COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS

BAR COUNSEL

Petitioner

v.

VALERIANO DIVIACCHI

BBO FILE # C1-12-0140

RESPONDENT'S BRIEF

I. STATEMENT OF THE CASE

Though Bar Counsel's Amended Petition for Discipline and its submission of evidence is an open-ended moving target and not specific as to what acts it claims violated what Rules, it appears that Bar Counsel is alleging the following violations of the Rules of Professional Conduct:

1. Respondent's hybrid/contingent fee agreement with his client Ms. Camilla Warrender ("Warrender") was a violation of Rule 1.5 either as an attempt to charge a clearly excessive fee or as an agreement signed without informed consent to its differences from the model contingent fee forms;

2. Respondent's refusal to return from California to file a motion for injunctive relief and his inability to provide an settlement value opinion and get involved with settlement negotiations begun by Warrender's additional counsel hired after hiring the Respondent is a violation of Rules 1.1, 1.2, and 1.3.

3. The Respondent's following argument made once to the Boston Municipal Court in an unsuccessful motion is a violation of Rules 3.3 & 8.4:

> Discovery has further revealed that such deceit by the Defendant [Warrender] is her standard habit and business routine for dealing with attorneys. In the past ten years, Defendant has had >15 different attorneys represent her in a half dozen matters ranging from a divorce in Probate Court to a lender liability action in Federal Court with the same

pattern: she hires an attorney, works with him or her until she stops paying the bill, fires that attorney and disputes the bill and files a BBO complaint and then gets another attorney and starts the process again.

4. That Respondent's pleading to the BMC and representation in federal court that the agreed upon flat rate for his appearance in the underlying lender liability case of *Sovereign Bank v. Warrender* was $25,000.00, not $15,000.00, is a violation of Rules 3.3 and 8.4.

OBJECTION: The Panel has asked for briefing as to when Diviacchi's representation of Warrender was "terminated." Diviacchi objects to such briefing because there is no evidence that Warrender ever discharged Diviacchi from representing her and the only evidence of termination is the District Court's allowance of his Motion to Withdraw on or about 20 March 2014 that is in the Record as Exhibit 91. There is nothing in the Petition about any violation having to do with his withdrawal from the Civil Action and the issue of discharge or termination is irrelevant to anything in the Record. Without waiving this objection, Respondent attaches as Addendum 2 a memorandum on the issue of termination of the attorney-client relationship.

A. Statement of Facts

Respondent incorporates herein by reference his filed Request for Findings of Fact and summarizes them as follows.

During the entire time of Warrender's consultation and negotiations with Diviacchi regarding hiring him on a contingent fee basis to represent her in the $2.8 million Civil Action (and prior legal matters in 2011), she was a very sophisticated client with experience in complex financial matters and litigation of complex financial matters; with the ability to understand and revise convoluted legal, tax, and litigation documents; and with access to the legal advice of at least the following known and some unnamed attorneys for purposes of the Civil Action and for

hiring Diviacchi:

> Michael Gilleran of Adler and Pollock; Bill Delahunt; Bob Laurie; an attorney who added case law to her 93A demand letter; her mother's attorney, Tim Hughes; "One of the attorneys I spoke with earlier said he thought the bank will likely try to claim that my loan was a commercial loan, so I kept that in mind as I went through the file"; Maury Mariani; "Someone expressed surprised that there was no escrow for taxes"; John Roddy, "who came recommended as a predatory lending specialist"; Ken Gullicksen; Arthur Reade (her attorneys of "twenty years"); Geoffrey H. Smith, Debra A. Squires-Lee, and R. Victoria Fuller of Sherin & Lodgen.

On 1 May 2014, she hired Diviacchi for representation in the Civil Action. By signing the contingent fee agreement at issue, Warrender got exactly what she wanted though this was different from what she represented to Diviacchi she wanted. Diviacchi thought she wanted and he believed the scope of his representation to be: 1) let the property go into foreclosure because there was no way to stop foreclosure: 2) try to settle the Civil Action only after success in opposing the filed Motion to Dismiss; 2) litigate if settlement is not successful at that point; and 4) take to trial if settlement is not successful. What Warrender intended though she did not disclose her true intentions to Diviacchi was: 1) an attorney to file a general appearance to avoid default or dismissal and a meritless motion to stop foreclosure in the Civil Action that she could then use as leverage in immediate settlement negotiations for a short sale of the property; and 2) if such negotiations did fail, an attorney who would in fact then take the case to trial and beyond if necessary. What she wanted and got for all practical purposes was leverage for settlement and insurance that would provide legal representation if the settlement failed. It is undisputed that she did in fact receive this and that Diviacchi did not receive what he believed to be the scope of his representation pursuant to the contingent fee agreement: allow the property to go into foreclosure and then litigate and take to trial if need be a claim for monetary damages for lender liability against Sovereign Bank.

At the time of signing the contingent fee agreement at issue and during the subsequent few days of delay after signing it during which time she ordered Diviacchi not to file an appearance, Warrender knew that Diviacchi was leaving the state on 9 May to attend his daughter's college graduation and would not be returning until 22 May — because he was a solo

practitioner, his office would be closed during this time period. She knew that there was a pending foreclosure during this time period and that he did not see anyway to stop the foreclosure. Once he timely filed his general appearance and his associated court filings to avoid default and dismissal in the Civil Action, she began continuously hounding him in California demanding that he file and offered to pay him separately to file a motion for injunctive relief to try to stop the pending foreclosure.

After Diviacchi's appearance and his salvaging of the Civil Action from dismissal and default against Warrender and his placing it on sound cause of action footing, Warrender hired Attorney Jacobi who using Diviacchi's work was then able to settle the Civil Action and as a direct result of the settlement Warrender received $340,000 in gross monetary funds that she used to pay off other creditors and attorneys but still had left over $175,750 that was payable directly to her (she owed prior counsel in the Civil Action $55,000 and paid them $15,000; she supposedly owed the Jacobi attorneys for >hundred hours worth of work but paid them based on a verbal contingent fee agreement $22,500). While doing this, she and all other attorneys in the Civil Action ignored the filed attorney's lien of Diviacchi.

The 1 May 2012 hybrid fee agreement signed by Warrender consists of a contingent fee and a flat rate payment of $25,000 that in relevant part provides as follows:

> (1) The claim, controversy, and other matters with reference to which the services are to be performed are:
> SOVEREIGN BANK V. WARRENDER & COUNTERCLAIM
> (2) The contingency upon which compensation is to be paid is:
> recovery by judgment or settlement or otherwise
> ...
> (4) Compensation ... to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the gross amount collected: 33%; 40% if appellate litigation is necessary. ... Client is responsible for any amount owed to prior or other counsel not associated with the undersigned. CLIENT IS TO RECEIVE A CREDIT FOR A NON-REFUNDABLE FLAT RATE PAYMENT OF $15,000 PAID NOW AND $10,000 STILL DUE.

Based on this enforceable fee agreement, Diviacchi has ongoing court actions consisting of an attempt to enforce his lien that is still before the 1st Circuit and an ongoing civil action in the BMC to collect 1/3 of Warrender's $340,000 "recovery by ... settlement" in the Civil Action.

Diviacchi has admitted that in the BMC he made a one-time Argument based on what he believed to be reasonable inference from the available records but that in hindsight he has admitted was a poorly-phrased attempt to summarize his review of discovery and his inferences therefrom as to what he considered to be the nature and practice of clients such as Warrender: that Warrender filed a BBO complaint against him solely as a tactic to force a reduction or a total avoidance of his claims for legal fees against her.

II. DISCUSSION OF THE EVIDENCE

For purposes of brevity, Respondent incorporates herein by reference his filed Request for Rulings of Law.

A. Clearly Excessive Fees

In addition to Bar Counsel revealing during the course of the proceedings that they do not know what a contingent fee is (they have ignored and made no attempt to discipline Jacobi's verbal contingent fee agreement with Warrender), they have confused and are completely confused about the difference between an attorney's lien, clearly excessive fees whose determination must be based on an objective analysis, a subjective determination of ambiguities that often and sometimes naturally occur in enforceable contracts, and even the concept of technical proof of "informed consent" required by Rule 1.5.

1. Diviacchi's filed Attorney's Lien

Bar Counsel continuously insinuates but has no given no basis in law or fact to challenge the merits of Diviacchi's filed attorney's lien nor has Bar Counsel submitted any law or evidence

that his assertion, litigation, and appeal of an attorney's lien was a proceeding or assertion that was frivolous and not "a good faith argument for an extension, modification, or reversal of existing law" as stated in Rule 3.1. Bar Counsel has nowhere alleged a violation of Rule 3.1 nor submitted any evidence as to this Rule. This lien issue is completely irrelevant to these proceedings and factually Bar Counsel has not initiated any evidence on this issue upon which it has the burden of proof. Respondent objects to any consideration of it on Due Process grounds.

2. ***Bar Counsel's burden to prove clearly excessive fees is supposed to be based on an objective basis by the Rule 1.5 criteria and not by what Bar Counsel personally believes nor by what a client subjectively agreed or did not agree to pay nor by ambiguity in a fee agreement caused by a client's acts.***

Bar Counsel has completely ignored and has initiated no factual evidence nor expert testimony on the objective criteria of Rule 1.5 for which it has the burden of proof. It appears that they base their entire claim of clearly excessive fee on their personal agreement with Warrender's subjective claim that the contractual phrase "(2) The contingency upon which compensation is to be paid is: recovery by judgment or settlement or otherwise" does not apply to the settlement by short sale and Warrender's recovery of $340,000 pursuant to that settlement. It is ridiculous and beyond belief that Bar Counsel who is supposedly charged with the duty of enforcing Rule 1.5 is so completely clueless as to its requirements and is also completely clueless as to basic, 1st semester, 1st year law school, breach of contract law.

A client's subjective agreement or disagreement is irrelevant to a determination of whether a fee is clearly excessive. Matter of Fordham, 423 Mass. 481, 494 (1996). "The test as stated in the [Rule 1.5] is whether the fee 'charged' is clearly excessive, not whether the fee is accepted as valid or acquiesced in by the client." Id.

If a contract is unambiguous, its interpretation is a question of law that is appropriate for a judge to decide on summary judgment. Seaco Ins. Co. v. Barbarosa, 435 Mass. 772, 779-80 (2002). "The construction of a written contract which is plain in its terms and free from

ambiguity presents a question of law for the court." Hiller v. Submarine Signal Co., 325 Mass. 546, 549–550, 91 N.E.2d 667 (1950). Words that are plain and free from ambiguity must be construed "in their usual and ordinary sense." Citation Ins. Co. v. Gomez, 426 Mass. 379, 381, 688 N.E.2d 951 (1998). The unyielding rule of law in such cases is to give effect to the intention of the parties. *See* Lovell v. Commonwealth Thread Co., 272 Mass. 138, 141, 172 N.E. 77 (1930).

However, just because there is some ambiguity in the terms of a contract, it does not magically and instantly become unenforceable as Bar Counsel seems to be saying. A question of fact to be determined by a jury arises where a contract contains ambiguous or uncertain terms. *See e.g.* Seaco Ins. Co. v. Barbosa, 435 Mass. 772, 779, 761 N.E.2d 946 (2002). (citations omitted) (Where ambiguous terms exist, interpretation "turns on the 'expectations and intentions of the parties, at the time of agreement with regard to the future effect of [the release]' "). Sometimes, as the Supreme Judicial Court stated in Leblanc v. Friedman, the question of whether performance, an act, or a matter is covered by the scope of a contract can, in certain instances, be a mixed question of law and fact requiring both findings by the jury and the judge. 438 Mass. 592, 597–598, 781 N.E.2d 1283 (2003). For example, where a release does not explicitly make reference to "unknown injuries," the question of whether the release encompasses such injuries depends on the intention of the parties, which is question of material fact. Id., *citing* LaFleur v. C.C. Pierce Co., 398 Mass. 254, 259–262, 496 N.E.2d 827 (1986).

It is not the case that subjective ambiguity in a particular fee agreement makes it unenforceable or *per se* makes it an attempt to collect a "clearly excessive fee" independently of analysis by the Rule 1.5 criteria. The terms "recovery by judgment or settlement or otherwise" is no more ambiguous that the concept of "reasonable fee" or "clearly excessive fee" nor of an almost infinite number of words that have led to ambiguity in contracts and resulting breach of contract litigation since the dawn of organized legal systems and attorneys. Respondent feels silly having to make such argument of fairly basic contract law. For purposes of brevity,

Respondent incorporates herein by reference the Mass. Practice series on *Prima Facie Case* dealing with certainty and uncertainty in contractual terms that is attached as Addendum 1.

Bar Counsel must prove that the claimed fee of approximately $90,000 is clearly excessive based on the objective criteria of Rule 1.5 by factual evidence and expert testimony — they have provided neither. If $90,000 is not a clearly excessive fee in the circumstances of what Warrender got in the Civil Action from Diviacchi, then it is not a clearly excessive fee regardless of whether she consented to it or not. Instead of evidence, Bar Counsel has provided personal animosity and a contempt for the Respondent's practice of law as their only basis. Warrender got what she wanted. If Warrender had hired Ropes & Grey for a fee of $90,000 that would give her their general appearance in a $2.8 million lender liability case to use as leverage in settlement and guaranteed representation through trial in the Civil Action if settlement failed, no one would have any problem with such fee or, if they did, it would be an issue of reasonableness and not of a clearly excessive fee. Even if Warrender for a fee of $90,000 got the same leverage and assurance of representation from Sherin and Lodgren, no one would have a problem with such fee — Bar Counsel seems to have no problem with them charging $55,000 with no contingency concern after telling a client that representation will cost only $2000 to $3000. However, here, simply because it is a solo practitioner Diviacchi who Bar Counsel considers *hoi polloi* and obviously too stupid to be entitled to such a $90,000 fee, their contempt leads them to conclude such amount for the same leverage and guarantee is a clearly excessive fee. Such subjective contempt for Diviacchi's practice is neither law nor evidence and does not satisfy their burden of proof for the Rule 1.5 criteria.

Regardless of the particular contractual fee requirements, the fair and reasonable value of services is not limited to an assessment of time spent by an attorney but such reasonable value may equal on a *quantum meruit* basis the contingent fee of a contingent fee agreement. *Mulhern v. Roach*, 398 Mass. 18, 27 (1986). In *Mulhern*, an attorney successfully argued that despite the absence of a written contingent fee agreement, the fair and reasonable fee amounted to one third

of the settlement, the same as the attorney would have collected under the unenforceable contingent fee agreement. Id. at 26. "In upholding the large fee [in *Mulbern]* as determined by the trial judge, the Supreme Judicial court recognized the principles of Rule 1.5 that: 1) the attorney was a highly regarded expert in the field of eminent domain; 2) that the underlying issue was "highly unusual"; 3) that the attorney spent a great deal of time; 4) that the price was similar to others firms' in the area for "like services"; and that the result of the attorney's efforts was "almost miraculous." *Redlich* at 721. Bar Counsel has submitted zero evidence on any of these.

Diviacchi did not explicitly list in the "recovery by ... settlement" paragraph of the contingent fee agreement a "short sale" settlement because the undisputed testimony is that until the Civil Action he had never seen a short sale settlement in which money is left over for the debtor. He also did not list the "hundreds" of other possibilities by which complicated lender liability matters — unlike simple personal injury cases for which Rule 1.5 is designed — may eventually be resolved especially when a client goes beyond the scope of the representation to do her own thing, lies about her intentions, or breaches the scope of the fee agreement either in bad faith as here or simply as a prerogative of being the client with final authority to do whatever she wants with a case. Such ambiguity may create a question of fact for a jury as to whether a "short sale" surplus amount is within the intended meaning of "recovery by ... settlement" but it does not *per se* make the fee excessive regardless of Bar Counsel's personal opinion.

There is no basis in law or reality to say that a contingent fee agreement must explicitly include the ramifications of Warrender or any client lying to an attorney or of breaching the fee agreement or agreed upon limited scope of representation. All the problems occurring here because of "ambiguity" in the contingent fee agreement result from Warrender acting on her own hidden intentions after she had Diviacchi hooked into the case by his general appearance and the settlement leverage she got by this hook. If she had stuck to the scope of the representation — foreclosure, defeat dismissal, and litigate and trial if settlement is unsuccessful — we would not be here. As the client, Warrender has the prerogative to do what she wants with

the case; however, such does not allow her to take advantage of contractual ambiguities to avoid claims for breach of contract remedies (*See* Addendum 1*)* and nor even of tort liability.

A contingent fee agreement, as with all contracts in Massachusetts, contains an implied covenant of good faith and fair dealing that places a burden on both the client and the attorney and whose purpose "'is to guarantee that **the parties** remain faithful to the intended and agreed expectations' of the contract, Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 441 Mass. 376, 385, 805 N.E.2d 957 (2004), and to ensure that "**neither party** shall do anything that will have the effect of destroying or injuring the **right of the other party** to receive the fruits of the contract.' Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471–472, 583 N.E.2d 806 (1991), *quoting* Druker v. Roland Wm. Jutras Assocs., 370 Mass. 383, 385, 348 N.E.2d 763 (1976)." Liss v. Studeny, 450 Mass. 473, 477-78 (Mass.,2008) (emphasis added).

> That the bad faith termination of an attorney is subject to sanction resonates deeply with general principles of contract law. It is a cardinal rule of Massachusetts contract law that every contract carries with it the implied obligation of good faith and fair dealing. This rule is set forth in the Massachusetts Supreme Judicial Court's seminal decision of Fortune v. National Cash Register Co., 373 Mass. 96, 102, 364 N.E.2d 1251 (1977), and was alluded to by the SJC in its Salem decision, 384 Mass. at 804. "Good faith and fair dealing between parties are pervasive requirements in our law; it can be said fairly, that parties to contracts or commercial transactions are bound by this standard." Fortune, 373 Mass. at 102, 364 N.E.2d 1251. The Supreme Judicial Court has concluded that this covenant imposes an obligation on each party not to do anything "which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract ..." Id., 373 Mass. at 104, 364 N.E.2d 1251 (Emphasis added; internal quotation marks and citations omitted.). Cf. Kansas City College of Osteopathic Medicine v. Employers' Surplus Lines Insurance Co., 581 F.2d 299, 303 (1st Cir .1978) (Court relies on the "recognized contract law principle of an implied contractual duty to cooperate and facilitate the performance of mutual promises.")

Redlich, supra at 726.

It seems that Bar Counsel's argument is not that the $90,000.00 is clearly excessive but that Diviacchi's claiming of the $90,000.00 upon a gross recovery from a short sale is improper. Presumably, if Sovereign Bank had actually paid the $340,000.00 directly instead of indirectly as occurred here but definitely as part of the settlement of the Civil Action, Bar Counsel would not have a problem with this fee. If they would not have a problem with the fee in that situation, they should not have any problem with the fee in the situation of a short sale. If the fee is not

clearly excessive in the former it is not clearly excessive in the latter. It may not be enforceable, the contract may be too ambiguous to be enforced in such a situation, or whatever, but that is a contract issue not an issue of the fee being objectively clearly excessive.

3. *Informed Consent*

Rule 1.5(f)(3) provides that

> The authorization of Forms A and B shall not prevent the use of other forms consistent with this rule. A lawyer who uses a form of contingent fee agreement that contains provisions that materially differ from or add to those contained in Forms A or B shall explain those different or added provisions or options to the client and obtain the client's informed consent confirmed in writing ... A fee agreement containing a statement in which the client specifically confirms with his or her signature that the lawyer has explained that there are provisions of the fee agreement, clearly identified by the lawyer, that materially differ from, or add to, those contained in Forms A or B meets the "confirmed in writing" requirement.

This requirement, according to Rule 1.5(f)(4), applies only when the client is not an organization — it does not bother to define "organization". This rule is a perfect example of bad legal writing — written by a bunch of established, large firm attorneys who feel that representing businesses and corporations is obviously the more honorable and sophisticated form of practice.

Neither the Rule nor the Editor's Note nor the Supreme Judicial Court has ever specified the form which such written consent must take. An informed-consent provision in the contingent-fee agreement is suggested by the Rule but is **not** required and is not necessary according to case law. In R.W. Granger & Sons v. J & S Insulation, Inc., 61 Mass.App.Ct. 92 (2004), the Appeals Court of Massachusetts held that "fastidious communications between the law firm and client throughout the course of their relationship," in the form of written letters, established compliance with Rule 1.5 despite the fact that the contingent fee agreement itself did not specifically have all elements required by Rule 1.5. Id. at 97 ("Although rule 1.5(f) sets forth a model form for such contracts, the rule permits "the use of other forms consistent with this rule" (emphasis supplied). The judge ruled that the three letters between H & S and J & S were

materially consistent with rule 1.5(c), and thus the bonus agreement was enforceable.") So long as an attorney has obtained the informed written consent of the client, the contingent fee agreement will satisfy the requirements of SJC 3:07 Rule 1.5(f). In this regard, according to the Standing Advisory Committee on the Rules of Professional Conduct, both the MBA and the BBA agree:

> Both the MBA and the BBA criticized the model form in the existing proposal as being applicable to a narrow range of contingent fee cases and that there was little guidance in what needed to be explained to the client. The Committee recognized that for matters for which the forum is not well suited, including more complex arrangements involving some contingent fee aspects, trying to explain the differences from the model form will appear to be a useless exercise. Id.; Exhibit(s) 57.

As a practical matter, having Warrender or any client initial each line or paragraph would make no difference in terms of proving informed consent because Warrender or any client as unscrupulous and dishonest as she is can still always deny informed consent — as Warrender is doing here — by simply stating that such initialization or signing was done without reading or knowing what was signed or that they were somehow conned into signing it.

It is undisputed that Warrender signed the contingent fee agreement at issue after months of discussing and negotiating it with Diviacchi. In Massachusetts there is a "presumption that a person signing a written instrument knows its contents" regardless if whether they actually read it. *See* Robinson v. Prudential Ins. Co. of America, 11 Mass.L.Rptr. 135 (Mass.Super.,1999) *citing* Dobija v. Hopey, 353 Mass. 600, 603 (1968); Hull v. Attleboro Savings Bank, 33 Mass.App.Ct. 18, 24 (1992) ("One who signs a writing that is designed to serve as a [written instrument], ... is presumed to know its contents"); Sullivan v. Manhattan Life Ins. Co. of New York, 626 F.2d 1080, 1082 (1st Cir.1980) (citation omitted) (holding insured accountable under ordinary contract principles for signing an application without first reading it).

Warrender is a sophisticated client who not only had signed contingent fee agreements at least twice before with numerous attorneys in the Warrender v. Young litigation, she discharged her first contingent fee attorney in that litigation Attorney Frank O'Rourke by making substantively the same accusations against him in correspondence sent directly to court that she

is making against Diviacchi. In Exhibit 86: "Because of innumerable errors and extreme difficulties communicating with Mr. O'Rourke, I have been looking for new counsel. Meanwhile, I instructed Mr. O'Rourke to communicate only in writing with opposing counsel, and to copy me on everything ... instead [h]e continues to act with complete independence in my case. He will not accept input or reasonable directions ..." so on and so forth. Clearly, Warrender is a not a client who is afraid or unable to stand up for herself before a court or before attorneys.

Bar Counsel has the burden to initiate evidence and to prove that Warrender did not know that she was signing a fee agreement that is different from the model forms of Rule 1.5. Their only evidence on this is Warrender's testimony that she does not remember being informed of the differences from the model forms at any time during the five to nine months that she was discussing and negotiating contingent fee agreements for various litigation matters with Diviacchi with a half-dozen other attorneys at her side or that she used for consultation as to the Civil Action and what Diviacchi was proposing. She claims that in ten minutes on 1 May she was conned into signing the contingent fee agreement without knowing what she was signing — she was conned into doing this by Diviacchi whom she did not "trust" until 29 May 2012.

Given the sophistication, experience, ability, months of preparation, lack of trust for Diviacchi, months of telephone and in-person consultation, and access to legal advice (not from one or two other attorneys, but >8 before and after coming to his office on 1 May) of Warrender and the personality of Diviacchi, it is not credible to believe that in 10 - 15 minutes on 1 May 2012 that Diviacchi conned her into signing the hybrid contingent fee agreement without her informed consent to such agreement including without her knowing that it did not conform to the standard models that she had seen at least twice before. More likely than not, Warrender just as she "stretched the truth" in the filing of her Probate Court pleading and just as she filed a fraudulent bankruptcy solely to get a stay, she is denying such knowledge to serve the whole and intent and purpose of her filing this complaint with the BBO: to avoid litigation and payment of Diviacchi's claim for legal fees. Having her initial each line or paragraph of the contingent fee

agreement would not have made nor make any difference to the present allegations because she can still always deny informed consent by saying as she does now that she initialed everything without knowing what she was initialing.

C. Competence, Scope of Representation, Diligence / Rules 1.1, 1.2, 1.3

Bar counsel has not provided the expert witness testimony necessary to establish any violation by Respondent of any required standard of care. The presented evidence shows that Respondent was the only one that had a clue as to what was actually going on substantively in the Civil Action and that the Jacobi attorneys ignorantly stumbled into an easy verbal contingent fee recovery by using his work and really having no clue as to what was going on.

Bar Counsel's allegation that Diviacchi somehow had a duty to abandon his family in California and his daughter's college graduation to attend to Warrender's demands that he file a motion to stop foreclosure exemplifies the contempt that Bar Counsel feels for practicing trial attorneys. The fact that Bar Counsel makes such an allegation fully aware that Warrender knew at the time that she hired Diviacchi that he was leaving the state for such graduation and would be gone during the time period for stopping foreclosure highlights Bar Counsel's view that practicing trial attorneys are essentially indentured serfs to the client masters to whom they are chained by a fee agreement. Warrender is a dishonest, unscrupulous client who cares for no one's humanity but her own. If she wanted a nonsense, meritless motion filed that she knew Diviacchi could not file solely to use the threat of litigation expense as settlement leverage, she had the option of finding an attorney who would file it, which is exactly what she did and for whose services under the contingent fee agreement she was liable.

Similarly, Bar Counsel's allegation that Diviacchi was obligated to fabricate a settlement value even though he had been telling Warrender for months that he could not opine on settlement value and chances until after surviving the motion to dismiss and obligated to appear

at a settlement mediation of a meritless appeal for no known reason exemplifies their contempt for contingent fee attorneys. If Diviacchi was on an hourly fee basis and appeared at a mediation of a meritless appeal just so that he could generate billable hours, he would be padding his bill. Since he is on a contingent fee, according to Bar Counsel without any expert testimony or evidence, he is supposed to attend and sit there for no reason and free of charge — even though it is not really free, because his contingent fee would go up to 40%.

Bar Counsel has no evidence on any of the alleged violations of these Rules.

D. RULES 3.3 / 8.4

Bar Counsel's evidence does not prove that Respondent's claim that the required flat fee was $25,000 for a full appearance in the Civil Action was not make in good faith. Given the sophistication, experience, ability, months of preparation, lack of trust for Diviacchi, and access to legal advice of Warrender and the personality of Diviacchi, it is not credible to believe that in 10 minutes on 1 May 2012 that Diviacchi conned her into signing the hybrid contingent fee agreement requiring a flat fee of $25,000 when all she really needed to pay was $15,000. The fee agreement required litigation and defense of a $2.8 million lender liability action and a counterclaim in such action of damages well into the six figures. Just the fact that Diviacchi would do such for $25,000 is rare and it is difficult to find any attorney that would do the equivalent. The idea that he would file a general appearance in such a case for $15,000 but somehow conned Warrender — a client that did not trust him at the time and most certainly did not like him because no one likes his personality — is nonsense.

She was supposed to bring $25,000 to the 1 May meeting. Diviacchi was stupid for not enforcing that requirement and instead modifying it to allow for partial payment plus a "still due" amount, and he is now paying the price for such stupidity. It is Warrender who conned Diviacchi into signing the fee agreement and not the other way around.

The BMC Argument was at worse a badly written summary of Diviacchi's honest inferences from the available facts at the time that was in large part true: Warrender filed her BBO complaint and intended to use it solely as a means to force Diviacchi to reduce or waive his claim for legal fees. Bar Counsel has not proven that it was made with any intentional, bad faith attempt to deceive nor that it was material when made given that the motion was denied.

The difference between the *mens rea* required and Diviacchi's good faith argument is exhibited by the Bar Counsel's own evidence. Both Attorney Jacobi and Warrender testified under oath here and in the BMC and in federal court and in the First Circuit that Warrender received no funds from the settlement of the Civil Action. They made and continue to make these repeated statements despite the fact that they both knew and know that Warrender received a $75,750 check from the closing on the settlement and that Jacobi had sitting in his client fund account another $100,000 for perhaps as long as three weeks after the closing to spend as Warrender directed. Bar Counsel apparently has no problem with these continuing misrepresentations and uses them in support of their Petition because Bar Counsel somehow believes that these misrepresentations are somehow "good faith" interpretations of the fact that the $175,750 was payable to Warrender and under her control. Whatever. Diviacchi's unartful attempt in his BMC Argument to summarize his review and inferences from a convoluted collection of documents and interviews with other attorneys that turned out to be at least partially substantively accurate was without doubt a "good faith" interpretation — one that was never repeated.

E. Sanctions, Mitigation, Aggravation.

Bar Counsel's demand of a suspension for one year and one day exemplifies the irrational, unfounded, ignorance, and personal animosity that is the real basis for this Petition.

Respondent has not been able to find any Massachusetts case law, any disciplinary

decision, nor any published discipline in which an attorney has been disciplined for a technical violation of Rule 1.5 — missing signature, missing required elements, bad form, or whatever. There is **no** record of any such discipline.

Respondent has not been able to find any Massachusetts case law, any disciplinary decision, nor any published discipline in which an attorney has been disciplined for an "attempt" to charge a supposed clearly excessive fee. There is **no** record of any such discipline.

As far as disciplining an attorney for actually charging a clearly excessive fee — something that has not occurred here since there is no dispute that the $15,000 portion of the flat rate was reasonable, "public reprimand [is] the appropriate sanction for charging a clearly excessive fee." Matter of Fordham, 423 Mass. 481, 496 (Mass., 1996).

Respondent has not been able to find any Massachusetts case law, any disciplinary decision, nor any published discipline of an attorney for limiting the scope of representation. There is **no** record of any such discipline.

Respondent has not been able to find any Massachusetts case law, any disciplinary decision, nor any published discipline for incompetence or lack of diligence that as here involved alleged inaction by the attorney that did not result in any harm to the client — no loss of money, no statute of limitations bar, no lost evidence, nothing. There is **no** record of any such discipline. The only outcome caused by the alleged incompetence and lack of diligence of Diviacchi is the loss of having him instead of Jacobi argue a meritless motion to stop foreclosure (the motion still would have been lost) and the loss of having him witness (for no reason) settlement negotiations being conducted by Jacobi — the negotiations were successful even in Diviacchi's absence though they were based on and used his work.

Respondent has not been able to find any Massachusetts case law, any disciplinary decision, nor any published discipline for violation of Rule 3.3 or 8.4 that involved solely argument by the attorney. There is **no** record of any such discipline. All such discipline involved either perjury, fabrication of evidence, or withholding of evidence from the Court or a Court

agent or in discovery from another party that specifically requested it. Even when there was such proven perjury, fabrication of evidence, or withholding of evidence, when the "evidence does not reveal a pattern of longstanding or continuous wrongful conduct" nor of "multiple instances" nor a "pattern" of perjury, the "imposition of public censure" is recommended "to conform to other cases involving similar misconduct". In re Joseph S. Provanzano, 5 Mass.Atty.Disc.R. 300, 305 (1987) *citing* Matter of Cowin, 2 Mass.Atty.Disc.R. 48 (1981); Matter of Regan, 2 Mass.Atty.Disc.R. 180 (1980); *Matter of Flannery,* 2 Mass.Atty.Disc.R. 76 (1980), Matter of Mahlowitz, 1 Mass.Atty.Disc.R. 189 (1979).

In the matter of In re Joseph S. Provanzano, the disciplinary hearing concluded that the respondent had actually outright fabricated documentary evidence to aid in his defense before the BBO. Such finding resulted in a public reprimand as conforming "to other cases involving similar misconduct". Id.

The prior public reprimand of Diviacchi was solely for bad bookkeeping during the two months of December 2005 and January 2006 that resulted in his having personal funds in his IOLTA and had nothing to do with his using client funds for his benefit, for any injury to any client, nor for any harmful acts to a client or any type of harmful conduct to anyone other than his bookkeeping duties as an attorney. Such "evidence does not reveal a pattern of longstanding or continuous wrongful conduct" nor of "multiple instances" or a "pattern" of perjury that would even warrant a public reprimand let alone anything near what Bar Counsel is demanding. Bar Counsel, just as Warrender, simply does not like Diviacchi just as most people do not like him. That problem is simple to solve: do not hire him as their attorney. Such dislike in a legal system that pretends to like and foster diversity should not be a basis for discipline.

The facts of this case involve a very sophisticated, unscrupulous client who knows how the system works and is using the Rules of Professional Conduct as leverage to force a waiver and reduction of attorneys' fees that she owes. Any type of discipline in this case will have nothing to do with maintaining professional integrity but would only serve to reward

unscrupulous clients who use the rules of professional conduct as leverage in fee negotiations. Bar Counsel had no business bringing this Petition while the underlying fee claims remain pending in state and federal courts except for Bar Counsel's personal animosity toward the Respondent, its general contempt for practicing trial attorneys, and their ignorance of the Rules that they are supposedly protecting — all of which also negates the respect that they are supposed to have to Respondent's right to a jury trial.

Any type of discipline in this Petition will only serve to assure that clients who have meritorious causes of action in anything but the simplest of personal injury cases but who are not as unscrupulous and sophisticated as Warrender in getting free legal work from attorneys will find it even harder if not impossible to retain contingent fee counsel.

Respondent

by his attorney,

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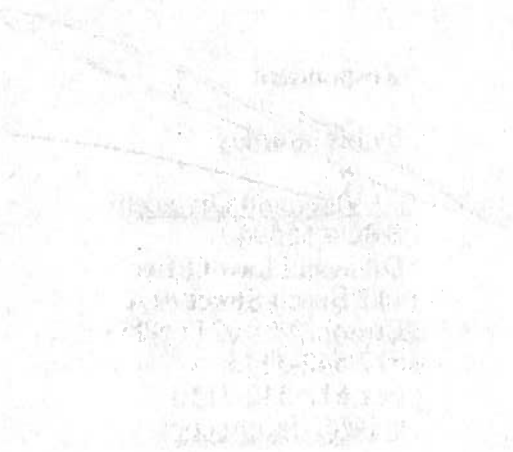
Date: 12/5/14

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon Bar Counsel by first class postage prepaid mail on 12 May 2014.

/s/ Valeriano Diviacchi



ADDENDUM I

For a discussion and cases relating to preliminary negotiations as distinguished from offers, conditional acceptance, revocation and lapse of offers, see § 2.75

The offeror has full control over his offer and may prescribe a particular and exclusive mode of acceptance. To be effective the acceptance must be made in the manner required by the offer. And if a purported acceptance substantially varies from the terms of the offer it is ineffective, creating no binding agreement.[8]

Contracts entered into by correspondence, like other contracts entirely in writing when they are unambiguous, are construed as a matter of law by the court.[9]

Library References:

C.J.S. Contracts § 52.
West's Key No. Digests, Contracts ⇐26.

§ 2.4 The Written Agreement—Certainty as to the Terms of the Contract

In order that the plaintiff may recover, the instrument relied on must be found to state the essential terms of a contract, by which the parties intended to be bound, with sufficient definiteness and clarity that a court, by interpretation with the aid of existing and contemplated circumstances, may enforce it.[1]

8. See David J. Tierney, Jr., Inc. v. T. Wellington Carpets, Inc., 8 Mass.App.Ct. 237, 392 N.E.2d 1066 (1979) and cases cited therein.

Yiakas v. Savoy, 26 Mass.App.Ct. 310, 526 N.E.2d 1305 (1988), review denied 403 Mass. 1103, 529 N.E.2d 1346 (1988): "Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances." (Quoting from Restatement (Second) of Contracts, § 30(2) (1981).)

Requests for bids

Requests for bids are usually nonbinding invitations for offers, and the bid solicitor retains discretion to choose the company with which it will contract. Where the bid solicitor is a governmental entity, however, an invitation to bid upon certain conditions followed by submission of a bid on those conditions creates an implied contract obligating the bid solicitor to those conditions. New England Insulation Company v. General Dynamics Corporation, 26 Mass.App.Ct. 28, 522 N.E.2d 997 (1988).

9. Ingalls v. Green, 337 Mass. 444, 149 N.E.2d 674 (1958).

Lawrence-Lynch Corp. v. Department of Environmental Management, 392 Mass. 681, 467 N.E.2d 838 (1984).

§ 2.4

1. George W. Wilcox, Inc. v. Shell Eastern Petroleum Products, 283 Mass. 383, 186 N.E. 562 (1933), in which an instrument provided that plaintiff should have exclusive right to sell defendant's gasoline for five years, but did not fix the price, quantity, delivery or terms of payment. The instrument was held unenforceable because not sufficiently definite.

See also Marble v. Standard Oil Co., 169 Mass. 553, 48 N.E. 783 (1897). An instrument purporting to sell oil to the plaintiff "on favorable terms so that they could compete successfully with

However, a contract in writing is not void for uncertainty merely because it is obscure or difficult of construction, unless it is wholly unintelligible, and in case of such mere obscurity the previous negotiations of the parties may be resorted to, to show in what sense the terms of the contract are used.[2]

Nor is a contract to be struck down because one of its material provisions is stated in broad and general terms if, when applied to the transaction and construed in the light of attending circumstances, the meaning to be attributed to it can be interpreted with reasonable certainty so that the rights and obligations of the parties can be fixed and determined.[3]

other parties selling in the same territory" was held too indefinite and too general to be enforceable as a contract.

See Ucello v. Cosentino, 354 Mass. 48, 235 N.E.2d 44 (1968): "The intent of the parties must be gathered from a fair construction of the contract as a whole and not by special emphasis upon any one part."

See Riedel v. Plymouth Redevelopment Authority, 354 Mass. 664, 241 N.E.2d 852 (1968) where the language was "too vague to adequately define the relations and rights of the parties."

Richardson Electric Company, Inc. v. Peter Francese & Son, Inc., 21 Mass. App.Ct. 47, 484 N.E.2d 108 (1985); "Whether the terms of the construction contract were impermissibly vague is a mixed question of fact and law."

2. Letts–Parker Grocer Co. v. W.R. Marshall & Co., 232 Mass. 504, 122 N.E. 647 (1919). The memorandum of sale contained the words "September shipment or no sale." The defendant refused to make September shipment. The court held that the defendant's performance was strictly limited to September shipment or there would be no binding sale. Acceptance of the condition by defendant and failure to perform made it liable for the difference between the contract price and the market price.

Cetrone v. Paul Livoli, Inc., 337 Mass. 607, 150 N.E.2d 732 (1958).

For construction of ambiguous contracts, see § 2.2, note 11, Construction.

3. Cygan v. Megathlin, 326 Mass. 732, 96 N.E.2d 702 (1951), in which an employee was allowed to recover the fair value of services rendered when defendants had agreed to pay "additional compensation if and when their business became sufficiently profitable to permit it and if the charges to be submitted by the plaintiff were fair and reasonable."

Consent to assignment of lease

Where defendant agrees in lease that it is subject to assignment on consent of the defendant "which consent will not be unreasonably withheld," plaintiff may recover for damages sustained when he is forced to liquidate business by proving: (1) the proposed assignees of the lease to have been reputable persons of business experience and financial means; (2) the defendant to have been totally unreasonable in withholding consent to the assignment of the lease; and (3) the damage sustained by the plaintiff. Haritas v. Goveia, 345 Mass. 774, 188 N.E.2d 854 (1963), certiorari denied 375 U.S. 845, 84 S.Ct. 98, 11 L.Ed.2d 73, rehearing denied 375 U.S. 917, 84 S.Ct. 200, 11 L.Ed.2d 157.

Where a lease requires landlord's consent to assignment or sublease and does not limit the landlord's discretion, however, no such limitation as to reasonableness will be implied. The landlord may refuse to consent arbitrarily or unreasonably. The rule applies to both residential property, Slavin v. Rent Control Board of Brookline, 406 Mass. 458, 548 N.E.2d 1226 (1990), and to commercial property, 21 Merchants Row Corporation v. Merchants Row, Inc., 412 Mass. 204, 587 N.E.2d 788 (1992).

Contracts involving services and compensation for services have been liberally construed by the courts, and have not been unenforceable solely because they do not specify in detail all of the terms of the compensation.

Thus a contract to employ time and skill to produce formulae for another's use for "fair and equitable share" of net profits has been upheld as not too indefinite to make enforcement impracticable so far as executed.[4]

Also a contract to appraise real estate based upon "rates established by Boston Real Estate Exchange"[5] as well as a contract "to take care of" a plaintiff hired to secure tenants for a building if he would cease negotiations with a firm and leave negotiations to the defendant, have been held enforceable by our courts.[6]

In most instances a contract will not be void for uncertainty if it fails to specify a time for performance. The want of such a stipulation infers that the acts required should be done within a reasonable time.[7]

Reasonableness is a question of fact. "In a commercial context, only factors which relate to a landlord's interest in preserving the property or in having the terms of the prime lease performed should be considered. Among the factors properly considered are the financial responsibility of the subtenant, the legality and suitability of the proposed use, and the nature of the occupancy. A landlord's personal taste and convenience, on the other hand, are not factors properly considered." Worcester–Tatnuck Square CVS, Inc. v. Kaplan, 33 Mass.App.Ct. 499, 601 N.E.2d 483 (1992).

Halper v. Demeter, 34 Mass.App.Ct. 299, 610 N.E.2d 332 (1993), holding that a landlord unreasonably withheld his consent to an assignment of a lease, and that a tenant was thereby relieved of his obligation to pay rent thereafter.

Compare Greater Lowell Auto Mall, Inc. v. Toyota Motor Distrib, Inc., 35 Mass.App.Ct. 247, 618 N.E.2d 1369 (1993) concerning assignment of a dealership and describing the factors to be considered as to the reasonableness of withholding consent.

4. Noble v. Joseph Burnett Co., 208 Mass. 75, 94 N.E. 289 (1911): "The contract itself states the rule—a fair and equitable share. The plaintiff simply asks that this rule shall be applied not to future probabilities but to past facts."

5. W.H. Ballard Co. v. Lipp, 288 Mass. 163, 192 N.E. 492 (1934). The contract was upheld even though Boston Real Estate Exchange had no schedule of rates for individual members, but did have a schedule for appraisals by a committee of its members.

6. Fenton v. Federal St. Bldg. Trust, 310 Mass. 602, 39 N.E.2d 414 (1942): "The promise by the testator to see that the plaintiff, if he would withdraw from further negotiations with the firm, would be taken care of was not too vague, uncertain or indefinite to render it incapable of being enforced. The jury might find that, in the circumstances, the plaintiff was to be paid the same compensation as if he himself had successfully negotiated the lease. In other words, the agreement could be reasonably understood to mean that the plaintiff was to be made whole. This could not be accomplished unless the plaintiff were put in the same position as he would have been in if his services had not been interrupted by the testator."

7. Atwood v. Cobb, 33 Mass. (16 Pick.) 227 (1834).

See also Phelps v. Shawprint, Inc., 328 Mass. 352, 103 N.E.2d 687 (1952), for a

Where a contract fails to state the amount that the plaintiff would receive as compensation in the event of a partial termination, the court will determine an amount that is reasonable in the circumstances.[8]

> "Even if an aspect of an agreement is informal, obscure, difficult of satisfactory interpretation, and the subject of dispute by the parties as to its meaning, a court should '[s]o far as reasonably practical * * * give [it] a construction which will make it a rational business instrument and will effectuate what appears to have been the intention of the parties'."[9]

The fact that the parties may have chosen to leave one of the terms of the contract indefinite does not render it unenforceable.[10]

Contracts promising support for life in exchange for property are enforceable.[11]

Library References:

C.J.S. Contracts § 38.
West's Key No. Digests, Contracts ⇐9.

§ 2.5 The Written Agreement—Delivery of Contract and Communication of Acceptance

A written agreement does not bind the party executing it, unless he delivers it as an agreement, and it is a corollary that a written agreement executed by one party does not take effect as an agreement when it remains unaccepted by the other.[1]

It is a question of fact whether any written instrument, though in the possession of the obligee, has been delivered by the obligor as

collection of cases in which contracts have been upheld, although it was "impossible to predict precisely when the contingency will occur that will bring the contract to an end."

8. Fay, Spofford & Thorndike, Inc. v. Massachusetts Port Authority, 7 Mass.App.Ct. 336, 387 N.E.2d 206 (1979): "In a sense, when an essential term of a contract is missing, that contract is ambiguous and it falls to us to interpret the contract sensibly in the light of the terms of the document taken as a whole."

9. Finn v. McNeil, 23 Mass.App.Ct. 367, 502 N.E.2d 557 (1987) quoting from Bray v. Hickman, 263 Mass. 409, 412, 161 N.E. 612, 613 (1928). In *Finn* the purchase price of real estate was "to be adjusted upward to reflect capital improvements * * *." The court held the words to be capable of judicial determination.

10. Associated Credit Services, Inc. v. City of Worcester, 33 Mass.App.Ct. 92, 596 N.E.2d 388 (1992), review denied 413 Mass. 1107, 602 N.E.2d 1094 (1992).

11. Robitaille v. Robitaille, 34 Mass.App.Ct. 947, 613 N.E.2d 933 (1993) and cases cited therein.

§ 2.5

1. Laprade v. Fitchburg & L. St. Ry. Co., 205 Mass. 77, 90 N.E. 982 (1910).

benefit of the strong inference that the parties do not intend to be bound by earlier negotiations until the final terms are settled, although the contemplation of a final written agreement does not conclusively establish such intention.[4]

Library References:

C.J.S. Contracts § 56.
West's Key No. Digests, Contracts ⇐32.

§ 2.77 Other Defenses—Uncertainty

The problems of contracts which are vague and uncertain as to their terms have been more fully discussed in a previous section,[1] as part of the plaintiff's case. Although it is a proper and valid defense, the defendant must take into account that the courts of Massachusetts are slow to turn a plaintiff out of court for the reason that the promise given and relied on was so vague that it can be given no effect. To have that result, indefiniteness must reach the point where construction becomes futile.[2]

Unexpressed terms may be introduced into a contract by virtue of usage and custom, but such usage and custom must be universal and uniform.[3]

ties agree to execute is to serve as a polished memorandum of an already binding contract. Inclusion in such a document of language obligating the parties to sign something such as a "usual agreement" may counter any negative inference concerning the parties' intention to form a binding contract. Nelsen v. Rebello, 26 Mass.App.Ct. 270, 526 N.E.2d 262 (1988), opinion amended and superseded on other grounds, 26 Mass.App.Ct. 270, 530 N.E.2d 798 (1968).

See also Hamad v. Manuel, 26 Mass. App.Ct. 966, 527 N.E.2d 242 (1988).

When parties agree in writing that time is to be of the essence, courts will hold parties to the deadlines they have imposed upon themselves. Vickery v. Walton, 26 Mass.App.Ct. 1030, 533 N.E.2d 1381 (1989): "Parties in the position of the sellers in this case [an offer to purchase real estate] were entitled to know whether their deal was on or off."

4. Rosenfield v. United States Trust Co., 290 Mass. 210, 195 N.E. 323 122 A.L.R. 1210 (1935).

See Mendel Kern, Inc. v. Workshop, Inc., 400 Mass. 277, 508 N.E.2d 853 (1987): "The judge correctly concluded that the letter of intent was a memorandum in which the parties expressed an intention not to be bound until a final agreement was executed."

Jones v. Consolidated Rail Corporation, 33 Mass.App.Ct. 918, 597 N.E.2d 1375 (1992): "The relevant language chosen and executed by the parties here is controlled by the line of cases holding that inchoate language, which both anticipates a final agreement and is imperfect in material respects, fails to bind the parties." (Citing *Rosenfield* with approval.)

§ 2.77

1. § 2.4.

2. Weiner v. Pictorial Paper Package Corp., 303 Mass. 123, 131, 20 N.E.2d 458, 462 (1939); Geo. W. Wilcox, Inc. v. Shell Eastern Petroleum Products, Inc., 283 Mass. 383, 388, 186 N.E. 562, 564 (1933).

3. Caggiano v. Marchegiano, 327 Mass. 574, 99 N.E.2d 861 (1951).

Barrie v. Quimby, 206 Mass. 259, 265, 92 N.E. 451, 454 (1910): "To be admissi-

An agreement to enter into a contract which leaves the terms of that contract for future negotiation is too indefinite to be enforced.[4]

Where the terms of the written contract are ambiguous, both parties may testify as to what they understood by the terms of the contract when they executed it, and the jury will then determine what its terms were and apply the law to such facts as they find comprise its provisions.[5]

Library References:

C.J.S. Contracts §§ 28-36.
West's Key No. Digests, Contracts ⇐9(1-3).

§ 2.78 Other Defenses—Lack of Damage

An unjustified breach of contract by the defendant is wrongful conduct and entitles the plaintiff to a verdict for nominal damages for the breach, if nothing more.[1]

ble, the usage must not only be universal, but has become notorious by the long and uniform practice of those engaged in the trade at the place where the contract is made."

4. Caggiano v. Marchegiano, 327 Mass. 574, 99 N.E.2d 861 (1951), in which a contract between boxer and manager to enter a contract of employment failed to specify the term, manager's salary or the rights and obligations of the parties. Evidence submitted relating to custom and usage in the profession was held inadequate to supply the missing provisions.

See Air Technology Corp. v. General Electric Co., 347 Mass. 613, 199 N.E.2d 538 (1964), collecting authorities and cases in this and other jurisdictions.

Lucey v. Hero International Corp., 361 Mass. 569, 281 N.E.2d 268 (1972).

5. Trafton v. Custeau, 338 Mass. 305, 155 N.E.2d 159 (1959).

Ambiguity

Whether there exists an ambiguity in a contract is a question of law. If there is no ambiguity, the interpretation of the contract is also a question of law. Frank Constr. Corp. v. Republic Powdered Metals, Inc., 11 Mass.App.Ct. 972, 417 N.E.2d 38 (1981).

If the words of a contract are plain and free from ambiguity, they must be construed in accordance with their ordinary and usual sense. Edwin R. Sage Co. v. Foley, 12 Mass.App.Ct. 20, 421 N.E.2d 460 (1981).

"An ambiguity exists in an insurance contract when the language contained therein is susceptible of more than one meaning. * * * It must be shown that reasonably intelligent persons would differ as to which one of two or more meanings is the proper one. * * * However, an ambiguity is not created simply because a controversy exists between parties, each favoring an interpretation contrary to the others * * *" (citations omitted). Jefferson Insurance Company of New York v. City of Holyoke, 23 Mass.App.Ct. 472, 503 N.E.2d 474 (1987), review denied 399 Mass. 1104, 506 N.E.2d 146 (1987).

Where the contract is unambiguous, its interpretation is a matter of law for the court and not for the jury. Barranco v. Milford Housing Authority, 408 Mass. 502, 562 N.E.2d 74 (1990).

§ 2.78

1. Damiano v. National Grange Mut. Liability Co., 316 Mass. 626, 56 N.E.2d 18, 153 A.L.R. 1402 (1944): "For every breach of a promise made on good con-

ADDENDUM II

I. DISCHARGE

As Respondent tried to explain during his testimony, though every discharge of an attorney by a client is a termination of the attorney-client relationship not every termination is a discharge. A client discharging an attorney is just that, in the plain meaning of that word, it means a client discharging an attorney in the same way that an employer would discharge an employee, agent, contractor, or whatever.

There is no evidence in this Record that Warrender ever discharged Diviacchi. She did not do so for the obvious reason that even right up to the Civil Action settlement closing date that there was still a "5%" chance that the settlement would not be consummated and she would need Diviacchi to continue on with litigation, trial, or whatever in the Civil Action.

Termination of an attorney-client relationship can encompass any number of events from the attorney being hit by a bus to motions to withdraw based on a breakdown of the attorney-client relationship as eventually occurred here.

II. TERMINATION

The question of when an attorney-client relationship terminates is an open one in Massachusetts. The Massachusetts Rules of Professional Conduct provide no guidance on the issue; though they state an attorney's responsibility upon termination but do not define what constitutes termination. No SJC or federal case directly addresses the issue either. However, several secondary sources, a few scattered Massachusetts cases, and cases from other federal districts shed some light on this question.

Guidance from Secondary Sources

Arthur Garwin, an attorney at the ABA's Center for Professional Responsibility, has written that "[t]he courts have generally recognized three ways of terminating the attorney-client relationship: an express statement, an act inconsistent with the continuation of the relationship, and the lapse of time." Arthur Garwin, It Ain't over Until...there's A Right Way and A Wrong Way to End Client Relationships, ABA J., January 1993, at 98.

Two articles in the Journal of the Legal Profession also address this question. In one article, Greg Taube divides case law on the question of termination into two general approaches, one taken in New York and another in Ohio: "New York courts look for some action by the client evincing an 'unmistakable purpose to sever relations,' while the Ohio courts focus on 'conduct which dissolves essential mutual confidence.'" Greg Taube, What Conduct by the Client Terminates the Attorney-Client Relationship?, 17 J. Legal Prof. 337 (1992). In cases where a client retains a new attorney, Taube writes, the State of Washington has adopted the New York approach to hold that "a client who retains another attorney has taken action sufficient to terminate the attorney-client relationship." Id. However, a mere threat by a client to retain another attorney would not be sufficient for termination.

In another article, Debra Ann Sutton writes that, "When an attorney-client relationship is established, the relationship generally terminates once the purpose of the employment is completed, absent a contrary agreement." Debra Ann Sutton, How Long Does the Attorney-Client Relationship Last?, 19 J. Legal Prof. 277, 281 (1994) (citing Simpson v. James, 903 F.2d 372, 376 (5th Cir. 1990)). Citing an Oregon case, Sutton writes that "[c]ourts have also held that the attorney-client relationship does not terminate after settlement until the proceeds of the settlement have been disbursed." Id.

Sutton also examines several cases in which the acts of an attorney client demonstrate a dissolution of the essential mutual confidence at the heart of the attorney-client relationship – the Ohio courts' test, above. Under this view, a client filing a grievance proceeding or malpractice suit against an attorney demonstrates such a dissolution, and thus termination, while merely discussing the case with another attorney does not. Id. Citing cases from Washington and Oregon, Sutton concludes that "[e]mployment of other counsel, which is inconsistent with continuance of former attorney-client relationship, also shows an unmistakable purpose to sever the former relationship. This is true even though the original attorney is still the attorney of record." Id.

No case law from Massachusetts appears in any of these three secondary sources.

Limited Guidance from Massachusetts

The fullest discussion of this question in Massachusetts came from an opinion by Judge (now Justice) Gants in a 2002 Superior Court case. Stating that "this Court is aware of no Massachusetts precedent that declares when an attorney-client relationship has ended," Judge Gants held that:

> in search of an administrable standard, this Court must look to logic, reason, experience, and basic principles of law. "[I]t is important that any decision that purports to conclude when, as a matter of law, a legal relationship has either come into being or has ceased to exist draw its essence from the reasonable expectations of the parties to that relationship and from the need to have rules for the relationship that strike an accommodation between the desirability for certainty and the need to reflect present reality." Nat'l Med. Care, Inc. v. Home Med. of Am., Inc., Civ.A. 00-1225, 2002 WL 31068413 (Mass. Super. Sept. 12, 2002) (citing Artromick Int'l, Inc. v. Drustar, Inc., 134 F.R.D. 226, 229 (S.D. Ohio 1991)).

Judge Gants further stated that "an attorney-client relationship continues as long as the law firm remains responsible for a pending matter on behalf of the client, **regardless of whether that matter is active, because the attorney, unless terminated by the client or withdrawing from the representation**, has accepted responsibility to bring that matter to a successful closure." Id. (Emphasis added). Looking at cases in which an attorney had been hired only for the purposes of a specific issue or case, Judge Gants concluded that "one measure of whether the attorney-client relationship has ended is whether the attorney needs to obtain permission from the client to continue to perform work on the client's behalf." Id. Given the facts of this case, Judge Gants held that the relationship had in fact terminated when the case at issue was definitively resolved.

The First Circuit has also offered some general guidance on termination, at least as far as joint attorney-client agreements are concerned. "A joint attorney-client relationship remains intact until it is expressly terminated or until circumstances arise that readily imply to *all the joint clients* that the relationship is over." Massachusetts Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., 412 F.3d 215, 226 (1st Cir. 2005); see also F.D.I.C. v. Ogden Corp., 202 F.3d 454, 463 (1st Cir. 2000) ("A joint attorney-client relationship remains intact until it is expressly terminated or until circumstances arise that readily imply *to all the joint clients* that the relationship is over."). These cases, however, do not address the termination of an attorney-client relationship in cases when a client retains a new attorney in an existing matter.

Federal District Court Cases

Various federal district courts have also weighed in on the issue. Most notably, the U.S. District Court for the Southern District of Ohio held that, in the absence of an express statement terminating the relationship, "acts inconsistent with the continuation of an attorney-client

relationship [in this case, a grievance filed against the attorney before the local bar association] are a second means of ending the relationship." Artromick Int'l, Inc. v. Drustar, Inc., 134 F.R.D. 226, 229 (S.D. Ohio 1991). That court continued:

> Absent either a specific act or statement by either party that shows clearly what that party's intent actually was, the law will imply an end to the relationship where it would be objectively unreasonable to continue to bind the parties to each other. This second principle would cover, for example, a situation where a party forms an intent to end the relationship but cannot communicate that intent because the other party cannot be located. Thus, evidence bearing upon both the parties' subjective intent and upon the reasonable expectations of attorneys and clients in general is relevant to the issue under consideration here. Id.

Judge Gants cited this case approvingly in his opinion in Nat'l Med. Care, *supra*, thus appearing to adopt the Ohio test for termination. In a similar vein, the U.S. District Court for the Northern District of Illinois has stated that "[t]he case law also holds that, once established, a lawyer-client relationship does not terminate easily. Something inconsistent with the continuation of the relationship must transpire in order to end the relationship." SWS Fin. Fund A v. Salomon Bros. Inc., 790 F. Supp. 1392, 1398 (N.D. Ill. 1992)

More specifically, at least two federal district courts have addressed the impact of a client's hiring a new attorney on his existing attorney-client relationship. The U.S. District Court for the District of Colorado found that a client effectively terminated his relationship with his attorney by hiring another attorney, when "the old attorney's authority has been terminated and the new attorney's authority has been recognized by the parties involved." Barry v. Ashley Anderson, P.C., 718 F. Supp. 1492, 1494 (D. Colo. 1989). In another case, this one in the Northern District of Ohio, the court held that "[certain activities by newly *retained* attorneys [filing a new lawsuit on the same subject matter] may constitute affirmative acts terminating the original attorney-client relationship ... A plaintiff-client's consultation with another attorney,

however, does not necessarily terminate the client's relationship with the original attorney." Thayer v. Fuller & Henry, Ltd., 503 F. Supp. 2d 887, 893 (N.D. Ohio 2007)

Conclusion

As to contingent fee cases, a "lawyer's miscalculation of the time or resources necessary to represent a client, the likelihood of success, or the amount of damages 'is usually a dubious ground' for withdrawal. ... [a]ttorneys who agree to represent clients on a contingent fee basis must choose their cases carefully". Faircloth v. DiLillo, 446 Mass. 120, 130 (2013) *quoting* G.C. Hazard, W.W. Hodes, & P.R. Jarvis, Law of Lawyering, §20.9 at 20-23. Diviacchi was stuck and responsible for the Civil Action as the only attorney representing Warrender, based on his and the only general appearance in the Civil Action, until his motion to withdraw was allowed.

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

BAR COUNSEL

Petitioner

v.

VALERIANO DIVIACCHI

BBO FILE # C1-12-0140

RESPONDENT'S REQUEST FOR RULINGS OF LAW

I. BURDEN OF PROOF

1. Pursuant to BBO Rules Section 3.28, "[i]n proceedings upon a petition for discipline Bar Counsel shall have the burden of proof by a preponderance of the evidence, shall initiate the presentation of evidence ..."

2. To establish a violation of Rules 3.3 or 8.4, there must be presented "substantial evidence" of Respondent's subjective "actual intent to mislead or deceive another." In re Slavitt, 449 Mass. 25, 33 (2007); In re Murray, 455 Mass. 872, 882 (2010) ("The hearing committee concluded that there was no violation because the respondent had no intent to mislead."); In re Balliro, 453 Mass. 75, 82 (2009) (... the mental state — knowing falsity — required for violation of rules 3.3(a)(1) and (4), and rule 8.4(c)"); In re Hrones, 457 Mass. 844, 855 & n. 6 (2010) (Rule 5.5 does not have specific intent requirement such as Rule 3.3 does.)

II. RULE 1.5 FEES

1. A fee must be illegal or clearly excessive to constitute a violation of paragraph (a) of Rule 1.5, an unreasonable fee is unenforceable against a client but it is not in itself a violation of ¶a. *Rule 1.5,* comment 1A; *Erb v. Wainwright*, 16 Mass.L.Rptr. 373, 384, 387 (Mass.Super.

2003). "[The] reasonableness of a contingent fee agreement presents a jury issue." *Erb v. Wainwright*, 16 Mass.L.Rptr. 372, 383 (Mass.Super., 2003) quoting *Smith v. Consalvo*, 37 Mass.App.Ct. 192, 195 (1994) citing *Cameron v. Sullivan*, 372 Mass. 128, 132 (1977) and *Guenard v. Burke*, 387 Mass. 802, 808 (1982) (holding question of fair and reasonable compensation one for jury).

2. The only type of contingent fee agreements that are unenforceable as a matter of law are agreements that are contingent upon a specific result in a criminal case or in a divorce case. Rule 1.5(d)(1).

3. However, even in cases of an illegal contingent fee agreement, the attorney is entitled to collect either on the contract itself or in *quantum meruit*. *Guenard v. Burke*, 387 Mass. 802, 809-10 (1982); *Mulhern v. Roach* 398 Mass. 18 1986 (lawyer entitled to a *quantum meruit* recovery where the contingent fee agreement between the parties was not in writing); *Erb*, supra, at 385 citing *Berman v. Linnane*, 434 Mass. 301, 303 (2001); *Johnson v. Blacke*, 32 Mass.App.Ct. 399, 403 (1992); *Donald v. Shoblom*, 409 Mass. 63, 67 (1991); See generally, *Redlich v. Lanell*, 20 Mass.L.Rptr. 688, 719 (Mass.Superior 2006).

4. The fair and reasonable value of services is not limited to an assessment of time spent by an attorney but such reasonable value may equal the contingent fee of the fee agreement. *Mulhern v. Roach*, 398 Mass. 18, 27 (1986).

5. The requirement that "'[a] fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence, **experienced in the area of the law involved**, would be left with a definite and firm conviction that the fee is substantially in excess of a reasonable fee,' creates explicitly an objective standard by which attorneys' fees are to be judged." *Matter of Fordham* 423 Mass. 481, 493-94 (1996) (emphasis added).

6. A client's subjective agreement or disagreement is irrelevant to a determination of whether a fee is clearly excessive. Matter of Fordham, 423 Mass. 481, 494 (1996) ("[t]he test as stated in the [Rule 1.5] is whether the fee 'charged' is clearly excessive, not whether the fee is accepted as valid or acquiesced in by the client.").

7. Rule 1.5(a)(1) establishes factors for reviewing on an objective basis any attorney's fee:

> The factors to be considered in determining whether a fee is clearly excessive include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

8. Because all these factors must be judged by an attorney "experienced in the area of the law involved", they require Bar Counsel to present expert testimony when trying to satisfy its burden of proof on these factors. *See* Matter of Fordham, 423 Mass. 481, 488-89, 493-94 (1996) (Four witnesses testified before the hearing committee as experts on OUI cases).

9. Some factors for examining whether there was informed consent to a contingent fee agreement consist of the sophistication of the client, whether the fee agreement was "the subject of intense negotiations", and whether the client had the benefit of the advice of other counsel. Cambridge Trust Co. v. Hanify & King Professional Corp., 430 Mass. at 472, 477–478 (1999).

10. Other special considerations in the case of a contingency fee are:

1) the likelihood of success;
2) the likely amount of recovery;
3) the possibility of an award of exemplary or multiple damages;
4) the attitude and prior practices of the other side with respect to settlement;
5) the likelihood of, or any anticipated difficulties in, collecting any judgment;
6) the availability of alternative dispute resolution as a means of achieving an early conclusion to the matter;
7) the amount of time that is likely to be invested by the lawyer;
8) the likely amount of the fee if the matter is handled on a non-contingent basis;
9) the client's ability and willingness to pay a non-contingent fee;
10) the percentage of any recovery that the lawyer would receive as a contingent fee and whether the percentage will be fixed or on a sliding scale;
11) whether the lawyer's fees would be recoverable by the client by statute or common law;
12) whether the jurisdiction has guidelines for contingent fees; and
13) how expenses of the litigation are to be handled.

Redlich v. Lanell, 20 Mass.L.Rptr. 688, 711 (Mass.Superior 2006) citing various *ABA Ethics Opinions*.

11. There is a presumption that the percentage established in a contingent fee agreement is reasonable. Smith v. Consalvo, 37 Mass.App.Ct. 192, 198 (1992); First Natl. Bank v. Brink, 372 Mass. 257, 265-266, 361 N.E.2d 406 (1977).

12. "[E]nsuring that attorneys will be paid for their work ... serves an important societal goal of providing access to legal services for clients who otherwise could not afford such services." Ropes & Gray LLP v. Jalbert, 454 Mass. 407, 414 (Mass., 2009).

13. "A critical factor in judging the reasonableness of a contingent fee is the uncertainty of the attorney's compensation. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-389 (1994)." Redlich v. Lanell, 20 Mass.L.Rptr. 688, 714 (Mass.Superior 2006) at 714.

14. However, uncertainty is not a requirement for a contingent fee agreement. The ABA Formal Opinion cited by *Redlich* states (with emphasis added):

... [t]he Committee is of the view that the argument may rest on a faulty notion as to the number of cases regarding which at the consent of the engagement the lawyer can say with certainty that the client will recover. [FN11] Defendants often vigorously defend and even with cases where liability seems certain. [FN12] Additionally, a previously undiscovered fact or an unexpected change in the law can suddenly transform a case that seemed a sure winner at the outset of representation into a certain loser. See, e.g., Central Bank of Denver v. First Interstate Bank of Denver, 114 S.Ct. 1439 (1994) (where the Supreme Court held that a private plaintiff may not maintain an aiding and abetting suit under § 10(b) of the Securities Act of 1934, overruling every circuit court which for decades had allowed such suits).

Moreover, even in cases where there is no risk of non-recovery, and the lawyer and client are certain that liability is clear and will be conceded, a fee arrangement contingent on the amount recovered my nonetheless be reasonable. [FN13] As the increasing popularity of reverse contingent fees demonstrates, for almost all cases there is a range of possible recoveries. Since the amount of the recovery will be largely determined by the lawyer's knowledge, skill, experience and time expended, both the defendant and the plaintiff may best be served by a contingency fee arrangement that ties the lawyer's fee to the amount recovered. [FN14]

Also, an early settlement offer is often prompted by the defendant's recognition of the ability of the plaintiff's lawyer fairly and accurately to value the case and to proceed effectively through trial and appeals if necessary. There is no ethical reason why the lawyer is not entitled to an appropriate consideration for this value that his engagement has brought to the case, even though it results in an early resolution.

Given the foregoing, the Committee concludes that as a general proposition contingent fees are appropriate and ethical in situations where liability is certain and some recovery is likely.

...

As with the question of appropriateness, the mere fact that liability may be clear and that some recovery is likely does not per se make any given contingent fee unreasonable. **It is important to keep in mind that the reasonableness as well as the appropriateness of a fee arrangement necessarily must be judged at the time it is entered into.** All contingent fee arrangements carry certain risks the risk that the case will require substantially more work than the lawyer anticipated; the risk that there will be no judgment, or only an unenforceable one; the risk of changes in the law; the risk that the client will dismiss the lawyer, and the risk that the client will require the lawyer to reject what the lawyer considers a good settlement or otherwise to continue the proceedings much further than in the lawyer's judgment they should be pursued. **If a lawyer accepts a given risk – for example, the settlement – and offers a fee contract reflecting that risk, which is accepted by a fully informed client, the lawyer should not be required as a matter of ethics to give up the benefits of the agreement because the opposing party, to everyone's surprise, offers an early settlement that is acceptable to the client.** [FN21] By the same token, a later development that increases the risk to the lawyer – for example, a statutorily imposed cap on liability, the loss of a summary judgment motion everyone expected to win, or the need to take three times the number of depositions originally anticipated – should not permit the lawyer to demand a new, or generous fee arrangement.[FN22]

...

[FN11]. A recent study indicates that the probability of recovery is presently decreasing, rather than increasing, in many types of lawsuits that are traditionally handled on a contingent fee basis. See Stingier Jurors Doling Out Fewer Awards, ABA Journal, Sept. 1994 at 20. This study shows that in medical malpractice cases the probability of recovery at trial has decreased from 37% to 31% and, in products liability cases from 51% to 43%. Id.

[FN12]. In a study of 8,231 closed medical malpractice cases in the State of New Jersey from 1977 to 1992, almost 10% of patients received no recovery at all in cases where the defendant doctors' conduct was rated indefensible. See M.I. Taragin, L.R. Willet, A. Pwilczek, R. Trout and J.L. Carson, The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims, 1992 Annals of Amer.Med. 780-784.

[FN13]. Evidence that, in such cases, free market forces may result in a substantially reduced contingent fee can be found in airline liability cases. In cases where airline insurers voluntarily sent out the "Alpert letter" which makes an early settlement offer and concedes all legal liability, average contingent fee rates dropped to 17% and were often only charged on a portion of the recovery. See L. Kriendler, The Letter: It Shouldn't be Sent, 12 The Brief 4, 38 (November 1982).

[FN14]. Similarly, in the case of reverse contingent fee arrangements, some savings from the amount the plaintiff demands is almost always a certainty, yet as this Committee opined in Formal Opinion 93-373, there is nothing ethically improper about entering into a fee agreement that compensates the lawyer based on a percentage of the total saved.

...

[FN21]. Brickman, supra note 4, at 87 ("it is not the actual effort expended by the attorney that is determinative of the legitimacy of the fee, but what a good faith, professionally informed estimate of anticipated effort and risk of non-recovery would have been prior to the commencement of representation"). (Emphasis added.)

[FN22]. See, e.g., Chase v. Gilbert, 499 A.2d 1203 (D.C. 1985) (A lawyer cannot modify a fee agreement even if he ends up performing significantly more services than were contemplated when agreement was entered into). Because reasonableness if judged at the time the contract is entered into, there is nothing necessarily unethical about charging a contingent fee on the portion of any recovery that is equal to an early settlement offer. See ABA Formal Opinion 329 ("[n]o reasonable method of fixing fees which takes into account the factors of DR 2-106(B) is prescribed by the Code of Professional Responsibility"). It should be noted, however, that extreme changes in circumstances occurring after negotiation of the fee agreement may lead a reviewing court to decide, ex post facto, that payment of the fee is unreasonable. See, e.g., Mckenzie Construction Inc. v. Maynard, 758 F.2d 97 (3d Cir. 1986).

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-389 (1994)

15. A "classic" retainer is a retainer paid to an attorney to forego other work to take on a case or to be available exclusively for certain legal work for which the attorney would not otherwise be available and is considered earned when paid. Blair v. Columbian Fireproofing Co., 191 Mass. 333 (1906); *"Write it Up, Write it Down: Amendments to the Mass.R.Prof.C 1.5 Require Fee Arrangements to be in Writing,"* and *"The Ethics of Charging and Collecting Fees"*, Massachusetts Bar Counsel Ethics Opinions.

16. A classic retainer may be non-refundable if reasonable. Id. Non-refundable flat fees are

allowed if "as with all other fees, [they are] reasonable. And the fee may not interfere with the client's right to discharge the attorney at any time." Id. Such decisions allow for a "classic" retainer that is considered earned when paid when the attorney makes clear to the client that the attorney would have to forego other work to take on the case and the total fee is reasonable. Id.

III. RULE 1.5 TECHNICAL

1. In order to illustrate the requirements of a contingent fee agreement, Rule 1.5(f) provides two forms which attorneys may use for contingent fee agreements. Rule 1.5(f)(1) states that "The following forms of contingent fee agreement may be used to satisfy the requirements of paragraphs (c) and (e) if they accurately and fully reflect the terms of the engagement." (Emphasis added).

2. Rule 1.5(f)(3) provides that:

> The authorization of Forms A and B shall not prevent the use of other forms consistent with this rule. A lawyer who uses a form of contingent fee agreement that contains provisions that materially differ from or add to those contained in Forms A or B shall explain those different or added provisions or options to the client and obtain the client's informed consent confirmed in writing ... A fee agreement containing a statement in which the client specifically confirms with his or her signature that the lawyer has explained that there are provisions of the fee agreement, clearly identified by the lawyer, that materially differ from, or add to, those contained in Forms A or B meets the "confirmed in writing" requirement.

3. The requirements of Rule 1.5(f)(1)-(3), according to Rule 1.5(f)(4), apply only when the client is not an organization.

4. Neither the Rule nor the Editor's Note nor the Supreme Judicial Court, however, has specified exactly the form which such written consent must take. An informed-consent provision in the contingent-fee agreement may suffice unless the client claims as here that it was signed into singing it, but is not necessary: in R.W. Granger & Sons v. J & S Insulation, Inc., 61 Mass.App.Ct. 92 (2004), the Appeals Court of Massachusetts held that "fastidious

communications between the law firm and client throughout the course of their relationship," in the form of written letters, satisfied the informed consent requirement.

IV. RULES 1.1, 1.2, AND 1.3

1. The Comments to these Rules establish that violation of these Rules is to be determined by an objective standard equivalent to the standard for attorney malpractice as follows.

> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. Rule 1.1, *Comment 1*.

2. Rule 1.2(c) specifically states that, "[a] lawyer may limit the objectives of the representation if the client consents after consultation." Its Comments with emphasis added state as follows:

> [1] A lawyer should seek to achieve the lawful objectives of a client through **permissible** means. ... In general, the client's wishes govern the conduct of a matter, subject to the lawyer's professional obligations under these Rules and other law, the general norms of professional courtesy, **specific understandings between the lawyer and the client**, and the rules governing withdrawal by a lawyer in the event of conflict with the client. ... As the Rule implies, there are circumstances, in litigation or otherwise, when lawyers are required **to act on their own with regard to legal tactics or technical matters** and they may and should do so, albeit within the framework of the objectives of the representation.
>
> ...
>
> [4] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. ... The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

3. Rule 1.3 Comments with emphasis added state as follows:

> [1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in

advocacy upon the client's behalf. **However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued subject to Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.**

4. The standard for attorney malpractice requires evidence sufficient to warrant findings that the defendant failed to exercise reasonable care and skill in handling the case and that this failure proximately caused the plaintiff to incur a loss. *DiPiero v. Goodman*, 14 Mass.App.Ct. 929, 929 (1982), rev. den., 387 Mass. 1102, *cert. den.*, 460 U.S. 1029, 103 S.Ct. 1418, 75 L.Ed.2d 782 (1983); *Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C.*, 25 Mass.App.Ct. 107, 111, 515 N.E.2d 891 (1987). Where an attorney has not held himself out to be a specialist, he owes the client a duty to exercise the degree of care, skill and attention of the average qualified practitioner. *Fishman v. Brooks*, 396 Mass. 643, 646, 487 N.E.2d 1377 (1986); *Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C.*, supra at 111.

5. Expert testimony is generally required to establish the standard of care owed by an attorney under given circumstances and the defendant's departure from that standard. *Fishman v. Brooks*, supra at 647; *Pongonis v. Saab*, 396 Mass. 1005, 1005 (1985); *Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C.*, supra at 111. It is well established that an allegation of legal malpractice is not self-proving. Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C., supra at 111, 515 N.E.2d 891. Expert testimony is necessary to establish that an attorney failed to meet the standard of care owed in the particular circumstances, unless the alleged malpractice is so gross or obvious that laymen can rely on their common knowledge to recognize or infer negligence. *Fishman v. Brooks*, supra at 647; *Pongonis v. Saab*, supra at 1005; *Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C.*, supra at 111.

III. RULES 3.3 / 8.4

1. Like *Massachusetts Rule of Civil Procedure Rule 11*[1], inferences both from the text and from related case-law require that both Rule 3.3 and Rule 8.4 should be evaluated on a subjective, good-faith-basis standard.

2. Any allegedly false statement that Bar Counsel argues as a basis for a disciplinary violation of Rules 3.3. or 8.4 "must be 'susceptible of a reasonably ascertainable meaning,' or reasonably free of ambiguity." In re Angwafo, 453 Mass. 28, 36 (2009).

3. The "knowing" component of Rule 3.3 states a subjective standard. Comment [2] to Rule 3.3 states that "an assertion purporting to be on the lawyer's own knowledge ... may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." There is no language here to suggest that anything the lawyer *could or should have known*—hallmarks of an objective standard—can be a knowing violation: what matters is the lawyer's subjective knowledge.

4. Such subjective standard is consistent with case law. There must be presented "substantial evidence" of Respondent's subjective "actual intent to mislead or deceive another." In re Slavitt, 449 Mass. 25, 33 (2007); In re Murray, 455 Mass. 872, 882 (2010) ("The hearing committee concluded that there was no violation because the respondent had no intent to mislead."); In re Balliro, 453 Mass. 75, 82 (2009) (... the mental state — knowing falsity —

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[1] Massachusetts Rule of Civil Procedure 11 has a subjective, good-faith basis suggested in the rule itself: "The signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay." Mass. R. Civ. P. 11. The case law also supports this proposition: "The principles enunciated above lead us to conclude that our rule 11(a) authorizes a judge to impose attorney's fees and costs where an attorney has failed to show a subjective good faith belief that the pleading was supported in both fact and law." Van Christo Adver., Inc. v. M/A-COM/LCS, 426 Mass. 410, 416 (1998) (citing Robinson v. Dean Witter Reynolds, Inc., 129 F.R.D. 15, 18 (D.Mass.1989)).

required for violation of rules 3.3(a)(1) and (4), and rule 8.4(c)"); In re Hrones, 457 Mass. 844, 855 & n. 6 (2010) (Rule 5.5 does not have specific intent such as Rule 3.3 does.) Along those lines, the case of In re Balliro, 453. Mass. 75 (2009) upheld discipline under Rule 3.3 when the BBO "properly could infer that the respondent knew, when she testified at Knox's trial, that she was giving false testimony with respect to how she sustained her injuries." (Emphasis added). 453 Mass. at 85.

5. Furthermore, the SJC has also stated that it will not impose a fully objective standard as far as knowing violations of SJC rules are concerned: "we will not draw an independent inference as to the respondent's knowledge when the facts are subject to several interpretations." In re Driscoll, 447 Mass. 678, 685 (2006).

6. Rule 8.4 also imposes a subjective standard on attorney conduct. Comment [2] states that "[a] lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law."[2] The language of "good faith" here supports a subjective interpretive standard.

7. The case law also supports such a standard. The SJC in In re Murray, 455. Mass. 872 (2010) upheld a BBO hearing committee's finding "concerning the respondent's state of mind" and finding that "the respondent lacked the required mental state and had no specific intent to deceive." 455 Mass. at 881-82. And In re Discipline of an Attorney, 451 Mass. 131, upheld discipline under Rule 8.4(c) when an attorney asserted a lien "although he knew that he was not entitled to such a lien at the time." 451 Mass. 131, 144-45 (2008). The court concluded that:

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[2] Rule 1.2(d) states that "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law."

"[t]he public assertion of a lien on a client's potential recovery when the lawyer knows he has no right to do so plainly constitutes a misrepresentation and is dishonest; ... Id.

Respondent

by his attorney,

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Date: 12 May 14

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon Bar Counsel by first class postage-prepaid mail on 12 May 2014.

/s/ Valeriano Diviacchi

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

BAR COUNSEL

Petitioner

v.

VALERIANO DIVIACCHI

BBO FILE # C1-12-0140

RESPONDENT'S REQUEST FOR FINDINGS OF FACT

I. UNDISPUTED FACTS

Respondent requests that the following facts be found to be undisputed and therefore as true for purposes of this matter.

A. Nature of the underlying action of Sovereign Bank v. Warrender

1. The Action of *Sovereign Bank v. Warrender,* District of Massachusetts Case No. 11-CV11054, in which the client of this Petition Camilla Warrender ("Warrender") is the Defendant/Plaintiff-in-Counterclaim was filed on 14 June 2011 ("Civil Action"). Exhibit(s) 1, 2.

2. In such Civil Action, Sovereign Bank as the holder of promissory notes owed to Nantucket Bank was suing Warrender for a "[d]emand of $2,808,000" based on alleged debts consisting of principal and interest owed on a construction loan note and a home equity line of credit in which the total indebtedness to the bank was allegedly $2,624,119.24 and $184,477.94 respectively plus continuing interest and attorneys fees since the alleged date of defaults that were alleged to be respectively 6 January 2011 and 13 January 2011. Exhibit(s) 2, 46.

3. By 25 July 2011, Warrender had contacted and then by 16 August 2011 she had hired the law firm of Sherin and Lodgen to represent her in the Civil Action. Though Sherin and Lodgen

eventually filed a general appearance on behalf of Warrender in the Civil Action, they had a side-deal with Warrender that if settlement negotiations were not successful and the Civil Action "proceeds beyond the pleading stage" that Warrender will "assent to Sherin and Lodgen's withdrawal from the Action." Sherin and Lodgen estimated that their fees for potential negotiations and the pleading stage "will be between $3,500 and $5,000." Exhibit(s) 23, 29.

4. On 16 September 2011, Sherin and Lodgen filed an Answer and Counterclaim for Warrender. The Counterclaim plead causes of action based on the Home Ownership and Equity Protection Act (HOEPA); the Equal Credit Opportunity Act (ECOA), common law fraud, *M.G.L.c. 93A, §11*, and federal statutory declaratory relief. Exhibit(s) 1, 3.

5. It is Respondent Diviacchi's ("Diviacchi") testimony and good faith opinion that he held throughout the Civil Action based on his 24 years of experience in handling lender liability cases and hundreds of civil actions that the Counterclaim filed by Sherin and Lodgen would not have survived the Motion to Dismiss eventually filed by Sovereign Bank and this statement is not contradicted by any evidence or contrary opinion. Transcript Vol. I pp. 44-48, 99-111, 147, 173-76; Transcript Vol. III pp. 280-81; Transcript Vol. IV pp. 135, 138-39; Exhibit(s) 25, 26.

6. The parties to the Civil Action initially reported the case settled to the Court on 17 October 2011. Exhibit(s) 58, 59, 60, 61.

7. However, by 14 November 2011, Sovereign Bank filed a Motion to ReOpen arguing that "the settlement was not consummated" based on arguments that Ms. Warrender and her Counsel had not honestly disclosed nor honestly stated the status of the alleged sale of the property and the state of the property and its title and that they had made material changes to the proposed settlement that went beyond what the bank had agreed to do (*i.e.*, "Although the Bank was not aware of such liens, Ms. Warrender and her counsel apparently were. During a telephone

conversation on November 3, Ms. Squires-Lee disclosed for the first time that there were significant junior liens on the Property including a mortgage in the amount of several hundred thousand dollars from Ms. Warrender to her mother. The existence of this insider mortgage transaction had not been previously disclosed to the Bank and the Bank's counsel had not yet received the results of a title examination which was ordered as part of the process of finalizing any settlement agreement." [Emphasis added]). Such arguments were eventually accepted as true and subsumed into the Court's Decision re-opening the case on 18 April 2012. Id.

8. From November until 18 April 2012, there was numerous litigation, motion practice, and court filings among the parties including the usual threats of bad faith, sanctions, and cross accusations among the attorneys as to who was breaching what that also included a Motion to Withdraw by Sherin and Lodgen with additional replies, oppositions, and associated disputes on these motions. The basis for Sherin and Lodgen's Motion to Withdraw was:

> 2. On August 16, 2011, Camilla Warrender engaged Sherin to represent her in connection with this action. That engagement was expressly limited to analyzing a response to the Complaint filed by Sovereign Bank (the "Bank"), responding to the Complaint, and negotiating an early settlement with the Bank. Ms. Warrender agreed that if we were unable to settle the case, she would agree to Sherin's withdrawal in this matter. I had estimated fees for those services would be between $3,500 and $5,000. A copy of Ms. Warrender's engagement letter is attached hereto as Exhibit A.
> 3. The engagement was not on a contingency basis. Ms. Warrender agreed to pay Sherin's fees and costs as they became due.
> 4. Other than a $2,000 retainer, Ms. Warrender has paid none of the bills rendered to her in this case.
> ...
> 6. To date, Ms. Warrender has accrued over $55,000 in fees and costs in this case. Ms. Warrender has made no payments to Sherin other than the initial $2,000 retainer.
> 7. As is apparent the retainer agreement, my firm and I were retained by Ms. Warrender to respond to the Complaint and negotiate an early settlement of the case. I did not anticipate the Bank's contentiousness in the litigation, the Bank's resistance in negotiations over two separate time periods which were far lengthier than I envisioned, and I did not anticipate that a response to the Complaint and negotiation would cost much more than $5,000. As an example of the unexpected contentiousness, I did not anticipate the Bank's Motion practice around the settlement, nor did I anticipate the Bank's unilateral refusal to postpone foreclosure during the pendency of this case.
> 8. I have been informed by Ms. Warrender that she has no ability to pay any of my fees incurred to date or going forward in the litigation and has no family member to borrow money from because a significant portion of her elderly mother's assets were used to pay on the mortgages to the Bank.
> ...
> 10. I advised Ms. Warrender to obtain successor counsel and she is diligently working

to do so. I have advised Ms. Warrender that if she is not successful in engaging successor counsel then she will likely not get any further extensions and will have to proceed *pro se*.

...

13. No motions were pending when I filed the Motion to Withdraw. The Bank's Opposition to Ms. Warrender's Counterclaims was not due for more than two weeks, until May 2, 2012.

14. Continued representation of Ms. Warrender will create an unreasonable financial burden on myself and my law firm.

...

... **[P]rocedurally, this matter is still in its infancy. Pleadings are not closed; no discovery has taken place; no discovery has taken place; no discovery has been noticed; no automatic disclosures have been provided; no trial date has been scheduled**. Exhibit(s) 31. (Emphasis added).

Exhibit(s) 1, 22 - 34, 58 - 61.

9. During such time period of November 2011 to April 2012, Warrender was materially involved in the details of the settlement proposals being made; the revision of any proposed settlement documents, affidavits, and court motions; approving communications to Sovereign Bank; and with the legal, factual, and even tax consequences of what was going on. When necessary, she specifically told her attorneys what to do and say. When she wanted, she went behind the three attorneys handling the Civil Action for Sherin and Lodgen to contact other attorneys for second and third opinions. She even skipped all attorneys for both parties to contact Nantucket and Sovereign Bank directly. The following is a sampling of her actions:

Hi Debbie-[Debra Squires-Lee, one of the Warrender's attorneys at Sherin & Lodgen]

Here are my edits. Let me know when you'll be available to discuss?

There are still a number of things not fully clarified in the documents:

1. credit reporting
2. appliances not to be included (unless all furnishings are)
3. if I assign contracts, bank accepts responsibility for indebtedness relating to those contracts
4. done in a way to minimize taxes (sell for $1??) This would include whether to call it a DIL, what to call the 206K "Release Fee", etc, etc.
5. determining what the bank would agree to as a short sale amount if I sell in the next month.

This would not affect the 206K, but would take care of how to classify it, the furniture, my siblings, etc. Would be much easier.

Is there anything else you can think of?

Exhibits 88, 89, *email dated 10/31/11.*

Hi Debbie-
I've been thinking all weekend about Gentilli's threats and your proposed letter. I would so much prefer, if at all possible, to try to manage him to try to massage him in. How about telling him that one of the lienholders is an aggressive attorney -- and one lien holder who is not secured but expecting to be paid at sale. I realize this could spook him. Or it could succeed. What do you think? btw, did you intend to decrease the amount of the larger payment to 317K? I'll be leaving here about noon tomorrow, so I'll try to reach early a.m. before heading to the airport.
Id., *email dated 11/7/11*; 89.

A few things that jumped out at me in reviewing your various emails with Gentilli: ...
Id. *email dated 11/14/11.*

Hi Deb- Open to any or all edits/deletions/additions [for Warrender's personal letter to CEO of Nantucket Bank] ...
...
... I will also seek additional input from Sovereign Bank and Banco Santander.
Id. *email dated 12/12/11.*

Lots of questions on the language to protect both my mom and me from tax liability, including the amount of the Transfer Credit. Will deal with that later. For now please let your intention to bring Gentilli to the table on the credit reporting and third party entity.
Id. *email dated 03/20/12.*
Exhibit(s) 58, 60, 84, 85, 88, 89, 92.

10. On 19 April 2012, Sovereign Bank filed a Motion to Dismiss the Counterclaim and associated motions opposing any extension of time to oppose that Motion or to stay the litigation. The Opposition to that Motion to Dismiss was due by 2 May 2012. Sovereign Bank's objections to any stay or extension of time was replete with statements that, "the likelihood of Ms. Warrender finding an attorney in three months who would defend her in this matter on a contingency basis is slim. Ordinarily defendants do not retain counsel on contingency." Eventually, Sovereign Bank assented to one extension for the filing of an Opposition by saying:

> I lack the authority from my client and I believe these issues should be briefed before the foreclosure sale and any effort to stop that sale by you or your client. The motion to dismiss was filed on April 19, 2012. The time for you to file an opposition expired last week. I can agree to extend to the end of this week 5/11, but no further. I am sorry but the current circumstances will not permit for a further extension, without prejudicing my client. Exhibit(s) 88 (at *email dated 05/7/12)*

Exhibit(s) 25, 26, 27, 28, 30, 32, 33, 34, 36, 37, 44, 45, 88.

11. At the time of the 1 May 2012 meeting between Warrender and Diviacchi at his office, all attempts at settlement of the Civil Action had failed, "[w]e did not have a settlement at that point", and an Opposition to the Motion to Dismiss was due initially 2 May 2012 and then by 11 May 2012. This 11 May date was two days after the 9 May 2012 date on which Diviacchi had prepaid plans to travel to California to attend his daughter's college graduation and to close his office until 22 May. Furthermore by 1 May 2012, Warrender understood: Diviacchi's prepaid plans; that if she did not hire new counsel nor file a timely opposition that she would be *pro se* and that the motion to dismiss would be allowed thus her case "would be dismissed"; that a foreclosure was scheduled for 24 May 2011 at noon; and that Attorney Diviacchi based on the material that he had been given so far did not see any meritorious basis to move for a foreclosure. For example, some of the communications were:

> **Q:** When you came to my office the bank had filed a motion to reopen the case that was allowed and the litigation was continued am I correct?
> **A:** That's right.
> **Q:** When you came to my office there was a motion to dismiss pending against you correct?
> **A:** Right.
> **Q:** You understood what happened with that motion to dismiss.
> **A:** Yes.
> **Q:** If it wasn't opposed what would happen?
> **A:** The case would be over.
> **Q:** And by the case being over, it means you would have had a judgment against you for $2.5 million and the property would be foreclosed upon, am I correct?
> **A:** Well they had already issued the foreclosure so that seemed to be independent of the case and we had lost that on appeal so.
> **Q:** So you can't answer my question yes or no?
> **A:** No. I just took exception with your point about the foreclosure. **That wasn't part of my case and that wasn't part of what you were pursuing.** Transcript Vol. IV, p. 97. (Emphasis added).

> ... I [Diviacchi] was not going to stop the foreclosure, no way. And settlement, I'm not going to talk settlement until when and if we [win] on a motion to dismiss because it's a waste of time, and I have to be efficient on a contingent case.
>
> I emphasized that. I told her that every time I talked to her [Warrender]. If she wanted to pay me hourly and do what Sherin & Lodgen did and rack up a bill of 55 grand just by filing an answer, we can do that. If you want to handle it on a contingency, you have do it my way. My way is no foreclosure, we don't talk settlement until after, if and

when we win on our motion to dismiss. If she doesn't like that, don't hire me.
Transcript Vol. I pp. 46.

If you [Warrender] want to do foreclosure, don't hire me [Diviacchi]. When she had come to my office, she had given up on that just like she had given up on the settlement, otherwise, she wouldn't have hired me.
Transcript Vol. I pp. 55.

So I [Diviacchi] explained to her [Warrender] that normally when you're behind with your mortgage even if you live there you're not going to be able to stop the foreclosure, and given these facts ... . There's no way to stop the foreclosure.

This type of lender liability case you have to do one [of] two things. You either have to go after the money or you have to try to save the property. If she wants to save the property, I can't help her. There's no way to stop the foreclosure. There's no way to do foreclosure defense on a contingent fee. ....
Transcript Vol. I pp. 148-49. (Emphasis added).

Q. By the term now that the bank sees that we can go the distance, is it fair to say what you [Warrender] meant by that the bank knew now that you could afford to have an attorney to go to trial and beyond if necessary?
A. Yes. That the bank saw that I had an attorney and could proceed.
Q. You knew that was significant leverage?
A. Yes, I believe that was true.
Transcript Vol. III pp. 151. (Emphasis added).

A. Well, you know, I [Warrender] think at that point [1 May 2012] it looked as if we were embarking on extensive litigation which turned out not to be the case.

And I know after leaving your office I called you and told you again that the sale might happen and I asked you whether you wanted to wait.
Q. You asked me [Diviacchi] or told me not to file an appearance because you were still trying to settle.
...
Q. You left the office, you called me back and told me to hold off, that you were still trying to settle, am I correct? That's what you just testified to.
A. Yes.
...
Q. So you called me back and told me that it didn't work out and you had me file an appearance.
A. Yes.
Transcript Vol. III pp. 104-105.

Everyone [emphasis added] felt that once you [Diviacchi] came on, that number was likely to go up. Now that the bank sees that we will go the distance, it seems that if we stop the FC [foreclosure] we have a decent chance of settling sooner rather than later.

I don't know if you have filed a formal motion for preliminary injunction. **I know it was not what you originally intended.** [emphasis added]. But even though my cash situation is not great, it there's anything else to be filed that would make the request for a restraining order as strong as possible, **I would like to offer to pay you separately for that.** [emphasis added] Please let me know.

Thanks again for taking my case.

Best regards,

Camilla
Exhibit(s) 76, *email dated 10 May 2012.*

I told you 100 times that there is no basis for a preliminary injunction, that I will not file a motion for one. The office is closed until 22 May. I will not respond to anymore requests for a preliminary injunction. Exhibit(s) 76, *email dated 11 May 2012*

One last time. There is no meritorious basis to file for preliminary injunction. If you have attorneys that believe they have a basis, talk to them and hire them to do it.
Exhibit(s) 76, *email dated 15 May 2012.*

Transcript Vol. I pp. 32-56, 71-84, 112-26, 147-149, 163-169; Transcript Vol. II pp. 115-126, 145-152; Transcript Vol. III pp. 116-117,135-36, 143-145, 150-55, 197, 128-150; Transcript Vol. IV pp. 97, 136-37; Exhibit(s) 1, 22, 23, 24, 58-61, 47, 76.

12. By the time of the 1 May meeting and subsequent, Warrender had access to legal advice and had sought legal advice regarding the Civil Action from at least the following known and some unnamed attorneys:

Michael Gilleran of Adler and Pollock; Bill Delahunt; Bob Laurie; an attorney who added case law to her 93A demand letter; her mother's attorney, Tim Hughes; "One of the **attorneys** [emphasis added] I spoke with earlier said he thought the bank will likely try to claim that my loan was a commercial loan, so I kept that in mind as I went through the file"; "Maury Mariani"; Someone expressed surprised that there was no escrow for taxes"; John Roddy, "who came recommended as a predatory lending specialist"; Ken Gullicksen; Arthur Reade; Attorneys Geoffrey H. Smith, Debra A. Squires-Lee, and R. Victoria Fuller of Sherin & Lodgen.

Exhibit(s) 84, 85, 76, 88; Transcript Vol. II pp. 44-56, 143-46; Transcript Vol. III pp. 121-22, 127, Transcript Vol. IV pp. 64-65

13. Despite such knowledge of Diviacchi's prepaid plans and because of her access to several other attorneys for advice, after the meeting and the signing of the hybird/contingent fee agreement with Diviacchi on 1 May, she contacted Diviacchi ordering him not to file an appearance while she made one more attempt to try to settle the Civil Action. Based on her sophistication and prior discussions with her other counsel, the reasonable inference is that she used the potential of Diviacchi's appearance in the Civil Action as further leverage in trying to settle the Civil Action ("**Everyone** [emphasis added] felt that once you came on, that number was likely to go up. ..."; **Q.** You knew that was significant leverage? **A.** Yes, I believe that was

true; *supra* at ¶11):

> **Q:** Did you tell me not to file an appearance in case?
> **A:** I told you that probably made sense, for you to wait to see if the settlement was going to work.
> **Q:** So you told me not to file an appearance in the case.
> **A:** I think that's what I said.
> **Q:** A few days later you called me up and changed your mind again and said that settlement wasn't going to work. You told me to file an appearance?
> ...
> **A:** The settlement didn't work, and I needed you to file an appearance.
> Transcript Vol. II pp. 125-126

> "Val-
> It was good to meet with and discuss where things are with the case. **And if I have to move forward against the bank, I'm confident that I'll be in good hands.**
>
> **As we discussed, as we both agreed**, because of my current financial situation and my mom's, **I'm going to do my best to reawaken the settlement / short sale** and make it work. If you could please put things on hold one or two days, I'll return to you with the results. **If I'm not able to settle, we're off and running.** If I succeed, I'll pay you hourly for all your time expended." (Emphasis added) Exhibit 76 *email of 1 May at 2:47 P.M.*; Transcript Vol. III pp. 132-35

> **Q:** By the term now that the bank's seized and we can go the distance, it is fair to say what you meant by that was that the bank knew now that you could afford to have an attorney to go to trial and beyond if necessary? Answer, yes that the bank saw that I had an attorney and could proceed.

> **Q:** You knew that was significant leverage?
> **A:** Yes, I believed that was true.

See ¶¶11, 12 *supra;* Transcript Vol. I pp. 172, Transcript Vol. II pp. 125-126; Transcript Vol. III pp. 132-35.

14. By the following week, on or about 7 and 8 May 2012, just a couple of days before Diviacchi was scheduled to leave for California with his family to attend his daughter's college graduation, Warrender's further settlement attempts failed and she told Diviacchi to file an appearance in the case. Id.

15. Before leaving for California the on 9 May 2012, Diviacchi filed a general appearance and filed a Verified Amended Counterclaim (after revisions by her and based upon the approval of Warrender) on 7 and 8 May 2012 that mooted the filed Motion to Dismiss that was pending at that time. Exhibit(s) 6, 38 - 43; Transcript Vol. II pp. 125-126; Transcript Vol. IV pp. 134, 136,

139.

16. On 17 May 2012, Sovereign Bank filed a second Motion to Dismiss the Civil Action. Diviacchi timely filed an Opposition. Exhibit(s) 1, 12, 44, 45, 50, 52-54. Respondent Diviacchi's ("Diviacchi") testimony and good faith opinion that he held throughout the Civil Action based on his 24 years of experience in handling lender liability cases and hundreds of civil actions that his filed Amended Counterclaim would have survived the second Motion to Dismiss subsequently filed by Sovereign Bank is not contradicted by any evidence or contrary opinion and was in fact subsequently confirmed by the Court in its Decision denying injunctive relief. Id.; Exhibit 47; Transcript Vol. I pp. 44-48, 99-111, 147, 173-76; Transcript Vol. III pp. 280-81; Transcript Vol. IV pp. 135, 136-39; Exhibit(s) 25, 26.

17. While he was away, despite Diviacchi having told her that he saw no meritorious basis upon which to try to stop the foreclosure, Warrender began repeatedly contacting him by email and emergency phone messages left with his answering service that she wanted him to try to stop the foreclosure and offered "to pay you separately for that". Transcript Vol. I pp. 32-56, 71-84, 112-117, 124-126, 147-149, 163-169, 185-88; Transcript Vol. II pp. 115-126, 145-152; Transcript Vol. III pp. 116-117,135-36, 143-145, 150-55, 197, 128-150; Exhibit(s) 76.

18. Diviacchi declined Warrender's offer to be paid separately to try to stop the foreclosure by responding repeatedly that such attempt had no meritorious basis. Id.; *See* ¶11 *supra.*

19. Diviacchi's testimony and good faith opinion based on his 24 years of experience in handling lender liability cases and hundreds of civil actions is that not only was there no meritorious basis to move to stop the foreclosure but that such attempt contradicted and destroyed the credibility before the Court of the plead causes of action for predatory lending (that the subject loans were "doomed to foreclosure") is not contradicted by any evidence or contrary

opinion. Id.; Transcript Vol. IV pp. 136-37.

20. Warrender then, consistent with her sophistication and pattern of dealing with attorneys, sought and found other attorneys do what she wanted consisting of an attempt to stop foreclosure. These attorneys were Harold Jacobi, Nancy Sue Keller, and Jacqueline M. Cronin of the law firm Jacobi Chamberlin LLP ("Jacobi" attorneys). Exhibit(s) 7, 8, 9, 10, 46, 47, 48, 49.

21. On 16 May 2012, Warrender had attorneys Harold Jacobi, Nancy Sue Keller, and Jacqueline M. Cronin of the law firm Jacobi Chamberlin LLP file a "Notice of Limited Appearance" stating that they are entering a limited appearance for Warrender "for the sole purposes of filing Defendant's Emergency Motion For Temporary Restraining Order And Motion For Preliminary Injunction in the above-captioned action while defendant and plaintiff-in-counter-claim awaits the return of her new counsel from vacation." Exhibit(s) 7.

22. The Jacobi attorneys filed a Motion for Preliminary Injunction that was heard and denied on 22 May 2012. Only Attorney Keller of the Jacobi attorneys appeared to argue the Motion. Despite the fact that they had only a limited appearance in the Civil Action and that Diviacchi was general counsel of record in the Civil Action, the Motion was filed by Attorney Jacobi telling an associate to file it without reading any of the prior court filings in the case and without any consultation with Attorney Diviacchi. The Motion argued "irreparable harm" because "the Subject Property remains the Defendant's [Warrender's] sole residence" despite the fact that the filed court documents established that Warrender was not living there but was using the "Subject Property" as income producing, rental property earning $7000/$8000 rental income that Warrender was not paying to Sovereign Bank. Jacobi signed the Motion despite the fact that he had no experience in trying lender liability cases, could not testify as to what standard of review would apply, and without knowing the difference between a *Chapter 93A §11* claim and a *93A §9* claim that was the substantive change made by Diviacchi's Amended Counterclaim. The

Court denied the Motion noting:

> Defendant and Counterclaim Plaintiff Camilla Warrender ("Warrender") filed a verified amended answer and counterclaim in this matter alleging that Plaintiff and Counterclaim Defendant Sovereign Bank ("the Bank") improperly made her a series of mortgage loans related to a residence located at 5 Monomoy Road, Nantucket, Massachusetts ("the Property"), including a $2.55 million loan secured by a mortgage on the Property and executed on January 6, 2007, and a $180,000.00 home equity line of credit ("HELOC") secured by a mortgage on the Property and extended by the Bank to Warrender on October 25, 2007. D. 46 at ¶¶ 1, 53, 60. The Bank alleges that Warrender defaulted on both loans in January 2011, has not made payments on the loans since March 2011, and is indebted to the Bank in an amount approximating $2.9 million including interest and costs. D. 1 at ¶¶ 12, 14.
>
> At a hearing before the Court on April 12, 2012, counsel for the Bank asserted, in the presence of Warrender's counsel, that the Bank would be restarting the foreclosure proceedings in short order. D. 58 at 35. At some point after the hearing, the Bank scheduled a foreclosure sale on the Property for May 24, 2012 at noon. D. 39. Warrender was apprised of the sale no later than April 26, 2012, on which date she sought to stay the various proceedings in this matter to allow her to locate new counsel and seek a preliminary injunction. D. 39. Warrender's new counsel filed his appearance May 7, 2012. D. 45, and Warrender filed the operative verified counterclaim on May 8, 2012. D. 46. ...
>
> ...
>
> ... As counsel for Warrender's briefing and her arguments at the hearing made clear, all of these claims boil down to one theory: that the Bank violated its duties, giving rise to the various counterclaims, when it issued mortgages to Warrender knowing, based on her true income, that she could not afford the loans and that their real interest was in the collateral of those loans, which is the Property at issue here. Quite respectfully, with the exception of one reference to Charlesbank reciting the four factors for preliminary injunctive relief, there is not a single case cited in Warrender's moving papers, nor any substantive analysis to explain how the allegations in the verified amended counterclaim give rise to any of these claims or to the critical issue of showing how she has a reasonable likelihood of success on any of them. D. 50 at 2-5. It has not been made clear to the Court what the showing of likelihood of success on the merits is here. The Court certainly understands Warrender's theory, but the showing that needs to be made here for the extraordinary measure sought has not been made. ...
>
> ...
>
> ... The Bank has argued that Warrender is unlikely to succeed on her counterclaims since federal preemption under the Home Owners' Loan Act, 12 U.S.C. §§ 1461 et seq. ("HOLA") is likely to dispose of all nine counts. At this juncture, the Court is not fully persuaded by this argument as to all counts, as the Court's questions to the Bank's counsel at the hearing suggested. The Court has reviewed Sovereign Bank v. Sturgis, 2012 WL 1014607 (D. Mass. Mar. 22, 2012), cited by the Bank, and based on Sturgis' analysis of Massachusetts law in light of HOLA, it appears that while HOLA preemption may apply to a number of Warrender's claims, some subset of those claims, likely including her 93A claim, might very well survive a motion to dismiss. See Sturgis, 2012 WL 1014607 at 18-19 (declining to dismiss various of the plaintiff's claims, including a 93A claim, on preemption grounds). ...
>
> ...
>
> ... Despite ample notice of the pending foreclosure, Warrender has not yet marshaled sufficient factual or legal support for her claims, ...

Transcript Vol. I pp. 53-54, 147, 188-89, 192; Transcript Vol. III pp. 178, 192, 213-54, 269, 278-82, 324-28; Transcript Vol. IV pp. 136-39; Exhibit(s) 8, 9, 28, 46, 47

23. The Jacobi attorneys filed a Notice of Appeal of the Court's denial of a preliminary injunction to stop the foreclosure. Exhibit(s) 10, 47.

24. Attorney Jacobi does not know what the standard of review would be for his notice of appeal nor could he state the basis for the appeal. Diviacchi's testimony and good faith opinion based on his 24 years of experience in handling lender liability cases and hundreds of civil actions the there was no meritorious basis to file the appeal and that it was filed solely as an attempt to use the delay and potential of cost and fees as settlement leverage is not contradicted by any evidence or contrary opinion. Transcript Vol. I pp. 32-56, 71-84, 112-117, 124-126, 147-149, 163-169, 185-89, 192; Transcript Vol. II pp. 115-126, 145-152; Transcript Vol. III pp. 116-117,135-36, 143-145, 150-55, 178, 192, 197, 128-150, 189-91, 213-54, 269, 278-82, 324-28; Transcript Vol. IV pp. 136-39; Exhibit(s) 8, 9, 28, 46, 47, 76 at *5/10/12 email et seq*

25. Once the attempt to stop the foreclosure by motion failed, Warrender *pro se* filed a bankruptcy petition without any intention to actually proceed with the bankruptcy but only to use the automatic stay provision of such filing to stop the foreclosure. According to her fraudulent intent:

> The sketal filing stopped the FC [foreclosure] until at least July 27th, which means I can honor the summer rentals and give my mom some money. I checked with the court and confirmed my ability to pull out after the initial filing. Just to be sure I'll have that control, I agreed to pay the filing fee in installments, which do not finish until September – and the bankruptcy will not proceed without me paying the fee in full and giving them a list of creditors.

Exhibit(s) 76, *email dated 05/24/12*; Transcript Vol. I pp. 189 Transcript Vol. III pp. 163-67.

26. Such fraudulent bankruptcy filing successfully cancelled the foreclosure and Warrender than dismissed her bankruptcy filing. Id.

27. As part of the appellate process, the First Circuit Court of Appeals referred the appeal filed by the Jacobi attorneys for mediation. Exhibit(s) 11.

28. Attorney Jacobi appeared at the mediation on behalf of Warrender. Transcript Vol. I pp. 57-58; Transcript Vol. III pp. 186.

29. On 17 July 2012, Diviacchi filed an Attorney's Lien in the Civil Action pursuant to *M.G.L.c. 221 §50* ("Lien"). Exhibit(s) 1 *at* #74; 13.

30. Eventually, the parties in the Civil Action reached a settlement and then a "Stipulation of Dismissal With Prejudice" of the Civil Action, signed by Attorney Jacobi for Warrender and Attorney Gentilli for Sovereign Bank, was filed with the Court on 6 September 2014. Exhibit(s) 1 *at* #75; 15.

31. The actual settlement agreement itself that led to the dismissal was signed by the same two attorneys on 20 July 2012 and was entitled "Stipulation." This Stipulation required as follows:

> 3. ... In the event any of the foregoing events does not timely occur or in the event the sale of the property to the Dwyers is cancelled or delayed for any reason, then such stay of the Litigation shall cease prior to September 5, 2012 upon notice to the court by either the Bank or Warrender. In such event, the bank shall be entitled to assert and/or pursue any and all claims against Warrender in connection with the Litigation, including any claims for a deficiency judgment and claims seeking recovery in amount greater than the Settlement Amount and Warrender shall be entitled to pursue her counterclaim against the Bank in connection with the Litigation, seeking all and her alleged damages.
>
> ...
>
> 8. The terms of the Stipulation shall be in the nature of a Court Order and any breach of this Stipulation by either party shall be subject to contempt remedies ... . The parties agree that the Court may enter such further orders as may be required to enforce the terms hereof.
>
> ...
>
> 10. This Stipulation is subject to approval by the Court, which approval the parties shall seek forthwith upon execution hereof.

Exhibit(s) 14, 16.

32. The required "forthwith" court approval of the Stipulation was never sought from the District Court. In fact, the Stipulation was never filed with the Court until Diviacchi was able to

get it as part of his discovery attempts on his Lien and filed with the Court as an Exhibit B to his Motion filed on 23 September 2012. Exhibit(s) 1 *at* #78; 16; Transcript Vol. III pp. 254-55.

33. The settlement requirements of the Stipulation were satisfied and consummated on 5 September by a closing on the sale of the subject property by which the following occurred: after paying Sovereign Bank $1.9 million and receiving a release of her >$2.5 million dollar debt the was the "Demand" of the Civil Action, Warrender received approximately $340,000 in gross proceeds out of the $2.24 million sale that she used to pay off her debts to other attorneys, to pay to her family, and then still personally to receive $175,750 to do with as she wanted consisting of the $100,000 buyer's deposit plus a remainder check made payable to her of $75,750. Exhibit(s) 56, 87; Transcript Vol. II pp. 15-19, 27, Transcript Vol. III pp. 298-305; Transcript Vol. IV pp. 30-34.

34. If history had repeated and the settlement broke down for some reason or was not consummated, Diviacchi would have had the obligation to continue with the litigation on to trial and as attorney of record to do whatever was necessary and the Jacobi attorneys' "limited appearance" would have been over and according to Jacobi's testimony in the record:

> ... had we not come up to a settlement discussion and finally resolve on stipulation, then I guess I [Jacobi] would have walked away and said she has got her predatory lending case against Sovereign Bank and Sovereign Bank would have foreclosed on the house.
> ...
> ... Question, so even at this point August 24th there's still a 5 percent chance that settlement may fall through. Your [Jacobi] answer is that's what it says. It went up from 9, to 95 percent in July to 95 percent by August 24th. Did I read that correctly?
> **A.** Yes, you did.
> **Q.** So there's still a 5 percent chance that the settlement may fall through, and the answer, correct. Next question, what if it did, what would your involvement be in the case? Answer, let me think about that. If the settlement fell through, I [Jacobi] would say that the foreclosure would have taken place and I would have nothing further to do with Richard Gentilli and probably nothing further to do with Camilla Warrender. That's what I would say. Did I read that correctly?
> **A.** Yes, you did.

Transcript Vol. III pp. 227-28, 257, 275, 278, 289-90, 318; Exhibit(s) 76 *email dated 08/24/12.*

35. As of 29 June 2012 and continuing to at least to 19 July 2012, Warrender was still considering rejecting settlement with Sovereign Bank, was considering litigation options for the Civil Action, and Jacobi had to read her "the riot act" in order to get her to seriously consider settlement of the Civil Action. The options that the sophisticated Warrender came up with on her own were among others:

> I forgot to ask if/when you [Diviacchi] would add Santander to the lawsuit. ...
>
> ...
>
> Rink, please give me your ideas as to how we might proceed today. I have a few:
> 1. Go directly to Sovereign/Santander with our request. Presumably some attorney without full knowledge made that decision yesterday.
> 2. Let the house go, and make a side agreement with Meg and Matt for them to go directly to the bank but buy the furnishings and appliances from me (50K or so). Then I have a little cash, **and I continue on with the lawsuit.** [Emphasis added.]
> 3. File again the appeal (if you'll please give me the information), making clear to the judge that the bank misrepresented almost everything when we were last in court, taking advantage of Diviacchi being out of town and Nancy being fresh to the case.
> 4. Try to refinance somehow. My credit is shot, so I'd need someone else to take out the loan and come on with me. If the bank will let it go for 1.9M, that could be possible?
> OK, those were my thoughts last evening and this morning. Please give me yours?
> Camilla

Exhibit(s) 76, *emails dated 06/29 - -7/29/12.*

36. Subsequently to receiving notice of the dismissal through the court's CM/ECF system, Diviacchi proceeded with attempts to do discovery and to collect on his filed Lien that were dismissed by the District Court and appealed by Attorney Diviacchi. Exhibit(s) 1, 16, 62 - 68.

37. Diviacchi filed an appeal to the First Circuit Court of Appeals of such dismissal that was briefed and then argued in December of 2013 and that is still pending as of this date. Id.

38. Diviacchi's testimony and good faith opinion based on his 24 years of experience in handling lender liability cases and hundreds of civil actions the he has a meritorious basis to file his appeal is not contradicted by any evidence or contrary opinion. Exhibit(s) 62 - 68; Transcript Vol. I pp. 197-213; Vol. II pp. 27; Vol. IV pp. 146-47, 200.

39. Warrender never discharged Diviacchi. Diviacchi's general appearance in the Civil Action was never terminated by the Court until his Motion to Withdraw was allowed by the Court on 14 March 2014. Therefore, his obligations as the only attorney with a general appearance in the Civil Action did not end until his Motion to Withdraw was allowed by the Court on 14 March 2014. Exhibit(s) 1, 91; Transcript Vol. IV pp. 190.

B. The Sophistication of the Client Warrander

1. According to Warrender's pleadings and sworn testimony by affidavit submitted by her in her *pro se* Equity Complaint filed in the Nantucket Probate Court, she is an experienced businessperson and real estate developer familiar with complex financing, business entity formation and liability, and government regulations and approvals with the following experience:

> 4. On or about March 1996, the Plaintiff [Warrender] and Defendant entered into an oral business partnership agreement.
> 5. The purpose of this oral business partnership agreement was to (a) resolve their dispute with a property development firm in San Diego, California and recover funds that had been invested with that firm; (b) purchase vacant land in Nantucket, construct a residential home on the property, sell the home to a buyer at a profit, then purchase other vacant lots and repeat the process.
> 6. In March 1996 Plaintiff [Warrender] began her extensive efforts to recover monies lost in the California venture, organizing and managing the case for three years. This involved us in some trips to San Diego, hiring private investigators, assembling investors, interviewing attorneys, eliciting the cooperation of witnesses, and finally hiring the attorney who handled the case.
> ...
> 8. The agreement for the money recovered in California was that 50 percent of proceeds would go to investor Ronald Smith of San Diego, California, and 50 percent would go to the "Warrender Group."
> 9. Allocation of the monies recovered by the "Warrender Group" was at Plaintiff's [Warrender] discretion.
> ...
> 13. In furtherance of the business partnership, the Plaintiff [Warrender] and the Defendant have purchased and held, purchased and developed and/or purchased and sold the following parcels of real estate:
> A. 8 Tom Nevers, which is still under construction.
> B. 6 Pochick Avenue (144 Surfside), which was sold.
> C. 5 Flintlock Road, which was sold.
> D. 26 Old Tom Nevers Road, which was sold.
> E. 5 Monomoy Road, which has not yet been developed.
> F. One Marcus Way, which was sold.
> G. 2 Sussex Road, which is being sold.
> 14. Both the Plaintiff [Warrender] and the Defendant were responsible for the

operations of the partnership.

15. The Plaintiff [Warrender] was also responsible for locating the properties to be purchased by the partnership business [Warrender].

...

19. Plaintiff [Warrender] assisted in preparation of all design plans and met with various city officials to obtain plan approvals and permits in order to begin, continue, facilitate and complete the construction of homes on these lots.

...

32. Because Defendant did not have a contractor's license, most of the business partnership properties could not have been developed without Plaintiff [Warrender] owning and financing those properties.

...

34. At the sale of each property, Defendant reported to Plaintiff [Warrender] the profit they made with that project.

...

Generally speaking, I [Warrender] look for and identify locations for the building of the homes. Working together, we applied for permits from the various town boards, each of us interfacing at different times with those boards. When there were particular problems, I often researched potential solutions and agreed and reargued the issues before the appropriate officials in order to ensure and facilitate the desired building ...

Exhibit(s) 83.

2. However, when the above experience was discovered by Sovereign Bank in the Civil Action in which Warrender was claiming to be an inexperienced musician just as she is doing here to hide her sophistication, she denied such experience and instructed her Counsel at that time consisting of Attorneys Victoria Fuller and Debra Squires-Lee as to how to deal with Attorney Gentili's attempt and intent to use her admissions filed in the Probate Court against her in federal court:

> Vicki and Debbie-
> I just spent some time in probate court with our divorce documents. I'm about to fax (to Vicki's fax) Ron's affidavit, which contains the history of Monomoy.
>
> Second, I also learned that the "equity" complaint, and the entire file that came from, are very likely to be impounded with the rest of the divorce file. The cases were consolidated, and the motion was written to include that file, and it just did not get transferred onto the court's order.
>
> Lastly, there was a protective order governing use of the tax returns, which seems to have been violated in using them within court last week.
>
> All of this is not to say I want to fight. I do want to settle as soon as we can. But I want you to know that I didn't lie to you, though I definitely stretched the truth in that goddamn equity complaint.
>
> But mostly, I want you to be able to tell Gentilli that I DID NOT LIE TO YOU, and that it all will become clear, with abundant witnesses, if we need to fight this. And also please

put him on notice that he is not likely to have access to those documents as evidence if we do end up in court (but please don't give him details – I don't need to be dealing with his attempts to involved himself in next week's hearing).

But let's talk before you present that.

Exhibit(s) 88, *email dated 5 October 2011;* Vol. II pp. 34.

3. During entire time period of November '11 to September '12, Warrender was materially involved in the details of all settlement proposals being made, the revision of any proposed settlement documents and court motions, approving communications to Sovereign Bank, and with the legal, factual, and even tax liability consequences of what was going on. When necessary, she specifically told her attorneys what to do and say. When she wanted, she went behind the attorneys handling the Civil Action for her to contact other attorneys for second and third opinions. When she wanted, she went directly to the Court to complaint about an attorney's actions and to request orders from the Court. She even skipped all attorneys for both parties to contact Nantucket Bank, government officials such as banking commissioners, and "my contact within Santander for help with the Sovereign" and "through other avenues" directly both before and after Diviacchi's involvement in the Civil Action. Exhibit(s) 88, 89, 76 *emails dated 06/29 - -7/29/12.*

4. Warrender is also experienced in workings of the legal system, in the handling of complex litigation, and in the hiring and firing of attorneys as needed both on a non-contingent fee and contingent fee bases. In the last ten years, Warrender has had >15 different attorneys advising her or representing her in a half-dozen matters ranging from a multi-million dollar divorce in probate court to the multi-million dollar Civil Action consisting of at least the following:

a) Attorneys Margaret Xifaras, Paul M. Kane, Jacob Atwood, Franklin H. Levy in her divorce;
b) Attorneys Scott Fink, Josh Vitullo, Francis O'Rourke, Christopher Sheehan, Kristen Stathis, Erik Hammerelund, David Krumsiek, and Diviacchi in the *Warrender v. Young* matter.
c) Michael Gilleran of Adler and Pollock; Bill Delahunt; Bob Laurie; John Roddy ("I just had an interesting conversation with John Roddy, Boston attorney who came recommended as a predatory lending specialist."); Jeoffrey H. Smith, Debra A.

Squires-Lee, R. Victoria Fuller of Sherin & Lodgen; Harold Jacobi, Nancy Sue Keller, Jacqueline M. Cronin of Jacobi and Chamberlain; and Diviacchi in the Civil Action; her mother's attorney, Tim Hughes; "Maury Mariani"; John Roddy, "who came recommended as a predatory lending specialist"; Attorneys Geoffrey H. Smith, Debra A. Squires-Lee, and R. Victoria Fuller of Sherin & Lodgen.

d) Other unidentified attorneys such as "I sent the bank a 93A letter, to which a friend of mine had added case law"; "[o]ne of the attorneys I spoke with earlier said he thought the bank will likely try to claim that my loan was a commercial loan, so I kept that in mind as I went through the file" and "[s]omeone expressed surprised that there was no escrow for taxes."

e) Ken Gullicksen & Arthur Reade as her general counsel/ "long-time attorneys for ... 20 years or so."

Id.; Transcript Vol. I pp. 221-34; Transcript Vol. II pp. 134-45; Transcript Vol. III pp. 73-110, 125-27, 135-152; Transcript Vol. IV pp.24-67, 80-81; Exhibit(s) 76, 83, 84, 85, 88, 89, 90, 92.

5. During the time period of at least February 2012 to 1 May 2012 when she was negotiating with Diviacchi to hire his services, she sought advice or had access to legal advice regarding the Civil Action from at least the following attorneys plus a CPA:

a) Michael Gilleran of Adler and Pollock; Bill Delahunt; Bob Laurie; John Roddy ("I just had an interesting conversation with John Roddy, Boston attorney who came recommended as a predatory lending specialist."); Jeoffrey H. Smith, Debra A. Squires-Lee, R. Victoria Fuller of Sherin & Lodgen; Tim Hughes; "Maury Mariani"; John Roddy;

b) Other unidentified attorneys such as "I sent the bank a 93A letter, to which a friend of mine had added case law"; "[o]ne of the attorneys I spoke with earlier said he thought the bank will likely try to claim that my loan was a commercial loan, so I kept that in mind as I went through the file" and "[s]omeone expressed surprised that there was no escrow for taxes."

C) Ken Gullicksen and Arthur Reade as her general counsel/ "long-time attorneys for ... 20 years or so."

Id.; Vol. IV pp. 27 ("my CPA").

6. Warrender entered into a verbal contingent fee agreement with Jacobi and was not bothered by the fact that she had "no clear understanding as to how or when or why you [Warrender] had to pay Jacobi anything." Transcript Vol. IV pp. 24; Transcript Vol. III pp. 159-60.

C. Negotiations between Warrender and Diviacchi

1. Warrender first approached Diviacchi sometime in 2011 about the Warrender v. Young

matter that she had pending against some real estate brokers dealing with the same property at issue in the Civil Action. Transcript Vol. I pp. 32, 130-48; Vol. III pp. 106-07.

2. By at least February 2012, possibly even by January 2012, Warrender sent Diviacchi documents to review to determine if he would represent her in a lender liability case against Sovereign Bank on a contingent fee basis. She did not tell him at such time that she was already being sued by Sovereign Bank — the Civil Action. Transcript Vol. I pp. 32-55, 130-48; Transcript Vol. IV pp. 127-151, 190-200; Exhibit(s) 76.

3. It is Diviacchi's normal business routine developed during his >20 years of practice to review necessary documents and to conduct consultations by phone to determine whether a case has merits and to determine and negotiate possible fee arrangement options all by phone consultation before setting up any in-person meeting with the potential client. The in-person meeting is the last step once an agreement is reached by phone as to whether a court action can pursued and as to what the fee agreement would be. If no such agreement is reached, no office appointment is scheduled. Transcript Vol. I pp. 99-118; Vol. IV pp. 153-162, 197-202.

4. Diviacchi has developed the contingent fee agreement that he uses based on his 24 years of experience in handling lender liability cases and hundreds of civil actions concluding that the model forms of Rule 1.5 of the Rules of Professional Conduct are worthless for anything but simple personal injury cases. Id. In this regard, according to the Standing Advisory Committee on the Rules of Professional Conduct, both the MBA and the BBBA agree with him:

> Both the MBA and the BBA criticized the model form in the existing proposal as being applicable to a narrow range of contingent fee cases and that there was little guidance in what needed to be explained to the client. The Committee recognized that for matters for which the forum is not well suited, including more complex arrangements involving some contingent fee aspects, trying to explain the differences from the model form will appear to be a useless exercise. Id.; Exhibit(s) 57.

5. Phone negotiations and email negotiations continued between Warrender and Diviacchi

from their first contact in January/February 2012 to 1 May 2012. There are no recordings of the phone conversations. The email exchanges are a convoluted collection of offers, counteroffers, comments, and responses that establish and are a background of weeks long ongoing back and forth phone discussions by Warrender with Diviacchi as to the merits of her lender liability case and as to the offer of his fee agreement with her. All available — they may or may not be complete — email exchanges have been produced as Exhibit 76 with Bar Counsel producing edited portions of such email exchanges as Exhibit 77. At one point, Warrender decided to meet Diviacchi in federal court for a motion hearing in another lender liability case he was handling and discussed her potential case in court after that hearing. Exhibit(s) 76; Vol. I pp. 33-60; 137-160; Vol. IV 127-132, 136-37, 143-145, 197-98.

6. Diviacchi's first proposal to Warrender was to handle the lender liability case against Sovereign Bank based on a hybrid contingent fee agreement that would require an up-front non-refundable flat rate payment of $25,000. Id.

7. Between March 2012 and 1 May 2012, Warrender either directly or through a Mr. Robert Sawyer made numerous counteroffers to this $25,000 proposal that he rejected and the substance of which were as follows:

> Apparently, you are not proceeding with me on this matter. Do you want me to mail this material back to you or toss it? — *22 March 2012*
>
> **A flat rate is paid up-front. Once I file an appearance I am stuck in the case.** — *2 April 2012*. (Emphasis added).
>
> Problem is that if I meet with everyone that wants free advice from me on lender liability issues, I cannot get any work done. I have told you what I can do for you and how much it will cost. If you have specific questions, please email or call. Otherwise, it is best to meet once and if the settlement fails and you need to decide that you will be proceeding with the litigation. Id.
>
> I am not answering these questions in the specific except to say that we are most likely not be trying to stop foreclosure, such is a waste of time usually. You did not want to pay me to review all the records, so there is no way to say if I will find any basis to stop foreclosure when I get to look at the file. … I am willing to handle the case on a contingent fee basis to a trial if you pay the costs up front of $25,000.00. Such a

contingent fee basis requires you to let me handle the case my way and to handle it efficiently my way. If it is obvious you are not comfortable with that and will try to control every aspect of the litigation. If that is the case, then do not hire me. — *3 April 2012.*

I do not want an attorney that needs to be micromanaged. I am so damn exhausted from all of this that I would gladly step aside. That said, I still have questions regarding transition into you taking over the case. I did not ask enough questions of the bank, nor Sherin, and you're now telling me to stop asking questions. That makes no sense. Id.

I cannot make the decision without you reviewing the case. I would like to postpone the hearing while you do that. Would you please consider reducing a bit the amount you would charge to review it? **And if you decide the case is strong, would you apply that amount toward the 25K in costs I'll be giving you**? Id. (Emphasis added).

You already are in litigation? Forget it. I wasted too much time on this as it is. It is clear that you are willing to give your time and money to attorneys who tell you what you want to hear but not to anyone that is honest with you. It is clear that we cannot work together. I am no longer interested in the case to not contact me again. *4 April 2012.*
Id.; Exhibit(s) 76.

8. As to what she understood or knew at the 1 May 2012 signing of the hybrid contingent fee agreement at issue, Warrender has admitted:

Q. What happened in the months after Ms. Squires-Lee entered her appearance for you?
A. The bank pushed back very hard.
Q. Did she file the answer in counterclaim?
A. She did.
Q. Then what happened?
A. Discussions opened for a moment and then quickly closed. And Debbie wasn't hopeful. Transcript Vol. II pp. 44.

Q. I am trying to get your understanding as to non-refundable, what you believe nonrefundable means?
A. What anybody would understand it to mean.
Q. What is your understanding?
A. **That although it was for costs, whether you spent it or not, you were going to keep it.** Transcript Vol. II pp. 115. (Emphasis added).

Q. Prior counsel was withdrawing. You were facing being pro se, correct?
A. Yes.
Q. You had a pending motion to dismiss and answer was due in a few days away, correct?
A. Yes.
Q. You understood what would happen if you didn't file an opposition to that motion to dismiss?
A. Yes.
Q. What would happen.
A. It would be dismissed. Transcript Vol. II pp. 118, 120.

Q. Other than me what other attorney did you have willing to take the case on a contingency basis?

...

A. Not yet, no. Transcript Vol. II pp. 119, 120.

Q. Settlement didn't work at that time?
A. We didn't have a settlement at that point. That's right. Transcript Vol. II pp. 123-24.

Q: What was going on when you came to my office and signed this fee agreement? What was your understanding as to what was going on?
A: That there was a potential sale and I was trying to reach agreement with the bank to stop the case, but it was up and down and up and down. Transcript Vol. IV pp. 93-94.

Q: When you came to my office on May 1 you knew that that was, one of the possibilities of settlement was a short sale?
A: Well, the bank had already agreed to a short sale. There was no question about that.
Q: Already agreed so there was absolutely no need to hire me. All you had to do was sign the settlement papers and the case was over, right?
A: No. There were issues that became real stumbling blocks. I wanted them to correct their credit reporting and that was a big one. They didn't want to do that but –

...

A: Well, you know, I think at that point it looked as if we were embarking on extensive litigation which turned out not to be the case. Id. Pp. 100-04. (Emphasis added).

I realize that you came on for the specific purpose of litigating the federal case. Given that, I was grateful for the additions you made to the complaint this week. But in addition to all the reasons I mentioned for and to stop the foreclosure, I also feel intuitively that stopping it is the ultimate leverage with the bank. It would seem that if the bank is able to limit their losses, the change of settling prior to trial would be much slimmer. And I really do hope we can settle.
We already know that the bank was willing to pay me $206,000.00Exhibit(s) to settle. Everyone felt that once you came on, that number was going to go up. Now that the bank sees that we will go the distance, it seems that if we stop the FC we have a decent chance of settling sooner rather than later. I don't know if you filed a formal motion for preliminary injunction. I know it was not what you originally intended but even though my cash situation is not great, if there is anything else to be filed that would make the request for restraining order as strong as possible, I would like to offer to pay you separately for that. Please let me know. [Emphasis added].
Thanks again for taking my case. — *10 May 2012,* Exhibit 76.

Please understand that I do believe and understand your advice on the bankruptcy, but there are also considerations here. ... Anyway, filing a few pages this morning allows me time to try to understand the ramifications of proceeding with it [bankruptcy] or not. I'd like to keep the house for the next 2 - 3 months. **Beyond that, if it helps our larger case to let it be foreclosed, I am willing to do so.** — *24 May 2012,* Exhibit 76. *(Emphasis added).*

I am sorry I have had to learn the hard way that I can trust you. — *29 May 2012,* Exhibit 76. (Emphasis added).

9. Regarding Diviacchi's opinion of the settlement value of the Civil Action, "I [Diviacchi] told her [Warrender] the same thing as I said in July [2012] that I told her back in February [2012] I don't know what the case is worth, there's no way for me to tell that the case is worth, until when and if I survive a motion to dismiss." Vol. I p.191.

D. Claim for Attorney's Fees / Rule 1.5

1. Bar Counsel has provided no expert witness testimony on their allegation that Diviacchi's claim for legal fees is clearly excessive.

2. The only expert witness testimony on this Petition's issue of fees that is in the Record consists of the expert witness opinion of Attorney Saul Benowitz that was verified through Diviacchi's Interrogatory Responses:

> **C. OPINIONS**
>
> 23. Based upon the foregoing, and applicable law and ethical standards in the Commonwealth of Massachusetts, I am of the opinion that Diviacchi is reasonably entitled to be paid a fee by Warrender in the amount of not less than $78,333[1] (in addition to the $15,000 previously paid) due to the following:
>
> (a) the Contingent Fee Agreement executed by Warrender and Diviacchi was enforceable as a binding contract in accordance with its terms (for a one-third (1/3) share of the recovery of $340,000.00). However, although I do not believe that the resulting fee would then be "clearly excessive", this is a difficult and atypical case, requiring consideration of other factors in order to arrive at a "reasonable" fee under our ethical standards.
>
> (b) Warrender is entitled to the following credits against that contingent fee: (a) $15,000 for the initial flat rate payment made to Diviacchi; and (b) the reasonable value of the services (measured on an hourly rate basis) which Jacobi provided to Warrender in securing the settlement (but not for time spent by Jacobi performing any other services); and
>
> (c) Contingent fees are generally and properly calculated upon the gross

[1] Jacobi was paid a fee of $22,000 at closing, which included $2,000 for real estate work. Therefore, of the remaining $20,000 paid to Jacobi, if any portion thereof was not reasonably incurred for work on the settlement, it should not be credited against Warrender's liability to Diviacchi for fees (for example, if Jacobi's work on settlement was reasonably valued at $10,000, Diviacchi's additional fee due would be $88,333, plus the original $15,000).

settlement amount received (in this case $340,000.00) before deduction of any liens. Furthermore, in this case: (a) Warrender received, directly, $75,750.00; (b) she voluntarily paid Jacobi $22,000.00 from the sale proceeds; and (c) she paid $132,388 to a family trust. Although the trust did hold a lien on the property, that does not necessarily mean that some other agreement may have been struck if Warrender so desired (a related or "friendly" lender may often place a lien on the property in order to protect its interest and position against other creditors, and for other purposes). Therefore, and although not determinative of the fee due to Diviacchi, it is apparent that Warrender had the cash available to pay Diviacchi the amount to which he was entitled.

D. ANALYSIS

Breach of Contract – Fee Agreement

24, The Contingent Fee Agreement ("Agreement") between Diviacchi and Warrender constituted a binding contract, enforceable in accordance with its terms. All of the elements of a binding contract were present, and are essentially undisputed. Warrender has not raised any affirmative defenses, in her Answer to Diviacchi's Complaint, which challenge the enforceability of the Agreement.

Reasonableness of Fee

25. Massachusetts Rules of Professional Conduct, Rule 1.5©, expressly provides that, "a fee may be contingent on the outcome of the matter for which the service is rendered," except in domestic relations or criminal matters. There is nothing inappropriate about a contingent fee arrangement in this case (nor has Warrender so claimed).

26. Supreme Judicial Court Rule 3:07, Massachusetts Rules of Professional Conduct, Rule 1.5(a), prohibits an attorney from collecting a "clearly excessive" fee. The Rule sets forth explicit factors to be considered. Viewing those factors, in their totality, results in a conclusion that the fee sought by Diviacchi is not prohibited as excessive. Application of those factors is as follows:

(a) at the time that the Agreement was entered into, the time and labor which would be involved (Rule 1.5(a)(1) was unknown to both Diviacchi and Warrender, however, it was anticipated that same would be substantial. It was precisely for this reason that a contingent fee was agreed upon. Warrender could not afford to pay Diviacchi on an hourly basis (and did not want to do so). In so agreeing, Diviacchi accepted the risk that the substantial hours which he might devote to the matter could result in no compensation for him (beyond the flat fee paid) if Warrender did not prevail;[2]

(b) Diviacchi had experience in the area of lender liability cases, which require knowledge and skill not typical for most civil practitioners (Rule 1.5(a)(1) and Rule 1.5(a)(7);

(c) Diviacchi made himself available to Warrender at a time when he was under serious time constraints; he gave this transaction the utmost priority, to the potential exclusion of other matters in which he may have become engaged (Rule 1.5(a)(2) and Rule 1.5(a)(5)); and

(d) In view of the fact that Warrender received a substantial reduction in the

[2] Note also that Jacobi acknowledged that his work in the case would have ended if no settlement had been reached; then leaving Diviacchi to continue on with the litigation as Warrender's counsel.

loan balance due to the Bank, Diviacchi's claim for a fee, based *only* on the proceeds remaining after the Bank was paid (and she was released in full), was neither unreasonable nor unusual when viewed in the context thereof.

27. The facts assumed indicate that Warrender agreed that any proceeds she received in excess of amounts due to the Bank would form the basis of calculation of the Contingent Fee due to Diviacchi. Although the Agreement, itself, may not have been as clear as it could have been, any reasonable reading of same, in the context in which it was entered, yields the conclusion that Diviacchi would have been entitled to collect one-third (1/3) thereof, and that same was both parties' intent. Warrender cannot possible be suggesting that Diviacchi had agreed to take the case for a total fee of $25,000.

28. Neither our law of contracts, nor rules of ethics, allow a client to decide, in hindsight, that a contingent fee agreement, fairly and voluntarily agreed to, may be undone because it results in a perceived windfall to the attorney. Were that to be the case, then perhaps thousands of personal injury cases and settlements, which had been expeditiously and fortuitously settled – to the benefit of the attorney and the client – could be set aside.

29. The fact that Warrender retained (and presumably paid) Jacobi to work on the settlement does not diminish her contractual obligation to Diviacchi – that was her choice. However, in the context of determining what is a "reasonable" fee under the Rules, I conclude that Diviacchi's fee should be reduced by the reasonable value of the services necessarily performed by Jacobi in securing the settlement (to the extent that Diviacchi arguably benefited from that work).

Conclusion

30. In my opinion, Diviacchi and Warrender freely and voluntarily entered into a Contingent Fee Agreement which is enforceable in accordance with its terms, being a fee payable to Diviacchi equivalent to one-third (1/3) of the amount which she received through judgment or settlement. That amount was not less than $340,000.00 (understanding that her indebtedness to the Bank was also reduced). Analysis of the factors provided in SJC Rule 1.5(a) indicates that the fee sought is not "clearly excessive", and provides no basis to allow Warrender to avoid the terms of the contract. It rather appears that Warrender sought to avoid paying Diviacchi his contingent fee by using other counsel to settle. Notwithstanding same, and although Warrender arguably should not be able to escape the consequences of her seeming manipulation of various counsel, it is not my role to weigh judgment on her intent. In an objective analysis of the reasonableness of the fee due in this case, it is not reasonable to relieve Warrender of liability under her Contingent Fee Agreement with Diviacchi, but to provide that said fee should be reduced by the amount reasonably incurred with Jacobi in securing settlement.

Exhibit(s) 72, 73, 74.

3. Bar Counsel has provided no factual evidence nor testimony on any of the objective criteria listed by SJC Rule 1.5(a).

4. Bar Counsel has not plead in the Petition nor provided any expert witness or factual

testimony that Diviacchi's assertion, litigation, and appeal of an attorney's lien was a proceeding or assertion that was frivolous and not "a good faith argument for an extension, modification, or reversal of existing law" as stated in SJC Rule 3.1.

5. The hybrid contingent fee agreement at issue is an enforceable contract either on the contract or in *quantum meruit.* Exhibit(s) 5; Transcript Vol. I pp. 99-118; Vol. IV pp. 153-162, 197-202.

E. Competence, Scope of Representation, Diligence / Rules 1.1, 1.2, 1.3

1. Diviacchi, despite severe time constraints placed upon him by Warrender, timely filed all pleadings and other court papers required by the proceedings in the Civil Action that were not being handled by other counsel specifically hired by Warrender for those other purposes. Exhibit(s) 1, 6, 12; *See ¶¶* 5, 15, 16 *supra.*

2. Bar Counsel has provided no expert witness testimony nor any other evidence that Diviacchi was required to accept Warrender's offer to pay for the filing of a motion for preliminary injunction that he considered meritless; that he was required to abandon his family in California to file such meritless motion or to attend the hearing on this motion; nor to get involved in settlement negotiations being handled by the Jacobi attorneys.

3. Bar Counsel has provided no expert witness testimony nor any other evidence that Diviacchi work for Warrender lacked legal knowledge, thoroughness, or preparation nor that his opinion that he could not give a settlement value for the Civil Acton until after surviving a motion to dismiss lacked legal knowledge, thoroughness, or preparation. In fact, it would be a fair inference from the Record that Diviacchi was the only attorney involved who had a clue as to the legality and factual substance of the plead causes of actions in the Civil Action (Neither

Attorney Jacobi nor Attorney Squires-Lee had any experience taking to trial 93A or lender liability actions nor could they testify as to why the plead causes of action of the Civil Action were plead). Id.; Transcript Vol. I pp. 31-99, 209; Transcript Vol. III pp. 227-300; Transcript Vol. IV pp. 127-200, 170-180, 184-186.

4. Bar Counsel has provided no expert witness testimony nor any other evidence that Diviacchi's failure to appear with Attorney Jacobi at the appellate mediation of an appeal that he considered meritless when such appearance would raise his contingent fee from 1/3 to 40% lacked legal knowledge, thoroughness, or preparation.

5. Bar Counsel has provided no expert witness testimony nor any other evidence that Diviacchi's refusal — despite the offer and potential of additional fees — to file or to get involved in what he in good faith considered to be a meritless motion and appeal was not a proper limitation of the objectives of his representation of Warrender.

6. Bar Counsel has provided no expert witness testimony nor any other evidence that Diviacchi was not diligent in this representation of Warrender's.

F. BMC Litigation / Rules 3.3, 8.4

1. Diviacchi filed his BMC action against Warrender based on what he in good faith believed at the time to be unpaid fees of $10,000 based on the flat rate portion of the contingent fee agreement ("BMC Action"). Exhibit(s) 17; Transcript Vol. I pp. 60, 64-73, 158-59, 197-213; Vol. II, 15, 19-25, Vol. IV pp. 131-33, 146-164, 197-213.

2. Diviacchi has never before seen a short-sale settlement as occurred in the Stipulation settlement of the Civil Action result in gross funds remaining for recovery to a debtor. Transcript

Vol. I pp. 66-67; Vol. IV pp. 133.

3. Once he discovered that Warrender did receive a gross recovery of $340,000 as part of the Stipulation settlement of the Civil Action, he amended the BMC Action to claim his contingent fee of 1/3 minus the flat rate payment: $96,483.33. Exhibit(s) 19; Transcript Vol. I pp. 60, 64-73, 158-59, 197-213; Vol. II, 15, 19-25, Vol. IV pp. 131-33, 146-164, 197-213.

4. Bar Counsel is taking the following argument ("Argument") by Diviacchi in his BMC Action "Conditional Motion to Amend and Join Additional Defendants" to be a false statement of material fact or conduct involving fraud:

> In the past ten years, Defendant has had >15 different attorneys represent her in a half-dozen matters ranging from a divorce in probate court to a lender liability action in federal court with the same pattern: she hires an attorney, works him or her until she stops paying the bill, fires that attorney and disputes the bill and files a BBO complaint, and then gets another attorney and starts the process again. Exhibit(s) 21.

5. The above Argument was made in the context of Diviacchi desperately trying to respond to Warrender's counterclaim allegations of "Harassment", "Abuse of Process", "Frivolous Claim" and her constant filing, argument, and bringing to the BMC's attention her filed complaint with the BBO despite the fact that at the time of the above statement pursuant to BBO Section 3.22 such filing was suppose to be confidential. Exhibit(s) 70; Transcript Vol. I pp. 157-59, 214-219; Vol. IV pp. 147-148, 197-213.

6. There is no evidence that the above Argument was repeated in any subsequent court filings by Diviacchi.

7. There is no evidence that the above Argument involved multiple, a pattern, or even a single instance of perjury. In fact, when it came up in summary judgment filings, Diviacchi more artfully described his conclusions from discovery as follows:

> During the last approximately 15 years, discovery has revealed that she has had at

least over 15 different attorneys advising her on matters varying from divorce litigation, to district court collection litigation, to superior court jury trials, and on to federal court lender liability litigation through fee agreements consisting of either hourly or contingent fee agreements though her favorite tactic is to get free legal work. Exhibit(s) 74.

7. There is no evidence that the above Argument is evidence of a pattern of longstanding or continuous wrongful conduct.

8. Diviacchi admitted that at time he made the above Argument he did not have access to actual BBO records, that it was a poorly worded attempt to summarize his review of discovery, and his inferences therefrom as to what he considered to be the nature and practice of clients such as Warrender. Transcript Vol. I pp. 157-59, 214-219; Vol. IV pp. 147-148, 197-213.

II. DISPUTED FACTS

Bar Counsel has not satisfied its burden of proof by a preponderance of the evidence as to the following facts for which Respondent has provided credible testimony or evidence.

A. Nature of the underlying action of Sovereign Bank v. Warrender

1. Respondent's amendment of Warrender's Verified Counterclaim to plead viable causes of action based on *Chapter 93A §9* instead of *Chapter 93A §9* was a material cause of the settlement of the Civil Action. See ¶¶15, 16, 22, 24 *supra.*

B. The Sophistication of the Client Warrender

1. Based on her email of 29 May 2012 stating that she only at that point concluded that she could "trust" him, it is a reasonable and required inference that she did not trust Diviacchi on 1 May 2012 or at any point until that date. Exhibit(s) 76 ("I am sorry I have had to learn the hard

way that I can trust you.") at *29 May 2012.*

2. Given the sophistication, experience, ability, months of preparation, lack of trust for Diviacchi, and access to legal advice of Warrender and the personality of Diviacchi, it is not credible to believe that in 10 - 15 minutes on 1 May 2012 that Diviacchi conned her into signing the hybrid contingent fee agreement without her informed consent to such agreement.

C. Negotiations between Warrender and Diviacchi

1. Warrender first contacted Diviacchi in the Fall of 2011 for purposes of taking to trial the case Warrender v. Young just as she contacted other attorneys for such purpose. Transcript Vol. I pp. 32-33, 112-143, 170; Vol. IV pp. 129-131, 197-213.*

> ***Note:** beginning at pp.142-143 of his testimony in Volume I, Diviacchi tried to testify about his contacts with Warrender in 2011 in which he explained the different form of his contingent fee agreement and about her threats/requests to file BBO complaints against the Attorneys in the Warrender v. Young matter. Bar Counsel objected to such testimony and the objection was sustained. Diviacchi argued and still maintains that such testimony should have been admitted because it was partially the basis for his BMC statements.

2. Once she lost the trial of Warrender v. Young, these contacts continued into Warrender asking Diviacchi to sue the attorneys in that Action for malpractice and to at least "twice" to assist in filing BBO complaints against them. Transcript Vol. I pp. 32-33, 112-143, 170; Vol. IV pp. 129-131, 197-213.*

> ***Note:** beginning at pp.142-143 of his testimony in Volume I, Diviacchi tried to testify about his contacts with Warrender in 2011 in which he explained the different form of his contingent fee agreement and about her threats/requests to file BBO complaints against the Attorneys in the Warrender v. Young matter. Bar Counsel objected to such testimony and the objection was sustained. Diviacchi argued and still maintains that such testimony should have been admitted because it was partially the basis for his BMC statements.

3. Repeatedly during these phone conversations, at an in-court meeting in April 2012 and finally at his office on 1 May 2012, Diviacchi informed Warrender of the nature of his contingent fee agreements, why they are different from the model forms and of what she had in the Young

litigation, and of the advantages and disadvantages of his fee proposal. Transcript Vol. I pp. 32-52, 112-147, 151-58, 170-71; Vol. IV pp. 127-133, 197-213.*

> ***Note:** beginning at pp.142-143 of his testimony in Volume I, Diviacchi tried to testify about his contacts with Warrender in 2011 in which he explained the different form of his contingent fee agreement and about her threats/requests to file BBO complaints against the Attorneys in the Warrender v. Young matter. Bar Counsel objected to such testimony and the objection was sustained. Diviacchi argued and still maintains that such testimony should have been admitted because it was partially the basis for his BMC statements.

4. Once Diviacchi learned that the Civil Action existed and of the amount of fees that she owed to Sherin and Lodgen, Warrender explained to him that the Sherin and Lodgen fees will not be an issue because if Sherin and Lodgen went after her for such fees that she would file a complaint with the BBO. Vol. I pp. 156-58.

5. The following is an accurate summary of the months of discussion between Warrender and Diviacchi from February to 1 May 2012:

> This is to confirm that you came to my office today to once again express your concerns about winning this case. This event was caused apparently by Judge King of the First Circuit meditation program supposedly telling you that my success in settling such cases is not good. You began to chastise me for not telling you such information before. Mediators as always say whatever they can to force people to settle. Judge King and I have never been on good terms but regardless of whether or not he said this, you had no business chastising me and I angrily responded and justifiably responded that you had no business chastising me. I have told you from day one and have repeated such numerous time that there is no guarantee of success in this Action, that it may go on for years, and that it may eventually involve a trial and not a settlement. I have told you that in my > 1000 court cases, that I have lost some and have won some. I do not guarantee a win in any action. You hired me a few days before I left on vacation after months of ignoring my advice. You hired me when you were facing a motion to dismiss and when you had a defective counterclaim that would have been dismissed but for my appearance. After my appearance, you have continued to ignore my advice and went on to waste time, money, and energy on bankruptcy filings and injunction motions and appeals that had absolutely no chance of success. All the while, not paying the fee that you owe me.
>
> As I have always told you and have told you repeatedly: 1) there is no guarantee of success; 2) it may take years to determine the chances of success; 3) if you get a settlement offer that you can live it, you should take it. I am abiding by my obligations, you are not. I told you from the beginning that in flat rate, contingent fee cases, that I need the good faith cooperation from the client to work with me and to be efficient. Instead, you in bad faith have wasted my time on everything from nonsense bankruptcy filings to repeatedly complaining to me about the chances of success. For the last time: at this early stage there is no way to tell the chance of success. If you do not like how I handle this case, fire me. If you have a settlement offer from the bank that you want to

take, take it. However, at this point, in either of these two events, you will still owe my $10,000. Exhibit(s) 76 *at email of 18 July 2012.*

6. Warrender fraudulently induced Diviacchi into the signing the hybrid contingent fee agreement with Warrender by the following lies made by her to him during the February - 1 May 2012 time period and he never would have signed a fee agreement with her had he know of these misrepresentations by her:

1st lie. That she would bring and pay a $25,000 flat rate payment;
2nd lie. That the underlying property was her home and the only asset that she received from her divorce that she was trying to improve through residential construction loans. The predatory lending claims are based on residential lending, they would not be viable if she was a commercial developer;
3rd lie. That she lived at 5 Monomy Road, Nantucket, MA. When mail by Diviacchi's office to her at that address was returned by the post office, Diviacchi learned from her that she actually lived at another address in Natucket at 60 Madaket Road and at 127 North Road, Bedford, MA. Again, the predatory lending claims are based on residential lending, they would not be viable if she was renovating and getting loans on property that was not her residence but was intended for development;
4th lie. That she would not file for preliminary injunction to try to stop the foreclosure.
5th lie. That she would not file for bankruptcy.
6th lie. That she would not engage in any settlement negotiations until after a ruling on the bank's motion to dismiss.
7th lie. That she would cooperate with Diviacchi in trying to get the litigation to the result agreed upon at the time of signing the fee agreement: ready for trial on all lender liability claims for monetary damages.

Exhibit(s) 74 at *page 6 of Diviacchi Affidavit.*

D. Claim for Attorney's Fees / Rule 1.5

1. There is no evidence that Warrender ever discharged Diviacchi as her attorney in the Civil Action.

2. Diviacchi obtained Warrender's informed consent to:

1) the form of his contingent fee agreement as it differs from forms A or B of Rule 1.5;

2) the scope of his representation as he understood it to be: a) litigate the case to trial and beyond if necessary; 2) not file a motion to stop the foreclosure; 3) he could not provide her with a settlement value for the Civil Action until when and if their

counterclaim survived the filed motion to dismiss. Transcript Vol. I pp. 32-52, 112-147, 151-58, 170-71; Vol. IV pp. 127-133, 197-213.

4. It did not matter how much time Diviacchi spent with Warrender on 1 May 2012 explaining the hybrid contingent fee agreement at issue nor its purpose and the purpose of his representation, it is a reasonable inference from the Undisputed Facts that she had her own plans on how to proceed that she did not disclose to Diviacchi and only wanted his general appearance in the Civil Action so that she could avoid a default and to use it as leverage in settlement negotiations.

E. Competence, Scope of Representation, Diligence / Rules 1.1, 1.2, 1.3

1. Diviacchi and Warrender agreed that Jacobi would use a "good cop/bad cop" settlement strategy with Diviacchi being the "bad cop" who intended and was hired to take the case to trial. Vol. I pp. 156-58.

F. BMC Litigation / Rules 3.3, 8.4

1. At the time that he made the Argument *supra,* Diviacchi assumed that the email of 14 February 2012 produced in discovery asking, "Also, what is the status of your complaint to the Board?" referenced a complaint to the BBO. Exhibit(s) 69, 76.

2. At the time that he made the Argument *supra,* Diviacchi had discovery showing that Warrender had discharged her first contingent fee attorney in the Warrender v. Young litigation Attorney Frank O'Rourke by making substantively the same accusations against him in correspondence sent directly to court that she is making against Diviacchi. Exhibit 86.

3. The Argument *supra* is ambiguous and as Diviacchi admits was a inartful choice for expressing his conclusions. Transcript Vol. I pp. 157-59, 214-219; Vol. IV pp. 147-148, 197-213.

4. Bar Counsel's interpretation that the word "complaint" means a formal BBO complaint and was not used merely in its generic sense is not a necessary interpretation of the word.

5. Bar Counsel's interpretation that the Argument means that Warrender disputed her bills and filed a BBO formal complaint with each or all of her >15 attorneys of the previous ten years is not a necessary interpretation of that Argument.

6. Diviacchi based the Argument *supra* upon his review and inferences therefrom based on his 24 years of dealing with clients such as Warrender and from the following facts:

1. The number of attorneys that she hired and fired in her divorce;
2. The number of attorneys that she hired and fired in the Young case;
3. The accusations, letter to the court, and lien filed in the Young case between Warrender and Attorney Francis O'Rourke (Exhibit 86);
4. The fact that when he contacted the attorneys in these prior cases about Warrender that they were "scared" to talk to him and mentioned that they did not want to get in trouble with the BBO (in his experience, these means that Warrender did take them or threatened to take them to the BBO);*
5. Warrender's desires expressed at least twice in 2011 to take her attorneys to the BBO;*
6. Warrender's stated intention to him to use the BBO to avoid a fee payment to Sherin and Lodgen if necessary;*
7. The number of attorneys that she hired and fired in the Civil Action;
8. The email of 14 February 2012 *supra.*
9. The fact that once he began enforcing his lien that the first thing that Jacobi and Warrender did was to threaten a BBO complaint to get him to cut his fee (In his experience, when such is the first option instead of trying to negotiate, it means that they have done it successfully before);
10. The filing of her false BBO complaint against him;
11. The immediate and constant use of her filing of her false BBO complaint against him in the BMC despite the fact that such filing is suppose to be confidential. Transcript Vol. I pp. 157-59, 214-219; Vol. IV pp. 147-148, 197-213.

***Note:** beginning at pp.214-15 of his testimony in Volume I, Diviacchi tried to testify about his contacts Warrender's prior counsel and how they were "scared" to talk to him because they did not want a BBO complaint against them but Bar Counsel objected to such testimony and the objection was sustained. Diviacchi argued and still maintains that such testimony should have been admitted because these contacts with prior counsel were partially the basis for his BMC statements.

*Note: beginning at pp.142-143 of his testimony in Volume I, Diviacchi tried to testify about his contacts with Warrender in 2011 in which she expressed threats/requests to file BBO complaints against the Attorneys in the Warrender v. Young matter. Bar Counsel objected to such testimony and the objection was sustained. Diviacchi argued and still maintains that such testimony should have been admitted because it was partially the basis for his BMC statements.

*Note: beginning at pp.120-21 of his cross-examination of Warrender in Volume III and at pp. 187-188, Diviacchi tried to examine them on whether there were any threats of a BBO filing if Sherin and Lodgen pressed their claim for $55,000 in fees. Bar Counsel objected to such testimony and the objection was sustained. Diviacchi argued and still maintains that such testimony should have been admitted because such threats stated to him were partially the basis for his BMC statements.

7. Bar Counsel has not submitted substantial evidence that Diviacchi has the necessary *mens rea* for a violation of Rules 3.3, 8.4 in making the Argument.

8. Respondent's Argument was simply a good faith statement of what he believed to be true about Warrender based on his review and inferences from a convoluted collection of records.

9. If Bar Counsel claims that Respondent's statement that Warrender lied that she would bring $25,000 to the 1 May meeting is a violation of Rules 3.3, 8.4:

1) Bar Counsel has failed to prove that this statement was false;

2) Bar Counsel has failed to prove that Diviacchi lacked a good faith belief in the truth of such statement.

Respondent

by his attorney,

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Date: 12 May 14

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon Bar Counsel by first class postage prepaid mail on 12 May 2014.

/s/ Valeriano Diviacchi