***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**Memorandum**

**To:** CAFL Appellate Panel Support Unit

**From:** [Law student intern – AS]

**Re:** Ineffective Assistance of Counsel – Is counsel ineffective “per se” when she is not licensed to practice in Massachusetts?

**Date:** June 14, 2017

**Questions Presented**:

Is counsel ineffective “per se” (without the need to analyze the quality of representation or prejudice from poor representation) when she represents a criminal or child welfare client in Massachusetts but is:

1. Unlicensed to practice law in any state?
2. Unlicensed to practice law in Massachusetts but licensed in another state?
3. Unlicensed in Massachusetts because she was suspended from practice due to an administrative or disciplinary sanction?

**Brief Answers**:

1. Attorneys unlicensed in any jurisdiction are “per se” ineffective.
2. Attorneys unlicensed in Massachusetts but licensed in another state are not “per se” ineffective.
3. Attorneys who were licensed but whose licensure is currently suspended based on an administrative or disciplinary sanction are not “per se” ineffective.

**Discussion**:

1. **Attorneys unlicensed in any jurisdiction are “per se” ineffective**.

When a “person who represented the defendant at trial had never been admitted to the bar, and had in fact never completed law school,” ineffective assistance is presumed, regardless of the representation’s quality or prejudice for poor representation. *Commonwealth v. Thomas*, 399 Mass. 165, 168 (1987); *see* *also* *Solina v. United States*, 709 F.2d 160, 169 (2d Cir. 1983) (reversing the trial court’s denial of the defendant's motion for a new trial because his lawyer, who had never passed any bar, was per se ineffective). “The principle applied in such cases is that one never admitted to practice law and therefore who never acquired the threshold qualification to represent a client in court cannot be allowed to do so, and no matter how spectacular a performance may ensue, it will not constitute effective representation of counsel for purposes of the Sixth Amendment.” *United States v. Mouzin*, 785 F.2d 682, 697 (9th Cir. 1986). “Per se” ineffective assistance of counsel, requiring reversal without any inquiry into the representational quality, is limited to instances of representation by “an attorney…never licensed to practice *anywhere*.” *Commonwealth v. Thibeault*, 28 Mass. App. Ct. 787, 789 (1990) (emphasis added); *see also* *People v. Felder*, 47 N.Y.2d 287, 291 (1979) (when one is only a “layman masquerading as a lawyer” he is presumed ineffective).

1. **Attorneys unlicensed in Massachusetts but licensed in another state are *not* “per se” ineffective**.

Attorneys representing clients in Massachusetts without Massachusetts licensure but who are licensed in another jurisdiction are not “per se” ineffective. *Commonwealth v. Melo*, 67 Mass. App. Ct. 71, 75 (2006). In *Melo*, the defendant’s trial attorney was licensed in Rhode Island but not Massachusetts. The defendant argued that his conviction should be reversed, regardless of the quality of his trial attorney’s advocacy, because his attorney’s lack of Massachusetts licensure, in itself, demonstrated ineffective assistance of counsel. *Id*. at 74. The *Melo* court distinguished the defendant’s case from *Thomas* based on the trial attorney’s licensure in Rhode Island. According to the Appeals Court in *Melo*, when counsel has been admitted to a bar (even if not the correct one) she is *not* presumed ineffective; instead the court must evaluate the quality of representation. *Id*. at 75.

1. **Attorneys who were licensed in Massachusetts but whose licensure was suspended at the time of trial based on an administrative or disciplinary sanction are *not* “per se” ineffective.**

Attorneys who have obtained proper licensure but whose licensure is suspended at the time of trial due to administrative or disciplinary sanctions are not “per se” ineffective. *Melo*, 67 Mass. App. Ct. at 74-75. However, courts must scrutinize the quality of representation even more thoroughly and carefully when the attorney was suspended or otherwise barred from practice at the time of trial. *United States v. Butler*, 504 F. 2d 220, 223-24 (D.C. Cir. 1974).

Administrative Suspensions:

An attorney who has been properly admitted to the bar but had his licensure suspended for an administrative matter not “raising serious questions such as moral character or other conduct bearing on his capacity and competence” is not “per se” ineffective. *Commonwealth v. Thomas*, 399 Mass. 165, 168 (1987). In *Thomas*, counsel had been suspended for failure to register with the board. The Supreme Judicial Court declined to extend a “per se” ineffective assistance of counsel rule to this situation. *Id*. at 168; *see* *also* *United States v. Bradford*, 238 F.2d 395, 397 (2d Cir. 1956) (holding that an attorney in good standing with the New York bar who failed to formally apply to practice before the New York federal court is not presumed ineffective); *Wilson v. People*, 652 P.2d 595, 596 (Colo. 1982) (holding that an attorney who is “in all respects qualified to practice law in Colorado yet remains unlicensed due to failure to take the mandatory oath for admission” is not “per se” ineffective); *Johnson v. State*, 225 Kan. 458, 461, 465 (1979) (holding that an attorney “suspended for nonpayment of attorney registration fee” is not per se ineffective); *People v. Brewer*, 88 Mich. App. 756, 761 (1979) (same).

Disciplinary Suspensions:

Similarly, an attorney who has been suspended from practice for disciplinary reasons is not “per se” ineffective, provided that the attorney’s misconduct is unrelated to lack of legal ability or moral character. *Commonwealth v. Thibeault*, 28 Mass. App. Ct. 787, 789-793 (1990). In *Thibeault*, the trial attorney represented the defendant while suspended for the crime of receiving stolen computer equipment (from the local school). The attorney’s suspension did not mean that counsel was “per se” ineffective. *Id*. at 789. Rather, the court looked to the quality of the suspended attorney’s representation and found that it was “very effective.” *Id*. at 789. According to the court, one must possess the specialized knowledge critical to the practice of law in order to obtain licensure; thus, disciplinary license suspension, alone, is not sufficient evidence of ineffective assistance of counsel. The quality of representation must be evaluated. *Id*. at 789.

However, where the disciplinary sanction is for “a reason going to legal ability, such as failure to pass a bar examination, or want of moral character,” the attorney is presumed to be ineffective. *Solina v. United States*, 709 F.2d 160, 167, 169 (2d Cir. 1983); *see* *also* *Thomas,* 399 Mass. at 168 (suggesting that an attorney may be “per se” ineffective in situations that call the attorney’s “moral character” or “capacity and competence” into question). *See, e.g.*, *Huckelbury v. State*, 337 So. 2d 400, 403 (Fla. App. 1976) (holding that one who is “not considered to be of sufficient moral fiber to bear the stamp of the Florida Bar,” who actually and knowingly misrepresented himself as a member of the bar when, in fact, he was not, is “per se” ineffective).