker consulted with the respondent several times in early October, 1999. On November 1, 1999, the respondent advised Mrs. Parker that she should give her all relevant documents to enable her to determine whether she could be of assistance. Several days later, Mrs. Parker sent the respondent a check and a box of documents. On November 11 the respondent recommended to Mrs. Parker that, after reviewing the documents, she be retained to take depositions in the protective services action. The respondent indicated the balance due for her services rendered thus far, and told

Mrs. Parker that she required a retainer of $10,000, which she said she would place in an escrow account from which she would pay herself for future services as they were rendered.

The respondent received the Parkers' retainer on November 22,1999, but she did not deposit it in a client funds account. Instead, she deposited it to her personal account. In early December, 1999, Mrs. Parker discharged the respondent. She asked the respondent to provide an itemized bill and return the balance of the retainer after deducting any amounts due for services rendered. One week later the respondent sent an itemized bill and her check in the amount of $3,174.50. The Parkers demanded the return of an additional $6,400. The respondent refused, and also failed to deposit the disputed amount in a trust account. In March, 2000, the Parkers filed a complaint with the office of bar counsel.

In mid December, 2002, the respondent posted on her website the Parker bill, correspondence between her and Mrs. Parker, and copies of her response to bar counsel regarding the Parkers' complaint. The posted materials disclosed confidential, personal, and private information that the respondent received in the course of her professional relationship with the Parkers, including the true identities of the Parkers and their family members, their daughter's history and disabilities, the history and details of the sexual abuse allegations,[2] and communications among the respondent, the Parkers, and the Parkers' other counsel. The respondent never obtained the Parkers' permission to disclose or disseminate the information about them on her website, or the permission of anyone authorized to consent on behalf of the Parkers' daughter before posting information about her.

On December 23,2002, the Parkers' attorney made written demand of the respondent that she immediately remove the confidential and privileged information about them from her website. The respondent answered by suggesting that she would consider removing the postings if the Parkers first withdrew their complaint to bar counsel. As of August, 2003,

[2] On October 27,2000, the Commonwealth nolleprossed the criminal charges against Mr. Parker.

the respondent had not removed any information about the Parkers from her website.

The special hearing officer found that bar counsel had failed to prove that the respondent had charged a clearly excessive fee. He also concluded that bar counsel failed to prove that the respondent intentionally had made false, deceptive, or misleading representations to the Parkers about her fees, time, and charges. Bar counsel has not appealed those findings.

By commingling the Parkers' retainer payment with her own funds, failing to segregate the disputed portion of their retainer, and failing to account adequately to the Parkers for her application and disposition of the retainer, the respondent violated Mass. R. Prof. C. 1.15 (a)-(c), 1.16 (d), and 8.4 (c) and (h). In addition, by revealing confidential information gained in the course of her professional relationship with the Parkers without their consent, the respondent violated Mass. R. Prof. C. 1.6(a) and 1.9 (1) and (2). Finally, by demanding the withdrawal of the Parkers' bar discipline grievance as a condition of removing their confidential information from her website, the respondent violated Mass. R. Prof. C. 8.4 (d) and (h) and SJ.C. Rule 4:01, § 10.

Count III. In 1992 the respondent filed a wrongful termination action on behalf of a client. The complaint was filed in the Superior Court and later remanded to the District Court. In January, 1995, a judge in the District Court Department entered an order permitting the respondent to inspect the defendants' documents. The respondent failed to appear for the scheduled inspection. In February she filed a motion to reconsider the scheduling order, and a motion seeking leave to depose nonparty witnesses outside the presence of defense counsel. The motions were denied, and the judge found that the motions were brought without legal or factual basis and in bad faith. The judge ordered the respondent and her client to pay attorney and paralegal fees totaling $981.25. They did not make the payments and both subsequently were found in contempt. The judge ordered payment of further fees of $558, plus a civil penalty of $50 for every day that the fees were

not paid, together with a warning that, as a further sanction, the plaintiffs complaint was subject to dismissal. No payments were made. On April 5,1995, the judge ordered payment of a civil penalty of $650. Again, no payments were made. On April 19, 1995, the complaint was dismissed, and the respondent's client was ordered to pay the defendants $3,809.25 in costs.

The respondent did not appeal the amended final judgment of dismissal. Instead, she filed a request for retransfer to the Superior Court, purportedly under G. L. c. 231, § 102C. The Superior Court judge ordered the request for retransfer to be stricken. The respondent appealed that order. The Appeals Court affirmed, held that the appeal was frivolous, and awarded attorney's fees and costs to be determined at a later date. The Appeals Court subsequently awarded $30,000 in fees and $1,071.65 in costs. The amounts ordered were paid by July, 2000.

On December 13,1995, the judge modified the prior contempt rulings by holding the respondent's client in contempt only for nonpayment of the paralegal fees ($261.25),[3] and holding the respondent in contempt only for nonpayment of the attorney's fees ($ 1,278) plus the civil penalty ($650). The order further provided that the respondent could purge her contempt and be forgiven payments of the civil penalty if she paid $ 1,278 by December 20, 1995. The respondent made no payments. As a result a final judgment of contempt was entered against her in July, 1996.

The respondent appealed the final judgment of contempt entered against her. The Appeals Court affirmed the judgment. After the judgment of contempt was affirmed, the District Court judge notified the respondent that she could become liable for additional penalties and the matter of her contempt would be referred to the Board of Bar Overseers if she did not purge her contempt by July 30, 1998. The respondent made no payment.

[3] The final judgment in the civil action was amended to reflect that the plaintiff owed the defendants $261.25, plus interest.

The District Court judge held a hearing on December 17, 1998, on the issue of the respondent's continuing contempt. After determining that the respondent had wilfully, and without justification or cause, failed to purge herself of contempt, the judge ordered that the respondent immediately be taken into custody. The next day the respondent arranged for payment of all sums owed for her contempt, and she was thereupon released. She filed no further appeal.

By knowingly disobeying the District Court judge's orders of December 13, 1995, after those orders were affirmed on appeal, engaging in contempt of court, and refusing to purge her contempt until incarcerated, the respondent violated Mass. R. Prof. C. 3.4 (c) and 8.4 (d) and (h). By filing motions without any legal or factual basis and in bad faith, exposing her client to dismissal of her claims and personal liability for sanctions and damages through the respondent's misconduct, failing to appeal from the contempt judgment against her client, and pursuing a frivolous appeal from the Superior Court judge's order striking the retransfer request, the respondent violated Canon One, DR 1-102(A)(5) and (6), Canon Six, DR 6-101 (A)(l) and (2), and Canon Seven, DR 7-101(A)(3).

In aggravation, the respondent has a history of prior discipline, an admonition in 1995 for repeated insults to the opposing party, and interruptions and other interference in the course of witness examinations in a civil matter. AD-95-80, 11 Mass. Att'y Disc. R. 468 (1995). Because this prior discipline was for related misconduct, that is, refusing to conform her behavior to professional norms and showing contempt for the legal process, it merits consideration in determining the sanction. See Matter of Gross, 435 Mass. 444, 453, 17 Mass. Att'y Disc. R. 271, 280-281 (2001).

The respondent's conduct during the disciplinary proceeding, in which she was insulting, vituperative, demonstrated utter disrespect and contempt for the process, and refused to participate in the hearing, is also an aggravating factor that merits consideration

in determining the sanction.[4]

[4] For example, at the prehearing conference, the respondent made the following comments:

> "The one that says something for protective order. I mean, all that is hog wash." (Tr. 11/17/03, at 22)
>
> "[Assistant Bar Counsel] has done everything to make sure this is a kangaroo court and this particular hearing goes along just the way the star chamber would want it, without any witnesses whatsoever." (Tr. 11/17/03, at 27)
>
> "So that document that you wanted to find out whether I received is the most bogus document you would ever want to read. There are people she's named as she written a little something about them, but she has no intention of calling them as witnesses. It's valueless, it's hollow, it's a sack of cow chips. The smell of it - " (Tr. 11/17/03, at 27-28)
>
> "Would you recuse yourself from being a Hearing Officer? You have shown your bias, you have shown you're not the brightest bulb in the chandelier . . . ." (Tr. 11/17/03, at 40-41)
>
> "I'm old and deaf, so I can yell." (Tr. 11/17/03, at 43)
>
> "But I'm sure as shit not going to pay for it. If [Assistant Bar Counsel] wants it, she can pay for it." (Tr. 11/17/03, at 66)
>
> "No. Damn it, no. Unless you agree that you're carrying a kangaroo court here, unless you're willing to agree that you have a kangaroo court here, you cannot say to me this is Count 3 and you can't have any defense to it because it's all been decided before.. .. That's a wagon of detritus, cow chips horse manure." (Tr. 11/17/03, at 79)
>
> "You're not going to accept them anyway, so who the hell cares. There, I swore." (Tr. 11/17/03, at 81)
>
> "She [Assistant Bar Counsel] is a liar. She is a liar." (Tr. 11/17/03, at 82)
>
> "If you're [Special Hearing Officer] going to really make this into a clown thing." (Tr. 11/17/03, at 88)
>
> "Come on, cut the crap. Excuse me, I swore then. This protective order is a piece of foolishness at this point." (Tr. 11/17/03, at 108)

Discussion.

(a) Count I. The respondent contends that she deliberately could not have disobeyed the Juvenile Court judge's order of May, 2001, because she was never in the Juvenile Court. She ignores the simple fact that the judge ordered her to return certain materials and to remove certain postings on her website. A copy of the order was served on her, and she ignored it. She never sought to vacate or appeal the order. Nor did she appeal the complementary ruling and order of the Probate Court judge stating that the records filed in the paternity action before 1998 were impounded by operation of law, and papers filed after G. L. c. 209C, § 13, was amended in 1998 were impounded by order of the court. The issue is waived and cannot be litigated for the first time in her disciplinary proceedings. An attorney must obey a court order where she has exhausted all appeals. See Florida Bar v. Gerstein, 707 So. 2d 711 (Fla. 1998). The respondent's claim that the 1998 amendment to G. L. c. 209C, § 13, has retroactive effect similarly is waived.

The respondent argues that there was no evidence that a source of the material she posted on her website included impounded Juvenile Court records. The posted material contained quotations from, and summaries of, reports filed in the Juvenile Court. Moreover, the May, 1, 2001, Juvenile Court order states that the respondent wrongfully disseminated impounded material. She never sought a hearing to explain that her sources were not copies of impounded Juvenile Court records; she simply ignored the order. The point is waived.

The respondent, citing the absence of any testimony, argues the absence of any evidence to support the findings that the information posted on her website had no

On the first day of hearing, the respondent made the following statements:

"If [Bar Counsel] doesn't lie so much, I wouldn't need to interrupt." (Tr. 12/2/03, at 17)

"Mr. Brown was not on her witness list. Plus, his affidavit is, oh god, it belongs in a pig farm." (Tr. 12/2/03, at 18)

substantial purpose other than to embarrass Jane, William and David Brown. No live testimony was required to draw this inference from the highly personal nature of the information (one reason why care and protection records are impounded and the public is excluded from such proceedings), and from the fact that the respondent had filed an action seeking modification of the judgment in the paternity action.

(b) Count II. The respondent claims that because it was determined that she did not charge an excessive fee, she owed nothing to the Parkers and therefore was not required to set aside any money she legitimately earned by placing it in a trust account. There are two flaws in her argument. The first is that her conduct is in violation of the plain language of Mass. R. Prof. C. 1.15 (b)(2)(ii), which requires an attorney to restore withdrawn funds to a trust account if the right of the attorney to receive the funds has been disputed and the attorney is notified of the dispute within a reasonable time after the funds were withdrawn. Second, the respondent never placed the funds in a trust account in the first place. The respondent had not earned all the funds at the time she deposited them to her personal account, and therefore she commingled client funds with her personal funds.

There is no merit to the claim that the Parkers had consented to the posting of confidential information on the respondent's website when Mrs. Parker wrote that they were looking forward to seeing their story on her website. As they apply to this case, Mass. R. Prof. C. 1.6 (a) and 9.1 (c) require the "communication of information reasonably sufficient to permit the client to appreciate the significance of the disclosure of confidential information before the disclosure is made. There is no evidence of any such communication by the respondent prior to the disclosure. In fact, the respondent acknowledges she had not even met the Parkers. It also is immaterial that the Parkers did not personally complain about the disclosure. Bar counsel may initiate an investigation of any conduct by a lawyer that may violate the Massachusetts Rules of Professional Conduct. See Rules of the Board of Bar Overseers § 2.1 (b)(2).

The respondent also argues that there was no evidence, other than hearsay, that she left a message on the telephone answering machine of the Parkers' other attorney demanding the withdrawal of their complaint with bar counsel as a condition of removing their confidential information from her website. The simple answer is that the respondent admitted in paragraph 93 of her amended answer to the petition for discipline (see docket #46) that she left a voice message. A taped message (Exhibit 75), which the special hearing officer properly could have determined is in her voice, contains the message in question. See also Exhibit 75 A - transcript of the voice message.

(c) Count III. The respondent argues that the December 13, 1998, orders, which she is charged with disobeying after they were affirmed on appeal, was not a final order, and therefore may not be the basis for discipline. There is no basis to the argument. The respondent was ordered to do something and she was bound to comply with the orders. See Florida Bar v. Rubin, 546 So.2d 1001 (Fla. 1989). It does not matter that the orders were interlocutory. She could have sought a stay of the orders pending rehearing or appeal, see Matter of R.I. Select Comm'n Subpoena, 415 Mass. 890, 893 (1993); Ward v. Coletti, 10 Mass. App. Ct. 629 (1980), S.C., 383 Mass. 99 (1981), but she failed to pursue that course. In any event, she is charged with failing to obey the orders after they were affirmed on appeal, not at the time they issued. Bar counsel has chosen not to prosecute the respondent for the interim disobedience of the orders. The respondent's argument necessarily evaporates.

The respondent claims that the underlying basis for the contempt findings, namely, the fact that she filed frivolous motions that resulted in the imposition of fees and costs that she refused to pay after being ordered to do so, is erroneous. The issue has been decided previously and affirmed in an appeal to which the respondent was a party. She had a full and fair opportunity to litigate this issue in that matter, and she may not collaterally attack that decision in this proceeding. See Matter of Goldstone, 445 Mass. 551, 559-560 (2005).

The respondent has raised other issues concerning the evidentiary basis of the three-count petition for discipline, none of which has merit.

(d) Selective Prosecution. The respondent contends that bar counsel improperly refused to investigate and prosecute opposing counsel in Counts I and III. Whether bar counsel pursues discipline of others is irrelevant in these proceedings, see Matter ofTobin, 417 Mass. 92, 103 (1994), unless it can be shown that the respondent has been prosecuted selectively because of her membership in a protected class. See United States v. Armstrong, 517 U.S. 456, 464-465 (1996). There has been no such showing.

(e) Subpoenas. The respondent argues that parties to bar discipline proceedings are entitled to issue subpoenas to witnesses, pursuant to G. L. c. 233, § 8, to produce books and papers at a hearing before the special hearing officer. The statute provides that parties may issue subpoenas to witnesses to testify and produce books and papers at hearings before certain listed boards. The Board of Bar Overseers is not listed in the statute. Bar counsel contends that only the special hearing officer was authorized to approve such subpoenas, pursuant to the Board of Bar Overseers Rules, § 4.5. The precise question need not be decided because the special hearing officer's order quashing the subpoenas issued by the respondent was proper. It prevented the respondent from circumventing his prior ruling refusing to issue subpoenas to witnesses whose testimony was irrelevant to the issues before him. The respondent has failed to show how such testimony would have been relevant. Moreover, the respondent had made no request for a subpoena for production of books, papers, or documents in her original request for subpoenas to be issued pursuant to Board of Bar Overseers Rules, § 4.5.

(f) Protective Order. The board's chair properly entered a protective order directing "the hearings [to] be conducted in such a way as to preserve the confidentiality of. . . [certain] information." Indeed, one of the conditions of the judge's order permitting bar counsel to use impounded documents in Count I in this matter was that bar counsel keep the

information confidential. Supreme Judicial Court Rule 4:01, § 20 (4), and Board of Bar Overseers Rules, § 3.22 (c), allow such an order, and contemplate an appeal to the single justice from the grant or denial of a protective order. The respondent took no such appeal.

When the respondent persisted in using the true names of one of the individuals whose identity was protected, the special hearing officer properly excluded the public from the hearing.

(g) First Amendment. With respect to Counts I and II, the respondent argues that she had a First Amendment right to publish information, as she chose, on her website, and that any sanction for this conduct would constitute a violation of this right. An attorney's right to speak, in contrast with that of other citizens, can be and, in fact, is constrained by ethical rules. Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991). With respect to Count I, the respondent had a duty to raise her First Amendment claims by challenging the court orders specifically impounding the information she published on her website - and, in raising them, refrain from disclosing the impounded material. See Mass. R.A.P. 16 (m). Instead, she simply defied the orders and belatedly claims here her First Amendment rights as a collateral defense to her disobedience of the court orders. See Florida Bar v. Rubin, supra; Florida Bar v. Gerstein, supra. Because the respondent failed to timely raise her First Amendment claims by challenging the validity of the court orders, it was misconduct to defy them, and she waived any such claim in this proceeding.

(h) Sanction. The board made the following statement about the sanction that should be imposed.

"Based on the misconduct in the three counts and the factors in aggravation, the special hearing officer recommended disbarment. We agree.

"The respondent's misconduct has been directed toward her clients, opposing parties, other counsel, judges and other adjudicators, witnesses and innocent third parties. She has ignored court orders repeatedly. She has made inflammatory and contemptuous statements

both verbally and in writing on her website and in this disciplinary proceeding. Her misconduct demonstrates her outright refusal to conform her conduct to professional standards and ethical requirements. As a result, the judicial system and the public must be protected from her repeated misconduct.

"In Counts I and II, the respondent repeatedly violated court orders, for which the standard sanction is at least a suspension. See, e.g., Matter of Cohen, [435 Mass. 7, 17 (2001)]; Matter ofTobin, supra. Moreover, in Count III, her misconduct resulted in the dismissal of her client's complaint. In Counts I and II, the respondent publicized confidential and private information on her website. In doing so, in Count I, she flouted court orders and publicized private information about a minor who was simply related to opponents in litigation. In Count II, she disclosed confidences of her former clients in retaliation for disputing her fee and refused to remove that information from her website. Such misconduct, standing alone[,J would warrant substantial discipline. Matter of Pool, 401 Mass. 460,5 Mass. Att'y Disc. R. 290 (1988) (disbarring attorney who furnished confidential client information to U.S. Attorney in order to collect his fee). Under the ABA Standards for Imposing Lawyer Sanctions § 6.21 (1992), '[djisbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding.' In this case there can be no doubt that the respondent has repeatedly defied court orders over substantial periods of time, has revealed confidential information solely to harass, and has interfered with the judicial process and this disciplinary proceeding.

"The sanction should be more severe where, as here, the respondent has engaged in a pattern of misconduct, persisting over a matter of time, including prior related discipline. Matter of Saab, 406 Mass. 315 (1989). We agree with the special hearing officer that, 'Of utmost concern … is the respondent's patent refusal to comply with, or even acknowledge,

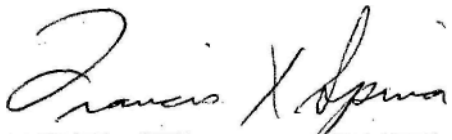
her ethical responsibilities as an attorney.' In our view, her misconduct is analogous to that in Matter of Cobb, [445 Mass. 452 (2005)]. Our review of the record establishes that the respondent, like Cobb,

> 'has demonstrated rather convincingly by [her] quick and ready disparagement of judges, [her] disdain for [her] fellow attorneys, and [her] lack of concern for and betrayal of [her] clients that [s]he is utterly unfit to practice law.'

"Id. at 479."

I agree. The appropriate sanction here is disbarment, and an order disbarring the respondent from the practice of law shall enter.

By the Court,



Francis X. Spina
Associate Justice

ENTERED: August_ j 2006

Supreme Judicial Court
For Suffolk County Fee
Waived Only

Date _, Assistant Clerk

APPENDIX F

SUMMARIES OF COUNTS I, II, AND III

In **Count I**, Johnson was charged with publishing allegedly confidential material on her website and thereby harming people, but the OBC ***never*** identified with any particularity, or even nonparticularity, the confidential material or the offending language.

Due process required the identification, i.e., notice, of the allegedly offending language. The prosecutor produced ***no*** evidence supporting the allegations. She produced only her speculation. Notwithstanding that the prosecutor later admitted that Johnson did not publish impounded documents from the Juvenile Court, but she continued to assert that the information on Johnson's website "was derived from confidential reports and records on file in the juvenile . . . or probate courts, and thus impounded or shielded from public view by rule or by statute."

One case to which the prosecutor was referring was a Care & Protection action brought by the Department of Social Services in juvenile court. The other was an action for paternity and custody brought by the putative father in family court. Both were brought circa 1988. The cases were closed years before Johnson ever met the client (the father), and Johnson had never been to the juvenile court.

The OBC alleged and the BBO found that by publishing online her client's Complaint for Modification in Probate & Family Court, Johnson had published impounded material. Johnson disagreed and filed a Motion for BBO to Report Issue of Whether M.G.L. **c. 209C, §13**, As Amended, Effective March 31, 1998, Has Retroactive or Prospective Effect. When the motion was denied on the grounds that Johnson had used true names in it, Johnson attempted to get review of the issue in the appellate courts. That effort, too, was unsuccessful, i.e., the court evaded reviewing the issue.

In **Count II**, the OBC accused Johnson of commingling a client's funds with her own personal funds, but the OBC ***never*** identified the amount of the funds allegedly commingled. Contending that she had already earned the money before depositing it into her account, Johnson denied that she commingled funds.

After the trial with no witnesses and no parties present,\[1]/ the BBO hearing officer nevertheless found that Johnson had committed no fraud, no deceit, no misrepresentation to anyone or to any court, and that she owed no money to anyone.

[1] The caption read, Daniel P. Crane, Bar Counsel v. Barbara C. Johnson.

Despite the BBO finding, the SJC found that Johnson violated Mass. R. Prof.C 1.15(a)-(c) and 8.4(c) [**APP-3-4, 21 and APP-37**]. No mention is made, however, *in words* of fraud, deceit, dishonesty, or misrepresentation [**APP-1 *et seq***],

As in Count I, the OBC charged Johnson in Count II with publishing "personal and confidential" information. Again denying the charge, Johnson produced to the OBC prosecutor a copy of the email which Johnson received from the Complainant. In the email, the Complainant wrote that she was looking forward to seeing her family's story on Johnson's educational website. Johnson construed the email as permission, the OBC and the BBO did not. [*See* **Mass.R.Prof.C.1.9(c)**.]

Count III arose from a "whistleblower" case brought by a female geologist in the early '90s. In that case, Johnson was gathering evidence of fraud by the defendant company of the state and federal governments. Petitioner's opponent during "the time of trouble"——between 1995 and 1998——was Tyco, headed by Dennis Kozlowski. Former Tyco CEO Kozlowski has since been found guilty of 30 charges and sentenced to a term of years in federal prison. (Defense counsel in the case did ***not*** disclose the purchase by Tyco of the original defendant company.)

On 22 March 1995, Johnson was found in contempt of a non-existent order.

She appealed and despite her considerable documentary evidence——docket sheets, a memo from the courtroom clerk, tapes and transcripts of the hearings, orders from the court——to prove her contention that there was no such order, the Appeals Court in the summer of 1998 affirmed the decision of contempt.

On 17 December 1998, Johnson was jailed by the same court that had held her in contempt of the 1995 non-existent order.

Prior to the Petition for Discipline issuing, the OBC prosecutor sent Johnson a copy of the alleged order in order to convince Johnson that the order existed. Surprised by the document, for safekeeping she scanned it in to her computer. The scanned copy revealed the document to be a different order materially altered to make it appear to be the non-existent order.

In the disciplinary petition of January 2003, the OBC prosecutor revised the truth of the event of 17 December 1998 by averring that Johnson was jailed to force payment of funds allegedly ordered in 1995 by the non-existent order, and charged Johnson with a violation of professional conduct. He grounds were based on Johnson having been found in contempt in 1995.

When Johnson wrote her Answer to the Petition, she included a copy of the fabricated document with full explanation, and uploaded it to her website, where it remains today. She included a copy of the fabricated document in legal briefs filed at

the BBO. See drano90-part-iii-answer-bbo-count-three-lily.htm, which file Johnson believes was included in the BBO's appendix submitted to the Massachusetts SJC. Johnson is unsure of this because she was ***never*** given a copy of the 12-volume appendix, not even a table of contents to it. The SJC failed to act on her motion seeking a copy of the volumes, or in the alternative, a table of contents.

APPENDIX G

THE SJC DECISION WITH PETITIONER'S COMMENTS INTERLEAVED

NOTES

Please read Petitioner's Summaries of Counts I, II, and III at pages-12-15 of this Addendum.

The SJC decision appears in 9.5-point Verdana, the typeface and size in which it appeared on the Internet.
Petitioner's interleaved comments appear in 12-point, boldfaced Century Schoolbook.

The references to Petitioner's website files link to some files that are in the Board of Bar Overseers' Appendix, which has not been made available to Petitioner, making it impossible for Petitioner to provide a page number.

Some references to Petitioner's website files link to some files that might not be in the BBO's Appendix,

The reference to Drano Series #106 is to a website file that gathers all of Petitioner's motions and opposition that she filed at the BBO. All those pleadings ought to be in the BBO's Appendix, but because she was also not supplied with a Table of Contents to the 12-volume Appendix, she cannot say with certainty that they are in the Appendix.

In The Matter of Ba rbara C. JOHNSON.

SJC-09820, SJC-09866.

November 6, 2007. - December 5, 2007.

Attorney at Law, Disbarment. *Contempt.*

INFORMATION filed in the Supreme Judicial Court for the county of Suffolk on May 16, 2006.

The case was heard by *Francis X. Spina,* J., and a petition for contempt, filed on September 27, 2006, was also heard by him.

Barbara C. Johnson, pro se.

Susan A. Strauss Weisberg, Assistant Bar Counsel.

Present: Marshall, C.J., Greaney, Ireland, Cowin, Cordy, & Botsford, JJ.

RESCRIPT.

BY THE COURT. Barbara C. Johnson (respondent) appeals from judgments of a single justice of this court disbarring her from the practice of law and finding her in contempt of the judgment of disbarment. We affirm both judgments.

1. *Disbarment.* a. *Background.* Following a hearing on a three-count petition for discipline, a special hearing officer made findings of fact and conclusions of law culminating in a recommendation that the respondent be disbarred. The Board of Bar Overseers (board) adopted those findings and conclusions, and filed an information in the county court recommending disbarment. The single justice adopted the findings and conclusions as adopted by the board and entered a judgment ordering that the respondent be disbarred. The findings and conclusions as adopted by the board are summarized as follows.

i. *Count one.* The respondent owns and maintains a Web site on which she posts information about allegations of child sexual abuse. In 2001, the respondent represented a father in a paternity and custody action in the Probate and Family Court who had been accused of sexually abusing his minor son. The son had also been the subject of a care and protection proceeding in the Juvenile Court.

> **I met the client in 2000. He had been accused of sexual abuse in 1987. The care and protection ["C&P"] began in 1987 or 1988 and had reached final judgment soon thereafter . . . no later than early '90s. In 1988, the client had brought a paternity and custody suit (M.G.L. c. 209C, for out-of-wedlock situations) in Bristol County Probate & Family Court ["P&F"]. The P&F case had also closed years ago. The client had had SIX lawyers, none of whom was able to get him custody or visitation with the child or even an evidentiary hearing.**

The respondent posted on her Web site information that had been impounded in the care and protection action, e.g., information identifying the son as having been allegedly sexually abused by his father, including the son's full name and photographs of him. The respondent also posted the full names of the son's mother and a half-brother (the product of the mother's partnership with a man whom she married and later divorced); pleadings from the mother's divorce action;

> **I posted my client's Complaint, filed in the U.S. District Court in Boston. A public record. I absolutely posted NO impounded files. No file was ever identified by the OBC, the BBO, Judge Spina, or the SJC panel as being impounded.**
>
> **I had used pseudonyms of two children's' names but had missed a few appearances of the true names that were in .jpg files. I changed the ones I found. The search tools do not work on .jpg fles. Those I saw, I cut out of the .jpg files. There are two or so still in the website files. The photos of my client's child were taken when he was an infant, when he was at his first birthday party, and when he was riding a plastic choo-choo train (á la Fisher Price). We were trying to show**

the father and son together. This was not an abusive father. By the time I uploaded the photo files on my website, the boy was around 15 or 16. No one would have recognized him from his baby pictures. Although the child's birthname appears in the mother's affidavit in her divorce action, she registered the child in school under his stepfather's surname.

and comments by the respondent characterizing the mother as a perjurer who had conceived both children out of wedlock and who had falsely accused both fathers of sexual abuse.

This is true and the facts of my comments are true. The documents I posted prove that the mother had lied. Of course, it is true that the mother had never been prosecuted for perjury. It would have been rare had she been. Mendacity is a human quality or state witnessed daily in every family court across this nation.

Proof of Mother's mendacity is in ¶6 of her Affidavit in her divorce action: i.e., in http://www.falseallegations.com/drano23-af-rgs.htm. In it, mother affianced that the subject child was from a previous marriage. That was untrue. He was conceived and born out of wedlock, but apparently she had not told her husband the truth of the child's origins.

The mother also accused the husband of child sexual abuse. DSS did not substantiate the accusation. I identified, by name, the social worker who cleared the husband. Despite her continuing mendacity, the mother received child support from each of the men whom she had accused of a heinous crime . . . and each of the men was caused considerable anxiety and attorneys' fees, facts which no court considered in its computations of child support for the woman who lied.

The mother and son filed complaints with bar counsel requesting that the respondent remove the material from her Web site.

The son did *not* file a complaint with bar counsel. A lawyer claiming to be his counsel filed one. The problem: the lawyer had been appointed his lawyer circa 1990, had *not* been re-appointed, and had *not* re-interviewed the then-young man.

I served subpoenas on the mother, the son, and the lawyer, but the BBO quashed my trial subpoenas . . . and on everyone else I caused to be served. My application, pursuant to BBO Rule 4.11 and dated 11 June 2003, for authorization to take depositions of potential witnesses was denied.

The OBC prosecutor did not call any potential or percipient witnesses to testify at trial.

In addition, a judge in the Juvenile Court ordered the respondent to return any impounded material to the court and remove all references to that material from her Web site.

Never having been in or gotten any documents from that Court, I did not have any impounded material from the Juvenile Court to return. If I referred to any document in Juvenile Court, the OBC prosecutor (an assistant bar counsel) did not identify it. The accusation has always struck me as bizarre in that the Juvenile Court docket was secret and I had no knowledge of what had been filed there. My client was never allowed to take the stand in his defense and was never allowed to examine anyone. In fact, in the 12 or 13 years after the C&P case was brought, there was never any evidentiary hearing of any size or sort or at any time.

My information regarding the case came from my client with a few exceptions, e.g., a report from a Juvenile-Court-appointed investigator and some reports from some social workers, who had NOT been appointed by either the juvenile or the family court in the two subject cases. The investigator's report came from one of the client's former attorneys OR my client. I have no memory from whom I got it approximately eight years ago.

The respondent ignored the court orders.

To this day, I am aware of only one order from the juvenile court.

Upon receiving the order, I wrote a letter to the juvenile court judge who issued the order on 29 May 2001. I iterated essentially

(1) that a document\[2]/ which was served upon me

(a) had no summons,

(b) was not a Complaint,

---

[2] On 7 May 2001, I was served with a pleading entitled "Verified Complaint for Equity Relief." The so-called Complaint was not in recognizable form and neither myself nor my client was named as a defendant.

(c) did not comport with any known set of rules of civil procedure, and most certainly not with the Massachusetts Rules of Civil Procedure,

(d) did not contain a short and plain statement of the claim showing that the pleader is entitled to relief,

(e) was not simple, concise and direct,

(f) did not inform me of what the plaintiff's claim is and the grounds upon which it rests,

(g) did not set out the facts in separately numbered paragraphs,

(h) did not have numbered paragraphs, making it impossible for me to answer the complaint in accordance with the rules,

(i) did not set out the facts clearly, unequivocally and directly so as to enable me to respond directly and intelligently,

(j) was verbose, argumentative, redundant, and contained material that is both impertinent and scandalous,

(k) did not have separate counts founded on separate transactions or occurrences. I have here omitted the internal cites,

(2) that I had no juvenile court documents to return, and

(3) that I wrote in ¶17 of the letter of 29 May 2001 to the judge, "I would suggest, with all due respect for the court, that the court go to my site and see if there is anything there which the court believes it has a right to order removed, or references to documents which it believes it has the authority to impound."

I never received any further communication from either the court or the judge personally.

Of greater significance is that that court and/or judge did not issue any contempt complaint or a summary holding of contempt. Why? Because the court could not identify any impounded documents on

my website.

Absent any basis for the juvenile-court order, it became clear that I was being retaliated against for filing both

- **on or around 25 September 2000 in the United States District Court in Boston a §1983 action [Docket No. 00-CV-11048-REK], which arose out of the egregious rulings in the original Care and Protection action filed in that juvenile court. *See* http://www.falseallegations.com-/drano5-complaint-linn.htm and**

- **on or around 9 May 2001 in Bristol County Probate & Family Court first a Complaint and then an Amended Complaint for Modification [Paper 55, Docket No. 88W0113-P1].**

Believing that the public should be educated as to court's retaliation against me for properly representing my client, I uploaded the letter to the juvenile-court judge who issued the order. Although it had a docket number [Docket No. EQ01N001], the clerk would not release any documents to me. *See* http://www.falseallegations.com/drano37-impound-ment-lawton.htm.

A subsequent order by a judge in the Probate and Family Court declared that the materials filed in that action were also impounded.

The P&F order was, in fact, simply a judgment allowing the OBC's motion for documents filed in the custody and paternity case, which had long since been closed. The judgment did not order me to do anything. I did not have the documents sought; the P&F court had them. I did not ask for them; the OBC assistant bar counsel did.

So the criticism of me by the OBC, the BBO, and the SJC single justice for failing to appeal the P&F order was criticism that was *un*just *ab initio*.

I had not even met the client until around 2000; I had never filed an appearance in the custody and paternity case before it closed; and at the time the OBC assistant bar counsel filed the motion, I had not been served with a Petition for Discipline. I had, however, *un*successfully tried twice to open the action with a Complaint and then an Amended Complaint for Modification.

As noted, the P&F court judge allowed the OBC counsel's motion and gave her the documents she sought. I have no clue what the documents were, I never saw them, and I was never given even a list of them.

The documents the OBC counsel received were allegedly put in the OBC/BBO's Appendix accompanying their "Information" (the document in which they seek disbarment) filed in the single-justice session of the SJC, but I was *never* given a copy of their 12-volume Appendix.

The decision says that I received all papers. That is another untrue statement. I was never given a copy of the 12-volume Appendix of even a Table of Contents of the Appendix. I filed a motion to get them, but the SJC never acted on it. During oral argument on 6 November 2007, I requested the Court to act on it. The Court did not do so. (A webcast of my oral argument against disbarment and my statement regarding the unacted-upon motion is archived at http://www.suffolk.edu/sjc/archive/2007/SJC_09820.html. It is 14 minutes in length. The oral argument appealing the judgment of contempt is archived at http://www.suffolk.edu/sjc/archive-/2007/SJC_09866.html. It is 11 minutes in length.)

THE BACKGROUND OF THE P&F DOCUMENT STORY
On or around 9 May 2000, I filed my client's Amended Complaint for Modification in P&F court. It may be seen at http://www.falseallegations.com/drano22-js-rgs.htm.

Two years prior to filing the Complaint and the Rule 15(a) Amended Complaint, §13 of M.G.L. c. 209C (the out-of wedlock chapter) had been amended. The amendment became effective at the end of March 1998, prior to my meeting the client.

Under the pre-amended section, all documents in an out-of-wedlock action were impounded and could be made public only after a showing of good cause.

Under the amended section, all filed documents in an out-of-wedlock action were open to the public and closed, i.e., impounded, only after a showing of good cause.

Under Massachusetts law, to get a modification of a court order, counsel must show four things (1) the order which the client wants modified, (2) the circumstances that brought that order about, (3) the substantial change in circumstances "today," and (4) the proposed new

order. Without showing items 1 and 2, the client will not get a modification, because unless the client or counsel educates the court as to what elements 1 and 2 were in yesteryear, the client or counsel cannot show how the change in circumstances is substantial.

The BBO and the court found that my using the early information from the P&F court for items 1 and 2 in my Complaint was a use of impounded material, a use that was forbidden. Clearly, the BBO and OBC ignored the amendment of §13.

In fact, I never uploaded to my website "pre-amendment" materials from the 209C (out-of-wedlock) case. I simply referred in my client's Amended Complaint for Modification to the date of the court order we sought to modify. The Amended Complaint for Modification was a PUBLIC record, having been filed two years after §13 had been amended.

The BBO and the SJC (both the single justice and the full panel sessions) ignored my argument re §13, although it was an issue of first impression. Thus the alleged use of impounded documents formed one of the reasons for my disbarment.

The board adopted the hearing officer's conclusions that by engaging in the foregoing activities, the respondent violated Mass. R. Prof. C. 3.4(c), 426 Mass. 1389 (1998); Mass. R. Prof. C. 4.4, 426 Mass. 1405 (1998); and Mass. R. Prof. C. 8.4(d) and (h), 426 Mass. 1429 (1998).

I addressed each of the professional-conduct rules by moving to dismiss each one of them. I also filed a Motion for More Definite Statement:

> . . . moves for more definite statement of Counts I and II of the Petition for Discipline, that is, **(a)** to identify with specificity those webpages, statements, and phrases which Bar Counsel is claiming are sufficient to constitute a violation of the Professional Rules of Conduct and **(b)** to identify each person who Bar Counsel claims has been harmed by those webpages, statements, and phrases.
>
> "These are adversary proceedings of a quasicriminal nature." In re Ruffalo, 390 U.S. 544, 551 (1968) (disbarment of petitioner reversed). "The charge must be known before the proceedings commence. They become a trap. . . ." Id. "The absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." Id. at 552.

I filed my Second Motion for More Definite Statement or in the Alternative Dismiss the Petition for Discipline.

I filed motions to dismiss each and every charge of alleged violation on the grounds that the OBC failed to state the elements of the claims .
All my motions were summarily denied without hearing.

All the motions I filed at the BBO are in Drano Series #106: http://www.falseallegations.com/drano106-motions-filed-at-bbo-n0603.htm.

I detailed the procedure by which the BBO broke its own rules (created by SJC committee), in http://www.falseallegations.com/-drano102-bbo-star-chamber-92503-forum.htm, an article in which I contend lawyers are entitled to the full sweep of due process rights.

ii. *Count two.* In 1999, the parents of a mentally retarded adult daughter paid the respondent a $10,000 retainer to represent them in connection with criminal and protective services proceedings arising from allegations that the father had sexually abused his daughter.

I was paid for consulting, ***not* for representation. In addition to the criminal case for which they had representation. (I told them to keep the husband's lawyer, since he was a retired judge's son and had political and judicial clout.)\[3]/**

The husband and wife had several cases in mind: one against the Department of Mental Retardation. Their niece, a lawyer, wanted help on the case. I sent them a contract. They signed it, but I did not, because they could not decide for which, if any, of the cases they wanted to hire me as a consultant. Also, because their cases were in Berkshire County, which is on the other side of the mountains at the far western end of the Commonwealth, I did not want to represent them as legal counsel. I reside in Essex County, which hugs the Atlantic Coast. They were too distant.

NOTE: I supplied to the OBC assistant counsel every email and every other piece of paper (approximately 500 pages) that went between myself and the complainant wife and mother, her other daughters (all married), and sons-in-law. In the package, included the several beautiful letters of thanks for my work.

---

[3] **Proof of that clout came in January 2008, when the son was nominated for a judgeship in the family court.**

The respondent deposited the retainer in her personal account rather than in a trust account.

> **I finished the work (all but 6 hours) and deposited their check. Then I sent them a bill. In the same envelope in which I put the bill, I returned $3100-plus dollars to them, having deeply discounted the bill ($50/hr for over half the work and $250 for lawyerly work, e.g., research and analyzing their case, etc.). I figured they were facing considerable legal fees to defend the father from two counts of rape and, if my memory is correct, two of sexual molestation (it is seven years ago and my memory of those two other charges is dim).**

The clients subsequently discharged the respondent and requested a refund of a portion of the retainer. The respondent refunded less than the clients had expected.

> **This is NOT true. I was not "discharged." My work simply was done. They did not expect the return of any money. I returned it on my own volition because I felt sorry for them. It was only *after* receiving the returned money, the wife wrote and wanted all but 1 hour and 26 minutes of my fees returned. We exchanged emails about the money and my bill. She wrote four lawyers the couple knew, and complained about me, and cc'd a copy of that letter to me. She did not, however, send to the four lawyers any copies of my correspondence explaining my fees. At an impasse, I recommended that we send all the correspondence to those lawyers and let them decide the dispute. If she did not want those four lawyers to mediate, then she should consider, I suggested, seeking assistance from the fee arbitration board. She did not pursue either avenue. Four months later she complained to the Bar.**

When the clients disputed the amount of the refund, the respondent failed to place the disputed sum in a trust account. Thereafter, the clients filed a complaint with bar counsel.

> **There was *no* dispute prior to depositing the money into my account. I had earned it. In fact, the BBO hearing officer, who was very hostile, found that I owed *no one* any money. In other words, the money in my account was my own earned money.**

In 2002, the respondent posted on her Web site the identities of her former clients and their daughter without their permission;

> **Bar Counsel Daniel Crane had gone public (newspapers) with the case. I had a right to defend myself publicly. Their daughter, the alleged victim, was monosyllabic, had the mentality of a 15-month-old infant, and had no "friends." She certainly did not know my website. And I had implicit permission to put their story up on the website. An**

email from Deb Sano stated that they were looking forward to seeing their story on my "wonderful website." In actual fact, I uploaded my bill and only those diverse emails relevant to the accusations by the OBC/BBO.

details of the sexual abuse allegations;

This is UNtrue.

and information regarding the fee dispute.

Yes, I was entitled to do so under well-settled law.

The clients demanded that the respondent remove the information from her Web site. In a telephone message,

I received a letter from a retired judge, William Simons (the father of the husband's criminal lawyer), ordering me to remove files re the Sanos/ "Parkers" from my website. Given that Simons was retired, he did not have the authority to order me to do anything. Notwithstanding that fact, I left a return message on his answer-machine. I never spoke to him. He never returned the phone call. He, instead, complained to the Bar.

the respondent said that she might remove the information but only if the clients withdrew their complaint with bar counsel.

If we were to negotiate, that was the only thing they could do. The rules seem to demand that a lawyer not ask a complainant to withdraw the complaint.

The board adopted the hearing officer's conclusions that by engaging in the foregoing activities, the respondent violated Mass. R. Prof. C. 1.6(a), 426 Mass. 1322 (1998); Mass. R. Prof. C. 1.9(c)(1) and (2), 426 Mass. 1342 (1998); Mass. R. Prof. C. 1.15(a)--(c), 426 Mass. 1363 (1998); Mass. R. Prof. C. 1.16(d), 426 Mass. 1369 (1998); Mass. R. Prof. C. 8.4(c), (d), and (h), 426 Mass. 1429 (1998); and S.J.C. Rule 4:01, § 10, as appearing in 425 Mass. 1313 (1997).

I addressed each of the professional-conduct rules as explained, *supra*, at Addendum pages 25-26.

iii. *Count three.* In 1995, in connection with representing a plaintiff in a wrongful termination action in the District Court, the respondent filed motions for leave to depose nonparty witnesses out of the presence of defendants' counsel.

True, I filed two motions in February 1995. They were styled after two motions filed and allowed in U.S. District Court in Boston by Magistrate-Judge Robert B. Collings.

The judge denied the motions, found that they lacked a legal or factual basis and were filed in bad faith, and ordered that the respondent or plaintiff pay the defendants' legal fees incurred in opposing the motions.

This is *not* true. The judge, Paul McGill, simply denied them. *TEN* months later, in December 1995, in one of his many orders amending a previous one, Judge McGill wrote that I filed frivolous motions but *never* identified which motions were frivolous. I only assumed the two filed in February were those to which he was referring. The judge ordered me to pay defendants' legal fees for *every* motion and daily sanctions.

THE BACKGROUND

It all began on 22 March 1995, when Judge McGill found both my client (living then in California) and myself in contempt of a NON-existent order allegedly dated 3 March 1995, the previous time we had been in court. The docket sheet shows he never issued that order. So does a summary prepared by the clerk (who was dead by the time the OBC brought a petition for discipline). And so did the transcript of the March 3d hearing. He clearly said he would take the motion under advisement. He never ruled on it. I kept on challenging the judge: Produce the order. He could not.

When the BBO/OBC began its so-called investigation of its case against me, the assistant bar counsel produced the alleged order. One had been fabricated either by the district-court judge or by opposing counsel. I never learned who the culprit was because my trial witness subpoenas were quashed. See my website: drano90-part-iii-answer-bbo-count-three-lily.htm. I scanned the fabricated order, enlarged it, and included it in my Answer to the Petition for Discipline.

Judge McGill repeatedly issued onerous orders from April through December 1995. After he made each order, I questioned him, after which he amended the complained-of order. I made a chart. The chart, too, is on my website. *Never* did Judge McGill write a *clear and unequivocal order*, necessary before finding contempt. *Never* was there an order with a total amount of what was to be paid. *Never* did he identify who was to be the payee. Were the daily sanctions due to the Commonwealth or the defendants? I *never* learned the answer to this question.

I defended nonpayment by pleading inability to pay. I produced my financial records, which had been subpoenaed, to the judge. He re-

viewed them in chambers with my then-counsel present, but never committed anything to paper, including whether he had seen them. I believe they were not given to the defendants, . . . and I never learned what happened thereafter.

I was jailed in October 1998, after an appeal was decided. There was *no* order for me to pay [in 1998]. The judge apparently wrote an order *after the fact*. One of my sons spent a day in Concord District Court to find out what he had to pay to get me out of jail. The clerk simply did not know. Why? Because there had been no order.

In actual fact, I was not jailed because I had not paid some mythical order. I was jailed during a motion session. The defendants had *again*, in 1998, subpoenaed my financial records. I think I had filed either a motion to quash or a motion to extend the time to produce the documentation. (Ten years later, my memory is dim.) It was during that hearing that I began an answer to the judge with the word "No". As soon as I uttered "No," he immediately had me locked up.

It was an innocent "No." By coincidence. My lawyer's husband was in Concord court for one of his own cases. His wife had given him to return to me a package, a box for a ream of paper, containing the papers I produced to the court in 1995. The ream box was on the table at which I was standing. The judge, thinking the box contained the 1998 papers -- that is, the papers that had been newly subpoenaed -- told me to give opposing counsel the box. I was about to say, "No. Your Honor, this box does not contain the subpoenaed papers," but I only got as far as the "No" when he said, "Lock her up."

I never could get the tape of that day's proceeding. Neither could the OBC or the BBO. The court had "overwritten" it.

So I was jailed for not handing a box containing 3-year-old personal financial papers to opposing counsel.

Opposing counsel represented Tyco, whose CEO at that time was Dennis Kozlowski, who embezzled $600 million from the company and who is now in Federal prison, having been found guilty of 38 indictments.

After the Petition for Discipline was brought against me, I learned from the OBC prosecutor that Judge McGill had *ex parte* contact with Tyco's counsel and told him to subpoena my personal financial re-

cords anew.

When the payments were not made, the judge imposed civil penalties on the respondent and found the respondent and the plaintiff in contempt, warning them that failure to pay the fees would lead to dismissal of the plaintiff's action.

As noted on page 20, *supra*, Judge McGill repeatedly issued onerous orders from April through December 1995.

Following further nonpayment, judgment entered dismissing the plaintiff's action and ordering costs to be paid to the defendants. The respondent did not file a notice of appeal following the dismissal but filed a motion for retransfer of the case to the Superior Court. The motion was struck with instructions to the respondent that an appeal from the dismissal was the proper avenue of relief. Following the entry of an amended final judgment dismissing the plaintiff's action, the respondent again sought to retransfer the case to the Superior Court rather than appeal from the dismissal; the request for retransfer was again struck.

This appears to be chronologically scrambled and difficult to separate. I have put the proper sequence in my Answer to the Petition for Discipline, which appears in http://www.falseallegations.-com/drano90-part-iii-answer-bbo-count-three-lily.htm. A capsulized explanation follows.

During 1995, Massachusetts still had remand cases. I had brought the whistleblower case in superior court, which remanded the case to district court. If unhappy with a final judgment in district court, the plaintiff was allowed to appeal the judgment to superior court, *not* the appeals court, but to superior court.

The so-called judgment by Judge Paul McGill was improperly written. I filed to have it done properly. I lost. Opposing counsel argued the judgment was fine and *final*. So I appealed to superior court.

Once we were in superior court, opposing counsel, from a well-known prestigious firm, changed his tune and argued that it was not a final judgment. So the superior-court judge sent it back to Concord, where Judge McGill once again changed his order, causing the cycle to begin repeating itself.

In December 1995, Judge McGill separated the contempts against my client and myself. My client's contempt stayed under the original docket number and the contempt against me was eventually, at the top of 1996, given a new docket number.

On that day in December, however, a lawyer who was in court when

Judge McGill declared he was separating the "contempt" issue\[4]/ because it was too confusing to deal simultaneously with the contempts against the client and against me, introduced herself to me and offered free representation. She had experienced, she said, a false charge in Michigan.

I was successful in convincing Judge McGill to lower the amount of money he had order my client to pay; i.e., the sanction was lowered from approximately $3500 to a little over $200. The judge had also said if paid, he would restore my client's case to the list. I therefore paid the two hundred-and-something for her, but the judge never restored the case to the list. He broke his promise. (I have the tape and transcript of the subject hearings.)

The respondent filed a notice of appeal from the order striking the motion for retransfer. The Appeals Court dismissed the appeal as frivolous

After the superior court struck my motion for retransfer, I appealed my client's case to the Appeals Court. We lost and the court said the appeal was frivolous and ordered my client to pay opposing counsel's fees. My contention was that it was anything but frivolous to appeal from a contempt of a NON-existent order. My client was a geologist and fortunately had started a consulting business in California, and was very successful in so doing. She had, fortunately, enough money to hire a lawyer out West, bargained, and settled for some smaller amount, paid it, and put it behind her. She has been absolutely loyal

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[4] Judge McGill did reduce to writing the reason he gave for bifurcating the case into two separate cases, namely, that it was too confusing to keep them together. I can only speculate that his and opposing counsel's inability to produce a true March 3d order was the motive for fabricating the order of which the assistant bar counsel produced a copy to me.

As noted, the case was a whistleblower case. The original corporate defendant was an environmental consulting firm that also worked on the Big Dig. The firm was falsifying time sheets and submitting falsified bills to the government. My client had obtained a time sheet filled out in pencil and had learned who had been instructed to falsify the time sheets by changing the hours written in pencil to hours written in pen. (The government contracts allowed a maximum of 8 hours a day and 40 hours a week to be charged. The company charged the hours over 8 a day and the hours over 40 a week on another week's time cards and/or against other "jobs." Professional staff took extra paid vacations on those weeks they had already "worked.")

Having proof of the entire scheme, I was going to bring a *qui tam* suit, but being a sole-practitioner and being papered continuously, literally, I had no time to do so. Instead, I notified the FBI and upon my request, an FBI agent came to my home. Unexpected by me, he was accompanied by a State agent, who was openly hostile, so fearing the evidence would be deep-sixed, I did not hand over the evidence.

to me and scolded the OBC for bringing a case against me. We email each other regularly and meet when she comes East.

.

Meanwhile, the judge in the District Court, following reconsideration of his earlier judgment of contempt against the respondent, entered a final judgment of contempt against her. She appealed and the Appeals Court affirmed the judgment. *HMM Assocs., Inc. v. Johnson,* 44 Mass.App.Ct. 1126 (1998).

Eventually the contempt case against me came to final judgment and I, through my counsel, appealed to the Appeals Court. (Contempts arising in district court may be appealed directly to the Appeals Court.) The appeal was unsuccessful.

The original defendant was HMM [baby bear], which then was bought out by Earth Technologies, Inc. [a medium-sized mama bear company], which was then bought out by Tyco [papa bear]. Tyco was the defendant in the summer of 1995, when all this became heated, and its counsel used to come to court saying "Have her bring her toothbrush next time." That was Dennis Kozlowski speaking.

Thereafter, the District Court judge gave the respondent a deadline for paying the outstanding fees and penalties, warning her that failure to comply would result in further penalties and referral to the board.

There was *never* identified a clear and unequivocal order with the amount, the payee(s) , and the time or date by which money was to be paid.

The respondent violated the order. Following a hearing, the judge held her in continuing contempt and ordered her jailed until she purged herself of contempt. The respondent did not appeal from those orders, but the following day she purged herself of contempt and was released.

Not so. See above, about the box holding a ream of paper.

In sum, the OBC said the misconduct was that I was found in contempt and had to be jailed before paying a sum (unidentified) ordered by the court.

I have always maintained the original order never existed, and it didn't, and that every order based on the non-existent order that thereafter issued was not only unclear and equivocal but also void.

The board adopted the hearing officer's conclusions that by engaging in the foregoing activities, the respondent violated Mass. R. Prof. C. 3.4(c); Mass. R. Prof. C. 8.4(d) and (h); S.J.C. Rule 3:07, Canon 1, DR 1-102(A)(5) and (6), as appearing in 382 Mass. 769 (1981); Canon 6, DR 6-101(A)(1)--(3), as appearing in 382 Mass. 783 (1981); and Canon 7, DR 7-101(A)(3), as appearing in 382 Mass. 784 (1981).

I addressed each of the professional-conduct rules as explained, supra.

b. *Discussion.* The respondent raises constitutional, procedural, and substantive challenges to the disciplinary proceedings. We address them in turn.

I raised many issues and the SJC sidestepped them, including but not limited to the following:

- **the First Amendment issues (free, political speech)**
- **the lack of a public trial (to which I was entitled under the BBO's rules)**
- **the amendment of §13 of c. 209C, by which all records in probate and family court became open records and became closed only upon a showing of good cause**
- **the deprivation of my entitlement to issue trial witness subpoenas under M.G.L. c. 233, § 8**
- **the lack of personal jurisdiction of New Bedford Juvenile Court (I had never appeared in the Juvenile Court and there was no case there in which I was either a party or counsel)**
- **due process rights to notice and opportunity to be heard**
- **selective enforcement**
- **equal protection on a "class-of-one" theory**

i. The respondent claims that, under a "class of one" theory, see *Willowbrook v. Olech,* 528 U.S. 562, 564 (2000), the board violated her right to equal protection under the Fourteenth Amendment to the United States Constitution by improperly singling her out for discipline while failing to pursue disciplinary action against other attorneys involved in the underlying cases. Generally, "[w]hether bar counsel pursues discipline of others is irrelevant ... to the respondent's current disciplinary action." *Matter of Tobin,* 417 Mass. 92, 103 (1994).

In any equal-protection case, one must show disparity. Therefore, to my case, the quoted conclusion of Tobin is inapplicable, if not also bad law.

Moreover, the respondent fails to point to any evidence adduced before the board showing that she was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Willowbrook v. Olech, supra.*

This is untrue. I identified several cases, including the adjudicated contempt of Kozlowski's counsel for nonpayment of child support and uninsured medical expenses [61 Mass.App. Ct. 1109, 809 N.E.2d 1099, No. 02-P-1709 (2004)]. No action for discipline against Tyco CEO Kozlowski's counsel issued from the family court, and my trial subpoena served on him was quashed.

Cf. *Matter of Cobb,* 445 Mass. 452, 479 (2005) (no support for attorney's claim bar counsel vindictively sought to punish him for reporting acts of judges).

Unlike me, Cobb raised allegations of selective prosecution for the first time on appeal.

On or around 2 October 2001, I did sue four judges in federal court [Docket No. 01-CV-11702-GAO].\[5]/ Amongst the grounds for the causes of action were the judges' acts in contravention of mandatory statutes and outside or in excess of their jurisdiction. *See* Drano #57: http://www.falseallegations.com/drano57-complaint-against-judges.htm. The case was dismissed on immunity grounds. (I had brought it to test immunity and to bring it eventually to the U.S. Supreme Court.) (There is more to this, but irrelevant to the within document.)

We need not address the respondent's bald accusation-- unsupported by anything in the record of this case--that the disciplinary process suffers from inherent bias, nor do we address other claims in which she seeks merely to incorporate arguments from prior memoranda. See *Matter of London,* 427 Mass. 477, 483 (1998).

This conclusion, too, is specious. If I had not raised the arguments during the BBO and the SJC single-justice, the SJC full panel would have found, as it did in Cobb, that I raised allegations of selective prosecution for the first time on appeal.

See the detailed the procedure in http://www.falseallegations.com-/drano102-bbo-star-chamber-92503-forum.htm and the motions in http://-www.falseallegations.com/drano106-motions-filed-at-bbo-n0603.htm.

ii. The respondent argues that the board chair improperly allowed bar counsel's motion for a protective order in connection with the disciplinary proceeding.

There was no such order in connection with the disciplinary proceeding. As I wrote on page 13 of my appellate brief: On the sched-

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[5] **1st Cir. Court of Appeals, Docket No. 02-1144 (judgment entered 28 January 2004); United States Supreme Court Docket No. 03-1478.**

uled first day of trial, 2 December 2003, the hearing officer ordered the public from the hearing room during my opening statement. He claimed that there was an order commanding me to use pseudonyms for certain people. The following excerpt from the transcript supports my statement that there was no such order.

> *HEARING OFFICER:* ***Do you happen to know whether that name*** **[Complainant's male roommate circa 1988-1989]** ***is on a protection list, Miss Weisberg****?*
>
> *MS. WEISBERG:* ***No, we don't actually have a list. We have documents that are protected.*** ***That's a name that appears -- I believe the evidence will show that that name is a name that appears in documents that Miss Johnson published on her web site. So they are out there in the public domain.***
>
> *HEARING OFFICER:* ***I'm going to assume that was an inadvertent slip, Miss Johnson. No more of those. I'm going to have the record redact that name, (name redacted).***

Fig. 2. Transcript, 12/2/03, Day I: 56-57, emphasis supplied.

The respondent failed to challenge the order.

There was no order to challenge. As for the use of a non-existent order: I moved for a new trial. My motion was denied without hearing and without reasons—oral or written.

I did, however, challenge several months earlier the Bar Counsel's Motion for Protective Order re documents. See page 18 of my Petition for Writ of Certiorari, where the protective order re documents is discussed, and my Motion to Strike Bar Counsel's Motion for Protective Order as to Counts I and II (dated 26 August 2003) at http://www.falseallegations.com-/drano106-motions-filed-at-bbo-n0603.htm.

See S.J.C. Rule 4:01, § 20(4), appearing in 425 Mass. 1302 (1997); Rule 3.22(c) of the Rules of the Board of Bar Overseers (2007).

***See* discussion, *supra*.**

In any event, the protective order was appropriately entered where impounded material was at issue in the disciplinary proceeding.

I was in the midst of my Opening Statement when the hearing officer wrongly invoked a protective order that did not exist. Although the protective order also sought the impoundment of documents, I was not using or offering any documents during my Opening Statement.

There is no way to challenge a hearing officer who is wading in deception. And the transcript, which I assume was in the Appendix filed by the BBO, shows clearly there were *no* documents whatsoever, including "impounded material . . . at issue **[during my Opening Statement]** in the disciplinary proceeding.**"**

Consistent with the protective order, the hearing officer instructed the parties to use pseudonyms during the hearing. When the respondent repeatedly violated the protective order by using the parties' real names, the hearing officer properly cleared the public from the forum. [FN1] In such circumstances, the respondent cannot be heard to complain about being deprived of a public hearing

There was *no* protective order with which to be "consistent."

Despite the OBC prosecutor informing the hearing officer that there was no such order [page 48, *supra*[, the hearing officer and BBO Assistant General Counsel Carol Wagner ignored the prosecutor's admission that there was no such protective order, and demanded that the public leave the hearing room.

Further, because the hearing officer had previously "played" with the transcription process [as shown in the figure below], I did not dare stay without the public as witnesses, so I, too, left the hearing room.

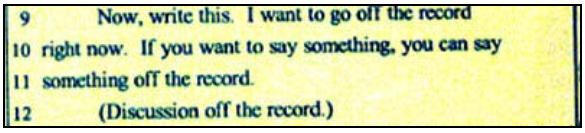
9 Now, write this. I want to go off the record
10 right now. If you want to say something, you can say
11 something off the record.
12 (Discussion off the record.)

Fig. 1. 11/17/03 Transcript, p. 40, lines 9-12

In such circumstances, I can and should, indeed, be heard complaining about being deprived of a public hearing. There is no other legal way to challenge a deception of a hearing officer.

iii. The respondent contends that the hearing officer wrongly quashed subpoenas that the respondent had issued on her own, arguing that she was entitled to issue them under G.L. c. 233, § 8. We need not decide whether the statute applies to bar discipline proceedings because the hearing officer properly quashed the subpoenas on grounds of irrelevance: through the subpoenaed witnesses, the respondent had sought to relitigate issues in the underlying cases and attack the disciplinary process itself.

It is significant that the SJC applied M.G.L. c. 30A, §12 in *Matter of Tobin*, 417 Mass. 92, 103, 628 N.E.2d 1273, 1279 (1994), to justify its vacating of subpoenas, but in my case, the panel wrote, "We need not decide whether the statute [**G.L. c. 233, § 8**] applies to bar discipline proceedings." **The non-application appears to be arbitrary and capricious.**

There is no evidence in the record that my subpoenas were irrelevant. There *is* evidence that I opposed the OBC's use of offensive collateral estoppel for their alleged proof of Count III, but there is no dispute that the issues in Counts I and II had not previously litigated. My subpoenas should not have been quashed! There was evidence—from my summaries of what each witness's testimony would be—that their testimony would *not* be irrelevant.

Where I had been found in contempt of a NON-existing order, the contempt finding in 1995 was transparently invalid. Fundamental fairness, the cornerstone of due process, mandated that I be allowed to show that that order did not exist. I had an abundance of court-created records to show the NON-existence of the order: the clerk's notes, the docket sheet, a court notice, and a transcript of the relevant hearing. *See* http://www.falseal-legations.com/drano90-part-iii-answer-bbo-count-three-lily.htm, in which I inserted those documents.\[6]/

See *Matter of Tobin, supra* at 102-103 (refusal to issue subpoenas appropriate where attorney sought to relitigate underlying matters in disciplinary proceeding).

It is significant that the SJC applied M.G.L. c. 30A, §12 in *Matter of Tobin*, 417 Mass. 92, 103, 628 N.E.2d 1273, 1279 (1994), to justify its vacating of subpoenas, but in my case, but refused to decide whether c. 30A, §8, was applicable to my case. As observed above, the SJC opinion appears arbitrary and capricious.

iv. With respect to count one, the respondent claims that she cannot be disciplined for having posted impounded material on her Web site

I did not post impounded material on my website. No one—from the OBC prosecutor, the BBO, the single justice, to the SJC full panel—ever identified any such impounded material. The unfettered power of the OBC is the only support for the accusation of uploading impounded material. It simply never existed on my website.

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[6] I had been told by an attorney to file everything I had with my Answer, for it was unlikely that I would have another opportunity to enter them into the record. He was correct.

The words "impounded material" were like words being waved by a Good Fairy's wand or being let out of a Genii's bottle.

because: (1) the Juvenile Court orders were invalid because she never obtained material from the care and protection proceeding and thus never posted impounded material from that case; (2) the Probate and Family Court order was invalid because material related to the paternity and custody matter was open to the public pursuant to G.L. c. 209C, § 13, as appearing in St.1998, c. 64, § 229; (3) her Web site postings are protected by the First Amendment to the United States Constitution; and (4) there was insufficient evidence to conclude that she had posted confidential information with no substantial purpose other than to embarrass the third parties involved--she claims that she intended only to educate the public about her client's plight.

All of my reasons are discussed above and are true and/or valid. As to embarrassment, the single justice had before him absolutely no evidence except the say-so of the OBC prosecutor that the complainant was embarrassed, and then the single justice declared that "no live testimony was required to draw [an] inference [of embarrassment." Given that "arguments of counsel were not evidence and could not be considered by them as evidence" [Com. v. Correia, 65 Mass.App. Ct. 27, 36 (2005)], it is with some surprise that the single justice relied on such am unusual basis for his finding. See my detailed argument in footnote 7 on page 5 and Issue 3 on pages 44-47 of my appellate brief.

The problem with the first three claims is that the respondent neither sought to appeal from nor otherwise legally challenge the courts' orders, and she was not free to ignore them and challenge them for the first time in the disciplinary proceeding. [FN2][FN3] See *Florida Bar v. Gersten,* 707 So.2d 711, 713 (Fla.1998); *Florida Bar v. Rubin,* 549 So.2d 1000, 1003 (Fla.1989); *Florida Bar v. Wishart,* 543 So.2d 1250, 1252 (Fla.1989), cert. denied, 493 U.S. 1044, 110 S.Ct. 839, 107 L.Ed.2d 834 (1990).

As noted, *supra*, I was neither a party to nor counsel in any juvenile court action. *See* http://www.falseallegations.com-/drano37-impoundment-Lawton.htm. This was one of the few dozen files the OBC used as evidence and wanted me to delete from my website. (The files of which the OBC complained are shown with a green background in the Drano Series table on my Home Page.)

- **The juvenile-court judge never had jurisdiction over me.**
- **The retired judge had no authority to order me to do anything.**
- **I had no standing to appeal family-court judge's judgment and/or order allowing the release of documents in a closed case to OBC assistant bar counsel. I never saw the documents. Nor was I ever supplied with a list of the documents allegedly supplied. I do believe they were pre-1998 documents.**

In sum, there were so many appealable issues, I would have time to do little except appeal from unlawful decisions and conduct by the OBC and BBO. And given that the SJC controls and supervises the OBC and BBO and appoints both the General Counsel and the Bar Counsel, any appeal would have been futile. The SJC was not about to reverse itself or its agents.

> **Since plaintiffs were challenging disciplinary rules adopted by the Supreme Court of New Jersey, they alleged that they had no realistic remedy within the legal machinery of the State of New Jersey and that "it would be a futile gesture to request the Ethics Committee, which was created by the said Court, *or the said Court itself, to declare its own pronouncement to be unconstitutional*" (Emphasis added) . . .**

<u>Middlesex County Ethics Committee v. Garden State Bar Ass'n</u>, 1981 WL 389660 (Petitioner's brief), opinion at 457 U.S. (N.J.) 423, (1982).

As for the fourth claim, it was reasonably inferable from the mother's having complained to bar counsel about the respondent's postings that the mother was embarrassed by them. Moreover, the respondent went far beyond merely educating the public about her client's case-she violated the confidences of third parties by publicizing information that she knew was impounded. See *Matter of Comfort,* 284 Kan. 183, 191-195, 159 P.3d 1011 (2007) (under disciplinary rule identical to Mass. R. Prof. C. 4.4, court held that objective evaluation of conduct would lead reasonable person to conclude that publishing of disparaging information about third party was done for no substantial purpose other than to embarrass).

As to the embarrassment, as noted, *supra*, I discussed the issue fully in footnote 7 on page 5 and Issue 3 on pages 44-47 of my appellate brief. The case law supports my position 100 percent.

c. *Sanction.* "We do not conclude, and the respondent makes no argument, that the sanction imposed by the single justice is 'markedly disparate' from sanctions in similar cases." *Matter of Tobin, supra* at 103. Cf. *Matter of Cobb, supra* at 479.

As I stated in my appellate argument,

> **Ultimately, the single justice not only parroted that which the BBO wrote and did. He also failed to follow the written practices and procedures for a single justice, which set out grounds upon which bar counsel may petition the single justice for disciplinary action against an attorney. They include:**
>
> - **misuse or loss of client funds,**

- **neglect of client interests,**
- **fraudulent conduct,**
- **sanction in another jurisdiction,**
- **conviction of a crime and**
- **misrepresentation to the court.**

None, none, none of those grounds is in the disciplinary case against me. I appear to be the exception to the rule.

The sanction of disbarment imposed upon me could not have been more "'markedly disparate' from sanctions in [other] cases." There *<u>are no</u>* "similar" cases!

2. *Contempt.* Pursuant to a petition filed by bar counsel and following a hearing, the single justice found the respondent in civil contempt for failing timely to comply with the following provisions of the judgment of disbarment: close her IOLTA account, give notice of her disbarment, and submit an affidavit of compliance pursuant to S.J.C. Rule 4:02, § 17, as amended, 426 Mass. 1301 (1997). He ordered her jailed until she purged herself of contempt, which she did four days later and was released.

We reject the respondent's challenges to the contempt judgment as follows. (a) She was not entitled to ignore the underlying judgment of disbarment on the ground that it was "transparently invalid"; that she needed to fulfil her clients' right to counsel of their choice; or that she had a property interest in continuing to receive fees from her clients. She presents no persuasive factual or legal grounds to substantiate any of those claims. (b) The respondent's argument that she was found in criminal rather than civil contempt because she did not "hold the key to the cell door" (and that she was denied the right to a jury trial for criminal contempt) is belied by the fact that she eventually complied with the terms of the judgment of disbarment and was released. [FN4] (c) We reject the respondent's claim that the single justice lacked jurisdiction to find her in contempt where she had appealed from the disbarment judgment. She had moved unsuccessfully for a stay of the judgment pending appeal. The cases relied on by the respondent--a criminal case holding that an appeal divests a lower court of jurisdiction to rule on motions "to rehear or vacate," *Commonwealth v. Cronk,* 396 Mass. 194, 197 (1985), and a divorce case holding that, absent a specific order to the contrary, a husband's obligation to make installment payments pursuant to a judgment dividing marital property was stayed by the husband's appeal, *Huber v. Huber,* 408 Mass. 495, 499-500 (1990)--are inapposite. Here the single justice merely acted to enforce the disbarment judgment. Cf. Mass. R. Civ. P. 62(a), as amended, 423 Mass. 1409 (1996).(d) Finally, the respondent's argument that the single justice erred in "implicit[ly]" finding that she had engaged in the unauthorized practice of law is misplaced because the finding of contempt was based on other violations of the terms of the judgment of disbarment. [FN5]

I was appalled by the abandonment of my clients' interests by both the SJC single-justice session and the SJC full bench session . . . and the disparate treatment: For instance, the SJC allowed Attorneys Crossen and Curry to practice until their appeal was heard, and Attorney Donohue to practice until he negotiated a 3-year suspension. Why could I not continue to represent my then-existing clients, so as to preserve their interests in their cases?

The judgment of contempt and my subsequent imprisonment was more a punishment of my clients because they had me as their lawyer than a punishment against me . . . although it was that, too.

By denying my Motion to Stay the Order to withdraw from my clients' cases, the single justice both deprived my clients of their right to have counsel of their choice and interfered with the orderly prosecution of their cases. The judge never considered the immediate and irreparable harm and damage his order would cause my clients.

The full Court did similarly when the clerk on the Court's behalf, so I've been told, summarily denied the Motion to Stay I filed there. Upon learning of the denial, I reasonably concluded that the Judgment of Disbarment was predetermined and that the single justice, too, knew that, . . . for were the SJC bench neutral and the option to reverse the single justice's decision still open, he would have allowed me to continue, at the very least, to represent my then-existing clients.

Each of my clients' cases was about to be horribly and needlessly prejudiced.

I was less upset at that time about my own disbarred status than I was for my clients. Their cases were generally complex and at stages which made it unlikely that another lawyer could be effective. My clients would be left without their counsel of choice when they most needed counsel familiar with their cases. My duty to them and to their cases was my responsibility and had priority.

I thought the court would understand and would not exalt procedure over substance. And I was unwilling to defy justice by sacrificing substance for procedure.

During the 30 days between the Judgment of Disbarment and the date it became effective, I had been working to tie up as many loose ends in my cases as possible.

The disbarment was effective on September 8th, a Friday, 2006. Prior to that date, two of my clients had been ordered to court on the following Monday and Tuesday. Without adequate opportunity to find substitute counsel, my clients would be at a loss were I not there. So in one court, I appeared also to deliver what I had been ordered prior to the disbarment to write and produce on Monday. And in the second court, I appeared to inform the judge of my idea for a reasonable

settlement—as well as to inform him that I had not heard from this Court regarding my Motion to Stay.

Those appearances prompted the assistant bar counsel who was prosecuting the case against me to add an allegation of Unauthorized Practice of Law to the Complaint for Contempt she filed in the single-justice session.

Given that I had already filed an appeal of the judgment of disbarment, the single justice no longer had jurisdiction to hear the contempt.

At that hearing, I attempted to show that where an order had no pretense of validity when it issued, it is a transparently invalid order, void *ab initio*, and cannot form the basis for a contempt citation.

Nevertheless, because I had failed to withdraw from my cases as the judge ordered, he found me in contempt and imprisoned me to force my compliance. Nothing, however, that the single justice wanted me to do could be done from prison. I did not hold the key to my cell door. I was being punished.

The contempt was thus criminal in nature with the possibility of indefinite incarceration, and but for having friends, a few human angels, I would still be imprisoned. That gave me an entitlement to a jury trial, for which I asked but was denied.

Further, where I did not hold the key to my cell door and the contempt charge brought against me was *de facto* criminal in nature, the County Court had no jurisdiction either to hear or to sentence me to any incarceration, definite or indefinite.

Significantly, the single justice did not declare it a criminal contempt because there is currently no statute or case law addressing the issue of incarceration for criminal contempt in the single-justice session. He would have had to treat me disparately and thus violate my right to equal protection.

The denial of equal protection is, unfortunately, done in our courts daily. For instance, a defendant being tried for criminal contempt in family court is denied a jury trial, but a defendant being tried for criminal contempt in superior court is afforded a jury trial.

Where the single justice acted intentionally and knowingly to deprive

me of my constitutional rights, the judge was no longer acting as a judge, but as a "'minister' of his own prejudices."

In sum, where I *did* appeal the Judgment of Disbarment on the grounds that it was transparently invalid or had only a frivolous pretense to validity, I could ignore the order until the appeal was resolved. Therefore, the Order issuing simultaneously with the disbarment judgment was void *ab initio*; the finding of contempt, a clear error of law requiring reversal; the resulting incarceration, an egregious abuse of discretion and clear error of law.

Where I was deprived of equal protection, the judge not only deprived me of the benefit of appealing the disbarment to the full panel of the High Court in the Commonwealth. It gave the appearance that the right to appeal his judgment was but a sham.

The practice of law, allegedly a "learned profession," is a fundamental right. To have deliberately, recklessly, and with callous indifference deprived me of my fundamental rights to property and subsequently my liberty before I had had the benefit of an appeal as other members of the populace have, the single justice also violated both article IV, section 2, and the Fourteenth Amendment of the United States Constitution.

I rested on my brief that the single justice's implicit or inferential finding that I was practicing law by my appearance in court one business day after the disbarment order became effective ("Axe Day") was clear error. A criminal charge must have elements so as not to be vague or overbroad. If the practice of law cannot be defined, neither can the unauthorized practice of law be, making §§41, 46A, 46B, 46C unconstitutionally vague.

I still maintain that the contempt was a criminal, not civil, one. I did not hold the key to the cell door. I could not have complied with the court's order but for the help of a few extraordinary friends who did all the "running" for me outside of jail. But for their kind and generous assistance, I would be still sitting in South Bay prison.

Judgments affirmed.

FN1. With members of the public gone, the respondent refused to participate in the hearing and left. The hearing officer considered the matter solely on documentary evidence submitted by the parties (exhibits submitted by bar counsel and the respondent's amended answer to the petition for discipline). The respondent was furnished with

copies of bar counsel's exhibits and transcripts of the hearing, which she used to prepare her appeal to the board.

Because the hearing officer had "played" with the transcription process [as shown in the figure below], I did not dare stay without the public as witnesses, so I, too, left the hearing room.

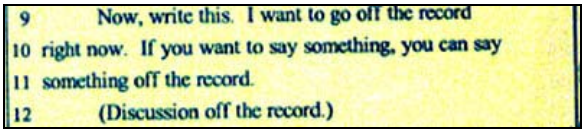
9 Now, write this. I want to go off the record
10 right now. If you want to say something, you can say
11 something off the record.
12 (Discussion off the record.)

Fig. 1. 11/17/03 Transcript, p. 40, ll. 9-12

It is untrue that I was supplied copies of the OBC exhibits. In fact, the transcript shows that they changed the numbering system for the exhibits as much as two weeks *after* the alleged trial was over. The OBC prosecutor appears to have submitted even *new* chalks two weeks *after* the alleged trial. The only people present were the hearing officer, an assistant general counsel, and the OBC prosecutor. There were no witnesses. Te prosecutor read exhibit numbers and the titles and the hearing officer admitted them. That was the extent of the so-called trial. The entire process was but a sham.

I did move for a new trial, but my motion was denied.

FN2. While the respondent claims that she filed a petition in the county court seeking relief from the order entered in the Probate and Family Court, she has shown neither that she actually filed such a petition nor that, if she had, she obtained any relief; she was not free to disobey the order. See *Florida Bar v. Wishart,* 543 So.2d 1250, 1252 (Fla.1989), cert. denied, 493 U.S. 1044 (1990).

This is an inaccurate statement of my assertions. *See* the Petition of Discipline and my Answer to Count 1 of the Petition for Discipline: http://www.falseallega-tions.com/drano90-part-i-answer-bbo-count-one-linnehan.htm. The subject family-court order was *not* mentioned in the Petition for Discipline. Therefore, basing one of the reasons of the disbarment on my alleged failure to appeal that order is improper. In fact, it is untrue. As the SJC Public Case Information website reveals, I filed three appeals on my client's behalf, one included the Bristol County Probate & Family Court.

Case status: Disposed: Case Closed
ROBYN L. GERRY SYLVIA vs. JAMES LINNEHAN

Linnehan, James - Defendant/Petitioner **2001-J-0717**
Case status: Disposed: Case Closed
ROBYN L. GERRY SYLVIA vs. JAMES LINNEHAN

Linnehan, James - Defendant/Petitioner **SJ-2002-0044**
Case status: Decided: petition denied
JAMES LINNEHAN vs. ROBYN L. (GERRY) SYLVIA,
BRISTOL COUNTY PROBATE & FAMILY COURT

How many times must one's appeals be summarily disposed of before one may conclude that another appeal would be futile?

FN3. With respect to count two, we reject the respondent's claim that her posting of confidential information about her former clients was protected under the First Amendment to the United States Constitution. Whatever rights she may have had to "defend herself against false accusations" regarding the fee dispute, those rights did not include publishing highly sensitive personal information regarding allegations that the father had sexually abused his mentally retarded daughter.

No highly sensitive personal information was identified by the OBC, the BBO, or the SJC (both courts). I could not fight ghosts. Notwithstanding that inability, as an educational publisher since 1998, I rely on the First Amendment and have never been sued for defamation or any other tort associated with my website.

FN4. Generally, a civil contempt proceeding is " 'remedial and coercive,' intended to achieve compliance with the court's orders," while a criminal contempt proceeding is "exclusively punitive. It is designed wholly to punish an attempt to prevent the course of justice." *Furtado v. Furtado,* 380 Mass. 137, 141 (1980), quoting *Cherry v. Cherry,* 253 Mass. 172, 174 (1925), and *Blackenburg v. Commonwealth,* 260 Mass. 369, 373 (1927). See *Matter of DeSaulnier (No. 3),* 360 Mass. 769, 772-773 (1971), quoting *Shillitani v. United States,* 384 U.S. 364, 368 (1966) (discussing features of criminal contempt, including that contemnor does not hold "the keys of ... [his] prison in ... [his] own pockets"); *Commonwealth v. Raczkowski,* 19 Mass.App.Ct. 991, 992 (1985), and cases cited (constitutional right to jury trial attaches to certain criminal contempts but not to civil contempts).

See my comments, *supra*, regarding the contempt charge.

FN5. Both parties have filed motions regarding the proper scope of the record on appeal, and the respondent has filed motions that repeat or add to arguments that she raised in her briefs. We have considered only those materials that were part of the record below and decline to address legal arguments not raised in the respondent's briefs.

The motions to which the Court was referring are the following, about which I spoke at the oral argument in November 2007.

The first motion (Paper 7) arose out of the BBO's appendix which was filed in the single-justice session and was accepted as the record by the full court. The BBO did not give me copies of the appendix and the Court failed to act on my motion to order the BBO to give me a copy. If I or any lawyer tried to file pleadings or documents that had not been served on opposing counsel, I or any lawyer would not be allowed to file those documents.

Therefore having wrongly accepted for filing the BBO's appendix which I have not seen, the Court should have (1) stricken those documents in the BBO's appendix, with the exception of any and all documents written or supplied by me which appear in the 12 volumes of the BBO's appendix and (2) proceeded only on those parts of the original record before the single justice which are my pleadings.

In the second motion (Paper 12), I sought an order commanding the BBO to correct docket sheets for BBO case, to provide me a table of contents to the 12-volumes of the appendix, and to provide me a copy of the 12-volume appendix). I am entitled to those three orders. Where they did not reverse the judgment of disbarment, I shall need those items should my intended petition for certiorari by the Supreme Court be granted.

In the third motion (Papers 20 and 22, the reply), I moved for a declaration as to what constitutes the unauthorized practice of law. As the Court has stated, it is difficult to define the unauthorized practice of law. Given, however, that the statute carries a criminal punishment, it is mandatory that this Court set out the elements before charging anyone, including myself, with the unauthorized practice of law.

The fourth (Paper 24) was my motion (1) to reverse the denial of my motion to stay and allow me to continue representing my then-existing clients' cases, (2) to hold the Office of Bar Counsel and the BBO in default, (3) to dismiss the petition for discipline, and (4) to vacate the judgment of disbarment.

The fifth (Paper 28) was my motion to exceed the page limit for a reply brief for the reasons set out in the motion.

I, of course, opposed all of the BBO prosecutor's motions, which were for the most part, motions to impound everything or almost everything I filed in the SJC.