

## **ADMONITION NO. 20-16**

### **CLASSIFICATIONS:**

Knowingly Advancing Frivolous Claim or Defense. [Mass. R. Prof. C. 3.1]

Improper Threat or Presentation of Criminal or Disciplinary Charges. [Mass. R. Prof. C. 3.4(h)]

### **SUMMARY:**

On August 13, 2019, Bar Counsel served on the respondent an admonition and summary that asserted that the respondent had violated Mass. Rules Prof. C. 3.1 and 3.4 (h) in connection with charges that an opposing party in civil litigation had engaged in a criminal violation of the Massachusetts wiretap statute, G.L. c. 272, § 99 (C)(1).

The respondent was successor counsel for the defendant in protracted and highly contentious litigation between two principals of a troubled business enterprise. The respondent learned that during a deposition, conducted before his appearance in the case, the plaintiff had disclosed that he had listened in on a telephone conference concerning the business enterprise, without disclosing his presence. The circumstances and means of this listening-in were not disclosed during the deposition.

With little or no additional investigation, the respondent sent an e-mail indicating to plaintiff's counsel that the plaintiff needed to settle the case to avoid criminal charges.

Months later, as the civil trial approached, the defendant filed an application for a criminal complaint under the wiretap statute. The respondent assisted the defendant at the show cause hearing. The presiding magistrate declined to issue the criminal complaint.

Bar Counsel charged that the respondent had no reasonable basis for threatening or presenting criminal charges under the wiretap statute because at the relevant times there was no evidence of one of the elements of wiretapping (specifically, the use of an "interception device" within the meaning of the statute) and because the applicable limitations period had elapsed. Further, the respondent had no reason for threatening or presenting the charges other than to gain an advantage in the civil case.

Bar Counsel asserted in mitigation that the respondent was relatively inexperienced at the time of his misconduct, which had occurred about two years after his admission to the Massachusetts bar.

The respondent objected to the admonition on several bases, which boil down to the assertions that he had a reasonable basis for the charges even if he did not then have all of the evidence necessary to support them at trial, and that the charges were not presented solely to gain an advantage in a private civil case, but also to further the client's interests in vindication and to present legitimate claims and defenses in the civil suit.

On August 29, 2019, bar counsel filed the summary along with the respondent's objections and matters in mitigation. Pursuant to S.J.C. Rule 4:01, §§ 8 (2) and 8 (4), and B.B.O. Rules, § 2.12, the Board assigned the matter to a Special Hearing Officer ("SHO").

At a hearing spanning two days, the SHO heard testimony from the major participants in the underlying events and received in evidence pertinent documents and pleadings from the civil litigation. The SHO credited, as Bar Counsel's summary had asserted, that the plaintiff had listened in on the telephone conference from another room as the call was broadcast by speakerphone. The SHO concluded that listening in from another room clearly did not involve an "interception device," as a matter of law.

The SHO did not credit that the defendant legitimately sought vindication for his rights under the wiretap statute, and he further noted that the defendant acknowledged the plaintiff's right to obtain information about the conference from the participant in the call in any event.

Reviewing the history of the litigation after the respondent's appearance, the SHO found that the respondent himself had not relied on his own client's speculations. He did not have the factual basis for asserting that the wiretap statute had been violated or that it could be prosecuted outside of the presumptive limitations period. He had performed no substantial research to support the charges.

Given the nature and timing of the respondent's use of the purported criminal charges at various points during the litigation, and the absence of a reasonable basis for them, the SHO found that the respondent and the client had in fact deployed them solely to obtain an advantage in the civil litigation, i.e., to bring the case to a settlement that would be favorable to the defendant-client, and to stop the investment of lawyer time the case was requiring and for which the client was not fully paying.

The SHO noted in aggravation that the respondent failed to acknowledge the wrongfulness of his actions and attempted to place responsibility for them on others. Nevertheless, the SHO concluded that an admonition was both warranted and sufficient in the circumstances.

The SHO's report and recommendation came before the Board at its April 2020 meeting without objection or appeal by either party. The Board voted to accept and adopt the report and its recommendation. Under S.J.C. Rule 4:01, §8(4)(b), that determination was final and unreviewable.