Legal Ethics & Practical Politics: Musings on the Public Perception of Lawyer Discipline

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I. INTRODUCTION

There has been an ongoing debate in the scholarly literature about the appropriate mechanisms for regulating and disciplining lawyers.¹ This debate has been fueled by the increasing public perception that lawyer misconduct is on the rise and that current models of lawyer discipline fail to adequately control and punish unethical lawyers. "Even the American Bar Association concedes that, 'the public continues to be critical of lawyer regulation.'"² One of the recurring criticisms is that the predominant model of lawyer discipline in this country, so-called judicial regulation, relies upon judges, who are themselves lawyers, to regulate other lawyers. Much of the public understandably feels that such a system is inherently biased in favor of lawyers.³

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1. See David B. Wilkins, Who Should Regulate Lawyers, 105 HARV. L. REV. 799 (1992) for a comprehensive discussion of the theoretical models that should be used to evaluate competing models of enforcement and professional controls. Professor Wilkins notes, "the presence of these alternative enforcement models has sparked a heated debate over who should have responsibility for regulating lawyers and how that authority should be exercised. The debate proceeds on several levels. On the policy level lawyers, judges, and legal academics argue whether the benefits of particular control systems outweigh their costs. This debate, however, is often merely a surrogate for deeper theoretical and methodological disagreement about the criteria for conducting a cost-benefit analysis in this context. On this theoretical level, partisans of particular enforcement strategies argue about the proper goals of professional regulation and the assumptions and processes that should guide any attempt to determine whether these goals are likely met." Id. at 803.

2. Wilkins, supra note 1, at 802 (citing COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASSOCIATION REPORT TO THE HOUSE OF DELEGATES iii (1991) (the McKay Report)).


   The importance of the distinction between self-regulation by the bar and the judicial regulation of the bar is not just one of semantics. Control of the lawyer disciplinary system by bar associations is self-regulation. Self-regulation, which was the primary system of discipline from about 1870 to 1970, failed because bar associations were not taking action against unethical lawyers and, as a result, it caused great damage to the public perception of the image of the bar. This perception was at the root of the change over to judicial regulation, which is now firmly established in every state. In 33 of the states, there is also a requirement that the lawyer belong to the state bar association, although in 11 of those states, the disciplinary agency is separate from the bar. Massachusetts is one of 18 states where there is no requirement to belong to the bar association.

Id. at n.5.

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All states now have some form of judicial regulation as a primary method of lawyer discipline. In judicial regulation, a disciplinary agency receives public complaints against members of the bar and initiates proceedings against such lawyers. That agency investigates the complaint and recommends a sanction. The ultimate arbiter of lawyer discipline in judicial regulation, however, is typically the state’s highest court, which reviews the appropriateness of the sanction recommended by the disciplinary agency. This model of judicial regulation has been supplemented over time by other means of responding to lawyer misconduct:

For example, judges now routinely use Rule 11 to sanction lawyers for filing frivolous claims or defenses or otherwise needlessly increasing the costs of litigation. Federal regulators bring enforcement actions, both administratively and in the courts, against lawyers who aid and abet their client’s violations of applicable regulatory statutes. State legislatures and Congress continue to expand the range of liability actions that can be filed against lawyers, while judges dismantle many of the restrictions against suits by third parties under existing statutory and common law theories. Even traditional malpractice liability has been transformed as courts have removed many of the evidentiary and procedural impediments that have traditionally made it difficult for clients to sue their lawyers successfully. More changes could soon be on the way, as policymakers contemplate new enforcement schemes ranging from the Competitiveness Council’s recommendation for a “loser pays” rule in diversity cases and a moratorium on one-way fee shifting to a variety of state initiatives that would place some or all of the disciplinary process under the control of the legislature.

Judicial regulation as the primary model of lawyer discipline has come under increasing fire by proponents of alternative models. Such models include the regulation of lawyers by the legislative branch of government. Proponents of legislative regulation argue that “the practice of law affects the public more than it affects the courts and that the legislature is more likely to regulate in the public interest. They also point out that judges are lawyers and that judicial regulation really is another form of self-regulation.” In its Report of the Commission on Evaluation of Disciplinary Enforcement (the “McKay Report”), the American Bar Association took the position that judicial regulation that includes both non-lawyer participation and a client security fund paid entirely by lawyers offers better protection to the public than does legislative regulation.

Historically, lawyer discipline has been conducted behind closed doors. In

4. Id.
5. Id.
6. Wilkins, supra note 1, at 803.
7. Rosenfeld, supra note 3, at n.5.
8. Id.
part, this is to protect the due process rights of the attorneys who have allegedly breached an ethical or disciplinary rule. However, the secrecy surrounding lawyer discipline has contributed to the public's perception that lawyers are "going easy" on one another in the process. In particular, there is a public perception that politically-connected lawyers are able to wield their political connections in such a way as to obtain more lenient treatment. Disciplinary boards, like all other bureaucratic organizations, are made up of people. Those people operate in a milieu where their professional and financial fortunes are affected by their relationships with other people. The practice of law, especially in state capitals where many disciplinary agencies are headquartered, is particularly intertwined with politics. For example, court appointments, legislative and administrative appearances, and appointments to the bench are all affected by politics.

When combined with the traditionally closed-door policy of lawyer disciplinary agencies, the public's understanding that lawyers are political animals has led many to believe that the members of lawyer disciplinary boards can be influenced by political considerations in meting out discipline. The judicial regulation model of lawyer discipline arguably contains a check on this possibility that the judgments of lawyer disciplinary boards (which are often made up of voluntary members who are engaged in the practice of law while making disciplinary decisions) might be affected by political considerations. This safeguard is the component of the model that requires the state's courts (often the supreme court) to review and grant final approval to the board's decisions in disciplinary matters. The members of the bench are theoretically immune from political influence because in many cases they are life-tenured. Thus, their ability to review the decision of a board should reassure the public that in the final analysis there is a neutral arbiter of lawyer discipline.

The case of Boston attorney Michael Muse and his role in the Mary Guzelian affair offers the public and the legal community a unique opportunity to examine how state disciplinary agencies and courts must be vigilant in avoiding even the appearance that politics has influenced lawyer discipline. If the model of

9. Ironically, the secrecy has also brought charges from accused lawyers that the disciplinary agencies are running amok with power, unchecked by the scrutiny of public accountability. See Claire Papanastasiou Rattigan, Is the BBO Out of Control? They Police the Profession . . . But Who Watches Them?, MASS. LAW. Wkly., June 3, 1996, at B1.

10. The definition of "politics" for purposes of this article embraces more than just the art or science of government. It includes the broader activity of networking for professional advancement.

11. See Ann Davis, Bar Readmissions Cloaked in Secrecy, NAT'L L.J., Aug. 12, 1996, at 1 ("Small wonder that even in states such as West Virginia, which holds 'open' disciplinary proceedings, readmissions can seem as covert as midnight town meetings to laypeople . . . . Had the public been adequately alerted beforehand . . . [bar counsel] would have learned [that] . . . the politically-connected ex-attorney 'was not candid' with the court . . . .")

judicial regulation is to be sustained as the predominant model in this country, such vigilance is critical. Otherwise, the movement toward other models, like the legislative model mentioned above, may well prevail. While the Muse case happened to have occurred in Massachusetts, it teaches more general lessons about the strengths and weaknesses of the model of judicial regulation as it exists across the United States.\(^\text{13}\)

This article will examine (1) the general story of Mary Guzelian and her will; (2) attorney Michael Muse’s role in the conservatorship of Mary Guzelian and the probate of her will; (3) the Board of Bar Overseers’ proceedings and their disposition of the case; (4) the role of the Supreme Judicial Court (SJC) in reviewing and ratifying the Board’s decision; and (5) the impact of the SJC’s actions on the public perception of lawyer discipline.

II. THE MARY GUZELIAN CASE\(^\text{14}\)

Mary Guzelian used to panhandle in front of the gay bars that dot Boston’s Back Bay. Patrons would give the apparent “bag lady” a “buck for luck.” On a warm summer night in 1985, however, Mary’s luck ran out. Mary had been hit by a taxi and she died soon thereafter. The street person who looked to all the world to be destitute and mad was in fact the owner of a substantial fortune. Her shopping bags contained enough stocks, bonds, and rumpled bills so that, when added to her substantial real estate holdings, they yielded a $500,000 probate estate. Mary’s homeless friends at the shelters she frequented could never have guessed that Mary had acquired several houses and other significant assets on her downward path into madness.

But someone knew on that July night that Mary Guzelian was a rich woman. A

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13. While the author recognizes the limitations on the use of “storytelling” in legal scholarship, the concept of narrative as useful in legal scholarship has been gaining wide recognition if not acceptance. See Liz McMillan, The Importance of Storytelling: A New Emphasis by Law Scholars, CHRON. HIGHER EDUC., July 26, 1996, at A10. Daniel Farber and Suzanna Sherry, professors of law at the University of Minnesota, have contributed a piece to Harvard law professors Martha Minnow and Gary Bellow’s new book Law Stories, soon to be published by University of Michigan Press. In that piece, Farber and Sherry “write that although most people agree that these stories are more readable than typical law review fare, ‘the consensus about their value stops there.’ Mr. Farber and Ms. Sherry express concern about the risk that ‘stories can distort legal debate particularly if those stories are atypical, inaccurate, or incomplete.’ They have called for greater care and rigor in the use of stories in scholarly analysis.” Id. at A10. With that admonition in mind, the author offers the Michael Muse story as an illustration of a uniquely high-profile case which therefore had a disproportionate effect on the public perception of the lawyer discipline process. The author does not intend the discussion of the case as a wholesale indictment of the model of judicial regulation as it exists in Massachusetts. The Massachusetts system appears to be one of the better systems in the fifty states and, since making hearings public in July 1993, one of the more open.

14. Part II is written as a general summary of the lengthy 11-year history of the Mary Guzelian matter. For ease of narrative, the description is not footnoted. All matters important to Attorney Muse’s role in the case are cited in depth later in the article.
call was made to a Boston attorney, enjoying the tennis at Wimbledon in London, informing him of Mary’s death. That attorney, Michael Muse, was Mary’s executor — a politically-connected Boston lobbyist, close to the Speaker of the Massachusetts House of Representatives, and a member of a prominent Boston legal family. While Michael Muse was a consummate lobbyist on Beacon Hill, he had substantially less experience drafting wills and maneuvering his way through the tangled web of probate. Unlike his mother, a well-respected Boston probate judge, Muse had little exposure to the complex and arcane world of the Massachusetts probate system.

Michael Muse, with his marginal probate experience, had drafted Mary Guzelian’s second will. His friend, State Representative Kevin Fitzgerald, had known Mary Guzelian and he and his legislative aide, Patricia McDermott, had contacted Muse about Mary’s situation. Unlike her first will, which left her entire estate to her sister, Elizabeth Scullin, of Philadelphia, the will Muse drafted for Mary benefited only Fitzgerald and McDermott, with a nominal $1.00 to Scullin. Fitzgerald and McDermott each received $200,000 on Mary’s death.

The case drew little, if any, public attention until Mary and her will became the subject of a *Boston Globe* article in 1991. By that time Fitzgerald had spent the money on a beach house and a bar and he had made his way into the Democratic leadership of the Commonwealth’s House of Representatives.

In the end, Judge David Kopelman of the Norfolk County Probate Court took the unusual step of reopening the probate proceedings surrounding Mary Guzelian’s estate and finding that Fitzgerald, McDermott, and Muse were “not credible” in their sworn testimony as to Guzelian’s testamentary capacity when she signed the suspect will. After a fifteen-day trial, Kopelman stated in his findings of fact “that the whirlwind of events and activities generated by Fitzgerald, McDermott and Muse, commencing on their discovery of Guzelian’s assets on July 10, 1981 and culminating with the execution of Guzelian’s will two weeks later on July 24, 1981, had the effect of overcoming Guzelian’s free will” and that “. . . the credible preponderance of evidence amply demonstrated that Guzelian was NOT of sound mind on July 24, 1981, and that on that date she lacked testamentary capacity.”

On November 8, 1994, Judge Kopelman ordered Fitzgerald and McDermott to return the money to Elizabeth Scullin, sister and rightful heir of Mary Guzelian. On January 29, 1996, the Supreme Judicial Court suspended Attorney Muse from the practice of law for three years.

III. ATTORNEY MUSE’S ROLE IN THE GUZELIAN CASE

Michael Muse was the son of a prominent Boston trial lawyer, Robert Muse, and one of Boston’s most respected probate judges, Mary Muse, when he joined the Massachusetts Bar in 1974. Muse proceeded to make a career as a labor union lawyer and Beacon Hill lobbyist for such groups as the Service Employees
International Union Local 254 and the Massachusetts Community College Association.\textsuperscript{15} As noted above, his experience in the area of probate law was limited at best.\textsuperscript{16}

In his role as a lobbyist on Beacon Hill, Michael Muse became acquainted with many of the politicians who would rise to power in the Democratic party in the 1980s. He became very close to Charles Flaherty, eventual Speaker of the House of Representatives. Another lobbyist, Jackie Murphy, and Muse were so solicitous of Flaherty, that, as one Beacon Hill observer said, "Lobbyist Michael Muse would shine one shoe; Jackie Murphy would shine the other. Muse & Murphy, M&M, you know. That was the joke."\textsuperscript{17} Muse began to be friendly with Kevin Fitzgerald, a young state legislator from Mission Hill, as his lobbying practice flourished.

By July of 1981, Muse had been a friend and colleague of State Representative Kevin Fitzgerald for several years, having first met him at an outdoor pool bar in a Florida hotel while both were attending the Super Bowl.\textsuperscript{18} Through Fitzgerald, Muse became acquainted with Patricia McDermott, who was at that time Fitzgerald’s part-time assistant.\textsuperscript{19}

Prior to July 1981, Fitzgerald and McDermott became acquainted with 65 year-old Mary Guzelian. Although Mary was not a constituent, Fitzgerald and McDermott provided assistance to her in proceedings at the Boston Rent Equity Board and the Boston Housing Court, brought to evict Mary from a rent-subsidized apartment in Brighton. Mary was in fact ordered to vacate the apartment by June 30, 1981.\textsuperscript{20}

Fitzgerald and McDermott visited Mary’s apartment around July 10, 1981, once they found out that she had not complied with the Court’s order to vacate. They then discovered that it lacked running water and electricity. In fact, the apartment was in total disarray. Debris and trash bags, which contained personal possessions mixed with garbage, rotting food, and human waste, filled the rent-controlled apartment. Even more interesting, bank books and cash were among the trash bags along with evidence that Mary owned other substantial assets.\textsuperscript{21}

Fitzgerald and McDermott arranged for the removal and storage of Mary’s valuables with the assistance of State House personnel and facilities. They then

\begin{thebibliography}{9}
\bibitem{16} Patricia Nealon, \textit{Lawyer’s Suspension was Quietly Set Aside}, B. GLOBE, Sep. 23, 1995, at 20.
\bibitem{17} Sally Jacobs, \textit{The Heady Life of “Good-Time Charlie:” Speaker Flaherty Loves the Limelight. It May End up Burning Him}, B. GLOBE, Sep. 28, 1995, at 53.
\bibitem{18} In re Estate of Mary Guzelian, \textit{Procedural Background and Findings of Fact}, No. 8501932-E1, Commonwealth of Massachusetts, Trial Court Probate and Family Court Department, Norfolk Division, No. 96, at 26 [hereinafter Findings].
\bibitem{20} \textit{Id.}
\bibitem{21} \textit{Id.} at 2.
\end{thebibliography}
took it upon themselves to take care of Mary’s housing needs and financial matters. On or about July 13, 1981, Michael Muse was asked to attend a meeting with McDermott, Fitzgerald, and Mary Guzelian to discuss Mary’s affairs.\textsuperscript{22} No one seems to remember exactly who arranged for Muse to be there, but he was.\textsuperscript{23}

Michael Muse learned quite a bit about Mary Guzelian that day. He learned that she had rented the apartment under an alias, that the apartment had been in essentially uninhabitable condition at the time of the eviction proceedings and that Guzelian herself had exhibited signs of unsanitary physical condition as well as uncertain mental capacity. Michael Muse also knew that substantial amounts of cash and other assets had been discovered among the accumulated debris in the apartment.\textsuperscript{24}

During that fateful meeting on July 13, Michael Muse made the first of many professional judgments that were later criticized as negligent and/or unethical. He agreed to institute proceedings to have Patricia McDermott named as Mary Guzelian’s conservator. Muse also told Mary that he would act as her attorney in the conservatorship proceedings.\textsuperscript{25}

Michael Muse went on to draft the petition necessary in the Suffolk County Probate and Family Court to have Kevin Fitzgerald’s aide, Patricia McDermott, appointed by the Court as Mary Guzelian’s conservator. This was the same Kevin Fitzgerald from whom Muse sought favorable votes on legislation, in his role as a registered lobbyist. Muse also arranged for Mary Guzelian to see a physician who filled out the standard probate form/medical certificate for the probate court saying that Mary was in need of a conservator.\textsuperscript{26} The medical certificate also recited the rote statement that Mary had the capacity to consent to the petition. The import of this recitation is that the conservatee does not then have to be represented by counsel.

In the trial that vacated Mary Guzelian’s will, drawn by Muse, Judge David Kopelman found that the physician to whom Mary was taken did not have much experience in assessing mental illness. And, in fact, Michael Muse did not make a serious effort to seek out Mary’s prior medical history. She had been under the care of another doctor for several years and had a long history of treatment at

\textsuperscript{22} Id.
\textsuperscript{23} Findings, supra note 18, No. 90, at 24.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} In Massachusetts, a conservatorship carries less comprehensive power than a full-blown guardianship. A person may well have the mental capacity to choose where she lives and to make other decisions, while not being able to manage her financial affairs. Thus, that person would have sufficient capacity to consent to someone (a conservator) doing such financial management for her while she retains control over the rest of her life decisions. Such a person would not necessarily lack testamentary capacity to make a will simply because she needed help with her finances. \textit{See} MASS. GEN. LAWS ch. 201, § 20 ("A conservator shall have the management of all the estate of his ward. . . . [A]ll laws relative to the jurisdiction of the probate court over the estate of a person under guardianship as a mentally ill person, including the management, sale or mortgage of his property and the payment of his debts, shall be applicable to the estate of a person under conservatorship.").
several hospitals in the Boston area. These records would have indicated to the examining physician in the conservatorship proceedings that Mary Guzelian suffered from chronic schizophrenia.27

Judge Kopelman found that, contrary to the testimony of the examining physician and his medical certificate, Mary Guzelian did not have sufficient mental ability to comprehend the nature of her act in assenting to the petition for conservatorship.28

Muse failed to act on suggestions that Mary be seen by a psychiatrist and instead proceeded to prepare the petition for conservatorship on the grounds of physical incapacity. Muse had not yet received the physician’s report or certificate when he did this.29 The petitioner was Patricia McDermott, the aide to Muse’s old friend Rep. Kevin Fitzgerald. The petition required that, as petitioner, McDermott list heirs apparent or presumptive of her ward, Mary. Muse “caused to be typewritten the word ‘none.’ This was followed by the words ‘known to petitioner’ in handwritten letters.”30

Mary actually did appear at the Suffolk County Probate Court when the petition was presented for allowance on July 16, 1981. Mary was accompanied by Muse and McDermott. After a brief hearing the judge allowed the petition.31 Muse listed his name, address, and telephone number as counsel for the petitioner, McDermott. Judge Kopelman found that this constituted an appearance by Muse as McDermott’s attorney, and not as Mary’s attorney.32

After McDermott’s appointment as Mary’s conservator, Muse and McDermott proceeded to marshal Mary’s assets and they “managed her properties in all respects, collected rents, sold the Arlington property, converted her savings bonds to liquid assets and purchased a condominium in Brookline” for Mary.33 Muse also proceeded to do estate planning for Mary.

Muse testified at the two-week trial that on July 22, 1981, six days after McDermott was appointed as conservator and twelve days after Fitzgerald and McDermott discovered all of Mary’s assets, Mary simply “showed up” at his office (where she had never been before) and asked Muse to draft a will for her. Judge Kopelman found Muse’s testimony “not credible.”34 At this point, Muse claimed, Mary disclosed to him that she did indeed have an heir, a living sister, Elizabeth Scullin.35 However, Muse testified that Mary did not want Elizabeth to share in her estate, because Elizabeth had “married an alcoholic or a bartender or

27. Findings, supra note 18, No. 113, at 30-31.
28. Findings, supra note 18, No. 116, at 32.
31. Findings, supra note 18, No. 121, at 33.
32. Findings, supra note 18, No. 122, at 33.
33. Findings, supra note 18, No. 126, at 34.
34. Findings, supra note 18, No. 127, at 34.
35. Findings, supra note 18, No. 128, at 34-35.
someone involved with the liquor industry.” Muse said that Mary also did not want to make any charitable bequests. Instead, she wanted her entire estate split between Fitzgerald and McDermott because of their friendship toward her. Judge Kopelman again found Muse’s testimony regarding Mary’s testamentary intentions “not credible.” He further found that Mary’s letters to her sister, as produced at trial, showed no such animosity and that Mary received numerous charitable benefits from various churches and organizations during her life that would have been natural recipients under her will.\textsuperscript{36}

Muse then proceeded to draft a will for Mary, naming himself as the executor, with no charitable bequests and a nominal sum of $1.00 to her sister, Elizabeth. Mary signed the will on July 24, 1981 at Muse’s Union office (as distinct from the Muse office where Mary had “appeared” on July 21st), and the will was witnessed by two people Mary did not know. One was an employee of the Union that was Muse’s primary client. Muse claimed that he never told Fitzgerald or McDermott of their luck in being named Mary’s beneficiaries. Judge Kopelman again found Muse’s testimony “not credible in light of the close relationship between Muse, Fitzgerald, and McDermott during all relevant times.”\textsuperscript{37}

After Mary’s death and the probate of her will, Fitzgerald received a total of $200,142.49 and McDermott received a total of $198,642.49 from Mary’s estate. Muse himself received $37,730 in legal fees from Guzelian’s estate, in addition to a $15,720 broker’s fee from his sale of Mary’s Cambridge property in June 1987.\textsuperscript{38}

During the trial at which the will was vacated and the money restored to Elizabeth Scullin, Judge Kopelman intimated that Michael Muse was a party to a conspiracy in the following finding:

The extent of the cooperation and possible connivance between Muse and McDermott is demonstrated by the fact that neither was able to produce time records concerning the dates and hours for services rendered by each of them in connection with their handling of Guzelian’s conservatorship. McDermott never submitted time sheets or records of her time to Muse, and Muse never submitted time sheets and records of his time to McDermott for services rendered by them in connection with guardianship from July 15, 1981 to July 1, 1985, a period of approximately four years. In spite of their respective failures to maintain time records for their services, the four guardianship accounts submitted to the probate court reflect that both Muse and McDermott were paid to the penny the exact same amount, i.e., $27,000, for their services from July of 1981 to July 1985. I find that it is highly likely that this is not a mathematical coincidence, but rather reflects a specific design embarked upon by Muse and McDermott.\textsuperscript{39}

\textsuperscript{36} Findings, supra note 18, No. 129, at 35.
\textsuperscript{37} Findings, supra note 18, No. 135, at 36.
\textsuperscript{38} Findings, supra note 18, No. 131, at 35.
\textsuperscript{39} Findings, supra note 18, No. 136, at 37.
Judge Kopelman went on in his Findings to note that the close relationship between Muse and politician Fitzgerald went on after Mary’s death on June 25, 1985. Kopelman cited the fact that in June 1986, the two men invested in a bar/restaurant in Newport together. The judge presumed that Fitzgerald’s interest in the bar came from Mary’s estate. Muse and Fitzgerald each purchased lots on the same road in Martha’s Vineyard. They used the same builder to construct vacation homes on the lots. Coincidentally, Bayes Hill Road was the favorite building spot of several other Beacon Hill lobbyists and politicians.

On June 11, 1985 Mary was struck by a taxi on Boylston street, on almost the exact spot where she once had been hit several years before. She was admitted to Massachusetts General Hospital where she remained until her death on June 25, 1985. Muse was notified of Mary’s death in the Player’s Lounge at Wimbledon, where he was enjoying the tennis.

After Mary’s death, Muse proceeded to petition the court to probate the will he had drafted for Mary. His actions at that point raise some of the most telling points about his lapse of ethics. The petitioner is required to list all known heirs so that they may be notified that the will is before the court. This gives such heirs (not only those named in the will but all would-be intestate takers) the opportunity to come into court and challenge the will on such grounds as the testator’s lack of capacity, undue influence, or fraud. Muse listed Mary’s sister incorrectly as “Elizabeth Guzelian, a/k/a Elizabeth Scallin of parts unknown and possibly deceased.” As Judge Kopelman said, “At the time he prepared the petition, Muse had no knowledge whatsoever that Scallin was deceased or possibly deceased.” The judge characterized this assertion by Muse as “a mistake.”

40. Findings, supra note 18, No. 137, at 37-38.
41. One reporter commented:

Up on a private road from a salty lagoon, in a gentle pine forest peppered with large homes and tennis courts, sits a Martha’s Vineyard enclave where the property owners’ association reads like a page from Who’s Who on Beacon Hill. The names of House leaders coexist with those of top lobbyists, politically connected developers and lawyers. All the plots were bought on the same date: August 1, 1986. Those who built houses did so through the same contractor and with mortgages from the same bank, the now-defunct University Bank and Trust. Among the original owners . . . are House Majority Whip Kevin Fitzgerald, House Ways and Means Committee Chairman Thomas Finneran; lawyer and lobbyist Michael Muse; longtime lobbyist, developer and campaign official William Ezekiel of Charlestown; and a former treasurer of House Speaker Charles Flaherty’s business consulting firm, George W. Kennedy. Six of the nine properties are or were held in blind “nominee” trusts, meaning the identities of the owners are not public . . . [T]o others on Beacon Hill and to advocates of ethics in government it has become a symbol of the disquieting closeness between lawmakers and lobbyists, and an example of the need for reform of the laws governing nominee trusts.

42. Findings, supra note 18, No. 151, at 42.
43. Findings, supra note 18, No. 152, at 42.
44. Findings, supra note 18, No. 154, at 42.
45. Id.
46. Id.
He also went on to find that Muse’s failure to state that Scullin was Mary’s sister and his misspelling of her name were also mistakes. So too was Muse’s listing of an incorrect date of death.47

Muse was party to the search of Mary’s apartment and represented her conservator, McDermott. Judge Kopelman found it “highly probable” that letters from Elizabeth to Mary were located in Guzelian’s apartment; these letters would have furnished Muse with the current address of Guzelian’s sole heir.48 Elizabeth had letters from Mary dated as close to Mary’s death as April 3, 1985, and Elizabeth testified that she had sent letters, with Elizabeth’s return address, to Mary every month between 1974 and 1985.49

In addition to letters, Judge Kopelman found an “abundance” of other documents that would have indicated to Muse that Elizabeth lived in Philadelphia, including Mary’s hospital records listing Elizabeth as Mary’s nearest relative and listing Elizabeth’s address. Mary’s marriage certificate listed the family’s Philadelphia address. Even McDermott’s own notes as conservator recite that Mary had been employed at the Philadelphia Navy Yard. Dr. Fuller’s written report of his medical exam recited that Mary’s origins were in Philadelphia.50

Despite all of this information, Muse proceeded to comply with the probate court’s notification requirement by publishing notice in a Brookline, Massachusetts paper, “a publication which Scullin, who resided in Philadelphia all of her adult life, was not likely to receive.”51 Muse also sent two letters, one to “Elizabeth Scallin” and another to “Elizabeth Guzelian” to the same address, Mary’s old Belmont, Massachusetts home that Muse knew Mary had sold in 1969.52 Both letters were returned to Muse unopened. Muse took no additional steps to locate Mary’s sole heir and the court found he failed in his duty as executor to exercise due diligence in searching for possible heirs.53 Judge Kopelman again characterized this as a “mistake.”54

Muse was obligated to file a return of service in connection with the notification. In that return of service he stated under the penalties of perjury that he had published notice and mailed notice of the probate proceedings to all interested parties. He filed the return of service on September 19, 1985, without disclosing to the court the likelihood that Mary’s sole heir probably resided outside of Massachusetts and the fact that he sent notice to an address in Massachusetts where the decedent had not lived since 1969.55 Judge Kopelman

47. Findings, supra note 18, Nos. 155-157, at 42-43.
49. Findings, supra note 18, No. 29, at 9.
50. Findings, supra note 18, No. 158, at 43.
51. Findings, supra note 18, No. 160, at 44.
52. Findings, supra note 18, Nos. 161-63, at 44.
53. Findings, supra note 18, No. 165, at 44.
54. Id.
55. Findings, supra note 18, No. 169, at 46.
again characterized this as a “mistake.”

The will was allowed on October 2, 1985 without a hearing, on the basis that all interested persons had been notified and had not objected to the probate of the will.

Muse’s other “mistakes” included not disclosing in his probate accounts to the court that Muse had sold Mary’s condominium to Pacific States Development Corporation, “a California corporation whose principals consisted of Muse’s family members. Muse was formerly the President of this Corporation.” Muse also failed to disclose the fact that he took a real estate commission on the sale of one of Mary’s other properties.

Judge Kopelman wrapped up his extraordinary 50 pages of Findings by concluding that Michael Muse’s various “mistakes” and a lack of diligence on Muse’s part had the “cumulative effect of depriving Scullin of her day in court, and her opportunity to present a substantial and meritorious defense, which she had, to the allowance of Guzelian’s 1981 will.” He also found that Elizabeth continued to mail letters to Mary after her death, and those letters were returned to Elizabeth after McDermott, Muse’s client, canceled the post office box. The obvious implication is that McDermott and Muse knew of Elizabeth’s existence and her address during the probate of the will.

Judge Kopelman responded to all these mistakes and to the testimony of many witnesses that Mary was clearly suffering from delusions, that she was sleeping in the streets and that she had a terrible odor emanating from her, by vacating the will based on Mary’s lack of testamentary capacity. Judge Kopelman’s order was dated November 7, 1994. He ordered Fitzgerald, McDermott, and Muse to repay the amounts they had taken from the estate to Elizabeth Scullin. It was not until September 1995 that the case ended in an undisclosed settlement between Fitzgerald, McDermott, and Scullin. Muse reimbursed the estate $41,660 in legal fees, “the full amount he was ordered by the court to repay, plus interest.”

IV. THE ROLE OF THE BOARD OF BAR OVERSEERS

After the trial, the Board of Bar Overseers (“Board”), the body appointed by the Supreme Judicial Court of the Commonwealth of Massachusetts to investi-

56. Id.
57. Findings, supra note 18, No. 172, at 47.
58. Findings, supra note 18, No. 179, at 48.
59. Findings, supra note 18, No. 180, at 49. In fact, Muse was subsequently stripped of his real estate license for three years. The Board of Registration of Real Estate Brokers and Salespersons suspended Muse’s license following his suspension from the practice of law by the Board of Bar Overseers. New England News Briefs, Draft of Will Costs Real Estate License, B. GLOBE, June 1, 1996, at 17.
60. Findings, supra note 18, No. 183, at 49.
61. Findings, supra note 18, No. 184, at 49.
63. Id.
64. Rules of the Supreme Judicial Court, Rule 4:01, § 5(1) [hereinafter SJC Rules] (“This court shall appoint
gate and discipline attorneys, initiated an investigation of Muse’s actions. There are currently twelve board members, eight of whom are attorneys and four of whom are non-attorneys. Board members are not full-time; they continue to maintain their law practices or their other positions while acting as board members.

The Board is given authority to appoint a chief Bar Counsel who is the prosecutorial arm of the disciplinary body. The procedure for investigation of any attorney begins with an order of the Board to Bar Counsel to investigate the conduct of the respondent attorney at issue. When the prosecution of formal charges is recommended, Bar Counsel prepares: (1) a petition for discipline; (2) a charging memorandum outlining the charges to be brought and the facts supporting the charges; and (3) a disposition memorandum outlining Bar Counsel’s justification for asserting that public discipline would be warranted if the charges were to be proved by a preponderance of the evidence and outlining the respondent’s disciplinary history, if any.

In Michael Muse’s case, Bar Counsel proceeded to file a Petition for Discipline on March 30, 1995, in which Bar Counsel requested the Board to: (1) consider and hear the matter; (2) determine that formal discipline of Michael Muse was required; and (3) file an information concerning the matter with the Supreme Judicial Court. Michael Muse’s response was in the form of a stipulation, entered into with the Bar Counsel. In the Stipulation, Michael Muse admitted the truth of the allegations in the Petition and admitted the disciplinary violations set forth in the Petition. Muse waived his right to an evidentiary hearing on the facts and disciplinary violations and agreed that he would not see the memorandum that Bar Counsel would submit to the Board on the matter. Muse also waived his right to the disposition memorandum and his right to file any opposition to it.

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a Board of Bar Overseers (Board) to act as provided in this Chapter Four, with respect to the conduct and discipline of attorneys and in such matters as may be referred to the Board by any court or by any judge or justice”.

65. SJC Rules, supra note 64, § 5(3)(b).
66. Rules of the Board of Bar Overseers, § 2.1 [hereinafter Board Rules].
67. Board Rules, supra note 66, § 2.8(b)(1).
68. Petition, supra note 19, at 8-9.
69. Bar Counsel v. Michael J. Muse, Respondent’s Answer to Petition for Discipline, Stipulation of the Parties, and Joint Recommendation for Discipline, BBO File No. C1-91-0346 [hereinafter Stipulation]. The SJC Rules provide for such a joint recommendation:

In the event the respondent-attorney files an answer admitting the charges and does not request the opportunity to be heard in mitigation, the Board Counsel and the respondent-attorney may jointly recommend to the Board that the respondent-attorney receive a public reprimand or a suspension . . . . If the Board accepts a joint recommendation for suspension, the Board shall file with the Clerk of this court for Suffolk County an information, together with the entire record of its proceedings.” SJC Rules, supra note 64, § 8(2). The Board Rules also provide that, “In the event the respondent files an answer admitting the charges, does not therein request the opportunity to be heard in mitigation, and reaches an agreement with the Bar Counsel on a joint recommendation that the matter be concluded by . . . a suspension, then the matter shall be referred directly to the Board.

Board Rules, supra note 66, § 3.19(d).
Finally, he acknowledged that, "the petition for discipline, this stipulation, and all further disciplinary proceedings thereon will become public 20 days after service of the petition for discipline, except as provided in Section 3.22 of the Rules ...." 70 Muse and Bar Counsel stipulated to and recommended that Muse be suspended from the practice of law for one year. However, Muse agreed that he was bound by his admission that he violated the rules even if the Board and/or the Supreme Judicial Court rejected the one-year recommendation and imposed a different sentence. 71 Essentially, Michael Muse agreed to a plea bargain and avoided an evidentiary hearing, the equivalent of a trial in such proceedings.

Just as a prosecutor cannot bind a judge to a plea bargain in a criminal case, however, the Bar Counsel could not bind the Board, and ultimately the SJC, in Michael Muse's case. The Board rejected the one-year suspension at its April 10, 1995 meeting. The Board voted to make a preliminary determination to "accept the Stipulation but to alter the disposition and instead to recommend that Mr. Muse be indefinitely suspended from the practice of law." 72 The practical effect of such an indefinite suspension is that the attorney must wait at least five years to petition the SJC for reinstatement. 73

It is clear from the minutes of the Board's April meeting that the decision of the eleven members who voted was not unanimous. There was a first vote, which failed, where four members voted for a motion to recommend a three-year suspension. Seven members voted against that motion. The vote for the indefinite suspension was then taken, with six members voting for the motion and five members voting against, one preferring a three-year suspension and four preferring to reject the underlying Stipulation altogether. 74 The Board's decision was then conveyed to Bar Counsel and Michael Muse. The letter noted that it constituted "formal notice under Section 3.52 of the Rules of the Board of Bar Overseers that the Board has made a preliminary determination to reject the parties' joint recommendation for discipline." That meant that Michael Muse (and the Bar Counsel) had fourteen days to file briefs in support of or opposition to the Board's decision. The Board would also hear oral argument if requested. If neither party filed a response within fourteen days, the Board's preliminary determination would become final. 75 Neither Bar Counsel nor Michael Muse

70. Stipulation, supra note 69, at 1-2.
71. Id. at 3.
73. MASS. SUP. JUD. CT. R. Rule 4.01, § 18(1) (West 1996) ("[A]n attorney who has been . . . suspended for an indefinite period . . . may not be reinstated otherwise than upon his petition filed in this court after the expiration of at least five years from the effective date of the order of . . . suspension.").
74. The SJC Rules provide for the Board to reject such a joint recommendation and stipulation, upon which the matter is assigned to an appropriate hearing committee, to the Board, or to a panel of the Board for hearing. Id. § 8(2).
responded within the fourteen days.  

The next phase of the Board’s proceedings is noteworthy. Between the April 10, 1995 meeting and a meeting held on July 10, 1995, the Board members must have undergone some significant changes in thinking. It is not clear from the record why this happened, but on July 10th the Board took the matter up again. It is also not clear why, after neither party responded within fourteen days, the preliminary determination did not become final as noted in the April 24th letter from the Board to the parties.

At its July 10th meeting, the Board, “[u]pon further consideration and by unanimous vote,” (1) withdrew its preliminary determination of an indefinite suspension; (2) rejected the Stipulation; (3) ordered the Bar Counsel to “undertake a complete investigation of the conduct” of Muse pursuant to a Board Memorandum that accompanied the Order; (4) ordered the Board Memorandum impounded as a confidential intra-agency memorandum reflecting the Board’s deliberations; (5) deferred a decision on whether to modify the existing Petition filed on March 30, 1995; and (6) stayed further proceedings on the Petition pending further order of the Board.

In the absence of any public explanation as to why the preliminary determination that Michael Muse deserved at least an indefinite suspension did not become final, the public is left to speculate. On the first vote taken at the April 10th meeting of the Board, four members preferred a three-year suspension. Their motion to recommend a three-year suspension was defeated on a 4-7 vote. A second motion was made to recommend an indefinite suspension, which would effectively mean a five-year suspension for Muse. The motion passed on a 6-5 vote. The Board Minutes reflect that, of those five who voted against the indefinite suspension, one preferred a three-year suspension and four preferred a rejection of the Stipulation.

Given those first and second votes, the eleven members of the Board who voted seemed to initially break out with four members favoring a three-year suspension, four preferring a tougher than indefinite (five-year) suspension and three who were willing to go with an indefinite suspension. On the second vote, one might surmise that the three members who were willing to go with the “compromise” position were joined by three of the four who initially wanted a shorter, three-year suspension. The four who preferred to reject the stipulation altogether presumably voted against the three-year motion and the indefinite motion. According to a later Board Memorandum, those four preferred to reject the Stipulation and to set the matter down for trial. Presumably, these four

77. Letter from Michael Fredrickson, supra note 75.
78. Board Order, supra note 76.
79. Id.
80. Apr. 10 Board Minutes, supra note 72.
Board members felt that a public hearing would be in the public’s best interest and might result in a stiffer suspension or perhaps disbarment.

What is clear from the 6-5 vote on the preliminary determination in April is that at least five members of the Board were unhappy with it. What is completely unclear is what transpired between the April 10th vote and the meeting of the Board on July 10, 1995, when the Board took the matter up again. After consideration, the Board voted unanimously to issue an order which (1) withdrew its preliminary determination; (2) rejected the stipulation of the parties; and (3) ordered Bar Counsel to “undertake and complete an investigation of the conduct of the respondent.”

It is clear that four members of the Board were predisposed to vote to effectively reject the Stipulation; they had already indicated their desire to have a trial. But what happened to get the other seven members to vote to reopen? In fact, Muse’s attorney, in a letter dated July 14, 1995, objected to the Board’s July 10, 1995 order on the grounds that “the Board had ‘exceeded the authority delegated to it by its own rules and [had] violated [Muse’s] right to due process.’ ” It appears that, technically, the Board reopened the case to investigate whether additional charges were warranted. Bar Counsel apparently decided they were not because none were imposed. However, absent a public explanation of the decision to reopen the investigation, the public does not, and cannot, know what happened.

On September 27, 1995, Bar Counsel followed up on the Board’s July order by filing a Supplemental Charging Memorandum. The Board reviewed the Supplemental Charging Memorandum and reconsidered the record at its October 16 and December 11, 1995 meetings. Although the Supplemental Charging Memorandum was impounded to preserve confidentiality, one can infer from the Board Memorandum issued that, after further investigation between July and September, Bar Counsel decided to confine the disciplinary charges to those alleged in the original Petition for Discipline. The Board found this to be within the scope of Bar Counsel’s prosecutorial discretion.

The Board voted unanimously at the December 11, 1995 meeting to again accept the Stipulation of the parties. However, it rejected the suggested disposition of a one-year suspension and recommended instead that Muse be suspended for three years. On January 29, 1996, Muse appeared before Justice Herbert Wilkins of the SJC and agreed to the suspension.

Thus, ironically, Muse ended up with a lighter sentence than the one originally

82. Id.
83. Id. at 3 n.2.
84. Id. at 3.
86. John Ellement, Lawyer’s Practice Suspended 3 Years Over Guzelian Case, B. GLOBE, Jan. 30, 1996, at 18. “Muse’s attorney, Michael Mone, told Wilkins that because Muse wanted to ‘get on with his life,’ the Beacon Hill lobbyist would not challenge the overseas’ finding that he had violated the ethical code for lawyers in his handling of Guzelian’s will.” Id.
recommended by the Board in April. To some members of the public, the events that transpired after Bar Counsel filed its Supplemental Charging Memorandum in September 1995 were interpreted to mean that political influence had been brought to bear on the Board in Michael Muse’s case. To fully understand such an impression, it is important to recall the political context in which the Board was operating. In early 1996, Massachusetts House Speaker Charles Flaherty, longtime friend and ally of Michael Muse, pleaded guilty to cheating on his income taxes. He also “admitted to the most flagrant pattern of violations in the 18-year history of the State Ethics Commission by routinely accepting accommodations and entertainment from powerful special interests and their lobbyists.”87 The Federal and State investigations of Flaherty and the media coverage of his connections to lobbyists had been in full gear during 1995 when the Board was considering the discipline of attorney Muse. Flaherty’s resignation was only the culmination of a series of investigations into the ethics (or lack thereof) of Massachusetts’ politicians and lobbyists that had gone on during this time period:

In addition to Flaherty’s guilty plea and resignation, other ethics cases in the news in the past year include: state Sen. Henri Rauschenbach’s acquittal in a conflict-of-interest case; former Senate President William M. Bulger’s fighting off of an ethics commission inquiry about his travels with a lobbyist; and the overturning on a technicality of lobbyist F. William Sawyer’s federal conviction on charges of lavishly entertaining state lawmakers.88

Flaherty, who had been speaker for five years, insisted that he had offered no *quid pro quo* from lobbyists, and no evidence was found that he had. The new Speaker, Thomas M. Finneran, acknowledged that the public at least perceived that influence-peddling was rampant on Beacon Hill: “‘Virtually all the members [of the Legislature] are decent and honest to the core. . . . Their vote is not available for purchase. But the public perception is that it’s like a Moroccan bazaar up here. Everything’s for sale.’”89

In polling the voters of Massachusetts as to how they felt about the politicians on Beacon Hill now that there were new faces in the Legislature and the old guard had resigned, pollster Gerry Chervinsky discovered the public’s continuing cynicism about its elected representatives in Boston: fewer than one third said that the new leadership made them confident about the legislature.90 Finneran conceded, “‘We’ve hurt ourselves dramatically with the public with a series of wounds that we’ve inflicted on ourselves . . . . The public has such high hopes but such low expectations.’”91

88. *Id.*
90. *Id.*
91. *Id.*
This is the prism through which the citizens of Massachusetts were viewing the actions of the Board when it quietly set aside its original recommendation of an indefinite suspension and eventually recommended a shorter, three-year suspension for the politically-connected Michael Muse. It is not surprising that the public's cynicism about politicians like Charlie Flaherty and his relationships with lobbyists was transferred to the Board's "reduction" of Michael Muse's suspension.

Because of the impoundment of the new Board Memorandum in July, it is very difficult for a member of the public to figure out why the Board changed its mind about the indefinite suspension voted on in April. Michael Muse did not officially protest the April determination and, by all accounts, a lack of opposition within fourteen days should have made the decision final. Newspaper accounts of the Board's actions are few and far between. The only mention to be found is in a September article by Boston Globe reporter Patricia Nealon, which states that:

The State Board of Bar Overseers, the body which disciplines attorneys, has changed its mind about suspending the right of Michael J. Muse, the lawyer and lobbyist who drafted Mary Guzelian's will, to practice law. In July, three months after voting 6-5 to suspend Muse indefinitely, the board quietly vacated the suspension and ordered further investigation. . . . In a confidential memo that has been impounded, bar counsel Arnold R. Rosenfeld was asked to conduct an investigation. Rosenfeld this week said he had completed his probe and no date is set for the board to take up Muse's case again. . . . Rosenfeld said he could not discuss the case or the reason why the board reconsidered its earlier decision, which he said had not been appealed by Muse.93

Presumably, the Board had asked Bar Counsel to investigate the matter prior to the filing of the Petition for Discipline on March 30, 1995. The Petition consists of nine pages of allegations as to what Michael Muse did in the Guzelian matter and which Canons he allegedly violated.94 The Petition notes that:

As a result of the respondent's mistakes and neglect in probating the estate, Scullin was deprived of her opportunity to contest the allowance of Guzelian's will until about early 1992, when she learned of Guzelian's death, and then had to bring an action to vacate the prior judgments in order to place her objections

92. Letter of Michael Frederickson, supra note 75.
94. The Commonwealth's highest court, the Supreme Judicial Court ("SJC"), has announced that it will adopt a modified version of the American Bar Association's Model Rules of Professional Conduct. See David Yas, SJC to Adopt ABA Rules of Professional Conduct, MASS. LAW Wkly., Mar. 6, 1995, at 1 (reporting announcement and explaining differences between the rules proposed for Massachusetts and the Model Rules); News from the Courts: Proposed Rules of Professional Conduct, MASS. LAW Wkly., June 24, 1996, at B1 (same). Massachusetts lawyers currently are governed in their conduct by certain Rules of the Supreme Judicial Court, embodied in Rule 3.07, "Canons of Ethics and Disciplinary Rules Regulating the Practice of Law" [hereinafter Mass. Rules]. The introduction to this rule notes that the "canons and rules are based on but are not identical to the ABA's Model Code of Professional Responsibility (1970)," MASS. SUP. JUD. CT. R. Rule 3.07 (West 1996). Thus, the Massachusetts rules are not the same as the newer and more widely adopted Model Rules of Professional Conduct. Id.
and defenses before the court. . . . The respondent's conduct as described above violated Canon One, DR 1-102(A)(5) and (6), Canon Five, DR 5-101(A) and DR 5-105(A)-(C), and Canon Six, DR 6-101(A)(1)-(3) . . . . 95

It could be that the Bar Counsel had conducted a rather superficial investigation prior to filing the Petition and that the Petition merely incorporated Judge Kopelman's findings during the trial. 96 It could be that further investigation was warranted after the vote of the Board in April. However, since Muse stipulated that he had violated several major ethical and disciplinary rules, the public is left to wonder why the Board rejected the Stipulation and reopened the investigation.

95. Petition for Discipline, supra note 19, at 7. More specifically, Muse was found to violate the following canons and rules:

Canon One:

A lawyer should assist in maintaining the integrity and competence of the legal profession . . . [by not] [e]ngaging in conduct that is prejudicial to the administration of justice; [or] engaging in any other conduct that adversely reflects on his fitness to practice law.


Canon Five:

A lawyer should exercise independent professional judgment on behalf of a client . . . [Therefore,] [e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests.

Id. at Canon 5, DR 5-101(A).

In addition, a lawyer must ensure that the interests of another client does not impair their judgment. Thus, DR 5-1-5 provides that:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgement in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C); (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C); and (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Id. at DR 5-105(A)-(C).

Canon Six:

A lawyer should represent a client competently. . . . [Thus, 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.

Id. at Canon 6, DR 6-101(A)(1)-(3).

96. Shortly after Judge Kopelman issued his findings in November 1994, Bar Counsel Arnold Rosenfeld stated that the Board of Overseers was "examining the decision," Patricia Nealon, Gazetian Lawyer's Conduct Probed. State Board Examines Probate Court Decision, B. Globe, Nov. 10, 1994, at 41. This appears to be the beginning of the Board's initial inquiry into Muse's actions.
Because the Board impounded its memorandum to Bar Counsel reopening the investigatory phase of the proceedings, the public has no way of knowing the reason.

The Board impounded its July memorandum pursuant to Board Rules pertaining to "Public Access to Proceedings; Protective Orders."97 The rule provides that, unless otherwise provided by the SJC, "the Board and Bar Counsel shall keep confidential all information involving allegations of misconduct by attorneys."98 This makes sense because allegations are just that — allegations. If the Board decides to simply admonish an attorney (as opposed to suspending or disbarring him), the Board has the authority to seal the record and close the proceedings.99 For all other proceedings, such as the one involving attorney Muse, the Board's proceedings are open to the public for twenty days after the service of a petition for discipline, except for the following:

(1) [D]eliberations of the hearing committee or the Board, and documents reflective of those deliberations, including without limitation charging memoranda, draft reports, and minutes of Board meetings; (2) information with respect to which the Board has issued a protective order . . . ; (3) information with respect to which the Supreme Judicial Court has issued a protective order on appeal from a Board decision denying such order . . . .100

These protections for an attorney against whom there are mere allegations seem quite appropriate. Until the Board makes a decision as to whether there is evidence to support the charges, the policy behind such secrecy makes sense. The reputations of attorneys against whom frivolous charges have been made may be unnecessarily damaged otherwise. However, once there is enough evidence to bring a Petition for Discipline, the underlying policy balance should shift. The protection of the attorney's reputation, which weighed more heavily than the public's right to know during the pre-petition phase, should now be weighed less heavily since the allegations have been found to be well-grounded.

In Michael Muse's case, he chose not to go through such a hearing process and he admitted the charges against him. Presumably, he did so to spare himself and his family the rigors of an open hearing and all the unpleasant laundry that might be washed in such a public forum. He stipulated to certain violations on February 23, 1995 and, even though the Board technically rejected its initial acceptance of the Stipulation in July, it voted to accept that stipulation in December. The Board may have had good policy reasons to impound detailed discussions of Board members' opinions or statements as to why they decided to impose a shorter suspension based on the same violations that they had initially sanctioned with a

98. Id. § 3.22(a).
99. Id. § 3.22(b)(4). The sealing of the record and closing of proceedings last until the Board or the SJC orders otherwise. Id.
100. Id. § 3.22(b)(1)-(3).
longer suspension. Such discussions and the minutes thereof contain sensitive material. However, the impoundment of such detailed discussions did not preclude the Board from issuing a broader and more general explanation of its change of heart.\textsuperscript{101}

The Supreme Judicial Court "has made it clear that in any discipline case 'the primary factor is the effect upon, and perception of, the public and the bar.'"\textsuperscript{102} The \textit{Muse} case was the subject of extensive media coverage and public scrutiny, and a public explanation by the Board would have served several important goals. Such an explanation would have dispelled the public perception that the well-connected Muse had used his political acquaintances and/or his family members to bring pressure on the Board members to lighten the suspension.\textsuperscript{103} In doing so, an explanation by the Board would have advanced one of the primary goals of lawyer discipline, to uphold the public’s perception of the integrity of the Bar.\textsuperscript{104} Much as judges are admonished in their ethical guidelines to avoid even the mere appearance of impropriety, state disciplinary boards should take great

\textsuperscript{101} The Board of Bar Overseers (the "Board"), which is the disciplinary agency responsible for enforcement of the ethical and disciplinary rules in Massachusetts, has come under fire in several recent cases for being too secretive and draconian in its activities. See, e.g., Rattigan, supra note 9. According to Quincy Lawyer Lawrence F. O’Donnell, representing Ann Lake, a prominent attorney who is under investigation by the Board, "[t]he breakdown is that everything is going on behind closed doors, and they are in charge. They have control. And lawyers are never supposed to question them." Id. In a recent editorial celebrating the twentieth anniversary of the Board’s establishment, the Editorial Board of the \textit{Massachusetts Lawyers Weekly} acknowledged that:

Of course, the BBO and Bar Counsel’s Office have not always been perfect. At times, perhaps, disciplinary power has been exercised too zealously. At other times, disciplinary action has probably been too lenient. But, by in large the BBO and the investigatory staff in the Bar Counsel’s office have done a pretty good job over the last 20 years.


\textsuperscript{102} Board Memorandum, supra note 81, at 22 (quoting \textit{In re Alter}, 448 N.E.2d 1262, 1263 (Mass. 1983), citing \textit{In re Keenan}, 50 N.E.2d 785, 787 (Mass. 1943) (explaining that “considerations of public welfare are wholly dominant”)).

\textsuperscript{103} See supra note 12 for a chronicle of Muse’s political and family connections.

\textsuperscript{104} The public in Massachusetts already has been exposed to the reality that Massachusetts, and Boston in particular, has a rather closely-knit legal community. For example, it is difficult to find a lawyer in Massachusetts who will sue another lawyer for malpractice. See Alison Bass, \textit{Lawyers Reluctant to Go After Peers}, B. \textit{Globe}, Aug. 6, 1995, at 1. Bass explains that:

If you’ve been injured in a car accident or a medical mishap, there is no shortage of attorneys eager to file a personal injury or [medical] malpractice claim on your behalf. But if your attorney has done you serious financial harm by botching your case, good luck. Finding a lawyer to represent you won’t be easy, especially in Massachusetts. For starters, you almost certainly won’t find a competent attorney willing to sue a fellow lawyer anywhere but in a big city like Boston, according to specialists both inside and outside the legal profession. But don’t even think about going to one of the state’s large law firms, especially if it was an attorney at another mega-firm who bungled your case. Large firms never sue each other because they consider such suits unseemly and because legal malpractice cases are not a reliable source of payment. The largest firms in Boston have another financial incentive not to sue each other — 80 percent of those with more than 60 attorneys on staff have the same insurance carrier, and their premiums go up when the insurer incurs big losses from malpractice claims.

\textit{Id.}
pains to offer a reasoned explanation for the kind of change in sanction that occurred in the *Muse* case. Such an explanation would have minimized the appearance that politics played a role in shortening the suspension.

The public will never know if Board members were lobbied in Michael Muse’s case, and if they were, whether such lobbying had any effect on the Board’s decision to change its preliminary recommendation. However, in the absence of the Board’s issuing an explanation of the change based on prior precedents and new facts, the public is left with the suspicion that the change was not based on solid legal precedent, but rather was the result of politics. The Board should have been sensitive to this perception and responded by issuing an explanation of its shift in position.

As noted above, the judicial regulation model of lawyer discipline has built into it a safeguard or check: the court’s review of the disciplinary agency’s recommendations. Theoretically, the members of the SJC, which is the “final arbiter” of bar discipline, are immune from political influence because they are life-tenured. The Board’s preliminary determination was that an indefinite suspension of Michael Muse was warranted. In the absence of a public explanation of why that initial determination was no longer justified, the SJC might have found the preliminary determination presumptively correct and might have sustained it. The SJC had the authority to draw its own inferences from the factual findings of the Board, and it had the authority to remand the case to the Board for consideration of additional charges. Both strategies would have buttressed a finding that the initial recommendation should stand. However, the SJC did neither, and the *Muse* case stands as an example of where the model of judicial regulation broke down.

V. THE ROLE OF THE SUPREME JUDICIAL COURT

Justice Wilkins’ Order of Temporary Suspension of Michael Muse was entered onto the docket on February 1, 1996. In Justice Wilkins’ ten-page Memorandum of Decision, he concludes that Muse violated Canon One, DR 1-102(A)(5) and (6); Canon Five, DR 5-101(A) and DR 5-105(A)-(C); and Canon Six, DR 6-101(A)(1)-(3) of the *Massachusetts Rules*. In essence, Muse was incompetent in his representation, was guilty of conflicts of interest, and impugned the integrity of the judicial process by his behavior.

In his Memorandum of Decision, Justice Wilkins begins his explanation of Muse’s ethical and disciplinary violations by addressing Muse’s role in the conservatorship proceedings. In having McDermott named as Mary’s conserva-

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105. *In re Michael J. Muse, Order of Term Suspension*, No. 96-004 BD (Mass. Feb. 1, 1996) [hereinafter Order of Term Suspension].
107. Memorandum of Decision, *supra* note 106, at 8. See also *supra* note 94 for the text of these rules.
tor, Muse's actions violated Canon Five, which states that "[a] lawyer should exercise independent professional judgment on behalf of a client." This is fundamentally a rule prohibiting conflicts of interest. As Wilkins states, during the July 13th meeting with Guzelian, McDermott, and Fitzgerald, Muse "agreed to institute proceedings in McDermott's name for her appointment as conservator of Guzelian's estate. The attorney represented to Guzelian that he would act as her attorney in those proceedings." However, Muse failed to advise Mary that her interests as ward might be quite different from those of McDermott as conservator.

A lawyer is prohibited from accepting employment where the interests of his or her client will likely involve him or her in differing interests, except with full disclosure and consent of both clients. Muse represented both the guardian and the ward, a situation that while not expressly prohibited, raises clear potential conflicts and that in fact requires extensive disclosure. As Justice Wilkins said:

[Muse] never advised Guzelian adequately that her interests as ward differed or might differ from those of McDermott as conservator, that he might be undertaking simultaneous representation of differing interests, or that he and McDermott would or might be realizing fees paid from Guzelian's own funds for their services. [Muse] never advised Guzelian to consult independent counsel. [Muse] never sought or received Guzelian's fully informed consent to this arrangement, and, in view of Guzelian's vulnerable position and uncertain mental capacity, could not have secured her fully informed consent under the circumstances.

One theme that runs throughout the Mary Guzelian case is Mary's mental capacity or lack thereof. This was an important issue at several junctures in the case. It was important to determine that Mary lacked the ability to manage her own financial affairs in order to establish the need for a conservator. However, if the appointment of a conservator was to proceed without adversarial trappings, Mary had to have enough capacity to consent to the appointment of a conservator. Finally, when Mary executed her will within weeks of the appointment of her conservator, Muse was bound to make a determination about her testamentary capacity. Justice Wilkins noted that Muse took Guzelian to:

a physician who had never met Guzelian or been involved in her care. Before this examination, the attorney did not ascertain that Guzelian had a long history of treatment at several hospitals in the Boston area. Neither the attorney nor McDermott obtained or provided this physician with any of Guzelian's prior hospital or medical records, which contained indications that Guzelian suffered

110. Rule 3:07, DR5-105(A), (C).
111. Memorandum of Decision, supra note 106, at 3.
from mental disorders. [In addition, the] physician . . . had no prior experience in assessing mental capacity . . . . \textsuperscript{112}

During the period of conservatorship, from July 1981 through Mary's death in June 1985, Muse and McDermott managed Mary's substantial assets. Muse continued to represent both McDermott as conservator and Mary as ward. He also represented McDermott in her divorce proceedings in the Suffolk Probate Court from November 1981 through April 1983.\textsuperscript{113} When Mary died in June 1985, Muse proceeded to have himself named as executor and to probate the will. As the Board said, "during the period of his legal representation in connection with the conservatorship and probate of Guzelian's estate, [Muse] was primarily a labor lawyer with a practice that included little probate work. In the circumstances, he should have sought greater assistance in handling those matters."

This lack of competent handling of the conservatorship and the probate proceedings invoked Canon Six, which states that a lawyer shall represent a client competently. Michael Muse made numerous "mistakes" in the accountings that he filed during the probate proceedings. Some of these were minor, like the misspelling of Elizabeth Scullin's name as "Scallin," others were more substantial. The Board felt that not only did these mistakes rise to the level of incompetence, but also Muse's continued misrepresentations to the Probate Court after Mary's death exacerbated "an already indefensible conflict of interests by probating the will and serving in the additional capacity as executor, for which he received another $58,000 in fees." \textsuperscript{115} The SJC agreed.\textsuperscript{116}

The Board and the SJC also concluded that Muse violated Canon One of the \textit{Massachusetts Rules}, which provides that a lawyer should assist in maintaining the integrity and competence of the legal profession and, under DR 1-102, should not engage in any conduct that is prejudicial to the administration of justice.\textsuperscript{117}

The Board distinguished Muse's case from those cases where lawyers received "short" suspensions for engaging in conflicts of interest.\textsuperscript{118} The cases that the

\textsuperscript{112} \textit{Id.} at 3.
\textsuperscript{113} Board Memorandum, \textit{supra} note 81, at 7-9.
\textsuperscript{114} \textit{Id.} at 10.
\textsuperscript{115} \textit{Id.} at 18.
\textsuperscript{116} Memorandum of Decision, \textit{supra} note 106, at 8-9.
\textsuperscript{117} \textit{Id.} at 8; Board Memorandum, \textit{supra} note 81, at 13.
\textsuperscript{118} Board Memorandum, \textit{supra} note 81, at 15-16. The Board stated that:

In 1981 the respondent purported to represent an elderly woman whose disheveled appearance and bizarre behavior trumpeted her likely incompetence to make informed decisions about her own personal and financial affairs. Yet when faced with such vulnerability, he failed to take the most basic steps to assure that she was protected from the interests of powerful individuals who were seizing control of her life. This circumstance alone sets this matter apart from those cases . . . in which lawyers have received short suspensions for engaging in conflicts of interest. Although the clients in those cases had varying levels of sophistication, all were businessmen or corporate entities, and all the conflicts arose out of commercial transactions.

\textit{Id.}
Board cited were each fundamentally conflict of interest cases.\textsuperscript{119} That is how the \textit{Muse} case is framed in the Board's Memorandum recommending the three-year suspension — as an aggravated conflict of interest case. The striking omission in the \textit{Muse} case was the exclusion of a charge that Muse violated DR 1-102(A)(4), which commands a lawyer to "not engage in conduct involving dishonesty, fraud, deceit or misrepresentation."\textsuperscript{120} In addition, it appears that Muse may have violated DR 7-102(A)(5), which requires a lawyer "in his representation of a client . . . [to not] knowingly make a false statement of law or fact."\textsuperscript{121} The SJC had the power to remand the matter to the Board for it to consider charges under these two rules.\textsuperscript{122} Alternatively, while the SJC must accept the Board's findings of fact, they also had the power to draw reasonable inferences from those facts even if the Board did not draw them.\textsuperscript{123}

For example, in \textit{In re Orfanello},\textsuperscript{124} the SJC was faced with a case of an officer of the court who communicated with a sitting judge in an effort to influence the outcome of a case. The Board had found that the conversation had taken place and recommended a public reprimand. Attorney Orfanello stipulated to facts, much as Michael Muse had. However, the Board rejected the finding of a special master that attorney Orfanello violated DR 7-110(B),\textsuperscript{125} by communicating as to the merits of a pending case, and did not include the violation in the Petition for Discipline.\textsuperscript{126}

On appeal, the SJC found that because Orfanello was not charged with a violation of DR 7-110(B), it would be inappropriate for the SJC to rule that he had violated that disciplinary rule. However, the SJC recognized its power to remand the matter to the Board for it to consider adding such a charge.\textsuperscript{127} While it did not remand in that case, the SJC did reassess the findings of fact and drew a

\begin{footnotesize}
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\item\textsuperscript{119} \textit{Id.} at 16 n.3 (citing \textit{In re} Tobin, 7 MASS. ATT'Y DISC. R. 290 (1991) (suspending a lawyer for one year for representing both a mortgagor and its financial backer in second-mortgage transactions that violated state lending law); \textit{In re} Pike, 563 N.E.2d 219 (Mass. 1990) (suspending a lawyer who represented both tenant and landlord in negotiating commercial lease without disclosing to tenant that the lawyer would receive a broker's commission from the landlord based on a percentage of the rent); \textit{In re} Taglino, 9 MASS. ATT'Y DISC. R. 318 (1993) (imposing a six-month suspension on a lawyer for representing both buyers and sellers of commercial property, with the result that seller's interests were damaged; when the deal soured, the lawyer drafted security agreements to mollify the seller even though the lawyer knew the agreements offered no real solace and that the restructured transaction was disadvantageous to the seller)).
\item\textsuperscript{120} MASS. SUP. JUD. CT. R. Rule 3:07, DR 1-102(A)(4) (West 1996).
\item\textsuperscript{121} \textit{Id.} at DR 7-102(A)(5).
\item\textsuperscript{122} \textit{In re} Francis X. Orfanello, 583 N.E.2d 1277, 1280 (Mass. 1992).
\item\textsuperscript{123} \textit{Id.} at 1280 (citing \textit{Simon v. Weymouth Agric. & Indus. Soc'y}, 449 N.E.371 (Mass. 1983) (stating that inferences from basic facts are for the appellate court); \textit{In re} Kipp, 416 N.E.2d 970 (Mass. 1981) (explaining that the court should draw conclusions on the basis of the board's findings of fact)).
\item\textsuperscript{124} 583 N.E.2d 1277 (Mass. 1992).
\item\textsuperscript{125} MASS. SUP. JUD. CT. R. Rule 3:07, DR 7-110(B) (West 1997) ("In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except . . ." in certain limited circumstances).
\item\textsuperscript{126} \textit{Orfanello}, 583 N.E.2d at 1280.
\item\textsuperscript{127} \textit{Id.}
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different inference, thus asserting its power to draw inferences not already drawn by the Board. For example, the Board had concluded that Orfanello’s communication with the sitting judge was benign. The SJC, however, saw his communication in a completely different way, stating that:

One would have to be wearing blinders not to draw the strong and reasonable inference that Orfanello went to [the judge], and said what he did, with the hope that the judge would look favorably on reaching a result beneficial . . . . We draw that reasonable and apparent, if not unavoidable, inference that Orfanello intended to influence the disposition of the case. We reject the view that the absence of explicit evidence of such intent bars us from arriving at that conclusion. 128

The SJC did not remand Muse’s case to the Board for consideration of additional charges. However, there appears to be enough evidence to have supported a remand, especially for the additional charge of misrepresentation. For example, from the short period (two weeks) between the discovery of Mary’s assets, the obtaining of the conservatorship, and the execution of a will benefiting Muse’s friends, the SJC could have found that Muse had an interest that might be furthered by not being diligent in his efforts to locate Elizabeth Scullin as an interested party to the probate matter. In addition, the SJC could have remanded the matter to the Board for consideration of additional violations concerning misrepresentation because of Muse’s “stunningly deficient efforts to notify Scullin,” 129 which prompted the Board to conclude that if Muse “had deliberately set out to devise a way to avoid giving notice while appearing to try, he could not have improved on what he actually did.” 130

Judge Kopelman labeled Muse’s actions as mere mistakes and did not find that Muse’s actions in his dealings with the probate court constituted misrepresentation to, or fraud on, a tribunal. 131 Given the factual findings of Judge Kopelman and of the Board, a request by the SJC for the Board to consider the addition of charges of misrepresentation seems justified. Such a remand would have been well-grounded if it were based on Muse’s statements to the court about giving notice to Elizabeth Scullin and his failure to notify the court that some heirs, notably Mary’s cousin John Guzelian, had contacted him in an effort to obtain information about the case. After that point, the SJC could have reasonably taken the position that Muse must have known that Mary had living heirs and had failed

128. Id. at 1281 (emphasis added).
129. See supra Parts II and III for a summary of the facts.
130. Board Memorandum, supra note 81, at 19-20.
131. If Judge Kopelman had made a finding of misrepresentation to or fraud on a tribunal in Muse’s case, Muse might be collaterally estopped from relitigating the finding in a subsequent disciplinary proceeding. See David L. Yasin, Lawyer Can’t Contest Court Findings Before BBO: SJC Says Collateral Estoppel is Applicable, MASS. L. W. Apr. 17, 1995, at 3 (The SJC found that “[a]n attorney who was successfully sued by a client in court for fraud cannot contest the court’s findings in a disciplinary proceeding before the Board unless it is unfair . . . . ‘Relitigation would not comport with the judicial goals of finality, efficiency, consistency and fairness’ ”).
to notify the probate court of that fact. They might also have focused on the fact that Scullin’s letters were returned after McDermott canceled Mary’s post office box. This would tend to indicate actual knowledge on the part of McDermott that an heir was indeed alive. Such knowledge might reasonably have been imputed to McDermott’s attorney, Michael Muse.

If the matter were remanded and additional charges added, there would probably have to be a hearing on the matter because, in his Stipulation, Muse had never admitted any intent to misrepresent the facts to the court or “to connivance with Fitzgerald and McDermott in an effort to strip Scullin of her inheritance.”

However, the Board found that:

> [E]ven without such admissions, however, it is plain that [Muse] engaged in an outrageous conflict of interest, driven by personal and financial interests, and continued to turn a blind eye to the impropriety of his actions for over thirteen years. In the process, he compounded his initial mistakes by errors of judgement that bespeak a reckless indifference to his obligations as counsel, fiduciary and officer of the court. The record demonstrates that [Muse’s] loyalty was never to Guzelian or his fiduciary duties, but instead to Fitzgerald and McDermott. Currying their favor was in his direct personal interest — as a lobbyist, as Fitzgerald’s friend, and as a fiduciary expecting handsome fees from Guzelian’s estate. That paramount loyalty dominated his actions in 1981 during the appointment of the conservator and the execution of the will, and it disfigured his conduct during the probating of the will in 1985 and its administration through 1989. When, a couple of years later, Scullin surfaced and his conduct came under attack, the respondent continued to defend the propriety of his conduct until 1995, when he finally stipulated that his position of conflict was “obvious” and that he had made “gross errors of judgment.”

The Board might well respond that it did not conduct a hearing in the first place because a hearing might have been time-consuming and that the Stipulation saved the public time and money. In fact, with a lengthy trial and fifty pages of findings, Judge Kopelman never characterized Muse’s actions as constituting intentional misrepresentation, deceit, or fraud. The Board might well have argued that to conduct another lengthy proceeding on fundamentally the same actions would be duplicative and unproductive.

It is not clear that adding such charges alone would have in fact justified an indefinite suspension. The standard of review in bar discipline cases is whether the sanction imposed in a particular case was “markedly disparate” from the judgments in comparable cases. It might be very surprising to the public, but in

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132. Board Memorandum, supra note 81, at 14.
133. Id. at 15.
134. However, as one probate attorney in Massachusetts noted, “I suspect Judge Kopelman was a little gentle in his characterization.” Nealon, supra note 16.
Massachusetts the presumptive sentence for fraud on a tribunal or for lying to a court is a mere one year. 136

In In re Neitlich, 137 the attorney failed to inform the court and opposing counsel about the existence and terms of a purchase and sale agreement in a divorce proceeding, a single misrepresentation to the court. The attorney, like Michael Muse, stipulated to certain factual findings made by the Board. The SJC rejected the attorney’s argument that the statement was a single “affirmative misrepresentation” made during a contentious hearing at which the attorney was faced with conflicting duties to his client and the court. In making its decision, the court cited Hazel-Atlas Glass Co. v. Hartford-Empire Co. 138 for the proposition that “fraud on the court is a ‘wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.’” 139 The SJC went on to state that the one-year suspension was appropriate for this single act of misrepresentation, further noting that “the ABA standards for Imposing Lawyer Sanctions recommend the even more serious sanction of disbarment where an attorney, with an intent to deceive a court, makes a false statement or ‘improperly withholds material information.’” 140

If the SJC had decided that remanding the case was unwarranted, it could have grounded a decision to reinstate the indefinite suspension on its ability to draw different inferences from the Board based on the Board’s findings of fact, the second source of authority cited in Orfanello. For example, the SJC could have reasonably inferred that Muse’s mailing of notice to an address that Mary had sold fifteen years before was Muse’s deliberate attempt to fail to give notice to an heir while assuring the court that he had. Such an inference, coupled with the aggravating circumstances found by the Board, could well have justified a decision by the SJC to reinstate the indefinite suspension, rather than a three-year suspension. After all, the Board itself had made a preliminary determination, unchallenged by Muse, that such an indefinite suspension was warranted.

Finally, the SJC could have justified a reinstatement of the Board’s original indefinite suspension by relying upon the oft-articulated goal of lawyer discipline of upholding the public perception of the bar. “The Court has made clear that in any discipline case ‘the primary factor is the effect upon, and perception of, the public and the bar.’” 141 The SJC might have cited the fact that members of the public might well wonder about the wisdom of allowing a lawyer who engaged in

136. See, e.g., In re Neitlich, 597 N.E.2d 425 (Mass. 1992) (imposing a one-year suspension on an attorney who perpetrated fraud on court and, as opposing counsel in postdivorce proceeding, actively misrepresented terms of client’s pending real estate transaction).
140. Id. (citing ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, § 6.11 (1986)).
141. Board Memorandum, supra note 81, at 22.
such egregious misconduct over a period of thirteen years to be let loose again on the citizens of Massachusetts in a mere three years.\textsuperscript{142}

The public was treated to more than fifty newspaper stories about this case between 1991 and 1996. One columnist accused Muse of lying to Judge Kopelman: “Muse had the gall to tell the judge that he had built a house right down the street from Fitzgerald’s Martha Vineyard House, yet he had never seen Fitize’s place. Even the judge was skeptical. What’s worse? A lawyer lying on the stand or ripping off a bag lady?”\textsuperscript{143}

The public read about the trial testimony, the result of Judge Kopelman’s findings, and the other proceedings that accompanied the case. Some members of the public felt this was fundamentally a case of misrepresentation, in addition to a case of conflict of interest. The Board itself recognized the damage done by Muse’s behavior in its Memorandum:

This was more than just a gross conflict aggravated by repeated failure to correct it. Given the identity of the players — a disturbed, vulnerable woman on the one hand, and a powerful state representative on the other — it should have been more than evident to the respondent that perceptions of his actions (and those of his confederates), whatever the intentions that drove him, would quickly curdle in the heat of public scrutiny. He should have been sensitive to the public’s understandable ire at the specter of two public officials and a lobbyist seeming to raven a troubled “constituent” who came to them for help. The “mistakes” that permitted the will and accounts to be allowed without actual notice further fueled such suspicions. As a consequence, the respondent damaged the public standing of both the judicial and legislative branches of government as well as that of his own profession. The Court has made it clear that in any discipline case “the primary factor is the effect upon, and perception of the public and the bar.”\textsuperscript{144}

The SJC might have cited the similar damage done to the Bar’s reputation by the Board’s own decision to reverse its initial recommendation from an indefinite suspension to a mere three-year suspension, without a public explanation of its shift in position. It could have grounded a reinstatement of the indefinite suspension on such perceived public damage.

The SJC clearly has the power to reject a recommendation and draw a different inference on the same facts. If they had exercised this authority in the \textit{Muse} case, the safeguard built into the judicial model of regulation would have worked, and

\textsuperscript{142} Note that, in actuality, Michael Muse did not appear to make his living primarily as a lawyer but rather as a lobbyist. In fact, according to a \textit{Boston Globe} article, Muse had “spent 20 years ingratiating himself with Beacon Hill powerbrokers, parlaying his State House connections into a lucrative lobbying career. Last year, he earned $82,500 from companies and unions, nearly twice what he made as a lobbyist just four years ago.” Hanafin & Canellos, \textit{supra} note 12, at 25. Thus, the SJC could have imposed an indefinite suspension from the practice of law, and Muse presumably still could have made a living.


\textsuperscript{144} Board Memorandum, \textit{supra} note 81, at 22.
the appearance that political influence had been brought to bear on the Board could have been successfully neutralized.

The case of Michael Muse illustrates that the safeguard built into the model, review by a neutral panel, may not be effective where the judges on the court are disinclined to reject the disciplinary board’s recommendations. Like so much in American jurisprudence, the efficacy and toughness of lawyer discipline depends in large part upon the personalities and the ideological bent of the members of the bench. Further examination of cases that have followed Muse’s case and the growing influence of new SJC Associate Justice and former Harvard Law Professor Charles Fried illustrate this point quite well.

In recent months the SJC has reversed the Board in several cases. In In re Nickerson, SJC Justice Abrams criticized the Board’s recommendation of a three-year suspension as “too lenient” and imposed an indefinite suspension on Attorney Nickerson, who was convicted on 14 counts of lying to a bank. In In re Concerni, issued the same day, Justice Abrams rejected an indefinite suspension and imposed disbarment on an attorney convicted of thirty-five felony counts for conspiracy to defraud a bank, bank fraud, and making false statements to a federally insured bank.

In commenting on the tougher sanctions imposed by the SJC, Bar Counsel Arnold Rosenfeld notes that “[t]he Board had begun to mete out lesser disciplines to attorneys convicted of felonies... The public perception of lawyers would be harmed if [offending lawyers] were treated otherwise.” Boston Attorney Michael Mone, a former member of the Board and, coincidentally, one of Michael Muse’s lawyers, noted that historically, it has been rare for the SJC to disagree with the Board’s disciplinary recommendation:

“Generally, [the SJC] gives deference to the board’s findings,” he stated. “This decision in Nickerson indicates that the court is turning harsher in attorney-discipline cases.” The retirement of Justice Joseph R. Nolan and the arrival of Justice Charles Fried has significant consequences for bar discipline cases, according to Mone. “Nolan was noted for looking carefully at bar discipline cases and giving lawyers a chance to come back,” Mone said. “[He] was very concerned with the lawyer as an individual. The new emphasis seems to be on upholding the integrity of the bar. The concentration is on how the public perceives lawyers rather than on the individual lawyers.” The BBO will undoubtedly follow the SJC’s lead and begin imposing harsher disciplines on attorneys, Mone noted.

146. Id. at 1029-30.
148. Id. at 1034.
150. Id.
VI. CONCLUSION

From the press accounts, an already cynical public knew that Michael Muse’s mother had been a prominent probate judge and that his father was an influential member of the Boston bar. They also knew about his close ties to former Speaker of the House Charles Flaherty, who was under State and Federal investigation for his own ethical and legal transgressions. They knew what role Michael Muse played in the Guzelian case as a result of the press’ extensive coverage of the matter. They followed the trial and heard a probate judge call Muse “not credible.”

In light of the extensive public attention to this case and Michael Muse’s political and family connections, an explanation from the Board would have helped the public feel that the disciplinary process was fair and free from political influence. The Board should have released a memorandum explaining its decision to back away from its preliminary recommendation of an indefinite suspension. Such an official explanation would have allowed the Board to impound sensitive material while still satisfying the public’s need to know that the system was independent. It would have signaled to the public that the Board’s decision to recommend a lesser suspension, despite the fact that Michael Muse did not appeal the longer suspension, was based on sound legal precedent rather than on political pressure or influence.¹⁵¹ Such action on the Board’s part would have been both wise and politic in the best sense of that word. The SJC could have bolstered the public’s perception of the impartiality of the lawyer discipline process by reinstating the original, longer suspension.

The author of a recent National Law Journal article notes that even in states which hold “open” disciplinary proceedings, some parts of lawyer discipline proceedings can still “seem as covert as midnight town meetings to laypeople . . . .”¹⁵² In the Muse case, the process was technically “open,” but since there was never a hearing, the real decision-making process, in the form of the Board’s deliberations, appears to have been conducted behind closed doors. All records of those deliberations were impounded. An “open” lawyer discipline system is often not enough to make the public feel secure that the disciplinary decisions of a state bar are in fact impartial and, equally as important, consistent.

One proposed solution has been to borrow the concept of sentencing guidelines from the criminal law area.¹⁵³ Sentencing guidelines take away discretion from judges and impose similar penalties for similar crimes. Sentencing guidelines arguably yield more consistent results. Adopting them in the context of lawyer discipline would presumably reduce the perceived effect of politics on the disciplinary process. Such guidelines increase the public’s perception of the

¹⁵¹ See supra note 12 for a description of the extent of the Muse family power and influence.
¹⁵² See Davis, supra note 11.
integrity of the process and, thereby, lessen the pressure for regulation of lawyers by the legislative branch of government.

Regulation of lawyers by the legislative branch of government raises a whole host of issues and problems for the profession. Ironically, the McKay Commission expressed its concern that legislative regulation was subject to political influence and would impair the independence of lawyers.\textsuperscript{154} The McKay Commission concluded that judicial regulation was better, in part because it minimized the opportunity for politics to potentially affect outcomes.\textsuperscript{155} However, the judicial model of regulation as it operated in the Muse case appeared to allow as much room for politics to influence outcomes as any model of legislative regulation.

If state bars want to stave off attempts to impose legislative regulation, they must make every effort to explain their decisions to the public and avoid the appearance that politics plays a role in such disciplinary decisions. If the profession does nothing, the cry for legislative regulation of lawyers will continue. As Bar Counsel Arnold Rosenfeld has said, “If we are going to have a system that disciplines lawyers and protects the public, public perception of that system is very important. If we don’t, it looks like a whitewash, and that is the worst.”\textsuperscript{156}

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155. \textit{Id}.
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