**COMMONWEALTH OF MASSACHUSETTS**
**BOARD OF BAR OVERSEERS**
**OF THE SUPREME JUDICIAL COURT**

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| **BAR COUNSEL,** | ) | |
| **Petitioner,** | ) | |
| | ) | |
| **vs.** | ) | **BBO File Nos. C1-97-0602,** |
| | ) | **C1-97-0589, & C1-97-(9)589** |
| | ) | |
| **KEVIN P. CURRY, ESQ.,** | ) | |
| **GARY C. CROSSEN, ESQ.** | ) | |
| **RICHARD K. DONAHUE, ESQ.,** | ) | |
| **Respondents.** | ) | |

# BOARD MEMORANDUM

On January 4, 2002, bar counsel filed a consolidated petition for discipline against Kevin P. Curry, Gary C. Crossen, and Richard K. Donahue for their various roles in efforts to obtain information from a former law clerk about his communications with a judge. The board chair designated M. Ellen Carpenter to hear the matter as a special hearing officer. See S.J.C. Rule 4:01, § 3(2); Board Rule 3.19(a). There then ensued twenty-five days of hearing spanning approximately eighteen months. On May 11, 2005, the hearing officer issued her report. After making detailed findings of fact and explaining the grounds for her conclusions of law, she recommended that all three respondents be disbarred.

The respondents have appealed. In addition to challenging many of the hearing officer's findings of fact, all three contend that the petition for discipline should be dismissed because their conduct was proper or, if it was not, that uncertainty as to the

standards of appropriate conduct warrants dismissal or at most public reprimand.[1] Crossen also argues that any sanction be palliated because of delay in the proceedings and the publicity he has endured. Bar counsel urges us to adopt the hearing officer's report and recommendation for discipline.

Oral argument was held before the full board, with Crossen and Donahue arguing on January 23, 2006, and Curry on February 13, 2006.[2] Except to the minor extent specifically indicated below, we unanimously adopt and incorporate by reference the hearing officer's findings of fact and conclusions of law. With regard to disposition the board determined:

- To recommend, by a unanimous vote, that Curry be disbarred.
- To recommend, by a 9-2 vote, that Crossen be disbarred. The dissenters preferred a three-year suspension.
- To recommend, by a 7-4 vote, that Donahue be suspended for three years. Two dissenters preferred a two-year suspension, one dissenter preferred a one-year suspension, and one dissenter preferred suspension for a year and a day.[3]

This memorandum is submitted to explain the grounds for the board's determination and for the majority's proposed disposition.

## Summary of the Factual Findings

We set out below a general summary of the hearing officer's findings of fact, reserving some details for our discussion of the issues raised on appeal.

[1] Curry does not specify what alternative sanction should be imposed if he is determined to have engaged in the misconduct charged except to argue that he "does not deserve to lose his license to practice law." Curry's Brief at 21.

[2] A cancelled flight due to weather conditions prevented Curry's counsel from appearing at the January 23 argument.

[3] All board members were present for the arguments and votes. Because the chair does not vote except to make or break a tie, Mr. Rose did not vote.

Theses proceedings arise from rancorous litigation among members of the Demoulas family. In 1964, brothers George and Telemachus Demoulas formed Demoulas Super Markets, Inc. (DSM), which owned and operated grocery stores. Their business was extraordinarily successful. At the time George died in 1971, ownership of the corporation was evenly divided between the two brothers' families, and Telemachus assumed control of the management of DSM.

In 1990, George's widow and children filed suit against Telemachus, his wife and children, and others in Middlesex Superior Court (the stock transfer case). The plaintiffs alleged that the defendants had breached fiduciary duties by fraudulently transferring DSM stock and other assets from George's family to Telemachus' family. About three weeks later, George's son brought a shareholder derivative action against Telemachus and his immediate family. This suit, also filed in Middlesex Superior Court, alleged that the defendants had diverted corporate opportunities from DSM to entities the defendants owned and controlled. Attorney Robert Gerrard represented the plaintiffs in both of these actions.

Judge Maria Lopez was assigned to hear both cases. We need not describe those actions in detail here. It suffices for our purposes that a jury returned a verdict principally for the plaintiffs in the stock transfer case in May 1994. A bench trial in the shareholder derivative action began that December. Paul Walsh, who was then beginning a second year as a law clerk because he had been unable to find a job after finishing his first year, was assigned to serve as Judge Lopez's law clerk for the trial of the shareholder derivative action. Walsh worked in that capacity from the fall of 1994 until August 1995, when the judge entered her decision and Walsh's clerkship ended. Judge

Lopez found for the plaintiffs in the shareholder derivative action. She ordered rescission of certain transactions, surrender of all illicit gains from those transactions, and payment of attorney's fees.

At this point the defendants' position looked grave. Despite having spent millions of dollars in attorney's fees, the defendants were about to lose enormously valuable assets, and control of the Demoulas business empire would pass from them to the plaintiffs. Approximately a billion dollars were at stake. Their counsel viewed the decision in the shareholder derivative action as well written, well researched, and founded on credibility determinations that made reversal highly unlikely.

The defendants and their counsel also believed that Judge Lopez had been prejudiced against them, and some of the lawyers expressed doubt that she had written the decision because they believed she was "too dumb" to have done so. The defendants retained Donahue to supervise and coordinate the continuing litigation, to monitor its cost, and to handle public relations for them. Attorney Edward Barshak was engaged to handle the appeal in the derivative action and to assist in other post-trial matters.

On March 13, 1997, the Supreme Judicial Court affirmed Judge Lopez's decision in the derivative action. Demoulas v. Demoulas Supermarkets, Inc., 424 Mass. 501 (1997). Transfers and mergers effectuating the two judgments now loomed, matters of great concern to the defendants. Crossen reinstituted an investigation into allegations that Judge Lopez had been seen dining with the plaintiffs' attorney, Robert Gerrard, at the Charles Restaurant. Defense counsel hoped this might lead to evidence that would warrant disqualifying Judge Lopez and vacating the two judgments against the defendants.

In the meantime, some two weeks after Judge Lopez issued her decision in the shareholder derivative action in August 1995, Ernest Reid, an investigator who worked with Curry, wrote a letter to Telemachus proposing a meeting to discuss "a matter of importance and confidence." Neither Curry nor Reid had had any previous involvement in the case. Sometime before Labor Day 1995, Curry and Reid met with Telemachus and his son, Arthur T. Demoulas (Arthur T.), at DSM headquarters in Tewksbury. Making scurrilous remarks about Judge Lopez and Gerrard (and others), Curry suggested that the defendants' case "was over before it began." He advised them that what they needed was evidence of "prior corrupt acts, judicial misconduct of Judge Lopez," which could then be presented to the Supreme Judicial Court and the media. He and Reid, he explained, could glean such evidence from a thorough investigation.

By Labor Day, Curry and Reid had been retained to conduct an investigation into whether Judge Lopez had engaged in any judicial misconduct. During the time he and Reid worked for the defendants in this capacity, Curry was paid at least $130,000.

Curry and Reid pored over public records pertaining to the public and private lives of Judge Lopez and her husband. In hopes of establishing that Judge Lopez had not written the decision in the shareholder derivative action, they also obtained copies of all the judicial opinions she had written.

Reid also investigated Walsh. Although Reid and Curry had no reason whatsoever to suspect Walsh of any wrongdoing, Reid obtained the following documents and information on Walsh: his petition for admission to the bar; a print-out from the Massachusetts Registry of Motor Vehicles; a report with Walsh's addresses and telephone numbers, as well as the addresses and telephone numbers of Walsh's neighbors

at each of his addresses; his parents' addresses and telephone numbers, as well as the names, addresses and telephone numbers of his parents' neighbors; and the type of building in which Walsh lived. Hearing Report ¶ 58.

In the spring of 1997, Walsh received a call from someone who identified himself as a "headhunter" named Ernest Reid. Reid said he had an "attractive opportunity" that would interest Walsh. Walsh, who had circulated his resume to some of the lawyers for the Demoulas defendants, had encountered difficulties finding a job. At the time of the call, he was working for the law firm of Sullivan, Weinstein & McQuay at an annual salary of $68,000. Walsh was flattered by the call and arranged for Reid to meet him at his home.

There Reid described the job, which paid $90,000 plus benefits, as an in-house position at an international corporation with offices in Bermuda, Boston, and London. The successful candidate would be someone with no history of ethical problems or other skeletons in his closet, who was married and "settled down," and who had "excellent writing skills."

No such job existed. Curry and Reid had concocted it as a ruse to pump Walsh for information, and they tailored it to appeal to Walsh's interests and strengths. It was, as the hearing officer found, "Walsh's dream job, and they knew it."

When Reid asked Walsh if he had worked on any "cases of note" as a law clerk, Walsh told him he had written the Demoulas decision, which he said the judge had read but not edited before signing it. After collecting names of character references, Reid said, he would do a background check and get back in touch.

Reid then reported on the meeting to Curry, who in describing the meeting later to Arthur T. said that the defendants "could tip the whole darn thing" if they could establish that a third person had written the decision.

Reid called Walsh back about a week later, indicated that he had unearthed nothing negative about him, and requested a writing sample. Walsh sent him the Demoulas decision and some other materials. When the two met again on May 4, 1997, Reid reported that his "client" was impressed by the writing, especially the Demoulas decision. Reid asked him a few questions about how the decision was written. Reid said his "client" wanted to meet him, probably in New York or Halifax.

Curry, Reid, and Richard LaBonte, an investigator they hired, prepared carefully for the next interview with Walsh, which would be conducted by Curry and LaBonte in Halifax. They had business cards printed for Curry (as "Kevin Concave") and LaBonte, who were identified as working for an international insurance underwriting business called "British Pacific Surplus Risks, LTD". Its address actually existed, and they hired someone in London to answer the telephone.

Reid called Walsh to inform him that he was the only remaining candidate for the job and that he had made airline reservations for a flight to Halifax. He later gave Walsh an airline ticket, $300 in cash to compensate him for a day's pay, and a piece of paper identifying "Kevin Concave" as the person he would be meeting at the Citadel Hotel in Halifax. Reid drove him to the airport.

Once in Halifax, Walsh met with Curry and LaBonte in one of the hotel's conference rooms. Although Walsh was later led to believe that the Halifax interview was taped, this apparently was not the case. See Tr. 9:37.

Curry introduced himself as "Kevin Concave," gave Walsh his false business card, and said he was the director of operations for British Pacific. When Walsh began to stutter at the beginning of the interview, Curry told him they knew about his stuttering and that it would not affect his prospects for the job. Walsh asked him how they knew. LaBonte explained that it was mentioned in a letter of recommendation Walsh had submitted with his bar application to the Board of Bar Examiners. LaBonte asked why a friend would mention his stuttering. Walsh replied that, contrary to the representations in the letter, its signor, Stephen Mulcahy, did not actually know him. Walsh had asked a friend named Edward Cotter to write the letter, but Cotter could not do so (because, Walsh had later learned, he was suspended from the bar) and asked his friend Mulcahy to sign the letter. Mulcahy also signed Walsh's petition for admission as the sponsoring attorney. Walsh expressed no concerns about the bar letter or that it might pose a problem for him.

After describing the "job" for which Walsh was interviewing, Curry turned to the writing of the Demoulas decision, with which he claimed to be very impressed. Curry and Labonte's questions regarding the decision and Judge Lopez were designed to inquire into the judge's deliberative process in reaching the Demoulas decision as well as to elicit damaging personal information about her. In response to questions about the drafting process, Walsh reiterated that he had written the entire decision and that Judge Lopez merely read and signed it. At the outset of the bench trial, he said, Judge Lopez told him that "very quickly he would know who the good guys were and who the bad guys were" and who the winners and losers were going to be. Walsh also made disparaging

comments about some Massachusetts state judges, including Judge Lopez. After returning from Halifax, Curry told Arthur T., "I think we got him."

Crossen and Donahue first learned of the phony-job ruse on June 8, 1997, when Arthur T. described Curry's doings to them. Crossen dismissed as "not that big a deal" the claim that the clerk had written the entire decision, but he found Walsh's statements about the judge's alleged predisposition to be "troubling and important," something "significant" that he needed to think about. Donahue, too, found the allegations of bias "troublesome." Donahue advised Arthur T. to pursue the matter to find out if the allegations were true. Donahue gave Crossen a copy of the Supreme Judicial Court's decision in Matter of Bonin, 375 Mass. 680 (1978), which discussed the admissibility of a clerk's testimony against a judge. In mulling over the issue later, Crossen believed he had three options: do nothing, file a motion with affidavits from the participants at the Halifax meeting, or do a further investigation "to find out the truth."

Shortly thereafter, Curry met with Crossen, Donahue, and Arthur T. Crossen asked Curry to tell them what had happened in Halifax. The four men discussed the three options Crossen had been considering. Donahue felt that the information from Halifax, if true, was very important and should be obtained for the client. He initially raised no questions as to the propriety of the phony-job ruse. He did not know whether it was legal, but he understood that Crossen, as a "very, very well regarded, experienced investigator and a great lawyer," was "very learned" on the topic and would have advised him if the pretextual interview was illegal. When Donahue later actually raised the question, Crossen responded that he was having it looked into, that he was not concerned about it, and that Donahue should not be concerned either. Donahue later told Andrea

Barsano, an associate in his office, that he did not like the ruse, and he asked her to confirm through research his belief that the investigators' statements would be inadmissible as hearsay. Her research confirmed his belief.

Immediately after this meeting, Donahue and Arthur T. went to Barshak's office and apprised him of Curry's involvement. Barshak said he "wasn't interested" in the information from Halifax because Curry was involved. He advised them to have nothing to do with Curry, with whom he had had prior dealings. Another member of the legal team, former Judge Samuel Adams, later advised circumspection where Curry was concerned. Donahue did not put an end to the Walsh matter because, as he testified, "we have a client and the client wants to proceed and it's necessary to at least pay some attention to the client. Otherwise, you won't have any."

At some point between June 9 and June 11, 1997, Crossen decided not to file a motion using affidavits from Curry and LaBonte because he wanted corroboration of the information from Halifax and because he had doubts about the admissibility of their statements. Crossen and Arthur T. also ruled out filing a complaint with the Commission on Judicial Conduct (CJC) because it was unlikely to afford the case-specific relief the Demoulas defendants needed.

On June 11, Crossen, Donahue, and Arthur T. met with Curry and two investigators Crossen had hired to conduct the Charles Restaurant investigation, Stewart Henry and Joseph McCain. The participants of this meeting discussed whether to rely on affidavits (as Curry urged), to present the matter to the CJC or the SJC (which apparently no one urged), or to conduct and tape-record a second ruse interview with Walsh (as Crossen urged). After discussion it was agreed, without dissent, to tape a second

interview in New York, which permits taping with one party's consent. Crossen initially hoped to conduct the interview in the law office of Attorney Robert Shaw, a long-time friend of Arthur T., but Shaw refused. Shaw advised him to review the decision in Miano v. AC&R Advertising, 148 F.R.D. 68 (S.D.N.Y. 1993). Crossen later claimed that he had tailored his actions with regard to the New York interview based on his reading of Miano, as discussed below.

The group chose to engage Joseph Peter Rush, who had been the assistant special agent-in-charge of the Boston office of the Secret Service, to conduct the interview. Crossen, Curry, and Donahue participated in the planning of the second interview, and none of them voiced any objections to the course of action agreed upon except Curry, who feared only that a further interview might undercut statements he and LaBonte had attributed to Walsh from the Halifax interview.

Planning continued on June 12 and 13, when Curry, Crossen, and the various investigators discussed how to conduct the New York interview. Donahue was not present at these meetings. It was decided that Crossen, Henry, Rush, LaBonte, and a technician would go to New York. Rush and LaBonte would conduct the interview itself, while Crossen and Henry would "monitor" the situation. Once Walsh had made statements consistent with the information out of Halifax, Crossen would "brace" Walsh, which Rush later testified meant "to confront [him] . . . just as you would impeach a witness." The intent was to "flip him, have him come over and testify for Mr. Crossen's side of the case." During the planning, Rush voiced reservations as to the ethical and legal propriety of the proposed New York interview; he particularly wanted assurance that it was legal for him to participate in such an activity as a private citizen. Crossen

told him that he had researched the issue, that it was legal, and that an investigator could assume roles in a ruse, but an attorney could not be an active participant. The research, he told Rush, "has been done and it's been cleared by ethics," a statement Rush took to mean that the ethics committee at Crossen's law firm had found the ruse to be ethical, which was not true. Based on these assurances, Rush agreed to participate.

After arriving at the hotel in New York on June 17, the day the interview took place, Crossen (1) instructed LaBonte that Rush would take the lead in the interview, (2) participated in decisions about the placement of tape recorders, (3) was present when the video camera was set up, (4) explained to LaBonte how Crossen and Henry would come in to brace Walsh at "the appropriate moment," and (5) decided that he himself would make the determination whether to confront Walsh. As the hearing officer found, "Crossen was clearly in control of the preparations for the New York interview." Hearing Report ¶ 343.

That same day, after receiving $100 in cash and a plane ticket from Reid, Walsh flew to New York. He was met at the airport by a limousine, which took him to the hotel. There he met with LaBonte and Rush, who identified himself as "Peter O'Hara". Crossen and Henry waited in a nearby room, where they were able to watch video feed of the interview but could not hear what was said.

After some preliminaries and in response to Rush's questioning, Walsh repeated his claim to have written the Demoulas decision himself. He explained that he and Judge Lopez would discuss the testimony at the end of each day of hearing as well as which witnesses they found credible, and "toward the end of the trial she told me that this is how she wants it to come out [and] to start writing." Walsh went on to say that she

"probably knew from the start who was going to win . . . from the other . . . ." Rush then interrupted, with a laugh, "Did she really?" Walsh replied, "I, I dunno. I mean she had seen an earlier trial with the same, same people . . . . Ah, and I think that the evidence and the correspondence over the year . . . over the ah, years ah, with the parties really just showed who, who was telling the truth and who's lying." Hearing Report ¶ 363.

Further efforts by Rush and LaBonte to elicit statements that might fortify those already made about predisposition were largely unavailing. When asked whether, as Walsh had stated during the Halifax interview, Judge Lopez had told him who the winners and losers were going to be, he responded, "At, at some point prior to the end I think, yes." He told them he did not start writing the decision until May; the trial ended on May 15.

Rush mentioned the bar letter during the interview. Still unconcerned about it, Walsh explained the circumstances of its composition and execution. Walsh told Rush he did not see a problem with it.

During a break in the interview, Rush reported to Crossen and Henry that Walsh's statements on predisposition were "very weak." The statements, Rush explained, were not as strong as those attributed to him by Curry and Reid, and Walsh had described how, in writing the decision, he and the judge had had discussions at the end of each day's trial session. Rush nonetheless thought Walsh had confirmed predisposition and that the interview was over. Crossen, however, told him to go back and clarify the issue of predisposition as best he could.

As the interview continued, Rush fared somewhat better. When he suggested that, after the jury trial, the judge must have been "looking forward to having her say as

to who was lying," Walsh interjected, "To hammer them, yeah." Walsh also agreed that Judge Lopez had "probably" "soured on [the defendants] to the point that it didn't matter," and that after the jury trial "it was pretty clear who was lying and who wasn't lying and what had actually occurred." Walsh resisted, however, LaBonte's characterization of the case as having been "predetermined"; Judge Lopez, he said, had "kept some sense of, of open-mindedness."

Rush left the interview to advise Crossen to remove LaBonte, whose repetitious questioning might make Walsh suspicious. Crossen replied, "Okay, we can get him outta there." Rush also advised Crossen not to brace Walsh because of discrepancies between the information out of Halifax and what he had just said in the interview. Crossen decided not to brace Walsh, but he did direct Rush to press further on the issue of predisposition.

After more questioning, Walsh agreed once again that the judge had told him "from the get go who was who, who's the good guys, who's the bad guys . . . ." The interview ended, with Rush promising to get back to Walsh within a week or ten days.

Rush believed Walsh was very interested in the phony job because Walsh had been anxious to please him and to agree with him. Rush viewed the interview as having confirmed some of the points in the accounts of Curry and Reid, especially those on predisposition, but he concluded that their information was not accurate in other respects. After Crossen reviewed the tape recording, he described the interview to Arthur T. as a "mixed bag" because Walsh had "appeared to go in different directions" on the issue of predisposition. Walsh himself thought the interview had been "strange" because he had

been asked "the same questions over and over again" about the Demoulas decision, but he decided the questions were perhaps appropriate in an interview setting.

After returning to Boston, Crossen attended several meetings regarding the Demoulas litigation. He described the New York interview to Barshak and others, one of whom (Crossen could not recall whom) asked if there were any issues about contacting a former law clerk. Crossen replied that he did not think so but would look into it. On June 20, he asked an associate at his firm to research the question, and in making the request he alluded to the prohibition in the First Circuit against post-trial contact with jurors. See United States v. Kepreos, 759 F.2d 961 (1st Cir. 1985). The associate reported back the same day, via voice mail and handwritten notes, that his research indicated the existence of a limited privilege between judges and law clerks, but he had found no outright proscription against such contacts. Crossen never discussed the research with the associate though he did review cases the associate had copied for him.

Also on June 20, Crossen delivered a tape and transcript of the New York interview to Barshak and others in his firm. After listening to it, Barshak concluded that the information was not useful, did not corroborate what had reportedly been said in Halifax, evinced efforts to put words in Walsh's mouth, and was – as Barshak later told Donahue – a "zero," a "nothing." Adams also viewed the tape as useless. Tr. 9:43. Crossen, in contrast, told Donahue the tape was positive. Despite these contradictory opinions, Donahue later testified that he did not listen to the tape. He did review transcripts of it. See Hearing Report ¶ 466; Ex. 134, at 16.

On June 23, Arthur T. attended an "emergency" meeting of defense counsel at Barshak's office. Present were Crossen, Donahue, Barshak, and at least eight other

lawyers. The meeting's urgency stemmed from the imminence of court-ordered asset transfers that, for the defendants, would "put the whole family fortune at risk." The focus of the meeting was the filing of a recusal motion based on the Charles Restaurant investigation, which counsel believed would yield at least an evidentiary hearing.

The discussion eventually turned to whether the fruits of the Walsh investigation, which Arthur T. and Crossen described to the participants, should be added to the recusal motion. Only Crossen and Arthur T. spoke in favor of doing so. Others, especially Barshak, who knew Curry and described him as a "bottom dweller" with little credibility, argued against inclusion. Barshak later testified that, while Crossen viewed the tape "on a scale of 1 to 10" as "an 8 with respect to corroborating" what Curry said had taken place in Halifax, Barshak himself assessed the tape as a "zero or less than zero." It was the consensus of the group, excepting Crossen and Arthur T., not to include the Walsh material in the motion to disqualify.

Arthur T., Crossen, and Donahue met immediately after the larger meeting. Arthur T. did not want to let the Walsh matter go, and he asked what they could do. Crossen, who like Donahue also believed it should be pursued, wanted to proceed cautiously because of Barshak's discomfort with Curry and because he did not want to file papers alleging judicial misconduct without being "absolutely solid on the facts." Crossen advised Arthur T. that the logical thing to do would be to confront Walsh and ask him to tell the truth about what had happened. Donahue voiced no disagreement with Crossen's suggestion.

Crossen could do nothing immediately because he was about to commence the retrial of another action related to the Demoulas dispute, one brought by Michael

Kettenbach, Telemachus' son-in-law, alleging that George Demoulas' son had arranged to have listening devices planted at DSM headquarters.[4] That trial was held in the federal court from July 7 through August 4, 1997, when the jury again returned a verdict against Crossen's clients. Meanwhile, on July 21, Judge Lopez denied the motion to recuse based on the Charles Restaurant allegations. She also denied the defendants' request for an evidentiary hearing on the issue. The defendants filed appeals from those denials.

In late July, Reid called Walsh to arrange a meeting at which, Reid said, "they" would offer him the job. Walsh was very excited. He bought himself a new suit and tie for the occasion. Reid later told him the meeting would take place at the Four Seasons Hotel in Boston on August 2.

On August 1, Crossen, Donahue, Arthur T., Rush, Reid, Curry, McCain, and Henry met to plan for the meeting with Walsh the next day. The August 2 meeting had three purposes: to disabuse Walsh about the phony job, to verify statements attributed to him about the judge's predisposition, and to see if he would sign an affidavit or otherwise confirm the statements. Crossen also wanted to know whether Walsh would later meet with someone connected with the Demoulas litigation. The group decided to put Walsh under surveillance in case he went to Judge Lopez or Gerrard, who represented the plaintiffs. McCain agreed to handle the surveillance of Walsh.

On August 2, a "jubilant" and "excited" Walsh arrived thirty minutes early for his interview at the Four Seasons. He was directed to a suite, where he met Rush and was introduced to Donahue. Rush began to explain that there had been a ruse, and Walsh interrupted to ask if this was about the Demoulas litigation. Rush replied that it was. He

[4] The first trial in the Kettenbach case had ended in a judgment for the defendants. Crossen had obtained a new trial upon a showing of juror misconduct.

and Donahue told Walsh they had been hired to inquire into possible misconduct by Judge Lopez. When told of Crossen's involvement, Walsh became angry. Rush explained that they had affidavits and tapes, and that it was a "serious matter." Donahue advised Walsh that he was not the target of their inquiry, but that they wanted him to tell them things about Judge Lopez. Crossen entered the room.

Rush led Walsh to believe that both the Halifax and New York interviews had been taped, and neither Crossen nor Donahue corrected Rush or told Walsh that Halifax had not been taped. When Crossen tried to get Walsh to state that he had in fact written the entire decision in the shareholder derivative action, Walsh first told him to "go over the tapes and draw your own conclusions." He then said he had been "puffing" when he claimed to have written the entire decision, as he had had input from the judge. Walsh refused to talk about Judge Lopez's alleged predisposition except to insist that the Demoulas defendants had received a fair trial.

Walsh asked what they were going to do with the fruits of the interviews. Crossen told him the information "was going to come out," that he "had to pursue it to its logical conclusion and know whether it was true." Crossen said that his clients had the tapes and he could not control them. If Walsh did not "help him," there would be "a missile fired," and that Walsh had a long career to think about because what was on the tapes was embarrassing. Walsh believed Crossen was implying that his career would be ruined. Donahue did not disclaim the threat.

Walsh asked, "What do you want from me?" Crossen replied that he wanted him to tell the truth and possibly give an affidavit. He repeatedly told Walsh he wanted to have "a candid conversation" with him. Donahue told Walsh that if he were cooperative,

"he could be protected to a certain extent, not of course if he perjured himself. If he was called to testify, he was required to testify truthfully and no one would protect him from that." Though Donahue did not specify what they would do for Walsh, he later testified that he meant they would attempt to ameliorate any harm that would come to him if the information became public.

Donahue raised the issue of the bar letter. Hearing Report ¶ 525. He threatened to make it public if Walsh did not cooperate with them. Rush, however, made quick work of the letter: with a dismissive gesture he told Walsh that the letter had "nothing to do with what we are talking about here."

The discussion then returned to issues of authorship and predisposition. Crossen told Walsh that he could understand why Walsh might have overstated his role in the drafting of the decision to puff his credentials, but he did not see how statements about the judge's predisposition could be viewed the same way. When Donahue asked whether his statements about predisposition were true, Walsh said he would not talk to him until he had spoken to a lawyer.

Walsh asked numerous times to hear the tapes, but Crossen and Donahue refused. Crossen explained that it would not be appropriate to allow it lest, as a witness, Walsh be inclined to tailor his testimony to fit what was on the tapes.

As the meeting concluded, Crossen encouraged Walsh to seek independent legal counsel. Crossen believed that if Walsh did so, Crossen and Walsh's counsel could work it out. Rush told Walsh he was "not the target here," and he, too, advised Walsh to get independent counsel. Walsh left the meeting feeling "[s]ad, scared, [and] emotionally

very hurt" because he had been told his career was over if the bar letter and the tapes became public.

As Crossen and Donahue knew, Walsh was followed after the meeting. The surveillance team lost him at first. Walsh went immediately to his office at Sullivan, Weinstein & McQuay. There his employer came upon him, crying and distraught, in a conference room. Walsh told him what had happened. The employer referred him to Attorney Harry Manion, whom Walsh retained to represent him. Manion arranged for him to meet with FBI agents on Monday, August 4. After hearing his story and reviewing an unsigned affidavit he and Manion had drafted, the agents advised Walsh that, to establish his credibility with the FBI, he should wear a wire for the purpose of catching Crossen on tape. Walsh agreed. He proceeded to tape four telephone conversations and two face-to-face meetings with Crossen over the next two weeks.

In the first taped telephone conversation, Walsh and Crossen agreed to meet the following week. When Walsh again asked to hear the tapes, Crossen said he would permit it only after the two of them had moved further along toward an understanding of "where we both are on this topic" – apparently a reference to the "candid conversation" he was seeking about Judge Lopez's alleged predisposition.

On August 20, Crossen and Walsh met at Crossen's firm. Crossen again declined to permit Walsh to hear the tapes until after they had had their "candid discussion." Walsh insisted there would be no discussion until he had heard the tapes. Crossen told him, "[T]hat is just not going to happen, okay?" Crossen continued: "What's going to happen is this. One way or another this client and their lawyers are going to play that card, okay? They are going to use the work that they did with these investigators . . . ."

Walsh asked Crossen why he had not just called him in the first place, to which Crossen replied, "Well, that's life in the fast lane, Paul . . . ." Walsh asked how, without hearing the tapes, he could be confident that Crossen wasn't bluffing. Crossen restated his position that he would not let him listen to them yet, and he added, "Ah, but if you don't believe that we have the tapes, then fine. Just call that, consider it a bluff and you'll see how it comes out, okay?" When Walsh asked Crossen what was going to happen to him, the following colloquy ensued:

PW: I mean, I'm in a situation here, Gary, where I, I can't win.

GC: I'm not sure that's right, but I don't wanna bullshit you either. I'm not saying that it's easy for you to win. Uhum..I think that there are spins that can be put on this from which you may win. But the bottom line is (pause) this is going to come out one way or the other, okay. I think that it could come out in any one of three ways. Okay, uhum, way number one is for you to have a candid conversation with me about what happened here and uhum, subsequently be in a position of executing an affidavit to the effect of what happened here or to testifying as to what happened here, okay…that's one. Way number two, is that you would not be of any assistance to us and we would merely file our papers in court indicating what had happened along with the tape and transcripts and things of that nature…

PW: And letter?

GC: Letter? I don't know, I don't know. Ah, that's a good question. But it would certainly be a possibility. … The third way is similar to the second way which is we file our papers in court,… Those are the three possibilities, as I see it, because this just ain't goin' away.

PW: That's clear it's not going away that's why I'm here right now.

GC: So, in my view is (clears throat) that if there is a way for Paul Walsh to deal with this, that's, that's uhum...not

> harmful to your career, it probably is for you to have the candid conversation with me. And to the extent that it involves an acknowledgement that the Judge was way out in front on a determination of the facts here, that she basically predetermined it. Basically, you are the equivalent of a whistle blower. Okay?

Ex. 4; Chalk F, at 12-13 (emphasis added). When Walsh asked what would happen with the bar letter if he had a "candid conversation" ("It's my career here, Gary"), Crossen responded as follows:

> I understand that. I understand that. I want to give you a straight answer, I'm just trying to ah..word smith it so that we are clear with each other, okay? Uh, as you know, I guess, I was a prosecutor, state and federal for ten years. … Uhum, neither you nor I is in any position to fabricate something. Okay, that's just not going to happen. Uhum, I think the way the letter can be handled is that we don't bring it up. We don't make an issue of it. …
>
> * * *
>
> But if a lawyer on the other side at some point asks, is there a letter that is bogus, that was filed in connection with your application for membership in the Massachusetts bar. Neither you nor I is in any position to answer that question in any way other than yes. Now, hopefully we can tailor this in a fashion that avoids that question from ever being asked, because the letter is not the crux of this thing from our perspective, okay. Ah, as far as I'm concerned, I don't give a shit about the letter, my client's interests are not bound up or wound up around that letter. Uhum, so I guess what I'm saying is I'll make every effort with you to try to keep the letter from becoming an issue, that is, is disclosed in any way. Can I sit here and promise Paul Walsh that it ain't coming out. No, I'd be bullshittin you if I, if I even tried, okay? But I will tell you that I will try to do the best I can to help it, to keep it from coming out. And I will also tell you that I will do the best I can to moderate its impact if it does come out.

Ex. 4; Chalk F, at 16-17. Crossen explained that there were "trial tactical moves" that could be taken to lessen the impact of the bar letter.

Walsh understood from Crossen's comments that if he helped Crossen, Crossen would not bring up the bar letter. The hearing officer found that Crossen knew the letter had become Walsh's critical concern, and that he used it to pressure Walsh into agreeing to have the "candid conversation." If Walsh agreed to cooperate with him, Crossen would use his experience and position to do his "best . . . to keep it from coming out."

In a telephone conversation the next day, Walsh questioned whether Crossen actually had tapes. Walsh said, "[U]nless you wanna play them, Gary, I'm not helping you." Crossen used this opportunity to bring up the bar letter again:

> [Y]ou're going to find yourself in a situation that is gonna be very troublesome for you and the lawyers that recommended you. Uhum, Cotter and whatever the other guy's name is Mulcahy, ah I guess that's his name, uhum. And I hate to see it go down that road.

Ex. 5; Chalk G, at 5-6. Walsh replied, "Well, unless I hear the tapes that's the road." He pressed Crossen to play him "at least a piece of them over the phone or just so I can hear that you . . . actually have something." Crossen then agreed to play him "a small segment of a tape, showing your voice and the voice of others in one of these meetings." Walsh agreed.

Crossen advised Arthur T. that he was going to play for Walsh a snippet from, as he later testified, "a non-substantive area." Arthur T. agreed. Crossen and Donahue chose to play for Walsh the segment dealing with the bar letter. The hearing officer found, after listening to the tape of the New York interview, that there were "numerous" other segments Crossen and Donahue

could have chosen that would have satisfied Walsh that the interview actually had been recorded. She inferred that they had chosen the segment dealing with the bar letter because they intended to use his concerns regarding the letter to frighten him into cooperating.

On August 22, Walsh met with Crossen, Donahue, and McCain at Crossen's offices. Walsh listened to the chosen snippet. Afterwards, Walsh explained that he was about to leave town to visit his in-laws and that his wife was waiting for him downstairs. Crossen advised that they were "on a fast moving train here. Strategic decisions are going to be made." He told Walsh, without contradiction by Donahue, that they needed to have "a full blown discussion" as soon as possible because "the client is not gonna be patient any longer frankly." Both Crossen and Donahue knew, however, that they had no plans to use the information in support of any motion because the Halifax affidavits would not be admissible and the tapes from New York were only a "mixed bag." The hearing officer found that these false statements were made to intimidate Walsh into supplying an affidavit with the statements they sought. At the end of the meeting, Crossen expected to meet with Walsh the following Monday to discuss the predisposition issue and "what actually happened."

Walsh believed he was being followed during August 1997. As it happened, with Crossen's knowledge and assent, McCain had his investigators follow Walsh and his wife on August 4, 22, 25, 26, and 27 in order to see

where Walsh went and whom he contacted. The investigators took photographs of Walsh with his employer and with his wife.

Early in the morning on August 25, the day Crossen expected that he and Walsh would "reduce the salient facts to an affidavit," Walsh advised him by voice mail that he was out of town. When investigators told Crossen that Walsh had not left town, Crossen called Walsh's home and spoke to his wife. Walsh telephoned Crossen the next day to object that Crossen was harassing her. Crossen replied that he was "a little troubled" because he had heard that Walsh was in town when he had said he was out of town. Walsh asked who had been following him. Crossen replied, falsely, that no one was following him: "It was a report I got from another source, Paul, and I'm not gonna divulge to you who it was." When Walsh insisted he was being followed, Crossen replied, again falsely, that "it's not the case as far as I know." Crossen also told him, falsely, that no one had been out in front of his house.

Crossen then told Walsh that he had a "very important client strategic meeting on Thursday," at which

> I think they are going to put my feet to the fire to make some strategic judgments as to how we use this information and what forums we expose it in. . . . [I]f I'm going to do anything that positions you in a favorable light I really need to make that progress between now and Thursday.

Ex. 8; Chalk J, at 3-4. Walsh said he was "still thinking about it." Crossen said he was not "optimistic that if we don't get something done before you head out of town that the client won't insist upon me dropping the hammer, if you will." He suggested they meet the next day.

Walsh told Crossen not to call his wife again, and he asked Crossen to "call off" the people who were following him. Crossen replied, falsely, "All I can tell you is there's nobody ah, watching you at ah, my direction or that I'm aware of but I will double check." He warned Walsh that if they did not meet the next day, "this baby is in your ball game, ball park and . . . I'm rapidly losing the ability to keep it reigned in." The hearing officer found that, as Crossen knew at the time, release of the information obtained from Walsh was not imminent.

On August 29, 1997, Crossen learned that the FBI was investigating his contacts with Walsh and had served grand jury subpoenas on McCain, LaBonte, Reid, and Rush. On September 17, Walsh and his counsel held a press conference regarding this matter. On September 26, the Chief Justice of the Superior Court filed a grievance with the Office of Bar Counsel. On February 1, 2001, the Department of Justice advised the respondents that it was closing its investigation without seeking any indictments. Bar counsel filed the petition for discipline in this matter on January 3, 2002, approximately eleven months later.

## Conclusions of Law

The hearing officer broke down her conclusions of law by respondent. They are set out almost verbatim below:

**Curry**

Curry's conduct in devising and participating in a scheme to induce a former law clerk under false pretenses into disclosing confidential communications with a judge regarding the decision-making process in a case violated Canon One, DR 1-102(A)(2) and (4)-(6) [5], and Canon Seven, DR 7-102(A)(5) and (7). [6]

Curry's conduct on behalf of a client in holding out to a former law clerk the false promise of lucrative employment involving the international practice of law for a sham multinational corporation, in falsely representing his own identity and the identity of his associates, and in luring the former law clerk out of the Commonwealth on the false pretext of a job interview for the purpose of inquiring into the deliberative processes of a

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[5] **DR 1-102 Misconduct.**

(A) A lawyer shall not:

(2) Circumvent a Disciplinary Rule through actions of another.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

[6] **DR 7-102 Representing a Client Within the Bounds of the Law.**

(A) In his representation of a client, a lawyer shall not:

(5) Knowingly make a false statement of law or fact.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

judge in a case tried before her violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Curry's conduct in inquiring into the details of the personal life of a former law clerk and of the judge for whom he clerked in order to gain potentially damaging personal information for use in a pending legal matter violated Canon One, DR 1-102(A)(2), (5) and (6), and Canon Seven, DR 7-102(A)(7). The hearing officer rejected Bar Counsel's contention that such conduct also violated Canon Seven, DR 7-102(A)(1)[7]: it was not undertaken "merely to harass or maliciously injure another," she found, given that Curry's inquiries did have a legal objective – disqualifying Judge Lopez – beyond harassment or injury.

Curry's conduct in planning, executing, and participating in a scheme to induce a former law clerk to travel to New York under the pretext of a job interview in order to tape a conversation with him without his knowledge and consent, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Curry's conduct in planning, executing, and participating in a scheme to induce a former law clerk to make damaging or compromising statements about himself or about the judge for whom he clerked with the false inducement of lucrative employment as in-house counsel handling an international practice in order to force the judge's recusal or

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[7] **DR 7-102 Representing a Client Within the Bounds of the Law.**

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

undermine her decisions in an ongoing case, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

**Crossen**

Crossen's conduct in planning, executing, and participating in a scheme to induce a former law clerk to travel to New York under the pretext of a job interview in order to tape a conversation with him without his knowledge and consent, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Crossen's conduct in planning, executing, and participating in a scheme to induce a former law clerk to make damaging or compromising statements about himself or about the judge for whom he clerked with the false inducement of lucrative employment as in-house counsel handling an international practice in order to force the judge's recusal or undermine her decisions in an ongoing case, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Crossen's conduct in deliberately misrepresenting to Walsh that there existed a tape of the Halifax meeting violated Canon One, DR 1-102(A)(4) and (6), and Canon Seven, DR 7-102(A)(5) and (7).

Crossen's conduct in attempting to induce Walsh, under the threat of disclosing the supposed contents of the tapes and embarrassing or compromising statements Walsh had made during the phony-job interviews, to state under oath that Judge Lopez had predetermined the outcome of the trial in the shareholder derivative action and had told him from the outset how the case was to be decided, violated Canon One, DR 1-102(A)(4)-(6), and Canon Seven, DR 7-102(A)(5), and (7).

Crossen's conduct in attempting to induce Walsh, under the threat of disclosing that Walsh had submitted with his petition for admission to the bar a recommendation from a lawyer whom he personally did not know, to state under oath that Judge Lopez had predetermined the outcome of the shareholder derivative action and had told him from the outset how the case was to be decided, violated Canon One, DR 1-102(A)(4)-(6), and Canon Seven, DR 7-102(A)(5), and (7).

Crossen's participation in arrangements to have Walsh and his wife put under surveillance violated Canon One, DR 1-102(A)(5) and (6).[8]

Crossen's conduct in denying to Walsh that Walsh was under surveillance violated Canon One, DR 1-102(A)(4) and (6).

Crossen's conduct in planning, executing, and participating in a scheme to induce a former law clerk to make damaging or compromising statements about himself or about the judge for whom he clerked with the false inducement of lucrative employment as in-house counsel handling an international practice in order to force the judge's recusal or undermine her decisions in an ongoing case, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

**Donahue**

Donahue's conduct in planning and participating in a scheme to induce a former law clerk to travel to New York under the pretext of a job interview in order to tape a conversation with him without his knowledge and consent, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

[8] As indicated below, this is the only one of the hearing officer's conclusions of law that we have not adopted. See note 10 and accompanying text, infra.

Donahue's conduct in planning and participating in a scheme to induce a former law clerk to make damaging or compromising statements about himself or about the judge for whom he clerked with the false inducement of lucrative employment as in-house counsel handling an international practice in order to force the judge's recusal or undermine her decisions in an ongoing case, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Donahue's conduct in attempting to induce Walsh, under the threat of disclosing the supposed contents of the tapes and embarrassing or compromising statements Walsh had made during the phony-job interviews, to state under oath that Judge Lopez had predetermined the outcome of the shareholder derivative action and had told him from the outset how the case was to be decided, violated Canon One, DR 1-102(A)(4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Donahue's conduct in planning and participating in a scheme to induce a former law clerk to travel to New York under the pretext of a job interview in order to tape a conversation with him without his knowledge and consent, violated Canon One, DR 1-102(A)(2) and (4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Donahue's conduct in planning and participating in a scheme to induce a former law clerk to make damaging or compromising statements about himself or about the judge for whom he clerked with the false inducement of lucrative employment as in-house counsel handling an international practice in order to force the judge's recusal or undermine her decisions in an ongoing case, violated Canon One, DR 1-102(A)(4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

Donahue's conduct in deliberately misrepresenting to Walsh that there existed a tape of the Halifax meeting violated Canon One, DR 1-102(A)(4) and (6), and Canon Seven, DR 7-102(A)(5) and (7).

Donahue's conduct in attempting to induce Walsh, under the threat of disclosing that Walsh had submitted with his petition for admission to the bar a recommendation from a lawyer whom he personally did not know, to state under oath that Judge Lopez had predetermined the outcome of the shareholder derivative action and had told him from the outset how the case was to be decided, violated Canon One, DR 1-102(A)(4)-(6), and Canon Seven, DR 7-102(A)(5) and (7).

## The Respondents' Appeals

We discuss below, first, the objections of Crossen and Donahue[9] to the hearing officer's findings of fact, and we then proceed to consider the objections of all three respondents to her conclusions of law. While we deal here only with those arguments that merit a response, we have nonetheless considered and disposed of all objections, including those we have not specifically addressed.

### Factual Objections

**1. Crossen's factual objections**. Crossen argues that the hearing officer erred in virtually all of the central findings as to his conduct, beliefs, and motives as well as the findings bearing on his truthfulness during the hearing. We discuss below all those objections that merit discussion.

[9] Curry's factual objections appear to be confined to two issues, each made in a single sentence and both found in the same footnote in his brief on appeal. See Curry's Brief at 13 n.3. To the extent such scant discussion rises to the level of appellate argument – which we doubt, see, Commonwealth v. Edwards, 420 Mass. 666, 667 n.2 (1995) – we have considered and rejected them. All other factual objections have been waived. See Board Rule 3.50(c).

**First**, Crossen challenges the hearing officer's finding that, by the phrase "candid conversation," Crossen meant not a conversation in which the truth would be told, but only one in which Walsh admitted that Judge Lopez was predisposed. Crossen contends there is no evidence to support this finding and that the "unrebutted circumstantial evidence establishes that [he] sought the truth." We disagree.

Crossen's repeated demand for a "candid conversation" must be understood in its context. His clients' position was grave. His admitted goal was to disqualify Judge Lopez and overturn her decisions. To do so, he needed to show, as he believed, that she was biased. He consequently was not inclined to welcome a statement from Walsh that would burnish a reputation for impartiality. He pointedly advised that if Walsh denied the truth of the "damaging" statements he had made on tape, he would have to explain "why he would have said such things, inaccurately." Walsh would have a heavy burden, in other words, to convince Crossen that Judge Lopez was not predisposed. Also, Crossen advised Walsh that, since his statements were going to become public anyway, the only way he could protect himself was to become, as Crossen put it, a whistleblower – a role wholly inconsistent with statements that she was not predisposed. The only way for Walsh to save himself was to give Crossen the version he wanted.

Further, the hearing officer could reasonably have inferred that someone actually interested in learning the truth would have taken steps Crossen eschewed. Despite Barshak's warnings about Curry and despite the investigators' qualms about Reid and LaBonte, Crossen undertook no investigation of their backgrounds aside from a single Internet search of Curry. He did not confront Curry and LaBonte with the discrepancies in their affidavits. He did not even interview LaBonte before the taping in New York.

After taping the New York interview, instead of inviting Walsh to meet with him to discuss the truth of the statements attributed to him, Crossen participated in luring him to the Four Seasons with the false promise of a job; once there, Walsh was blindsided and threatened with exposure.

Also inconsistent with Crossen's professed "quest for the truth" were his continued efforts, after the unsuccessful bracing of Walsh, to seek a statement from him even though Crossen had come to believe that he was "hugely not credible." Given these circumstances as well as her disbelief of his testimony to the contrary, the hearing officer had a substantial basis for concluding that what Crossen sought from a "candid conversation" was not the truth but a predetermined statement about how Judge Lopez had decided the case.

**Second**, Crossen takes issue with the finding that he deliberately led Walsh to believe that the Halifax interview had been taped. Use of the plural ("tapes") in his recorded interviews with Walsh, Crossen insists, referred to the separate tapes of the New York interview. The hearing officer was not required to accept that self-serving gloss, and her decision not to believe him was one committed solely to her province. See S.J.C. Rule 4:01, § 8(4). Her determination finds further support in the record, in particular from Crossen's failure to correct Rush's assertion at the Four Seasons that the Halifax interview had been taped.

Also, Crossen later explained to Walsh that the Four Seasons interview had not been taped because it would have been illegal in Massachusetts, whereas "it's okay to secretly tape in Nova Scotia and to tape in New York as long as one party is consenting to the tape" (emphasis added). When, during that same conversation, it became obvious

that Walsh still believed there was a tape of the Halifax interview, Crossen did not correct him. Instead, he continued to speak of "tapes" and later told Walsh that he did not "know who told them what the ah, taping laws, who if anybody told them what the taping laws were in Nova Scotia."

In a later conversation, Walsh accused Crossen of bluffing about having tapes. The context makes it plain that Crossen was implying that both interviews were taped:

> PW: Well, GARY, I mean I, I haven't heard them I mean I don't know what you have, what you, what you have. I mean how. . . I think you're bluffing personally.
>
> GC: Okay, that's fine. If you feel I'm bluffing then you're gonna call my bluff, but you know damned well (pause) that you were in meetings in NOVA SCOTIA and NEW YORK and you know damned well, although you many not know ah, word for word what you said. You know exactly what you said.
>
> PW: I know damned well I haven't heard any tapes. I don't know that you have tapes, GARY.
>
> GC: PAUL, I have 'em, okay.

Ex. 5, Chalk G, at 5. If Crossen had not meant to stoke Walsh's mistaken belief that the Halifax interview was on tape, he could simply have told him so. Instead, he led him on and shored up that belief. Such a record warrants a finding that Crossen intended to convey to Walsh that the Halifax and New York interviews had both been taped.

**Third**, Crossen objects to the finding that he intentionally lied when he told Walsh he was not being followed in late August. It is undisputed that Walsh was under surveillance on August 2, 22, 25, 26, and 27, and Crossen concedes that he knew Walsh would be followed on the first two dates – after the meeting at the Four Seasons on

August 2 and after Crossen and Donahue played him the snippet of tape on August 22. He denies having known of the surveillance on the last three of these dates. The hearing officer found that he did know and then falsely disclaimed such knowledge when talking to Walsh. Crossen claims there was no evidence to support such a finding.

The short rejoinder to this claim is found in Crossen's answer to the petition for discipline, for he there admitted knowing and assenting to surveillance on all five dates, although he added that his knowledge of specifics was "sometimes after-acquired and his assent sometimes tacit." Answer ¶ 127. Even without the admission, however, there was sufficient evidence to support the hearing officer's inference that he knew.

Crossen expected to meet with Walsh on August 25. Walsh cancelled the meeting by leaving a phone message at 6:55 that morning in which he said he was going out of town. Walsh was under surveillance that day. Crossen called Walsh's home in the evening and spoke to his wife. The next day, Walsh telephoned Crossen to complain about the call to his wife. Crossen justified the call by referring to

> information I received and I'm still a little troubled by what I've been hearing is that while I was told that you were out of town that you weren't out of town. . . . The bottom line is I was receiving . . . a report yesterday that you had been sighted in town . . . .

Walsh said he did not "appreciate" being followed. Crossen said, "Nobody's following you. It was a report I got from another source, Paul, and I'm not gonna divulge to you who it was." When Walsh insisted he was being followed, Crossen said, "All I can tell you is there's nobody ah, watching you at ah, my direction or that I'm aware of but I will double check." Given (1) Crossen's general knowledge of the surveillance; (2) his admission that he believed "there were other surveillances in August" aside from those he admitted knowing; (3) the likelihood that all reports of surveillance would go, as Henry

testified, "to the client and the attorney"; (4) Crossen's having received a "report" that Walsh was in town; and (5) his unwillingness to divulge its source to Walsh – given all these facts, the hearing officer's inference that he knew of the surveillance is warranted by the evidence. She also disbelieved his testimony to the contrary. His knowledge having been established, the remaining issue as to the intentional falsity of his statements to Walsh about that knowledge was a question committed to the sole discretion of the hearing officer.

While discussing aggravating factors later in her report, however, the hearing officer made the following additional comment:

> To screw up the pressure on [Walsh], Crossen had him followed for days after the meeting at the Four Seasons in Boston, and he did so in such a way as to ensure that Walsh knew it. The investigators hung around conspicuously and even arranged for the delivery of an unsolicited pizza to Walsh's home.

Hearing Report at 222. There was no subsidiary finding – and no evidence firmly establishing – that Crossen was the one who ordered the surveillance after August 20 or that he directed its details in the manner implied. To the extent the comment may be read to import a finding to that effect, we decline to adopt it.[10] In all other respects, however, we dismiss Crossen's objections to the hearing officer's findings as to his conduct and statements about the surveillance of Walsh.

**Fourth**, Crossen objects to the finding that he threatened Walsh with exposure of the bar letter if he did not cooperate. His objection is without merit.

It was Crossen who directed Rush to cover, during the New York interview, all aspects of what had been covered in Nova Scotia, including the bar letter. It was

[10] For the same reason, we decline to adopt the hearing officer's conclusion that Crossen violated DR 1-102(A)(5) and (6) by participating in arrangements to have Walsh and his wife followed. See note 8, supra. The disposition we recommend would be the same even if we had adopted the conclusion.

Crossen, again, who stood by when Donahue raised the letter at the Four Seasons on August 2. It was not Crossen, but Rush, who sought to brush the issue aside immediately afterwards. It is true that Walsh initiated the issue during his recorded conversation with Crossen on August 20, but Crossen seized upon the opportunity:

> Letter? I don't know, I don't know. Ah, that's a good question. But it would certainly be a possibility."

In a later exchange (one, incidentally, that is mysteriously absent from the exchanges found on the audio disc attached as Appendix C to Crossen's brief), Walsh asked Crossen what would happen with the letter if he agreed to have that "candid conversation."

> PW: (pause) With the first option that you said you, you, you and I have a candid discussion, what happens to the letter?
>
> GC: (pause) Uhum…(pause)
>
> PW: It's my career here, Gary.
>
> GC: I understand that. I understand that. I want to give you a straight answer, I'm just trying to ah..word smith it so that we are clear with each other, okay? Uh, as you know, I guess, I was a prosecutor, state and federal for ten years. Now, I've done about ten years on the other side. Uhum, neither you nor I is in any position to fabricate something. Okay, that's just not going to happen. Uhum, I think the way the letter can be handled is that we don't bring it up. We don't make an issue of it. Now Paul…
>
> PW: Ha, ha
>
> GC: Let me be straight with you. If you end up on a witness stand later on and a lawyer on the other side asks…
>
> PW: How'd this all come about? Yeah.
>
> * * *
>
> GC: Well, I don't think it came about from the letter frankly. I think it came about from an investigative attempt by a bunch of investigators. But if a lawyer on the other side at some point asks, is there a letter that is bogus, that was filed in connection with your application for membership in the Massachusetts bar.

> Neither you nor I is in any position to answer that question in any way other than yes. Now, hopefully we can tailor this in a fashion that avoids that question from ever being asked, because the letter is not the crux of this thing from our perspective, okay. Ah, as far as I'm concerned, I don't give a shit about the letter, my client's interests are not bound up or wound up around that letter. Uhum, so I guess what I'm saying is I'll make every effort with you to try to keep the letter from becoming an issue, that is, is disclosed in any way. Can I sit here and promise Paul Walsh that it ain't coming out. No I'd be bullshitting you if I, if I even tried, okay? But I will tell you that I will try to do the best I can to help it, to keep it from coming out. And I will also tell you that I will do the best I can to moderate its impact if it does come out.

Ex. 4; Chalk F, at 16-17.

The very next day, Walsh and Crossen returned to the letter in another telephone conversation. Walsh accused Crossen of "bluffing" about having tapes. The following exchange ensued:

> GC: Paul, I have 'em okay?
>
> PW: Well, unless you wanna play them, Gary, I'm not helping you.
>
> GC: Okay. Well, whether we have tapes or not is rea…really not what it's gonna come down to, but we have tapes.
>
> PW: Okay.
>
> GC: Uhum, you're gonna find yourself in a situation that is gonna be very troublesome for you and the lawyers that recommended you. Uhum, Cotter and whatever the other guy's name is Mulcahy, ah, I guess that's his name, uhum. And I hate to see it go down that road.

Ex. 5, Chalk G, at 5-6 (emphasis added).

In other words, while Crossen said he would do what he could to mitigate the impact of the bar letter, the blunt implication of these and other remarks was that such mitigation would not be forthcoming unless Walsh did his bidding. We have no reason to fault the hearing officer for declining to accept Crossen's characterization of his discussion of the bar letter as merely conveying "due concern for Walsh."

**Fifth**, Crossen finds fault with the hearing officer's determination not to credit his testimony that he had relied on the opinion in Miano v. AC&R Advertising, 148 F.R.D. 68 (S.D.N.Y 1993), in deciding what he could and could not do ethically with respect to the New York interview. This finding, he argues, is a legal conclusion masquerading as a credibility determination. This puts it backwards. The hearing officer did not credit Crossen's testimony that he had relied on Miano, and her reading of the case merely buttressed her decision not to believe him.

Miano involved an attempt to preclude the admission of tapes secretly made by the plaintiff, Miano. Opposing counsel argued that Miano's lawyer was "so embroiled in Miano's conduct as to be considered to have circumvented the disciplinary rules through Miano." Id. at 89. Although the court found that the lawyer's knowledge of the taping and receipt of information derived from it raised "a troubling and close ethical question," it found no violation. The lawyer had not "suggest[ed], plan[ned], or supervise[d]" the conduct, had "never advised, counseled or coached Miano regarding with whom he should speak or what to ask them," had not advised him "to tape or not to tape, and [had been] generally unaware of whether specific information Miano was providing had actually been taped." Id. at 87. Even so, the court said the lawyer should have further distanced himself from Miano's undertakings, and it admonished the lawyer for having come "perilously close to crossing the line." Id. at 89.

As the hearing officer aptly put it, Crossen's conduct may be "likened to that in Miano only by vastly minimizing the extent of his actual participation in the New York interview." Even Crossen read Miano as forbidding him from making the decision whether to brace Walsh. Tr. 10: 76-77. Yet the evidence shows that Crossen (1)

participated in the decision to tape, (2) assumed the leading role in the planning of the event, (3) "introduced [Rush] into the situation" as the principal interviewer, (4) decided who else would actually participate in the interview, (5) monitored it visually from another room, (6) directed the interviewers to redouble their efforts to establish predisposition when told the evidence was "weak," (7) pulled LaBonte from the room when his presence seemed counterproductive, and (8) made the decision himself not to brace Walsh. Crossen's involvement even penetrated to such details as the placement of microphones.

These facts call into substantial question the credibility of Crossen's claim to have sought to conform his conduct to the teaching of Miano. Put another way, the hearing officer was fully justified in concluding that the extent of Crossen's participation in the planning and execution of the New York interview "so dwarfed the conduct at issue in Miano that no first-year associate – let alone a lawyer with Crossen's intelligence, experience, and stature – could have read that case as sanctioning his actions."[11]

To the extent the hearing officer's statement is viewed as reflecting a legal judgment, we wholeheartedly share it. Compare Jones v. Scientific Colors, Inc., 201 F. Supp.2d 820, 826-828 (N.D. Ill. 2001) (no ethical violation where attorney did not direct focus of improper undercover investigation and never told investigators, directly or indirectly, to communicate with anyone) with Allen v. Int'l Truck and Diesel, No. 1:02-CV-0902-RLY-TAB, slip op. at 13-14 (D. Ind. September 6, 2006) (violation where "counsel were integrally involved in the [undercover] investigation from its conception to

[11] Crossen's hired legal expert, in a written statement not admitted into evidence, opined that "Crossen's efforts to conform his conduct to the requirements of the Court in Miano were reasonable." The extent of the expert's knowledge of Crossen's actual participation in the New York venture appears to be far less

its close"). It also cast substantial doubt on the bona fides of Crossen's claim that he had shaped his actions based on his reading of Miano. Like the hearing officer, we infer instead that Crossen seized on Miano as a basis for the post hoc rationalization of his conduct.

**Sixth**, Crossen takes issue with the hearing officer's finding that he deliberately misrepresented to Walsh that public disclosure of the tapes was imminent. This finding, too, is fully supported by the record.

On August 22, when Crossen and Donahue played the snippet of tape dealing with the bar letter, Crossen said to Walsh,

> We're on a fast-moving train here. Strategic decisions are gonna be made . . . This is real serious and the . . . train is ready to pull out of the station, okay?

Crossen suggested they meet again on August 25 "so we can discuss the best way to present them in a way that's protective of you . . . 'cause the client is not gonna be patient any longer, frankly." On August 26, he told Walsh they needed "to get something done" before Walsh left town because the client would "insist upon me dropping the hammer." It was essential that the two of them meet by "five o'clock tomorrow night" lest Crossen lose "the ability to keep this thing reined in."

In truth, release of the material was far from imminent. In late August, neither Crossen nor Donahue – let alone their clients – had formed any firm intention to use information from the Walsh investigation at all. Other defense counsel had reacted very negatively when news of the New York interview was broken to them, and they feared the court's likely response to the ruse and to the intrusion into the judge-clerk relationship. They also believed the tape was worthless. See Tr. 8:131 (Barshak); Tr.

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complete than the hearing officer's (see note 15, infra), and in any event we have agreed with her that

9:43 (Adams). The associate who worked most closely with Crossen on the case did not even know about Crossen's contact with Walsh until after Labor Day. Crossen himself viewed the New York tape as but a mixed bag, while Donahue admitted at the disciplinary hearing that the point of the confrontation at the Four Seasons was to get Walsh to acknowledge and support the statements attributed to him, and, if he did not, "we could dismiss the whole matter." By the conclusion of that meeting, Donahue admitted, he had come to the belief that Walsh's statements "were basically useless to us."

In other words, the Walsh information would only be used if Walsh affirmed the truth of the statements attributed to him. Hence Crossen's vigorous efforts to convince him to have that "candid conversation." None of the other defense counsel had been apprised of any plans, immediate or otherwise, to use or release the Walsh material; in fact, Barshak and former Judge Samuel Adams first learned about the meeting at the Four Seasons through the media. Tr. 8:40; 9:52. No motions had been drafted. It was also evident, as indicated by the research Donahue ordered done, that affidavits would not likely be admitted.

As it happened, nothing at all was done with regard to Walsh's statements before he held his press conference in mid-September. Even after that, no motions mentioned the Walsh material until 1999, when it was but one item in a grab-bag of issues raised in an effort to obtain Judge Lopez's disqualification. As of late August 1997, however, no decision had been made, no motion was planned, and absolutely nothing was imminent. The hearing officer appropriately found that Crossen falsely misrepresented to Walsh that his clients were about to go public with the information.

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Crossen's claimed efforts to follow Miano were manifestly unreasonable.

**2. <u>Donahue's Factual Objections.</u>** The main subheads of Donahue's factual objections are claims that the hearing officer (1) erred in finding he had participated in the planning of the New York interview, (2) exaggerated the extent of his participation in the bracing of Walsh at the Four Seasons on August 2, and (3) overstated his role in the August 22 meeting at which Donahue and Crossen played the snippet of tape for Walsh. We disagree.

**<u>First</u>**, the hearing officer did not err in finding that Donahue participated in the planning of the New York interview. The short answer to this objection is that the hearing officer credited Crossen's testimony that Donahue did participate. When Bar counsel asked Crossen directly who had discussed "the planning and conceptualization of the New York meeting," Crossen answered:

> It was discussed amongst, let's see, Arthur T. Demoulas, myself, Mr. Curry, Mr. Donahue, I would say Mr. Reid, probably Mr. LaBonte, at some level Mr. McCain, Mr. Henry, eventually Mr. Rush.

Tr.15:168. This testimony alone is a sufficient basis for a finding that Donahue participated in the planning of the New York meeting, and we may not disturb the hearing officer's determination to credit it. S.J.C. Rule 4:01, § 8(4).

Instead of challenging this testimony head-on (which could not succeed), Donahue seeks refuge in the details surrounding the decision to tape in New York. The hearing officer found that the meeting at which the decision was made took place on June 11, 1997. Donahue characterizes as "weak" the evidence of his presence at the meeting on that date. He contrasts Crossen's "equivocal" testimony that Donahue was present then with Henry's "unequivocal" testimony to the contrary. Though the question is not

critical, given Crossen's testimony that Donahue did participate in the decision, the evidence of Donahue's participation on June 11 is strong:

- On June 9, Crossen and Donahue discussed the need to get Walsh's statements "in a better evidentiary posture," and Donahue testified that he sought Crossen's assurances as to the propriety of the ruse on either June 9 or June 11. Tr. 17:30-32.

- On June 10, Barisano advised Donahue that affidavits would not be admissible. Donahue concluded that the affidavits from Halifax were "unclearuppable." Tr. 7:107-110.

- Donahue did not even deny being present at the meeting on June 11; he said only that he could not recall attending it. He indicated, however, that he would concede as much if his time records showed he had been there. Tr. 17:107-110.

- Donahue's time records (Ex. 22, Batch # 14545) indicate that he spent 6.1 hours on Demoulas matters on June 11 and that he had two conferences, an in-person (Tr. 17:30) meeting with Arthur T. and a meeting with Arthur T. and Crossen at Crossen's firm.

- Crossen's time records (Ex. 77) reference "meetings" (plural) with Donahue and Arthur T. on June 11.

- Crossen's testimony was <u>not</u> "equivocal" on the question whether Donahue participated in the planning of the New York interview (Tr. 15:169); he was only equivocal as to the timing of the meeting. Tr. 10:76-77. He indicated, however, that the planning meeting with Donahue and Henry took place "within that time frame, the 9th, 10th, 11th, probably the 11th." Tr. 10:69.

- Henry's testimony that Donahue was not present on June 11 fell far short of being "unequivocal." Henry's enumeration of those he "believe[d]" had attended did not include Donahue (Tr.7:49; see also Tr. 7:64), but Henry's testimony was impeached with an FBI field report in which he had listed Donahue among the attendees of the June 11 meeting. Tr. 7:64-67.

- Crossen testified that Donahue was at a meeting with him and Henry between June 9 and June 11. Tr. 10:69.

- Henry first learned about the Walsh investigation on June 10 and had no meetings regarding the investigation before June 11. Tr. 7:41-42.

By a process of elimination, therefore, the most likely date for the meeting at which Crossen, Donahue, and others decided upon and planned the New York interview took

place on June 11 – and Donahue was there. All these circumstances buttress the hearing officer's determination to believe Crossen's testimony that Donahue participated in the planning of the New York interview.

This is not to say that Donahue's participation in the ruse – and in the subsequent intimidation of Walsh – was as extensive as Crossen's. As discussed below, there is a quantitative and qualitative difference between the conduct of the two, a difference we believe should be reflected in the sanction. His conduct was sufficient, however, to violate the rules charged and to warrant discipline.

**Second**, Donahue argues that the hearing officer exaggerated his participation in the August 2 meeting at the Four Seasons. He asks us to set aside findings that he communicated falsely to Walsh that the Halifax interview was taped and that he threatened disclosure of Walsh's statements in Halifax and New York, including those about the bar letter. Again, we find no error.

With regard to the phantom tape of the Halifax interview, Donahue pleads confusion over how many tapes there were, but it is implicit in the hearing officer's finding that she rejected any testimony to that effect. Donahue maintains that he never affirmatively represented that such a tape existed and that he had no duty to speak up when Rush told Walsh there was a tape. Bar counsel apparently concedes that there was no affirmative misrepresentation, but she derives a duty to speak from the agency relationship between Donahue and Rush: statements made to a third party (Walsh) by an agent (Rush) in the scope of his authority are admissible against the principal (Donahue and Crossen, as organizers of the interview). See Blake v. Hendrickson, 40 Mass. App. Ct. 579, 583 (1996). So viewed, Donahue adopted Rush's statements by failing to

disaffirm them. Bar counsel has not referred us, however, to any cases in which such agency analysis alone has formed the basis for imposing discipline.

Bar counsel fares better in urging the authority of Matter of the Discipline of an Attorney, 2 Mass. Att'y Disc. R. 100 (1981). There a lawyer was disciplined for remaining silent while an impostor posing as the head of an investigative unit purported to negotiate a plea agreement with a trooper who had arrested the lawyer's client. Because the lawyer was aware of the imposture, he was found to have engaged in dishonesty, in violation of DR 1-102(A)(4), for failing "to disabuse the Trooper of the misrepresentations being made to him" by the impostor. Id. at 108. While Rush was no longer an impostor when he met with Walsh on August 2, he obviously knew that Halifax had not been taped: the whole New York venture was undertaken to obtain better evidence than affidavits about what had happened in Halifax. Hearing Report ¶ 501. In such circumstances, Donahue and Crossen could not stand idly by while Rush led Walsh to believe he had been taped in Halifax. Cf. Allen v. Int'l Truck and Diesel, No. 1:02-CV-0902-RLY-TAB, slip op. at 8 & n.8 (D. Ind. September 6, 2006) (outside counsel implicitly ratified, by "failing to affirmatively instruct otherwise," directions given in his presence by in-house counsel to undercover investigators).

Donahue maintains that if any threats were made to Walsh on August 2 about the disclosure of damaging statements, they were made by Crossen, not him. He then proceeds to challenge the characterization of Crossen's actions as threats. We reject his argument as to the latter contention for the same reason we rejected Crossen's. As to the former, the hearing officer could, and apparently did, credit Walsh's testimony that

> Donahue said to me, "You submitted a false letter to the Board of Bar Examiners. If you don't work with us, that letter will get made public and a

> process would start." All of them referenced the letter in that regard, saying that if I can't help them that letter is coming out.

Tr. 2-79. This testimony alone is evidence sufficient to support the hearing officer's finding that Donahue made the threats.

**Third**, Donahue argues that he was not involved in the decision to put Walsh under surveillance after the confrontation at the Four Seasons on August 2. Even he concedes, however, that he was a participant in the meeting the day before when the decision was made to find out where Walsh went afterwards. Both Crossen and Henry spoke of the need to ascertain whether Walsh "left the meeting and went to see Judge Lopez or Mr. Gerrard." Donahue argues that the participants talked only of the reasons for following Walsh, but he "did not recall any discussion of the details." The hearing officer found, however, that McCain told those present, with Donahue among their number, that he would be at the Four Seasons the next day "with a couple of men." Given Donahue's presence at the meeting, the nature of the discussion, and McCain's pronouncement, the hearing officer had an adequate basis for rejecting Donahue's testimony that he was not a participant in the decision to have Walsh followed after he left the Four Seasons.

**Fourth**, Donahue argues that the hearing officer exaggerated his involvement in the August 22 meeting at which Walsh listened to a snippet of the tape. Donahue insists that he had no role in the choice of the snippet, which contained a discussion of the bar letter, and that his role at the meeting itself was confined to his greeting Walsh by saying, "Hello, how are you?"

Again, it is important to consider the context. Donahue thought the bar letter was "important" from the very beginning (Ex. 87), and his notes called attention to the letter:

"Letter for bar application – Steve Mulcahy never met him." Ex. 19 (emphasis in original). He marked the passage on the subject when he reviewed a transcript of the tape made of the New York interview. Ex. 134, at 16. And it was Donahue who first raised the bar letter during the August 2 meeting with Walsh. Hearing Report ¶ 525.

On August 21, Donahue testified, he and Crossen discussed Walsh's request to hear a snippet from the tape. They decided to play one for him. The hearing officer rejected the claim, made by both of them in testimony before her, that they did not discuss playing the segment dealing with the bar letter. Against the finding, Donahue cites the truism that the disbelief of testimony does not of itself warrant a finding that the contrary fact is true. See, e.g., Hopping v. Whirlaway, Inc., 37 Mass. App. 121, 126 (1994); Commonwealth v. Camerano, 42 Mass. App. Ct. 363, 367 (1997).

There was, however, circumstantial evidence that permitted the inference in question – an inference that may be fortified by the rejection of his testimony to the contrary. See, e.g., Matter of Stern, 425 Mass. 708, 714-715, 13 Mass. Att'y Disc. R. 749, 757-758 (1997); Commonwealth v. Herbert, 421 Mass. 307, 311-13 (1995). On August 21, Crossen agreed to play a snippet right after a conversation in which he brought up the bar letter and threatened Walsh with it. See Hearing Report ¶¶ 619-624. They agreed to meet the next day at Crossen's offices. Although Crossen testified that he did not talk with Donahue at all on August 21, the time records of both respondents indicate that he did. See Ex. 22 (Batch #15698); Ex. 77. Donahue and Crossen both admitted that they discussed playing a snippet of the tape (Report ¶ 175), but the hearing officer did not credit their testimony that they did not discuss which segment to play.

The next day, August 22, Donahue joined Crossen, McCain, Arthur T., Henry, and a technician at Crossen's offices. Donahue testified that he could not recall whether they then discussed which section would be played – testimony the hearing officer obviously did not credit. He was present, in any event, when McCain cued up the bar letter segment to play for Walsh. At the hearing Donahue acknowledged that, while choosing that segment was "more likely" coincidental, "it may have been intended" – though only, he suggested, because "it happens to be a relatively long section in which you can hear the voice or voices."

From all these circumstances, and given (1) that Donahue had brought up the bar letter at the Four Seasons, (2) that he knew Walsh was concerned about it, (3) that there were "numerous" other segments that would have served the purpose of convincing Walsh that he had been taped (Hearing Report ¶ 629), and (4) the hearing officer's decision not to believe Donahue's contrary testimony on the subject, she was justified in finding that Donahue had participated in the choice of the snippet played for Walsh.

Nor did the hearing officer overstate the extent of Donahue's involvement in the meeting at which the snippet was played for Walsh. He was clearly present when it was played, and even if we had not found that he participated in the choice of the snippet itself, he certainly knew that Walsh was very concerned about consequences that might attend disclosure of the bar letter. Despite that knowledge, after listening to the tape with Walsh, Donahue said nothing when Crossen warned Walsh of its likely impact if played in a courtroom "with the best equipment." Donahue also listened, in silence, as Crossen misrepresented to Walsh that the "fast-moving train" of disclosure "is ready to pull out of the station" because "the client is not gonna be patient any longer, frankly." See Allen v.

Int'l Truck and Diesel, No. 1:02-CV-0902-RLY-TAB, slip op. at 8 & n.8 (outside counsel implicitly ratified, by "failing to affirmatively instruct otherwise," directions given in his presence by in-house counsel to undercover investigators). As the hearing officer found, Donahue, like Crossen, knew otherwise. Donahue's claim on appeal that disclosure really was a fast-moving train fails because there were no plans to do anything with the Walsh information unless he gave them the sworn statement they were seeking. Without it, they had little beyond inadmissible affidavits by persons of tattered credibility and tapes even Crossen acknowledged were but a "mixed bag." In short, their fast-moving train was going nowhere unless Walsh got on board.[12]

Accordingly, aside from our unwillingness to adopt the implication that Crossen had ordered the surveillance after August 20 or that he directed the delivery of an unsolicited pizza, the special hearing officer's subsidiary findings are appropriate and justified by the record, and we adopt them in their entirety.

**Legal objections**

We deal below with so much of the parties' legal arguments as warrant discussion. They devolve, in the main, to the following principal contentions: (1) that the hearing officer erred in finding the respondents could have obtained relief through avenues other than continuing the phony-job ruse; (2) that they were unfairly precluded from introducing expert testimony bearing on the propriety of their conduct; (3) that the phony-job ruse was an appropriate investigative device for obtaining evidence of judicial predisposition in the circumstances; (4) that imposing discipline for such conduct would

[12] Like Crossen, Donahue stresses that Walsh's statements were eventually used in a motion to disqualify, but by then it had become public anyway, it was one among a number of other matters, and the tape of the New York interview itself was never used.

violate their rights to due process; and (5) that the conduct should be excused or mitigated for reliance on advice of counsel. We consider each in turn.

**1. Alternative relief**. In their briefs on appeal, both Crossen and Donahue lead with contentions that the hearing officer erred in concluding that they could have pursued relief through alternative avenues – specifically, by filing a complaint with the CJC or requesting an investigation by the Chief Justice of the Superior Court. Crossen characterizes this conclusion as the "central premise" and "linchpin" of the hearing officer's report. Donahue grants it similar status: that she failed to "give due weight to the importance of vigorous advocacy" by finding it improper for the respondents to "investigate the allegations themselves." Donahue's Brief on Appeal at 47, quoting Matter of an Attorney, 442 Mass. 660, 670, 20 Mass. Att'y Disc. R. 585, 597 (2004). Both respondents misstate the nature of the hearing officer's finding and overstate its implications.

At no time did the hearing officer say or suggest that Crossen was ethically prohibited from filing a motion to recuse or from investigating the grounds for such a motion. She did not rule that Donahue could not undertake his own investigation of the statements attributed to Walsh in Halifax. Nor did she maintain that the alternatives she described would have produced the case-specific relief their clients needed. On the contrary, she confessed openly that she did "not claim to know whether such actions would have produced the results the respondents sought . . . ." Hearing Report ¶ 593. Like the hearing officer, we view respondents' failure to pursue those alternatives, however unappealing as adversarial weapons, both as casting doubt on their claims to be

motivated by an "obligation to the system" and doing little to bolster their professions to be engaged, as Crossen puts it, only in a "quest for the truth."

More importantly, the argument is an irrelevant diversion. The central issue – both here and as fully understood by the hearing officer – is not whether it was appropriate to conduct an investigation or to file a motion to recuse, which no one disputes, but whether the means the respondents employed in doing so were ethically permissible. As indicated below, we agree with the hearing officer that they were not. In other words, even if the respondents were correct that no CJC complaint or request for investigation could have helped their clients (we express no opinion on the point), this would not render permissible conduct that was not otherwise permissible. Should the respondents be right on the point, that would signify – at worst – only that there was no ethically permissible option that could have directly advanced their clients' interests in this respect.[13] This would not absolve the respondents of blame for engaging in wrongful conduct. Lawyers are routinely called upon to give their clients the bad news that no legal options remain open to them. Having to do so – even when a billion dollars are at stake – does nothing to alter a lawyer's duty to conduct himself ethically.[14]

We are also left to wonder why none of the respondents took the time to examine whether Walsh's statements about Judge Lopez actually described cognizable evidence of judicial misconduct or of a disqualifying bias. There is good reason for doubting this, the

[13] This we will never know because they did not try any of them, whether through a complaint to the CJC, an application to the Chief Justice, or a even a straightforward request to Walsh that he tell them what had happened in Halifax.

[14] Along similar lines, Crossen invokes Matter of Kurker, 18 Mass. Att'y Disc. R. 353 (2002), in raising the specter of a choice between the "Scylla" of continuing the ruse and the "Charybdis" of filing a factually deficient motion to recuse, thus subjecting him to sanctions either way. Crossen's Brief at 76-77. The choice is a false one: if there is no ethically appropriate way to substantiate the grounds for disqualification, the proper decision is to abandon the motion, not (as his argument necessarily implies) to file a frivolous one. There was clear sailing between both of these imagined navigational hazards.

unexamined premise of the respondents' defense. A judge's impartiality may reasonably be questioned where she "has a personal bias or prejudice concerning a party . . . ." S.J.C. Rule 3:09, Canon 3(E)(1). In Haddad v. Gonzalez, 410 Mass. 855 (1991), however, the Supreme Judicial Court made clear that the disqualifying bias must be one acquired from an extrajudicial source.

Haddad filed a summary eviction action to which his tenant interposed counterclaims based on the condition of the premises. Haddad sought the trial judge's recusal on the ground that, in a prior case involving Haddad and the same rental property, the judge had described the building as dangerous and "in deplorable condition" and had characterized Haddad himself as "not credible" and as a landlord whose "objective was to 'bleed' the properties as long as possible without any regard whatsoever for the health, safety and wellbeing of his tenants." Id. at 861. This evinced, Haddad argued on appeal, a personal bias or prejudice against him that manifested itself in the trial and outcome of the second case.

The Supreme Judicial Court rejected the claim that the judge's remarks, with which it nonetheless expressed its "clear disapproval," required disqualification in the second case. While the Court noted that the poor condition of the building in the first case "appear[ed] to have led the judge to develop a negative opinion of Haddad's building and his performance as a landlord," the judge had "acquired his opinion . . . in his judicial role and not from an extrajudicial source." Id. at 862. This factor, the Court noted, "weighs heavily in favor of the judge's decision not to disqualify himself." Id., quoting Commonwealth v. Dane Entertainment Servs., 19 Mass. App. Ct. 446, 460 (1984).

It is difficult to distinguish the alleged comments attributed to Judge Lopez – in essence, that she told Walsh "who the good guys were and who the bad guys were," and who was credible and who was not – as qualitatively different from the opinion the trial judge carried over from one trial to the next in Haddad. In both instances the opinions were acquired in the judge's judicial capacity from a prior action involving the party in question, not from any extrajudicial source. While the point may not have dispositive force here, it does expose as overblown the melodramatic claims that the respondents had a solemn duty to combat "judicial corruption" in a noble effort to secure for their clients "the fundamental requirements of due process." Unlike the Charles Restaurant investigation, which (if true) did suggest a cognizable impropriety, it is far from clear that the statements attributed to Walsh (if true) were likely to advance their clients' position.

**2. Expert testimony**. All three respondents proffered the testimony of expert witnesses to opine, directly or indirectly, as to the propriety of their conduct. The hearing officer granted bar counsel's motion in limine to exclude all such testimony. The board chair denied appeals from this ruling, and Justice Greaney denied a subsequent interlocutory appeal. All three respondents have renewed their objections on appeal.

**Donahue** sought to call Attorney Camille F. Sarrouf, a highly respected Boston trial lawyer and past president of the Massachusetts Bar Association, to testify "that a reasonable, experienced trial attorney in Donahue's position would have felt duty-bound to investigate the accuracy of the Halifax report." Donahue's Brief at 23. "What a reasonable lawyer would have done in the circumstances," Donahue argues, "is a classic subject of expert testimony and does not fall within the prohibition [under Fishman v. Brooks, 396 Mass. 643, 650 (1986)] on expert testimony about the fact of an ethical

violation." What a "reasonable lawyer" would have done may indeed be "a classic subject" of expert testimony, but such testimony is offered – classically – to establish the duty of care in a legal malpractice action, as to which expert testimony is usually required as part of the plaintiff's prima facie case. See, e.g., Harris v. Magri, 39 Mass. App. Ct. 349 (1995). In a bar discipline proceeding, however, expert testimony is not required either to show a standard of care, Matter of Buckley, 2 Mass. Att'y Disc. R. 24, 25 (1980), or to establish a rule violation. Matter of Tobin, 417 Mass. 81, 86, 10 Mass. Att'y Disc. R. 269, 274 (1994). To the contrary, expert testimony on such subjects is "inappropriate." Matter of Saab, 406 Mass. 315, 329, 6 Mass. Att'y Disc. R. 278, 292 (1989), quoting Fishman v. Brooks, 396 Mass. at 650.

Further, testimony that a reasonable lawyer would investigate is, as so expressed, undisputed, even self-evident. On the one hand, that bland truism sheds no light whatsoever on whether the *kind* of investigation Donahue participated in was ethically permitted. On the other hand, to the extent the testimony would touch upon the nature of the investigation, it necessarily touches also on the propriety of the phony-job ruse and, in consequence, the later misrepresentations. In that event, the testimony would concern "the fact of an ethical violation" and would thereby both fall within the prohibition of Fishman and trench upon the hearing officer's province to determine whether a violation occurred. The former is "inappropriate" while the latter is a question as to which a hearing officer does not need an expert opinion. See Fishman v. Brooks, 396 Mass. at 650; Matter of Saab, 406 Mass. at 329, 6 Mass. Att'y Disc. R. at 292; Matter of Tobin, 417 Mass. at 86, 10 Mass. Att'y Disc. R. at 274. Contrast Matter of Fordham, 423 Mass. 481, 12 Mass. Att'y Disc. R. 161 (1996) (expert testimony admitted where the

determination whether a fee is "excessive" requires, by the very terms of the ethical rule in question, consideration of "the fee customarily charged in the locality for similar legal services"). Even if such testimony could be deemed appropriate, moreover, there has been no showing that the refusal to admit it constituted an abuse of the hearing officer's discretion.

**Crossen** has not quibbled with the question whether his expert's testimony went to the fact of an ethical violation. He proffered the testimony of Professor Charles Wolfram, an acknowledged authority on legal ethics who had previously written a letter defending Crossen's conduct to the Department of Justice. Crossen asked that the professor's letter and live testimony be entered into evidence. He argues on appeal that the hearing officer erred in "mechanistically" applying Fishman to exclude the testimony.

To the extent Crossen's position rests on arguments similar to Donahue's, we reject it for the same reasons. As best we understand his argument, however, Crossen appears also to imply that, while expert testimony is not required to establish an ethical violation, it should be allowed to refute a claim that he committed an ethical violation. We fail to see the distinction apparently drawn, and in any event it is difficult to see how the failure to permit it would amount to an abuse of discretion by the hearing officer, the Board chair, and the single justice.[15]

There appears also to be a sense in which Crossen is arguing that expert testimony is particularly appropriate when determining whether one has violated the so-called

[15] Bar Counsel has laid out in convincing fashion the degree to which Professor Wolfram's opinion is predicated on an impoverished and sometimes flatly inaccurate view of the extent of Crossen's involvement in the events leading up to, during, and after the New York interview. See Bar Counsel's Brief at 64-66. Technically speaking, these deficiencies go to the weight of the testimony rather than its admissibility, but they also make it evident that its exclusion was not an abuse of discretion. Furthermore, as indicated below, the professor's legal analysis of the patent infringement cases differed sharply from the hearing officer's, and we agree that hers was more convincing.

"catch-all" provisions of the rules – those forbidding conduct that reflects adversely on fitness to practice or is prejudicial to the administration of justice. See DR 1-102(A)(5) and (6). If, however, liability may be disputed on the ground that those rules are too vague to be applied to the conduct at issue, that is a legal determination for the Board and the Court, not a fit subject for the testimony of dueling legal experts.

**Curry** proffered the testimony of former Attorney General Robert Quinn, for whom Curry once worked as an assistant attorney general. In addition to defending Curry's conduct as proper, Quinn would have testified about the norms for undercover investigations in the context of criminal law enforcement. Expert testimony as to the propriety of Curry's conduct was rightly excluded for the same reasons we rejected similar arguments by Crossen and Donahue. Testimony about the "norms" of criminal investigations was irrelevant, since (as discussed below) the hearing officer convincingly distinguished criminal undercover investigations from those undertaken by private counsel representing parties in civil matters. We note, in addition, that Curry's brief on appeal devotes but a single sentence restating his position below. "[A] short, conclusory argument" that "does not rise to the level of adequate appellate argument" may be disregarded. Commonwealth v. Edwards, 420 Mass. 666, 667 n.2 (1995), citing Commonwealth v. Cook, 419 Mass. 192, 194 n.1 (1994).

**3. The propriety of the conduct.** A lawyer is forbidden by DR 1-102(A)(4) from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and by DR 7-102(A)(5) and (7) from knowingly making "a false statement of law or fact" or "counsel[ing] or assist[ing] his client in conduct he knows to be illegal or fraudulent." In accordance with the common understanding of the words in question, it cannot seriously

be questioned that false statements were made or that fraud and deceit were used to convince Walsh of the existence of the phony job and of the reason for the interviews in Halifax and New York. The respondents maintain, however, that deception of the sort they practiced does not fall within the proscription of these rules. We disagree.

First, there are, as the hearing officer pointed out, only narrowly circumscribed situations in which lawyers acting on behalf of private clients may sometimes use deception in investigatory activity. While such activity is common in criminal investigations, there are detailed regulatory schemes to cabin the discretion of criminal prosecutors, see, e.g., In re Gatti, 8 P.3d 966 (Ore. 2000), and private lawyers are not encumbered by the ethical duties that enjoin prosecutors to seek justice, not just victory. See Mass. R. Prof. C. 3.8; Commonwealth v. Tabor, 376 Mass. 811, 819-820 (1978). Not surprisingly, therefore, deception in civil litigation has been sanctioned only in the so-called "tester" cases, where an undercover investigator poses as an applicant for a job or housing in order to gather evidence of illegal discrimination.[16] Such impostures are accepted as a necessary means to obtain evidence. See, e.g., Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

The respondents rely on recent cases that have extended the rationale of the tester cases to the field of patent infringement, where impostors pretending to be customers induce representations about the sale of infringing products. In these cases, courts rejected claims that lawyers' involvement in such impostures violated DR 1-102(A)(4).

[16] We do not deal here with trickery in a controlled setting, such as that taking place in front of a judge with her permission as part of what is plainly an adversarial process (and so understood by the witness). It is not proper to engage in in-court deception without the court's permission. See Matter of Gross, 435 Mass. 444, 17 Mass. Att'y Disc. R. 271 (2001). Also, whether a statement "is regarded as one of fact can depend on the circumstances." Mass. R. Prof. C. 4.1, Comment [2]. Statements conventionally made during negotiations, such as a party's intentions with regard to settlement, are not taken as statements of fact. Id. Neither of these scenarios is present here.

Instead, the courts found deception as to identity and purpose by posing as normal consumers to be "an accepted investigative technique, not a misrepresentation" within the meaning of the rule. Gidatex v. Campiello Importers, Ltd., 82 F. Supp.2d 119, 122 (S.D.N.Y. 1999); accord Apple Corps Ltd. v. Int'l Collectors Soc., 15 F. Supp.2d 456, 474-475 (D.N.J. 1998).

As the hearing officer rightly observed, however, the phony-job ruse involved here greatly exceeded the narrow scope of the deception permitted in the infringement cases. The only misrepresentations made in the infringement cases were "as to the [impostors'] purpose in calling and their identities," and the callers sought only to determine the sellers' "day-to-day practices in the ordinary course of business." Apple Corps, 15 F. Supp.2d at 474-475. Similarly, in Gidatex the court stressed that the impostors neither "cause[d] the sales clerks to make any statements they otherwise would [not] have made" nor otherwise "tricked or duped" them. 82 F. Supp.2d at 122. To obtain the evidence they sought, the investigators asked only "simple questions such as 'is the quality the same?' or 'so there is no other place to get their furniture?'" Id. So constrained, "a lawyer's use of deception to detect ongoing violations of the law is not ethically proscribed . . . ." Flebotte v. Dow Jones & Co., 2001 U.S.D.C. Lexis 21327, at 5 (D. Mass. 2001), citing United States v. Talao, 222 F.3d 1133,1140 (9th Cir. 2000).

Putting to one side that there were no "ongoing violations" here, the infringement cases sanction a course of deception nothing like that in which the respondents participated. The whole point of the phony-job ruse was to "trick or dupe" Walsh into making statements he "otherwise would not have made." This was because the premise of the respondents' dealings with Walsh was their expectation that he would not disclose,

in violation of his obligations as a clerk, confidential communications with a judge unless he were seduced by an offer he could not refuse. Hence the dream job, the meticulous arrangements to make it seem real, the fancy hotels, the cash, the limousine service – all the blandishments that propped up what the hearing officer aptly likened to a Potemkin village. When blandishments failed, Crossen and Donahue resorted to the threats to make public Walsh's statements and the bar letter. Given such facts, the hearing officer rightly distinguished an imposture of ordinary consumers from the deadfall trap the respondents set for Walsh.

These are not subtle or carping distinctions. They go far beyond the mere winding of a more "extensive skein of falsification" than in the infringement cases. Donahue's Brief at 27 n.18. The differences go to the heart of what saved the limited deception in Apple Corp and Gidatex – and what consequently condemns the fundamentally dishonest ruse they worked on Walsh. The differences we have identified, particularly the efforts to trick Walsh into saying what he would not ordinarily have said, are as real and as critical as those that distinguish, in the criminal law, a legitimate undercover investigation from entrapment. See, e.g., J.R. Nolan & L.J. Sartorio, Criminal Law, 32 M.P.S. § 689, at 726-729 (2001) (entrapment defense succeeds on a showing that the criminal conduct was "the product of the creative activity" of government officers and that the defendant was not predisposed to commit it). The distinctions fatally undermine claims that the respondents' conduct reasonably comported with the law on the subject of deceptive investigations.[17]

[17] That Crossen's expert could argue that the respondents' ruse is legally indistinguishable from the imposture described in Apple Corps demonstrates not the reasonableness of their conduct but the wisdom of the Court's prohibition against expert testimony on such issues.

Of course, Apple Corp and Gidatex were decided after the conduct at issue here, but it is the respondents, not bar counsel, who rely on them to justify their position. That the cases postdate their actions serves only to underscore that, at the time of the misconduct in 1997, there was no law that permitted deceptive investigations by private lawyers beyond the tester cases.

The respondents' use of impermissible deception also renders the tape-recording of the New York interview improper, even though (1) it violated no local statute to do so without Walsh's consent, and (2) there are ethics opinions that sanction secret taping. Even when the ABA abrogated its blanket ban on secret taping in 2001, it nonetheless warned against secret taping "where it is accompanied by other circumstances that make it unethical." ABA Formal Opinion 337 (1997). "It is not the use of recording devices, but the employment of artifice or pretense, that truly poses a threat to the trust which is the bedrock of our professional relationship." Board of Prof. Ethics & Conduct v. Plumb, 546 N.W.2d 215, 217 (Iowa 1996).

**Second**, the respondents' defense reduces, in any event, to a contention that their actions fall within some unstated exception to the plain language of DR 1-102(A)(4) and DR 7-102(A)(5) and (7). As discussed above, we believe the evidence establishes that bar counsel proved that their conduct did not fit into any applicable exception to the requirements of those rules. In fact, there is a substantial likelihood that the burden was not even bar counsel's to carry.

Even where what is at issue is a stated exception to a disciplinary rule, the burden is on the lawyer in a bar discipline proceeding to prove that the exception applies. See, e.g., Matter of Eisenhauer, 426 Mass. 448, 452, 14 Mass. Att'y Disc. R. 251, 256 (1998)

(burden on lawyer to prove client consent to waive conflict of interest); In re Lane's Case, 889 A.2d 3, 13 (N.H. 2005) (same for exception to confidentiality rules); Beery v. State Bar of California, 739 P.2d 1289, 1293-94 (Cal. 1987) (same for exception to rule prohibiting business transaction with a client); In re Cohen, 82 P.3d 224, 230-31 (Wash. 2004) (en banc) (same for exception to rule forbidding prejudicial withdrawals); Rodgers v. Comm'n for Lawyer Discipline, 151 S.W.3d 602, 615-16 (Tex. App. 2004), review denied, No. 05-0017 (2005) (same for exception to rule requiring the filing of advertisements). If a lawyer must prove the application of an explicit exception, it would appear even more compelling that the onus should be on the respondents to prove an implicit exception to the rules prohibiting misrepresentation and deceit. They have not carried that burden.

**Third**, Donahue maintains that that there is "simply no evidence that [he] ever made any false statement to Walsh," and certainly none that was material. The misrepresentations made to Walsh to get him to the New York interview necessarily carried forward the implications that there was a job and that the purpose of the meeting was to interview him for it. By virtue of his participation in the planning of the New York interview, Donahue circumvented the rules prohibiting such misrepresentations through another, in violation of DR 1-102(A)(2). We have already cited authority establishing his responsibility for misrepresentations Crossen later made in his presence, with his knowledge, and with at least his tacit approval. See Matter of the Discipline of an Attorney, 2 Mass. Att'y Disc. R. 100 (1981), discussed at page 47, supra. Donahue's argument that the misrepresentations were not violative because they were not "material" borders on the frivolous. There is a substantial question whether materiality is required

to establish violations of DR 1-102(A)(4) and DR 7-102(A)(5) & (7). The Court has not hesitated to find violations of these rules where a false statement was not material.[18] In any event, the misrepresentations made to Walsh regarding the imminence and inevitability of his public exposure were undeniably material. The case on which Donahue relies for his contention that materiality matters classified a misrepresentation as material "if it involves information that would or could significantly influence the hearer's decision-making process." Conduct of Kluge, 332 Or. 251, 255 (2000). Misrepresentations about the imminent disclosure of Walsh's statements were clearly intended, and could reasonably be expected, to "significantly influence" Walsh's decision whether to cooperate with Crossen and Donahue.

Nor may these misrepresentations be sloughed off as mere statements of "expectation, estimate, opinion, or judgment" that would not be actionable as misrepresentation in a civil action. Donahue's Brief at 42, quoting Zimmerman v. Kent, 31 Mass. App. Ct. 72, 79 (1991). Mention of the "missile" that was about to be fired, and the later statement about "the train leaving the station," cannot be dismissed as merely an expression of Crossen's "sense of urgency." The statements necessarily and falsely implied, and the respondents hoped Walsh would conclude, that there were well-advanced plans to make almost immediate use of the information when, as we have already found, the respondents knew (1) that there were no plans afoot to disclose the information and (2) that the information would not be used at all unless Walsh confirmed it.

[18] In Matter of Cowin, 2 Mass. Att'y Disc. R. 48 (1981), the Court sustained findings that a lawyer's failure to correct a client's false testimony at a deposition violated DR 1-102(A)(4) and DR 7-102(A)(5) & (7) even though the client's statement – that he had signed his verified complaint in front of a notary – could

**4. Due process.** Invoking comments from Justice White's concurring opinion in In re Ruffalo, 390 U.S. 544 (1968), the respondents also accuse the hearing officer of finding misconduct by the "arbitrary application" of an indeterminate rule. In Ruffalo Justice White expressed concern whether broadly worded standards put attorneys on sufficient notice that their conduct would violate those standards. He argued that an attorney may not be disbarred "on the determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct." Id. at 554-556 (White, J., concurring), quoted with approval in Matter of the Discipline of an Attorney, 442 Mass. 660, 668 (2004). From this, Crossen argues that it would offend due process to impose discipline here because, "as illustrated by Charles Wolfram's opinion," "responsible people would differ in appraising the propriety of Crossen's conduct." Crossen's Brief at 16.

The argument is unconvincing. Ruffalo was decided before there even were disciplinary rules; the Code of Professional Conduct had not yet been created. Rather, Justice White was addressing a standard so vague that it contemplated disbarment for "conduct unbecoming a member of the bar." 390 U.S. at 554 (White, J., concurring). Commentators have since quoted his remarks when describing the so-called catch-all provisions of Canon One, that is, DR 1-102(A)(5) (prohibiting conduct that is prejudicial to the administration of justice) and DR 1-102(A)(6) (prohibiting conduct that reflects adversely on one's fitness to practice law). See, e.g., A. Kaufman, Problems in Professional Responsibility 667 (3rd ed. 1989); C.W. Wolfram, Modern Legal Ethics § 3.3, at 87-88 (1986). It was in connection with those rules, not (A)(4), that the Supreme

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hardly be deemed a "material" fact in the circumstances by any definition of the word. See id. at 49 n.1, 53.

Judicial Court quoted Justice White's concurring opinion. See Matter of an Attorney, 442 Mass. 660, 667-669, 20 Mass. Att'y Disc. R. 580, 593-596 (2004). See also Matter of the Discipline of Two Attorneys (Two Attorneys), 421 Mass. 619, 627-629, 12 Mass. Att'y Disc. R. 580, 590-592 (1996) (discussing the need for limiting construction of DR 1-102(A)(5)). In contrast, DR 1-102(A)(4) is, as Professor Kaufman notes in discussing the problems of generality in rulemaking, "a rather specific prohibition" compared to the vaguer proscriptions of (A)(5) and (A)(6).[19] A. Kaufman, supra, at 667.

It follows that the prohibition against "dishonesty, fraud, deceit or misrepresentation" does not raise concerns of equal dimension. And whatever vagueness may be deemed still to inhere in DR 1-102(A)(4), there is none at all in DR 7-102(A)(5) and (7), which expressly and flatly forbid, respectively, "making a false statement of law" and "counsel[ing] or assist[ing] a client in conduct the lawyer knows is illegal or fraudulent." The hearing officer was right to find violations of DR 1-102(A)(4) and DR 7-102(A)(5) and (7).

Even as applied to the two more general rules, however, Justice White's statement cannot be taken literally or viewed as enunciating a working standard for determining violations of these rules. If it were, there could never be a violation of DR 1-102(A)(5) and (A)(6) so long as a respondent could produce a single "responsible" lawyer – expert or no – to dispute a contention that a particular action interfered with the administration of justice or reflected adversely on one's fitness to practice. Such lawyers (and such experts) are not in short supply.

[19] Professor Wolfram does describe (A)(4) as a "broad provision," but his footnote to that proposition mentions no troublesome applications of it and concludes with the comment that "[c]ourts are brusk in rejecting technical legal arguments that dishonest acts were not fraudulent." C.W. Wolfram, Modern Legal Ethics § 3.3, at 87-88 & n.55 (1986).

The New York Court of Appeals has articulated and applied an objective test to address Justice White's concerns. In Matter of Holzman, 557 N.E.2d 30 (N.Y. 1991), the elected district attorney for the Borough of Brooklyn was disciplined under DR 1-102(A)(6) for making a false allegation of judicial wrongdoing. Responding to the notice issue, the court framed the relevant question as "whether a reasonable attorney, familiar with the Code [of Professional Responsibility] and its ethical strictures, would have notice of what conduct is proscribed . . . ." Id. at 33 (citing authorities, including Justice White's concurrence in Ruffalo). See also PR 94-2, 10 Mass. Att'y Disc. R. 309, 315-316 (1994) (applying Holzman to find (A)(6) violation). As evidence that Holzman was on notice that her allegations could be held to reflect adversely on her fitness to practice, the court noted that her staff had counseled her to wait until she had received a transcript of the judge's remarks before recklessly repeating statements attributed to him. Id. at 33.

Here Crossen and Donahue were placed on similar notice regarding their conduct (1) by the misgivings expressed by co-counsel, such as Barshak and former Judge Adams about Curry's probity; (2) by Peter Rush's demand for assurance that, as a private citizen, he could participate the phony-job ruse; (3) by Attorney Shaw's refusal to allow them to use his office for the New York interview; and (4) by Shaw's suggestion that Crossen review Miano before going forward with that venture. Despite such notice, and without undertaking any comprehensive legal research, any meaningful investigation, or any questioning of the investigators involved in the Halifax interview, Crossen and Donahue proceeded with the New York interview and its aftermath. In fact, they shielded their conduct from scrutiny and contrary advice by keeping co-counsel in the dark about their intentions and plans: Barshak and Adams learned about the New York interview only

afterwards (Tr. 8:25, 8:102), and the first news Barshak, Adams, and Barisano received regarding the subsequent confrontations with Walsh came from the media in mid-September. Tr. 9:52; 8:137; 8:40.

Further, their efforts to intimidate Walsh with threats of disclosure, coupled as they were with misrepresentations about its likelihood and imminence – while perhaps a somewhat closer call – seem to us sufficiently "violative of accepted professional norms" as to violate DR 1-102(A)(5) and (6). Two Attorneys, 421 Mass. at 628, 12 Mass. Att'y Disc. R. at 592, quoting Matter of Hinds, 90 N.J. 604, 632 (1982). In this respect it is important not to lose sight of the hearing officer's core subsidiary and ultimate findings, which we have adopted:

> Crossen and Donahue deliberately sought to force Walsh to do their bidding by threatening to disclose the contents of the "tapes," including embarrassing or compromising statements he had made during the phony-job interviews. Joined, as they were, with the use of the bar letter, false claims about the extent of the taping (implying that the Halifax interview had also been taped), and Crossen's misrepresentations about the immediacy of court filings in which Walsh's conduct would be exposed, such actions border on outright extortion.

Hearing Report at 207. We believe that "a reasonable attorney, familiar with the Code [of Professional Responsibility] and its ethical strictures, would have [had] notice" that such outrageous conduct is proscribed. Matter of Holzman, 557 N.E.2d at 33.

We are also mindful that the violations of DR 1-102(A)(5) and (6) are not the sole basis for finding misconduct here. The rulings are, in a sense, throw-ins on top of sound rulings that the respondents violated other, unquestionably specific disciplinary rules. In this regard, see Two Attorneys, supra, in which the Court collected cases where the basis for a violation of DR 1-102(A)(5) had not been explained because substantial violations

of other rules made the question "unimportant." 421 Mass. at 619, 12 Mass. Att'y Disc. R. at 590-591. Given the serious violations of other rules here, the dispositions we recommend would not be altered even if we had not embraced the hearing officer's rulings with regard to DR 1-102(A)(5) and (6). See Matter of Kerlinsky, 406 Mass. 67, 74 n.6 (1989), 6 Mass. Att'y Disc. R. 172, 180 n.6, cert. denied, 498 U.S. 1027 (1990).

**4. Delay.** We can dispense fairly quickly with Crossen's claim that undue delay in these proceedings should be treated as a mitigating factor in choosing the appropriate sanction. First, there was no undue delay. Crossen has yet to explain how bar counsel could even have investigated, let alone have tried, this case without the tape recordings of the New York interview and Walsh's later conversations with Crossen. Those recordings were in the custody of the Department of Justice. Even after it closed its investigation, the DOJ did not fall over itself in its eagerness to share the tapes and other essential evidence. The federal investigation closed in February 2001 (Ex. 28), yet documents and other evidentiary material from the DOJ were still trickling in to OBC as late as June 28, 2002. See Chalk A (fax heading). Bar counsel's decision not to investigate and try the cases piecemeal was not unreasonable, and the (also not unreasonable) refusal of Donahue and Curry to participate in the investigation before completion of the federal inquiry made an earlier hearing untenable.[20]

[20] The board properly refused requests to sever the cases against the three respondents. These matters arose from the same set of intersecting facts, and separate proceedings would have forced bar counsel to choose between holding three separate hearings simultaneously, with separate assistants assigned to each, or conducting serial trials – a true Scylla and Charybdis that raises difficult questions as to which respondent would be permitted or required to go first). Of course, separate hearings would grant the last of the respondents, under Crossen's overbroad reading of Matter of Gross, 435 Mass. 444, 17 Mass. Att'y Disc. R. 271 (2001), a legitimate ground for complaining about the delay.

Despite Crossen's observation that joinder is not expressly mentioned in the rules, the Board has employed it routinely for some twenty years, and the Court has accepted it – expressly in the case of joinder of claims, see Matter of Saab, 406 Mass. 315, 322 n.10, 6 Mass. Att'y Disc. R. 278, 285 n.10

Second, even undue delay is not a ground for dismissal or mitigation unless it results in prejudice to the lawyer's defense, see, e.g., Matter of Kerlinsky, 406 Mass. at 75, 6 Mass. Att'y Disc. R. at 180-181, or extensive and damaging public opprobrium attributable to the delay. See Matter of Gross, 435 Mass. 444, 450, 17 Mass. Att'y Disc. R. 271, 277 (2001). None of the respondents has demonstrated any substantial prejudice to their defense, and the withering publicity to which Crossen refers stemmed not from the delay in the disciplinary proceeding, but from actions by private parties (like Walsh's press conference), the federal criminal investigation, and press interest in the lurid nature of the ruse and its aftermath. Crossen's efforts to construe Gross as not requiring such a showing are strained at best. His argument also overlooks the fact that he was permitted to continue practicing law during all the time consumed by the federal investigation, the disciplinary hearing, the drafting of the hearing officer's report and this appeal.[21]

**5. Advice of counsel.** Donahue[22] argues that his conduct should be excused or mitigated by his reliance on Crossen's expertise, as a longtime prosecutor, on the subject of undercover investigations. As the hearing officer observed, Donahue's putative

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(1989), and tacitly in the joinder of parties. See, e.g., Matter of Pike, 408 Mass. 740, 6 Mass. Att'y Disc. R. 256 (1990); Matter of Dillon and Joseph, 20 Mass. Att'y Disc. R. 575 (2004); Matter of Grossman, 3 Mass. Att'y Disc. R. 89 (1983); Matter of Two Attorneys, 421 Mass. 619, 12 Mass. Att'y Disc. R. 580 (1996); Matter of the Discipline of Two Attorneys, No. BD-2003-048 (March 1, 2005).

[21] Reference has also been made to the length of time the hearing officer needed to complete her report. We cannot fault her, a busy practitioner who volunteered to hear the longest proceeding in the Board's history, for the time she took in producing her comprehensive and detailed report. As a consequence, we see no need to take up her conditional suggestion that the sanctions we propose be made effective as of some date earlier than the entry of the Court's orders on disposition.

[22] To the extent Curry's proffer of the expert testimony of former Attorney General Quinn may be construed as interposing an advice of counsel defense, we reject it for the same reasons we reject Donahue's argument. Moreover, Curry devoted but a sentence to the offer of Quinn's testimony in his brief on appeal (at page 19), a quantum that falls far short of a reasoned appellate argument that would preserve the issue. See Commonwealth v. Edwards, 420 Mass. 666, 667 n.2 (1995). At hearing, Curry testified that he had relied on the advice of an attorney named Barbara Smith, but he has waived any defense based on her advice by failing to raise it on appeal. See Board Rule 3.50(c).

deference can hardly be likened to that of a subordinate relying in good faith on instructions from a superior. See Matter of Grossman, 3 Mass. Att'y Disc. R. 89, 94 (1983); Matter of Jamieson, 10 Mass. Att'y Disc. R. 157, 157-158 (1994), disapproved in Matter of Nickerson, 322 Mass. 336, 12 Mass. Att'y Disc. R. 367, 373 (1996). Donahue was nobody's subordinate: his credentials and experience arguably surpassed that of any member of the Demoulas "dream team" of lawyers, and he was brought in to coordinate and oversee the Demoulas litigation.

To the extent his claim may be viewed as invoking the advice of counsel defense, it is also unavailing. There is no showing that Donahue has made out the elements of such a defense – he had, certainly, no attorney-client relationship with Crossen – and, as the hearing officer noted, we have rejected advice of counsel as a defense to a bar discipline proceeding. Matter of Baylis, 19 Mass. Att'y Disc. R. 44, 52 (2003) (rejecting, like other jurisdictions, advice of counsel as a defense but following those that allow it to be weighed in mitigation).[23]

Since the hearing officer issued her report, the full Court has had occasion to address the issue. Matter of Lupo, 447 Mass. 345 (2006), dealt with an attorney who had sued a complainant for filing an allegedly baseless disciplinary grievance against him. In upholding the board's conclusion that the claim was frivolous because of the absolute immunity granted bar grievants, the Court brushed aside Lupo's claim that he had relied

[23] Citing In re Order to Show Cause, 741 F. Supp. 1379 (N.D. Cal. 1990), Donahue also argues that his reliance on Crossen was an instance of the legal team's "divid[ing] up responsibility for major assignments," which is "a common procedure in cases where several law firms are cooperating in the defense of a case." Donahue's Brief at 27-28. At issue in Order to Show Cause, however, was whether sanctions should be imposed on members of the team who reasonably relied on the factual investigation of other lawyers in filing what turned out to be an unsubstantiated motion to recuse – not whether a lawyer

on the advice of the lawyer who was representing him in the civil action. Id. at 357. The Court held that the defense was not available in a bar discipline proceeding because, "[a]s an attorney, the respondent was obliged to be familiar with this court's rules." Id. It is clear, therefore, that the defense was not available to Donahue either.[24]

**Disposition**

In her discussion of sanctions, the hearing officer noted that the Supreme Judicial Court has generally imposed suspensions ranging from one to two years for a misrepresentation to a tribunal. See, e.g., Matter of McCarthy, 413 Mass. 423, 9 Mass. Att'y Disc. R. 225 (1993) (1 year); Matter of Neitlich, 413 Mass. 416, 8 Mass. Att'y Disc. R. 167 (1992) (1 year); Matter of Gross, 435 Mass. 444, 450, 17 Mass. Att'y Disc. R. 271, 277 (2001) (18 months); Matter of Nunes, 13 Mass. Att'y Disc. R. 584 (1997) (2 years); Matter of Meade, 21 Mass. Att'y Disc. R. 487 (2005) (a year and a day). Shorter suspensions have been imposed for material misrepresentations not made before a tribunal. See, e.g., Matter of Thurston, 13 Mass. Att'y Disc. R. 776 (1997) (6 months). But see Matter of Bloom, 9 Mass. Att'y Disc. R. 23 (1993) (reluctantly accepting stipulation for public censure where a prosecutor sought to trick two suspects with a fabricated confession into confessing to a crime); Matter of Aufiero, 13 Mass. Att'y Disc. R. 6, 26-27 (1997) (2-year suspension where misrepresentations in opinion letter were repeated in court filing and caused substantial financial harm).

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could delegate wholesale a determination as to the ethical propriety of conduct in which Donahue himself took part. See id. at 1384-1386.

[24] The Court's decision in Lupo also buttresses our conclusion that the hearing officer did not abuse her discretion in declining to hear the expert testimony of Attorney Sarrouf, whose testimony was offered in part to show that a reasonable attorney would have deferred to Crossen's expertise. Given Lupo, that inquiry would be irrelevant, except perhaps by way of mitigation of any sanction imposed. Donahue proffered the testimony as bearing on liability. See Donahue's Brief at 26 n.17.

The hearing officer also surveyed cases from other jurisdictions that had imposed discipline for isolated instances of unethical trickery or deception, for which public discipline, usually suspension, has been imposed. See Hearing Report at 224-225, and cases cited. A survey of cases from other jurisdictions that dealt with secret tape-recording deemed unethical in the circumstances yielded a similar range of sanctions. Id. at 225, and cases cited.

The hearing officer properly noted, however, that all the cases in these three groupings "involved single, isolated incidents." Id. at 224. None concerned "a scheme as intricate, as wide-ranging, as well-planned or as potentially harmful to innocent people as the Walsh affair." Id. at 225. Furthermore, absent from the cases in her survey were the subsequent efforts, through threats and misrepresentation, by which Crossen and Donahue sought to compel Walsh's cooperation.

We agree with the hearing officer that the sanction here should exceed those meted out in the cases she surveyed. This is, in a sense, an all-or-nothing case: the respondents' massive and elaborate undertaking to trick and then bully Walsh into revealing confidential communications with Judge Lopez was either ethically proper or it was not. If it was not proper, as the hearing officer and we have concluded, it warrants substantial discipline – and certainly a sanction exceeding those in the cases she collected on misrepresentation, trickery, and unethical tape-recording. See In re Harrington, 128 Vt. 445, 266 A.2d 433 (Vt. 1970) (per curiam); In re Knight, 129 Vt. 429 (1971 (per curiam) (companion cases dealing with a scheme, resulting in criminal conviction and disbarment for the senior lawyer, to entrap a man in a compromising position with a young woman for the purpose of extorting concessions in a contemplated divorce action).

The respondents' arguments that discipline should be mitigated by the alleged "uncertainty" surrounding the propriety of their actions prove too much, for the argument goes directly to the question whether there were violations in the first place. In finding the violations, we have necessarily determined that there was no cognizable uncertainty that may now be weighed in mitigation. Whatever uncertainty there might be over precisely where to draw the line in such cases, the conduct here went far beyond it. Furthermore, even if the respondents were correct that some "uncertainty" surrounds the propriety of their decisions to conceive and continue the phony-job ruse, there is none at all about the threats and misrepresentations by which Crossen and Donahue later sought to compel Walsh's cooperation. If they had abandoned the venture after reviewing the unsatisfactory results of the New York interview, our proposed sanctions might have been quite different. Instead, however, Crossen and Donahue went on to compound their misconduct by ambushing, threatening, and lying to Walsh.

Another infirmity afflicts the respondents' related claims that their actions were undertaken in a good faith belief as to their propriety: the hearing officer did not believe them. She found an "absence of good faith in all three Respondents." Hearing Report at 219. She noted that the conduct was "business as usual" for Curry, who preyed on the desperation of the principals on the losing side of the Demoulas family and profited by their willingness to expend substantial funds in an attempt to reverse the judgments against them. She discredited Crossen's testimony that he had relied in good faith on the teaching of Miano. She rejected Donahue's claim that he could rely in good faith on Crossen's expertise and assurances about the undercover investigation. These findings

are fully supported by the record and the legal principles we have discussed in denying the respondents' objections to them.

In fact, the only legitimate "special" mitigating factor[25] we can glean from the record inheres in Donahue's – and perhaps Crossen's[26] – motivation. Their misconduct sprang from ardor to serve their clients zealously, not from their own self-interest. The Court, however, has not shown an eagerness to find much palliation in misguided zeal. See, e.g., Matter of Neitlich, 413 Mass. 416, 423-424, 8 Mass. Att'y Disc. R. 167, 175 (1992) ("Where this duty [to be truthful to the court and opposing counsel] is in seeming conflict with the client's interest in zealous representation, the latter's interest must yield."). Cf. Matter of Griffith, 440 Mass. 500, 509, 20 Mass. Att'y Disc. R.174, 188 (2003) ("the lawyer's obsession with the case and the contentious nature of the proceedings are not mitigating factors").

Whatever mitigation inheres in such zeal, Curry can claim none of it. Unlike Crossen and Donahue, Curry had no client until he intruded. An officious intermeddler who injected himself into the situation, he solicited Telemachus' business. When called upon to defend his conduct, he falsely claimed that he was acting as an investigator, not

[25] The Court has distinguished as largely unpersuasive what it termed "typical" mitigating circumstances – such as a reputation for good character, pro bono activities, a clean disciplinary record, and service to the bar and the community – from "special" mitigating circumstances, such as a contributing disability. See, e.g., Matter of Alter, 389 Mass. 153, 156-157, 3 Mass. Att'y Disc. R. 3, 7-8 (1983).

[26] There may be some reason to question the hearing officer's ultimate finding that Crossen was driven by the desire to continue receiving the substantial fees generated by the Demoulas litigation. The only basis for the finding was the amount of fees Crossen earned and the hearing officer's determination not to credit his testimony that he acted out of a sense of duty to the clients, not for the money. We need not resolve that issue here, as there is ample ground to support disbarment for Crossen, and a decision to reject the hearing officer's finding on the point would not alter the disposition we recommend. In contrast, the hearing officer had a solid basis in the record for finding Curry's conduct to be motivated not by zealous pursuit of his client's interests but by his own interest in profiting from the desperation of Arthur T., whose business Curry actually solicited.

as a lawyer acting on behalf of a client. See Hearing Report ¶ 47. He may not now be heard to argue that he was acting zealously on behalf of a client.

Even if there had been more support in the record for the putative mitigation, the aggravating circumstances identified by the hearing officer would have far outweighed them. First, to say the respondents had substantial experience is an understatement, and their wealth of experience was properly weighed in aggravation. See, e.g., Matter of Luongo, 416 Mass. 308, 312, 9 Mass. Att'y Disc. R. 193, 203 (1993), citing ABA Standards for Imposing Lawyer Sanctions § 9.22(I) (1992) (substantial experience is aggravating circumstance). Here, the respondents' vast experience "only serves to heighten the seriousness of [their] offenses." Matter of Bailey, 439 Mass. 134, 152, 19 Mass. Att'y Disc. R. 12, 34 (2003).

Second, the hearing officer weighed in aggravation the "marked lack of candor" all three respondents displayed at the hearing. Hearing Report at 227. There was no error in doing so.[27] See e.g., Matter of Eisenhauer, 426 Mass. 448, 457, 14 Mass. Att'y Disc. R. 251, 260 (1998); Matter of Friedman, 7 Mass. Att'y Disc. R. 100, 103 (1991).

[27] Crossen claims that taking into account his lack of candor at the hearing is tantamount to imposing discipline for "uncharged conduct" in violation of due process. The Court has routinely treated lack of candor as an aggravating circumstance. See, e.g., Matter of Eisenhauer, supra; Matter of Friedman, supra. Crossen relies on Apprendi v. New Jersey, 530 U.S. 466 (2000), and its progeny for the broad proposition that, as a matter of constitutional law, all aggravating circumstances must be pleaded in the petition for discipline – including those, like lack of candor, that have not yet occurred. See Crossen's Brief at 29 n.22. The argument is mistaken, as that line of cases addresses sentencing factors in criminal cases. Respondents in bar discipline proceedings are not entitled to the full panoply of rights accorded criminal defendants. See, e.g., Matter of Abbott, 437 Mass. 384, 391, 18 Mass. Att'y Disc. R. 2, 11 (2002). Even in a criminal case, moreover, a sentencing judge may consider uncharged conduct so long as the sentencing scheme is discretionary, not mandatory. United States v. Booker, 543 U.S. 220, 230, 233, 243-244 (2005). Obviously, there are no mandatory "sentencing guidelines" in bar discipline cases. See, e.g., Matter of the Discipline of an Attorney (and two companion cases), 392 Mass. 827, 836-837, 4 Mass. Att'y Disc. R. 155, 166 (1984) ("We do not adopt a posture of mandatory sanctions . . . .").

Curry took it one step further by showing "a complete disdain for the disciplinary process." Hearing Report at 227.

Third, the hearing officer gave great – and appropriate – weight to the "repellent" manner in which the respondents targeted Walsh. Whatever Curry's opinion of Judge Lopez, there was no reason whatsoever for him to believe that Walsh had engaged in any kind of misconduct. His clerkship had ended, and he was gainfully employed despite prior difficulties in finding a job. Yet Curry began digging into his past and "did not hesitate to beguile him with the false promise of a dream job in an effort to compromise him . . . ." Id. at 228. Crossen and Donahue had no compunctions about continuing a cruel ruse and then callously attempting "to flip him with threats and intimidation, like some cornered junkie . . . into becoming a cooperating witness." Id. To be sure, Walsh did not cover himself with glory in the two interviews; he told the investigators what he believed they wanted to hear. But the tapes of the New York interview show the lengths to which the investigators went to put words in his mouth with leading questions that later convinced Barshak and others of the worthlessness of the tapes.

We agree with the hearing officer that substantial sanctions are mandated for the respondents' misconduct. Not a single board member believes a sanction short of suspension would be appropriate for any of them. A majority of the board believes disbarment is warranted for Curry and Crossen. As for Donahue, the board unanimously recommends a lesser sanction. The latest comer to the scheme, Donahue's overall involvement did not approach the scope or severity of Curry's or Crossen's, and he participated only in the planning, not the execution, of the New York venture. While his conduct during the confrontation at the Four Seasons was reprehensible, as were the

mocking remarks he made about Walsh at the disciplinary hearing,[28] his role in Crossen's later efforts to bully Walsh into cooperating consisted principally of condoning and ratifying the wrongful conduct of another. On that basis, a majority of the board recommends that he be suspended for three years. The dissenters favor a shorter suspension.

Like the hearing officer before us, we feel compelled to comment on the other side of the injurious publicity about which Crossen complains. Wholly apart from the damage done to Walsh and to the respondents' practices and reputations, the publicity has taken an ugly toll on the public's perception of the legal profession and those who practice it. By their conduct, as the hearing officer observed, the respondents have "brought shame and disrepute upon the bar. They have left what one can only hope is a not indelible impression that lawyers, even very prominent ones, will do almost anything to prevail if enough money is at stake and available for their use." Id. at 228-229. The hearing officer believed it was necessary to "address the seriousness of the misconduct [and] reassure the bar and the public that such conduct is completely contrary to the oath of office taken by every lawyer . . . ." Matter of Foley, 439 Mass. 324, 339, 19 Mass. Att'y Disc. R. 141, 159 (2003). We wholeheartedly agree.

## Conclusion

For all of the foregoing reasons and except to the limited extent explicitly stated above, we unanimously adopt the special hearing officer's findings of fact and

[28]The hearing officer found "particularly callous" Donahue's "mean-spirited efforts [during his testimony] to mock Walsh's evident and understandable distress during the 'bracing'" by referring to the danger of Walsh's getting "fruit poisoning" and to Rush's having destroyed Walsh's illusions about the dream job with a statement "as cold as a stepmother's kiss." Hearing Report at 222. The hearing officer's reaction to Donahue's mocking remarks is not evidence of any personal animus on her part. It reflects only a reasoned

conclusions of law. An Information shall be filed with the Supreme Judicial Court recommending that respondents Gary C. Crossen and Kevin P. Curry be disbarred and that respondent Richard K. Donahue be suspended from the practice of law for three years.

Respectfully submitted,

_____
George A. Berman
Secretary

Voted: October 16, 2006

response to Donahue's inability, even years after the events in question, to acknowledge the seriousness of his conduct, to take responsibility for it, or to appreciate the foreseeable harm to the target of their ruse.