**COMMONWEALTH OF MASSACHUSETTS**
**SUPREME JUDICIAL COURT**
**FOR SUFFOLK COUNTY**

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| **IN RE: MARC JOHN RANDAZZA,**<br><br>Respondent. | No. BD-2018-110<br><br>**RESPONSE TO PETITION FOR RECIPROCAL DISCIPLINE** |



The Nevada Supreme Court determined that Respondent, Marc J. Randazza,[1] was fit to practice law and was permitted to do so, so long as he abided certain conditions, despite otherwise disciplining him. See *In re: Marc J. Randazza, Bar No. 12265,* No. 76453 (Nev. Oct. 10, 2018). On December 12, 2018, this Court issued an Order ordering that Respondent file a response:

> Why the imposition of the identical discipline imposed in the Supreme Court of Nevada if imposed in the Commonwealth of Massachusetts would be unwarranted[.]

See Order of Dec. 12, 2018. Such Order was issued in response to the December 11, 2018 petition by the Office of Bar Counsel for "an order imposing reciprocal discipline."

As noted in the Order, S.J.C. Rule 4:01, § 16(1) indicates that the presumed discipline where an attorney has been disciplined by another court is "identical" discipline. However, the Supreme Court of Nevada did not give effect to its

[1] Respondent's first name was misspelled in the petition.

suspension order. Instead, it stayed the discipline for a probationary period until April 10, 2020. Thus, no reciprocal suspension is warranted at this time.

This Court should take a "wait and see" approach; if Respondent violates his Nevada term of probation, at that point a reciprocal suspension can enter. This is the approach taken by the U.S. District Court for the District of Massachusetts, under its Local Rule 83.6.9(d). In furtherance thereof, on December 19, 2018, that Court issued an Order Concerning Reciprocal Discipline indicating that it would not take any action until the stay expires on April 10, 2020. See *In re: Marc J. Randazza,* Misc. Bus. Docket No. 18-mc-81480 (Dec. 19, 2018) (Saylor, J.). Similarly, under S.J.C. Rule 4:01, § 16(2), this Court may also defer such discipline. Alternately, if this Court were to take any action at all, it should be no greater than that imposed in Nevada—a term of probation until April 10, 2020.

**1. Introduction**

Mr. Randazza has been an attorney in the Commonwealth since 2002. He is licensed to practice law in Arizona, California, Florida, Massachusetts, and Nevada. Other than the current matter, Mr. Randazza has no disciplinary history in any jurisdiction.

Respondent was admitted to practice before this Court on January 24, 2002. Since that time, he has successfully represented clients in various matters within Massachusetts, both at the State and Federal level. At no time has this Court sanctioned or disciplined Respondent.

As set forth in the Conditional Guilty Plea in Exchange for a Stated form of Discipline in *State Bar of Nevada v. Marc J. Randazza*, Case No. OBC15-0747 (State Bar of Nev., S. Nev. Disciplinary Bd., Jun. 5, 2018), a copy of which was previously provided to the Court, and which was the basis of the Order of the Nevada Supreme Court, this matter arises from litigation in the U.S. District Court for the District of Nevada where Respondent represented the sister-entity of the company for which he then-served as in-house counsel.

The Nevada Supreme Court did not engage in any independent factfinding, though it did inexplicably and erroneously state that Mr. Randazza's conduct "may have caused a delay in the disbursement of settlement funds to his client." Order at 2. That statement is not supported by the stipulated facts, is not accurate, and should be disregarded by this Court. Instead, the Court should look exclusively to the stipulated facts as set forth in the Conditional Guilty Plea.

During the course of representing his employer's sister entity, he **permissibly** advanced litigation funds, but memorialized it in the form of a promissory note without explicitly advising the sister entity to obtain independent counsel. In short, he advanced $25,000 of his own money at his employer's direction to its sister company, and then asked they simply agree to pay it back. But, he failed to advise them to ask another attorney if they should agree to pay him back. Notably, they were not bound by the agreement and they have never paid back Respondent.

Additionally, the defendant in that litigation insisted that Mr. Randazza agree to never sue them again, as a condition of paying Mr. Randazza's employer $550,000. Mr. Randazza never agreed to such a condition or made such an offer. However, to promote his client's interests, he discussed, but did not consummate, the potential that he *might* be *subsequently* retained by the other side, having the natural consequence of conflicting him from representing others against them, which might have been (if consummated) construed as a restriction on the right to practice in violation of RPC 5.6. Such had nothing to do with his practice before this Court and arose from circumstances that are not going to be repeated. The complained-of circumstances happened in 2012 – and, since then, there has not been even a hint of further disciplinary action.



**2. This Court Should Not Impose Sanctions**

The Nevada Supreme Court disciplined Mr. Randazza by imposing a term of probation with deferred suspension – with the suspension to be entered only if Mr. Randazza fails to fulfill the conditions of probation. During the probationary period, Mr. Randazza must 1) "stay out of trouble," meaning he must have no new grievances against him resulting in imposition of actual discipline, 2) complete 20 additional hours of ethics CLE, and 3) seek advice of an independent ethics attorney in the relevant jurisdiction before obtaining any conflict of interest waivers.

The Nevada discipline was stayed until April 10, 2020, at which point no suspension will be given effect should Respondent comply with the terms of the probation. This Court should act likewise. Therefore, no reciprocal action should be taken at this time.

Under the circumstances, the most appropriate and practical approach would be for the Court to stay consideration of any reciprocal discipline during the Nevada probationary period. Staying this matter would allow the Court to monitor Mr. Randazza's compliance with the terms of his Nevada probation and respond accordingly. If Mr. Randazza successfully completes his probationary term, no reciprocal discipline in this Court will be necessary and the matter should be dismissed. If Mr. Randazza fails to "stay out of trouble," the Nevada Supreme Court will then consider whether to revoke the stay of his suspension. In that case, the Court would be able to reopen this matter and, at that time, seek to impose reciprocal discipline consistent with the determination in Nevada. Staying this matter would thus provide the most flexibility over time to determine a suitable discipline, if necessary, based on Mr. Randazza's ongoing conduct. This would make more logical sense as well – as none of the conduct complained of occurred in matters before this Court, nor did it touch on any matters within this Court's jurisdiction.

As to whether reciprocal discipline should otherwise be imposed, this Court is governed by S.J.C. 4:01, § 16(3). Respondent does not dispute a lack of due process or an infirmity of proof, and the pleaded-to conduct is established. However,

the Court may consider that the imposition of identical discipline would be gravely unjust or that the misconduct does not justify the same discipline in this Commonwealth. Respondent's prior practice in the Commonwealth has not warranted the initiation of disciplinary action.

**2.1 Massachusetts has Never Indicated that Respondent's Conduct would have Violated its Rule 5.6**

Massachusetts R. Prof. Conduct 5.6 provides, in relevant part, that "A lawyer shall not participate in offering or making . . . (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." Comment [2] to the Rule states that "Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client." The purpose of Rule 5.6 is "to protect the strong interests clients have in being able to choose freely the counsel they determine will best represent their interests. The rule furthers the client's right freely to select counsel by prohibiting attorneys from engaging in certain practices that effectively shrink the pool of qualified attorneys from which clients may choose." *Eisenstein v. Conlin*, 444 Mass. 258, 262 (2005).

Although Nevada chose to interpret its analog of Rule 5.6 to prohibit Respondent's conduct, Massachusetts not done so, and thus Respondent posits that his conduct would not be subject to the same discipline (if any) in the Commonwealth. "Rule 5.6 has seldom been the source of discipline in

Massachusetts." Massachusetts Board of Bar Overseers "Massachusetts Legal Ethics: Substance and Practice," at 293 (Dec. 2017).[2] Respondent is only aware of one matter in which this rule, or its predecessor, was applied with respect to settlement terms. See *In the Matter of Traficonte*, 22 Mass. Att'y Disc. R. 747 (2006). There, the respondent attorney negotiated a settlement that would involve, *inter alia,* a covenant not to represent other plaintiffs bringing claims against the company. Respondent's conduct was materially different from the *Traficonte* conduct.

Respondent did not participate in the offering or making of an agreement to explicitly restrict his practice—no covenant akin to the one agreed to by Mr. Traficonte is at issue. To the contrary, Mr. Randazza did that which the Rule is *intended* to promote—permitting Oron to freely choose Mr. Randazza as its counsel – for the *bona fide* provision of services, only after all matters with his employer's sister entity were resolved.

Prohibiting an attorney from discussing post-settlement *bona fide* services to be provided to the opposing party/future client, especially, as here, where it furthers the interests of the attorney's current client, would shrink the pool of attorneys in *opposition* to the goal promoted in *Eisenstein.* Mass. R. Prof. Conduct 1.7 or 1.9 might subsequently preclude Respondent from representing someone else against

[2] Available at: https://bbopublic.blob.core.windows.net/web/f/BBO_Draft_Treatise.pdf.

the future client, but every engagement comes with the possibility that those rules may ultimately come into operation. Rule 5.6 should not be interpreted to *require* Respondent to restrict his ability to discuss his potential retention by an opposing party in the absence of any actual terms to specifically not represent third parties.

**2.2 Massachusetts Rule 1.8(e) Does Not Incorporate the Requirements of Rule 1.8(a)**

Respondent is aware of no cases in which advancing litigation expenses, expressly permitted by Mass. R. Prof. Conduct 1.8(e), imported the writing requirements of Rule 1.8(a)(2) & (3). Here, the discipline imposed by Nevada was not because Mr. Randazza made such an advance, but rather that he did not provide the writings required under Rule 1.8(a). Rule 1.8(e) has been interpreted elsewhere to expressly permit an attorney to pay the fees of associated counsel as "expenses of litigation" thereunder. See, e.g., *Mercantile Adjustment Bureau, LLC v. Flood*, 2012 CO 38, ¶¶ 27-28, 278 P.3d 348, 357-58 (Colo. 2012). Specifically, in *Flood*, an advance of expenses of litigation was viewed as being akin to entering into a contingency fee agreement. *Id.* Here, the promissory note provided by Mr. Randazza was the equivalent of the term of repayment of litigation expenses deemed by this Court as not triggering Rule 1.8(a). See, *In re Discipline of an Atty.*, 451 Mass. 131, 139 (2008). Thus, although Respondent was disciplined in Nevada, he would not have been directly subject to discipline for the same conduct in Massachusetts.

Respondent is acting to ensure that any time there is a whiff of a potential for a conflict of interest, clients are advised to obtain independent counsel. Neither is Respondent likely to negotiate to represent an adverse party, even if it is to his client's advantage, as was the prior case. Thus, Respondent requests the Court impose a lesser discipline.[3] Compare *Traficonte, supra* ("If the Respondent's violations are viewed in isolation from each other, and especially if we accept his argument that his clients were not substantially harmed, a public reprimand might be appropriate.") Here, Mr. Randazza's client was not harmed by either the discussion of potentially representing Oron or by the memorialization of the lawful litigation advance.

### 2.3 The U.S. Courts of Appeals Have Not Seen Fit to Restrict Respondent's Practice

This Court may be guided by the U.S. Courts of Appeals, which have not reciprocally disciplined Respondent.[4] Following the making of the Conditional Guilty Plea, Respondent applied for admission to practice before the U.S. Court of Appeals for the Second Circuit. That court's application form contains a question regarding discipline, and Respondent made the same disclosures to that court as he

[3] In the event the Court imposes the same discipline, Respondent requests it run concurrently, based on his self-report. *See, e.g., In re Aimar*, 926 A.2d 167, 169 (D.C. 2007) ("the stayed suspension shall run concurrent to the Nevada discipline since respondent reported the discipline to Bar Counsel").

[4] No U.S. District Court has done so, either.

did to this one. Despite the pendency of the Conditional Guilty Plea, on August 14, 2018, the Second Circuit admitted Respondent to its roll of attorneys.[5]

Similarly, Mr. Randazza timely notified the U.S. Court of Appeals for the 10th Circuit of the discipline imposed in Nevada. On November 13, 2018, he received notice that that court "does not impose reciprocal discipline based on stayed suspensions. No further action from you is required at this time. In the event you fail to meet the conditions of probation, and you are suspended by the Supreme Court of Nevada, you must notify this court immediately." Respondent suggests that this Court may be guided by the Circuit Courts of Appeals and not restrict his practice, except that, in the event a suspension is imposed, he be required to give immediate notice to this Court.[6]



### 2.4 If the Matter is Not Stayed, Respondent Should be Placed on Probation with No Conditions beyond the Nevada Probation

If the matter is not stayed, the appropriate "identical" discipline would be a term of probation with no additional terms beyond those imposed in Nevada. The Nevada requirements that Mr. Randazza take additional ethics CLE and consult with ethics counsel before seeking conflict waivers adequately protect this Court's interests,

[5] He has since put them on notice of the Order approving the plea, and, to date, no action has been taken.

[6] In the interest of full disclosure, Respondent notes that the U.S. Court of Appeals for the Eleventh Circuit is considering the matter as part of its ordinary five-year admission renewal process. No reciprocal discipline has been imposed, however.

including the interests of future clients from whom Mr. Randazza might seek a conflict waiver.

Mr. Randazza has not had a suspension put into effect in Nevada and he should not be suspended in this Court either. Suspending Mr. Randazza in this Court as "identical" discipline would amount to a "grave injustice" under S.J.C. Rule 4:01, § 16(3). To presently suspend him would significantly and substantially exceed the discipline imposed by Nevada, removing it from the bounds of being "identical". He can practice law in Nevada; he should be permitted to continue to practice presently in this Court as well. Nevada did not deem Mr. Randazza's conduct worthy of a suspension in the absence of him engaging in future misconduct; the conduct described in the stipulated facts is not of the sort that has historically led to a suspension this Court; Mr. Randazza's conduct did not cause his clients to suffer any actual harm or financial losses; the Nevada Supreme Court noted Mr. Randazza's full disclosure and cooperative attitude (Order at 2); Mr. Randazza has no discipline history in this Court or any other jurisdiction; the conduct at issue occurred 6-7 years ago, with no other complaints having been lodged against Mr. Randazza in the subsequent years; and nothing in the record would support a finding that Mr. Randazza is likely to harm the public during a term of probation. Nevada's determination that immediate suspension is not warranted should be respected.

"[T]he vast weight of judicial authority recognizes that bar discipline exists to protect the public, and not to 'punish' the lawyer." *De Bock v. State*, 512 So. 2d

164, 167 (Fla. 1987); accord *Matter of Keenan*, 314 Mass. 544, 547, 50 N.E.2d 785 (1943). Suspension of Mr. Randazza – indeed, imposition of any additional probationary terms – would be punitive, not protective. If the Court chooses not to stay this matter, then Mr. Randazza should be placed on probation with no additional terms beyond those imposed by the Supreme Court of Nevada.

In light of the foregoing, Respondent's disciplinary action should be deferred until the successful completion of the period of probation.

Dated: January 11, 2019.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon Bar Counsel via First-Class mail, postage prepaid, as follows:

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Marc J. Randazza

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

I, Marc John Randazza, hereby accept service of the within order of notice this 11th day of January, 2019.

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