PREFACE

Under Rule 3:16 of the Rules of the Supreme Judicial Court, all newly admitted lawyers in Massachusetts are now required to take a one-day course titled Practicing with Professionalism. The course covers a broad array of topics central to professional practice, such as relationships with clients, colleagues, and the courts; ethics; bar discipline; social media; law office management; and resources available to attorneys.

The challenges associated with these topics are formidable, and they will continue to resonate throughout the professional life of each attendee. MCLE is accordingly presenting Practicing with Professionalism—Resource Materials, which is designed not only to complement the program's curriculum but also to provide an exceptional set of reference materials for each new lawyer's personal law library.

These resource materials consist of original written works as well as previously published materials, organized into twelve essential topics. Although a significant part of the content is derived from MCLE's Ethical Lawyering in Massachusetts (MCLE, Inc. 3d ed. 2009 & Supp. 2013) and other MCLE publications, a substantial portion of the book reflects a wide range of perspectives offered by other individuals, agencies, and organizations, both within and outside of the Commonwealth. The publication covers a full range of topics in ethics and professional practice, with extensive information on resources available to lawyers, including mental health support, bar associations, and mentoring. For convenience and ready access, participants in Practicing with Professionalism may download the entire print version of this book along with a wide array of supplemental electronic materials, as described below.

We trust that this publication will serve as a valuable companion for Practicing with Professionalism and a continuing resource for research and reference in daily practice.

ACKNOWLEDGMENTS

MCLE Press benefits greatly from the volunteer contributions of editors, authors, and advisors, most of whom are Massachusetts attorneys and judges. Their willingness to share their time and expertise is an integral part of our continuing effort to educate the bar and help enhance the quality of legal services provided to the public.
Publication of the Practicing with Professionalism resource materials was made possible by the efforts of numerous contributors. MCLE extends its appreciation to the many volunteers who prepared MCLE materials that are included in the print or supplemental electronic resources for this book. We also thank the authors who contributed original writings, including Daniel R. Coquillette, Sheila A. Hubbard, Judith A. McMorrow, Thomas E. Maffei, and Richard C. Van Nosstrand. And we are grateful for the many individuals and organizations granting MCLE reprint permission, including Robert J. Ambrogi, Dorothy Anderson, David J. Azotea, Alan C. Bail, Mahzarin R. Banaji, James S. Bolan, Sarah A. Chambers, Hon. Daniel C. Crane, Jeffrey Fortgang, Ann D. Foster, Michael E. Hall, Nancy Byerly Jones, Owen Kelly, Nancy Payeur, Frank Sanitate, Freya Allen Shoffner, Constance V. Vecchione, the Administrative Office of the Trial Court and the Supreme Judicial Court of Massachusetts, ALM Media Properties, the American Bar Association, the American Inns of Court, the Board of Bar Overseers/Office of the Bar Counsel, the Boston Bar Association/Boston Bar Journal, Healthy Exchange, Lawyers Concerned for Lawyers, Inc., the Massachusetts IOLTA Committee, the Massachusetts Law Office Management Assistance Program, the Massachusetts Office of Consumer Affairs and Business Regulation, the Mecklenburg County Bar, the National Center for State Courts, On the Human (the National Humanities Center), the Canadian Bar Association, the Texas Bar Journal, the North Carolina Lawyer Assistance Program, and the Law Society of British Columbia.

Finally, we would like to thank the Supreme Judicial Court and the Standing Advisory Committee on Professionalism for their commitment to promoting professionalism and their ongoing efforts to achieve the objectives of Rule 3:16.

On behalf of Jack Reilly, Publisher, Maryanne Jensen, Editor-in-Chief, and the MCLE Board of Trustees, our appreciation extends to all whose talent, hard work, and generosity have made this publication possible.

John M. Lawlor  
Publications Attorney  
May 2015
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SECTION 1.1

Massachusetts Attorney’s Oath

G.L. c. 221, § 38

Whoever is admitted as an attorney shall in open court take and subscribe the oaths to support the constitution of the United States and of the commonwealth; and the following oath of office shall be administered to and subscribed by him:

I (repeat the name) solemnly swear that I will do no falsehood, nor consent to the doing of any in court; I will not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same; I will delay no man for lucre or malice; but I will conduct myself in the office of an attorney within the courts according to the best of my knowledge and discretion, and with all good fidelity as well to the courts as my clients. So help me God.
SECTION 1.2

Civility and Professionalism at the Massachusetts Bar: The Heritage and the Challenge Today

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§ 1 HERITAGE

The spring wells of Massachusetts legal professionalism run deep. To paraphrase Martin Luther King, they were “dug deep by the founding fathers.”¹ Even before the Revolution, the tiny but distinguished band of lawyers who practiced before the Superior Court of Judicature formed themselves into associations to maintain professional standards. One was John Adams’ “Sodalitas,” a group of very diverse lawyers committed to mutual civility. In John Adams’ words, “The Spirit that reigned was that of Solid Sense, Generosity and Integrity: and the Consequences were most happy, for the Courts and the Bar instead of Scenes of Wrangling, Chicanery, Quibbling and ill manners, were soon converted to Order, Decency, Truth and Candor.”²

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Let no one think that this professional solidarity came at the expense of vigorous and effective advocacy. Quincy’s Reports, the earliest reports of the Superior Court of Judicature and the oldest in America, covering 1761 to 1772, was full of accounts of well-fought cases. In addition, the bar and the Commonwealth were increasingly divided politically, between loyalists and patriots. Leading advocates, such as John Adams and his cousin by marriage Josiah Quincy Jr., were secret members of the Sons of Liberty, and many of their colleagues, including Adams’ own pupil-master, Jeremiah Gridley, and Quincy’s brother and the Commonwealth’s Solicitor General, Samuel Quincy, were staunch loyalists. Despite the traumatic events of the Stamp Act, including riots that divided Boston, these lawyers continued to treat each other with respect and dignity. The loyalist chief justice, Thomas Hutchinson, drew the group together at the end of the tortured court session of 1765, in which his own house was destroyed by a mob, and observed:

GENTLEMEN of the Bar: I cannot but with Pleasure observe to you the Harmony which has subsisted between all of you in our present Session, and that Unanimity and Order which has prevailed universally amongst us through this whole Term. I the rather observe this, because, in most Parts of the Province there has been great Disturbances. I thought this Notice justly due, and cannot but hope ’twill serve as a future Precedent to us all, and a good Example to the Community.

Perhaps the highest point of the legal professionalism of our founders came in the aftermath of a terrible tragedy. On March 3, 1770, a small detachment panicked and fired into an unarmed crowd, killing five and wounding six others in an incident that became known as the “Boston Massacre.” This, of course, was the polarizing event that the radical patriot leaders such as John Hancock and Sam Adams had long anticipated, and the city was in turmoil. John Adams and Josiah Quincy were approached to represent the British soldiers, including their commander, Captain Preston. They both made it clear they had no sympathy with the military occupation, but as a matter of professional duty they undertook the case. Quincy’s father was furious, writing:

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My dear Son,

I am under great affliction, at hearing the bitterest re-proaches uttered against you, for having become an advocate for those criminals who are charged with the murder of their fellow-citizens. Good God! Is it possible? I will not believe it.5

Quincy’s reply is a monument of professionalism.

Honoured Sir,

Let such be told, Sir, that these criminals, charged with murder, are not yet legally proved guilty, and therefore, however criminal, are entitled, by the laws of God and man, to all legal counsel and aid; that my duty as a man obliged me to undertake; that my duty as a lawyer strengthened the obligation.6

Even more extraordinary, the prosecution was headed by Josiah’s brother, Samuel, the loyalist, assisted by Robert Treat Paine, a patriot and signer of the Declaration of Independence, while John Adams and Josiah Quincy were aided by Robert Auchmuty, a staunch loyalist.7 Here, indeed, was “soliditas” and devotion to the duty of the bar in the face of terrible events and division. The result, the acquittal of all the soldiers on the murder charges and the conviction of two for manslaughter with reduced sentences, was a triumph of the rule of law.

Fortunately, we do not live in such terribly divisive times, but civility and professionalism are still surprisingly difficult topics for lawyers to discuss. Very few people are against civility or professionalism. But conversations rarely get beyond lamenting decline in civility and professional and the yearning for more of these virtues. (Be nice! Can’t we all just get along?)

Several factors make a discussion of civility and professionalism particularly difficult. First, both words describe broad outcomes and consequently are difficult to define in precise terms. Are “civility” and “professionalism” just synonyms for being polite or an attitude about the lawyer’s role? Josiah Quincy’s letter to his father makes clear that civility and professionalism are deeply embedded in our historical experience of the lawyer’s obligation both to society and

6 Id.
7 Conflict of interest issues were defined different in that era.
to oneself. Second, the terms have sometimes been used in exclusionary fashion, leaving the impression that civility and professionalism are terms embraced by the supposed “elite” to separate themselves from others, or appropriate for those who have succeeded financially. Third, in modern and ahistorical conversations the terms are seen by some as a quaint relic of a bygone era, akin to chastity, and cease to have meaning in our highly polarized society. If law is the manifestation of cultural values, why should civility and professionalism exist in legal practice when it is an increasingly weak concept in politics, business, and other aspects of social life?

Yet we must overcome these difficulties and move beyond free-floating generalities to address why we should care about civility and professionalism in our modern practice of law and how we can look at ourselves as playing a role in shaping our local, regional, and national legal profession.

We begin with some definitions. The concept of “civility” is the obligation to respect the dignity of the human person with whom you are interacting, even as you disagree with that person legally, factually, and sometimes even morally. Civility does not require conceding a valid point, waiving a valid objection, or bypassing a valid negotiation point. “Professionalism” means the tradition of treating others, including professional colleagues, with respect. It also adds an additional element of fundamental fair play.

Some readers may be scratching their heads. We have now simply defined the concepts so that we have pushed all the ambiguity onto the idea of dignity and fair play. Particularly on the latter point, it is easy enough when the rules and lines are clear (dates motions should be filed, discovery complete, etc.) but many aspects of the lawyer’s role are subject to interpretation. We can address this challenge only if we answer a preliminary point: Why we should care about civility and professionalism?

§ 2  WHY WE SHOULD CARE

We urge there are at least three reasons why you should care about civility and professionalism. First, judges care about civility and professionalism and are increasingly responsive when they see conduct that violates baseline obligations of fair play. Even if you think that it is a rough-and-tumble world out there and if you can’t stand the fight you should not be a lawyer, judges are intervening at a faster pace than in the past.8

8 See, e.g., Michael B. Keating, Civility, in BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS (Robert L. Haig, Ed. 3d ed. 2011).
Litigators, of course, do most of their work outside the presence of judges. Like your child’s classmate, who is ever so polite when adults are looking but is nasty, snarky, and the schoolyard bully when they are not, some lawyers can turn civility on and off. But out-of-courtroom behavior is increasingly the subject of published criticisms and sometimes sanctions if a lawyer has crossed a line. As a practical matter, snide and sarcastic comments, unwillingness to give an extension even if it does not affect one’s client, filing emergency motions at 5 p.m. on Friday with the specific intent of burdening opposing counsel, and a stated commitment to burden opposing clients and counsel with aggressive discovery for the purpose of running up transaction costs can be difficult to prove. Some aspects, such as aggressive discovery, can be framed as legitimate zealous advocacy. But a habit of such tactics often leaves a trail that can be ascertained. If the judge identifies this pattern, the lawyer is increasingly subject to scathing criticism. For this reason, lawyers confronted with these tactics are well-advised to craft a careful chain of evidence. When dealing with counsel who engage in these actions, put all communications in writing.

Some judges have reported anecdotally that lawyers are increasingly impolite to the judges as well, sometimes because the client is in the courtroom and the lawyer is presenting an aggressive front that the lawyer believes the client wants. In such cases, incivility is regarded as a “badge of honor,” a testament to one’s aggressiveness that can be used to market oneself to clients. (“I’ll go to the edge for you!”) This behavior carries significant risks when the judge is making decisions on the margins, such as requests for trial date extensions and the like.

Second, lawyers should care about civility and professionalism because these attributes tend to be more effective strategically and often reduce costs to your client. Data on aggressive tactics in negotiation indicate that negotiation styles that are combative and competitive are sometimes successful, but in test studies the problem-solving model (commitment to find shared outcomes, etc.) is more likely to be successful than a competitive adversarial model. This is particularly true if the lawyer who is on the receiving end of unduly aggressive tactics has developed an effective strategy to deal with these types of tactics. The more that law practice bullies find polite push-back, the less effective the strategy will be.

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9 Andrea Kupfer Schneider, Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style, 7 HARV. NEGOTIATION L. REV. 143, 148 (2002) (study revealed “distinctive characteristics of ineffective negotiators, who are more likely to be stubborn, arrogant, and egotistical. Furthermore, when this adversarial negotiator is unethical, he is perceived as even less effective.”); Charles B. Craver The Impact of Negotiator Styles of Bargaining Interactions, 35 AM. J. TRIAL ADVOC. 1 (2011) (discussing success of competitive problem-solving over cooperative problem solving if cooperative problem-solver does not adapt to the difference):
A lawyer responding to incivility (lawyer bullies) must exhibit strong self-control. We have all seen instances in which a lawyer responds to aggressive and inappropriate conduct by opposing counsel with the same tactics, leading to a race to the bottom. If the issue ends up in court, the judge may ultimately see both sides as equally to blame, which risks significant harm to one’s client because of higher attorney fees and potential sanctions against both the client and the lawyer.

A third reason for caring about civility and professionalism is that the habits you exhibit from 9 to 5 (or more likely 8 a.m. to 8 p.m.) bleed into the rest of your life. If you become increasingly aggressive, combative, and contemptuous of others, these attitudes spill into your personal life. If that is your choice on how to treat spouses, parents, and friends, so be it. But these tend not to be the attributes on which a strong family and community life is built. As Aristotle said:

> The man, then, must be a perfect fool who is unaware that people’s characters take their bias from the steady direction of their activities. If a man, well aware of what he is doing, behaves in such a way that he is bound to become unjust, we can only say that he is voluntarily unjust.10

§ 3 CIVILITY AND PROFESSIONALISM: IT IS PERSONAL

Ultimately, civility and professionalism are personal. As Bernard Williams observed, “It is a personal fact about somebody that [being a lawyer] is his [or her] profession.”11 Lawyers can commit in broad strokes to some professional ideal, but when it comes down to it, it is all about you. It can be easy to slip from the goal when confronted with a high-pressure practice and aggressive opposing counsel. We suggest two factors to consider when embracing a commitment to civility and professionalism in your own practice.

First, no lawyer in today’s world can proceed without making a thoughtful analysis of how to respond to the legal bully. Your opposing counsel is sarcastic,

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contemptuous, and insulting. For many, it is difficult not to respond in kind. But once you respond with a similar style, your opposing counsel is now in control and has set the tone. It can be helpful to think of how one interacts with a sulky 14-year-old. Most parents will admit to having spoken in harsh tones and losing their cool occasionally. But almost as many will admit that it turns out to be an ineffective strategy. Staying calm, setting lines, and figuring out adaptive strategies prevents you from being “played” by the other side. Putting all requests in writing, keeping a detailed log of interactions, and being calm in the face of heated exchanges can often result in you being the one in control.

Second, it is inevitable that at some points you will be angry, frustrated, and dismissive of another person. It may be sharp comments to the associate who seems to have billed too much, the testy remark to the court clerk, yelling at opposing counsel. When one engages in this conduct, it is important to step back and figure out what was the true trigger point. Often it is due to a heavy workload, deadlines, family stress, and the like. We are all prone to the kick-the-dog phenomenon. Pressures and abusive treatment by others during the day cause us to take out our frustrations on the next person we see. When you behave in a manner that is uncivil, you should step back and figure out what triggered the response and then rectify the situation as best you can. Someone might have deserved a comment, question, or criticism, but that does not mean he or she deserved to be berated and humiliated. If you have been uncivil or unprofessional, you should apologize.

§ 4 TAKING A LEADERSHIP ROLE IN CREATING A CIVIL PRACTICE

Civility and professionalism, whatever definitions you might use, only have meaning if embraced by a critical mass within the legal community. You need not be an evangelist for civility. The quiet example of your own behavior has an influence on those around you. Committing to civility and professionalism in practice is the first and most powerful form of leadership. Anti-bullying initiatives emphasize as well the importance of stepping in when you see others behaving in an inappropriate fashion. A gentle conversation with a colleague, after tempers have quieted, may have an influence in helping the colleague develop stronger self-control.

And, of course, you are not alone. Many practitioners, judges, educators, and clients want to maintain and improve the professional environment in which we all must live and work. Bar associations, continuing legal education foundations, law schools, boards of bar overseers, governmental agencies, and courts all have
a stake in this environment, and those who want help in avoiding the lowest
common denominators of conduct will find allies, if they seek them.

But it all goes deeper than that. All we have in terms of our professional dignity
and standards, even the rule of law itself, is built on the backs of the generations
of the bar that have gone before us. It is a heritage that has been passed to us,
and we are responsible for passing it on to the generation that will follow. It may
seem like our many daily professional choices are trivial and unimportant in this
great picture, but, in fact, it is just these choices that, collectively and ultimately,
are what we will pass on to the future.

Here we return to where we began: heritage. Massachusetts lawyers have inher-
ited one of the greatest heritages of any bar, whether it be the courageous profes-
sionalism of the founders, such as John Adams, Josiah Quincy, Jr., Robert Treat
Paine, and James Otis, or those that followed, lawyers like Oliver Wendell
Holmes, Jr., John Chipman Gray, Archibald Grimké, John Brooks, or Margaret
Marshall. The list goes on, stretching back behind us and forward to our children
and our children’s children. To betray this trust, even in the “trivial” acts of daily
practice, is to lose one’s professional self-respect. And that is no small thing.
**SECTION 1.3**

**A Lawyer’s Duties to the Courts***

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**Scope Note**

This chapter covers the particular situations that may arise in the context of a lawyer’s duty to the court. Best practices regarding behavior at trial, the pitfalls of client fraud and perjury, and how to manage trial publicity are among the topics addressed.

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§ 1  INTRODUCTION

While lawyers are obliged to represent clients zealously, potentially competing obligations exist as between Mass. R. Prof. C. 1.3 and 3.3, which make it clear that the lawyer’s first duty is to the courts, tribunals, and justice system as a whole. See In re Crossen, 450 Mass. 533, 582 (2008); In re Neitlich, 413 Mass. 416, 423 (1992); Commonwealth v. Pavao, 39 Mass. App. Ct. 490, 500–01 (1995), rev’d on other grounds, 423 Mass. 798 (1996). This obligation to the system of justice may, under some circumstances, even require you to act contrary to your client’s wishes. MBA Ethics Op. 80-3. One court has even gone so far as to say: “An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client.” In re Integration of Neb. State Bar Ass’n, 275 N.W. 265, 268 (Neb. 1937); see also G.L. c. 221, § 38 (“I will conduct myself in the office of an attorney . . . with all good fidelity as well to the courts as my clients”). This chapter discusses the ethical duties owed by attorneys to the courts and other tribunals.

Practice Note

Many of the cases cited in this text refer to the Disciplinary Rules and Ethical Canons, which were in effect before January 1, 1998, when the current Massachusetts Rules of Professional Conduct took effect. See generally Mass. R. Prof. C., Preamble and Scope, ¶¶ 7–8 (lawyer’s roles as officer of court, advocate for client, and citizen are usually harmonious, but when conflict arises, the Rules of Professional Conduct exist to resolve them).
§ 2    ADMINISTRATION OF JUSTICE

§ 2.1    General Honesty in Dealings

The Massachusetts Rules of Professional Conduct guide the attorney handling a matter that is, or may at some time be, before a tribunal. A lawyer is an officer of the court, and must not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Mass. R. Prof. C. 8.4(c); see, e.g., In re Balliro, 453 Mass. 75, 84–85 (2009) (giving false testimony under oath about boyfriend who assaulted her); In re Driscoll, 447 Mass. 678, 685 (2006) (making a false statement to a federally insured bank in violation of 18 U.S.C. § 1014); In re Lupo, 447 Mass. 345, 348 (2006) (attorney acquired the house of a relative at price substantially lower than the house was worth). This rule requires a general honesty in dealings with others, including the court. This general duty of honesty even requires that lawyers pay for the services of a court reporter within a reasonable time. MBA Ethics Op. 74-9 (interpreting DR 1-102(A)(4), the predecessor of Mass. R. Prof. C. 8.4); see also Burt v. Gahan, 351 Mass. 340, 343 (1966) (holding lawyer responsible for fees under contract principles).

A lawyer may not engage in conduct that is prejudicial to the administration of justice. Mass. R. Prof. C. 8.4(d). Courts interpreting the earlier version of this rule, codified in DR 1-102(A)(5), have held that it is prejudicial to the administration of justice for an attorney to

• intentionally misrepresent his or her eligibility to practice law in another state, In re Finn, 433 Mass. 418, 420–21 (2001);

• submit false descriptions of services rendered and false time records to the court, In re Tobin, 417 Mass. 92, 94 (1994);

• withhold information from the court and violate court orders, In re Clooney, 403 Mass. 654, 656 (1981);

• make false statements under oath, file false affidavits in court, and forge the notary of another attorney, In re Kerlinsky, 428 Mass. 656, 661 (1999); In re Shaw, 427 Mass. 764, 764 (1998);

• intentionally misrepresent his or her financial worth to the court during his or her own divorce proceeding, In re Finnerty, 418 Mass. 821, 825 (1994);
SECTION 1.3 PRACTICING WITH PROFESSIONALISM

- introduce false documents into evidence and fail to correct the record when given the opportunity to do so, In re McCarthy, 416 Mass. 423, 423 (1993); or
- make ex parte communication to a judge on behalf of another attorney relating to a case pending before that judge, In re Orfanello, 411 Mass. 551, 556–57 (1991).

Cf. In re Discipline of Two Attorneys, 421 Mass. 619, 629 (1996) (attorneys’ breach of duty as escrow holders not prejudicial to administration of justice where breach involved no egregious conduct and where no client was harmed). The cases in which conduct is held to prejudice the administration of justice involve adjudicative proceedings. In re Discipline of Two Attorneys, 421 Mass. at 627.

The Rules of Professional Conduct speak not just in terms of duties to “courts”—the obligations also run to any “tribunal” before whom lawyers may appear. E.g., Mass. R. Prof. C. 3.3, 3.9, cmts. [1], [3]. Thus, an arbitration panel or a public authority is a tribunal to which a lawyer may owe a duty separate and different from the duty owed to the client being represented. In re McCarthy, 416 Mass. 423, 423 (1993) (duty to city rent control board); MBA Ethics Ops. 80-3 and 76-15; cf. MBA Ethics Op. 99-2 (lawyers’ misrepresentation of facts to state and federal agencies that were not “tribunals” analyzed as a violation of Mass. R. Prof. C. 4.1).

Much of the prohibited conduct discussed in the above case law interpreting the former Disciplinary Rules is also specifically proscribed by Mass. R. Prof. C. 3.3. Rule 3.3 requires “Candor Toward the Tribunal.” For example, the rule prohibits a lawyer from making “a false statement of material fact or law to a tribunal.” Mass. R. Prof. C. 3.3(a). In fact, “a lawyer may refuse to offer evidence that the lawyer reasonably believes is false.” Mass. R. Prof. C. 3.3(c); see In re Cobb, 445 Mass. 452, 464 (2005) (false representation to tribunal that attorney had authority from client to settle claim for $15,000).

§ 2.2 Refusal to Aid in Unauthorized Practice of Law

The Rules of Professional Conduct contain other, more specific obligations requiring lawyers to aid in the administration of justice. For example, an attorney may not aid in the unauthorized practice of law. Mass. R. Prof. C. 5.5(b).

Recognizing unauthorized practice of law is not a simple matter. See C. Wolfram, Modern Legal Ethics 834–46 (West 1986) (hereinafter Wolfram). There does seem to be agreement that a nonlawyer may not appear at a court
Some guidance on unauthorized practice issues can be found in G.L. c. 221, § 41, which makes unauthorized practice a criminal offense. The Supreme Judicial Court has stated that occasional drafting of deeds may not be the practice of law. Opinion of the Justices, 289 Mass. 607, 615 (1935); cf. Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs., 609 F. Supp. 2d 135 (D. Mass. 2009) (regarding real estate conveyancing services). However, a collection agency that gives legal advice and represents creditors to collect their debts is practicing law. Creditor's Nat'l Clearing House, Inc. v. Bannwart, 227 Mass. 579, 583 (1917). Absent express permission from the Supreme Judicial Court, a suspended or disbarred lawyer may not work as a paralegal. SJC Rule 4:01, § 18(3). Pending the adoption of an explicit rule, a suspended or disbarred attorney should petition the Supreme Judicial Court before acting as a mediator. In re Bott, 462 Mass. 430, 439 n.10 (2012). No lawyer may knowingly employ, in any capacity, a person who is suspended, is disbarred, or has resigned due to allegations of misconduct. SJC Rule 4:01, § 17(7); see In re Alfonso, 1 Mass. Att'y Disc. R. 1, 6 (1978).

§ 2.3 Accountability for Delegated Legal Work

Rule 5.1 of the Massachusetts Rules of Professional Conduct requires partners or supervising attorneys to have safeguards in place to assure compliance with the rules by all other attorneys in a firm. Mass. R. Prof. C. 5.1. Supervising lawyers are responsible for the ethical violations of their charges, lawyers, or nonlawyers, if the supervising attorney or partner “orders, or with knowledge of the specific conduct, ratifies the conduct involved.” Mass. R. Prof. C. 5.1(c)(1), 5.3(c)(1). The supervising lawyer is also responsible for such conduct if the attorney “knows of the conduct at a time when its consequences can be avoided or mitigated” and fails to act. Mass. R. Prof. C. 5.1(c)(2), 5.3(c)(2). The lawyer must also accept complete professional responsibility for the work produced, which stems from a lawyer’s duty of reasonable care to a client. See DeVaux v. Am. Home Assurance Co., 387 Mass. 814, 820 (1983). There are tasks, such as the formation of the attorney-client relationship itself, that amount to the direct practice of law and cannot be delegated to a nonlawyer. DeVaux v. Am. Home Assurance Co., 387 Mass. at 820; ABA Comm. on Prof’l Ethics, Informal Op. 998 (1967).
§ 2.4 Duty to Report Ethical Violations

Under the Massachusetts Rules of Professional Conduct, unlike the former Disciplinary Rules, lawyers are required to report the unethical conduct of other lawyers. Mass. R. Prof. C. 8.3. Specifically, if a lawyer knows that another lawyer has committed a violation of the Rules of Professional Conduct that “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” the lawyer must report this conduct to the Board of Bar Overseers. Mass. R. Prof. C. 8.3(a). The rule also encompasses information regarding a judge’s fitness for office. Mass. R. Prof. C. 8.3(b); see also SJC Rule 4:01, § 12(3). However, a lawyer is not obligated to disclose confidential communications. Mass. R. Prof. C. 8.3(c). But see MBA Ethics Op. 99-2 (interpreting Mass. R. Prof. C. 8.3 to require a lawyer to report information that the lawyer has discretion to disclose pursuant to Mass. R. Prof. C. 1.6(b)). See generally Annotation, Failure to Co-operate with or Obey Disciplinary Authorities as Ground for Disciplining Attorney, 37 A.L.R. 4th 646 (1985).

§ 3 TRIAL BEHAVIOR

§ 3.1 Misuse of the Courts

(a) Exaggerated Claims and Frivolous Suits

An attorney may not misuse the courts by filing a suit or taking other action for a client where the attorney knows or it is obvious that the action would serve merely to harass or maliciously injure another. Mass. R. Prof. C. 3.1, cmt. [2]; Mass. R. Prof. C. 4.4; see also Mass. R. Prof. C. 3.4. Unrestrained verbal harassment of an opposing party may amount to a violation of the Rules of Professional Conduct. See Private Reprimand No. PR-86-23, 5 Mass. Att’y Disc. R. 459 (1986).


Massachusetts courts will now consider sanctions under Mass. R. Civ. P. 11 against lawyers who sign pleadings that contain overstated, frivolous, or bad-faith representations or claims. Van Christo Adver., Inc. v. M/A-Com/LCS, 426 Mass. 410, 416–17 (1998) (discussing sanctionable conduct under Mass. R. Civ. P. 11, as compared to Fed. R. Civ. P. 11, and concluding that judge is authorized to impose
sanctions, though not appropriate on presented facts); see also Mass. R. Civ. P. 11. Earlier federal court decisions state that Rule 11 requires that pleadings be well grounded in fact and warranted by existing law or by a good-faith argument for a change in the law. See ABA Standards and Guidelines for Practice Under Rule 11 (1988). Federal Rule 11 authorizes the imposition of sanctions, including reasonable attorney fees and expenses, for its violation. Fed. R. Civ. P. 11(c). While Mass. R. Civ. P. 11 does not explicitly authorize sanctions, the Supreme Judicial Court has held that they are available. Van Christo Adver., Inc. v. M/A-Com/LCS, 426 Mass. at 419 n.18. Nonetheless, the utility of Rule 11 as an effective tool for dealing with attorneys’ violations of their Rule 11 obligation has been limited by the Supreme Judicial Court’s adoption of a “subjective good faith belief” defense on the part of violators, rather than the more demanding objective standard of the federal counterpart. See Van Christo Adver., Inc. v. M/A-Com/LCS, 426 Mass. at 416. Sanctions are only available 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. at 416. The subjective good-faith belief requires “at least some level of reasonable inquiry.” Psy-Ed Corp. v. Klein, 62 Mass. App. Ct. 110, 113 (2004). In addition to sanctions, a violation of Mass. R. Civ. P. 11 may give rise to a disciplinary complaint based on Mass. R. Prof. C. 3.1.


In Avery v. Steele, 414 Mass. 450, 455-57 (1993), the Supreme Judicial Court imposed double costs directly on an attorney where the attorney’s brief to the Appeals Court in a rent control dispute misrepresented the holding of the trial court, misstated the opposing party’s principal position, and accused the opposing attorney of unprofessional, even criminal, conduct. Noting that sanctions for frivolity should be reserved for “egregious cases,” the court held this to be one. Avery v. Steele, 414 Mass. at 455-57; cf. Berkson v. Palmer & Dodge LLP, 428 Mass. 1002, 1002 (1998) (denying request for costs because the appeal in question, though frivolous, was not egregious).
(b) Threat of Criminal Prosecution to Gain Advantage

A lawyer may not prosecute or threaten criminal prosecution solely to obtain an advantage in a civil matter. Mass. R. Prof. C. 3.4(h); MBA Ethics Op. 83-3. However, a lawyer is not prohibited from representing a client who pursues against another party both a civil claim and a criminal complaint. The issue is motive—is the criminal matter pursued solely to gain advantage in the civil matter? MBA Ethics Op. 79-7; see J. Wilkins, Memorandum, 1 Mass. Att'y Disc. R. 144 (1979). As noted in MBA Ethics Opinion 79-7, acceptance of anything of value for a promise not to prosecute a crime may itself be a crime. See G.L. c. 268, § 36; Partridge v. Hood, 120 Mass. 403, 404 (1876). One analogous concern is the tactic some lawyers use during a dispute or litigation of threatening to file a Board of Bar Overseers (BBO) complaint if certain alleged behavior by opposing counsel does not cease. (Of course, such misuse of legal process can also subject a lawyer to a tort action. See Restatement (Third) of the Law Governing Lawyers § 57, cmt. d (2000).)

(c) Courteous Behavior

A lawyer must meet his or her client's objectives through reasonably available means. Mass. R. Prof. C. 1.2(a). Treating all persons involved in the process with courtesy and consideration is consistent with such a requirement. Mass. R. Prof. C. 1.2(a), cmt. [1]. There may be some tension between this rule and Mass. R. Prof. C. 1.3, which requires a lawyer to represent a client zealously. For example, in Sussman v. Commonwealth, 374 Mass. 692 (1978), the Supreme Judicial Court reversed a judgment of contempt against a defense attorney who the trial judge felt asked one too many questions. The appellate court stated that it was not clear that the attorney intended to disobey the trial judge's ruling. Sussman v. Commonwealth, 374 Mass. at 701 n.9.

Fine lines may be drawn in trial situations. For example, the court may decide that it has heard enough or that the lawyer is not moving the case along fast enough. This is consistent with Mass. R. Prof. C. 3.2, which requires counsel to make reasonable efforts to expedite litigation. The clash between the court's need to administer justice and a lawyer's tactical or zealous behavior may result in subtler repercussions—the court may allow all of the other lawyer's objections, for example—if the lawyer does not obey the court's suggestion or if he or she zealously but courteously replies.

(d) Reference to Extraneous Matters

In representing a client, a lawyer may not “use means that have no substantial purpose other than to embarrass, delay, or burden a third person.” Mass. R.
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Prof. C. 4.4. Moreover, a lawyer may not state or allude to facts not reasonably thought to be relevant or not supported by admissible evidence. Mass. R. Prof. C. 3.4(e). A prosecutor in a criminal case may not express a personal knowledge of facts or a personal opinion of the merits of the credibility of witnesses. Mass. R. Prof. C. 3.8(h), (i); see also Mass. R. Prof. C. 3.4(e) (prohibited statements in trial generally); In-Towne Rest. Corp. v. Aetna Cas. & Sur. Co., 9 Mass. App. Ct. 534, 543-44 (1980) (attorney “swore on his license” he would not represent anyone with a false claim). This problem comes up most often with regard to prejudicial or inadmissible evidence being mentioned in an opening statement or closing argument. See, e.g., Commonwealth v. Howell, 394 Mass. 654, 661 (1985). The Supreme Judicial Court has emphasized that overzealous arguments, references to facts outside the record, and expressions of personal opinion are particularly objectionable in criminal cases. Attorneys have been disciplined for improper arguments, particularly closing arguments in criminal cases. See Commonwealth v. Smith, 387 Mass. 900, 914 & n.3 (1983); Commonwealth v. Redmond, 370 Mass. 591, 597 (1976); BBO Admonition No. 01-03 (improper use of grand jury testimony and improper appeal to the jury for sympathy for the victims); see also Mass. R. Prof. C. 3.8 (discussing responsibilities of a prosecutor).

(e) Fairness to Parties

A lawyer must act with fairness to opposing parties and their counsel. Mass. R. Prof. C. 3.4. Specifically, lawyers should not obstruct another’s access to evidence. Mass. R. Prof. C. 3.4(a). Lawyers should make every effort to comply with reasonable discovery requests. Mass. R. Prof. C. 3.4(d). For example, a lawyer in Massachusetts is not going to be sanctioned for granting an extension to respond to discovery or answer a complaint. A different conclusion might be reached only if the lawyer’s client would be substantially prejudiced by such an extension.

(f) Observation of Court Rules and Rulings

(g) **Disclosure of Client Identity**

Since the adoption of new rules in 1997, lawyers are no longer subject to a duty to disclose the identities of clients to a tribunal. Instead, Mass. R. Prof. C. 3.9 imposes on a lawyer representing a client before a legislative or administrative tribunal a duty to disclose his or her representative capacity. Typically, the identity of a lawyer’s client is clear in the case of a court proceeding. Rule 3.9 was apparently intended to prevent a lawyer from masquerading as a “concerned citizen” when actually appearing on behalf of a client at an adjudicatory hearing before an administrative agency. Wolfram at 750–51.

§ 3.2 **Duty of Candor**

“[T]he bar must realize that an attorney’s first duty is to further the administration of justice, which mandates candor toward the court.” Commonwealth v. Pavao, 39 Mass. App. Ct. 490, 500 (1995), rev’d on other grounds, 423 Mass. 798 (1996). An attorney appearing before a tribunal or in a matter pending before a tribunal may violate a disciplinary rule simply by silence where there is an obligation to speak. Mass. R. Prof. C. 3.3(a)(2). An attorney must disclose to the tribunal legal authority in the controlling jurisdiction that is known to him or her to be directly adverse to the client’s position if opposing counsel does not bring the authority to the court’s attention. Mass. R. Prof. C. 3.3(a)(3). The duty to disclose adverse precedent may exist even where the lawyer’s client and opposing counsel object to disclosure; the precedent in question need not be dispositive in order to require disclosure. It should be disclosed if the court should clearly consider it in deciding the case. MBA Ethics Op. 80-3 (citing ABA Comm. on Prof’l Ethics and Grievances, Formal Ops. 146 (1935) and 280 (1949)).

As noted above, an attorney also has a duty to speak up and provide information that must be disclosed by law. Attorneys cannot stand in silence knowing that the tribunal is about to make a decision based on inaccurate information, In re Mahlowitz, 1 Mass. Att’y Disc. R. 189 (1979); Mass. R. Prof. C. 3.3(d); MBA Ethics Op. 78-9, or that the tribunal has failed through inadvertence to comply with established requirements and is thereby committing potentially reversible error. See Commonwealth v. Pavao, 39 Mass. App. Ct. at 500–01 (attorney chas-tised for knowingly allowing court to omit jury waiver colloquy). The Supreme Judicial Court reversed the conviction and refused to express an opinion on the “propriety of defense counsel’s inaction.” Commonwealth v. Pavao, 423 Mass. at 804. When attorneys do speak up, they may not make untrue statements of law or fact. Mass. R. Prof. C. 3.3(a)(1). By offering evidence or stating facts directly to the tribunal, the lawyer is warranting that the testimony or document is what it purports to be and is accurate to the best of the lawyer’s knowledge. Wolfram at 641. Lawyers must also not stand idly by, in the courthouse hallway, for example,
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and fail to correct a misrepresentation made by a third person to a prosecutor when the lawyer knows that the statements are false. Mass. R. Prof. C. 3.3(a)(2)-(4); 2 Mass. Att'y Disc. R. 100 (1981). The Supreme Judicial Court has held that it is a violation for an attorney to misrepresent to the Probate and Family Court his or her financial worth in his or her own divorce proceeding. In re Finnerty, 418 Mass. 821, 828 (1994); see Mass. R. Prof. C. 8.4(c), (d).

§ 3.3 Lawyer as Witness

An attorney must be extremely careful whenever stating facts to a tribunal. The lawyer may not assert personal knowledge of facts except when testifying as a witness. Mass. R. Prof. C. 3.4(e); see also MBA Ethics Op. 78-9. In Commonwealth v. Villalobos, 7 Mass. App. Ct. 905, 906 (1979), a conviction was overturned for improper final arguments where the prosecutor said “Believe me, no one is selling heroin at half-price in Chelsea.”

Moreover, a lawyer who has personal knowledge of relevant facts must be aware of Mass. R. Prof. C. 3.7, which in many circumstances requires an attorney to decline or withdraw from representation of a party where the attorney is likely to be a necessary witness. A lawyer shall not accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that he or she or a lawyer in his or her firm ought to be called as a witness, except that the lawyer may undertake the employment and the lawyer or a lawyer in his or her firm may testify

• if the testimony will relate solely to an uncontested matter;

• if the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his or her firm to the client; and

• as to any matter, if disqualification would work a substantial hardship on the client because of the distinctive value of the lawyer or his or her firm as counsel in the particular case.


If it is not until after accepting employment that the lawyer learns that he or she ought to be added as a witness on behalf of his or her own client, the lawyer must generally withdraw. Mass. R. Prof. C. 1.7(b); Mass. R. Prof. C. 3.7, cmt. [1]. If it becomes apparent that you may be called as a witness, you should review Mass. R. Prof. C. 3.7 early and with care. Nevertheless, when another lawyer in
the same firm is likely to be called as a witness, a lawyer may act as an advocate in the proceeding in the absence of conflicts. Mass. R. Prof. C. 3.7(b).

There are exceptions to the general rules restricting the lawyer from acting as witness and attorney in the same proceeding. A lawyer may not be disqualified if he or she will testify only as to uncontested matters or the nature and value of legal services rendered. Mass. R. Prof. C. 3.7(a)(1)–(2). Also, where disqualification would result in a substantial hardship to the client, the lawyer may continue in the case. Mass. R. Prof. C. 3.7(a)(3); MBA Ethics Op. 74-2 (considering substantial hardship under predecessor Disciplinary Rule). But see MBA Ethics Op. 75-2 (stating that some additional expense to bring in new counsel is not a “substantial hardship” that would justify a lawyer continuing as counsel in a case where the lawyer—or another lawyer in the same firm—will be called as a witness).

The Committee on Professional Ethics of the MBA has addressed the appropriateness of a lawyer acting as an expert witness under Mass. R. Civ. P. 1.9 and 5.7. MBA Ethics Op. 99-3. Essentially, a lawyer should not act as an expert for a party when the matter is substantially related to a matter where the lawyer previously represented the opposing party. This is the case even where the lawyer possesses no relevant confidential information. MBA Ethics Op. 99-3. This opinion relates more to a lawyer’s duty to a former client than to Mass. R. Prof. C. 3.7, which more specifically governs when it is appropriate for a lawyer to testify as a witness.

Where the lawyer involved is not just a witness, but is actually a party, special considerations exist. A party can choose to be represented by a member of his or her own law firm. Borman v. Borman, 378 Mass. 775, 789 (1979).

§ 3.4 Contact with Judges and Jurors

(a) Contact with Judges

A lawyer must give careful consideration to the disciplinary rules before any direct contact regarding the merits of a matter with a judge or other official before whom an adversary proceeding is pending. Rule 3.5 of the Massachusetts Rules of Professional Conduct restricts such direct contact outside the official proceedings. A copy of any written communication must be delivered promptly to the opposing counsel (or to an adverse party who is not represented). The restriction on ex parte contact with a judge about the merits would extend to any third party through whom an attorney may try to communicate with the judge. Mass. R. Prof. C. 8.4(a) (prohibiting a lawyer from knowingly assisting or inducing another to violate any of the Rules of Professional Conduct); see also
In re Orfanello, 411 Mass. 551, 555–56 (1991) (ex parte communication to a judge by an attorney on another attorney’s behalf violates disciplinary rules governing communication with judges).

A lawyer may, of course, communicate ex parte with a judge where allowed by law. Mass. R. Prof. C. 3.5(b); see, e.g., Mass. R. Civ. P. 4.1(f) (ex parte attachments). The rules make no other exception for ex parte communication with a judge before whom a lawyer has a matter pending.

It goes without saying that a lawyer may not give or lend anything of substantial value to a judge or other official other than those items allowed by SJC Rule 3:09, the Code of Judicial Conduct, Canon 5(C)(4)(a)–(c). See Mass. R. Prof. C. 3.5(a).

(b) Contact with Jurors

A lawyer is prohibited from exerting influence over or communicating ex parte with jurors or prospective jurors. Mass. R. Prof. C. 3.5(a)–(b). The scope of Rule 3.5 is broad, prohibiting all conduct intended to disrupt the proceeding. Mass. R. Prof. C. 3.5(c). Moreover, in light of Mass. R. Prof. C. 8.4(a), communication with jurors through another attorney or through the family members of the jurors constitutes a violation of Rule 3.5.

Even after discharge of the jury, a lawyer connected with a trial is restricted from communicating with the jurors without leave of court and for good cause shown. Mass. R. Prof. C. 3.5(d). While a lawyer may respond to the question of a juror after the discharge of the jury, a lawyer may not ask questions or make comments to that juror that are intended to harass or embarrass the juror. Mass. R. Prof. C. 3.5(d). Under no circumstances “shall such a lawyer inquire of a juror concerning the jury’s deliberation process.” Mass. R. Prof. C. 3.5(d).

The Supreme Judicial Court appears to impose even more severe restrictions. The court has said that postverdict interviews of jurors by counsel, litigants, or their agents should take place under a judge’s supervision. See Commonwealth v. Fidler, 377 Mass. 192, 203 (1979). Thus, a lawyer would be prudent to refrain from all communication with jurors.

§ 4 FRAUD OR CLIENT PERJURY

A lawyer involved in a matter before a tribunal has particular obligations when fraud or perjury may be involved.
§ 4.1 Lawyer’s Conduct

(a) General Obligation to Avoid Dishonesty

A lawyer is always subject to the general obligation to avoid dishonest conduct. Mass. R. Prof. C. 8.4(c). As noted above, a lawyer may not knowingly make a false statement of material fact. Mass. R. Prof. C. 3.3(a)(1).

(b) Attempts to Mislead the Court

Specific rules prohibit a lawyer’s active participation in attempts to mislead the court. Lawyers may not knowingly use perjured testimony or false evidence. Mass. R. Prof. C. 3.3(a)(4); see also In re Provanzano, 5 Mass. Att'y Disc. R. 300 (1987) (public censure of lawyer who altered document used in evidence at disciplinary hearing); In re Cowin, 2 Mass. Att'y Disc. R. 48 (1981) (attorney censured for helping manufacture document appearing to be signed by client and for procuring false notarization). Lawyers may not “ghostwrite” litigation documents—especially pleadings—on behalf of pro se litigants. MBA Ethics Op. 98-1 (attorneys ghostwriting pleadings for pro se litigants may gain an unfair advantage and may mislead the court and the opposing parties, violating Mass. R. Prof. C. 3.3(a)(1), (2) and Mass. R. Prof. C. 8.4(a), (d)).

(c) Deception Through Attorney Silence

A lawyer may not counsel or advise fraudulent or criminal conduct, and cannot help a client to conceal assets with intent to defraud the client’s lawful creditors. Mass. R. Prof. C. 1.2(d), 3.3(a)(4); see In re Mahlowitz, 1 Mass. Att'y Disc. R. 189, 195 (1979). In Mahlowitz, an attorney was censured for remaining silent while the court labored under the mistaken belief that it had earlier restrained the husband from transferring the marital home. The attorney, knowing that no restraining order had been entered, said nothing in court and then helped the husband sell the house. The attorney was censured for this conduct. See also In re Discipline of an Attorney, 2 Mass. Att'y Disc. R. 100 (1981).

(d) Witness or Evidence Tampering

A lawyer may not procure the unavailability of witnesses or evidence, Mass. R. Prof. C. 3.4(f), and a lawyer may not compensate any witness contingent upon the content of testimony on the outcome of the case. Mass. R. Prof. C. 3.4(g); see also Wolfram at 651–53; New Eng. Tel. & Tel. Co. v. Bd. of Assessors of Boston, 392 Mass. 865, 871–72 (1984). However, a lawyer may pay an “occurrence”
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A lawyer's reasonable expenses for testifying. Mass. R. Prof. C. 3.4(g)(1). A lawyer may also reasonably compensate an occurrence witness for loss of time in testifying. Mass. R. Prof. C. 3.4(g)(2). In the case of such a witness, it is not clear whether or to what extent a fact witness may be compensated for "loss of time" that does not cause the witness to lose wages or compensation. MBA Ethics Op. 91-3. Compare N.Y. State Bar Ass'n Comm. on Prof. Ethics, Op. 547 (1982) (concluding that a lawyer may compensate a witness for the reasonable value of time spent preparing and testifying), with Md. Bar Ass'n Ethics Docket No. 83-38 (concluding that a lawyer may pay a nonexpert only to replace lost wages or other monetary loss). A lawyer may pay a reasonable fee to an expert witness. Mass. R. Prof. C. 3.4(g)(3).

§ 4.2 Client Fraud or Perjury

In addition to the prohibitions on active participation by lawyers in fraudulent or perjurious conduct discussed in § 4.1, Lawyer's Conduct, above, an attorney must be aware of obligations where a client is engaged in such conduct.

Where a lawyer finds out that a client has perpetrated a fraud on a tribunal, the lawyer, under Mass. R. Prof. C. 3.3(a) and 3.3(e), must call on the client to rectify any fraud perpetrated on a tribunal during the lawyer's representation. If the client cannot or will not set the record straight, the lawyer must reveal the fraud to the affected tribunal. Mass. R. Prof. C. 3.3(b). Even confidential information is required to be revealed if it falls under Rule 3.3(a). Mass. R. Prof. C. 3.3(b); cf. MBA Ethics Op. 99-2 (discussing lawyer's obligation to reveal client confidences in order to bring the material misrepresentation of lawyer's partners to the attention of bar counsel and the agency to whom those misrepresentations were made).

The obligation imposed by Mass. R. Prof. C. 3.3 to disclose client perjury must be read together with Mass. R. Prof. C. 1.6, which governs client confidentiality. A general obligation of confidentiality is imposed on lawyers by Mass. R. Prof. C. 1.6. However, Mass. R. Prof. C. 1.6 allows disclosure of a client's intent to commit a crime or a fraudulent act "which the lawyer reasonably believes is likely to result in death or bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful execution or incarceration of another." Mass. R. Prof. C. 1.6(b)(1).

Additionally, Rule 1.6 of the Massachusetts Rules of Professional Conduct allows an attorney to disclose client confidences

• with the consent of the client after consultation with the client, Mass. R. Prof. C. 1.6(a);
• when permitted under the Rules of Professional Conduct or required by law or court order, Mass. R. Prof. C. 1.6(b)(4); and

• to the extent necessary to establish a claim or defense in a controversy between the lawyer and the client, or concerning the lawyer’s representation of the client, or to establish a defense to a civil claim or criminal charge against the lawyer, Mass. R. Prof. C. 1.6(b)(2).

There is a tension among Mass. R. Prof. C. 1.6, 3.3, and 4.1 with respect to lawyers having to report potential criminal conduct of their clients. The tension was somewhat removed by the limitation currently embodied in Mass. R. Prof. C. 1.6. Specifically, a lawyer need only report criminal or fraudulent conduct of a client if the lawyer reasonably believes that the conduct would involve death or serious bodily injury, or substantial financial harm. Mass. R. Prof. C. 1.6. See generally Wilkins, H.P., C.J., “The New Massachusetts Rules of Professional Conduct: An Overview,” 82 Mass. L. Rev. 261, 263–64 (Winter 1997) (discussing confidentiality under new rules). The rule of disclosure with respect to false statements or false evidence has been expanded to the extent that Mass. R. Prof. C. 3.3(a) and 3.3(b) require disclosure despite the existence of Mass. R. Prof. C. 1.6.

The difficulty in this area is compounded in criminal cases where the Fifth Amendment’s privilege against self-incrimination is implicated. Rule 3.3(e) of the Massachusetts Rules of Professional Conduct provides that defense counsel who knows that a client intends to testify falsely has a duty to discourage the perjury. If counsel discovers the intention before trial, counsel should move to withdraw. If counsel moves to withdraw, effort should be made to protect the client by bringing the motion ex parte before a judge other than the judge who will be trying the case. If, however, the trial has begun, the lawyer may continue the representation if withdrawal will prejudice the client. If ultimately the lawyer knows the defendant has testified falsely, the lawyer shall not reveal it to the tribunal. Mass. R. Prof. C. 3.3(e). Moreover, the lawyer shall not attempt to elicit testimony from the defendant known to be false or to make arguments relating to the false testimony. Mass. R. Prof. C. 3.3(e).

§ 4.3 Fraud or Perjury by Others

If the lawyer discovers that a nonclient has committed or intends to commit perjury, and obtains that information from a source other than the client, the lawyer’s obligation is clear. Rule 3.3(a)(4) of the Massachusetts Rules of Professional Conduct requires prompt disclosure.
§ 5  TRIAL PUBLICITY

§ 5.1  In General

The Massachusetts Rules of Professional Conduct regulate public communication by lawyers concerning pending proceedings. Mass. R. Prof. C. 3.6. Specifically, in connection with both civil and criminal proceedings, a lawyer is prohibited from making any “extrajudicial statement” that one would reasonably expect would be publicly disseminated if “the lawyer knows or reasonably should know that [the statement] will have a substantial likelihood of prejudicing” the proceeding. Mass. R. Prof. C. 3.6(a). Rule 3.6 does allow statements regarding

- the claims, offenses, or defenses;
- information contained in the public record;
- items relating to scheduling issues;
- requests for necessary information; and
- warnings of danger if there is reason to believe substantial harm may occur.

Mass. R. Prof. C. 3.6(b)(1)–(6). A lawyer may also make certain statements to protect a client from the prejudicial effect of recent publicity. Mass. R. Prof. C. 3.6(c). Lawyers must use reasonable care to prevent their employees and associates from making public statements that the lawyers themselves would be prohibited from making. Mass. R. Prof. C. 3.6(d).

§ 5.2  Criminal Proceedings Specifically

Rules 3.6(b)(7) and 3.8(g) of the Massachusetts Rules of Professional Conduct, in addition to Mass. R. Prof. C. 3.6 generally, govern dissemination of information in the context of criminal proceedings. During a criminal proceeding, in addition to the information contained in Mass. R. Prof. C. 3.6(b), a lawyer may also disclose the identity of the accused, the “fact, time and place of arrest,” and the identity of the parties involved in the investigation. Mass. R. Prof. C. 3.7(i)–(iv). A prosecutor may not make any statement that would increase “public condemnation of the accused.” Mass. R. Prof. C. 3.8(g). A prosecutor may, however, make statements necessary to inform the public of the prosecutor’s actions and statements that serve a legitimate law enforcement purpose. Mass. R. Prof. C. 3.8(g).
§ 6 CONCLUSION

With the adoption of the Massachusetts Rules of Professional Conduct comes the hope that all members of the profession will aspire to the high standard of conduct set forth in those rules. The Massachusetts Bar Association has adopted a Statement of Lawyer Professionalism and the Civility Guidelines for Family Law Attorneys. See also the Preamble and Scope of the Massachusetts Rules of Professional Conduct, included in Section 2.1 of these materials. These documents encourage a mutual respect for the professional obligations of those associated with the judicial process and the process itself.
A Lawyer’s Duties to Colleagues*

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Scope Note
This chapter introduces the reader to the specific duties and responsibilities that pertain to relationships with colleagues, principally in the law firm context. The chapter discusses leading case law on the topic of law firm split-ups and continuing responsibilities following firm dissolution.

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* Reprinted from Ethical Lawyering in Massachusetts (MCLE, Inc. 3d ed. 2009 & Supp. 2013). The Massachusetts Rules of Professional Conduct have since been amended, effective July 1, 2015.
Of the various duties and obligations that lawyers encounter, duties to colleagues may have the greatest daily impact, because they shape the way law firms operate. Yet, at least until recently, these duties received rather scant attention. In an era when previously unthinkable dissolutions and splitups are routinely occurring, these “collegial” rules deserve increasing scrutiny. This chapter analyzes the rules and duties among legal colleagues, with a particular focus on the high-profile case that helped bring the issues to public attention within the profession.

Partners in any type of enterprise, including law partners, owe each other a fiduciary duty of “the utmost good faith and loyalty.” Cardullo v. Landau, 329 Mass. 5, 8 (1952). A partner must refrain from acting purely for private gain, and must always consider his or her partners’ welfare and reasonably protect the partners’ interests. Meehan v. Shaughnessy, 404 Mass. 419 (1989). Thus, a partner may not simply take for his or her own benefit an economic opportunity presented to the partnership. (It is probably fair to say that any economic opportunity relating to the practice of law that is presented to one partner should be deemed an op-
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portunity for the partnership.) Typically, a partnership agreement will explicitly require that all compensation for legal work performed by a partner be for the benefit of the entire partnership.

Moreover, a partner owes a duty of honesty to the partnership. This duty has been codified in the Uniform Partnership Act, G.L. c. 108A, which orders that a partner “render on demand true and full information of all things affecting the partnership to any partner.” G.L. c. 108A, § 20.

Trusted employees, including “junior partners,” nonequity partners, and associates, like partners in a law firm, owe a duty of loyalty and should act to protect the interests of their employer. This duty, however, is not necessarily as extensive as that owed by partners to each other (see also discussion in § 9, Unresolved Issues, below). See also Gagnon v. Coombs, 39 Mass. App. Ct. 144, 154–59, (1995) (fiduciary duties of agents to principals).

It must be remembered that the duties lawyers owe to the profession, the court, and their clients may at times conflict with their duties to their colleagues. For example, while in the world of business a restrictive covenant is commonplace in employment agreements as a way to protect the economic interests of the ongoing enterprise, a lawyer who requests that a colleague enter into an agreement that would restrict the latter’s right to practice law is in violation of disciplinary rules that govern the conduct of the legal profession. See Mass. R. Prof. C. 5.6; Eisenstein v. David G. Conlin, P.C., 444 Mass. 258 (2005); cf. Pierce v. Morrison Mahoney LLP, 452 Mass. 718 (2008). While obligations owed to the profession or to clients (like the obligation to provide adequate representation) rarely conflict with the duties owed to colleagues, as discussed below, they are most likely to do so in the event of a dissolution or breakup of a law firm.

§ 3 POTENTIAL SOURCES OF DUTIES

The duties noted in § 2, General Duties Owed to Colleagues in a Law Firm, above, find their source in both the common law and statutes. The basic fiduciary duties owed in a partnership (or inherent in particular employment relationships) are delineated in a series of cases that generally do not involve law firms. Similarly, the statutory source for duties owed in law partnerships is the Uniform Partnership Act, which governs all partnerships in the state. The canons of ethics governing the practice of law (now codified in the Massachusetts Rules of Professional Conduct) provide another source of duties to colleagues—one that is unique to the legal profession.

General principles of contract and tort law also determine duties to colleagues in law firm. Indeed, the most common source for duties to colleagues is a con-
tract—the written partnership or employment agreement—that will be read in light of general contract rules of construction. Other contractual principles, such as the implied obligation of good faith and fair dealing, also come into play.

Tort law probably impacts lawyer-lawyer relationships the least. In fact, it has been held that where one lawyer induces a client to sever his or her relationship with his or her first attorney, no action for tortious interference with contract will lie against the second attorney (unless the inducement itself involved tortious activity, e.g., libel), because the lawyer-client relationship is purely at will and consensual. See Walsh v. O’Neill, 350 Mass. 586 (1966). However, Walsh does not vitiate the strong principles of fiduciary duty among partners that preclude a partner from appropriation of partnership business. See also Cavicchi v. Koski, 67 Mass. App. Ct. 654 (2006) (addressing claims between discharged attorney and retained attorney). While affirming the basic rules in Walsh, the Cavicchi court also held that an attorney could be liable for tortiously inducing a client to breach a contract to pay his former attorney for past services.

§ 4 THE IMPORTANCE OF A WRITTEN AGREEMENT

Because law firms are so variable in their size, nature of practice, “firm culture,” and governance, it makes sense for firms to create rules and duties for themselves that fit the firm. Of the sources of duties outlined above, it is, of course, the partnership (or employment) agreement that can be appropriately customized. The old maxim about the shoemaker’s children not having shoes can be fairly applied to the legal profession. Of all the legal lapses in our lives, the most inexcusable, yet one of the most common, is a law partnership without a written partnership agreement.

§ 4.1 For Ongoing Firms

While it is beyond the scope of this chapter to provide a manual for the drafting of written partnership agreements, the importance of certain issues is obvious. Among the most important matters are the following:

• governance of the firm, including management committees, voting rights, administration, and partnership meetings;

• selection of new partners;

• criteria for expulsion;
• criteria and mechanisms for determination of compensation; and

• issues created by a partner's death, disability, retirement, or departure.

While larger law firms may require more structure, and thus a more complicated agreement, written agreements are no less important for smaller or medium-sized firms.

§ 4.2 In the Event of Dissolution

Much like a person dying intestate (where state law provides an estate plan for him or her), the Uniform Partnership Act, G.L. c. 108A, provides the framework for lawyers in a dissolving firm who have failed to provide their own. In the context of law firm dissolutions or splitups, this framework is unwieldy and impractical, sometimes to the point of near impossibility. See § 5.1, Dissolution Under the Uniform Partnership Act, below. Because it is becoming increasingly clear that law firms (unlike diamonds) are not necessarily forever, the importance of contemplating—and regulating—splitups and dissolutions in a written agreement is greater than ever.

§ 5 DISSOLUTION OR SEPARATION

§ 5.1 Dissolution Under the Uniform Partnership Act

Under G.L. c. 108A, § 31, dissolution is caused

(1) Without violation of the agreement between the partners,

   (a) By the termination of the definite term or particular undertaking specified in the agreement;

   (b) By the express will of any partner when no definite term or particular undertaking is specified,

   (c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking;
(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership; and

(6) By decree of court under section thirty-two.

This means that any partner, by a simple act of “express will,” can dissolve the partnership. Under Section 30, this dissolution does not terminate the partnership instantly, but results in the “winding up of partnership affairs,” which is not defined in the statute. See generally Shelley v. Smith, 271 Mass. 106 (1930). Each partner owes a fiduciary duty in connection with this “unfinished business,” and cannot act for personal gain in relation to this business. See Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180 (Cal. App. Ct. 1983). The limitations on the ability of a partner to bind the partnership after dissolution, except for the purpose of “winding up partnership affairs” or to complete unfinished transactions (detailed in G.L. c. 108A, §§ 33–35), are a further significant complication. For example, former partners may be operating in distant cities, attempting to finish matters, but without flexibility to modify existing arrangements, such as fee arrangements, with clients of the former partnership.

In the context of an active law firm, especially a large one, the “winding up” envisioned in G.L. c. 108A, § 30 would create a bureaucratic and bookkeeping nightmare, requiring a sharply drawn line between assets, liabilities and cases that existed as of the time of dissolution and those that arise afterward. As noted in Meehan v. Shaughnessy, 404 Mass. 419 (1989), only after the “windup” is complete (which could obviously be years later) can the final accounting and distributions be made for the dissolved partnership. Recognizing that this process is destructive, the court in Meehan strongly endorsed the right of partners to
plan a different destiny upon dissolution. Meehan v. Shaughnessy, 404 Mass. at 430. There are many strong reasons for written partnership agreements, but the most compelling may well be to preclude a disenchanted partner from unilaterally inflicting the chaos of the Uniform Partnership Act—mandated “winding up”—on his or her partners.

§ 5.2 Effect of a Written Agreement

Typically, written partnership agreements ease some of the problems created by the Uniform Partnership Act in one or more of the following ways:

• by allowing for the continuation of the partnership enterprise by modifying or accelerating the “winding up” process in the event of departure;

• by providing for specified payouts—typically, return of capital and a share of profits up to the time of separation; and

• by allowing for removal of ongoing cases, subject to some agreed compensation for work already performed.

A written agreement can also ease the logistical problems created by a partner’s death. Under G.L. c. 108A, § 31, the death of a partner automatically dissolves a partnership, by operation of law. See Davis v. Bicknell, 244 Mass. 352, 356 (1923). Thus, death triggers the “winding up” mechanism of the Uniform Partnership Act, but the problems this would otherwise create can be ameliorated by provisions that

• allow for continuation of the firm’s business—perhaps even using the deceased partner’s name—without disruption (however, technically it is a “new” partnership);

• prescribe procedures for payouts to the estate of the partner, including issues of timing and valuation; and

• provide that title in partnership property vests in the surviving partners.

§ 5.3 Absence of a Written Agreement

As noted above, the law creates a “default option,” where partners have failed to control their own destiny with a written agreement. This option is the “winding up” envisioned, but not really spelled out, in the Uniform Partnership Act. This process can be both cumbersome and protracted, particularly in a large firm. But even in smaller firms, this process can create significant problems, especially when the practice deals with litigation or other matters of long duration.

Obviously, attorneys do not need to be doomed by their lack of foresight. They can—and should—attempt to work out postdissolution agreements that at least allow them to separate their practices and move forward. Even if some issues, such as allocation of fees, cannot be worked out, it should be possible in most instances to negotiate an arrangement whereby clients select whom they wish to represent them, and the postdissolution work and related fees belong exclusively to the responsible attorney. Resolution of other issues, such as allocation of the remaining portion of the fees and division of firm assets and liability, could then be resolved through mediation, arbitration, or, as a last resort, litigation.

§ 6 DUTIES TO COLLEAGUES AND CLIENTS IN LAW FIRM SPLITUPS UNDER MEEHAN V. SHAUGHNESSY AND ITS PROGENY

In Meehan v. Shaughnessy, 404 Mass. 419 (1989), the Supreme Judicial Court addressed the duties owed to colleagues in connection with the departure of two partners, a junior partner, and several associates from a large Boston law firm. The partners who left had, over the years, developed a substantial insurance defense and plaintiff’s personal injury practice. Following their departure and the establishment of their new law firm, disputes arose with their former partners over the allocation of fees on certain cases (particularly contingent fee matters) that the clients had removed to the new practice, as well as over the partnership’s failure to pay amounts owed to the departing partners under the partnership agreement. Suit was commenced by the departing partners, seeking recovery of the sums owed under the partnership agreement and a declaration of the amount of fees owed on removed cases. Counterclaims were filed, seeking damages for alleged breaches of fiduciary duty, interference with contractual relations, and other tortious activities. In its opinion, which followed a lengthy trial before a Superior Court judge, the Supreme Judicial Court recognized that the right of a client to choose his or her attorney will affect the obligations and rights of attorneys who separate their practices. The court also discussed the right of an attorney to leave a firm and the limitations imposed on his or her conduct in this regard.
as a result of the fiduciary duties owed to former colleagues. Cases since Meehan have further defined these rights.

§ 6.1 Recognition of a Client’s Right of Choice

The Supreme Judicial Court in Meehan, in interpreting the partnership agreement before it, recognized that the canons of ethics expressly limit the restrictions that can be placed on a departing attorney’s right to remove cases or clients. Specifically, the court cited DR 2-108(A) of SJC Rule 3:07 (which corresponds to the current Mass. R. Prof. C. 5.6). Disciplinary Rule 2-108(A) provided that

[a] lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

The court recognized that the “strong public interest in allowing clients to retain counsel of their choice outweighs any professional benefits derived from a restrictive covenant.” Meehan v. Shaughnessy, 404 Mass. 419, 431 (1989).

Thus, a partnership or employment agreement among attorneys cannot legitimately restrict a departing attorney’s right to remove or handle any case in which a client freely chooses to retain the departing attorney as counsel. Clearly, a total ban on the removal of cases or on contacts with clients would be both unethical and unenforceable. Moreover, the court cited approvingly from cases elsewhere that indicate that reduction of the amount of money to which an attorney would otherwise be entitled on departure from a firm, solely because cases are taken, could also be an impermissible economic restraint on the departing attorney’s right to remove cases and practice law. This foreshadowed a series of discussions that have collectively defined the enforceability of “forfeiture for competition” provisions in partnership or employment agreements. The first of these was Pettingell v. Morrison, Mahoney & Miller, 426 Mass. 253 (1997).

In Pettingell, the two plaintiffs withdrew as partners from the Boston law firm of Morrison, Mahoney & Miller and formed their own partnership. They sued for their share of profits in the year of withdrawal, as well as their share of “annual partnership interest credits,” which essentially reflected their share of change in the net worth of the firm over time. The defendant relied on a provision in the partnership agreement that required forfeiture of these funds for partners who compete, and the plaintiffs moved for summary judgment on the ground that the
provision was unenforceable. The plaintiffs prevailed below, and the Supreme Judicial Court granted direct appellate review. See opinion by Hinkle, J., 5 Mass. L. Rptr. 215 (1996).

While essentially upholding the decision of the Superior Court, the Supreme Judicial Court specifically rejected adoption of a per se rule against forfeiture provisions. It noted that “[t]he basic concerns of DR 2-108(A) are the interests of clients, not the interrelationship of the partners and former partners as such.” Pettingell v. Morrison, Mahoney & Miller, 426 Mass. at 255. While the court found that the clause in question clearly violated DR 2-108(A), it was a violation by all parties, and the court said, “[s]uch a collective violation is not sufficient to preclude enforcement of the forfeiture clause” in the absence of some other public policy for supporting nonenforcement. Pettingell v. Morrison, Mahoney & Miller, 426 Mass. at 256.

The defendants argued that since the parties had followed joint notice procedures, as proposed in Meehan v. Shaughnessy, 404 Mass. 419, 437, 442 n.16 (1989), the policy of free client choice was sufficiently protected and would not be impaired by enforcement of this clause. The court rejected this position and leaned toward the “strong majority rule” to not enforce such agreements, particularly where the benefits that would be forfeited had already accrued. Pettingell v. Morrison, Mahoney & Miller, 426 Mass. at 256. Nevertheless, the court declined to take an absolute position. After recognizing a “law firm’s legitimate interest in its survival and well-being,” the court found that the Pettingell defendants had failed to produce evidence of “any harm to the firm or its continuing partners that should be recognized as a reasonable offset against some or all of the amounts due to the plaintiffs.” Pettingell v. Morrison, Mahoney & Miller, 426 Mass. at 258. Moreover, even in a situation where some such harm could be shown (such as where a departing partner leaves his or her surviving partners with onerous debts), the court implied that it would look unfavorably at clauses that treated partners who competed differently from partners who did not.

In 2005, the Supreme Judicial Court considered Mass. R. Prof. C. 5.6, the successor to former DR 2-108, in Eisenstein v. David G. Conlin, P.C., 444 Mass. 258 (2005). In that case, Eisenstein and another partner resigned from Dike, Bronstein, Roberts & Cushman (DBRC) and became partners in another firm. The DBRC partnership agreement required departing partners to pay to DBRC a portion of the fees generated at their new firm as a result of work performed for current and former DBRC clients. Eisenstein v. David G. Conlin, P.C., 444 Mass. at 259. The Supreme Judicial Court held that a contractual agreement requiring the former partners to share fees they earn from DBRC’s current and former client after leaving DBRC contravenes the “strong public interest in allowing clients to retain counsel of their choice.” Eisenstein v. David G. Conlin, P.C., 444 Mass. at 259 (quoting Meehan v. Shaughnessy, 404 Mass. at 431).
The Eisenstein court reviewed the partnership agreement in light of Rule 5.6, stating:

Rule 5.6 exists 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. See Pettinell v. Morrison, Mahoney & Miller, 426 Mass. 253, 257 (1997) (Pettinell) (rule safeguards interests of clients by providing “the fullest possible freedom of choice to clients” in selecting counsel).


The court continued:

In light of the fact that DBRC’s practice concentrated solely on intellectual property matters and that their clients necessarily had to look elsewhere to meet other legal needs, paragraphs 5A and 5B are especially punitive and anticompetitive. Enforcing paragraphs 5A and 5B would provide a windfall to DBRC by channeling fees to the firm for work it would not have, and could not have, undertaken. More importantly, if enforced, these provisions would provide clear disincentives for former DBRC partners to provide legal services to current or former DBRC clients, even where those clients have determined that their own interests would best be served by such representation.


The most recent refinement and restatement of the law in this area makes it clear that it is not forfeiture of benefits per se, but rather differential treatment, which is the controlling factor. In Pierce v. Morrison Mahoney LLP, 452 Mass. 718 (2008), the Supreme Judicial Court was addressing an amended version of the partnership agreement at issue in Pettinell. The defendant firm, a limited liability partnership, was the successor-in-interest to Morrison, Mahoney & Miller. The plaintiffs, while partners at Morrison Mahoney, had signed the 1989 partnership
agreement at issue in Pettingell. While the Pettingell litigation was pending, the Morrison Mahoney partners (including the five plaintiffs in the Pierce case) voted to amend the 1989 agreement. The amendment deleted the “forfeiture-for-competition” provision which the Supreme Judicial Court eventually struck down in Pettingell. The amended language provided that all voluntarily withdrawing partners (except those who were at least sixty years old or who had been a partner for at least twenty years) would forfeit their partnership credits, referred to as “APICs,” regardless of whether they subsequently competed. Several years after the amendment, three of the plaintiffs withdrew to form a new firm, a fourth withdrew to join another law firm, and the fifth plaintiff withdrew to form her own office. At the time of withdrawal, none had reached age sixty, nor had any of them served as a partner for twenty years, the triggers for payment of the APICs. Consistent with the 1995 amendment, Morrison Mahoney refused to make any payments on account of APICs, and the plaintiffs sued.

On cross-motions for summary judgment, the plaintiffs prevailed in the Superior Court, on the basis that the forfeiture of credits had a potentially chilling effect on the ability of the partners to leave the firm. Exercising de novo review, the Supreme Judicial Court reversed. The court held that “central to our holdings” in both Pettingell and Eisenstein was differential treatment between a lawyer who withdrew and competed, and one who did not. Pierce v. Morrison Mahoney LLP, 452 Mass. at 725. In each of the prior cases, the court reasoned, the offense to Rule 5.6 was not the forfeiture itself, but the specific disincentive the forfeiture created as to representation of certain clients. Under the amended agreement, the court held, “the fate of a lawyer who voluntarily withdraws and competes with Morrison Mahoney for its clients is precisely the same as the fate of a lawyer who voluntarily withdraws and does not.” Pierce v. Morrison Mahoney LLP, 452 Mass. at 726. Thus, the choice found to be problematic in Pettingell (to compete or not) no longer had financial consequences, and the amended version did nothing to “shrink the pool of qualified attorneys from which clients may choose.” Pierce v. Morrison Mahoney LLP, 452 Mass. at 726 (quoting Eisenstein v. David G. Conlin, P.C., 444 Mass at 262). As the court specifically stated, “The purpose of Rule 5.6 is not to protect lawyer mobility. A provision that makes a lawyer reluctant to leave, but that does not restrict the lawyer’s conduct after he or she departs, does nothing to prevent the lawyer from thereafter accepting clients in competition with the firm.” Pierce v. Morrison Mahoney LLP, 452 Mass. at 726. The court even suggested in dicta that it might uphold Morrison Mahoney’s practice of denying APIC benefits to partners who had reached retirement age (sixty years) but competed, noting that Rule 5.6 allows that sort of discrimination as to “retirement benefits.” It did not need to decide whether APICs qualified as “retirement benefits,” however, since none of the plaintiffs had met that age/service threshold.
The next frontier in this area of law may well be cases that define the contours of "a law firm's legitimate interests in its survival and well-being," as set out in Pettingell, that could justify some type of forfeiture of benefits when an attorney leaves to compete with his or her former firm. For example, in the view of the authors, the departure of an entire “practice group” under some circumstances, particularly in the absence of adequate prior notice, may well qualify as a reasonable exception, where some forfeiture might reasonably be upheld.

In this circumstance, the law firm is effectively not in a position to compete with the departing lawyers for the client's business. Although planning for a departure is generally permissible, secretly arranging for the departure of all attorneys and paraprofessionals involved in a particular practice area in a firm, coupled with a lack of notice to the firm that would enable it to retrain other employees or hire replacements, may constitute a breach of fiduciary duty that could support a finding of damages to the firm that is sufficient to justify forfeiture of some financial benefits. The Restatement (Third) of the Law Governing Lawyers (2000) touches on this issue in Section 9 Comment i, stating that "whatever detriment may befall the firm" from "mutual or serial departures" does not, by itself, constitute a breach of fiduciary duty. Nevertheless, the restatement affirms that a departing attorney must give the firm sufficient notice to enable the firm to have "a reasonable opportunity to make its own fair and accurate presentation to relevant clients." Restatement (Third) of the Law Governing Lawyers, § 9 cmt. i (2000). In the case of a departure of an entire department or practice group, a period of notice to the firm before actual departure may need to be quite lengthy to provide "reasonable opportunity."

A related issue is the extent and manner in which a firm may take into account the economic effect of the departure on the firm, e.g., in determining the value of a capital account. In Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 152 (N.J. 1992), the New Jersey Supreme Court said that such a consideration is "not inappropriate." Because this case is premised on valuing the "good will" of the firm—a concept that Massachusetts courts have not adopted for law firms—it is not clear that Jacobs would be followed in the Commonwealth in its precise form. However, the language about "survival and well-being" in Pettingell strongly suggests that Massachusetts would allow some kind of economic penalization (in the form of an offset) for conduct that threatens a law firm's ability to survive and/or compete. (For an analogous situation, see Mass. R. Prof. C. 1.17, which addressed for the first time the sale of a law practice, including good will.)
§ 6.2 Procedure for Notification to Clients and Removal of Cases

Recognizing that some cases are likely to be removed by a departing attorney and handled at his or her new office, the Meehan court set forth, but did not mandate, an acceptable procedure for notifying clients of the departure of a partner or employee from a firm. The procedure was modeled on ABA Committee on Ethics and Professional Responsibility, which provides that notice of a separation of practices is permissible (and is not considered “improper solicitation”) if the notice

- is mailed;
- is sent only to persons with whom the lawyer had an active lawyer-client relationship immediately before the change in the lawyer’s professional association;
- is clearly related to open and pending matters for which the lawyer had direct professional responsibility to the client immediately before the change;
- is sent promptly after the change;
- does not urge the client to sever the relationship with the lawyer’s former firm and does not recommend the lawyer’s employment (although it indicates the lawyer’s willingness to continue his or her responsibility for the matters);
- makes it clear that the client has the right to decide who will complete or continue the matters; and
- is brief, dignified, and not disparaging of the lawyer’s former firm.


The opinion does not address an obvious reality: when a client receives a unilateral or joint “breakup” letter under these circumstances, the result will often be a phone call to the lawyer. Many practitioners view such a client-initiated call as a natural and appropriate way for the client to obtain more information to aid his or her choice. The attorney, of course, should adhere to the guidelines set forth above from ABA Informal Op. 1457 and should take particular care to avoid disparaging his or her former partners or employers.
Although recognizing that this ethical standard is designed primarily to protect clients, the Meehan court held that the guidelines set forth in the standard constitute “what partners are entitled to expect from each other concerning their joint clients on the division of their practice.” Meehan v. Shaughnessy, 404 Mass. 419, 437 (1989). The court indicated that an appropriate means of opening the discussion between the attorneys and their clients would be “a mutual letter, from both the partnership and the departing partner, outlining the separation plans and the clients’ right to choose.” Meehan v. Shaughnessy, 404 Mass. at 442 n.16. It appears that such a joint letter could be sent prior to the actual physical separation of the practices, and practical considerations would seem to support such timing. However, the court suggested that unilateral contacts with clients seeking their permission to remove cases before any announcement to the partnership of a planned departure, or without mutual discussion concerning the content and form of notifications to clients, might in many instances constitute a breach of fiduciary duty.

§ 6.3 Division of Fees

In Meehan v. Shaughnessy, 404 Mass. 419 (1989), the Supreme Judicial Court rejected the previously discussed “winding up of business” method of dividing fees in pending cases (which would otherwise apply under the Uniform Partnership Act) in the face of a written partnership agreement that provided to the contrary. Specifically, the partnership agreement provided that there would be no liquidation of the business in the event of a voluntary withdrawal by a partner. Such a “savings” provision is quite common in law partnership agreements and, as previously noted, has obvious administrative and financial advantages to the firm.

The court also enforced the provisions of the partnership agreement that governed the division of fees on removed cases and provided that a “fair charge” be paid back to the firm for work actually performed at the firm before the removal of the case. Although the partnership agreement in question provided solely for the removal of cases, with client consent, that had originally been generated by the departing attorneys, the court extended this provision to cover all cases that were properly removed with client consent, regardless of the identity of the originating attorney. The court noted that a contrary reading (which would purport to limit an attorney’s right to remove a case depending on who had originally brought the client to the firm) might run afoul of the disciplinary rule prohibiting restrictive covenants.
§ 6.4 Calculation of “Fair Charge”

The Meehan court adopted the conclusion of the trial judge that in all cases, whether billed on an hourly basis or as a contingent fee, the attorney’s usual hourly rate multiplied by the hours actually spent on the matter constituted a “fair charge” for work actually performed on the matter before its removal to the new firm. The court recognized that use of billable hours in the determination of what constitutes a fair charge on contingent fee cases has an unfair effect whenever the client is unsuccessful (because the departing attorney will nevertheless have to reimburse the original firm for services that ultimately generated no fee) and sometimes when the client is successful (because the new firm will retain all of the amount by which the contingent fee exceeds the time spent on the matter at both firms). However, because “the parties [in this case] did not bargain otherwise,” this degree of unfairness was deemed acceptable by the court. Meehan v. Shaughnessy, 404 Mass. 419, 444 n.20 (1989).

The court appears to be willing to enforce other approaches to fee division on properly removed cases as long as such division is not so onerous as to run afoul of Mass. R. Prof. C. 5.6 or interfere with the client’s right to choose counsel. Another example of an approach to fee division in a contingent fee matter that one would expect to be found acceptable would be a division of the fee in accordance with the percentage of overall work performed on the matter at the old firm versus that performed at the new firm. Within the previously discussed limitations imposed by Mass. R. Prof. C. 5.6, fee division is apparently an area that may be left to the parties’ negotiation, and as long as the provision is reasonably definite or is definable by reference to custom and usage in the trade (as is the term “fair charge”), the court will honor and enforce the parties’ agreement. If there is no partnership agreement, the court needs to face the problem created by the concept of “winding up” discussed in the following section.

§ 6.5 The “No Compensation” Rule

One of the most vexing problems in the context of law firm dissolution, and one that arises directly from the duties owed to colleagues (or, in this instance, former colleagues), is the equitable allocation of fees earned subsequent to the dissolution. Generally, this is not a problem with regard to matters billed on an hourly basis. While technically, such cases are part of the “winding up,” in practice, they are normally billed through the effective date of dissolution, and only accounts receivable becomes an asset of the former firm. It is typically in contingent fee matters where a problem arises. Conceivably, one could analyze a contingent fee case as not encompassed in the “winding up of partnership affairs” under G.L. c. 108A, § 30. Under this approach, the plaintiff could be seen as having severed his or her relationship with the former firm and having chosen
to hire new counsel, who simply happens to be one of the former partners. The former firm would then have rights analogous to a discharged attorney under the principles of Salem Realty Co. v. Matera, 10 Mass App. Ct. 571, 575 (1980). However, most courts that have considered the issue have in fact viewed pending contingent fee work as within the scope of the “winding up.” The critical issue becomes whether the former partner who continues to handle the case is entitled to receive extra compensation (beyond his or her share as a former partner), or whether his or her fiduciary duty toward his or her former partners precludes such additional compensation.

To understand the significance of the problem, one can consider it in its simplest form: a partnership of two attorneys handling only two cases, each with serious injuries. Case No. 1 is in the early stages of discovery, with complex issues, while Case No. 2 is ready for trial. If the “winding up” obligation precludes any additional compensation, then each partner would have every motivation to handle Case No. 2, and no motivation to handle Case No. 1. What guidance can be found under Massachusetts law? First, it is important to note that the Uniform Partnership Act does not answer the question. General Laws c. 108A, § 30 specifically provides that “on dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.” “Winding up” is not defined, nor is “partnership affairs,” and the statute is simply silent as to compensation. Massachusetts case law has generally rejected compensation for “winding up.” Silversmith v. Sydeman, 305 Mass. 65 (1940); Wiggins v. Brand, 202 Mass. 141 (1909). However, these cases did not involve attorneys, and this proposition has not been reexamined in the context of law firm dissolutions, where the “winding up” process tends to be more complex and longer lasting. Massachusetts has, however, recognized that the issue of compensation for “winding up” activities must be dealt with on a case-by-case basis. Thayer v. Badger, 171 Mass. 279, 280 (1898). Perhaps the most analogous case involves “unfinished suits” of another sort. In Robinson v. Simmons, 146 Mass. 167 (1888), the court approved compensation for the completion and selling of unfinished clothing that had been the property of a former partnership. Embryonic lawsuits, the authors submit, should be treated in the same fashion. Returning to the above hypothetical situation, to enforce a rule of no compensation in such a situation significantly burdens Client No. 1’s choice of counsel. That is the same policy that underlies Mass. R. Prof. C. 5.6, which regulates agreements restricting the rights of lawyers to practice following termination of employment. (Courts elsewhere have reached inconsistent results. Compare Jewel v. Boxer, 203 Cal. Rptr. 13 (Cal. Ct. App. 1984), with Cofer v. Hearn, 459 S.W.2d 877, 880 (Tex. Civ. App. 1970), which describes a no-compensation rule as “unconscionable and inequitable.”)

Despite the potential burden on client choice inherent in the “no compensation” rule, in Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld, LLP, 477 B.R. 318 (S.D.N.Y. 2012), motion to certify appeal granted, No. 11 Civ. 5968 et al., 2012 WL 2952929 (S.D.N.Y. July 18, 2012), the court discussed extending the rule to hourly billed cases. Development Specialists, Inc. (DSI) was the plan administrator for the dissolved law firm of Coudert Brothers LLP. It brought suit against ten law firms that former Coudert partners had joined, and where they had worked on matters that were pending when Coudert dissolved. On cross motions for summary judgment, the court held that these matters, most of which were billed hourly, were assets of Coudert at the time of dissolution.

The thornier issue was how to value such assets. The defendants argued, as a matter of law, that hourly matters were without value because any postdissolution fees earned would be equal to the value of postdissolution efforts by the former partners. New York courts, in prior contingent fee cases, had in fact modified the “no compensation rule” by reducing the “profits” for which former partners had to account by the value of postdissolution “efforts, skill and diligence.” Rejecting the defendants’ position, the court held that the “efforts, skill and diligence” concept cannot completely undo the statutory “no compensation” rule of the Uniform Partnership Act. The court envisioned an accounting to determine such issues as the value of Coudert matters as of the date of dissolution, the amount of postdissolution “profits” for which former Coudert partners would have a duty to account, and how to appropriately value the “effort, skill and diligence” put in after dissolution. Given that New York’s highest court, the Court of Appeals, had not spoken on these issues, the court encouraged the defendants to seek certification and interlocutory appeal. The defendants obliged and the court certified an appeal to the Second Circuit, citing as “controlling” issues (1) whether pending matters were assets of Coudert on the date of dissolution, and (2) whether the former Coudert partners could deduct from profits earned on those matters an amount representing their “effort, skill and diligence.”

§ 6.6 The Right to Plan for a Departure

Despite a general fiduciary duty not to compete with one’s partners, a departing partner may plan for his or her departure, and, in effect, “plan to compete with the entity to which [he or she otherwise] owe[s] allegiance,” provided that, in the course of such plans, he or she does not otherwise violate fiduciary duties. Meehan v. Shaughnessy, 404 Mass. 419, 435 (1989). Specifically, logistical arrangements may be made for the establishment of a new law firm prior to departure from the old firm, because such arrangements do not constitute actual competition and, moreover, because they are necessary for a departing attorney to fulfill the obligation owed to clients to represent them adequately throughout the transition.
period. Among the logistical arrangements that were found to be permissible in Meehan v. Shaughnessy were the following:

- executing a lease for office space,
- renting or purchasing furniture or supplies,
- hiring employees,
- preparing lists of clients expecting to leave with the departing attorney, and
- obtaining financing on the basis of these lists.


However, it should be noted that use of firm resources to accomplish these tasks is a probable fiduciary violation. See Restatement (Third) of the Law Governing Lawyers § 9 cmt. i (2000).

The court did not directly address the propriety of soliciting employees of the original firm to join the new firm. At-will nonlawyer employees would, under common law principles, be free to join the departing attorney. Rule 5.6 of the Massachusetts Rules of Professional Conduct would seem to bar enforcement of any agreement that would purport to limit any attorney’s right to practice law in conjunction with any other attorney. Thus, the only question may be the timing of such “solicitation.” In view of the fiduciary duty of honesty and fair dealing, the safest course would be not to solicit employees of the old firm before discussing with the remaining partners one’s intent in this regard.

§ 6.7 Duty to Disclose

Left somewhat unclear by the court is the extent of any obligation to disclose the logistical plans to depart. There does not appear to be an obligation, in general, to disclose plans or logistical arrangements concerning departure, as long as the conduct that is not being disclosed does not independently constitute a breach of fiduciary duty, and as long as the silence does not detrimentally affect the original firm’s ability to ultimately communicate with clients concerning their future legal representation. Nevertheless, the court did recognize a partner’s (but probably not an employee’s) obligation to “render on demand true and full information of all things affecting the partnership to any partner.” Meehan v. Shaughnessy, 404 Mass. 419, 436 (1989) (citation omitted). In certain circumstances (such as where a major economic commitment by the firm in renting new and larger space is imminent), this duty may well require early disclosure of plans.
§ 6.8 Effect of a Breach of Fiduciary Duty

Damages may be awarded

- where a departing attorney actively competes with his or her original firm; or

- where through preparation for obtaining clients’ consent to case removal, secrecy regarding it, and communications with clients that do not follow the guidelines set forth above, the attorney obtains “an unfair advantage” over the former partners.

However, the damages must be shown to be such as are causally linked to the specific breach of duty. Thus, for example, a breach of duty in connection with obtaining client consent to removal of cases will not prevent a departing partner from receiving various sums owed under the partnership agreement for his or her capital account or for his or her interest in fees earned but not collected. Such forfeiture, unrelated to the breach of duty, is not permitted. On the other hand, if there was a breach of duty in obtaining client consent, the departing attorney could not benefit from it, and any profit flowing from the breach (for example, the fee earned on the removed case) would have to be held in trust for the benefit of the former partnership.

In this regard, once a breach of fiduciary duty is established, the burden of proof shifts to the breaching party to establish the lack of any damages. For example, in Meehan v. Shaughnessy, 404 Mass. 419 (1989), it became the plaintiff’s burden to establish that, even in the absence of certain activities that the plaintiff undertook to acquire consent from clients to remove cases, which the court found to constitute breaches of duty, the clients would have nevertheless freely chosen to be represented by the departing attorneys at their new firm. If such a showing were made, there would be no damages resulting from any breach of duty, and the provisions of the partnership agreement would govern the division of fees. On the other hand, if such a showing could not be made, the fees received by the new firm on the improperly removed case would be held in trust for the benefit of the old partnership, and all fees received would be divided according to the terms of the old partnership. Thus, if the departing attorneys were entitled to 10 percent of the fee in the old partnership, they would receive 10 percent of gross fees at their new firm, with 90 percent of the net fee (after reasonable overhead had been subtracted) being returned to the original firm.
§ 7  MUTUALITY OF FIDUCIARY DUTIES 
AND THE LAW FIRM’S OBLIGATION 
OF GOOD FAITH AND FAIR DEALING

While most cases addressing the issue of fiduciary duties between law partners have focused on the conduct of a departing attorney, it is clear that fiduciary obligations are mutual. Many of the fiduciary obligations and ethical limitations (on client solicitation, for example) apply equally to those who remain and those who depart. Other fiduciary obligations would constrain the expulsion of partners, in contravention of partnership agreements. Even after a partner leaves, courts have found that the remaining partners owe a fiduciary obligation to the departing partner to act fairly and reasonably in determining the departing partner’s profit allocations and compensation. In cases like these, courts have criticized firms that have engaged in “secretive” decision-making processes affecting a partner’s tenure or compensation, and have also voiced concern about partner self-interest and “self-dealing” in making a financial decision—issues that may well arise in connection with the recent rash of law firm mergers.

§ 7.1  Firing of Partners

In an era of heightened competition, mergers, and increased focus on “productivity,” it was inevitable that courts would come to deal with the once unthinkable phenomenon of partners being forced out of law firms. The case that has received by far the greatest national attention is Beasley v. Cadwalader, Wickersham & Taft, No. CL-94-8646 “AJ,” 1996 WL 438777 (Fla. Cir. Ct. July 23, 1996), aff’d, Cadwalader, Wickersham & Taft v. Beasley, 728 So.2d 253 (Fla. Dist. Ct. App. 1998). The case was decided by a Florida state judge, applying New York law. James Beasley, a South Florida litigator, joined the Palm Beach office of Cadwalader, Wickersham & Taft, which was seeking to expand the office from a trust and estates practice. In the early 1990s, the office showed increasing profits, but in 1993 it operated at a loss, in part because of disruptive conduct of another partner in the Palm Beach office. In the meantime, partner compensation throughout the firm had been declining, and a group of fifteen powerful New York partners succeeded in convincing the management committee that the only solution was to expel less productive partners. A clandestine effort to identify partners to be eliminated was launched with the infelicitous name “Project Right Size.” As a result of these efforts, the entire Palm Beach office was slated to be closed and at the same time, significant bonuses were paid to certain of the partners behind the downsizing movement.

Because the partnership agreement contained no provisions for expulsion, Beasley claimed that closing the Palm Beach office was a clear and simple breach.
Cadwalader, Wickersham & Taft argued that it was a voluntary withdrawal, which the court quickly rejected. The court further found that by expelling Beasley—a contravention of the partnership agreement—and by operating in a secretive fashion, the firm had also breached the high fiduciary duty owed to partners. This decision was affirmed in most respects on appeal, although the judgment was reduced to exclude profits arising after the expulsion.

Obviously, the lack of an expulsion clause is an unusual feature, and the court made it clear that there was a route that could have been taken—to have amended the partnership agreement by creating such a procedure and then following the procedure. Indeed, even under circumstances where expulsion may seem harsh or even unfair, strict adherence to procedures in the partnership agreement may insulate the firm from liability. In Bohatch v. Butler & Binion, 977 S.W.2d 543 (Tex. 1998), the Supreme Court of Texas upheld the expulsion of a partner who had reported concerns that another partner was overbilling a client. The firm did some investigation of the complaint and was satisfied that there was no basis for the contentions, and ultimately expelled the reporting partner. She then sued for breach of contract and breach of fiduciary duty, and prevailed before a jury. On appeal, while reiterating that the relationship between partners “is fiduciary in character,” the Supreme Court of Texas also recognized the principle that “partners may choose with whom they wish to be associated.” Bohatch v. Butler & Binion, 977 S.W.2d at 545 (citations omitted). Unlike Beasley, the partnership agreement here contemplated expulsion and prescribed procedures. The court rejected an argument that Bohatch was entitled to tort damages as a “whistle-blower,” stating, “The fact that the ethical duty to report may create an irreparable schism between partners neither excuses failure to report nor transforms expulsion as a means of resolving that schism into a tort.” Bohatch v. Butler & Binion, 977 S.W.2d at 547. However, the court affirmed the recovery for breach of contract because the firm had reduced Bohatch’s partnership distribution in violation of a procedure in the partnership agreement.

§ 7.2 Setting of Compensation of Partners After Departure

It is clear that even after an attorney departs from a law firm, the remaining partners must avoid “self-dealing” and ensure that the departing attorney is treated “fairly” in connection with subsequent profit allocations and asset valuation. The implications of these requirements were examined by the Supreme Judicial Court in 1995 in the case of Starr v. Fordham, 420 Mass. 178 (1995).

In Starr, the plaintiff and the two defendants had departed from a large Boston law firm and formed their own firm with several others. The new partnership agreement vested in the two defendants the authority to determine each partner’s
share of the firm's annual profits. The agreement essentially placed no con-
straints on this power. When the plaintiff decided to leave the new firm at the
end of calendar year 1986, he was allocated a relatively small percentage of the
profits for that year—a percentage significantly lower than his share of billable
hours and dollars billed. While the defendants attempted to justify this allocation
on the basis of various factors, the trial judge in a bench trial rejected their con-
tentions. In a ruling affirmed by the Supreme Judicial Court, the trial judge held
that the implied covenant of good faith and fair dealing, as well as the fiduciary
duty among partners, constrained the profit allocation that the defendants had
made. The trial court also rejected the defendant's argument that the "business
judgment" rule applied to preclude a review of the profit allocation. Indeed, finding
that the defendants engaged in "self-dealing" in setting the allocation (a finding
apparently premised in the mere fact that the defendants had some "self-interest"
in designating each partner's share of the profits because that allocation had a
direct effect on their own share), the court held that the defendants bore the bur-
den of establishing that the distribution was, in fact, fair and reasonable.

After vigorous scrutiny of the profit allocation and close examination of the firm
financials, the court found that the defendants had deliberately selected perfor-
ance factors in order to justify a smaller payment to the plaintiff in breach of
their fiduciary duty and covenant of good faith and fair dealing, and found that
the plaintiff was entitled to an additional substantial portion of profits for the
year in question. The Supreme Judicial Court upheld this finding. In contrast
with its treatment of the defendant's profit allocation, the trial court found that
the defendants had fairly determined the departing partner's share of the "net
value" of the outstanding accounts receivable and work in process, less firm lia-
bilities as of the date of his departure. Specifically, the court approved the de-
fendants' decision that the long-term office lease obligation was a "liability" that
should be appropriately subtracted from the accounts receivable and work in
process.

While it is not, per se, a breach of duty to assign decisions concerning profit
allocation, compensation, and financial matters to the complete discretion of a
single partner (or any group less than the whole), the clear lesson of Starr is that
any decision by that individual or group will, in a subsequent suit, be subject to
close scrutiny by a court to ensure its objective fairness and reasonability. This
scrutiny, for obvious reasons, is most likely to occur in cases involving departing
attorneys, where it will serve as a significant limitation on the remaining partners'
ability to penalize, punish, or otherwise disadvantage their former colleagues.
§ 7.3 Potential Fiduciary Duty Issues Arising Out of Law Firm Mergers

A relatively recent feature on the legal landscape is the increasing number of mergers between firms. While there is currently little case law addressing the ramifications of fiduciary duties between colleagues in connection with this phenomenon, courts are likely to soon address these issues. Indeed, a firm exploring a merger must recognize that the process itself can give rise to conflicts of interest among partners, and inherently raises the possibility of the type of “self-dealing” criticized by the court in Starr v. Fordham, 420 Mass. 178 (1995). Thus, those conducting merger negotiations must be particularly aware of their fiduciary duties and of the fact that their conduct may ultimately be scrutinized by the court to ensure that it was, in all respects, fair and reasonable.

For example, the fiduciary obligations discussed above in § 7.1, Firing of Partners, may arise if, as part of a potential merger, significant numbers of partners are “fired” or “retired from the practice.” News reports in other jurisdictions concerning failed mergers also suggest other circumstances that may give rise to claims of breach of fiduciary duty. Thus, if in the wake of unsuccessful merger talks, several partners most closely involved in the negotiations for one side leave their former firm to join the proposed merger partner, potential breach of duty claims might lie based on claims of usurpation of a partnership opportunity, failure to disclose fully to their colleagues the content of their discussions with a prospective merger partner and a failure to reveal when the partners began negotiating for themselves, as distinct from the group as a whole. It remains to be seen how courts will address some of these thorny issues.

§ 8 LIMITED LIABILITY ENTITIES

Regulations applicable to lawyers who wish to use a limited liability entity are set forth in SJC Rule 3:06. This rule expressly recognizes the protection from personal liability provided to shareholders of a professional corporation (PC), members and managers of a limited liability corporation (LLC), and partners of a limited liability partnership (LLP). It also covers other matters such as the requirements for ownership and the control over and name of an entity. The LLC and LLP laws also require the Supreme Judicial Court to establish minimum levels of malpractice insurance that law firms operating as LLPs and LLCs must have in order to retain full insulation from vicarious liability.
With respect to LLPs and LLCs, the rule provides that

\[ \text{[each owner of the entity shall be personally liable for damages which arise out of the performance of legal services on behalf of the entity and which are caused by his or her own negligent or wrongful act, error, or omission. Owners of the entity whose acts, errors or omissions did not cause the damages shall not be personally liable therefor, whether or not they have agreed with any owners or employees or other persons to contribute to the payment of the liability, except to the extent provided in subparagraphs (b), (c), and (d).} \]

SJC Rule 3:06(3)(a).

Subparagraph (c) of the rule provides that each LLP and LLC shall maintain at all times either (a) professional liability insurance covering negligence, wrongful acts, errors, and omissions of said entity and its owners and employees in connection with their performance of legal services in an amount per claim and in an annual aggregate limit, exclusive of any deductible or retention, not less than the Designated Amount, or (b) a specifically designated and segregated fund for the satisfaction of judgments against said entity or its owners or employees based on their professional negligence, wrongful acts, errors, or omissions in connection with their performance of legal services in an amount not less than the Designated Amount, maintained as (i) a deposit in trust or a bank escrow of cash, bank certificates of deposit, or United States Treasury obligations, or (ii) a bank letter of credit or an insurance company bond. As used herein the term “Designated Amount” shall mean $50,000 plus the product of $15,000 multiplied by the number of owners and employees of said entity who are licensed to practice law in the Commonwealth or another jurisdiction, but not in excess of $500,000 in the aggregate. If such an entity fails to maintain insurance or a fund in the Designated Amount in compliance with this rule, its owners at the time when a professional liability claim is asserted shall be jointly and severally liable to the
claimant for an amount not to exceed the Designated Amount applicable at that time, less the sum of the assets of said entity and the proceeds of any professional liability insurance policy issued to it which are applied to the payment of said liability.

SJC Rule 3:06(3)(c).

Thus, if an LLP or LLC maintains the “Designated Amount” of insurance, or if it pays a portion of a malpractice judgment using insurance proceeds or firm assets totaling the “Designated Amount” or more, nonnegligent owners will not have any personal liability regardless of the size of the judgment.

Rule 3:06(5) expressly states that it does not diminish or change any obligations of attorneys that flow from recognized standards of professional conduct:

Nothing in this rule shall be deemed to diminish or change the obligation of each attorney who is an owner of or who is employed by the entity or an ownership entity to conduct the practice of law in accordance with generally recognized standards of professional conduct and in accordance with any specific standards which may be promulgated by this court or the licensing authority of the jurisdiction in which the attorney practices. Any attorney who by act or omission causes the entity to act or fail to act in a way which violates any applicable standard of professional conduct, including any provision of this rule, shall be personally responsible for such act or omission and shall be subject to discipline therefor.

§ 9 UNRESOLVED ISSUES

§ 9.1 Scope of Duties Owed by Associates or Nonequity Partners

The court in Meehan v. Shaughnessy found that “employees occupying a position of trust and confidence owe a duty of loyalty to their employer and must protect the interests of their employer.” Meehan v. Shaughnessy, 404 Mass. 419, 438 (1989) (citation omitted). In a law firm, it is likely that all junior partners and associates will fall into the class of “trusted employee.” The court did not describe how, if at all, the duties owed by such employees might differ from the
duty of “utmost loyalty” owed by partners to each other. However, a departing attorney-employee would probably be required, at a minimum, to adhere to the ethical standards governing notice to clients, and could not actively compete with his or her firm before a planned departure. For departing associates, as for departing partners, the Meehan opinion created a “safe harbor” based on ABA Informal Op. 1457. See discussion in § 6.2, Procedure for Notification to Clients and Removal of Cases, above.

The question of division of fees is more complicated when an associate leaves a firm, because it is not addressed by partnership agreements nor the Uniform Partnership Act, and written employment agreements are rare in the legal field. However, if a case were properly removed by an employee, in the absence of any employment agreement to the contrary, the appropriate analysis would seem to be that the client had terminated its relationship with the old firm and merely owes a “reasonable fee,” probably on a quantum meruit basis, for all work actually performed by the old firm on the matter. The reasonable fee or fair charge would likely be determined to be the usual hourly rate on hourly billed cases. On contingent fee matters, the reasonable fee might well be determined by reference to factors that have been utilized in determining a reasonable fee in attorney discharge cases. See, e.g., Salem Realty Co. v. Matera, 10 Mass. App. Ct. 571 (1980), aff’d, 384 Mass. 803 (1981) (indicating that such factors include the services performed, the contribution of those services to the ultimate result achieved, the caliber of the services, the time spent, the usual fees charged for the type of work, the size of the case in sums of dollars and its complexity, and the success achieved).

§ 9.2 Contact with Current Clients Before Departure

While the court in Meehan authorized departing attorneys to make necessary logistical arrangements for setting up and equipping a competing office, even before notification to their partners, as long as there is no independent fiduciary violation, the court seemed much less sensitive to practical reality in its attitude toward the contacting of clients. For many attorneys, setting up (and paying for) a new office would be unthinkably risky without some assurance that key clients would engage them.

In the Meehan case, the court referred, apparently disapprovingly, to a visit by one of the plaintiffs to an aviation insurance client before notification of the planned departure from the firm. Because this was listed as one of several acts that the court found (at least cumulatively) to be fiduciary violations, it is not clear whether any contact with a client before notification to the partners would be a violation. Meehan v. Shaughnessy, 404 Mass. 419, 436 (1989).
In Meehan, the inquiry to the aviation carrier was framed in a somewhat general and hypothetical way, designed to elicit the receptivity of the client to hiring a much smaller firm. It would be unfortunate, in the authors’ opinion, to authorize contacts even more vague or ambiguous yet bar inquiries that are more direct and, in essence, more honest. The fact is that all such contacts are, in a sense, inconsistent with the interests of an existing law firm in that they ease the way for attorneys who wish to depart. Easing the restriction, however, serves a competing interest—that of giving attorneys greater freedom of movement into and out of law firms. This freedom is consistent with the spirit of Mass. R. Prof. C. 5.6.

In the authors’ opinion, consideration should be given to allowing oral or written contact with current clients, even before notification of one’s partners, subject to some restrictions to ensure fairness. Such a policy would seem necessary to address the practical issue noted above and to better balance the competing interests of loyalty and freedom.

A significant case from the New York Court of Appeals underscores the tension that can exist between duties to clients and duties to partners when an attorney is making plans to leave. In Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179 (N.Y. 1995), the court affirmed a denial of a motion for summary judgment sought by the defendant Moskovitz. The allegations of the plaintiff law firm (which Moskovitz had founded and left after thirty-three years as managing partner) included the following:

- that Moskovitz, after agreeing to a plan for transmission of management to more junior attorneys, including a phasing down of compensation of the most senior partners, formed a plan to leave the firm and take a very significant client, a major pharmaceutical firm;

- that Moskovitz approached a larger New York firm, which was interested in taking him on, but only if the client would go with him; and

- that prior to announcing his intentions to his partners, Moskovitz asked the client whether it would have any objections to his specific relocation, and arranged meetings between the client’s general counsel and the head of the new firm’s tax department.

Against those allegations (among others), the defendant moved for summary judgment on the ground that he had not only the right, but the duty to inform the client of his impending move, given that he had had a direct relationship with the client for more than thirty years and that the client was in the midst of a serious tax matter.
Acknowledging that it is “unquestionably difficult to draw hard lines defining lawyers’ fiduciary duty to partners and their fiduciary duty to clients,” the court felt that summary judgment was clearly inappropriate. Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d at 1183. However, the court did set out “broad parameters” of acceptable conduct. In the view of the New York Court of Appeals, dissatisfied partners deciding to leave and “taking steps to locate alternative space” would be clearly appropriate—the sort of logistical arrangements that the Meehan court also ratified. Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d at 1183. The New York court acknowledged the right of the departing partner in such a situation to inform clients, stating that “ideally, such approaches would take place only after notice to the firm.” Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d at 1183.

Secret attempts to lure clients away, accompanied by lying to clients about their rights with respect to choice of counsel and lying to partners about plans to leave, are at the other end of the spectrum. Only by trial, the court held, could one determine in this case where the defendant’s conduct fell along that spectrum.
SECTION 1.5

A Lawyer’s Duties to Third Parties*

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Scope Note
The topic of this chapter is a lawyer’s specific duties to persons who are considered to be “third parties,” i.e., encountered where no tribunal is involved, or even outside the practice of law. The principles of honesty, fair dealing, pitfalls to avoid in dealing with adversaries, and proper communications are addressed.

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Updated for the 2013 Supplement by MCLE. The Massachusetts Rules of Professional Conduct have since been amended, effective July 1, 2015.
§ 1 INTRODUCTION

Many of the duties owed by an attorney to a tribunal also protect an opposing party, the general public, or the integrity of the judicial system.

For example, the prohibition on filing of claims that are frivolous protects the adverse party. Mass. R. Prof. C. 3.1. In addition, the Massachusetts Rules of Professional Conduct contain a general prohibition against an attorney’s acting in a way that has no other purpose but to “embarrass, delay or burden” third parties. Mass. R. Prof. C. 4.4. These prohibitions also prevent unnecessary burdens on the courts and mitigate general disrespect for courts and the legal profession. The same is true of the prohibition against knowingly making false statements of law or fact. Mass. R. Prof. C. 4.1(a).

This chapter does not repeat the general discussion of duties owed to tribunals except where specific issues are raised concerning duties to third parties. This chapter also discusses the obligations to third parties where no tribunal is involved.
§ 2

OBLIGATION OF HONESTY AND FAIR DEALING

§ 2.1 General Scope of Prohibited Conduct

Whether you are representing a client before a tribunal, negotiating a lease, or resolving a shareholder dispute, you have a duty to act honestly. This basic concept is found in several provisions of the Massachusetts Rules of Professional Conduct. Mass. R. Prof. C. 3.3, 4.1. Rule 8.4 in particular prohibits an attorney from engaging in conduct involving “dishonesty, fraud, deceit or misrepresentation,” and specifically states that such conduct constitutes “professional misconduct.” Mass. R. Prof. C. 8.4(c).

Other professional conduct rules provide specific guidance regarding the duty of honesty. For example, an attorney may not knowingly make a false statement of fact or law. Mass. R. Prof. C. .3(a)(1). An attorney may not mislead the tribunal by citation to favorable authority without citation to contrary authority not brought to the attention of the tribunal by the opposing party. Mass. R. Prof. C. 3.3(a)(3). Also, an attorney may not advance a claim unwarranted under existing law or made without a good-faith argument for a change of existing law. Mass. R. Prof. C. 3.1.

However, the prohibition in Mass. R. Prof. C. 8.4 with respect to dishonest or fraudulent conduct applies where no tribunal is involved; it even applies to conduct outside the practice of law. The precise limits of the duty of honesty and related principles are not entirely clear, but some guidelines exist.

§ 2.2 Distortion or Misstatement

You may not distort or misstate facts. C. Wolfram, Modern Legal Ethics § 12.3.3 at 641 (West 1986) (hereinafter, Wolfram). It is a violation and cause for disciplinary action for an attorney to

• misrepresent to opposing counsel the status of an escrow account, In re Collins, 1 Mass. Att’y Disc. R. 89 (1979); Mass. R. Prof. C. 8.4(c);

• file false fiduciary accounts, In re McGinn, 4 Mass. Att’y Disc. R. 89 (1984); In re Kouri, 4 Mass. Att’y Disc. R. 61 (1985); Mass. R. Prof. C. 8.4(c);

• falsely notarize a document, even where there was no intent to defraud, Public Reprimand No. PR-84-15, 4 Mass. Att’y Disc. R. 207 (1984); Mass. R. Prof. C. 4.1(a);

• misrepresent his or her financial worth during his or her own divorce proceedings, In re Angwafo, 453 Mass. 28 (2009); In re Finnerty, 418 Mass. 821 (1994); Mass. R. Prof. C. 8.4(c); Mass. R. Prof. C. 3.3(a)(1);

• misstate the opposing party’s principal position and misrepresent the holding of the trial court in a brief to the Appeals Court, Avery v. Steele, 414 Mass. 450 (1993); Mass. R. Prof. C. 8.4(c); Mass. R. Prof. C. 3.3(a)(1); or

• introduce false documents into evidence and fail to correct the record when given the opportunity to do so, In re McCarthy, 416 Mass. 423 (1993); Mass. R. Prof. C. 3.3(a)(4); Mass. R. Prof. C. 3.4(b).

Two formal opinions of the ABA (American Bar Association) Committee on Professional Ethics and Grievances are particularly illustrative of the scope of the prohibition on dishonest conduct. The first, ABA Formal Op. 178 (1938), held that it was improper for a creditor’s attorney to send papers to debtors that created the false impression that a court proceeding had already been commenced. The second, ABA Formal Op. 253 (1943), held that a lawyer would be engaging in fraud or misrepresentation (in violation of then ABA Canon 15) by allowing a client to send collection letters on the lawyer’s stationery. The opinion stated that, because the collection matters in question had not actually been referred to the attorney, the use of the stationery would be misleading.

(a) Misconduct Relating to Fees

The Massachusetts Rules of Professional Conduct are also violated when an attorney fails to pay within a reasonable time bills rendered by stenographers, real estate appraisers, expert witnesses, etc. MBA (Massachusetts Bar Association) Ethics Op. 74-9 (interpreting DR 102(A), now loosely codified in Mass. R. Prof. C. 8.4(d), which prohibits conduct that prejudices the administration of justice); Public Reprimand No. PR-84-11, 4 Mass. Att’y Disc. R. 200 (1984) (failure to pay expert and lying to expert regarding application to court for fees). Similarly, failure to make clear the basis for calculating and charging fees violates Mass. R. Prof. C. 8.4(c). MBA Ethics Op. 84-1 (interpreting prior disciplinary rules).

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(b) Overstatement and Negotiation Tactics

What of the “puffing” that is often a part of the negotiating process? Can a lawyer state to an adversary that “my client has instructed me to commence proceedings if . . .” where such a representation is not literally true? What of overstating the value of an asset as a negotiating technique?

Some commentators find such techniques permissible. See Wolfram at 726 n.37. However, Rule 4.1 of the Massachusetts Rules of Professional Conduct prohibits the making of any false statement of law or fact. Mass. R. Prof. C. 4.1(a). The comments to this rule suggest that estimates regarding settlements of claims generally are not considered facts. Mass. R. Prof. C. 4.1, cmt. [2].

Because there is no Massachusetts authority discussing these issues in connection with attorney discipline, caution is advised, for a statement that a lawyer knows to be untrue, or that is so aggressive that the lawyer must know it is untrue, raises serious issues under Mass. R. Prof. C. 4.1, as well as Mass. R. Prof. C. 8.4(c).

(c) Silence

Affirmative false statements are clearly proscribed. Silence that leaves a third party under a mistaken impression is more problematic. Clearly, in communicating with your own client or with a tribunal, silence is unacceptable if a basic factual misimpression will result. See, e.g., Mass. R. Prof. C. 1.6(b)(1), 1.6(b)(3), 3.3(a)(2), 8.4(c); In re Mahlowitz, 1 Mass. Att’y Disc. R. 189 (1979); Office of Disciplinary Counsel v. Kissell, 442 A.2d 217, 219–20 (Pa. 1982) (lawyer told client that settlement check was being applied to his fee but did not tell client that he forged the client’s name on the check in order to cash it).

Under certain circumstances, you must speak up, even to third parties. When a lawyer’s service is used in assisting a client’s crime or fraud, and the lawyer is rendered liable as an aider or abetter under criminal law or as a joint tortfeasor under tort and agency principles, the lawyer may be required to disclose confidential information. Mass. R. Prof. C. 4.1, cmt. [3]. Before making such a disclosure, the lawyer should, where practical, seek to persuade the client to take suitable action to rectify the fraud. Mass. R. Prof. C. 1.6, cmt. [14]. Thus, you may not stand in silence if the client, during the representation, has committed fraud on another. See, e.g., In re John Doe, 2 Mass. Att’y Disc. R. 100 (1981).

Rule 1.6(b)(4) states that a lawyer may disclose confidential information “when required by law or court order.” Mass. R. Prof. C. 1.6(b)(4). Unless mandated by Mass. R. Prof. C. 3.3, 4.1(b), or 8.3, it appears that such disclosure is discretionary.
However, any attorney negotiating a dispute does not have a duty to inform an opposing party of relevant facts. Mass. R. Prof. C. 4.1, cmts. [1]-[2]. In fact, if you acquired knowledge of the facts through a confidential communication from your client, disclosure may be prohibited unless the client agrees. Mass. R. Prof. C. 1.6.

§ 2.3 Assisting Client in Fraudulent or Illegal Conduct

Clearly, you may not assist or counsel a client in illegal or fraudulent conduct. Mass. R. Prof. C. 1.2(d). You may not gather information from public records for a client if you believe that the client will use the information for an illegal purpose. MBA Ethics Op. 81-4.

Similarly, you may not assist a client in a scheme to defraud creditors by concealing and disguising assets. In re Mandell, 4 Mass. Att’y Disc. R. 76 (1985). In Mandell, the attorney caused the client’s title to appear to be encumbered by sham mortgages. The court found that the attorney participated in fraudulent conveyances to conceal assets for creditors. The attorney also falsely notarized signatures and backdated Internal Revenue Service (IRS) filings. The court held that, although there was not actual harm and no intent to defraud by these actions, the actions were prejudicial to the administration of justice and adversely reflected on the attorney’s fitness to practice law. See Public Reprimand No. PR-102(A)(5), (6). Mr. Mandell was suspended for four months.

In a similar matter, an attorney was disciplined when his client sold his home in violation of a court order. The attorney did not tell the buyer of the prohibition. In re Shyavitz, 5 Mass. Att’y Disc. R. 349 (1988); see also Public Reprimand No. PR-80-6, 2 Mass. Att’y Disc. R. 210 (1980) (lawyer helped relocate child illegally).

Massachusetts Bar Association Ethics Op. 80-8, considering the predecessor Disciplinary Rules, discusses at some length the ethical considerations that arise when an attorney assists a client in structuring a transaction so that it appears other than it is. In MBA Ethics Op. 80-8, an attorney requested advice as to whether he could assist a client in purchasing property through an intermediary. The client sought to use the intermediary because the seller would refuse to sell the property to the client directly. While the Ethics Committee did not give a definitive opinion on the ethical issues (it declined to give advice on the substantive issue of whether “fraud” was involved), the opinion suggests that a lawyer must take great care when a client seeks help in disguising a transaction to induce desired action by a third party.
Rule 4.1 of the Massachusetts Rules of Professional Conduct goes so far as to require an attorney to speak up where necessary to avoid assisting in criminal conduct or misrepresentation.

The above situations involve clients engaged in fraudulent or deceitful conduct, and an attorney who assists in such fraudulent conduct violates Mass. R. Prof. C. 1.2(d) as well as Mass. R. Prof. C. 8.4(c). A lawyer may "counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Mass. R. Prof. C. 1.2(d). However, there is no reported instance of a lawyer in Massachusetts being disciplined for assisting or advising a client regarding matters such as breach of contract or torts, which are traditionally thought of as noncriminal and, therefore, not "illegal." See Restatement (Third) of the Law Governing Lawyers § 57(3), cmt. 9 (1998); Los Angeles Airways, Inc. v. Davis, 687 F.2d 321, 326 (9th Cir. 1982) (lawyer not liable for advising breach).

§ 2.4 Criminal Conduct by Attorneys

The rules are much clearer where the attorney engages directly in criminal conduct. Mass. R. Prof. C. 8.4(b). Rule 8.4(b) states that it is professional misconduct for a lawyer to commit "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Mass. R. Prof. C. 8.4(b). A lawyer may not use illegal means to collect evidence. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 337 (1974); Markham v. Markham, 272 So.2d 813, 814 (Fla. 1973) (evidence inadmissible where husband wiretapped wife's phone in domestic relations case). A lawyer may be disciplined if convicted of bribing a municipal official with intent to influence an official act, In re Latour, 1 Mass. Att'y Disc. R. 176 (1977), or for participating in a scheme to defraud insurance companies by submitting false invoices, In re McCarthy, 4 Mass. Att'y Disc. R. 86 (1984) (lawyer "used his license to practice law to defraud and steal"). These crimes were all committed in connection with the practice of law.

Even if a crime is unrelated to the practice of law, conviction may lead to discipline. Supreme Judicial Court Rule 4:01, § 3(1) provides that each violation of the Massachusetts Rules of Professional Conduct is misconduct even if unrelated to the practice of law. Under SJC Rule 4:01, § 12(3) and (4), if a certificate is filed with the Supreme Judicial Court establishing that an attorney has been convicted of a "serious crime," the court issues a notice to show cause why the attorney should not be immediately suspended. A "serious crime" is a felony or any lesser crime that demonstrates unfitness to practice law and involves the following:

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false swearing;
• misrepresentation;
• fraud;
• interference with the administration of justice;
• willful failure to file income tax returns;
• deceit, bribery, or extortion;
• misrepresentation or theft; or
• an attempt to or solicitation of another to commit a serious crime.

Conviction of one of these “serious crimes” will normally lead to at least a suspension from practice. In re Finneran, 455 Mass. 722, 728–29, 739 (2010) (holding that disbarment was warranted for conviction of obstruction of justice relating to the attorney’s providing false testimony in a federal voting rights lawsuit); In re Alter, 3 Mass. Att’y Disc. R. 3 (1983). In determining the appropriate discipline, the Supreme Judicial Court does consider whether the crime was committed in connection with the practice of law. In re Campbell, 4 Mass. Att’y Disc. R. 13 (1985). Even if an attorney has not been charged or convicted of a crime, activity in the course of practicing law that rises to the level of a crime may be sufficient for the imposition of similar sanctions such as suspension or disbarment. In re Buck, 27 Mass. Att’y Disc. R. ___ (2011).

It is noteworthy that Massachusetts has never adopted a disciplinary rule that prohibits the commission of offenses involving moral turpitude. Instead, “a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.” Mass. R. Prof. C. 8.4, cmt. [1]. Attorneys in Massachusetts have been disciplined for the following:

• making a false statement to a federally insured bank, In re Driscoll, 447 Mass. 678, 689–90 (2006);
• misapplication of bank funds while acting as bank officers, In re Alford, 1 Mass. Att’y Disc. R. 9 (1979);
• conspiracy to commit arson and insurance fraud, In re Allen, 1 Mass. Att’y Disc. R. 11 (1978);
• knowingly leaving the scene of an accident and lying to police to cover up, In re Blais, 1 Mass. Att’y Disc. R. 30 (1978); and

The MBA Statement of Lawyer Professionalism reminds attorneys that the Disciplinary Rules are minimal standards and that lawyers should adhere to the highest principles of professional conduct. MBA Statement of Lawyer Professionalism at XA(1). To aspire to ethical standards higher than those minimal standards needed to avoid professional discipline, consider the following.

The Massachusetts Rules of Professional Conduct provide that an attorney should not encourage or aid a client in commission of a crime and should not advise a client on how to commit a crime and avoid punishment. Mass. R. Prof. C. 1.2(d), 1.2(e). Where a client proposes a course of conduct that is unjust, the lawyer may point that out to the client and suggest that the client forgo such action. Mass. R. Prof. C. 1.2(c), 2.1.

§ 3 DEALING WITH ADVERSARIES

In dealing with an adversary, you must be guided by the zealous advocacy due your client, by obligations to tribunals, and by the general duty to be honest in dealing with third parties. Mass. R. Prof. C. 1.3, 3.3, 4.1. Moreover, there are separate duties owed to adversaries.

§ 3.1 Duty to Avoid Unmeritorious or Malicious Actions

The Massachusetts Rules of Professional Conduct prohibit lawyers from filing frivolous claims. Mass. R. Prof. C. 3.1. Moreover, a lawyer should use the process only for legitimate purposes and not for the purpose of embarrassing or burdening another person. Mass. R. Prof. C. 4.4; see also Mass. R. Prof. C. 3.1, cmt. [2]. At each point in the process, consider whether there is a good-faith basis for the claim.

(a) Whether Claim Is Warranted

The issue is whether the claim is warranted under existing law, which would include having “a good faith argument for an extension, modification, or reversal of existing law.” Mass. R. Prof. C. 3.1. Determining whether a claim meets the standard is not always easy, and there are few reported decisions of the Supreme Judicial Court interpreting it. However, a decision from the Supreme Judicial Court considering Mass. R. Civ. P. 11 may provide guidance. Van Christo Adver-

The Supreme Judicial Court has held that unlike Fed. R. Civ. P. 11, the standard under Mass. R. Civ. P. 11 is a subjective one. Van Christo Advertising, Inc. v. M/A-Com/LCS, 426 Mass. at 415–16. In other words, sanctions are available under Rule 11 only where “the attorney has failed to show a subjective good faith belief that the pleading was supported in both fact and law.” Van Christo Advertising, Inc. v. M/A-Com/LCS, 426 Mass. at 416. Van Christo was decided on facts arising before the current Rules of Professional Conduct took effect. The rules now define belief as meaning that the “person involved actually supposed the fact in question to be true.” Mass. R. Prof. C. 9.1(b).


You can avoid these problematic situations altogether by diligent investigation of facts and law before agreeing to pursue a claim. Before pursuing a claim, gather credible factual evidence and legal authority indicating that there is a fair prospect of success. Wolfram § 11.2.4 at 598. The ABA Standards set out explicitly the steps that should ensure that reasonable inquiry has taken place. See also Newburger, Loeb & Co. v. Gross, 563 F.2d 1057 (2d Cir. 1977); Overmyer v. Fid. & Deposit Co. of Md., 554 F.2d 539 (2d Cir. 1977); Dealing with the “S.O.B.” Litigator or Jurist at 10–13 (MCLE 1990) (examples of claims found to be “frivolous”).

(b) Delaying Tactic

A claim brought solely to postpone an obligation to pay is “unwarranted” under several of the Rules of Professional Conduct. Mass. R. Prof. C. 3.2, cmt. [1]; Mass. R. Prof. C. 1.3 (lawyer should react promptly); Mass. R. Prof. C. 4.4; see
also Overmyer v. Fid. & Deposit Co. of Md., 554 F.2d 539, 542 (2d Cir. 1977) (appeal taken to delay obligation to pay judgment).

(c) Embarrassment or Burden to Third Persons

Even if a claim has some merit, you may violate Mass. R. Prof. C. 4.4 by pursuing the claim if the claim is brought to embarrass or burden another. Mass. R. Prof. C. 4.4. Moreover, a lawyer shall not assist a client in bringing a claim where the purpose is fraudulent. Mass. R. Prof. C. 1.2(d). For example, an attorney for an established company may violate Mass. R. Prof. C. 4.4 by pursuing even a valid claim against a small competitor if the purpose was to drive the competitor out of business. See Wolfram § 11.2.3 at 597. Improper purpose may consist of forcing an opposing party to incur expense far beyond the point of reason. Excessive persistence in pursuit of a claim after the claim has been rejected on appeal may show improper motive. See Andre v. Merrill Lynch Ready Assets Trust, 97 F.R.D. 699, 701–02 (S.D.N.Y. 1983); Viola Sportswear, Inc. v. Mimun, 574 F. Supp. 619, 621 (E.D.N.Y. 1983).

If a client shows enthusiasm out of reasonable proportion to the value or merit of the claim, you should look to both Mass. R. Prof. C. 3.1 and 4.4 before agreeing to handle the matter. If, after taking the matter, it becomes obvious that the claim is without merit, or that the client’s motive is improper, you may withdraw subject to Mass. R. Prof. C. 1.16(b), and subject to taking reasonable steps to avoid prejudice to the client. Mass. R. Prof. C. 1.16(d).

(d) Government Attorneys

The problems of unwarranted claims and improper motives are compounded for an attorney working for the government. See generally Mass. R. Prof. C. 3.8 (special responsibilities of a prosecutor). A prosecutor may not institute criminal charges if the lawyer knows or it is obvious that the charges are not supported by probable cause. Mass. R. Prof. C. 3.8(a).

These disciplinary considerations apply not only to “claims,” but to any defense or position asserted. Thus, virtually any unwarranted action taken by a lawyer or any action taken on behalf of a client that is not supported by the law will run afoul of the Massachusetts Rules of Professional Conduct. Mass. R. Prof. C. 3.1, 3.8, 4.4.
§ 3.2 Violation of Customary Courtesies

A lawyer must act with fairness to the opposing party and his or her counsel. Mass. R. Prof. C. 3.4. Specifically, lawyers should not obstruct another’s access to evidence. Mass. R. Prof. C. 3.4(a). Lawyers should make every effort to comply with discovery requests. Mass. R. Prof. C. 3.4(d). For example, a lawyer in Massachusetts is not going to be sanctioned for granting an extension to respond to discovery or answer a complaint. A different conclusion might be reached only if the lawyer’s client would be substantially prejudiced by such an extension.

In a case disciplining an attorney for violation of prior DR 7-102(A)(1), an attorney in a civil matter encountered the opposing party at the district attorney’s office. The attorney interrogated the party in a loud, angry voice and ordered her to leave. The attorney continued to berate the party until office staff ordered him to leave. The lawyer received a private reprimand. Public Reprimand No. PR-86-23, 5 Mass. Att’y Disc. R. 459 (1986).

Former DR 7-106(C)(5) prohibited an attorney from taking unfair advantage of local customs of courtesy. Under the current Massachusetts Rules of Professional Conduct, however, there is no such specific requirement. Nevertheless, the current rules imply that lawyers should abide by the general norms of professional courtesy. Mass. R. Prof. C. 1.2, cmt. [1]. Moreover, violation of a local custom may amount to conduct that reflects adversely on fitness to practice law. Mass. R. Prof. C. 8.4(h); Wright v. Roberts, 573 S.W.2d 468, 472–73 (Tenn. 1978). Such conduct may also be prejudicial to the administration of justice. Mass. R. Prof. C. 8.4(d); In re Zderic, 600 P.2d 1297, 1301 (Wash. 1979) (obtaining continuance on assurance that certain rights would be waived, then negating at client’s insistence); Independent Investor Protective League v. Touche, Ross & Co., 607 F.2d 530, 533–34 (2d Cir. 1978) (failure to be open and honest with opposing counsel wasted court’s time).

Extending common courtesies may conflict with your obligation to represent each client zealously. Mass. R. Prof. C. 1.2, 1.3. However, Mass. R. Prof. C. 1.2(a) expressly provides that

[a] lawyer does not violate [the duty of zealous advocacy] by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
§ 3.3  Intentional Violation of Rules of Procedure or Evidence

A lawyer must represent a client “through reasonably available means permitted by the law,” including any established rule of procedure or evidence. Mass. R. Prof. C. 1.2(a), 3.4(e), 4.4. An attorney must also make reasonable efforts to expedite litigation. Mass. R. Prof. C. 3.2. Moreover, lawyers shall not make frivolous discovery requests or obstruct another party’s access to evidence or conceal evidence. Mass. R. Prof. C. 3.4(a), (d). Thus, asking prejudicial questions regarding immoral conduct, if not calculated to elicit admissible evidence, would run afoul of these provisions. People v. Butler, 317 N.E.2d 35, 37–38 (Ill. 1979); see N.Y. County Law. Ass’n Ethics Op. 43 (1914).

§ 3.4  Threats of Criminal or Similar Charges

On its face, Mass. R. Prof. C. 3.4(h) is quite straightforward—no attorney may “present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain advantage in a civil matter.” Mass. R. Prof. C. 3.4(h). However, a number of issues come up in application of the provision.

Many wrongs lead to potential civil and criminal liability. A lawyer representing a client in a civil matter is not obligated to ignore a criminal offense that arises out of the same circumstances. The lawyer may represent the client in the civil matter even though the client (or the lawyer, for that matter) commences criminal process. See MBA Ethics Op. 79-7; In re Discipline of an Attorney, 1 Mass. Att’y Disc. R. 144 (1978) (an excellent discussion of the issues by Justice Wilkins under former DR 7-105—hereinafter, Wilkins Memorandum); ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1484 (1981). An attorney can report criminal conduct to proper authorities and may confront a wrongdoer with the facts and demand repayment. MBA Ethics Op. 79-7.

Rule 3.4(h) of the Massachusetts Rules of Professional Conduct, however, requires that an attorney not use the criminal process (or threats to resort to the criminal process) as a “club” solely to gain advantage in a civil matter. A civil remedy must be pursued for its benefit to the plaintiff, and the criminal matter must be pursued to bring an offender to justice. Wilkins Memorandum at 150.

Judge Wilkins, in his above-mentioned memorandum, discussed directly the suggestion that certain statutes may authorize the use of the criminal process to adjust civil disputes. See G.L. c. 276, §§ 55, 56 (discharge of defendant charged
with certain misdemeanors if victim acknowledges satisfaction received); G.L. c. 266, § 37 (bad checks); Wilkins Memorandum at 151-53. Judge Wilkins warned that, even if such statutes commonly lead to adjustment of essentially civil matters, the statutes do not authorize threat of criminal proceedings for civil advantage. Wilkins Memorandum at 151-53. Moreover, Judge Wilkins stated that, depending on the state of mind of the attorney, use of these statutes might violate DR 7-105, the former codification of Mass. R. Prof. C. 3.4(h).

The issue under Mass. R. Prof. C. 3.4(h) is often the attorney's motive. Most cases finding violations of this type of rule involve direct threats to pursue criminal charges unless payment or other civil relief is forthcoming. Wilkins Memorandum at 150 (and cases cited); MBA Ethics Op. 83-2. However, an inference of improper conduct is reasonable where a criminal charge is dropped immediately after civil relief is obtained. Robinson v. Fimbel Door Co., 306 A.2d 768, 771 (N.H. 1973). Even a veiled reference to the criminal aspect of a person's conduct or delaying the institution of criminal proceedings pending settlement of a civil suit may violate Mass. R. Prof. C. 3.4(h) if the lawyer's motive is improper. Wolfram § 13.5.5 at 717.

Whether the threat of criminal proceedings is well founded is usually not determinative. Wilkins Memorandum at 148. The fact that an attorney has probable cause to believe that a crime has in fact been committed does not mean that Mass. R. Prof. C. 3.4(h) would not apply. Wilkins Memorandum at 148; ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1427 (1978).

However, a groundless threat of criminal action is more likely to lead to discipline. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1484 (1981); MBA Ethics Op. 83-2. A threat of criminal charges coupled with a demand for relief in an unrelated civil matter suggests a misuse of the criminal process. See Wolfram § 13.5.4 at 715 (and cases cited).

Threats of criminal prosecution appear to be used most frequently in particular areas of civil practice. Debt collection, actions for support of a spouse or minor children, and bad check cases seem to be areas where the issue arises. Wilkins Memorandum at 151; Law. Man. on Prof. Conduct (ABA/BNA) at 71:601. In each of these areas, an attorney must be scrupulous to avoid misuse of the criminal process. See Fla. Bar v. Suprina, 484 So.2d 1245, 1246 (Fla. 1986) (violation where collection lawyer threatened prosecution solely to gain advantage in a civil matter); Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Michelson, 345 N.W.2d 112, 114–15 (Iowa 1984) (while attempting to collect debt, lawyer sent letters stating that debtor faced felony conviction, five years in prison, and being drummed out of the military).
Threats of disciplinary action may violate Mass. R. Prof. C. 3.4(h). A threat to report any attorney to the Board of Bar Overseers (BBO) would clearly violate Mass. R. Prof. C. 3.4(h) if it were made to obtain advantage in a civil matter. Mass. R. Prof. C. 3.4(h); see also MBA Ethics Op. 83–2. However, a threat to file a civil suit or a threat to petition the registry of motor vehicles to revoke the driver’s license of a debtor under G.L. c. 90, § 22A may not amount to a threat of criminal prosecution for purposes of Mass. R. Prof. C. 3.4(h). MBA Ethics Ops. 76–15, 83–3 (interpreting predecessor disciplinary rule); Law. Man. on Prof. Conduct (ABA/BNA) at 71:604; Wolfram § 13.5.5 at 716.

Rule 3.4(h) does not limit itself to threats against adversaries. Threats of criminal prosecution against third-party witnesses, administrative agencies, etc., solely to gain advantage in civil matters would violate Mass. R. Prof. C. 3.4(h). Mass. R. Prof. C. 3.4(h); Law. Man. on Prof. Conduct (ABA/BNA) at 71:603 (and cases cited).

Public officials must be especially wary of Mass. R. Prof. C. 3.4(h). See Wolfram § 13.5.5 at 717; Law. Man. on Prof. Conduct (ABA/BNA) at 71:604. Rule 3.4(h) may apply when prosecutors use their power as an unfair bargaining tool. See MacDonald v. Musick, 425 F.2d 373, 375 (9th Cir. 1970) (plea bargain tied to dismissal of civil suit against police officers); see also Colo. Ethics Op. 62 (1982) (prosecution offered to reduce sentence if defendant released government entities from civil liability); Mass. R. Prof. C. 3.8(a) (prosecution must refrain from bringing charges not supported by probable cause).

References to criminal charges can lead a lawyer into serious difficulty even outside the Massachusetts Rules of Professional Conduct. Misuse of such charges to gain advantage in a civil matter can lead to civil or criminal liability for extortion or abuse of process. Wolfram § 13.5.5 at 716–17.

Anytime a lawyer threatens, mentions, or suggests the possibility of criminal charges to a witness or opposing party in a civil matter, Mass. R. Prof. C. 3.4(h) is implicated. The lines between prohibited and permissible conduct are quite unclear. Judge Wilkins’ helpful memorandum should be consulted before any such reference or threat is made. Any actual pursuit of the criminal charges should be done so as to avoid any appearance of overreaching or intimidation.

The report should be discrete, without putting pressure on the prosecutor to take action; should not be conveyed to the person charged; and should not by its timing suggest a punitive or extortionate intent.

Wolfram § 13.5.5 at 717.
§ 3.5 Blocking Access to Witnesses or Evidence

Although you do not always have an obligation to volunteer damaging information to an adversary, you may not actively suppress or hide material “having a potential evidentiary value.” Mass. R. Prof. C. 3.4(a).

In general, a lawyer may not “unlawfully obstruct another party’s access to evidence.” Mass. R. Prof. C. 3.4(a). This includes outright concealment of evidence or potential evidence. A lawyer shall not aid a third party in engaging in such conduct. Mass. R. Prof. C. 3.4(a).


(a) Criminal Proceedings

In criminal proceedings, the prosecutor has the additional requirement of making disclosure of all exculpatory evidence. Mass. R. Prof. C. 3.8(d); see also Mass. R. Crim. P. 14(a)(1)(A)(iii); Commonwealth v. Baldwin, 385 Mass. 165, 177 (1982).

A prosecutor may not discourage or obstruct communication between prospective witnesses and defense counsel. Mass. R. Prof. C. 3.4(a), (f). A prosecutor may not refuse defense counsel the right to interview witnesses held in custody. Commonwealth v. Balliro, 349 Mass. 505, 515–18 (1965). Witnesses do not belong to either party and are not partisans. They should be available to either party to prepare for trial. Commonwealth v. Balliro, 349 Mass. at 516. All counsel must honor these principles. The current Massachusetts Rules of Professional Conduct, with the exception of Mass. R. Prof. C. 3.8, applying to prosecutors, make no distinction between the obligations of attorneys admitted to practice. Whether civil or criminal attorneys, all are obligated to comply with SJC Rule 3:07, in which the Massachusetts Rules of Professional Conduct are found.

Practice Note

Former SJC Rule 3:08 had special provisions relating to defense counsel and prosecutors in criminal actions. These provisions have been stricken.
However, a prosecutor does not “suppress” evidence or procure unavailability of witnesses by failing to produce a witness not under prosecution control. Commonwealth v. Curcio, 26 Mass. App. Ct. 738, 747 (1989) (prosecutor had given identifying information to defense counsel); see United States v. Kelly, 550 F. Supp. 901, 903–04 (D. Mass. 1982) (not prosecutorial misconduct to fail to interview witnesses without showing that prosecution attempted to avoid discovery of exculpatory evidence).

(b) Civil Proceedings

Although a lawyer is prohibited from obstructing access to evidence and concealing material having a potentially evidentiary value, a lawyer is not legally obligated to “reveal or produce” evidence to the adversary.

Practice Note

There may be situations where an attorney is obligated to affirmatively produce relevant information under the Local Rules of the Federal District Court for the District of Massachusetts in the absence of a specific request for such information.

Suppression of evidence required to be disclosed in response to discovery requests would violate Mass. R. Prof. C. 3.4(a). See also G.L. c. 191, § 13 (obligation to produce and file original will).

The Massachusetts Rules of Professional Conduct clearly prohibit a lawyer (even in a civil proceeding) from requesting a witness not to speak with the other side. The only exception is a witness who is a relative or employee of the lawyer’s client. Mass. R. Prof. C. 3.4.

Authority suggests a basic tenet that a lawyer should not “blockade” witnesses by asking them not to speak with the adversary. Wolfram § 12.4 n.80; see IBM Corp. v. Edelstein, 526 F.2d 37, 46 (2d Cir. 1975) (even court should not interfere unduly with party’s attempts to interview witnesses); L’Orange v. Med. Protective Co., 394 F.2d 57, 63 (6th Cir. 1968) (insurer acted contrary to public policy by canceling malpractice policy of dentist who testified as expert for plaintiff). A lawyer thinking about the issues raised by Mass. R. Prof. C. 3.4 may have concerns outside of the Rules of Professional Conduct. Suppression of evidence may amount to criminal obstruction of justice. Wolfram at 646 n.80; see G.L. c. 268, § 13B (criminal threats to witnesses). It is generally held that a lawyer may not advise a witness to invoke the Fifth Amendment if the lawyer is trying to protect his or her own client. Wolfram § 12.4 at 646.
§ 4 COMMUNICATION WITH PARTIES

§ 4.1 Parties Represented

A party represented by a lawyer is given broad protection from direct contact with an opposing lawyer. If the opposing lawyer knows that the party is represented, the lawyer must refrain from direct communication about the subject matter of the representation. Massachusetts R. Prof. C. 4.2; see In re Herman, 5 Mass. Att’y Disc. R. 148, 150 (1987). The only exceptions are if the party’s lawyer agrees that the party can be contacted directly or if the direct contact is authorized by law. Massachusetts R. Prof. C. 4.2, cmt. [1]. There are circumstances where the law authorizes—indeed requires—direct communication. Thus, for example, a formal demand under G.L. c. 93A, § 9 may have to be sent directly to the opposing party. MBA Ethics Op. 83-5; see also ABA Comm. on Prof’l Ethics, Informal Op. 426 (1961) (service of legal notice can be made directly on party); Me. State Bar Ass’n Op. 28 (1975) (notice to quit). Although some jurisdictions require a copy to counsel, Massachusetts apparently does not. MBA Ethics Op. 83-5. Moreover, a direct communication with an opposing party does not become proper just because a copy is sent to that party’s counsel. Public Reprimand No. PR-83-17, 3 Mass. Att’y Disc. R. 255 (1985).

Communication with a represented opposing party is not justified by the fact that opposing counsel is not communicating settlement offers to the client. ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1348 (1975). A lawyer is not obliged to prevent his or her own client from directly contacting the opposing party, as long as the lawyer does not advise or cause the contact. Wolfram § 11.6.2 at 614; MBA Ethics Op. 82-8. Where the parties have been negotiating directly and are using the lawyers for “formalities,” the lawyers are under no obligation to stop that interaction. Yet a lawyer representing himself or herself in litigation may not communicate with the adverse party when the lawyer knows that the adverse party is represented by counsel. MBA Ethics Op. 97-1.

However, a lawyer must carefully avoid a charge of using the client to contact the other party, in order to bypass counsel and evade Massachusetts R. Prof. C. 4.2 and 8.4(a). See In re Marietta, 569 P.2d 921, 921 (Kan. 1977). If the lawyer and the client together devise a settlement offer, this is considered a product of the lawyer’s work, and the lawyer should not permit the client to present it directly to the opposing party. MBA Ethics Op. 82-8. A lawyer may not cause an agent or investigator to contact directly a represented party. ABA Comm. on Prof’l Ethics, Informal Op. 663 (1963). In essence, one should not do indirectly what one may not do directly.
The most difficult issue under Mass. R. Prof. C. 4.2 can be identifying the “person” represented. See MBA Ethics Op. 82-7; see also Mass. R. Prof. C. 9.1(h) (“‘Person’ includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.”). A former trustee of a condominium trust may be contacted directly even though the trust is represented. MBA Ethics Op. 88-5. The use of the term “person,” rather than “party,” clarifies that Rule 4.2 prohibits direct communications even with third parties (witnesses, etc.) who are represented.

Rule 4.2 does “not prohibit communication with a represented person, or employee or agent of such a person concerning matters outside the representation.” Mass. R. Prof. C. 4.2, cmt. [1].


In Messing, a law firm representing a plaintiff in an employment discrimination case conducted informal ex parte interviews with five employees of the defendant. Messing, Rudavsky & Weliky, P.C. v. President of Harvard Coll., 436 Mass. at 350. The defendants brought a motion for sanctions, which was granted by the Superior Court based in part on language in Comment [4] indicating that Rule 4.2 applied to any person “whose statement may constitute an admission on the part of the organization.” On appeal, the Supreme Judicial Court vacated the court’s order, noting that the comment was merely a “guide to interpretation” and holding that Rule 4.2 prohibits ex parte contact only as to those employees who

- exercise managerial responsibility in the matter,
- are alleged to have committed the wrongful acts at issue in the litigation, or
- have authority on behalf of the corporation to make decisions about the course of the litigation.


Regarding the last of the three categories identified above (“authority on behalf of the corporation”), the Supreme Judicial Court explained that Rule 4.2 prohibits contact “only with those employees who have the authority to ‘commit the
In the case of an organization, [Rule 4.2] prohibits communications by a lawyer for another person or entity concerning the matter in representation only with those agents or employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the organization to make decisions about the course of the litigation. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

Although the Messing case itself concerned only current employees, the Supreme Judicial Court’s subsequent amendment of Comment [4] appears to have a bearing on contacts with former employees as well. On June 26, 2002, the MBA Committee on Professional Ethics issued an opinion stating that the prohibitions on ex parte contacts imposed by Rule 4.2 were generally inapplicable to former employees. See MBA Ethics Op. 2002-3, available at http://www.massbar.org/ethics/. The committee relied in substantial part on the new references to “agents and employees,” reasoning that “[f]ormer agents or employees are not ‘agents or employees’ of an organization” and that under the circumstances it was likely that this change was intentional.
In reaching this conclusion, the MBA committee cautioned that

> [t]he conclusion that Rule 4.2 does not apply the anti-contact prohibition to former employees is not absolute. A former employee may of course choose to be represented by the lawyer for his former corporate employer. Communication of that information to opposing counsel would then trigger the anti-contact provision of Rule 4.2. Also, a former employee may have been so exposed to confidential information that contact with the employee should only be made through corporate counsel.

MBA Ethics Op. 2002-3 (citations omitted).


Rule 4.2 is silent as to whether an attorney is prohibited from speaking directly with a person dissatisfied with existing counsel. Wolfram § 11.6.2 at 612. In Massachusetts, there is a public policy to ensure one in need of legal help the freedom to seek a consultation or second opinion regarding the fees, competency, etc., of one’s lawyer. Walsh v. O’Neill, 350 Mass. 586, 590 (1966). Thus, in Massachusetts, an attorney probably does not violate the Rules of Professional Conduct by meeting with a represented party to act as a sounding board or to give a second opinion.

§ 4.2 Communication with Unrepresented Parties

Where a lawyer is contacting a person who is not represented, the lawyer must be careful not to overreach. Mass. R. Prof. C. 4.3(a). Absent an attorney-client relationship, the court will recognize a duty of reasonable care if an attorney

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knows or has reason to know that a nonclient is relying on the services rendered. Lamare v. Basbanes, 418 Mass. 274, 276 (1994) (citing Spinner v. Nutt, 417 Mass. 549, 552 (1994)). However, the court will not impose a duty of reasonable care on an attorney if that duty will potentially conflict with the duty the attorney owes to his or her client. Lamare v. Basbanes, 418 Mass. at 276 (citing Spinner v. Nutt, 417 Mass. at 552). A lawyer should not give advice to an unrepresented person if that person’s interest has a reasonable possibility of conflicting with the interests of the client. Mass. R. Prof. C. 4.3(b). A lawyer can always advise a person to obtain counsel. If the person’s interests are adverse, the lawyer may not recommend hiring a particular lawyer. Mass. R. Prof. C. 4.3(b); see also ABA Comm. on Prof’l Ethics, Informal Op. 1194 (1971). There is no obligation to suggest that the unrepresented person hire a lawyer, but a lawyer should never suggest that an unrepresented person not hire counsel. Wolfram § 11.6.3 at 616 n.65; see W.T. Grant Co. v. Haines, 531 F.2d 671, 675-76 (2d Cir. 1976).

The primary issue is what constitutes “advice.” Although not clear in all jurisdictions, in Massachusetts, a lawyer does not violate the predecessor disciplinary rule by drafting documents to be signed by an unrepresented person of adverse interest. Dolan v. Hickey, 385 Mass. 234, 237 (1982) (interpreting DR 7-104(A)). In Dolan, the lawyer owned property through a straw and held a closing at his office with unrepresented buyers who did not know of the lawyer’s personal interest. As attorney for the buyers’ bank, the lawyer drew and saw to the buyers’ execution of a note and mortgage. The court held that the lawyer made no misrepresentations and did not have a fiduciary obligation to the buyers at the closing.

“Advice” certainly includes a description of the state of the law or of the course of conduct that the lawyer recommends. W.T. Grant Co. v. Haines, 531 F.2d at 676 n.3. A lawyer may send a collection letter to an unrepresented person, but should not include a detailed description of the legal consequences of nonpayment. S.C. Ethics Op. 24-78 (1978) (a statement to the effect that “legal proceedings are costly and time-consuming” may constitute advice).

A lawyer may draft and present certain types of waivers for signatures by unrepresented persons, but will run into trouble with others. Presentation of waiver of issuance of summons and entry of appearance of the unrepresented person is allowable. ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1269 (1973); Law. Man. on Prof. Conduct (ABA/BNA) at § 71:504 (and cases cited). However, a waiver allowing a lawyer access to confidential personal records of an unrepresented person may not be allowed. W.T. Grant Co. v. Haines, 531 F.2d at 676. Obtaining a release soon after an accident may be prohibited. Wolfram § 11.6.3 at 616 n.70.
A lawyer can gather facts and interview unrepresented persons. See Mass. R. Prof. C. 4.2, cmt. [2]; Mass. R. Prof. C. 4.3, cmt. [1]. The limits are explored in Grant, where the lawyer for the company interrogated an unrepresented employee without telling the employee a decision had been made to fire him and without disclosing that a lawsuit already had been filed against him. The employee was tricked into subjecting himself to service of process. The interview was taped and a polygraph administered when the employee waived objection. The decision seems to turn in part on the fact that the employee was a sophisticated businessman. Cf. Lyons v. Paul, 321 S.W.2d 944, 949–50 (Tex. Civ. App. 1958) (uneducated person). There is some question whether Grant remains good authority. Wolfram § 11.6.3 at 616 n.67.

The better practice as to any unrepresented person with an adverse (or potentially adverse) interest is to disclaim any intention to represent him or her or give advice other than to hire counsel. In re Bauer, 581 P.2d 511, 514 (Or. 1978).

§ 5 OBLIGATIONS TO OTHERS

§ 5.1 Jurors

A lawyer is prohibited from exerting influence over or communicating ex parte with jurors or prospective jurors. Mass. R. Prof. C. 3.5(a)–(b). Rule 3.5 is broad, prohibiting all conduct intended to disrupt the proceeding. Mass. R. Prof. C. 3.5(c). Moreover, Mass. R. Prof. C. 8.4 defines professional misconduct as conduct that also knowingly assists or induces another to violate the rules. Mass. R. Prof. C. 8.4(a). Therefore, communication with jurors by any attorneys connected with a proceeding is also prohibited. So too is it misconduct to attempt to communicate with the jury through those connected with its members. See Mass. R. Prof. C. 8.4(a). For example, attempting to communicate with the jury through a juror member’s family violates the Massachusetts Rules of Professional Conduct. “Communicate” for this purpose means substantive acts, not simple courtesy such as standing when the jury enters the court.

Even after discharge of the jury, a lawyer connected with a trial is restricted from communicating with the jurors without leave of court and for good cause shown. Mass. R. Prof. C. 3.5(d). While a lawyer may respond to the question of a juror after the discharge of the jury, a lawyer may not ask questions or make comments to that juror that are intended to harass or embarrass the juror. Mass. R. Prof. C. 3.5(d). Under no circumstances “shall a lawyer inquire of a juror concerning the jury’s deliberation process.” Mass. R. Prof. C. 3.5(d).
Moreover, the Supreme Judicial Court has imposed restrictions that further narrow posttrial contact with jurors. In Commonwealth v. Fidler, 377 Mass. 192, 201–04 (1979), the Supreme Judicial Court decided that lawyers are not free to interview jurors posttrial to determine whether misconduct occurred. The court held that any such interviews had to be authorized by the court. See also Commonwealth v. Solis, 407 Mass. 398, 399 (1990) (finding lawyer's conduct inconsistent with the standard in Fidler but not in violation of Disciplinary Rules); United States v. Kepreos, 759 F.2d 961, 967 (1st Cir. 1985).

In light of these precedents under the earlier disciplinary rules and Mass. R. Prof. C. 3.5, a lawyer would be prudent to refrain from all communication with jurors.

Under the predecessor rules, if, without undertaking ex parte interviews, a lawyer receives information suggesting juror misconduct, the lawyer must reveal the information promptly to the court. See United States v. Boylan, 698 F. Supp. 376 (D. Mass. 1988) (procedure to be followed where possible misconduct discovered).

In sum, a lawyer must be wary whenever out-of-court communication with a juror is contemplated.

§ 5.2 Witnesses

In combination, Mass. R. Prof. C. 3.4(e), 3.4(i), and 4.4 all create some duty to a witness or potential witness. Rule 4.4 specifically requires a lawyer to refrain from conduct designed to “embarrass, delay or burden a third person.” Mass. R. Prof. C. 4.4. Moreover, Mass. R. Prof. C. 3.5(c) provides that a lawyer shall not engage in any conduct that is intended to disrupt a proceeding. Mass. R. Prof. C. 3.5(c).

In Commonwealth v. Rooney, 365 Mass. 484, 495–96 (1974), the Supreme Judicial Court noted that the limits of cross-examination must consider the rights of witnesses to fair treatment. The court criticized “a bruising, grueling and abrasive cross-examination.” Commonwealth v. Rooney, 365 Mass. at 496; see Fed. R. Evid. 611(a)(3) (court to protect witness from harassment and undue embarrassment).

A witness also has a right to a certain minimal level of privacy. A lawyer may not use misrepresentation or illegal methods to obtain evidence, as such conduct may run afoul of several of the Massachusetts Rules of Professional Conduct. See generally Mass. R. Prof. C. 1.2, 3.5, 4.1, 8.4(a)–(d), 8.4(h). A lawyer may be prohibited from using electronic equipment to eavesdrop and record witness statements. See 18 U.S.C. §§ 2510–2520 (federal Omnibus Crime Control Act).

§ 5.3 Judges and Other Public Officials

A lawyer may not knowingly make a false statement of fact concerning the qualifications of a candidate for judicial office and may not make false accusations against a judge or magistrate. Mass. R. Prof. C. 8.2.

Lawyers are especially able to comment on the qualifications of potential appointees or on the conduct of sitting judges. In fact, a lawyer who has knowledge that a judge has engaged in conduct that violates the rules of judicial conduct and calls into question the judge’s “fitness for office” is obligated to report such knowledge to the Commission of Judicial Conduct. Mass. R. Prof. C. 8.3(b). Finally, the MBA Statement of Lawyer Professionalism calls for lawyers and judges “to deal with one another respectfully.”

§ 5.4 General Public

In limited circumstances, a lawyer’s obligation to the general public may overcome the duty of loyalty to the client. For example, if you know that a client intends to commit a criminal or fraudulent act that would result in death or serious bodily injury or serious financial harm, you may reveal that intention and the information necessary to prevent it even where the information is a client “confidence” or “secret.” Mass. R. Prof. C. 1.6(b).

In deciding whether to reveal otherwise confidential information, the lawyer must decide whether the criminal or fraudulent act will likely result in substantial harm. Mass. R. Prof. C. 1.6; see also MBA Ethics Op. 90-2.

In certain situations, a lawyer is required to disclose confidential information when necessary to prevent or remedy fraudulent behavior before a tribunal or government agency. Mass. R. Prof. C. 3.3(a)-(b); see also Mass. R. Prof. C. 1.6(b)(3); MBA Ethics Op. 99-2 (an obligation to reveal client confidence to rectify a partner’s misrepresentation before a state agency).

Under the earlier Disciplinary Rules, the MBA opined that a lawyer has discretion to reveal a client confidence or secret even if it is the client’s accomplice or associate who plans to commit the crime. MBA Ethics Op. 90-1.
Where disclosure of an intent to commit criminal or fraudulent behavior is not mandated by Mass. R. Prof. C. 3.3(a) and 3.3(b) or 4.1, lawyers may want to consider the possibility of civil liability for failure to warn potential victims of a client's crimes when a special relationship exists between either the lawyer and the client or the lawyer and a potential victim. See Tarasoff v. Regents of Univ. of Calif., 551 P.2d 334, 343–44 (Cal. 1976).

Rule 4.1(b) requires a lawyer to reveal to an affected third person the fact that the client perpetrated a fraud on that third person. Mass. R. Prof. C. 4.1(b); see also In re Shyavitz, 5 Mass. Att'y Disc. R. 349 (1988) (interpreting predecessor rule). However, the lawyer is not required by Mass. R. Prof. C. 4.1(b) to reveal facts that are client confidences or secrets. Before revealing such information, the lawyer must call on the client to rectify the fraud. See In re Grand Jury Investigation, 453 Mass. 453, 457–58 (2009).

Whenever deciding whether to reveal confidential client information, a lawyer should consider Mass. R. Prof. C. 1.6, 3.3, and 4.1 in concert. Failure to do so may result in a failure to reveal information when otherwise required by the rules, or, worse, revealing a client confidence when not otherwise authorized to do so. Mass. R. Prof. C. 1.6, 3.3, 4.1.

§ 5.5 As Public Official

Lawyers often serve as public officials. The rules governing appropriate behavior by lawyers apply in the context of service as a public official. (Former Disciplinary Rule 8-101, a separate provision governing lawyers as public officials, was not adopted as part of the Massachusetts Rules of Professional Conduct.) For example, lawyers serving as public officials are bound by the Massachusetts Rules of Professional Conduct even when performing any law-related services, i.e., “services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.” Mass. R. Prof. C. 5.7(b). Moreover, Mass. R. Prof. C. 8.4 generally proscribes any dishonest behavior of an attorney. Mass. R. Prof. C. 8.4(c). Finally, the Massachusetts Rules of Professional Conduct prohibit an attorney from stating or implying an ability to influence a government agency or official. Mass. R. Prof. C. 8.4(e).

Lawyers in public office may face ethical dilemmas when representing clients before state agencies and other government entities. See MBA Ethics Op. 82-6 (state legislator may, under certain circumstances, represent clients before state agencies). A lawyer may also be placed in a position of conflict when acts undertaken as an official may harm a present or former client. See MBA Ethics Op.
76-9. Under all such circumstances, the public official is bound, like any attorney, to act in accordance with the Massachusetts Rules of Professional Conduct.

§ 6 CONCLUSION

The specific provisions of the Massachusetts Rules of Professional Conduct discussed above reveal several common themes. They require a lawyer to be at least "minimally [honest and] law abiding." Wolfram § 3.3.2 at 94. Numerous specific provisions also prohibit overreaching—a lawyer's misuse of his or her special position to harass, intimidate, or embarrass others (including adversaries, opposing parties, and witnesses).

The MBA Statement of Lawyer Professionalism and the Preamble and Scope to the Massachusetts Rules of Professional Conduct set high standards to which all lawyers should aspire. Lawyers who focus and strive to adhere to these standards are unlikely to run afoul of the Massachusetts Rules of Professional Conduct.
Civility Standards for Civil Litigation

PREAMBLE

BELIEVING THAT THE FOLLOWING Civil Litigation Standards embody the principles to which most litigating lawyers already adhere, the Boston Bar Association promulgates these Standards in order to articulate those principles in writing for ease of reference to benefit the community, practicing lawyers and new members of the bar.

These Standards are intended to be aspirational and voluntary. They are not intended to generate disputes that may result in additional litigation, and they should not be cited as legal authority in any disciplinary proceeding or in any civil or criminal action. Rather, it is hoped that the Standards will be used as an educational tool with the effect of promoting efficient, economical and respectful conduct of civil litigation.

A. In his or her representation of a client, a lawyer should conduct himself or herself in a manner which, without compromising the interests of his or her client, will facilitate the resolution of disputed matters. Accordingly, a lawyer should:

1. maintain open communication with opposing lawyers;
2. communicate respectfully with other lawyers;
3. respect the schedule of opposing lawyers and be truthful about his or her own schedule;
4. present issues efficiently without unnecessarily burdening opposing lawyers by discovery or otherwise;

5. discuss each issue with opposing lawyers in a good faith attempt to resolve it without protracted negotiation or unnecessary litigation;

6. be guided by the principle that representation on behalf of his or her client ought to be characterized by good faith and honesty;

7. avoid creating unnecessary animosity or contentiousness;

8. avoid setting forth allegations against another lawyer unless relevant to the proceeding and well founded;

9. require those under his/her control to comply with these guidelines and encourage clients and others to do likewise.

B. The application of these guidelines to situations frequently occurring in a litigation practice are described herein.

1. Continuances and Extensions of Time

   a. First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery or motions, should ordinarily be granted as a matter of courtesy unless time is of the essence. A first extension should be allowed even if the lawyer requesting it has previously refused to grant an extension.

   b. After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent’s schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent’s willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.

   c. A lawyer should inform clients that the decision whether to grant extensions of time belongs to the lawyer and not to the client.

   d. A lawyer should not seek extensions or continuances for the purpose of harassment or prolonging litigation.

   e. A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions such as preserving rights that an extension might jeopardize or seeking reciprocal scheduling concessions. A lawyer should not, by granting extensions, seek to preclude an opponent’s substantive rights, such as his or her right to move against a complaint.
2. **Service of Papers**
   
a. The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

b. Papers should not be served so close to a court appearance that they inhibit the ability of opposing lawyers to prepare for that appearance or to respond to the papers, where the law permits a response. In making or responding to a motion for preliminary injunction or other emergency matters, a lawyer should make reasonable efforts to comply with the spirit of this rule.

c. Papers should not be served in order to take advantage of a lawyer’s known absence from the office or at a time or in a manner designed to inconvenience a lawyer or his/her client, such as late on Friday afternoon or the day preceding a secular or religious holiday.

d. Service should be made personally or by facsimile transmission when it is likely that service by mail, even when allowed, will prejudice the opposing party. A lawyer who has obtained a short order of notice and knows the identity of or can reasonably identify the opposing lawyer should immediately notify that lawyer by telephone or by facsimile. A lawyer who receives notification as described above should immediately notify his or her client of any temporary restraining order and that he or she is bound by it even before formal service is made.

3. **Written Submissions to a Court, Including Briefs, Memoranda, Affidavits and Declarations**
   
a. Written briefs or memoranda of points and authorities should not rely on facts that are not properly part of the record or subject to judicial notice.

b. Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity or personal behavior of another lawyer or his/her client, unless such matters are directly and necessarily in issue.

4. **Communications with Lawyers**

a. A lawyer should at all times be civil and courteous in communicating with other lawyers, whether in writing or orally.
b. A lawyer should not write a letter to ascribe to another lawyer a position he or she has not taken or to create “a record” of events that have not occurred.

c. Letters intended only to make a record should be used sparingly and only when thought to be necessary under all the circumstances.

d. Unless specifically permitted or invited by the court, letters between lawyers should not be sent to judges.

5. Depositions

a. Depositions should be taken only where actually needed to ascertain facts or information or to perpetuate testimony for purposes of the case in which the deposition is taken. They should never be used as a means of harassment or to generate expense or solely to obtain information for use in other pending or anticipated litigation.

b. In scheduling depositions reasonable consideration should be given to accommodating schedules of opposing lawyers and of the deponent, where it is possible to do so without prejudicing the client’s rights.

c. Before issuing notice of deposition, a lawyer should contact all lawyers of record in an attempt to reach agreement on a schedule for all depositions and all lawyers should attempt in good faith to abide by any agreement reached.

d. A lawyer should not attempt to delay a deposition for dilatory purposes.

e. A lawyer should not inquire into a deponent’s personal affairs or question a deponent’s integrity where such inquiry is irrelevant to the subject matter of the deposition.

f. A lawyer should not harass a deponent and should refrain from repetitive or arguments live questions.

g. A lawyer defending a deposition should limit objections to those that are well-founded and necessary for the protection of a client’s interest. A lawyer should bear in mind that most objections are preserved and need be interposed only when the form of a question is defective or privileged information is sought.
h. While a question is pending, a lawyer should not, through objections or otherwise, coach the deponent or suggest answers.

i. A lawyer should not direct a deponent to refuse to answer questions unless he or she has a good faith basis for claiming privilege or for seeking a protective order.

j. A lawyer should refrain from self-serving speeches during depositions.

k. A lawyer should not engage in any conduct during a deposition that would not be allowed or would be inappropriate in the presence of a judicial officer or a jury.

6. Interrogatories

a. Interrogatories should not be used to harass or impose undue burden or expense.

b. Interrogatories should not be read by the lawyer in an artificial manner designed to assure that answers are not truly responsive.

c. Objections to interrogatories should be based on a good faith belief in their merit and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.

7. Document Demands

a. Demands for production of documents should be limited to documents actually and reasonably believed to be needed for the prosecution or defense of an action and not made to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.

b. Demands for document production should not be so broad as to encompass documents clearly not relevant to the subject matter of the case.

c. In responding to document demands, a lawyer should not strain to interpret the request in an artificially restrictive manner in order to avoid disclosure.

d. Documents should be withheld on the grounds of privilege only where there is a good faith basis for asserting privilege.
e. A lawyer should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of particular documents.

f. Document production should not be delayed to prevent opposing lawyers from inspecting documents prior to scheduled depositions or for any other tactical reason.

8. Motion Practice
a. Absent justification to do otherwise, before filing or serving a motion, a lawyer should engage the opposing lawyer(s) in more than a mere pro forma discussion of its purpose in an effort to resolve the issue.

b. A lawyer should respond in good faith to any request for an assent to a motion.

9. Dealing with Non-Party Witnesses
a. A lawyer should not issue subpoenas to nonparty witnesses except in connection with their appearance at a hearing, trial or deposition.

b. Deposition subpoenas should be accompanied by notices of deposition with copies to all lawyers.

c. Where a lawyer obtains documents pursuant to a deposition subpoena, copies of the documents should be made available to each other lawyer at his or her expense even if the deposition is canceled or adjourned.

10. Ex Parte Communications with the Court
a. A lawyer should avoid ex parte communication on the substance of a pending case with a judge (or his or her law clerk) before whom such case is pending.

b. Even where applicable laws or rules permit an ex parte application or communication to the court, before making such an application or communication, a lawyer should make diligent efforts to notify the opposing party and should reasonable efforts to accommodate the schedule of such lawyer to permit the opposing party to be represented on the application, unless subsection (c.) applies.
c. Where the rules permit an ex parte application or communication to the court in an emergency situation, a lawyer should make such an application or communication (including an application to shorten an otherwise applicable time period) only where there is a bona fide emergency such that the lawyer's client will be seriously prejudiced by a failure to make the application or communication on regular notice.

11. Settlement and Alternative Dispute Resolution

a. A lawyer should raise and explore with his or her client the issue of settlement in every case as soon as enough is known about the case to make that discussion meaningful.

b. A lawyer should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

c. In every case, a lawyer should consider, and discuss with his/her client, whether the client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other forms of alternative dispute resolution.

12. Trials and Hearings

a. A lawyer should be punctual and prepared for any court appearance.

b. A lawyer should always deal with parties, other lawyers, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility.
SECTION 1.7

Within Our Reach: Gender, Racial and Ethnic Equality in the Courts*

The Administrative Office of the Trial Court and the Supreme Judicial Court of Massachusetts

March 4, 2004

Dear Colleague:

Fairness and equality are bedrock principles of our constitutional democracy. Each of us must treat others with courtesy, dignity and respect at all times. Behavior manifesting bias or prejudice based on race, gender, religion, national origin, ethnicity, disability, age, sexual orientation or socioeconomic status is inimical to our justice system and will not be tolerated in the courthouse.

We are pleased to present this booklet, Within Our Reach: Gender, Racial and Ethnic Equality in the Courts. It was produced by the Trial Court’s Gender Equality Advisory Board and Racial and Ethnic Access and Fairness Advisory Board, and updates the Court Conduct Handbook which was first issued more than a decade ago. Within Our Reach provides important guidelines concerning appropriate behavior for those who work in the judicial branch and for those who use our court system. It is a useful reminder of our responsibility to treat each other with dignity and respect, and we urge you to read it.

We commend the Gender Equality Advisory Board and the Racial and Ethnic Access and Fairness Advisory Board for their work on this booklet and for their continuing efforts to promote fairness and equality throughout the judicial branch.

Yours sincerely,

Margaret H. Marshall
Chief Justice, Supreme Judicial Court

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“All people are born free and equal . . .”

These introductory words form the foundation of the Constitution of the Commonwealth of Massachusetts. Article I states that “Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”

The Massachusetts Judiciary has a long tradition of protecting individual rights. In addition to faithfully fulfilling the duties of their professions, the judges, court employees and attorneys in our court system work hard to eliminate unlawful and unconstitutional bias. They have pursued this goal for more than a generation, and most particularly for the fifteen years that the Supreme Judicial Court and the Administrative Office of the Trial Court have spearheaded efforts to address gender, racial and ethnic bias in the courts.

Unfortunately, inappropriate language and behavior demeaning towards women and individuals of color are still too common in the courts, as they are in society at large. Despite improvements, the problem still exists and its import should not be underestimated or ignored. Although some practices may not be motivated by bias, they may nonetheless produce biased results or give the impression of bias, and must be addressed.

This booklet offers valuable guidance for eliminating gender, racial and ethnic bias and discrimination in the courts of Massachusetts. It effectuates the court’s policy of treating all people with respect and dignity, and should be a blueprint for all who work in and are served by the courts.

Further, if we are to preserve the integrity of our courts we must also work together to eliminate all inequities within the courts, such as those based on disability, sexual orientation, religion, age and socioeconomic status. This booklet is an important step toward that larger goal.

YOUR RIGHTS AND RESPONSIBILITIES

As a private citizen...
as a court employee...
as an attorney...
as a judge...

You have the right:
✓ To be treated with fairness, respect and courtesy;
✓ To expect nonbiased treatment from everyone you encounter in the legal system; and
✓ To object to biased statements regardless of who makes them.

You have the responsibility:
✓ To treat everyone with fairness, respect, and courtesy regardless of race, gender, religion, national origin, ethnicity, disability, age, sexual orientation or socioeconomic status.
YOUR ROLE IN ELIMINATING GENDER, RACIAL AND ETHNIC BIAS

JUDGES: Judges are the most visible leaders of the court. You are in a unique position both to prevent and to eliminate biased behavior in court. You can do this by serving as a model of respectful and equal treatment of others, by rendering fair decisions, and by intervening to stop the biased behavior of others, whether the bias is intentional or unintentional.

The Code of Judicial Conduct

Canon 2 (C): A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, ethnicity, or sexual orientation.

Canon 3 (B) (5): A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status, and shall require court personnel and others not to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel, or others.

COURT EMPLOYEES: In interactions with the public and colleagues, court employees play a central role in promoting equality and fairness in the courts. Members of the public generally have their first and often their only experience with the court system through an interaction with an employee outside of the courtroom; for example, at the clerk’s counter or on the telephone. By conveying respect and providing effective assistance to all, you help the users of the courts know and feel that they have been treated fairly and respectfully by the courts. It is equally important to communicate respect and consideration to your colleagues, creating a comfortable and welcoming workplace for all.

ATTORNEYS: As officers of the court, attorneys also play a critical role in maintaining the dignity and integrity of the judicial system. This is codified in
the Rules of Professional Conduct, which prohibit lawyers from engaging in conduct manifesting bias or prejudice when appearing in a professional capacity before a tribunal (Rule 3.4). However, your contribution to a respectful and just judicial system extends beyond your conduct in a case. Fair and equal treatment of employees, litigants, and others, in and out of the courtroom, as well as your participation in relevant activities sponsored by the bar associations, also help to promote a court system which is fair for all.

MEMBERS OF THE PUBLIC: The courts are your courts. You should expect to be treated with fairness, respect and courtesy, just as you should treat everyone else with fairness, respect and courtesy. Your behavior in court can help to set a tone of respect throughout the court community.

STEREOTYPES HAVE NO PLACE IN OUR TREATMENT OF PEOPLE OR IN THE HANDLING OF CASES

Bias exists in our society, and it is sometimes difficult to overcome deeply ingrained preconceptions. We must make a sincere and honest effort to recognize unwarranted and impermissible assumptions and to prevent them from coloring our perceptions of individuals in the courtroom, our assessments of credibility, our fact finding, our decision making and our priorities.

Litigants

The claims of litigants must be accorded equal respect regardless of the gender, race or ethnicity of the litigant. For instance, guard against any tendency to label female litigants as more troublesome or emotional than male litigants, or to regard cases typically brought by female litigants, such as child support enforcement, as less important than other cases. Similarly, avoid stereotypes of male litigants, for example applying different standards to assess damages for facial scarring of male and female plaintiffs. Stereotyping litigants from particular racial or ethnic groups is equally harmful. For example, it would be inappropriate to think of some groups as having a greater propensity for criminal activity or violence than other groups.

Victims

Courts must take special care to treat all victims of crime with respect and sensitivity to the trauma that they have experienced. Victims of domestic violence and sexual assault must not be subjected to heightened scrutiny because of the nature
of the act(s) perpetrated against them, or because of their relationship to the perpetrator. Nor should the race of victims affect their treatment or the handling and outcome of their cases.

**Court Employees**

All court employees should be accorded respect and courtesy. Do not assume that an employee’s ability to assist you or level of authority is related to the employee’s gender, race, or ethnicity.

**Lawyers**

Good attorneys, regardless of gender, race or ethnicity, are zealous advocates. For instance, do not expect that women or lawyers of particular ethnicities will be more passive in their advocacy, tolerate more interruption, or respond differently to reprimands. Recognize and treat all attorneys with equal attention, respect, and courtesy.

**Witnesses**

Be alert to ingrained stereotypes of women and people of color when assessing witnesses. For instance, do not assume that female witnesses are more likely than others to be irrational or unduly emotional, then disbelieve them when their actions are inconsistent with your expectations. Conversely, do not discredit men who are more emotional than you might expect men to be. The same holds true for witnesses of particular racial or ethnic groups who, for example, may be viewed as less educated or as more likely to associate with criminals. Credibility should be based on evaluation of the individual witness, not on stereotypes.

**Expert Witnesses**

Expert witnesses must be judged on the basis of their qualifications and not their gender, race or ethnicity. Be sure that the standards for qualification as experts are unbiased.
WHAT CAN I DO?

1. Address all individuals by last names and appropriate professional titles.
   - Counselor or Attorney
   - Mr./Ms. (Unless Miss or Mrs. are requested)
   - Dr. or Officer or Representative/Senator

Using first names and other informal forms of address can lead to many problems. On the one hand, when used to address women and individuals of color, and not male and/or white individuals, such informality has traditionally suggested a lack of respect. On the other hand, informal address, particularly when used in familiar tones and with personal conversation, may suggest an acquaintance with and partiality in favor of the person addressed. To avoid differential treatment or the appearance of differential treatment, address everyone in the same formal, professional manner.

2. Avoid terms of endearment and diminutive terms—they do not belong in courthouse interactions.
   - girl or boy (for adults)
   - honey, sweetie, dear
   - little lady, young lady, young man
   - your kind, you people

Terms of endearment and diminutive terms should not be applied to anyone in the courts. These terms can demean or offend, even if the speaker does not intend to do so. In the past, they have been used disproportionately to suggest that women or people of color have lower status or less power.

3. Address mixed groups of women and men with gender neutral or gender inclusive terms.
   - colleagues
   - members of the jury
Referring to a mixed group as “brothers” or “gentlemen” implies that women are not legitimate members of the community who must be taken seriously. Avoid this or any other conversation that creates an exclusively masculine atmosphere. All persons should feel that they have access to the courts and that they are treated fairly and equally. Exclusionary expressions or terms that highlight a person’s gender undermine that goal.

4. **Do not comment on physical appearance.**
   - body parts or hair
   - dress style or jewelry
   - your feelings about a person’s looks
   - pregnancy

Comments on physical appearance may be demeaning, putting people at a disadvantage by drawing attention to their physical traits, gender, race or ethnicity rather than the reason for their presence in the court. Remarks appropriate in a social setting often are inappropriate in a professional setting. For example, complimenting a female attorney on her appearance or drawing attention to her pregnancy while she is conducting business may undermine the way others perceive her.

5. **Refrain from behavior of a sexual nature. It will not be tolerated in the courts.**

Everyone in the courthouse must protect the dignity and integrity of the court and show respect for every other person. Sexually-suggestive comments, graphics, gestures and touching, comments on sexual orientation, and sexual advances humiliate and intimidate people, and undermine the dignity of the court. Power imbalances in the court setting can exacerbate the offense, since individuals in less powerful positions may feel unable to put a stop to the behavior. Such acts can also constitute sexual harassment punishable by law and subject harassers to serious sanctions pursuant to court policy.
6. **Avoid comments or behavior that call inappropriate attention to any individual’s racial or ethnic group.**

Similarly, jokes, comments, and behavior based upon race or ethnicity have no place in the courthouse or the administration of justice. For example, ethnic jokes and racially-based or ethnically-based name calling, whether directed at an individual or used to refer to a racial or ethnic group, can be humiliating and intimidating to those individuals or the members of those groups. Such behavior is at best insensitive and, at worst, can constitute illegal discrimination or harassment.

7. **Treat all professionals with equal dignity.**

Surveys have shown that women lawyers and lawyers of color are asked if they are attorneys significantly more often than white men are. At the security desk, at the counter, or in the courtroom, do not ask the professional status of a woman or person of color when you would not ask the same question of a white man. All participants in our legal system must be accorded equal and appropriate dignity and respect.

This Handbook revises the Court Conduct Handbook first published by the Supreme Judicial Court in 1990, and retains many of its original provisions. The original handbook was based on the findings of the Gender Bias Study of the Court System of Massachusetts, and was written under the direction of the Committee for Gender Equality, chaired by the Honorable Ruth I. Abrams of the Supreme Judicial Court. The handbook was written by the Task Force on Court Conduct, chaired by Maria C. Moynihan, Esq., with the Honorable Barbara A. Dortch-Okara acting as Advisor. It was completed with the assistance of Gladys Maged, Executive Director of the Committee for Gender Equality.

The current version also includes new material based on the findings of the Commission to Study Racial and Ethnic Bias in the Courts. It was updated to ensure continued relevancy. It was prepared by the Gender Equality Advisory Board to the Chief Justice for Administration and Management under the direction of Vice Chair Timothy H. Gailey, First Justice of the Chelsea Division of the District Court Department, and by the Racial and Ethnic Access and Fairness Advisory Board, under the direction of member Kay Hodge, Esq.. Former Chief Justice Barbara A. Dortch-Okara oversaw the revision process, and Lois Frankel, Coordinator for Gender Issues, provided staff assistance. Printing was made possible with educational funds of the Judicial Institute of the Administrative Office of the Trial Court.
It was a chilly fall night in Columbus Ohio and we had just returned, as we did almost every evening in graduate school, from a sumptuous dinner at Wendy’s (the city was, after all, the testing ground for the highest echelon of fast food chains). As usual, we had done our part for food research by consuming a non-trivial number of strangely textured burgers and florescent milk shakes. We had returned, also as usual, to our desks located under the bleachers of the football stadium at Ohio State, where we would remain until late into the night. That evening, my friend and officemate Trish Devine told me that she was going to subliminally prime stereotypic concepts about Black Americans to see if such unconscious activation would affect reactions to subsequent racially ambiguous information.

“You’ve got to be kidding me,” I thought, even though I’m sure I found something supportive to say. There was something illicit about the idea and it seemed to be such an invitation to trouble when perfectly good research on impression formation awaited. Trish could continue to counterbalance hundreds of sentences about John and Mary and test memory for them. She gets her data and nobody gets hurt. But now that the unthinkable had been suggested, how could one not wonder about what might happen, what the ramifications would be if it turned out that the result she had obviously imagined did indeed obtain.

To put my trepidation into context, remember that this was 1983. We still wore t-shirts that said “Help stamp out disco in our lifetime”, we were certain that Ronald Reagan would lose the election, Michael Jackson’s hair had not yet caught fire doing a Pepsi commercial. It is fair to say that what we now know to be such well-established facts about dissociations between conscious and unconscious feelings were hard to even imagine, let alone about race, because they involved aspects of the mind into which experiments hadn’t yet been ushered.
The methods to study such topics were available in dribs and drabs. In the 1970s, a few studies of amnesic patients showing dissociations between explicit and implicit memory existed (like the work by Warrington and Weiskrantz); with ordinary people, not much evidence existed except the landmark work on semantic priming by David Myers and Jim Neely’s dissertation, but the most outrageous they had gotten in terms of the content, was to test if “bread” primed “butter”. A few papers on subliminal perception were also available (did king prime queen?), but in 1983 we didn’t trust such results any more than we trusted that a virus that caused AIDS would be discovered that year.

So what I can say with certainty is that I had no idea that my remarkable friend was about to make a breakthrough that would open a brand new gate to theorizing and experimentation about the double dark side of the mind. There were those who studied one of the darks—the mental unconscious where processes unfolded without conscious awareness, without conscious control and without intention or self-reflection. There were also those who had studied the other kind of dark—humans with high amounts of melanin in their epidermis. Trish would bring these two darks together in a tough test, and in her work the scientific method was used to unearth new knowledge about human groups and our representations of them.

The first experiments showed evidence for unconscious negative attitudes towards Black Americans in those of us who seemed unaware that they even had such attitudes. When the psychologist’s probe bypassed the conscious mind, we all looked more alike—many more of us showed negative attitudes toward dark skinned people. Now, it is more than 28 years later and mention of disco music only makes me smile nostalgically. I think Ronald Reagan did become president. And Michael Jackson, sadly, burned more than just his hair.

Today, as a science, we know a whole lot more about the nature of the implicit ways in which we think about social groups, and race in particular. After Trisha’s experiments, I myself had joined the crew to try to figure it all out. It was impossible to do anything but.

Human beings have considerable capacity for self-deception because the architecture and the traffic through the mind allows information to be dissociated: it allows us to both know and not know the same thing, to feel and not feel the same way about the same thing, to be aware and not aware of the motives that guide behavior toward ourselves and others. Psychologists and neuroscientists have found it profitable to think about the mind’s fractures by relying less on the malign motives of bad social actors as the explanation, and more on elucidating the evolutionary presses that created the minds we have and the sociocultural and situational presses that exert influence on us more proximally.
Over the past 25 years, we have studied the hidden biases of good people, i.e., self-professed egalitarians. My colleagues and I include ourselves in this group, and some of our methods have allowed us to be subjects in our own experiments. This unusual opportunity has brought us closer to some answers that would otherwise have been difficult to accept if we hadn’t had the direct experience we did. It also brought us answers more quickly because the clarity and strength of the evidence were hard to refute.

In my own lab in the mid 1990s, the opportunity to view implicit bias up close came in the form of a test of implicit cognition called the Implicit Association Test (IAT). Although it can be put to use in a wide variety of settings, the first experiments that were done with it focused on the attitudes we have toward a variety of social groups—female and male, Black and White, elderly and young—giving us a simple 2 X 2: those groups of which we are members (female, elderly) and those social opposites of which we are not (male, young); those groups that are relatively more preferred (female, young) and advantaged (male, young) and those that are less preferred (male, elderly) and less advantaged (female, elderly).

To grasp the processes about which we speak, it is best to take a test yourself by visiting www.implicit.harvard.edu, and given the focus here on race, you might try one of a few tests involving these human categories—i.e., tests that use as stimuli faces of black and white adults or children, or dark-skinned and light-skinned people more generally. You can take a test that measures the association of “good” and “bad” concepts such as “love”, “peace”, “friend” or “anger”, “war”, “devil” with the aforementioned social groups or one that measures the association of these groups with “weapons” and “harmless” objects. If you are like most White and Asian people who take these tests, you’ll have a harder time associating White+bad and Black+good concepts.

To set the stage for the main discussion, I will start with eight results. There should be no disagreement about what the data are, if we share assumptions about the nature of the test, and in fact these results are now sufficiently commonplace so as to be accepted. The real discussion we might have lies in the material that follows, concerning some unexpected effects and what they may be telling us about the nature of implicit attitudes. As well, I will mention a couple of the larger set of questions that remain unanswered.

**Implicit Race Bias Using the IAT: The Main Results**

1. Many White Americans and Asian Americans in the world show robust association of white+good and black+bad compared to the opposite pairings; the percentage of White Americans who show such an effect
is upwards of 75% with the remaining 20-25% being neutral or showing slight Black preference.

2. On self-report measures of group preference, White Americans report positive attitudes toward their own group but far less so than observed on the IAT.

3. African Americans and Africans do not show matched and opposite positive associations with their own group (i.e., Black+good). About 40% show pro-white bias, a little less show a pro-black bias, and the remaining 20% show neutrality.

4. On self-report measures of group preference, Black Americans report positive attitudes toward their own group and far more strongly than that observed on the IAT.

5. Self-reported and implicit attitudes towards the two groups are correlated, i.e., those with stronger expressed anti-black sentiment also show weaker associations of Black+good relative to White+good on the IAT. This correlation is consistently obtained, is moderate in size, suggesting that self-report and IAT measures have some shared components and have unique aspects to in what they each measure about group preference.

6. To respond to questions about whether the obtained results are a function of the laboratory environment in which they are experienced or the self selection of those who arrive at the website, a database continues to be gathered of published and unpublished studies that use “real world” sample populations (of actual voters in elections, doctors prescribing medication, nurses who work with drug addicts, managers who are making real job selections between White Europeans and Arabs, and so forth). The growing database of 56 studies at present includes a subset of studies of attitudes and stereotypes of racial and ethnic groups.

7. Performance on the race IAT predicts behavior toward members of the groups tested. In a meta-analysis, the IAT race bias predicted such behaviors as non-verbal expressions, ratings of ability and performance, and decisions about resources. In each case the greater the bias detected on the test toward a particular group (Jewish Americans, Black Americans), the greater the negative attitudes observed in behavior toward them. The studies included in the published meta-analysis are largely samples of convenience, of college students who are more homogeneous
than the population at large and the reported correlations may be an underestimate of the actual correlation between IAT score and behavior.9

8. Research shows that the IAT race effect is malleable, although the extent of malleability and the precise conditions under which it is obtained remain open questions. Malleability of any sort was not initially predicted because performance on the IAT is difficult to adjust based on one's volition. It takes much practice and an understanding of the task to move the outcome in the direction of one's preference and even so, it is not always possible to be successful. That is the nature of the test, and its signature feature. However, studies have shown that particular interventions can produce a significant reduction in the baseline IAT race bias. Such a possibility tells us that even those group attitudes, like race attitudes, that have built up over extended periods of time and been in us for extended period of time (unlike attitudes toward a new movie) are pliable in the direction of the intervention.

**Unexpected Results**

A student once described to me his frustration at the way research was being done in his lab. He felt that his advisor conducted a large number of experiments most of which were a wash. When a study did work, they published it. The student had a different view of how science should be done and wondered whether I considered this to be tricky or problematic science practice. Knowing the research program well, my response was more reassuring than he may have expected. The advisor had a strong theory, but a weak method, I thought. When tests didn’t support the theory, it was reasonable to distrust the failure and continue to believe in what is a gorgeous theory. I offered my own research program as an example of the opposite problem. I had less of a theoretical stake in the questions I asked (okay, I’ll admit it, I don’t actually have a theory; I sure hope though that the work is theoretical, in the sense that a particular set of problems with particular histories and assumptions have been selected for study). What I did have was a preference for a classy family of methods in the form of priming, the IAT, startle responses, neuroimaging, ERP and the like. I have banged each can with one of these, and then whatever data were shaken out needed to be dealt with. The situation was more akin to looking at a visual illusion. We wouldn’t say the illusion is wrong or that it didn’t work like it was supposed to. It is what it is. It needs explaining.

Still, it is natural to go into most experiments with expectations of what ought to be, and every now and then we are puzzled by what comes out. This then, is the stuff we may find worth discussing.
Developmental Evidence

The work that has surprised me most recently came from research I began soon after arrival at Harvard in 2001. Here I met two amazing developmental psychologists who had also just arrived. I fell in love with Liz Spelke and Susan Carey, especially their approach to understanding the mind. I realized that by contrast to what they knew about their phenomena, I had no clue as to where implicit attitudes, beliefs, or identity, originated or how they developed. By contrast, I had never had a subject who needed a mother’s permission to be in a study, except the occasional 17-year old summer student. But that was preposterous. How could I have gone for this long without worrying about the origins of implicit social cognition? Starting about a decade ago, Andy Baron, then an RA and later a graduate student in the lab, and now a professor at the University of British Columbia made a discovery that I found to be surprising. It was followed by confirmation in research by another student, Yarrow Dunham.

An infant is born into the world with some obvious built-in preferences—it spits out bitter tasting food and sucks in the sweet, it knows to orient towards a touch applied to the cheek and it imitates the facial expressions of other before it. We also know that babies have a ready mechanism to learn new preferences and that one dimension along which learning proceeds is familiarity; that which is seen over and over again, and by extension, that which is akin to the familiar is preferred because it, by comparison to the strange and exotic, is assumed to be trustworthy. However rapidly social learning occurs, it is assumed that learning requires some experience and looking at the same concept, say an attitude, develop over time provides a rich source of learning about its nature. Nobody would say that a three year old and an adult have had the same experiences with race. Even those who live in the most shielded of social environments in America have got to “learn race” in some way—by observation, via stories, through education, and perhaps most persistently from the media. It goes without saying that American adults have many hundreds of thousands of extra units of experience with social groups in general, and on race in particular than young children. We went in without strong hunches but some expectation that we would see developmental shifts. The most likely effect we would see is that as experience in intergroup settings and knowledge increased with age, so would implicit race bias (stronger pro-White/anti-Black associations).
As the graph at right shows, that was not what we obtained.\textsuperscript{10} When asking the blunt question of whom one likes, the youngest White children we tested, aged 6, are significantly likely to say that they prefer a White child to a Black child. This fits with research by Francis Aboud, who showed much earlier that young children are not pure and without explicit prejudice.\textsuperscript{11} Interestingly, 10 year olds in our sample are less likely to show as strong ingroup preference, suggesting that they have either lost that strong preference or more likely, that they have learned about the inappropriateness of expressing consistent preference for those from one’s own group. We have some anecdotal evidence that 10 year olds may indeed be struggling here—an occasional child did ask the experimenter to remind them about the race of the child on the previous trial so that they could choose one from the other group! As the data show, adults are at chance in their choice, with Black and White targets selected equally often. Together, this progression towards conscious egalitarianism may be best viewed as an effect of social learning about race tolerance.

The IAT data were unexpected. Not so much that we see evidence of ingroup preference at the earliest age we were able to test but rather in the stark stability of the preference across development. Year upon year of greater experience with race seems to have no impact on the IAT attitude. We are left with the conclusion that whatever the nature of the preference detected by the IAT, it is a primitive form of attitude that expresses itself relatively early in life and doesn’t change with increased experience with the attitude object that must occur between age 6 and adulthood.

In further work with Yarrow Dunham, we went to even younger ages, something we could not achieve with the version of the child IAT that Andy had developed. Now, we adapted a test previously used by Hugenberg and Bodenhausen in which racially ambiguous faces were judged as Black or White. Results with adults had shown that if the racially ambiguous face happened to have a smiling
expression it was more likely to be categorized as White, and when the face had a frowning expression, it was more likely to be categorized as Black. Yarrow thought this would be a good procedure for our purposes because even a child can do it.

So we conducted a large n study including children as young as 3 years of age, ramping up to adults and including a range of age groups in between. We found again, in this new test that is quite different from the IAT, the same striking result: White children as young as three and all ages upwards through adulthood showed an identical level of ingroup favoring bias.

Questions: Why is this effect invariant across the age spectrum? Shouldn’t the age of the person matter? If age doesn’t matter, it seems obvious that experience doesn’t shape this particular form of attitude. It gets into us early and stays. I welcome views on the meaning of this result and whether other procedures can be used to go to ages even younger while still being feasible for use across all ages for comparison.12

A second result has been on my mind since we first obtained it at Yale in the mid 1990s. When we sliced the data from 50 Black American students we found that the no-bias absolute zero sat squarely in the middle of the distribution—that is, half the sample of Black students fell to the right of the zero score showing a pro-white bias, the other half to the left of the zero, showing pro-Black bias.

The first such observation of a lack of strong ingroup preference led us to interpret these data as unique to the sample. Black students at an elite institution with a largely White faculty, administration and student body, we speculated, may show such a pattern of neutrality, but surely it wouldn’t obtain in most other samples of Black Americans. But the very same result has indeed obtained over and over again and it has been replicated among Black South Africans as well (the study was motivated by the recognition that Black Americans may show this because they are not only disadvantaged but also because they are a statistical minority in the United States, something Black South Africans are not).

At the website, with hundreds of thousands of Black Americans taking the test, about 40% percent of Black Americans show a pro-White effect, about 40% show a pro-Black effect, and the remainder are neutral. Each ordinary sized sample we test, as well as the large numbers at the website show the same pattern. Here’s the whammy: Young Americans who come from disadvantaged groups look like the adults of their group.13 A gain, we might have expected that children would show an ingroup favoring effect that is then mitigated in adults who come to realize that their group isn’t regarded to be as good as others. But younger children who are Black and Hispanic show effects that map onto those produced by adult members of their group. How is this possible? How do children
come to know and internalize so early in life exactly what adults have? Shouldn’t there be an effect of slower learning that is visible in developmental trends?

These data suggest an additional possibility that the data from White samples do not. At least the data from White children and adults can be explained as reflecting an early emerging and stable preference for one’s ingroup, with that preference reflecting a socially adaptive mechanism. When adults of a group do not show the expected group love, we assume that they have come to terms, through experience, with lower regard for their own, less privileged, group. But children of that group ought to show robust ingroup preference, before it gets beaten out of them. We don’t see that; instead, we see a fateful mapping of neutrality between child and adult. Implicit attitudes represent an automatic and early internalization of whatever the social world signals about the status or value of one’s groups. That’s the reason Black and Hispanic young people show exactly the same reactions as their adult group members.

A final age-based result gives further food for thought. Among the many tests we’ve used at the website, a long-standing test is one that measures the stereotype that men belong in the world of work, women at home. The test involves association of clear gender markers like first names to capture the categories female (Susan, Mary, Jane) and male (Steve, Matt, John) with attributes of home (garden, kitchen, children) versus career (job, briefcase, office). In adults, both male and female, the outcome is a robust association of male+career and female+home relative to the opposite pairing. But there is also a clear age trend on this test. Starting with children in the low teens, the data from thousands of subjects show that as age increases, so does this stereotype. Not surprisingly, the story we and others tell is that the world experienced by younger people is indeed different from that of older people on this dimension of gender and career—there are many more women in the workplace with each passing decade; even the number of stay-at-home dads is likely to be higher now than before. This difference in environments, we have assumed, is responsible for the observed age effect.

In the same breath, many parents report that likewise, on race, their children are in a quite different world than their own. They report stories of their children being oblivious to race, having friends who cut across race lines, and rap and hip-hop having changed their children’s attitudes toward Black Americans. We don’t like busting parents’ myths, but the data do not bear this out. Unlike the gender stereotype test, the data from hundreds of thousands of test takers at the website shows no difference in the race attitude as a function of age. Whatever social changes have occurred that involve race, our children are not different from us in their implicit race attitude. What does this mean, given the change in gender stereotypes by age? Does it mean that in spite of all the changes since civil rights legislation, social change and media change, that a 10 year old and a
70 year old have the same race attitude? Does it mean that racially our lives are still so segregated that that to nudge implicit attitudes we haven’t created the appropriate conditions of contact?

Self-Esteem

Many years ago, Jennifer Crocker and Brenda Major reported a result that was unexpected. A cross subgroups that varied greatly in social advantage, they found that members of less advantaged groups did not show lower self-esteem; in some cases, it was actually higher.14 The review they presented was thorough and left little room for argument, except one: their data, due to availability, consisted of self-report measures of self-esteem asking for reactions to questions such as “I am a person of equal worth compared to others”.

It is possible that on such blatant measures, members of socially disadvantaged groups are especially likely to take control by expressing a positive sense of self. I certainly thought that was a possibility and when we began research with the IAT and an implicit self-esteem measure was developed (strength of me+good vs. me+bad, compared to “other”) we looked at self-esteem by racial groups and found the same surprising result (at least to me) that Black Americans showed the highest self-esteem of any group. Another intuitive prediction gone by the wayside! Self-esteem is robust enough in most people that “given” group membership, like race, does not seem to affect it.

Many years later, we showed another twist to this result. A great deal of research had shown that on self-report self-esteem inventories, Asian Americans and Asians reported lower regard for self, and many cultural psychologists believed this difference to be reflecting a serious western versus eastern difference in self regard, i.e., not a simple effect reflecting demand characteristics to show confidence or modesty but a true difference in how the self is viewed. Our work in China, Japan and the United States showed that whatever the differences in self-reported self-esteem were, people of all three cultures showed robust implicit self-esteem. An unexpected result based on intuitions of the past but giving a more accurate view that reports that are not modified by the pressures of presentation show that a tendency toward high self-esteem is universal. Here, the implicit measure wiped out a previously established cultural difference and showed that we are all more similar than may have been assumed.

We Don’t Know Why Yet

In reporting on some well-replicated results earlier, I showed that even on tests on which a large majority within a sample show a particular preference or belief (White=good, Home=Female) there is always a significant minority that shows no such preference or a slight tilt in the opposite direction (Black=good,
Home=Male). So who are these people who on a given test do not show the effect that the majority of the sample (70, 80, 90%) do? Why, if they apparently live in the same culture as the rest of us, do they not show the same preferences and beliefs? In our conversations we find that those who do not show the effect demonstrated by the majority also say that they do not have any idea as to why they are unique. It is my sense that those who are neutral are cognitively oblivious to signals of social group membership, either on a particular dimension such as gender or race/ethnicity or more generally.

A White construction worker who was once interviewed regarding his IAT result (he had showed no bias one way or another) said that he didn’t notice things like that. His spouse was surprised that in identifying a co-worker, he hadn’t immediately identified the co-worker as Hispanic, which may have been the most obvious way to single him out from the group. Our construction worker said that he didn’t notice things like that. It is possible that some of those who do not show the majority pattern are oblivious in this way. Others tell more expected stories about trying to lead an examined life around social issues and practicing counterstereotypic behavior. But we have no way of knowing whether this actually accounts for their IAT behavior. So far, we have found no clear story we can tell about the qualities of those who don’t show the standard effect of ingroup preference (we haven’t had the time to do intensive studies of this), it is an oft-asked question to which I don’t have a good answer.

A second dimension that I put forward for discussion is the question of malleability. I know that I began as a skeptic on this, believing that intense and lengthy interventions would be needed to shift implicit cognition. To my surprise, my colleagues proved that even milk toast experiences that lasted a few minutes were sufficient to shift implicit attitudes. Such effects have been found since then in my lab. The presence of a Muslim experimenter made attitudes toward Arab Muslims more positive in liberals and more negative in conservatives. Thinking about the virtues of winter for a few minutes blunted an otherwise positive attitude toward summer. But I don’t know how easily replicable these effects are and I certainly don’t know how to definitively produce an effect or a long-lasting one. Maybe others do and they’ll tell me in their comments. I wonder when we’ll have a clear understanding of the conditions under which we can definitively observe and predict change, and how we might mold it into a state desired by our conscious attitudes.

In the age of Obama, it may be passé to quote MLK Jr. But until the president develops a spine, I’ll stick with the older civil rights leader. In a speech that Martin Luther King Jr. gave as among his last (at the convention of the American Psychological Association) he said that what social scientists could do to assist
the cause is to “tell it like it is”. We have told it like it is about the research discoveries, whether it is palatable or not. The personal discovery I made about the contents of my own mind, especially regarding race, hasn’t been easy to come to terms with even though a long time has passed since I first came face-to-face with it more than 15 years ago. But there were others, colleagues and strangers who also told it like it is about themselves, and for their company I am grateful. They have made it no longer a matter of courage for me to tell it like it is.

Notes


8. http://faculty.washington.edu/agg/ (follow link titled “Studies showing use of the IAT with “real world” subject populations”)


12. Of course, we can conduct yet other tests with even younger children who are unable to understand and respond with language. In infants preferences cannot obviously be measured with the procedures used here. Instead they can be measured through reaching, grasping, and looking time. But such measures cannot be meaningfully applied across the life span. And to speak to the question of attitude stability and change over the course of development, we do need the same measure to be applied at all age levels to learn anything of interest about stability versus change.


15. And an ongoing experiment at University of Virginia, issued as a challenge to design any five minute intervention that can change the race IAT, is producing some interesting data that will soon become public on the types of interventions that work and do not.

Acknowledgments: I thank the Edmond J. Safra Center for Ethics at Harvard University for support and Paul Meinshausen for comments and editorial assistance.

September 19th, 2011
SECTION 1.9

Addressing Implicit Bias in the Courts*

The National Center for State Courts

Fairness is a fundamental tenet of American courts. Yet, despite substantial work by state courts to address issues of racial and ethnic fairness, public skepticism that racial and ethnic minorities receive consistently fair and equal treatment in American courts remains widespread. Why?

The Influence of Implicit Associations

Perhaps one explanation may be found in an emerging body of research on implicit cognition. During the last two decades, new assessment methods and technologies in the fields of social science and neuroscience have advanced research on brain functions, providing a glimpse into what Vedantam (2010) refers to as the “hidden brain”. Although in its early stages, this research is helping scientists understand how the brain takes in, sorts, synthesizes, and responds to the enormous amount of information an individual faces on a daily basis. It also is providing intriguing insights into how and why individuals develop stereotypes and biases, often without even knowing they exist.

The research indicates that an individual’s brain learns over time how to distinguish different objects (e.g., a chair or desk) based on features of the objects that coalesce into patterns. These patterns or schemas help the brain efficiently recognize objects encountered in the environment. What is interesting is that these patterns also operate at the social level. Over time, the brain learns to sort people into certain groups (e.g., male or female, young or old) based on combinations of characteristics as well. The problem is when the brain automatically associates certain characteristics with specific groups that are not accurate for all the individuals in the group (e.g., “elderly individuals are frail”). Scientists refer to these automatic associations as implicit—they operate behind the scenes without the individual’s awareness.

* This project brief, based on a report by Pamela M. Casey, Roger K. Warren, Fred L. Cheesman II, and Jennifer K. Elek, was funded by the Open Society Institute, the State Justice Institute, and the National Center for State Courts. The full report is available at www.ncsc.org/ibreport. Reprinted with permission.
Scientists have developed a variety of methods to measure these implicit attitudes about different groups, but the most common measure used is reaction time (e.g., the Implicit Association Test, or IAT). The idea behind these types of measures is that individuals will react faster to two stimuli that are strongly associated (e.g., elderly and frail) than to two stimuli that are less strongly associated (e.g., elderly and robust). In the case of race, scientists have found that most European Americans who have taken the test are faster at pairing a White face with a good word (e.g., honest) and a Black face with a bad word (e.g., violent) than the other way around. For African Americans, approximately a third show a preference for African Americans, a third show a preference for European Americans, and a third show no preference (Greenwald & Krieger, 2006, pp. 956-958).

There is evidence that judges are susceptible to these implicit associations, too. Rachlinski, Johnson, Wistrich, and Guthrie (2009), for example, found a strong White preference on the IAT among White judges. Black judges also followed the general African American population findings, showing no clear preference overall (44% showed a White preference but the preference was weaker overall).

The question is whether these implicit associations can influence, i.e., bias, an individual’s decisions and actions, and there is growing evidence that the answer is yes. Research has demonstrated that implicit bias can affect decisions regarding, for example, job applicants (e.g., Bertrand & Mullainathan, 2004; Rooth, 2010; Ziegert & Hanges, 2005), medical treatment (e.g., Green, Carney, Pallin, Ngo, Raymond, Lezzeni, & Banaji, 2007), a suspect’s dangerousness (Correll, Park, Judd, & Wittenbrink, 2002; Correll, Park, Judd, Wittenbrink, Sadler, & Keesee, 2007; Plant & Peruche, 2005), and nominees for elected office (Greenwald, Smith, Sriram, Bar-Anan, & Nosek, 2009; Payne, Krosnick, Pasek, Leikes, Akhtar, & Thompson, 2010).

Kang (2009) describes the potential problem this poses for the justice system:

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. Do we, for instance, associate aggressiveness with Black men, such that we see them as more likely to have started the fight than to have responded in self-defense? (p. 2)

The problem is compounded by judges and other court professionals who, because they have worked hard to eliminate explicit bias in their own decisions and
behaviors, assume that they do not allow racial prejudice to color their judgments. For example, most, if not all, judges believe that they are fair and objective and base their decisions only on the facts of a case (see, for example, Rachlinski, et al., 2009, p. 126, reporting that 97% of judges in an educational program rated themselves in the top half of the judges attending the program—statistically impossible—in their ability to “avoid racial prejudice in decisionmaking”). Judges and court professionals who focus only on eliminating explicit bias may conclude that they are better at understanding and controlling for bias in their decisions and actions than they really are.

Rachlinski, et al. (2009) also found preliminary evidence that implicit bias affected judges’ sentences. Additional research is needed to confirm these findings. More importantly for the justice system, though, is the authors’ conclusion that “when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so” (p. 1221). The next section discusses potential strategies judges and court professionals can use to address implicit bias.

Reducing the Influence of Implicit Bias

Compared to the science on the existence of implicit bias and its potential influence on behavior, the science on ways to mitigate implicit bias is relatively young and often does not address specific applied contexts such as judicial decision making. Yet, it is important for strategies to be concrete and applicable to an individual’s work to be effective; instructions to simply avoid biased outcomes or respond in an egalitarian manner are too vague to be helpful (Dasgupta, 2009). To address this gap in concrete strategies applicable to court audiences, the authors reviewed the science on general strategies to address implicit bias and considered their potential relevance for judges and court professionals. They also convened a small group discussion with judges and judicial educators (referred to as the Judicial Focus Group) to discuss potential strategies. These efforts yielded seven general research-based strategies that may help attenuate implicit bias or mitigate the influence of implicit bias on decisions and actions.$^5$

STRATEGY 1: RAISE AWARENESS OF IMPLICIT BIAS

Individuals can only work to correct for sources of bias that they are aware exist (Wilson & Brekke, 1994). Simply knowing about implicit bias and its potentially harmful effects on judgment and behavior may prompt individuals to pursue corrective action (cf. Green, Carney, Pallin, Ngo, Raymond, Iezzoni, & Banaji, 2007). Although awareness of implicit bias in and of itself is not sufficient to ensure that effective debiasing efforts take place (Kim, 2003), it is a crucial starting point that may prompt individuals to seek out and implement additional strategies.
SECTION 1.9 PRACTICING WITH PROFESSIONALISM

Strategy 1: Potential Actions to Take

Ÿ Individual: Seek information on implicit bias by attending educational sessions, taking the IAT, and reading relevant research.

Ÿ Courts: Provide education on implicit bias that includes judicial facilitators/presenters, examples of implicit bias across other professions, and exercises to make the material more personally relevant.

STRATEGY 2: SEEK TO IDENTIFY AND CONSCIOUSLY ACKNOWLEDGE REAL GROUP AND INDIVIDUAL DIFFERENCES

The popular “color blind” approach to egalitarianism (i.e., avoiding or ignoring race; lack of awareness of and sensitivity to differences between social groups) fails as an implicit bias intervention strategy. “Color blindness” actually produces greater implicit bias than strategies that acknowledge race (Apfelbaum, Sommers, & Norton, 2008). Cultivating greater awareness of and sensitivity to group and individual differences appears to be a more effective tactic: Training seminars that acknowledge and promote an appreciation of group differences and multicultural viewpoints can help reduce implicit bias (Rudman, Ashmore, & Gary, 2001; Richeson & Nussbaum, 2004).

Strategy 2: Potential Actions to Take

Ÿ Individual: Participate in diversity training that focuses on multiculturalism, associate with those committed to egalitarian goals, and invest effort in identifying the unique characteristics of different members of the same minority groups.

Ÿ Courts: Provide routine diversity training that emphasizes multiculturalism and encourage court leaders to promote egalitarian behavior as part of a court’s culture.

Diversity training seminars can serve as a starting point from which court culture itself can change. When respected court leadership actively supports the multiculturalism approach, those egalitarian goals can influence others (Aarts, Gollwitzer, & Hassin, 2004). Moreover, when an individual (e.g., new employee) discovers that peers in the court community are more egalitarian, the individual’s beliefs become less implicitly biased (Sechrist & Stangor, 2001). Thus, a systemwide effort to cultivate a workplace environment that supports egalitarian norms is important in reducing individual-level implicit bias. Note, however, that mandatory training or other imposed pressure to comply with egalitarian
standards may elicit hostility and resistance from some types of individuals, failing to reduce implicit bias (Plant & Devine, 2001).

In addition to considering and acknowledging group differences, individuals should purposely compare and individuate stigmatized group members. By defining individuals in multiple ways other than in terms of race, implicit bias may be reduced (e.g., Djikic, Langer, & Stapleton, 2008; Lebrecht, Pierce, Tarr, & Tanaka, 2009; Corcoran, Hundhammer, & Mussweiler, 2009).

**STRATEGY 3: ROUTINELY CHECK THOUGHT PROCESSES AND DECISIONS FOR POSSIBLE BIAS**

When individuals engage in low-effort information processing, they rely on stereotypes and produce more stereotype-consistent judgments than when engaged in more deliberative, effortful processing (Bodenhausen, 1990). As a result, low effort decision makers tend to develop inferences or expectations about an individual early on in the information-gathering process. These expectations then guide subsequent information processing: Attention and subsequent recall are biased in favor of stereotype-confirming evidence and produce biased judgment (Bodenhausen & Wyer, 1985; Darley & Gross, 1983). Expectations can also affect social interaction between the decision maker (e.g., judge) and the stereotyped target (e.g., defendant), causing the decision maker to behave in ways that inadvertently elicit stereotype-confirming behavior from the other person (Word, Zanna, & Cooper, 1973). Individuals interested in minimizing the impact of implicit bias on their own judgment and behaviors should actively engage in more thoughtful, deliberative information processing.

**Strategy 3: Potential Actions to Take**

- **Individual:** Use decision-support tools such as note-taking, checklists, and bench cards and techniques such as writing down the reasons for a judgment to promote greater deliberative as opposed to intuitive thinking.

- **Courts:** Develop guidelines and/or formal protocols for decision makers to check and correct for implicit bias (e.g., taking the other person’s perspective, imagining the person is from a non-stigmatized social group, thinking of counter-stereotypic thoughts in the presence of an individual from a minority social group).

When sufficient effort is exerted to limit the effects of implicit biases on judgment, attempts to consciously control implicit bias can be successful (Payne, 2005; Stewart & Payne, 2008).
To do this, however, individuals must possess a certain degree of self-awareness. They must be mindful of their decision-making processes rather than just the results of decision making (Seamone, 2006) to eliminate distractions, to minimize emotional decision making, and to objectively and deliberatively consider the facts at hand instead of relying on schemas, stereotypes, and/or intuition.

**STRATEGY 4: IDENTIFY DISTRACTIONS AND SOURCES OF STRESS IN THE DECISION-MAKING ENVIRONMENT AND REMOVE OR REDUCE THEM**

Tiring (e.g., long hours, fatigue), stressful (e.g., heavy, backlogged, or very diverse caseloads; loud construction noise; threats to physical safety; popular or political pressure about a particular decision; emergency or crisis situations), or otherwise distracting circumstances can adversely affect judicial performance (e.g., Eells & Showalter, 1994; Hartley & Adams, 1974; Keinan, 1987). Specifically, situations that involve time pressure (e.g., van Knippenberg, Dijksterhuis, & Vermeulen, 1999), that force a decision maker to form complex judgments relatively quickly (e.g., Bodenhausen & Lichtenstein, 1987), or in which the decision maker is distracted and cannot fully attend to incoming information (e.g., Gilbert & Hixon, 1991; Sherman, Lee, Bessennof, & Frost, 1998) all limit the ability to fully process case information. Decision makers who are rushed, stressed, distracted, or pressured are more likely to apply stereotypes – recalling facts in ways biased by stereotypes and making more stereotypic judgments – than decision makers whose cognitive abilities are not similarly constrained. A decision maker may be more likely to think in terms of race and use implicit racial stereotypes (Macrae, Bodenhausen, & Milne, 1995; Mitchell, Nosek, & Banaji, 2003) because race often is a salient, i.e., easily-accessible, attribute. In addition, certain emotional states (anger, disgust) can exacerbate implicit bias in judgments of stigmatized group members, even if the source of the negative emotion has nothing to do with the current situation or with the issue of social groups or stereotypes more broadly (e.g., DeSteno, Dasgupta, Bartlett, & Cjadric, 2004; Dasgupta, DeSteno, Williams, & Hunsinger, 2009). Happiness may also produce more stereotypic judgments, though this can be consciously controlled if the person is motivated to do so (Bodenhausen, Kramer, & Susser, 1994).

**Strategy 4: Potential Actions to Take**

- **Individual**: Allow more time on cases in which implicit bias might be a concern by, for example, spending more time reviewing the facts of the case before committing to a decision; consider ways to clear your mind (e.g., through meditation) and focus completely on the task at hand.
Courts: Review areas in which judges and other decision makers are likely to be over-burdened and consider options (e.g., reorganizing court calendars) for modifying procedures to open provide more time for decision making (see Guthrie, Rachlinski, Wistrich, 2007).

Given all these potential distractions and sources of stress, decision makers need enough time and cognitive resources to thoroughly process case information to avoid relying on intuitive reasoning processes that can result in biased judgments.

STRATEGY 5: IDENTIFY SOURCES OF AMBIGUITY IN THE DECISION-MAKING CONTEXT AND ESTABLISH MORE CONCRETE STANDARDS BEFORE ENGAGING IN THE DECISION-MAKING PROCESS

When the basis for judgment is somewhat vague (e.g., situations that call for discretion; cases that involve the application of new, unfamiliar laws), biased judgments are more likely. Without more explicit, concrete criteria for decision making, individuals tend to disambiguate the situation using whatever information is most easily accessible—including stereotypes (e.g., Dovidio & Gaertner, 2000; Johnson, Whitestone, Jackson, & Gatto, 1995).

In cases involving ambiguous factors, decision makers should preemptively commit to specific decision-making criteria (e.g., the importance of various types of evidence to the decision) before hearing a case or reviewing evidence to minimize the opportunity for implicit bias (Uhlmann & Cohen, 2005). Establishing this structure before entering the decision-making context will help prevent constructing criteria after the fact in ways biased by implicit stereotypes but rationalized by specific types of evidence (e.g., placing greater weight on stereotype-consistent evidence in a case against a Black defendant than one would in a case against a White defendant).

Strategy 5: Potential Actions to Take

Individual: Commit to decision-making criteria before reviewing case-specific information.

Courts: Develop protocols that identify potential sources of ambiguity; consider the pros (e.g., more understanding of issues) and cons (e.g., familiarity may lead to less deliberative processing) of using judges with special expertise to handle cases with greater ambiguity.
STRATEGY 6: INSTITUTE FEEDBACK MECHANISMS

Providing egalitarian consensus information (i.e., information that others in the court hold egalitarian beliefs rather than adhere to stereotypic beliefs) and other feedback mechanisms can be powerful tools in promoting more egalitarian attitudes and behavior in the court community (Sechrist & Stangor, 2001). To encourage individual effort in addressing personal implicit biases, court administration may opt to provide judges and other court professionals with relevant performance feedback. As part of this process, court administration should consider the type of judicial decision-making data currently available or easily obtained that would offer judges meaningful but nonthreatening feedback on demonstrated biases. Transparent feedback from regular or intermittent peer reviews that raise personal awareness of biases could prompt those with egalitarian motives to do more to prevent implicit bias in future decisions and actions (e.g., Son Hing, Li, & Zanna, 2002). This feedback should include concrete suggestions on how to improve performance (cf. Mendoza, Gollwitzer, & Amodio, 2010; Kim, 2003) and could also involve recognition of those individuals who display exceptional fairness as positive reinforcement.

Feedback tends to work best when it (a) comes from a legitimate, respected authority, (b) addresses the person’s decision-making process rather than simply the decision outcome, and (c) when provided before the person commits to a decision rather than afterwards, when he or she already has committed to a particular course of action (see Lerner & Tetlock, 1999, for a review). Note, however, that feedback mechanisms which apply coercive pressure to comply with egalitarian standards can elicit hostility from some types of individuals and fail to mitigate implicit bias (e.g., Plant & Devine, 2001). By inciting hostility, these imposed standards may even be counterproductive to egalitarian goals, generating backlash in the form of increased explicit and implicit prejudice (Legault, Gutsell, & Inzlicht, 2011).

Strategy 6: Potential Actions to Take

ü **Individual**: Seek feedback through, for example, participating in a sentencing round table discussion discussing hypothetical cases or consulting with a skilled mentor or senior judge about handling challenging cases; ask for feedback from colleagues, supervisors and others regarding past performance; document and review the underlying logic of decisions to ensure their soundness.

ü **Courts**: Periodically review a judge’s case materials and provide feedback and suggestions for improvement as needed; develop a bench-bar committee to oversee an informal internal grievance process and work with judges as needed; convene sentencing
round tables to discuss hypothetical cases involving implicit bias issues and encourage more deliberate thinking.

STRATEGY 7: INCREASE EXPOSURE TO STIGMATIZED GROUP MEMBERS AND COUNTER-STEREOTYPES AND REDUCE EXPOSURE TO STEREOTYPES

Increased contact with counter-stereotypes—specifically, increased exposure to stigmatized group members that contradict the social stereotype—can help individuals negate stereotypes, affirm counter-stereotypes, and “unlearn” the associations that underlie implicit bias. “Exposure” can include imagining counter-stereotypes (Blair, Ma, & Lenton, 2001), incidentally observing counter-stereotypes in the environment (Dasgupta & Greenwald, 2001; Olson & Fazio, 2006), engaging with counter-stereotypic role models (Dasgupta & Asgari, 2004; Dasgupta & Rivera, 2008) or extensive practice making counter-stereotypic associations (Kawakami, Dovidio, Moll, Hermsen, & Russin, 2000).

Strategy 7: Potential Actions to Take

- **Individual**: View images (e.g., by hanging photos, creating new screen savers and desk top images) of admired individuals (e.g., Martin Luther King, Jr.) of the stereotyped social group; spend more time with individuals who are counter-stereotypic role models; practice making positive, i.e., counter-stereotypic, associations, with members of minority social groups.

- **Courts**: Assess visual and auditory communications for implicit bias and modify to convey egalitarian norms and present counter-stereotypic information; increase representation of stigmatized social groups in valued, authoritative roles in the court to foster positive intergroup relations and provide immediately accessible counter-stereotypic examples.

For individuals who seek greater contact with counter-stereotypic individuals, such contact is more effective when the counter-stereotype is of at least equal status in the workplace (see Pettigrew & Tropp, 2006). Moreover, positive and meaningful interactions work best: Cooperation is one of the most powerful forms of debiasing contact (e.g., Sherif, Harvey, White, Hood & Sherif, 1961).

In addition to greater contact with counter-stereotypes, this strategy also involves decreased exposure to stereotypes. Certain environmental cues can automatically trigger stereotype activation and implicit bias. Images and language that are a part of any signage, pamphlets, brochures, instructional manuals, background music, or any other verbal or visual communications in the court...
may inadvertently activate implicit biases because they convey stereotypic information (see Devine, 1989; Rudman & Lee, 2002; Anderson, Benjamin, & Bartholow, 1998; for examples of how such communications can prime stereotypic actions and judgments; see also Kang & Banaji, 2006).

Identifying these communications and removing them or replacing them with non-stereotypic or counter-stereotypic information can help decrease the amount of daily exposure court employees and other legal professionals have with the types of social stereotypes that underlie implicit bias.

CONCLUSION

Research shows that individuals develop implicit attitudes and stereotypes as a routine process of sorting and categorizing the vast amounts of sensory information they encounter on an ongoing basis. Implicit, as opposed to explicit, attitudes and stereotypes operate automatically, without awareness, intent, or conscious control and can operate even in individuals who express low explicit bias (Devine, 1989). Because implicit biases are automatic, they can influence or bias decisions and behaviors, both positively and negatively, without an individual’s awareness. This phenomenon leaves open the possibility that even those dedicated to the principles of a fair justice system may, at times, unknowingly make crucial decisions and act in ways that are unintentionally unfair. Thus although courts may have made great strides in eliminating explicit or consciously endorsed racial bias, they, like all social institutions, may still be challenged by implicit biases that are more difficult to identify and change.

Devine (1989) argues that “prejudice need not be the consequence of ordinary thought processes” if individuals actively take steps to avoid the influence of implicit biases on their behavior. Avoiding the influence of implicit bias, however, is an effortful, as opposed to automatic, process and requires intention, attention and time. Combating implicit bias, much like combating any habit, involves “becoming aware of one’s implicit bias, being concerned about the consequences of the bias, and learning to replace the biased response with non-prejudiced responses—ones that more closely match the values people consciously believe that they hold” (Law, 2011).

Once judges and court professionals become aware of implicit bias, examples of strategies they can use to help combat it and encourage egalitarianism are:

- Consciously acknowledge group and individual differences (i.e., adopt a multiculturalism approach to egalitarianism rather than a color-blindness strategy in which one tries to ignore these differences)
Routinely check thought processes and decisions for possible bias (i.e., adopt a thoughtful, deliberative, and self-aware process for inspecting how one’s decisions are made)

Identify sources of stress and reduce them in the decision-making environment

Identify sources of ambiguity and impose greater structure in the decisionmaking context

Institute feedback mechanisms

Increase exposure to stereotyped group members (e.g., seek out greater contact with the stigmatized group in a positive context)

Those dedicated to the principles of a fair justice system who have worked to eliminate explicit bias from the system and in their own decisions and behaviors may nonetheless be influenced by implicit bias. Providing information on implicit bias offers judges and court staff an opportunity to explore this possibility and to consider strategies to address it. It also provides an opportunity to engage judges and court professionals in a dialog on broader race and ethnic fairness issues in a thoughtful and constructive manner:

Recognizing that implicit bias appears to be relatively universal provides an interesting foundation for broadening discussions on issues such as minority over-representation (MOR), disproportionate minority contact (DMC), and gender or age discrimination. In essence, when we look at research on social cognitive processes such as implicit bias we understand that these processes are normal rather than pathological. This does not mean we should use them as an excuse for prejudice or discrimination. Rather, they give us insight into how we might go about avoiding the pitfalls we face when some of our information processing functions outside of our awareness. (Marsh, 2009, p. 18)
REFERENCES


WEB RESOURCES CITED

National Center for State Courts, Racial Fairness Task Forces and Reports: http://www.ncsc.org/SearchState
Notes
1 See, for example, state court reports of racial fairness task forces and commissions, available through the National Center for State Courts at http://www.ncsc.org/SearchState and the National Center for State Courts’ Interactive Database of State Programs to address race and ethnic fairness in the courts, available at http://www.ncsc.org/refprograms.

2 See, for example, National Center for State Courts (1999, p. 37), reporting on a national survey of public attitudes about state courts that found 47% of Americans surveyed did not believe that African Americans and Latinos receive equal treatment in America’s state courts, 55% did not believe that non-English speaking persons receive equal treatment, and more than two-thirds of African Americans thought that African Americans received worse treatment than others in court. State surveys, such as the public opinion survey commissioned by the California Administrative Office of the Courts report similar findings: A majority of all California respondents stated that African Americans and Latinos usually receive less favorable results in court than others, approximately two-thirds believed that non-English speakers receive less favorable results, and, a much higher proportion of African Americans, 87%, thought that African Americans receive unequal treatment (see Rottman, 2005, p. 29).

3 Social science research on implicit stereotypes, attitudes, and bias has accumulated across several decades into a compelling body of knowledge and continues to be a robust area of inquiry, but the research is not without its critics (see “What Are the Key Criticisms of Implicit Bias Research?” in Appendix B in Casey, et al., 2012). There is much that scientists do not yet know. This project brief and the full report on which it is based are offered as a starting point for courts interested in exploring implicit bias and potential remedies, with the understanding that advances in technology and neuroscience promise continued refinement of knowledge about implicit bias and its effects on decision making and behavior.


5 See Appendix G in Casey, et al. (2012) for more information on the strategies.
SECTION 2

Ethics

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SECTION 2.1

Sources of Ethical Authority in Massachusetts*

Gilda Tuoni Russell, Esq.

Scope Note
This chapter provides a historical perspective on the sources for ethical authority in the Commonwealth of Massachusetts. Beginning with the nature and origin of self-regulation within the legal community, the chapter goes on to acquaint the reader with the organization and scope of the Massachusetts Rules of Professional Conduct.

§ 1 Self-Regulation and the Role of the Supreme Judicial Court
§ 2 The Massachusetts Rules of Professional Conduct—Organization and Scope
§ 3 The Predecessor to the Massachusetts Rules of Professional Conduct—The Massachusetts Canons of Ethics and Disciplinary Rules
§ 4 Jurisdictional Reach of Massachusetts Rules of Professional Conduct
§ 5 Conclusion

§ 1 SELF-REGULATION AND THE ROLE OF THE SUPREME JUDICIAL COURT

The legal profession in the United States is largely self-regulated. See C. Wolf-ram, Modern Legal Ethics 20–21 (West 1986). In Massachusetts, the ultimate authority in this self-regulated process is the Supreme Judicial Court. In this

\[1\] Reprinted from Ethical Lawyering in Massachusetts (MCLE, Inc. 3d ed. 2009 & Supp. 2013). Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
The exercise of the Supreme Judicial Court's regulatory power over the bar is said to be “inherent” and “exclusive.” The court itself has described this power:

It is inherent in the judicial department of government under the Constitution to control the practice of law, the admission to the bar of persons found qualified to act as attorneys at law and the removal from that position of those once admitted and found to be unfaithful to their trust.

Opinion of the Justices, 289 Mass. 607, 612 (1935). Further, the court has stated: “Permission to practise law is within the exclusive cognizance of the judicial department.” Opinion of the Justices, 289 Mass. at 613.

The history of Supreme Judicial Court power in this area is substantial. More than sixty years ago, the court held that “[t]he determination by the judicial department of the appropriate procedure to be followed in review in proceedings for disbarment or in proceedings for admission to the bar necessarily must be made by the Supreme Judicial Court.” In re Keenan, 313 Mass. 186, 207 (1943).

The court has opined that such determinations “naturally must be made by the court that, under the Constitution, is the ‘supreme’ court, and that, by a statute of long standing, has general supervisory powers over other courts—so far as that court sees fit to make such determination. G.L. (Ter. Ed.), c. 211, § 3.” In re Keenan, 313 Mass. at 208 (quoting In re Keenan, 310 Mass. 166, 182 (1941)).

Unlike the Supreme Judicial Court’s superintendency power, the role of the Massachusetts legislature—the general court—in matters regarding the bar is limited. The court has pronounced as follows:

Control of membership in the bar of the courts of the Commonwealth, both of admission thereto and removal therefrom, is exclusively in the judicial department of the government of the Commonwealth. Interference therewith by the legislative department would conflict with the provision of art. 30 of the Declaration of Rights that “the legislative department shall never exercise the executive and judicial powers, of either of them.”

In re Keenan, 310 Mass. at 171. However, the legislature is empowered to enact statutes that “aid in the performance of” judicial department duties. One such
statute was G.L. c. 221, § 37, which conferred jurisdiction for admission to the bar in the Superior Court as well as the Supreme Judicial Court. In In re Keenan, the court held that such enactment was not legislative interference with its constitutional power. In re Keenan, 310 Mass. at 173. Rather, the court interpreted the statute as “making provision in aid of the judicial department in reaching a proper selection of those qualified for admission as attorneys to practice in the courts.” In re Keenan, 310 Mass. at 173 (quoting Opinion of the Justices, 279 Mass. 607, 610 (1932)). The court held further that it had not, through its rules, specifically excluded the Superior Court from jurisdiction in these matters. In re Keenan, 310 Mass. at 182–85.

However, it should be noted that while G.L. c. 221, §§ 37 and 40 gave the Superior Court concurrent jurisdiction in bar admission and disciplinary matters, and have not, as of this date, been explicitly repealed, it appears that the Supreme Judicial Court has now, by its own rules, given itself exclusive jurisdiction in these matters. See Strigler v. Bd. of Bar Exam’rs, 448 Mass. 1027 (2007) (finding that the Supreme Judicial Court retains the ultimate authority of an individual to practice law); 1976 amendment of SJC Rule 3:01, Opinion of the Justices, 370 Mass. 895 (1976) (bar admission); 1974 adoption of SJC Rule 4:01, Opinion of the Justices, 365 Mass. 681 (1974) (bar discipline). Similarly, while other legislative enactments concern bar admission, discipline and related matters, see G.L. c. 221, §§ 36, 38, 41-52, under the decisional authority discussed above, the Supreme Judicial Court rules that specifically cover the same areas would appear to be controlling.

The Supreme Judicial Court has adopted many such rules that govern attorneys in the Commonwealth. They can be characterized as “substantive” rules, which regulate conduct, and “procedural” rules, which regulate process. The substantive rules are contained within Chapter 3 of the Supreme Judicial Court Rules, entitled “Ethical Requirements and Rules Concerning the Practice of Law.” They are as follows:

- Rule 3:01 concerns, among other things, petitions for bar admissions, qualifications for taking the bar examination, and qualifications for admission.

- Rule 3:02, entitled “Administration of Justice,” concerns prohibitions against a disbarred attorney representing a corporation or association and clerks of court, registers of probate, and the Land Court recorder, assistants, and employees practicing law.

- Rule 3:03 allows supervised senior law student practice on behalf of indigents and/or for the Commonwealth and its subdivisions in certain situations.
• Rule 3:04 allows attorneys from other jurisdictions who are engaged in certain graduate law studies or programs of legal assistance to practice within the context of such law studies or programs.

• Rule 3:05 addresses licensing of foreign legal consultants.

• Rule 3:06 concerns provisions regarding lawyers practicing in professional corporations, limited liability companies, or limited liability partnerships and requirements applicable to such entities.

• Rule 3:07 contains the Massachusetts Rules of Professional Conduct and comments.

• Rule 3:08 (which previously covered the special “Disciplinary Rule Applicable to Practice as a Prosecutor or as a Defense Lawyer”) was stricken, effective January 1, 1999.


• Rule 3:10 concerns the assignment of counsel.

• Rule 3:11 concerns the Committee of Judicial Ethics.

• Rule 3:12 contains the Code of Professional Responsibility for clerks of court.

• Rule 3:13 concerns the Committee on Professional Responsibility for clerks of court.

• Rule 3:14 concerns the Advisory Committee on Ethical Opinions for clerks of court.

• Rule 3:15 concerns the pro hac vice registration fee.

• Rule 3:16 establishes a mandatory one-day course on professionalism for attorneys newly admitted to the bar.

The procedural rules promulgated by the court are found in Chapter 4 of the Supreme Judicial Court Rules, entitled “Bar Discipline and Clients’ Security Protection.” They are as follows:

• Rule 4:01 concerns bar discipline.

• Rule 4:02 concerns periodic registration of attorneys.

• Rule 4:03 concerns periodic assessment of attorney registration fees.
• Rule 4:04 concerns the Clients’ Security Board and Fund.

• Rule 4:05 concerns claims by clients to the Clients’ Security Board for reimbursement of losses.

• Rule 4:06 concerns the miscellaneous powers and duties of the Clients’ Security Board.

• Rule 4:07 concerns the Lawyers Concerned for Lawyers Fund and Oversight Committee.

• Rule 4:08 concerns the allowance of the Board of Bar Overseers and the Clients’ Security Board to request interpretation, advice, and instruction from the Supreme Judicial Court—as well as to make suggestions or proposals to the court—concerning the rules included in Chapter 4.

• Rule 4:09 concerns the court’s ability to amend, modify, or repeal Chapter 4 and provide for the dissolution and winding up of the Clients’ Security Fund.

The primary focus of this chapter of Ethical Lawyering in Massachusetts is Rule 3:07 of the Supreme Judicial Court Rules—the Massachusetts Rules of Professional Conduct and comments (“Rules of Professional Conduct”). The Rules of Professional Conduct were adopted by the Supreme Judicial Court in June 1997, became effective January 1, 1998, and have been amended in part thereafter. They set forth the standards of professional conduct for members of the Massachusetts bar and serve as the basis for professional discipline. In order for readers to more effectively understand the Massachusetts Rules of Professional Conduct, the organizational framework and scope of the rules—as well as a brief history of the predecessor rules that were operative in the Commonwealth for many years and the reasons for the change from them—are discussed below.

§ 2 THE MASSACHUSETTS RULES
OF PROFESSIONAL CONDUCT—ORGANIZATION AND SCOPE

The Massachusetts Rules of Professional Conduct finally came into operation in the Commonwealth on January 1, 1998, replacing the Massachusetts Canons of Ethics and Disciplinary Rules, which had been in effect for a quarter of a century. The term “finally” is used because Massachusetts, the forty-fourth state to adopt the Rules of Professional Conduct, did so some fifteen years after the
rules’ promulgation by the American Bar Association. See § 3, below, for a discussion of the history of the Supreme Judicial Court’s adoption of the rules.

The Rules of Professional Conduct begin with a preamble and scope section designed to provide general orientation to the rules. The preamble outlines the various responsibilities that a lawyer may take on and the functions that a lawyer may perform. Such responsibilities include being a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice. A lawyer’s functions may include that of advisor, advocate, negotiator, and evaluator. The preamble articulates the lawyer’s role in upholding the legal process and conforming the lawyer’s behavior to the requirements of the law. The lawyer’s duties as a public citizen to seek improvement of the law, the administration of justice, and the quality of legal services are also set forth. The preamble further attempts to acknowledge lawyers’ conflicting responsibilities and the prescription by the Rules of Professional Conduct of terms for resolving such conflicts. The preamble also notes the largely self-governing nature of the legal profession and emphasizes the importance—as well as the special responsibilities—of such self-governance.

The scope defines the Rules of Professional Conduct as “rules of reason.” Some rules are cast in obligatory terms such as “shall” and “shall not.” Some rules are permissive, using the term “may” and defining areas in which the lawyer may utilize professional discretion. The Comments following each rule are described as not adding obligations to the rules but rather providing “guidance for practicing in compliance with the rules.” While the Comments are guides to interpretation, the text of the rules is authoritative.

The scope section further notes that the rules are to be considered within the larger legal context of court rules and statutes. Moreover, the scope section provides that the rules “provide a framework for the ethical practice of law,” but do not “exhaust the moral and ethical considerations that should inform” a lawyer’s actions. The scope section also provides that principles of substantive law external to the rules may also be applicable to a lawyer’s authority and responsibilities. The scope section provides that failure to comply with the rules is a basis for invoking the disciplinary process. Yet, the scope section also reiterates Massachusetts law to the effect that violation of an ethical rule does not itself constitute “an actionable breach of duty to a client,” although it may be “some evidence” of negligence.

Following the preamble and scope are the Rules of Professional Conduct themselves. The rules are organized under the following substantive titles:

- “Client-Lawyer Relationship,”
• “Counselor,”
• “Advocate,”
• “Transactions with Persons Other Than Clients,”
• “Law Firms and Associations,”
• “Public Service,”
• “Information About Legal Services,”
• “Maintaining the Integrity of the Profession,” and
• “Definitions; Title.”

Included under the substantive titles are subcategories of rules and comments that relate to the subject matter of the title. For example, under “Client-Lawyer Relationship” are Rules 1.1 through 1.17 and corresponding comments, which cover competence, scope of representation, diligence, communication, fees, and other areas. See Section 2.1 of these materials for the full text of the rules.

The “Counselor” section includes Rules 2.1 through 2.4 and comments covering the lawyer’s role as advisor, conducting evaluations for third persons, and serving as a third-party neutral. The “Advocate” section contains Rules 3.1 through 3.9 and comments pertaining to meritorious claims, expediting litigation, candor toward the tribunal, fairness to the opposing party and counsel, impartiality and decorum of the tribunal, trial publicity, the lawyer as witness, special responsibilities of a prosecutor, and the advocate in nonadjudicative proceedings. The “Transactions with Persons Other Than Clients” section includes Rules 4.1 through 4.4 and comments regarding truthfulness in statements to others, communications with persons represented by counsel, dealing with an unrepresented person, and respect for the rights of third persons.

The “Law Firms and Associations” section contains Rules 5.1 through 5.7 and comments regarding the responsibilities of a partner or supervisory lawyer and the responsibilities of a subordinate lawyer, the responsibilities regarding nonlawyer assistants, the professional independence of a lawyer (which includes prohibitions on practicing and dividing fees with nonlawyers), unauthorized practice of law and multijurisdictional practice of law, restrictions on the right to practice, and responsibilities regarding law-related services. The “Public Service” section contains Rules 6.1 through 6.5 and comments regarding voluntary pro bono publico service, accepting appointments, membership in legal services organizations, law reform activities affecting client interests, and nonprofit and court-annexed limited legal services programs.
The “Information About Legal Services” section includes Rules 7.1 through 7.5 and comments covering communications concerning a lawyer’s services, advertising, solicitation, communication of fields of practice, and firm names and letterheads. The “Maintaining the Integrity of the Profession” section includes Rules 8.1 through 8.5 and comments regarding bar admission and disciplinary matters, judicial and legal officials, reporting professional misconduct, what constitutes misconduct, disciplinary authority, and choice of law. The “Definitions; Title” section contains Rules 9.1 and 9.2 and comments regarding definitions applicable to the rules and the title of the rules themselves.

To a large extent, prior to 2002, the Massachusetts Rules of Professional Conduct followed the American Bar Association (ABA) Model Rules of Professional Conduct adopted by the ABA in 1983. However, in 2002, the ABA adopted many rule changes proposed as part of the ABA’s “Ethics 2000” Commission’s recommendations. There are some nuances in the Massachusetts rules that are distinct from the ABA rules in that they conform to some traditional aspects of Massachusetts practice and/or address special concerns of the Massachusetts bar and judiciary. As such, the Massachusetts rules currently differ in part from the ABA Model Rules.

The Comments to each of the Massachusetts rules note the corresponding ABA Model Rule and whether it is identical to, similar to, or departs from the Massachusetts rule. Further, the Comments note the former Massachusetts rule.

§ 3  THE PREDECESSOR TO THE MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT—THE MASSACHUSETTS CANONS OF ETHICS AND DISCIPLINARY RULES

The Canons were modeled on the ABA’s Code of Professional Responsibility (“the ABA Code”), which had been adopted in 1970, and which was the predecessor to the now-operative ABA Model Rules. The ABA Code itself replaced the previous ABA Canons of Ethics, originally adopted by the ABA in 1908.

The Canons, which were in effect in Massachusetts through December 31, 1997, consisted of three types of provisions: canons, disciplinary rules (DRs), and definitions. The Massachusetts Canons did not include the ethical considerations (ECs) that had been part of the ABA Code, although the Supreme Judicial Court noted that it viewed the ethical considerations of the ABA Code as a body of principles on which the Massachusetts Canons were to be interpreted. 1972 adoption of SJC Rule 3:22, Opinion of the Justices, 359 Mass. 778 (1971).

The Canons consisted of nine axiomatic norms that expressed in general terms the standards of professional conduct expected of lawyers. They were, in essence, general concepts from which the Disciplinary Rules were derived. The Disciplinary Rules were mandatory in character—violation of them formed the basis for professional discipline.

Over the years, the ABA Code and corresponding state codes such as the Massachusetts Canons were criticized for impractical and sometimes conflicting provisions. Consequently, in the mid-1970s the American Bar Association formed a commission to study and propose a redrafted set of rules. In 1983, after much publicity, a good deal of wrangling, and an ultimate compromise, the ABA approved, through its House of Delegates, the ABA Model Rules.

The ABA Model Rules addressed many of the criticisms of the former ABA Code by providing practical commentary concerning ethical issues and specifically addressing conflicting principles and the resolution of such conflicts. However, the ABA Model Rules engendered a much less uniform reception. While as of this writing only one state, California, has not adopted some form of the ABA Model Rules, the term “some form” should be emphasized. What this means is that a number of jurisdictions, while following the format of the ABA Model Rules, do not always follow their substantive provisions, particularly in controversial areas dealing with client confidentiality and candor to the court. Other states (including Massachusetts until 1997) rejected the format of the ABA Model Rules and stayed with some version of the old ABA Code, making needed changes only by way of amendment. Some states had and have an amalgam of rules based on both the ABA Code and ABA Model Rules. Since the adoption of the numerous changes to the ABA Model Rules that were enacted as a result of the “Ethics 2000” amendments, states have been adopting either in whole or, as in Massachusetts, some but not all of the amendments to the ABA Model Rules. The method of adoption also varies from state to state, with Massachusetts not adopting the ABA changes whole scale, but rather one at a time.
Historically, it is interesting to note that the Supreme Judicial Court initially rejected adoption of the ABA Model Rules in 1988. The court found then that there was insufficient demonstration that the then-operating Canons were inadequate or did not serve the interests of the public and the bar. See In re Adoption of Model Rules of Professional Conduct, Petition of the Boston Bar Association, S–4357 (1988). There was a strong dissent to the court’s 5–2 decision in 1988. The dissent highlighted what the dissenting justices considered the superior format of the ABA Model Rules, the adoption at that time by at least half of the states, and the fact that many of the ABA Model Rules gave guidance to lawyers as to appropriate conduct in specific situations. In re Adoption of Model Rules of Professional Conduct, Petition of the Boston Bar Association, S–4357 (1988) (Hennessey, C.J., and Wilkins, J., dissenting).

However, in 1995, some seven years later, the view of the dissenter gained majority acceptance when the court announced that it would adopt a modified version of the ABA Model Rules. After extensive study, commentary, and argument, the Supreme Judicial Court adopted the Massachusetts Rules of Professional Conduct on June 9, 1997, to be effective January 1, 1998. As of this writing, the Massachusetts rules have been in effect for fifteen years and have been amended several times, most recently in the area of fees. See Mass. R. Prof. C. 1.5.

As stated above, as of this writing, only one state, California, has not adopted some form of the ABA Model Rules. However, California has undergone a substantial review of its rules and the California Supreme Court will soon be considering adoption of some form of the ABA Model Rules.

§ 4 JURISDICTIONAL REACH OF MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT

The Massachusetts Rules of Professional Conduct have a wide reach pursuant to court rule and decisional law. Massachusetts lawyers practicing in the U.S. District Court for the District of Massachusetts and the U.S. Court of Appeals for the First Circuit must abide by the Massachusetts ethics rules. Lawyers admitted to practice in Massachusetts but practicing in another state also must conform their conduct to the Massachusetts ethics rules, unless the Massachusetts rule is contrary to the rule of the jurisdiction in which the out-of-state Massachusetts lawyer is practicing.

Admission to the Massachusetts bar does not automatically result in a lawyer’s admission to the federal courts sitting in Massachusetts or elsewhere. Federal courts set forth their own admission requirements for lawyers practicing before

Lawyers admitted to practice in Massachusetts are subject to regulation by the Supreme Judicial Court even if they are engaged in out-of-state practice. See In re Singer, 1 Mass. Att’y Disc. R. 263, 265 (1978) (Jurisdiction of the Supreme Judicial Court extends to any attorney admitted to practice in the Commonwealth. However, a lawyer will not be disciplined for conduct in another state that does not violate the standards of conduct of that state merely because the lawyer is a member of the Massachusetts bar).

§ 5 CONCLUSION

Massachusetts lawyers benefit from the largely self- regulatory aspects of membership in the Massachusetts bar. Significant rules governing the profession are contained in Chapters 3 and 4 of the Supreme Judicial Court Rules. Paramount among these rules are the Massachusetts Rules of Professional Conduct, which are contained in SJC Rule 3:07. These rules represent a departure in many instances from the prior Massachusetts Canons of Ethics and Disciplinary Rules. The Massachusetts rules also contain nuances of Massachusetts practice that, in some instances, have resulted in different rules than those contained in the ABA Model Rules. Finally, lawyers admitted to practice in Massachusetts must conform their conduct to the Massachusetts rules when practicing in the federal courts. When practicing in another jurisdiction, Massachusetts lawyers should be aware of the ethics rules of both jurisdictions. See Mass. R. Prof. C. 8.5(a).
SECTION 2.2

Ethics, Risk, and Malpractice Avoidance*

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Scope Note

This chapter provides insight into risk avoidance, crisis management, and disciplinary or malpractice defense in the practice of law. Styled in the tradition of a self-assessment, the chapter provides practical questions and answers that help guide the reader in addressing the often complex issues confronting counsel today.

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§ 1  INTRODUCTION—THE BRIDGE FROM THE 20TH CENTURY

As the new century progresses, the field generally known as “risk avoidance” is becoming an active aspect of the practice of law. It is no longer spoken about in hushed terms while myriad professional problems are stuffed under the metaphorical rug. Insurance carriers actively promote preventive practice to avoid malpractice and continuing legal education programs now feature its topics. Within the field, three principal, but interconnected, stages appear:

2–14
(1) risk avoidance and other preventative actions;
(2) crisis management, after the risk has arisen; and
(3) disciplinary or malpractice defense.

In the first stage, the intent is to anticipate, recognize, and avoid problems before they become problems. In the second stage, the need is to face up to problems that have occurred. And, in the third stage, the hope is to manage problems once they have blossomed into claims or grievances. This chapter is intended to highlight methods by which risks can be recognized, avoided, and managed. One part of this chapter will use a “conflict” problem as an example of the kind of risk that frequently appears. Many of the materials set forth below may seem to derive from “The 32 Things I Should Have Learned in Kindergarten.” Perhaps they do. Nonetheless, they are now “tried and true” and will help us focus on better ways to practice law.

As a general and overarching set of rules of the road, consider the following. Numerous commentators, authors, and writers have undertaken to quantify the “things to do” to avoid malpractice and prevent loss. In the sections that follow, in summary form, are some suggestions. They require some prospective and counterintuitive thinking. Sometimes we have to step away to be able to move forward.

§ 1.1 Prospective Clients

Avoid prospective clients whose expectations, demands, or “all-knowingness” gives you pause.

Avoid matters that arrive at your door too late for you to be contemplative. Said another way, if you have to rush to rescue a claim, you may step over the cliff before you realize it.

If something doesn’t seem right, run it by a friend, colleague, or other trusted person before you undertake a representation. Do not ignore red flags, bright lights, bells going off, etc.

§ 1.2 Conflicts

Failure to do conflicts checks will come back to bite you someday.
§ 1.3 Nonengagement

If you do not undertake to represent someone, confirm the nonrepresentation in writing, either by e-mail or letter.

§ 1.4 Fees and Bills

Think long and hard about undertaking a matter in which the amount in issue is less than the realistic costs of conducting the litigation. If a $25,000 claim is going to cost $20,000 to litigate, you are going to lose money.

Talk about fees. Do not avoid the subject. If someone is reluctant or unable to pay up front, why is it going to get better down the road? (We are not talking about contingent or startup situations, of course.)

If you agree to be retained, put it in writing. As Rule 1.5 of the Massachusetts Rules of Professional Conduct states,

the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

Make sure that the scope of the engagement is clear and defined from the beginning.

Bill monthly.

§ 1.5 Representations, Planning, and Doing

If you make a promise, can you keep it?

If you guarantee a result, can you achieve it?

Spend time determining whether the facts and the law provide a good-faith basis before filing suit. Therefore, don’t promise to file suit when you are not sure if you will have a good-faith basis to do so.
Consider having an expert witness on board as early in the case as possible (if one is going to be needed) to substantiate the claims to be made.

Keep an accurate calendar, with a tickler system for upcoming dates, and make sure that a second person double checks it.

If you don’t want to or cannot handle a matter, tell that client (or prospective client) that you want to refer it out. Make sure that the person referred to is competent. If you intend to seek a referral fee, it must be in writing signed by both counsel and the client before the referral is made. See Mass. R. Prof. C. 1.5; Saggese v. Kelly, 455 Mass. 434 (2005).

§ 1.6 Getting In and Out

If you are not being paid, do not walk away, fail to show up, or withhold services. See Mass. R. Prof. C. 1.16.

If you do file a motion to withdraw, limit the text of the motion to a disclosure that there are irreconcilable differences between you and the client. Refrain from telling tales about the client, since anything you disclose of substance is a breach of confidentiality.

Do not go into business with a client. One of the rare exceptions is taking stock in a startup company, but even that occurrence has substantial risk and conditions attached.

§ 2 Risk Avoidance and Other Preventive Actions

The following material, written by practitioners in the field, describes the ways to identify, avoid and ward off risks.

§ 2.1 How Risk-Prone Are You?

Take a test of your “avoidance radar.”

RISK MANAGEMENT

According to legal malpractice experts, the average lawyer can expect three malpractice claims during his or her career. Take the following test to see where you are most at risk.
SECTION 2.2  PRACTICING WITH PROFESSIONALISM

Scale:

0 = never
1 = once in a while
2 = half of the time
3 = regularly
4 = always

Initial Contact

______ I carefully screen potential clients
______ I check for possible conflicts of interest with new clients and for new
matters with continuing clients
______ I listen closely to clients’ concerns and wishes
______ I communicate realistic expectations for outcome and costs
______ I write engagement letters

Communication

______ I promptly inform clients of developments in their legal matters
______ I regularly report to clients, even when no activity has occurred
______ I respond to clients in a timely manner
______ I obtain clients’ consent before proceeding
______ I provide clients with enough information to participate meaningfully in
their representation

Competence

______ I choose continuing legal education that expands my skills and knowledge
______ I read legal publications regularly
______ I use checklists and practice guides
______ I consult with experts and other lawyers when necessary
______ I refer work to other lawyers when appropriate

Billing

2-18
I discuss billing and costs with clients up front
I attempt to gauge clients’ willingness and ability to pay
I use written fee agreements
I bill regularly and follow up promptly on unpaid accounts
I do not sue clients for unpaid legal fees

Impairment
I eat a balanced diet and exercise regularly to reduce stress
I can relax without using alcohol or drugs
I recognize and take steps to reduce work overload
I have friends and interests outside of law
I establish realistic expectations for myself and my law practice

Scoring
Subtotal each of the five categories, then figure your total score. (Don’t worry, we won’t ask for your score on your next insurance application!)

92–100 = Keep up the good work!
86–91 = Not bad. Avoid complacency.
78–85 = Time to review your procedures.
70–77 = You’re in the “danger zone” for malpractice.
Under 70 = Locate your professional liability insurance policy. Chances are you’ll be using it!

Now assign your law practice a grade. Does your law firm get an “O” for Outstanding? Or does your total score suggest “needs improvement?” Are you more vulnerable in one area than another? What steps can you take today, next week and next month to improve your score and, accordingly, your service to clients?
Clients frequently sue their lawyers because they dislike how they were treated (or ignored) by their lawyer, not because they were unhappy with the legal work. You can ward off these claims by honing your client relations skills.

(a) Stop Talking and Start Listening

Survey after survey confirms that clients want lawyers who “care.” Caring for a client is inexorably linked to the ability to listen well. Alas, lawyers tend to be dynamic talkers but lousy listeners. How can lawyers become expert listeners?

First of all, take off your legal hat at the initial meeting with the client and allow the client to tell his or her story from start to finish without interruption. If you’re too busy focusing on the legal aspects of the client’s story and asking technical questions, you’ll miss the subtle, personal issues that are important to the client. You don’t have a chance of satisfying the client if you can’t identify his or her endgame. Is the client more concerned about an expedited conclusion than a fair and just resolution? Does he or she want to avoid publicity at all costs? Does the client have an all-or-nothing approach to the matter?

Second, end each conversation with the client by soliciting questions: “Is there anything else you would like to ask me or have explained in greater detail?” This simple practice lets the client know that she or he is not just a number and that you’re willing to spend whatever time it takes to instill a sense of comfort.

(b) Nothing Says You Care Like Paper

Jay Foonberg, a noted expert on attorney-client relations, recommends that lawyers consider “cc” an acronym for “client copy.” I agree. Sending the client a copy of all correspondence and material relating to his or her matter is one of the easiest, least expensive, and most efficient ways of keeping the client informed and staying in touch. If you’re worried that each mailing will generate a call from the client, attach a cover note that reads “For your information only. No response required.”
Proper telephone skills are key to successful client relations. Every telephone call should be returned by the end of the day, if not sooner. Whether you send the client an e-mail response, leave a voice-mail message, or have your secretary return the call, the client should not have to wait for a response—even if you’re merely informing the client that you’ll be tied up the next few days with a trial or a closing.

When it comes to telephone calls, demanding clients are like crying babies. The more they are ignored, the louder they cry. Ironically, lawyers tend to take the wrong approach with needy clients. They ignore the client who calls frequently, praying that he or she will miraculously disappear or give up. The client won’t.

Here are some tips on reducing your backlog of unreturned telephone calls. To begin with, if you don’t have voice-mail, get it. When used correctly, voice-mail can be a powerful communications tool for both client and attorney. First, it allows clients to leave detailed messages. That allows you to research the matter and have an answer when you return the call. The dreaded and time-consuming game of telephone tag soon disappears.

Second, voice-mail allows you to customize messages so clients know where you are and when you will be able to return the call. Most salespeople I deal with in the dog-eat-dog business world change their voice-mail messages every day so customers can always reach them. Lawyers can adopt this marketing tool to increase client satisfaction. Customizing your voice-mail on a daily basis takes less than sixty seconds but conveys a strong sense of responsiveness to the client: “Hi. This is Perry Mason. It’s Monday, August 16. I will be in court all morning but will be back in the office this afternoon. Please leave a message and I will return your call later today. If you need immediate assistance, please press ‘0’ and ask for my secretary Della Reese.” Voice-mail also works well if you will be out of the office for an extended period: “Hi. This is Perry Mason. I’ll be out of the office the week of August 16 taking depositions but will be calling in for messages every day. If you need immediate assistance...” The last thing you want your client to do is sit and wonder anxiously day after day why you are not returning a call.

If you don’t have voice-mail, you can accomplish the same thing by having your secretary pick up your line: “Mr. Mason is at a closing this morning but will be back around 2:00 p.m. Is there something I can help you with or would you like to leave Mr. Mason a message?” E-mail is another method of responding to client telephone calls. And unlike voice-mail, e-mail gives you the option of attaching draft documents and other materials. A few words of caution on e-mail, however. First, verify that the client is comfortable with communicating by e-
mail. Second, check your e-mail as often as you would voice-mail. Finally, if you don’t have the ability to check your e-mail while away from the office, consider alternative arrangements, such as providing your secretary with access to your messages.

(d) Interruptions Send the Wrong Message

Do you routinely interrupt meetings or telephone calls with one client to take a call from another client or counsel? While you may think this represents the height of customer service, it may create the opposite impression. I know that such interruptions infuriate me. Put yourself in the shoes of the client on the other end of the interruption. She undoubtedly feels that you value another client’s matter more than hers. The solution is to train your staff to distinguish the calls that are true emergencies from those that can wait another thirty minutes. Clients will understand the occasional interruption, but don’t let it become routine.

(e) Don’t Sugarcoat It

A cornerstone of every strong relationship is candor. This includes relationships between attorneys and their clients. Yet attorneys are often reluctant to tell clients the weaknesses in their legal positions. Let’s look at a few techniques for conveying the full picture to your clients, warts and all.

Lawyer Tess Trueheart specializes in representing individuals with medical malpractice claims. Most of her clients are burdened with significant health problems. Nonetheless, Tess informs every new client during the initial consultation that, statistically speaking, the client has less than a 50/50 chance of prevailing. While this may seem harsh, her clients are better prepared for an adverse judgment (and less likely to blame Tess). Similarly, Attorney Sam Spade is often embroiled in bitter domestic disputes. To set the record straight, Sam tells new clients that regardless of the other benefits of divorce, they will undoubtedly be worse off financially after the divorce than before it. As a result, Spade’s clients are better prepared for the financial strains of divorce (and the legal bill that follows).

(f) Just Do It

Successful lawyers don’t just sit around and read columns on how to improve their client relations skills. Challenge yourself to change bad client relations habits and improve on the skills you already possess. And never forget that client service means much more than the final legal product.
§ 2.3 Avoid Malpractice Claims by Screening Undesirable Clients

Having seen reality head-on, there are steps that can be taken. The first is to evaluate whether we want to take on the client and the case in hand. One of the important tasks is to screen out “undesirable” clients.

Lawyers frequently see clients with unrealistic expectations as to goals, unreasonable opinions about how lawyers should behave and what lawyers will do for them, and unreasonable attitudes about legal fees. We see clients who are exceedingly demanding on one’s time, who are always in a hurry, who expect you to stand by your fax machine or e-mail at beck and call. In dealing with these kinds of persons, lawyers need to be clear about what they expect from the client, who decides whether cases are meritorious, who controls what part of the process, how and when fees are going to be paid, and whether certain cases are better handled by another law firm with different skills, capacities, and expertise. One of the best ways to avoid a future problem is not to take on a problem client or case at the outset. An old lesson is that if a “red light” starts to flash in your head, pay attention.

Not every client is right for your practice. In fact, some clients are just plain trouble. The first step in any good loss prevention program is weeding out undesirable clients. You can establish an effective client screening program by implementing the following procedures:

Evaluate the potential client and matter. Before you agree to represent a new client (or to take a new matter for an existing client), ask yourself the following questions:

1. Is the legal matter inappropriate for the size or scope of your practice? If so, you must either decline the representation or engage a qualified cocounsel. Many malpractice cases are caused by practitioners who take on matters outside their expertise. For example, if you routinely handle residential real estate matters, don’t assume that you know enough to take on commercial real estate matters.

Avoid highly specialized or regulated areas such as securities work and environmental law. Ask yourself whether a few thousand dollars in fees is worth the risk of a potentially enormous malpractice claim and its damage to your reputation and practice.

2. Is the client overly concerned about cost? Taking on a client who can’t afford your fees is a lose/lose situation. Even if you provide superb legal services, the client will more than likely be dissatisfied with the bill.
A significant percentage of today’s legal malpractice claims are generated by fee disputes. Typically, the attorney sues his or her client for fees and is countersued for malpractice. The attorney often spends thousands in defense costs before finally writing off the original fee in exchange for the former client’s agreement to drop the malpractice claim.

Even worse, attorneys faced with cost-conscious clients sometimes cut corners to avoid increasing the bill so that critical research is not completed and experts are not consulted. Such practices can lead to disciplinary complaints as well as malpractice claims.

3. **Has the potential client changed attorneys in the past?** There are several reasons to avoid such clients. First, they are often seeking your advice at the eleventh hour. As the newly hired attorney, you may not have time to properly investigate the matter or draft the required documents.

Second, clients dissatisfied with a previous attorney’s work may well be dissatisfied with yours. Don’t let your ego overwhelm your common sense. At a minimum, try to determine why the client was dissatisfied with the previous lawyer. If you can’t find a good reason, then the client, not the attorney, is probably the problem.

Third, clients who frequently switch attorneys may be trying to avoid legal bills. If you’re representing a person who has had multiple attorneys, obtain a retainer.

4. **Does the client have unrealistic expectations?** If a person believes he or she is entitled to millions for a simple slip and fall, decline the representation. These clients will inevitably be unhappy with the results you get.

5. **Is the client proceeding on principle alone?** Avoid the client who wants blood at all costs. They often do not appreciate the limitations of our legal system and will not accept anything short of total victory, however defined.

6. **Does the person exhibit irrational behavior?** Over-stressed or emotionally distraught clients can be troublesome in two respects. First, they may be unable to assist you in the representation. Client participation is critical to the success of any legal matter. For example, an attorney cannot zealously represent the best interests of a client who withholds vital information or is constantly changing his or her story.

Second, emotionally distraught clients sometimes instruct their attorneys to pursue a course of action they later regret. The classic example is the spouse who instructs the divorce attorney to extricate him or her from the marriage at any cost. The client may regret that decision a few months later and blame the attorney.
7. Has the client created unreasonable time constraints by seeking your counsel at the eleventh hour? As pointed out above, you should never accept a client or matter if you will not have time to properly represent the client. For example, many malpractice claims are caused by attorneys’ failure to name the proper defendant because they didn’t have time to investigate the matter.

8. Is the client of questionable moral character? If so, you may not want to represent him or her. For example, attorneys may defend individuals in criminal or civil matters whom they would not represent in business matters, such as securities issues.

Corporate attorneys must be particularly careful of start-up ventures. The attorney often discovers too late that the client is dishonest or financially incapable of consummating the deal. Frustrated investors and other third parties may then seek relief from the innocent attorney’s deep pocket. Today, a growing number of transactional attorneys investigate the background of new clients before agreeing to represent them.

9. Do you have any conflict of interests in representing the client in the matter at hand? Don’t forget to check thoroughly for conflicts; remember that some cannot be waived by the client.

Reassess past problem clients. There is one final step you can take to guard against the troublesome client. Make a list of the problem clients you have represented in the past and search for common themes. You will often find patterns in the clients, their legal matters or the circumstances surrounding the representation. You can then avoid these situations in the future.

Use nonengagement letters. Finally, if you decide to decline representation, send a nonengagement letter. Many attorneys have been surprised by malpractice suits brought on behalf of individuals they met only briefly during an initial interview.

Remember the following rules in drafting nonengagement letters: (1) clearly state your decision not to represent; (2) send the letter by certified mail, return receipt requested, particularly when a statute of limitations is approaching or you reviewed personal documents; (3) avoid stating opinions about the liability of various parties or saying that the case lacks merit; (4) if applicable, point out that a critical deadline is approaching, such as a statute of limitations, but do not specify the date; and (5) advise the declined client to seek other counsel as soon as possible.

Following these rules will help you select the proper clients for your practice and avoid costly malpractice claims.
§ 2.4 One Common Risk— from Start to Finish— Conflicts and Confidentiality

One of the most common examples of risk that arise in everyday practice is a conflict of interest problem— actual, whether prospective or potential. Conflicts are routinely at the top of the list of recurring and pervasive risks.

The acquisition of confidential information could lead to or result in the disqualification of the law firm and the loss of a client, with the incumbent discomfort of trying to explain to everyone how such a result occurred. For example, a lawyer has been approached by a long-time client who seeks to sell a parcel of real estate and wants the lawyer to find a buyer quickly, negotiate the deal and close the sale. The client believes that the parcel of land has little value, it being “in the middle of nowhere.” Coincidentally, a real estate developer has approached another member of the firm and disclosed information to that lawyer that he wants to develop a parcel of land “in the middle of nowhere” because the value is likely to go up quickly. He wants the lawyer to locate the seller and handle the negotiations and the closing. Within the firm, one lawyer approaches the other and in the course of the conversation, all of the foregoing information is exchanged and shared.

The dilemma presented by the foregoing situation opens numerous doors laden with practical and ethical concerns. They are discussed in the following subsections.

(a) Monty Hall Lives! Oops! — We’re on Both Sides of the Same Matter— the Use of Client Confidences

The Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.) set forth the obligations for counsel to follow in conflict situations, including the use of confidential information. First, Mass. R. Prof. C. 1.6 states as follows:

(a) A lawyer shall not reveal confidential information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal, and to the extent required by Rule 3.3 and Rule 4.1(b) must reveal, such information:

(1) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or
in substantial injury to the financial interests or prop-
erty of another, or to prevent the wrongful execution
or incarceration of another.

(2) to the extent the lawyer reasonably believes nec-
essary to establish a claim or defense on behalf of the
lawyer in a controversy between the lawyer and the
client, to establish a defense to a criminal charge or
civil claim against the lawyer based upon conduct in
which the client was involved, or to respond to alle-
gations in any proceeding concerning the lawyer's
representation of the client.

(3) to the extent the lawyer reasonably believes nec-
essary to rectify client fraud in which the lawyer's
services have been used, subject to Rule 3.3 (e).

(4) when permitted under these rules or required by
law or court order.

See definition of “consultation” in Mass. R. Prof. C. 9.1 (c).

Second, Mass. R. Prof. C. 1.8 (b) states as follows:

(c) A lawyer shall not use confidential information
relating to representation of a client to the disad-
vantage of the client or for the lawyer's advantage or
the advantage of a third person, unless the client con-
sents after consultation, except as Rule 1.6 or
Rule 3.3 would permit or require.

The obligation to preserve such confidences and secrets takes precedence over
all other obligations. See generally Comm'r v. Comcast Corp., 453 Mass. 293
(2009). Those confidences and secrets belong to the client and may be revealed
only after consent by the client is given, except in the rare circumstances elabo-
rated under Mass. R. Prof. C. 1.6(b) or 3.3. The only other “exception” is that
Mass. R. Prof. C. 1.8 permits disclosures that are impliedly authorized in order
to perform lawyerly functions. For an analysis of the role of the attorney-client
evidentiary privilege, as it was applied when the prior rule DR 4-101 was extant,
see, e.g., In the Matter of John Doe Grand Jury Investigation, 408 Mass. 480
(1990). There were also numerous opinions issued by the ABA and MBA commit-
tees on professional ethics in dealing with the prior rules. See, e.g., ABA Comm. on
Ethics and Prof'l Responsibility, Informal Ops. 1235 (1972), 1293 (1974), 1301
(1975); see also MBA Ethics Ops. 90-2, 84-3, 76-11.
(b) How Did We Get Ourselves into This Mess—Shoot First and Ask Questions Later

The danger in a fast-paced society is that, more often than not, we feel the pressure to start working before we figure out whether there exists an impediment to our doing so. The only way to avoid the avoidable is to check beforehand as to whether there is any reason why we cannot undertake the work. Attached as exhibits to this chapter are new matter forms, conflicts check forms, risk avoidance outlines and self-audit checklists.

(c) Are We In or Are We Out—What Use of Client Confidences Leads to Disqualification

Imputed Disqualification

The intriguing issue raised in the hypothetical fact pattern is whether there is any possibility of creating a screen within one firm when the two adverse clients have come to the different lawyers in the same firm at the same time and both matters are active. The Massachusetts Rules of Professional Conduct provide for the first time the possibility of sanctioned “screens.” (The applicable rules are set out in § 2.4, below.)

Before the possible remedy of a screen can be applied, the question of imputed disqualification arises. Imputed disqualification means that all members of a firm are disqualified from representing a client if one member is disqualified. The theory is based on the logical assumption that all information is shared or capable of being shared throughout the entity. Thus, if confidential information is reposed by a client in one attorney, the entire firm is charged with holding that information confidential for the benefit of that client.

In cases of lateral transfers (where an attorney leaves one firm and joins another), the new member imports into the new firm all the confidential information from the former firm. Thus, where the transferring attorney or her or his firm represented client A, and the new firm is representing client B in a matter adverse to client A, the question arises as to whether the new lawyer and all relevant information as to client A can effectively be screened off from the new firm and client B.

It is in such an instance that screening has been employed. The assumption therein is that the contaminating information can effectively be screened off from the new firm in such a way that client confidences will not be breached. The further assumption is that the new lawyer is not actively working on the ongoing matter in
the new firm that is adverse to that lawyer’s client and that client A’s prior matter is at an end.

If a conflict arises after representation has been undertaken, the lawyer would likely have to withdraw from the representation. See Mass. R. Prof. C. 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined by Mass. R. Prof. C. 1.9. See also Mass. R. Prof. C. 1.8(g) regarding aggregate pool claims. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see the comments to Mass. R. Prof. C. 1.3 and DeVaux v. American Home Assurance Co., 387 Mass. 814 (1983), as an example of how an attorney-client relationship can become established (being implied in fact) with very little effort. See also Bays v. Theran, 418 Mass. 685 (1994); G.D. Mathews & Sons Corp. v. MSN Corp., 54 Mass. App. Ct. 18 (2002).

(d) The Applicability and Use of “Screening” (f.k.a. “Chinese Walls”)

As noted above, screening may be applicable in some instances.

Mass. R. Prof. C. 1.10 states in relevant part

(d) When a lawyer becomes associated with a firm, the firm may not undertake to or continue to represent a person in a matter that the firm knows or reasonably should know is the same or a substantially related to a matter in which the newly associated lawyer (the “personally disqualified lawyer”), or a firm with which that lawyer was associated, had previously represented a client whose interests are materially adverse to that person unless:

(1) the personally disqualified lawyer has no information protected by Rule 1.6 or Rule 1.9 that is material to the matter (“material information”); or

(2) the personally disqualified lawyer (i) had neither substantial involvement nor substantial material information relating to the matter and (ii) is screened from any participation in the matter in accordance with paragraph (e) of this Rule and is apportioned no part of the fee therefrom.
(e) For the purposes of paragraph (d) of this Rule and of Rules 1.11 and 1.12, a personally disqualified lawyer in a firm will be deemed to have been screened from any participation in a matter if:

(1) all material information which the personally disqualified lawyer has has been isolated from the firm;

(2) the personally disqualified lawyer has been isolated from all contact with the client relating to the matter, and any witness for or against the client;

(3) the personally disqualified lawyer and the firm have been precluded from discussing the matter with each other;

(4) the former client of the personally disqualified lawyer or of the firm with which the personally disqualified lawyer was associated receives notice of the conflict and an affidavit of the personally disqualified lawyer and the firm describing the procedures being used effectively to screen the personally disqualified lawyer, and attesting that (i) the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current firm, (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer’s personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter; and

(5) the personally disqualified lawyer and the firm with which he is associated reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client. In any matter in which the former client and the person being represented by the firm with which the personally disqualified lawyer is associated are not before a tribunal, the firm, the personally dis-
qualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening procedures used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

The critical facts are the ability of the firm to erect an effective screen and the capacity for understanding (i.e., consent) on the part of all parties. As to the former, size of the firm is one critical factor. See, e.g., Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983); Manning v. Waring, Cox, 849 F.2d 222 (6th Cir. 1988). However, many jurisdictions reject screens as ineffective and antithetical to protecting client confidences. See, e.g., Amoco Chems. v. MacArthur, 568 F. Supp. 42 (N.D. Ga. 1983).

Practice Note
As to some transactions, screening may not be necessary; for example, representing the passenger and driver where there is no liability issue. However, these situations are rare and must be treated with great care.

Conflicts in Litigation
Ordinarily, a lawyer may not act or represent one client against another client whom the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are certain instances in which a lawyer may wear both hats. For example, an attorney may represent the driver and passenger if no issue of liability exists. The Supreme Judicial Court has held in McCourt Co. v. FPC Properties, 386 Mass. 145 (1982), that a parent corporation and its wholly owned subsidiaries should normally be treated as a single client for conflict purposes. See also Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

A lawyer may represent parties having opposing positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court. For an example, see Bays v. Theran, 418 Mass. 685 (1994).
(e) **How Do We Get Out of This Mess— to Avoid Disqualification, Do We Seek Consent— or Can We?**

In the hypothetical situation presented, as in similar situations, it may not be possible to seek the informed consent of the client, let alone obtain it. The obligation under Mass. R. Prof. C. 1.6 to preserve confidences and secrets will likely make it impossible to provide full disclosure. For example, in the instance at hand, if counsel sought to obtain the consent of the buyer for the firm to represent both seller and buyer, counsel could not reveal to the buyer the fact that seller believes that the land has little value and wants to move the land quickly. Similarly, counsel could not reveal to seller the information that an interstate highway is planned to pass right by the land.

The dilemma is apparent: to get informed consent, we may not be able to reveal the facts that are material and relevant to the process of getting the consent. As the comment to Mass. R. Prof. C. 1.6 states, a client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances when it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Mass. R. Prof. C. 1.10(a) states as follows:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8 (c), 1.9, or 2.2. A lawyer employed by the Public Counsel Division of the Committee for Public Counsel Services and a lawyer assigned to represent clients by the Private Counsel Division of that Committee are not considered to be associated. Lawyers are not considered to be associated merely because they have each individually been assigned to represent clients by the Committee for Public Counsel Services through its Private Counsel Division.
(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) When a lawyer becomes associated with a firm, the firm may not represent a person in a matter that the firm knows or reasonably should know is the same or a substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, had previously represented a client whose interests are materially adverse to that person unless:

(1) the associated lawyer has no information protected by Rule 1.6 or Rule 1.9 that is material to the matter, or the associated lawyer is screened from any participation in the matter; and

(2) the previously represented client whose interests are materially adverse is notified of the lawyer’s association with the new law firm and the present representation of that firm of the person on the same or a substantially related matter.

(e) For the purposes of paragraph (b) of this Rule and of Rules 1.11 and 1.12, a lawyer in a firm will be deemed to have been screened from any participation in a matter if:
(1) the lawyer has been isolated from information protected by Rule 1.6 that is material to the matter.

(2) the lawyer has been isolated from all contact with the client or any agent, officer, or employee of the client and any witness for or against the client;

(3) the lawyer and the firm have been precluded from discussing the matter with each other; and

(4) the firm has taken affirmative steps to accomplish the foregoing.

In addition, Mass. R. Prof. C. 1.7 states as follows:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.
(f) Now, How Do We Get Out of This Mess—If We Are Able to Obtain Informed Consent, Is It Obvious That We Can Represent the Client’s Interests?

Some conflicts are not waivable. See Mass. R. Prof. C. 1.7(a), 1.7(b), 1.9. Whether it is obvious that a lawyer can adequately represent the interests of both clients is a question of fact. However, the standard to be satisfied is, and should be, quite high. See, e.g., MBA Ethics Op. Nos. 94-2, 92-2, 91-2, 90-3.

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer’s relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally inapposite to each other, but concurrent representation may be permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and depending upon the circumstances, a conflict of interest may arise. In estate administration, the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under California law, for example, the client is the estate or trust, including its beneficiaries. We need to make clear to the parties involved the parameters of each relationship.

A lawyer for a close corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the reaction of the players if the conflict arises, the effect of the lawyer’s resignation from the board in the event of conflict and the necessity of the corporation having to obtain legal advice from another lawyer in such situations. If there is material risk that wearing more than one hat will compromise the lawyer’s independence of professional judgment, the lawyer should not serve as a director.

The concern about the concurrent representation within one firm of the two clients is that, even if one somehow could obtain the consent of both to the parallel representation, each lawyer is, nonetheless, bound to hold confidential the in-
formation imparted to him or her by the client and still may not reveal or use it. The very practical effect of such a compartmentalized representation is that the lawyer will be impaired in her or his representation and cannot assertively seek out information to assist the client that a truly independent and “unimpaired” attorney could act upon.

(g) How Do We Avoid the Quicksand the Second Time—the Use of Conflicts Checks and Other Management Tools, Such as Supervisors

First Steps

As noted in the fact scenario set out above, an impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest. As noted above, suggested forms, checklists and policies relating to new matters, conflicts and risk avoidance are attached as appendices to this chapter.

Dealing with potential issues at the very outset of the relationship is difficult, but critical. For example, if asked to represent two partners in a new venture, lawyers need to inform the parties that there can be no secrets among the three of them or that if an adversarial or conflict issue arises, the lawyer will likely have to withdraw from the joint representation. Being as candid as possible at the very outset of the relationship will help to inform the prospective client as to the potential problems that could arise and assure that person that you are willing to turn away business in order to protect the client’s interests.

Next: Crisis Management After the Risk Has Arisen

One of the ways to manage potential and actual risk is to have in place a management structure wherein supervisory roles are well defined. Even in smaller firms, it is beneficial to have “department heads” whose responsibility it is to oversee the substantive work in his or her area, to provide a focal point for raising questions and problems and to manage the flow of business. Self-evident as that may seem, the Supreme Judicial Court has memorialized the obligatory roles of supervisors and subordinates in the Massachusetts Rules of Professional Conduct.
1. Responsibilities of a Partner or Supervisory Lawyer

No counterpart to this rule existed in the prior Disciplinary Rules. In particular, subsection (c) specifically exposes a lawyer to responsibility for another lawyer's violation of the rules of professional conduct if the supervising lawyer knowingly orders or ratifies the conduct involved in that regard. A supervising lawyer should make it clear in writing, if necessary, that the supervised lawyer should not violate any rule of professional conduct.

This is the first instance, other than limited language contained in the prior disciplinary rules prohibiting the disclosure of confidential information or engaging in inappropriate trial publicity, where a supervising lawyer can now be held responsible for another lawyer's acts. The general principle of “respondeat superior” has now been elevated to a potential disciplinary violation.

Again, “knowledge” as used in this rule is defined under Mass. R. Prof. C. 9.1 and, because of the inference of knowledge that may be drawn under that definition, a greater burden may be imposed on a supervisory lawyer to act in circumstances where “actual knowledge” is not possessed by the lawyer.

The language in Mass. R. Prof. C. 9.1 is identical to that in Model Rule 5.1:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
There is no corresponding former Massachusetts rule to Mass. R. Prof. C. 5.1, but see DR 4-101 (D) and DR 7-107 (J).


2. Responsibilities of a Subordinate Lawyer

This rule presents the flip side of Mass. R. Prof. C. 5.1. It, too, had no counterpart in the prior Disciplinary Rules. Both Mass. R. Prof. C. 5.1 and 5.2 are designed to encourage seeking advice, within or without a law firm, as to conduct that might result in a violation. Given the scope of these two rules, it would be propitious for attorneys to establish checks and balances necessary to avoid violation of the rule.

Rule 5.2 of the Massachusetts Rules of Professional Conduct provides the subordinate lawyer with a clear “safe harbor” if that lawyer acts in accordance with a supervisory lawyer’s “reasonable resolution of an arguable question of professional duty.” That means, particularly in larger firms, that a subordinate lawyer does not have to take a question of professional duty to a firm “ombudsperson” and risk political strife therein. Instead, the (typically) younger lawyer can rely directly on the supervisory lawyer’s reasonable resolution of a question of duty and the rules does not seem to impose a standard on the subordinate lawyer to question that decision. Said another way, the senior lawyer’s determination of what is reasonable would appear to insulate the junior lawyer’s actions.

Rule 5.2 provides as follows:

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.

This language is identical to Model Rule 5.2. There is no corresponding former Massachusetts Rule.
3. Responsibilities Regarding Nonlawyer Assistants

There was no corresponding DR. Rule 5.3 of the Massachusetts Rules of Professional Conduct is the counterpart of Mass. R. Prof. C. 5.1 as it pertains to nonlawyers employed or retained or associated with a lawyer.

Rule 5.3 of the Massachusetts Rules of Professional Conduct provides as follows:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

This language is identical to Model Rule 5.3. There is no corresponding former Massachusetts rule, but see DR 4-101(D) and DR 7-107(J).

See, e.g., In re Jackman, No. BD-2004-020 (May 24, 2004), available at http://www.mass.gov/obcbbo/bd04-020.htm, vacated and suspension reduced, 444 Mass. 1013 (2005) (day-to-day operations of the firm, including the handling of funds, were undertaken by nonlawyers and were not adequately supervised by the respondent, resulting in the conversion of client and other funds).

§ 3 DISCIPLINARY OR MALPRACTICE DEFENSE

§ 3.1 Malpractice and Disciplinary Cases in Massachusetts

§ 3.2 Self-Audits

There are a number of “self-audit” outlines and checklists that have been created and used over the years. These self-audits provide an excellent mechanism in which to look for and avoid incipient problems, to better organize the flow of information within a firm, to view and analyze the ways in which law firms function and to establish methods for managing risk. Included in this chapter as exhibits are several forms of self-audit created by the following persons and entities:

§ 4 CONCLUSION

Having seen a variety of issues, methods of recognition and management, take two other tests. The following, produced by the Wisconsin Lawyers Mutual Insurance Co., is entitled “49 New Year’s Resolutions for Lawyers and Ten New Year’s Resolutions for Lawyers” (the concentrated version). It contains helpful hints to work through the practice morass, organize one’s mind, cure your slice, make the Red Sox unbeatable, and a wealth of other practical concerns.

§ 4.1 Risk Management: 49 New Year’s Resolutions for Lawyers

1. Set a goal of returning phone calls within twenty-four hours. Reserve time at the beginning and end of each work day to return phone calls.

2. Keep a record of all voice-mail messages, including name, date, time, phone numbers and key points.
3. Read every document before it leaves your office. Don’t expect your support staff to catch your errors.

4. Make up a proofreading checklist that you and your staff can use to check names, dates, amounts and other details. Include several columns for multiple drafts of work product.

5. Personally sign your letters. You will stay on top of correspondence and instill client confidence.

6. Write a policy for identifying conflicts of interest. Make sure everyone in the firm is using the same policy.

7. Schedule a monthly meeting of support staff to discuss office procedures, confidentiality, client relations, ethics, and similar topics. Ask your staff for their input.

8. Schedule enough time to do work wrong— and correct it— before the statute of limitations or other deadline runs.

9. Before you accept a position on a client’s board of directors, consider the potential conflict of interest.

10. Discuss fee arrangements in your initial meeting. Follow up with a written fee agreement.

11. If you are offered an interest in a client’s business in lieu of fees, say no.

12. Check for conflicts of interest before you have heard the client’s life story.

13. Never answer questions from telephone callers before you have their full name and phone number.

14. Send letters of engagement to new clients and to current clients who come to you with new matters.

15. Stay loyal to the client you agreed to represent. Don’t begin prospecting with the opposing party, no matter how tempting.

16. Know who your client is. Would your client agree? Would the person who is paying for the representation agree?

17. Schedule one day a month to do the chores you dislike most. Reward your self-discipline with dinner and a movie with someone special.
18. Write a script for saying “no” on a note card that you can pull out of your top desk drawer when needed. For example, “I appreciate your confidence in my work; however, I don’t have the time/resources/experience to give your legal matter the consideration it needs. Thank you for thinking of my firm.” Follow up with a nonengagement letter.

19. If the client's problem would be better solved outside the legal system, say so up front. Don’t wait for the client to discover it on his or her own after you have racked up time and fees.

20. Identify another attorney who could protect your clients’ interests in your unforeseen absence. If you’re a sole practitioner, work out a reciprocal arrangement with another attorney for unplanned absences.

21. Examine your bill from the client's perspective. Does your bill clearly state what services your firm provided, including those offered at no charge?

22. Check your accounts receivable. Call clients who are more than 45 days past due and ask if they have concerns about your firm’s representation.

23. Mail a short client satisfaction survey with your bill. Follow up with a phone call if you detect concerns.

24. Sit quietly in your reception area or conference room. What conversations can you overhear? Would your clients feel their confidentiality is being compromised?

25. Develop written procedures for opening, storing and retrieving, archiving and destroying client files.


27. Send “for your information” copies of all important correspondence and documents to your clients.

28. Write a letter when clients choose not to follow your recommendations in order to document your advice.

29. Obtain written client consent before accepting any settlement offers.

30. Keep detailed time records.

31. Back up all your computer files daily or weekly. Store the backup disk or tape offsite.
32. Investigate new calendaring and docketing software.

33. Remember, time continues to run on a statute of limitations even when you have an offer on the table.

34. Review trust account procedures with everyone in your firm.

35. Participate in continuing legal education and ethics education that is relevant to your area of practice.

36. Become better acquainted with at least five attorneys through your state or local bar association.

37. Identify five promising new clients. Let them know you’re interested in their business over lunch or dinner.

38. Suggest that five undesirable or unprofitable clients seek other counsel.

39. Exercise caution in making referrals. Give clients at least three names or the phone number of the State Bar’s Lawyer Referral & Information Service.

40. Establish written job descriptions and performance expectations for everyone in your firm. Review quarterly.

41. Ask satisfied clients for referrals. Clients who find you by word of mouth are less risky than clients who pick your name out of the phone book.

42. Ask someone to critique your advertisements. Do they focus on service to clients? Do they inflate your firm’s capabilities?

43. Meet with your clients on their turf.

44. Schedule your own personal retreat, away from the office and telephone. Think about what kind of practice you would like to have two years, five years, 10 years from today.

45. Practice active listening. Look clients in the eye. Paraphrase and repeat their statements back to them. Ask if you have correctly interpreted their concerns.

46. Make sure the limits of liability on all your insurance policies are adequate.

47. Report claims or potential claims to your professional liability insurer as soon as you become aware of an error or omission. Failure to report during the policy period may jeopardize your coverage.

48. Become a mentor to a new lawyer.
49. Never promise more than you can deliver.


§ 4.2 Ten New Year’s Resolutions for Lawyers

Start the new year out right with these ten New Year’s resolutions for lawyers who want to avoid malpractice, reduce stress and enjoy practicing law.

I resolve to:

1. Return clients’ phone calls within twenty-four hours.

2. Seek out five promising new clients.

3. Suggest that five undesirable clients seek other counsel.

4. Double-check every statute of limitation.

5. Block out time to work on files well in advance of the deadline.


7. Send letters of engagement to new clients or to current clients with new matters.

8. Refer work to other attorneys when I don’t have the necessary time, knowledge or resources.

9. Become acquainted (or better acquainted) with at least six attorneys through my local or state bar association.

10. Look people in the eye and listen when they speak to me.

SECTION 2.3

Taking the Case: Conflicts of Interest*

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Scope Note
This chapter addresses conflict-of-interest issues practitioners must consider when deciding whether to take on a new case. It reviews conflicts arising from prior or simultaneous representation of an adverse party, the special ethical dilemmas faced by lawyers who are transitioning from government employment to private practice, and the rules that apply to advocates who may be called as witnesses. The chapter concludes by briefly discussing the appealability of orders disqualifying counsel.

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* Reprinted from Ethical Lawyering in Massachusetts (MCLE, Inc. 3d ed. 2009 & Supp. 2013). Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
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§ 1  INTRODUCTION

Although “[t]he undivided loyalty that a lawyer owes to his clients,” McCourt Co. v. FPC Properties, Inc., 386 Mass. 145 (1982), is the foundation of the lawyer’s relationship to his or her clients, conflicts nonetheless arise over taking a case, keeping a case, and leaving a case. They have been characterized under the Massachusetts Rules of Professional Conduct in the following categories.

§ 1.1  Prior Representations

You may be asked to represent a new client in a matter in which a former client is involved. You need to determine whether you can and should represent the prospective or existing client, whether you can and should represent the former client, or whether you should get out of the case altogether.

§ 1.2  Simultaneous Representations

You may be asked to represent a client in more than one case. You may also be asked to represent more than one client in related cases, or to take a case in litigation against a current client on an unrelated matter.

§ 1.3  Independent Professional Judgment

You may become involved in a matter with a client in which your judgment may be adversely affected by having to balance your personal and professional concerns and interests.

§ 1.4  Lawyer as Witness

You may be called as a witness in a pending client matter.
§ 2    PRIOR REPRESENTATION
        OF ADVERSE PARTY

§ 2.1    General Principles

You should be aware of the various issues concerning disqualification. Rule
1.6(a) of the Massachusetts Rules of Professional Conduct, Confidentiality of
Information, provides in material part that

[a] lawyer shall not reveal confidential information
relating to representation of a client unless the client
consents after consultation, except for disclosures
that are impliedly authorized in order to carry out the
representation, and except as stated in paragraph (b).

Rule 1.8(b) of the Massachusetts Rules of Professional Conduct provides as
follows:

A lawyer shall not use confidential information relat-
ing to representation of the client to the disadvantage
of the client or for the lawyer's advantage or the ad-
vantage of a third person, unless the client consents
after consultation, except as Rule 1.6 or Rule 3.3
would permit or require.

Rule 1.9(a) of the Massachusetts Rules of Professional Conduct provides as
follows:

A lawyer who has formerly represented a client in a
matter shall not thereafter represent another person in
the same or a substantially related matter in which
that person's interests are materially adverse to the in-
terests of the former client unless the former client
consents after consultation.

Under the Disciplinary Rules, these issues were dealt with by DR 4-101(B)
and (C).

Whenever a lawyer is asked to take a case against a former client, a question
arises as to whether the lawyer may intentionally or inadvertently violate the
Massachusetts Rules of Professional Conduct concerning preservation of client
confidences. Absent client consent after full disclosure, a lawyer may not take a
case against a former client in a matter that is substantially related to a matter in
which the lawyer represented the former client.

In formulating the “substantial relationship” rule, Judge Weinfeld wrote in the
seminal case that

the former client need show no more than that the
matters embraced within the pending suit wherein his
former attorney appears on behalf of his adversary
are substantially related to the matters or cause of ac-
tion wherein the attorney previously represented him,
the former client. The Court will assume that during
the course of the former representation confidences
were disclosed to the attorney bearing on the subject
matter of the representation. It will not inquire into
their nature and extent. Only in this manner can the
lawyer’s duty of absolute fidelity be enforced and the
spirit of the rule relating to privileged communications
be maintained.

(S.D.N.Y. 1953) (emphasis added).

The “substantially related” test became the generally accepted standard for dis-
qualification in subsequent adverse representation cases. See Kevlik v. Goldstein,
724 F.2d 844, 850–51 (1st Cir. 1984); MBA Ethics Ops. 75-7, 76-14, 88-2. The
Supreme Judicial Court explicitly adopted the substantial relationship test in
Adoption of Erica, 426 Mass. 55, 61 (1997), noting that in prior cases it was
unnecessary to address the issue because the question of disqualification based
on successive representation could be decided on different grounds. In Adoption
of Erica, the court found no alternative ground to evaluate the order disqualifying
counsel, but was mindful that the new Massachusetts Rules of Professional
Conduct expressly incorporated the substantial relationship test in Rule 1.9(a).

In Adoption of Erica, the court recognized that Rule 1.9(a) did not directly ad-
dress the adverse interests of the present client. Adoption of Erica, 426 Mass. at
61 n.7. Nonetheless, the court stated, “We interpret the scope of both DR 4-101(B)
and Rule 1.9 to encompass the adverse effect on the interest of the former and
the present client.” Adoption of Erica, 426 Mass. at 61 n.7. The trial judge had
disqualified the attorney representing a child in a proceeding under G.L. c. 210,
§ 3 to dispense with parental consent to adoption based on the attorney’s previ-
ous representation of the child’s grandfather. The court found that this was error
because there was an absence of evidence to indicate that the grandfather’s inter-
ests were “adverse” to the child and there was nothing in the record to indicate
that the former representation was substantially related to the current representation. Adoption of Erica, 426 Mass. at 62. On the latter point, the court noted that some courts have focused on the subject of factual context of the former and current matters, whereas others have adopted a stricter standard that requires the showing of a relationship between the issues of the two matters. In Adoption of Erica, there was no necessity to choose between the two tests because there was no showing of a relationship—let alone a substantial relationship—between the matters in which the attorney formerly represented the grandfather and the G.L. c. 210, § 3 proceeding.

In G.D. Mathews & Sons v. MSN Corp., 54 Mass. App. Ct. 18, 20–22 (2002), a law firm representing the defendant had represented the plaintiff in previous litigation. The court upheld the disqualification of the defendant’s law firm, relying on the “substantially related” test set forth in Rule 1.9. The firm’s “continued representation of MSN presented a ‘strong temptation’ that could compromise [the firm's] duty to preserve confidential information provided by Mathews during the course of the 1995 action.” G.D. Mathews & Sons v. MSN Corp., 54 Mass. App. Ct. at 22. In Rodriguez v. Montalvo, 337 F. Supp. 2d 212, 218–19 (D. Mass. 2004), the court disqualified an attorney from representing a landlord in a dispute with a tenant where the tenant had consulted, on a substantially related matter, a paralegal at a legal services organization where the attorney previously worked and was responsible for reviewing the paralegal’s intake files. See also Smith & Nephew, Inc. v. Ethicon, Inc., 98 F. Supp. 2d 106, 110 (D. Mass. 2000) (law firm disqualified from representing employer, which was asserting ownership interests in patents held by former employees, where attorney hired by employees fifteen years earlier to negotiate employment agreements had drafted contractual provisions determinative of current dispute, and was currently of counsel with firm); United States v. Lemieux, 532 F. Supp. 2d 225, 231–32 (D. Mass. 2008) (defendant’s attorney disqualified because he initially represented codefendant for two months at initial appearance and probable cause hearing and obtained confidential information from codefendant that he could not ethically use or refrain from using in joint trial).

Under the substantial relationship test, all that needs to be shown by the client is that the subject matter of the second action is “substantially related” to the prior representation. Even where “considerable time” has passed, disqualification will be ordered where “the attorneys had been exposed to confidential information that could be used to the [former client’s] disadvantage.” R&D Muller, Ltd. v. Fontaine’s Auction Gallery, LLC, 74 Mass. App. Ct. 906, 907 (2009). “A finding of actual use of confidential information is unnecessary if the substantial relationship test is met; under that test, the court will assume an attorney will use confidences obtained from the former client in the subsequent representation.” ebix.com, Inc. v. McCracken, 312 F. Supp. 2d 82, 89–90 (D. Mass. 2004) (dic-
Detailed factual findings are required to support disqualification on the basis that two representations are “substantially related.” *Slade v. Ormsby*, 69 Mass. App. Ct. 542, 547 (2007) (remanding disqualification order where trial judge’s decision “was not adequately supported”).

Certain broad statements in some older opinions suggest that once this is done, there is an irrebuttable presumption that confidences were provided to the attorney in the first action and that, absent the client’s consent, the attorney must be disqualified in the second action.

This rationale certainly applied to *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953), which dealt with an antitrust specialist who switched sides. See also *Consol. Theatres v. Warner Bros. Circuit Mgmt. Corp.*, 216 F.2d 920 (2d Cir. 1954). Subsequently, the Second Circuit recognized that difficulties can arise in making a rigid rule where a junior associate in a large law firm moves on to another firm. Thus, *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975) found that the presumption that confidences were provided to the attorney in the first action was rebuttable and, under the particular facts, refused to disqualify the plaintiff’s lawyer in the second action. In rejecting the irrebuttable presumption approach, the District Court in *Silver Chrysler* ruled that:

> the court will assume that a senior partner knows more about what is happening in the firm generally than does a junior associate. . . . The persuasiveness and detail of the proof required will . . . vary inversely with the status of the lawyer in the firm in the prior litigation.

The law must reject defendants’ suggestion that for purposes of disqualification, in an organization as large as Kelley Drye [at this time, Kelley Drye had eighty lawyers], every associate is charged with the knowledge of the confidences of every lawyer in the firm. Nor can it accept the more limited submission that any associate who did substantial work for a client is thereafter precluded from opposing it in any litigation. Each case must rest on a close analysis of the facts in light of the sometimes conflicting policies favoring the protection of former client confidences and freedom of new clients to retain attorneys of their choice.
TAKING THE CASE: CONFLICTS OF INTEREST


Rule 1.10(a) of the Massachusetts Rules of Professional Conduct follows DR 5-105(D) in requiring that when one attorney is disqualified, all the attorneys in the law firm are disqualified (except for attorneys employed by the Public Counsel Division of the Committee for Public Counsel Services):

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c) or 1.9. A lawyer employed by the Public Counsel Division of the Committee for Public Counsel Services and a lawyer assigned to represent clients by the Private Counsel Division of that committee are not considered to be associated. Lawyers are not considered to be associated merely because they have individually been assigned to represent clients by the Committee for Public Counsel Services through its Private Counsel Division.

At least as to situations in which the lawyer is a witness, the requirement in DR 5-105(D) that all attorneys in a firm be disqualified if one attorney is disqualified was criticized in BBA Ethics Op. 93-5, 38 Boston B.J., May/June 1994, at 28.

§ 2.2 Screening

Massachusetts Rule of Professional Conduct 1.10 provides for screening in detailed terms when an attorney switches firms. Courts outside Massachusetts remain divided as to whether screening mechanisms are appropriate when attorneys switch firms. For those rejecting such remedies, see Falvey v. A.P.C. Sales Corp., 185 F.R.D. 120, 125–26 (D.R.I. 1999) (screening not permitted under ABA Model Rules); Penn Mutual Life v. Cleveland Mall Associates, 841 F. Supp. 815, 817–18 (E.D. Tenn. 1993) (screening devices insufficient to defeat disqualification of plaintiff’s counsel where conflict policy was not implemented until five months after lawsuit was filed, where nothing in conflict policy prevented “infected” attorneys from sharing fees derived from Penn Mutual litigation and where “infected” attorney worked in same office as the lawyers prosecuting claim); Baxter Diagnostics, Inc. v. AVL Scientific Corp., 798 F. Supp. 612, 616 (C.D. Cal. 1992) (screening mechanisms and other remedial suggestions, including bifurcation, rejected in case where defendants’ attorneys previously repre-

**Practice Note**
Boston Bar Association Ethics Opinion 94–1 observed that courts have not been sympathetic to firms that institute screening devices months after the new lawyer arrives. *Boston B.J.*, Nov./Dec. 1994, at 27, 28.

Other courts have upheld screening devices. See Cromley v. Bd. of Educ. of Lockport H.S.D., 17 F.3d 1059, 1065 (7th Cir. 1994) and cases cited. In Baker v. Cox, 974 F. Supp. 73 (D. Mass. 1997), the court refused to disqualify the entire Office of the Attorney General from representing employees of the Executive Office of Environmental Affairs (EOEA) because a law student intern at the law firm representing the plaintiffs in related litigation took a job with the Commonwealth as special counsel for public access at the Massachusetts Office of Coastal Zone Management. The court noted that the person who switched employment performed legal research on public coastal access issues rather than any work related to the plaintiffs’ litigation. In reviewing the provisions of Canons 1, 4, 5, 7, and 9, which had been adopted pursuant to Local Rule 83.6(4)(b) of the U.S. District Court for the District of Massachusetts, the court noted the draconian nature of the relief sought (disqualification of the entire Office of the Attorney General), found that there was no basis for suggesting there had been any exchange of confidences, and denied disqualification. The court also stated, however, that “if requested by plaintiffs, the office of the Attorney General and the EOEA shall build a ‘Chinese wall’ between Ms. Balozzi [the law student–special counsel at issue] and all persons (legal and non-legal) involved in this litigation.” Baker v. Cox, 974 F. Supp. at 77. Although Baker v. Cox did not apply the Massachusetts Rules of Professional Conduct (which were not in effect at the time the controversy arose), it would seem that the same result would obtain on the ground that Ms. Balozzi had neither substantial involvement nor substantial material information relating to the matter. Indeed, almost all cases in which screening has been permitted have involved situations in which the infected attorney had neither substantial involvement nor substantial material information relating to the matter.
The Report to the Justices of the Supreme Judicial Court of its Committee on Rules of Professional Conduct recommended that screening be permitted with respect to former government employment but severely restricted with respect to private attorneys moving from firm to firm. See Mass. R. Prof. C. 1.10, 1.11. Rule 1.10 specifically provides that unless a lawyer moving to a new firm has “no information protected by Rule 1.6 or Rule 1.9 that is material to the matter,” the new firm may not represent a client in the same or a substantially related matter for a client whose interests are materially adverse unless

the personally disqualified lawyer (i) had neither substantial involvement nor substantial material information relating to the matter, and (ii) is screened from any participation in the matter in accordance with (e) of this Rule and is apportioned no part of the fee therefrom.

Mass. R. Prof. C. 1.10(d). The screening requirement is very detailed and provides for judicial review.

Under the Massachusetts Rules of Professional Conduct, screening is not permitted in situations where the infected attorney had substantial involvement or substantial material information relating to the matter. See U.S. Filter Corp. v. Ionics, Inc., 189 F.R.D. 26, 29–30 (D. Mass. 1999) (attorney in firm representing defendant in patent case who was considering joining firm representing plaintiff did not fall within the exception for lack of substantial involvement or substantial material information where attorney was one of two equity partners in ten-person firm and consulted with other equity partner, who was spending significant amounts of time on pending litigation). “Substantial involvement” does not include an associate spending “7.2 hours . . . researching a discrete legal issue . . . for which she wrote a one and one-half page single spaced memorandum summarizing her research.” O’Donnell v. Robert Half Int’l, Inc., 641 F. Supp. 2d 84, 87 (D. Mass. 2009). “Substantial material information,” however, includes exposure to a practice group meeting at which strategy was discussed, a discussion with a partner about an article to be published in which the particular case was discussed, a discussion with a partner about an article to be published in which the particular case was discussed, and receiving confidential information at the time the research memorandum was requested. O’Donnell v. Robert Half Int’l, Inc., 641 F. Supp. 2d at 88–89. This warranted disqualification even where the court credited the associate’s testimony that “she had absolutely no memory of ever having worked on the . . . case or of having received information about . . . [the case].” O’Donnell v. Robert Half Int’l, Inc., 641 F. Supp. 2d at 87. On the other hand, after the “infected” associate left the second firm, the firm was not precluded from representing another plaintiff against the same defendant in a similar claim because the “risk of recalling the substantial material information to which she was exposed and . . . the subsequent intolerably strong temptation to divulge such information

§ 3 SIMULTANEOUS REPRESENTATION OF CONFLICTING INTERESTS

Issues covered by former DR 5-105 are now largely dealt with by Mass. R. Prof. C. 1.7, Conflict of Interest: General Rule, which provides in material part that

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other clients; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Although the wording is different in Mass. R. Prof. C. 1.7, the consent requirement is virtually identical and the tests are not materially different.

Note that Rule 1.7(b) refers to material limitation by the lawyer’s responsibility to another client or to a third person. The “critical inquiry is whether the lawyer has a competing interest or responsibility that ‘will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of a client.’”

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Client consent to simultaneous adverse representation of clients in litigation is required even for unrelated matters. McCourt Co. v. FPC Props., Inc., 386 Mass. 145 (1982). Consent is required even if it appears probable that the client “will not in fact be prejudiced by the concurrent participation of the law firm in both actions.” McCourt Co. v. FPC Props., Inc., 386 Mass. at 146.

McCourt did recognize that application of this rule for a large corporation could permit the client to “distribute its legal business with the view to barring any local attorney from handling cases against the corporation.” McCourt Co. v. FPC Props., Inc., 386 Mass. at 151. However, the court stated that it need not pass on this question because there was no evidence of “any such anticipatorily defensive behavior” by the client. McCourt Co. v. FPC Props., Inc., 386 Mass. at 151.

Subsequent to McCourt, the court held that where the attorney reasonably believed at the outset of representing a client that there would be an amicable settlement without a lawsuit, his or her representation did not constitute simultaneous representation of two clients requiring consent within the meaning of DR 5-105(C). Masiello v. Perini Corp., 394 Mass. 842 (1985). In Masiello, an attorney represented a joint venture in three lawsuits relating to the extension of the MBTA’s Red Line through Cambridge and Somerville. In the first and second suits, the Cambridge building inspector and the Cambridge fire chief sought to enjoin the project. In the third action, in federal court, Red Line Alert, a group of concerned citizens, challenged the sufficiency of an environmental impact report prepared for the project by the Urban Mass Transit Administration. The Perini Corporation was also engaged in the disputed construction and requested the attorney to represent it in the three actions because its interest was identical to that of the joint venture. The first two actions had been completed by 1979; however, the federal court action was not concluded until 1982. Masiello v. Perini Corp., 394 Mass. at 843.

The Masiellos consulted the attorney in 1981 regarding damage to their property, allegedly resulting from Perini’s failure to take sufficient precautions to prevent such damage during construction of the subway extension. The attorney wrote to Perini’s insurer, explaining the claim and stating his intention to effect a fair settlement of the claim as promptly as possible. The trial judge found that at the time the attorney wrote the letter, he believed the problem “could be settled amicably without a lawsuit.” When this did not occur, he withdrew from the representation of the Masiellos, who procured another attorney, filed suit on January 4, 1982, and
thereafter asked the attorney to represent them anew. A motion to disqualify the attorney based on McCourt was denied because in 1981 the attorney reasonably believed that he could effectuate an amicable settlement; therefore, no differing or conflicting interest existed requiring that consent be obtained. Masiello v. Perini Corp., 394 Mass. at 846–47.

Although the point has not been dealt with expressly in Massachusetts, courts elsewhere have held that a party who wishes to object to simultaneous adverse representation must do so on a reasonable basis or be estopped from asserting the conflict. See City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 205–11 (N.D. Ohio 1976), aff’d, 573 F.2d 1310 (6th Cir. 1977); cf. Levitt v. Levitt, 9 Mass. App. Ct. 894, 894 (1980) (Rule 3 of the Superior Court Rules—and its predecessor—“requires that an objection to the right of an attorney to appear for the opposite party is to be made within ten days after the entry of the case or of the appearance of the attorney”).

For a discussion on the adequacy of “full disclosure” and “consent,” see Maddocks v. Ricker, 403 Mass. 592, 597 (1988) (affidavit merely stating that client has consulted to multiple representation “does not present the kind of consent referred to in DR 5-105(C)’’); MBA Ethics Ops. 81-2, 85-1, 87-1 (attorney “wisely” referred clients “to another attorney so that they may have independent counsel in deciding whether to give their consent”); and MBA Ethics Op. 90-3 (disclosure should be in writing). For a discussion of full disclosure and obvious adequate representation, see MBA Ethics Ops. 92-2 and 92-3; BBA Ethics Op. 93-3; Boston B.J., May/June 1994, at 26–29; and Image Technical Services, Inc. v. Eastman Kodak Co., 820 F. Supp. 1212, 1216 (N.D. Cal. 1993).

Consent is not the end of the matter—it is only the beginning. In addition to consent after full disclosure, the lawyer must reasonably believe that the representation will not be adversely affected. Under DR 5-105(C), it had to be “obvious” that the lawyer could “adequately” represent the interests of all. The next question was “obvious to whom?” It was apparent that the term could not have referred to the clients, because the clients would have already consented after full disclosure. The better view was that the obviousness requirement was an objective one; that is, it must have been obvious to a disinterested observer, such as a judge, that the attorney could “adequately” represent the interests of all. For discussions of obviousness, see MBA Ethics Ops. 78-12, 80-2, 80-10, and 85-1, and Wellman v. Willis, 400 Mass. 494, 501 n.16 (1987). Although in McCann v. Davis, Malm & D’Agostine, 423 Mass. 558, 560 (1996) (not obvious that law firm could represent both buyer and seller of stock in nonlitigation matters) the Supreme Judicial Court acknowledged that other cases have used an objective standard to determine obviousness, it suggested in Wellman v. Willis, 400 Mass. at 502, that deference would be given to the exercise of an attorney’s best judgment. Where the plaintiff’s attorney is brought in as a third-party defendant al-
leging a contribution claim, “it is certainly not ‘obvious,’ in the words of DR 5-105(C),” that the attorney “can adequately represent the interest[s] of both the plaintiffs and himself.” Maddocks v. Ricker, 403 Mass. 592, 597 (1988); cf. Brown & Williamson Tobacco Corp. v. Daniel Int’l Corp., 563 F.2d 671, 673 (5th Cir. 1977) (attorney may properly represent two corporations technically in adverse position— one was a fourth-party plaintiff and the other a fifth-party plaintiff— where “capital stock of each is owned by the same three members of one family, with the exception of a minuscule interest held by the children of two of the three co-owners”); see also MBA Ethics Op. 86-2 (joint representation of town and police officer in civil rights action improper if town wishes to assert defense that officer was not acting within scope of official duties because “it is plainly not ‘obvious’ that counsel can represent both”); MBA Ethics Op. 87-1. The adequacy requirement depends so much on the particular facts that it is difficult to formulate a useful definition. See MBA Ethics Ops. 78-12, 80-10, 81-2, 90-3.

§ 4 INDEPENDENT PROFESSIONAL JUDGMENT

Former DR 5-101(A) is now dealt with in Mass. R. Prof. C. 1.7. See discussion in § 3, above.

In including “financial, business, property, or personal interests,” DR 5-101 sought to cover anything that might affect the independent professional judgment of the lawyer. Some examples have been discussed in the following MBA Ethics Opinions:

- MBA Ethics Op. 79-2— discussion of the circumstances under which an attorney may receive commissions from the promoters of tax shelter sales while at the same time providing legal advice to purchasers of the tax shelters.

- MBA Ethics Op. 81-7— discussion of an attorney taking a second mortgage on a client’s home as security for a fee to be rendered in a noncontingent civil matter.

- MBA Ethics Op. 81-9— a lawyer may not bid on his or her own account at a third party’s foreclosure sale of property involving substantial equity that has been attached to satisfy his or her client’s judgment (even with the client’s consent) unless the lawyer agrees in advance to bid an amount sufficient to satisfy the client’s judgment in full.
• MBA Ethics Op. 82-4—discussion of the circumstances under which an attorney who represents a real estate owner in drafting condominium documents and participates in the closing of titles to the condominium units may properly act as a broker for the owner in the sales of the units.

• MBA Ethics Op. 86-1—discussion of the circumstances under which a lawyer who is a defendant in a legal malpractice action brought by a long-standing, regular client may continue to represent that client on other matters and new matters.

• MBA Ethics Op. 95-3—discussion of circumstances under which relative of district attorney could represent criminal defendants whom the district attorney’s office prosecuted.

Disciplinary Rule 5-101 contained two tests that required the lawyer to obtain the client’s consent after full disclosure: a subjective test and an objective test. With respect to the first test, the question was whether in the lawyer’s opinion, “his professional judgment on behalf of his client will be . . . affected by his own financial, business, property, or personal interests.” DR 5-101(A). If the answer was affirmative, the lawyer was required to make full disclosure to obtain consent before accepting employment and, in a criminal case, to decline employment. Commonwealth v. Croken, 432 Mass. 266, 273 (2000).

Entirely independent of what the lawyer subjectively believed, DR 5-101 contained an objective test that required full disclosure and consent if the facts indicated that the independent professional judgment of the lawyer “reasonably may be affected by his own financial, business, property, or personal interests.” DR 5-101(A); see Commonwealth v. Croken, 432 Mass. at 273. To satisfy the second aspect of the disciplinary rule, the lawyer was required to make full disclosure and obtain consent if a neutral observer, such as a judge, might have found that the lawyer’s independent professional judgment “reasonably may be affected by his own financial, business, property, or personal interests.” Rule 1.7(b) was not violated when defense counsel agreed to a television production company’s request to wear a wireless microphone during trial where the defendant-client knowingly consented to the arrangement. Commonwealth v. Perkins, 450 Mass. 834, 851–56 (2008). Similarly, a defendant was not entitled to a new trial because his counsel commenced an intimate personal relationship with an assistant district attorney in the appellate division of the office that represented the Commonwealth on appeal where that attorney had nothing to do with the Commonwealth’s brief and did not discuss the case with the trial prosecutor, who also handled the appeal. Commonwealth v. Stote, 456 Mass. 213, 221–24 (2010).
Practice Note
If questions arose as to whether “full disclosure” had been made or whether the client had in fact consented, the burden was on the lawyer to demonstrate that former DR 5-101 had been complied with. Prudence dictates that after oral disclosure a follow-up letter should be sent that details the facts that were disclosed and confirms that the client had in fact consented.

§ 5 OTHER MATTERS

§ 5.1 Prohibited Transactions

Rule 1.8 of the Massachusetts Rules of Professional Conduct, entitled Conflict of Interest: Prohibited Transactions, provides as follows:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) The transaction in terms on which the lawyer requires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) The client consents in writing thereto.

This rule is quite similar to former DR 5-104(A) except that Rule 1.8(a)(3) requires that “consent be in writing.” In re Wainwright, 448 Mass. 378, 385 n.8 (2007); see also Rubin v. Murray, 79 Mass. App. Ct. 64, 70 n.8 (2011) (The court found that a disclosure in 1975 under former Rule 5-104(A) was sufficient for a lawyer to accept 10 percent of a corporation’s stock as partial payment. The court noted that “this level of disclosure would not be sufficient under the current formulation of the Massachusetts Rules of Professional Conduct, which now requires, among other things, written disclosure and the client’s written consent. Mass. R. Prof. C. 1.8(a), 426 Mass. 1338 (1998).”). The requirement of

Similarly, Rule 1.8(d) provides as follows:

Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

This self-explanatory rule replicates former DR 5-104(B).

Rule 1.8(g) provides as follows:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all claims or pleas involved and of the participation of each person in the settlement.

Former DR 5-106 dealt only with civil claims.

Frequently, in litigation involving a situation such as an accident that results in injuries to more than one person, it may be in the interests of the claimants to pool their resources and hire one attorney to press their claims. It is proper for a lawyer to accept such a retainer, provided that the provisions of Mass. R. Prof. C. 1.7 are met. In addition to these restrictions, the purpose of Mass. R. Prof. C.
1.8(g) is to ensure that one or more clients are not favored over others. Prudence dictates that in a settlement in which the lawyer represents multiple claimants, the lawyer should advise all clients in writing as to “the existence and nature of all the claims involved in the proposed settlement, . . . the total amount of the settlement, and . . . the participation of each person in the settlement.”

Former DR 5-103(B) is now dealt with by Mass. R. Prof. C. 1.8(e), which provides in material part that

(a) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

This represents a departure from DR 5-103(B), which required that the client remain ultimately liable for expenses.

The MBA Committee on Professional Ethics expressed the view that DR 5-103(B) prohibited a lawyer representing a client in litigation from lending money to the client for purposes of helping the client defray nonlitigation-related expenses and also prohibited him or her and his or her firm from cosigning or guaranteeing a bank loan for such purposes. However, it did not prohibit him or her from referring the client to an unaffiliated third party who would lend the client money or purchase a portion of the tort claim, at least as long as no commission, finder’s fee, or the like was to be paid to the lawyer or law firm for doing so. See MBA Ethics Op. 83-7. See generally Saladini v. Righellis, 426 Mass. 231 (1997) (abolishing common law doctrines of champerty, barratry, and maintenance).

§ 5.2  Government Lawyers

Lawyers leaving government service and moving into private practice face a variety of ethical problems as well as issues pursuant to G.L. c. 268A. In addition, as noted above, Mass. R. Prof. C. 1.11 governs successive government and private employment. Rule 1.11 is much more detailed than DR 9-101(B). It provides as follows:
(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
(2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this rule, the term “matter” includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term “confidential government information” means information which has been obtained under government authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Former DR 9-101(B) provided that “[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.” Disciplinary Rule 9-101(B) was subject to several opinions by the MBA Committee on Professional Ethics. See MBA Ethics Ops. 78-7, 78-14, 88-2, 91-7 (assistant district attorney working on prosecution of husband for assault and battery cannot represent wife in civil action against husband on entering private practice), 94-2 (town counsel in certain circumstances may represent board of selectmen in litigation against town agency even though town counsel represents town agency in other litigation).
§ 6 LAWYER AS WITNESS

§ 6.1 Accepting Employment

Rule 3.7 of the Massachusetts Rules of Professional Conduct, entitled Lawyer as Witness, provides as follows:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and value of legal services rendered in the case; or

(3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

If a lawyer accepted employment and later found out that he or she might be called as a witness, former DR 5-102(A), Withdrawal as Counsel When the Lawyer Becomes a Witness, provided as follows:

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B), (1) through (4).

See MBA Ethics Ops. 75-2, 75-4.

The leading Massachusetts case dealing with whether an attorney should be disqualified because he or she "ought to be called" as a witness is Borman v. Borman, 378 Mass. 775 (1979). In Borman, counsel was disqualified by the trial court, and the Supreme Judicial Court reversed. The court warned of the inevitable infringement of a client's right to counsel of his or her choice and the dangers of abuse inherent in motions to disqualify:

Notwithstanding the purposes served, application of the rule may have harsher consequences for the client than the continued service of the attorney. Most obviously, the rule may deny a litigant of the right to counsel of his choice.... When disqualification occurs after employment has begun, it temporarily (and possibly permanently) disables the litigant in his effort to prosecute a claim or mount a defense. It is not surprising therefore that the code has been used increasingly as a catalog of pretrial tactics. When needless disqualification occurs as a result of these tactics, the very rules intended to prevent public disrespect for the legal profession foster a more dangerous disrespect for the legal process.

Borman v. Borman, 378 Mass. at 787 (footnote and citations omitted). The court then set forth a severe test for disqualification:

When a lawyer, exercising his best judgment, determines that his employment will not bring him into conflict with the code, disqualification may occur only
if the trial court determines that his continued participation as counsel taints the legal system or the trial of the cause before it.

Borman v. Borman, 378 Mass. at 788. It is worth noting that this standard would appear to apply only to the lawyer-as-witness disqualification in light of McCourt Co. v. FPC Props., Inc. See discussion in § 7, Appealability of Disqualification Orders, below. Finally, the court expressly stated the following:

The question remains, how are courts to determine whether counsel ought to testify when there is a dispute between the parties on that issue? The issue might be left to the discretion of the trial judge. We think the better approach however is for the judge to defer to the best judgment of counsel and his client.


For other cases discussing DR 5-102(A), see Commonwealth v. Patterson, 432 Mass. 767, 778–80 (2000) (new trial required where defense counsel knew that she ought to be called as a witness and did not withdraw); Serody v. Serody, 19 Mass. App. Ct. 411, 413 (1985) (disqualification upheld); and American Hospital Supply Corp. v. Roy Lapidus, Inc., 493 F. Supp. 1076, 1078 (D. Mass. 1980) (“[B]ecause of his active role in the [transaction] which is the subject matter of this litigation [the attorney] has sufficient personal knowledge of material facts that he ought to be called as a witness.”). See also Byington v. City of Boston, 37 Mass. App. Ct. 907, 908 (1994) (order disqualifying husband’s partner from representing wife reversed where other witnesses had knowledge of wife’s pain and partner had no intention of calling husband as witness); Byrnes v. Jamkowski, 29 Mass. App. Ct. 107, 110 (1990) (defense attorney who negotiated allegedly binding pretrial settlement did not have to be called as witness and should not have been disqualified from representing defendants).

There was a division of opinion as to whether DR 5-102(A) permitted counsel to remain in the case up to the commencement of the trial or whether counsel was required to withdraw as soon as counsel learned that he or she ought to be called as a witness. Compare MBA Ethics Op. 75-4 (“We believe that it is the intent of DR 5-102(A) that the lawyer and his firm may continue to represent the client in the litigation until commencement of trial on the merits, since the rule makes specific reference to ‘conduct of the trial’ and ‘representation in the trial,’ rather than making reference to the ‘litigation.’”), with MBA Ethics Op. 88-6 (“[I]n our view, the word ‘trial’ in DR 5-102 should not be construed narrowly to apply solely to the actual litigation before the trier of the facts.”). In the latter opinion,
the MBA recognized that the courts have taken differing views on the appropriate interpretation of DR 5-102 but apparently overlooked its earlier opinion. In MBA Ethics Op. 88-6, the MBA cited various judicial authorities (and no Massachusetts cases).

§ 6.2 When the Lawyer Is Called by Opposing Counsel

When called by opposing counsel, a lawyer’s conduct was governed by former DR 5-102(B), which provided as follows:

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

The Supreme Judicial Court has stated: “[A] party may call opposing counsel. But in such cases, ‘the party who calls the witness has no right to require him to withdraw as counsel.’” Borman v. Borman, 378 Mass. 775, 792 (1979) (quoting Kendall v. Atkins, 374 Mass. 320, 324 (1978)). The present rule, Mass. R. Prof. C. 3.7, applies in this instance as well.

See also MBA Ethics Op. 76-22 (“It is clear that the rule ‘. . . was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel.’”) (quoting Galarowicz v. Ward, 230 P.2d 576, 580 (Utah 1951)). One court has observed that there is a contradiction between a lawyer’s assertion that his or her adversary should be disqualified because of DR 5-102(A) and simultaneously claiming that disqualification is required because of DR 5-102(B). Nolte v. Pearson, 133 F.R.D. 585, 597 (D. Neb. 1990) (“The phrase ‘ought to be called as a witness on behalf of his client’ found in DR 5-102(A) implies that [plaintiff’s counsel] would be helpful to his clients’ cause; as a consequence, I do not understand why . . . defendants claim that if they call [plaintiff’s counsel] as a witness his testimony will be prejudicial to his clients.”).

One case has interpreted “prejudicial” to refer to more than de minimis prejudice that would or might arise from the testimony:

[T]he projected testimony of a lawyer or firm member must be sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer’s independence in discrediting that testimony.

Freeman also construed the meaning of “is . . . or may be” and decided that a mere assertion by the other party that the testimony might be or would be prejudicial was insufficient grounds for disqualification. Rather, the moving party “bears the burden of demonstrating the likelihood that prejudice will or might result.” Freeman v. Kulicke & Soffa Indus., Inc., 449 F. Supp. at 978; accord Nolte v. Pearson, 133 F.R.D. at 597.

Rule 3.7(a) provides that “a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.” Comment [2] states that

[...] the opposing party has proper objection where the combination of roles may prejudice that party’s rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof.

Mass. R. Prof. C. 3.7(a), cmt. [2].

Steinert v. Steinert, 73 Mass. App. Ct. 287, 291 (2008), relied on this comment in reversing an order granting the wife’s motion to disqualify the husband’s counsel in an action seeking reformation of a divorce agreement based on counsel’s involvement in drafting and revising the agreement. Cf. NGM Ins. Co. v. Cotter, 26 Mass. L. Rptr. 301, 302 (Super. Ct. 2009) (opposing counsel disqualified where counsel “is the only witness able to testify on behalf of the Cotters with full knowledge about . . . negotiations” with the plaintiffs).

§ 7 APPEALABILITY OF DISQUALIFICATION ORDERS

In Borman v. Borman, the court permitted an appeal from the allowance of a motion to disqualify. Borman v. Borman, 378 Mass. 775, 778–79 (1979). While the court was concerned that a rule allowing interlocutory review delays the resolution of the underlying dispute and increases appellate workloads, it adopted a

The Supreme Judicial Court has adhered to its position in Borman. Maddocks v. Ricker, 403 Mass. at 600. “If the issues are not collateral, interlocutory review can be obtained only on report by the motion judge . . . or by leave of an appellate judge.” Maddocks v. Ricker, 403 Mass. at 600 n.10; see also Slade v. Ormsby, 69 Mass. App. Ct. 542, 544 (2007) (“disqualification orders are immediately appealable as they ‘are conclusive of a party’s right to counsel of his choice’ and therefore cannot be remedied by a later appeal”) (quoting Borman v. Borman, 378 Mass. at 780); Byrnes v. Jamitkowsky, 29 Mass. App. Ct. 107, 109 n.3 (1990).
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Hon. Margot Botsford
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SECTION 3.1

The Judicial System*

Hon. Margot Botsford
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Scope Note
This chapter is an introduction to the Massachusetts judicial system, beginning with a history of the courts in Massachusetts from the early days of the colonies to the present. It goes on to discuss the structure, jurisdiction, and decision making of the various courts within the Massachusetts court system, as well as sources for state court decisions. Featured is a description of various research aids.

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§ 1  HISTORY OF THE MASSACHUSETTS JUDICIAL SYSTEM

The first courts in Massachusetts were established in the very early days of the Plymouth and Massachusetts Bay colonies. In each colony, the General Court, at designated times of the year, replaced its collective legislative hat with a judicial one and sat as a judicial tribunal to hear both civil and criminal matters. In each colony as well, the Court of Assistants, like the General Court composed of elected representatives who performed lawmaking functions, also sat as a second tribunal. Legislation in both colonies defined and redefined the jurisdiction and sessions of these judicial bodies.

During the seventeenth century, different local courts were established from time to time to hear suits involving smaller amounts of money than those heard by the General Court and Court of Assistants, and criminal matters with lesser penalties. Originally, jury trials were held only before the General Court, but later the Courts of Assistants and the more local courts also acquired jurisdiction over jury actions. Over the course of the seventeenth century as well, the General Court established separate chancery courts. However, jurisdiction over wills, estates, and general probate matters originally resided in the governor. For a detailed treatment of the courts in these early years, see William T. Davis, History of the Judiciary of Massachusetts. 1900. Reprint, New York: DaCapo Press, 1974.

The Province Charter of 1691 arrived in Massachusetts in May 1692. In addition to unifying the Plymouth and Massachusetts Bay colonies, the charter authorized the General Court to establish "judicatories and courts of record or other courts," with full jurisdiction over civil and criminal cases, but not admiralty. In November 1692, the General Court passed a statute setting up a comprehensive system of judicial tribunals. The legislation established justices of the peace, quarter sessions of the peace, courts of common pleas, a court of chancery, and the Superior Court of Judicature. The English Privy Council originally prohibited this legislation from going into effect because the council opposed the chancery court. However, in 1699, the General Court established a system of courts that met with English approval. The Superior Court of Judicature was the only court of record. It had a chief justice and four associate justices, and exercised broad civil, criminal, and appellate jurisdiction over all matters over which the courts of the King's Bench, Common Pleas, and Exchequer possessed jurisdiction in England. The justices of the Superior Court of Judicature were appointed by the English crown.

The Superior Court of Judicature continued to operate in accordance with the 1699 legislation until the beginning of the American Revolution. In August 1775, the Provincial Congress of Massachusetts, having assumed control of the
government, “dismissed” the royal officials, including judges. Replacements were chosen. The first sitting of the reorganized Superior Court of Judicature took place in early 1776.

The Massachusetts Constitution of 1780 provided for the continuation of the Superior Court of Judicature as the Supreme Judicial Court. This court was and remains the only Massachusetts court with constitutional status. See, e.g., Mass. Const. pt. 1, arts. 29–30. However, since 1782, the legislature has always determined the number of justices of the Supreme Judicial Court and its jurisdiction through legislation. All lower courts are established by acts of the legislature. See Mass. Const. pt. 2, c. 1, § 1, art. 3 (vesting the legislature with authority to establish courts).

Following the adoption of the constitution and for much of the nineteenth century, the Supreme Judicial Court served as both a trial and appellate court. Early on, most civil and criminal matters first heard in the lower courts were tried de novo in the Supreme Judicial Court, often with a jury. As the century progressed, however, the opportunities for a second trial were reduced, and more trials took place originally and only in the lower courts, with the right of appeal to the Supreme Judicial Court.

Although the constitution did not recognize them, the lower courts in existence at the time the constitution was adopted continued as tribunals thereafter. These lower courts had been in place before the Revolution and were continued by the Provincial Congress. The system of lower courts included a court of common pleas in each county, which was a tribunal with only civil jurisdiction. Each county also had a court of general sessions of the peace, made up of the county’s justices of the peace sitting as a body. The latter courts exercised a civil jurisdiction that resembled that of a county administrative board, and a criminal jurisdiction over all matters not punished by loss of life or limb, or by banishment. The lowest level of tribunal was the individual justice of the peace, who served as a magistrate with limited civil and criminal jurisdiction on a local level.

The Probate Courts in Massachusetts have a separate history. Under the Province Charter, the General Court had no power to establish Probate Courts: the governor alone could exercise probate jurisdiction. The governor appointed judges of probate to serve as deputies in each county, with appeals directly to the governor and Governor’s Council. After the constitution was adopted in 1780, these probate judges continued to sit.

During the nineteenth and twentieth centuries, a number of reorganizations of the lower courts took place and a variety of new courts was created. The history is, unfortunately, too full to recount here. (For an informative discussion of Massachusetts court history, see Alan J. Dimond, A Short History of the Massachusetts
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Courts. Boston: National Center for State Courts, 1975.) However, the following sections of this chapter describing the current court system give some brief historical information about each court.

§ 2 THE PRESENT JUDICIAL SYSTEM—A BRIEF OVERVIEW

Exhibit A shows a chart of the current organizational structure of the Massachusetts courts. At the top is the Supreme Judicial Court (G.L. c. 211, § 1 et seq.), followed by the Appeals Court, an intermediate appellate court established in 1972 (G.L. c. 211A, § 1, et seq.), and then the Trial Court consisting of seven departments (G.L. c. 211B, § 1).

Prior to 1978, there was no judicial entity known as the “trial court.” Rather, there were a number of separate and distinct trial courts; some had overlapping jurisdiction and each was administered separately. There were approximately 400 separate county and local court budgets with different standards for fiscal and personnel management. In 1978, the legislature enacted a statute known as the Court Reform Act of 1978 that provided for a comprehensive administrative reorganization of the trial court system (G.L. c. 211B, 1978 Mass. Acts c. 478, § 110). This was the culmination of years of effort by many commissions, committees, legislative and executive officials, and others who repeatedly had pointed out the desperate need for a central reorganization of the courts to combat, among other things, the increasing backlogs at all levels of the system.

One of the major goals of the Court Reform Act was to establish a more effective administrative framework for the several trial-level tribunals, and to accomplish this, the legislation brought them together into a single “trial court” with the individual courts (Superior Court, Housing Court, Land Court, Probate and Family Court, Boston Municipal Court, Juvenile Court, and District Court) becoming “departments” of the trial court. The act also provided for a chief administrative justice of the trial court and a chief (administrative) justice for each department, and mandated a statewide judicial budget and a single, systemwide standard for judicial personnel, fiscal management, and collective bargaining. In 1992, the act was amended to rename and enlarge the powers of the chief administrative justice, now known as the chief justice for administration and management (CJAM). It also significantly expanded the Juvenile Court Department and altered the jurisdiction of the District Court Department. Subsequent amendments increased the number of justices in the various departments.
§ 3 SUPREME JUDICIAL COURT

The Supreme Judicial Court is the highest state court and has the longest continuous existence of any court in the United States. It has a chief justice and six associate justices. Four justices constitute a quorum of the full bench, but in practice the full court usually sits to hear appeals. All justices of the Supreme Judicial Court are appointed by the governor and are subject to approval by the Governor’s Council. They hold their positions until the mandatory retirement age of seventy. A retired chief justice or associate justice may be designated and assigned by the chief justice to perform certain duties and temporary assignments. G.L. c. 211, § 24; G.L. c. 32, § 65E.

§ 3.1 Appellate Jurisdiction

The full bench of the Supreme Judicial Court has appellate jurisdiction over all questions of law arising on report or appeal from the Superior Court Department, Land Court Department, Probate and Family Court Department, Housing Court Department, District Court Department (criminal cases), Boston Municipal Court Department (criminal cases), the appellate divisions of the District Court and Boston Municipal Court Departments, the Juvenile Court Department, and the Appellate Tax Board. See G.L. c. 211, § 5. The full Supreme Judicial Court also hears appeals from decisions, orders, and rulings by a single justice of that court. See G.L. c. 211, § 6; G.L. c. 231, § 112. However, appeals from these lower courts are taken first to the Appeals Court, except where the legislature has given the Supreme Judicial Court exclusive jurisdiction, such as in appeals from convictions in cases of murder in the first degree, G.L. c. 278, § 33E; and appeals from rate decisions of the Department of Public Utilities. G.L. c. 25, § 5; see G.L. c. 211, § 4A. The Supreme Judicial Court is also the exclusive forum for the dissolution of charitable corporations. G.L. c. 180, § 11A; see Congregational Church of Chicopee Falls v. Attorney Gen., 376 Mass. 545 (1978).

An appeal that is docketed in the Appeals Court may be transferred to the Supreme Judicial Court for direct appellate review (DAR) if two of its justices issue an order for such review. A litigant may apply to the Supreme Judicial Court for direct appellate review, or an order for direct appellate review may issue on the court’s own initiative on a finding that there are constitutional issues, issues of first impression, or issues of great public import. See G.L. c. 211A, § 10; Mass. R. App. P. 11. The Appeals Court (or a majority thereof) also may certify a case for direct review by the Supreme Judicial Court on determining that direct review is in the public interest.

Three justices of the Supreme Judicial Court may give leave to obtain further appellate review (FAR) of a decision by the Appeals Court “for substantial reasons
affecting the public interest or the interests of justice." G.L. c. 211, § 11. A party submitting an application for further appellate review must do so within twenty days after the date of the rescript of the Appeals Court. See Mass. R. App. P. 27.1. The Appeals Court (or a majority of the justices) also may certify a case for further appellate review by the Supreme Judicial Court.

A single justice of the Supreme Judicial Court also may exercise certain types of appellate jurisdiction. For example, a single justice can hear appeals from the granting or denial of interlocutory orders and preliminary injunctions by a trial court justice, G.L. c. 231, § 118, first and second paras., respectively, and appeals from the denial of a bail request, see, e.g., Commesso v. Commonwealth, 369 Mass. 368 (1975). See G.L. c. 211, § 4A. An application may be made to a single justice for leave to appeal a pretrial order determining a motion to suppress pursuant to Mass. R. Crim. P. 15 (a)(2).

A petition for review pursuant to G.L. c. 231, § 118 must be filed within thirty days after the entry of the order. The review provided by this statute is an exception to the general policy against "piecemeal" appellate review. See Manousos v. Sarkis, 382 Mass. 317, 321 (1981). An appeal from an interlocutory ruling of a single justice is to the full court; the standard of review is the same as a review of a trial court justice. See SJC Rule 2:21. See generally J.R. Nolan & K. Durning, Appellate Procedure (3rd ed. 2009). Formerly, a single justice heard applications for appellate attorney fees; however, the procedure was revised so that the justices who heard the appeal, and not the single justice, make the fee award determination, see Fabre v. Walton, 441 Mass. 9, 10 (2004), unless a statute provides otherwise. See G.L. c. 231, §§ 6F, 6G.

The Supreme Judicial Court issues equity decisions (cited as "Eq. Supr. Jud. Ct."), which do not appear in the published reporter volumes or in online sources. Due to the court's policy that these are nonprecedential opinions, they remain unpublished but are accessible on request to the clerk of the Supreme Judicial Court for Suffolk County.

§ 3.2 Advisory Opinions

The Massachusetts Constitution requires the Supreme Judicial Court to render advisory opinions to the governor and to each branch of the legislature "upon important questions of law, and upon solemn occasions." Mass. Const. pt. 2, c. 3, art. 2. A large number of opinions requested concern the constitutionality of proposed legislation. The court declines to give advisory opinions when it concludes that a solemn occasion or an important question of law is not presented. See, e.g., Opinion of the Justices, 408 Mass. 1201, 1204 (1990); Mass. Const. amend. art. 85; see Opinion of the Justices, 386 Mass. 1201 (1982). Moreover,
the court does not consider its advisory opinions to have settled finally the legal questions discussed. If later litigation presents the same questions in the context of a true adversary proceeding with opposing parties, the court considers them anew, unaffected by its advisory opinion. See, e.g., Mass. Taxpayers Found., Inc. v. Sec'y of Admin., 398 Mass. 40 (1986).

§ 3.3 Original Jurisdiction

The Supreme Judicial Court has original concurrent jurisdiction with the Superior Court Department of the trial court over all matters traditionally within a common law court's general equity jurisdiction, G.L. c. 214, § 1; original and sometimes exclusive jurisdiction over statutory actions where equitable relief is sought, see G.L. c. 214, § 2; and original jurisdiction over a number of special equitable actions, G.L. c. 214, § 3. Such actions are brought initially before a single justice. See G.L. c. 214, § 8. As a practical matter, however, the court will not act on a matter in which the facts are in dispute, but will use its power to remand the case to an appropriate lower court for trial. See G.L. c. 211, § 4A. In cases with no controverted facts, a single justice may report the matter to the full bench, or transfer it to the Appeals Court. See G.L. c. 211, §§ 4A, 6; G.L. c. 231, § 112.

§ 3.4 Superintendence Power

The Supreme Judicial Court has “general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided.” G.L. c. 211, § 3. This extraordinary remedy will be exercised only in exceptional circumstances to protect important substantive rights that cannot be remedied through the normal appellate process. See MacDougall v. Commonwealth, 447 Mass. 505 (2006); Abdullah v. Sec'y of Pub. Safety, 447 Mass. 1009 (2006). The petitioner seeking relief under G.L. c. 211, § 3 bears the burden to allege and demonstrate the absence or inadequacy of other remedies. Scott v. Attorney Gen., 448 Mass. 1002 (2006). The petition is brought first to a single justice of the Supreme Judicial Court. The denial of the petition may be appealed to the full court pursuant to SJC Rule 2:21; however, the court will not reverse the order of the single justice absent a showing of abuse of discretion or clear error of law. See Youngworth v. Commonwealth, 436 Mass. 608, 617 (2006). A petitioner’s failure to file a memorandum setting forth the inadequacy of other remedies will provide an independent ground for affirming the single justice’s denial. See Cimini v. Cimini, 449 Mass. 1033, 1034 (2007); see also Marides v. Rossi, 446 Mass. 1007 (2006); Sagar v. Middlesex Div. of the Probate & Family Court Dep’t of the Trial Court, 447 Mass. 1022 (2006).
However, where there is a “systemic issue affecting the proper administration of the judiciary,” the resolution of that issue by the Supreme Judicial Court under its general superintendence powers is appropriate without resort to the normal appellate process. Simmons v. Clerk Magistrate of Boston Div. of the Hous. Court Dep’t, 448 Mass. 57, 60–61 (2006); see In re Subpoena Duces Tecum, 445 Mass. 685 (2006) (proper for district attorney to petition for review of pretrial order compelling disclosure of Sexual Abuse Intervention Network (SAIN) interview tapes with alleged minor sex abuse victims); Commonwealth v. Johnson, 447 Mass. 1018 (2006) (single justice did not abuse his discretion in reaching merits of Commonwealth’s petition for relief from court order granting defendant’s motion to dismiss sentence enhancement counts when it was unclear that appeal would have afforded adequate relief). In another case, in an appeal from a single justice’s denial of the petition, the full court considered the petition on the merits despite finding that the single justice had not abused his discretion; the court concluded from the record that without such guidance, the trial judge intended to instruct himself incorrectly on an important rule of law. See Commonwealth v. Kerns, 449 Mass. 641 (2007).

As part of its superintendence power under G.L. c. 211, § 3, the Supreme Judicial Court supervises the administration of all lower courts, including approval of the lower courts’ rules. The administrative duties of the chief justice for administration and management of the trial court that do not directly implicate the essential functioning of the judicial department are not subject to the superintendence powers of the Supreme Judicial Court, unless the exercise of authority of the chief justice for administration and management would have severe adverse impact on the administration of justice. See Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Court, 448 Mass. 15 (2006).

Several rules and standing orders of the Supreme Judicial Court govern the administration of the courts in specific areas. Rules 1:01–1:21, entitled General Rules, include a variety of matters, such as the following:

- sittings of the court;
- records;
- impoundment procedures;
- uniform rules on dispute resolution;
- cameras in the courts;
- address confidentiality programs;
- the Massachusetts judicial conference;
• fee-generating appointments for specific matters designated by letters (A–Z and AA–BB);

• the uniform certification of questions of law from the U.S. Supreme Court, federal courts, and the highest appellate court of other states; and

• other matters.

Rule 2 governs practice before the single justice, and Rule 3 regulates the admission, practice, and ethical standards of attorneys, justices, and clerks, and provides procedures for legal assistance to indigent criminal and civil defendants using certified law students. See SJC Rule 3:01 et. seq. Registration of attorneys, bar discipline, and the clients' security board are covered by Rule 4.

There also are standing orders of the Supreme Judicial Court covering general matters, including time standards for the “reasonably expeditious disposition of appealed cases,” in which both the Supreme Judicial Court and Appeals Court have adopted as an administrative goal a time frame of 130 days after oral argument or submission in which to render a decision. A quorum of the court may permit variation from this standard when necessary if a case presents special problems. Another standing order relates to the limited representation pilot project, which permits attorneys in certain divisions of the Probate and Family Court Department to assist pro se litigants on a limited basis without undertaking a full representation of the client on all issues. Sample forms are part of the standing order.

The Supreme Judicial Court also may establish advisory committees. See G.L. c. 211, § 3G, as inserted by 1987 Mass. Acts c. 199, § 142. In 1988, by standing order, an advisory committee to the Judicial Training Institute was established to assist the justices in matters pertaining to the policies and activities of the institute. Another more recent advisory committee, consisting of seventeen members, was established to advise on evidentiary rules. As a result of the committee's efforts, with the approval of the court, there is a Massachusetts Guide to Evidence, updated regularly and available on the Internet (http://www.mass.gov/courts/sjc/guide-to-evidence), as well as through the Flaschner Judicial Institute, and through MCLE. A permanent executive advisory committee has been established to monitor the Guide and suggest future revisions.

§ 3.5 Statutory Committees

There is a statutory jury management advisory committee established as a standing committee of the Supreme Judicial Court. The chairperson and five members,
comprised of justices of any trial court or appellate court, are appointed by the chief justice of the Supreme Judicial Court and supervise the office of the jury commissioner. G.L. c. 234A, § 6. The jury commissioner is appointed by the Supreme Judicial Court for a five-year term.

The justices of the Supreme Judicial Court appoint the members of the Committee for Public Counsel Services (CPCS), a fifteen-person committee established “to plan, oversee, and coordinate the delivery of criminal and certain noncriminal legal services to indigent persons.” G.L. c. 211D, § 1.

The justices of the Supreme Judicial Court also have authority to appoint three members out of nine of the Judicial Conduct Commission. The three justices may not be members of the Supreme Judicial Court. Three other members (attorneys) are appointed by the chief justice for administration and management, and three lay members are appointed by the governor. G.L. c. 211C, § 1. The commission investigates allegations of judicial misconduct or disability; all justices of the trial court, the Appeals Court, and the Supreme Judicial Court are subject to discipline pursuant to this chapter. G.L. c. 211C, § 3.

§ 4    APPEALS COURT

Massachusetts has a two-tier appellate system (in addition to the appellate divisions of certain trial courts). The Appeals Court was established in 1972 as an intermediate appellate court. G.L. c. 211A, § 1. Its purpose was to relieve the growing burden of appellate and single justice work imposed on the Supreme Judicial Court. The Appeals Court started with six members—a chief justice and five associate justices—but the Court Reform Act of 1978 increased the number of associate justices to nine, for a total of ten justices. In 1988 and 2000, the legislature increased the number of justices again, so that there are presently twenty-four associate justices and a chief justice. The Appeals Court ordinarily sits in panels of three justices. See G.L. c. 211A, § 3. All justices of the Appeals Court are appointed by the governor and must be approved by the Governor’s Council. They hold office until the mandatory retirement age of seventy. A retired chief justice or associate justice may make a request to the chief justice of the Supreme Judicial Court that he or she be placed on the list of retired justices who perform judicial duties. G.L. c. 32, § 65F; G.L. c. 211A, § 16.

§ 4.1    Appellate Jurisdiction

The Appeals Court has concurrent appellate jurisdiction with the Supreme Judicial Court over all civil cases coming from the Superior Court Department, Probate and Family Court Department, Land Court Department, Housing Court
Department, the appellate divisions of the Boston Municipal Court Department and District Court Department, and all appeals coming from the Juvenile Court Department. In addition, the Appeals Court has concurrent jurisdiction to hear appeals from the final decisions of the Appellate Tax Board, the Department of Industrial Accidents, and the Labor Relations Board. The Appeals Court also has concurrent appellate jurisdiction over all criminal cases from the Superior Court Department, and the criminal sessions for the Boston Municipal Court Department and the District Court Department, except appeals from convictions for murder in the first degree. G.L. c. 278, § 33E.

All the appeals from these courts (with the exceptions noted above) are entered in the Appeals Court in the first instance. G.L. c. 211A, § 10. The Supreme Judicial Court may exercise its discretion to grant direct appellate review or, after the rescript enters in the Appeals Court, to grant leave for further appellate review. G.L. c. 211A, §§ 10–11. In addition, the Appeals Court may, in certain instances, report questions of law to the Supreme Judicial Court. G.L. c. 211A, § 12.

A single justice of the Appeals Court also exercises jurisdiction over certain matters, such as review of summary process appeals, impoundment orders, and the grant or denial of an interlocutory order or preliminary injunction under G.L. c. 231, § 118, as well as cases transferred from a single justice of the Supreme Judicial Court under G.L. c. 211A, § 4A. Review of the action of a single justice is to a panel of other justices on the court. See Mass. R. A pp. P. 15(c); Rule 2:02 of the Massachusetts Appeals Court Rules for the Regulation of Appellate Practice.

In a rule announced prospectively, a single justice no longer determines appellate attorney fees; that authority has been transferred to a panel. Love v. Pratt, 64 Mass. App. Ct. 454, 460 n.4 (2005) (citing Fabre v. Walton, 441 Mass. 9, 10–11 (2004)); G.L. c. 211A, § 15; Mass. R. A pp. P. 25. (But see fee awards under G.L. c. 231, §§ 6F and 6G.) A justice sits in the single justice session for a month at a time. Practice before a single justice is governed by Massachusetts Appeals Court Rule 2:01 and standing orders, such as the order concerning petitions under G.L. c. 231, § 118, first para.

Those cases in which a panel of the justices determines either that “no substantial question of law is presented by the appeal, or that some clear error of law has been committed which has injuriously affected the substantial rights of an appellant” are subject to summary disposition under Rule 1:28. An order affirming, modifying, or reversing the lower court’s action is entered without hearing. Previously, Rule 1:28 decisions were unpublished and could not be cited as authority. Recently, there has been a change in the citation policy, permitting future Rule 1:28 decisions to be cited for persuasive but not binding authority. See Chace v. Curran, 71 Mass. App. Ct. 258 (2008). Rule 1:28 decisions (including
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§ 5 THE TRIAL COURT

§ 5.1 Introduction: Composition and Administration

As noted in the overview of the Massachusetts court system, the 1978 Court Reform Act (G.L. c. 211B, added by 1978 Mass. Acts c. 478, § 110) provided for an administrative consolidation of the several trial courts “to promote the orderly and effective administration of the judicial system of the Commonwealth.” The act also provides for an overall administrative head—the chief justice for administration and management—and a chief justice of each department.

The trial court is made up of seven trial-level courts, which are called “departments,” with a statutorily assigned number of justices to each department. G.L. c. 211B, § 2, as amended by 2006 Mass. Acts c. 205, § 16. The seven courts are as follows:

• the Superior Court Department (eighty-two justices),
• the Probate and Family Court Department (fifty-one justices),
• the Land Court Department (seven justices),
• the Housing Court Department (ten justices),
• the District Court Department (158 justices and special justices),
• the Boston Municipal Court Department (thirty justices), and
• the Juvenile Court Department (forty-one justices).

The total number of justices is now 379; although G.L. c. 211B, § 1, as amended by 2001 Mass. Acts c. 177, § 37, states that the trial court, as an administrative unit, shall consist of no more than 378 justices, a subsequent statute added one more justice to the Land Court. G.L. c. 211B, § 2, as amended by 2006 Mass. Acts c. 205, § 16. The Office of the Commissioner of Probation is also part of the trial court.

The individual courts at each trial level formally are called “divisions” of the appropriate department. For example, the Middlesex Division of the Superior Court Department is the formal designation of the Middlesex County Superior Court.
Court; the Norfolk Division of the Probate and Family Court Department is the formal name of the Norfolk County Probate and Family Court. Except in the case of circuit justices, appointments in the Housing Court, Probate and Family Court, Juvenile Court, and District Court Departments are made to a particular division within the department. G.L. c. 211B, § 2. All trial court justices are appointed by the governor and are subject to approval by the Governor’s Council. They may serve as justices until reaching the mandatory retirement age of seventy. A retired justice of the trial court whose name has been placed on the list pursuant to G.L. c. 32, § 65G may be assigned by the chief justice for administration and management to perform duties of the trial court for a limited term. G.L. c. 211B, § 14.

Each of the seven departments of the trial court has a chief justice appointed by the chief justice for administration and management. The chief justice, in addition to his or her judicial powers, is the administrative head of that department, its clerks, and other officers or employees, subject to the superintendence authority of the Supreme Judicial Court under G.L. c. 211, § 3, and to the administrative authority of the chief justice for administration and management under G.L. c. 211B, § 10. Each division has, as its immediate administrative head, a first justice who is subject to the administrative authority of the chief justice of that particular department, as well as the authority of the chief justice for administration and management and the superintendence authority of the Supreme Judicial Court. However, clerks, recorders, and registers have responsibility for the internal administration of their respective offices. G.L. c. 211B, § 10A.

The chief justice for administration and management and the chief justice of each trial court department are not “judicial offices” as the Massachusetts Constitution uses that term. They are instead administrative positions with five-year terms; although a justice appointed to hold such a position is eligible for reappointment to an additional five-year term or terms. The chief justice for administration and management is appointed by the Supreme Judicial Court, and he or she, in turn, appoints the chief justice of each department. The departmental chief justice appoints a first justice of each division (individual court) of the department.

As of July 1, 1979, the Commonwealth assumed financial responsibility for the entire state court system. One of the main duties of the chief justice for administration and management is to prepare a single budget for the entire trial court. The responsibilities of the chief justice for administration and management include the maintenance and operation of court facilities; he or she may employ all ordinary means reasonably necessary for the full exercise of the powers and duties of that office. The Supreme Judicial Court does not have superintendence powers over the chief justice for administration and management in the exercise of his or her authority unless there is a serious adverse effect on the administration.

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The chief justice for administration and management can transfer the assignment of any judge appointed to any department of the trial court to another department (subject to the justice’s right of appeal to the Supreme Judicial Court) as a way to deal with backlogs in certain parts of the trial court. G.L. c. 211B, § 9. At a party’s request (or a trial justice’s), the chief justice for administration and management may make interdepartmental judicial assignments to reduce delay and duplication in a case involving the same issues and the same parties. For example, a justice of the Probate and Family Court Department may be assigned as a Superior Court justice in a matter involving subject matter jurisdiction of both courts. See Trial Court Rule XII, which sets out the procedure for such a request. The chief justice for administration and management also has supervisory authority over all nonjudicial court personnel. Subject to some restrictions, the chief justice for administration and management may assign personnel to different branches of the trial court, and is responsible for developing uniform personnel policies. G.L. c. 211B, § 9.

Finally, the chief justice for administration and management was given the authority to establish a judicial institute for training judicial and nonjudicial personnel (G.L. c. 211B, § 16); to authorize up to one year’s leave of absence for a justice to teach, study, or do research (G.L. c. 211B, § 20); and to establish a mandatory alternative dispute resolution program for civil actions subject to approval by the Supreme Judicial Court (G.L. c. 211B, § 19). There are trial court–connected alternative dispute resolution programs in the various departments and sessions in particular courts.

Each court department has promulgated its own rules and standing orders; there also may be uniform practices, administrative directives, and fee schedules and forms. In addition, there are trial court rules, including uniform rules on summary process, small claims, custody disclosures, procedures for standing orders, impoundment procedures, and requests for interdepartmental judicial assignments (Trial Court Rules I through XII, inclusive). See Massachusetts Rules of Court (West); Annotated Laws of Massachusetts Court Rules (LexisNexis).

§ 5.2 Superior Court Department

SECTION 3.1  PRACTICING WITH PROFESSIONALISM

(giving all courts and justices of Commonwealth powers necessary for performance of their duties). The Superior Court is the principal trial court for all general civil and criminal matters. See G.L. c. 212, §§ 4–5. The Superior Court has existed continuously since 1859 and currently is comprised of eighty-two justices, including one who serves as the chief justice of the Superior Court Department. See G.L. c. 211B, §§ 2, 5; G.L. c. 212, § 1. The Superior Court operates as a statewide unit, with sessions in each county, and its business is conducted primarily by the respective justices sitting singly. (Labor disputes provide an exception. In certain types of such disputes, three Superior Court justices are required to sit as a panel. See G.L. c. 212, § 30.)

The justices sit on a rotating circuit basis, in accordance with the assignments made by the administrative justice. G.L. c. 212, § 2. The chief justice of the Superior Court makes the appointments of the justices to each county and also appoints a regional administrative justice (RAJ), who, along with other duties and responsibilities, assigns the justices within a specific county. The justices of the Superior Court, as is true of all justices in Massachusetts, serve on a full-time basis and may not practice law. G.L. c. 211B, § 4.

(a)  Original Civil Jurisdiction

The Superior Court has exclusive original jurisdiction over civil actions involving mortgage foreclosures; real and mixed actions, except those over which the Land Court or District Court Departments have jurisdiction; complaints for flowing lands; and claims against the Commonwealth. G.L. c. 212, § 3. It also has exclusive jurisdiction over certain statutory types of actions that specifically so provide. See, e.g., G.L. c. 214, §§ 1 (actions for injunctive relief growing out of labor disputes), 1B, 3A (statutory action for protecting against invasion of right to privacy), 1C (sexual harassment), 7A (statutory action for claims of damage to the environment). Otherwise, the Superior Court has original concurrent jurisdiction over all types of civil actions, including actions equitable in nature, except such categories of actions over which another court department has been granted exclusive jurisdiction. G.L. c. 212, § 4; G.L. c. 214, § 1; see G.L. c. 213, § 1A. The Superior Court has concurrent equity jurisdiction with the Supreme Judicial Court in all cases and matters cognizable under the general principles of equity jurisprudence, G.L. c. 214, § 3; with the Probate and Family Court Department, G.L. c. 215, § 6; and with the Land Court Department where any right, title, or interest in real estate is involved, G.L. c. 185, § 1(k).

(b)  Appellate Civil Jurisdiction

By statute, the Superior Court has jurisdiction over all civil actions brought to it by appeal or removal. G.L. c. 212, § 5. Actions brought by “appeal” include
those that challenge decisions of certain administrative agencies. See, for example, G.L. c. 30A, § 14, which provides generally for appeals to the Superior Court from adjudicatory decisions of agencies governed by the Massachusetts Administrative Procedure Act. Actions “brought by removal” are those actions that a party properly began in the District Court Department, and which may be removed to the Superior Court for trial because the damages claimed in the complaint, counterclaim, cross-claim, or compulsory counterclaim exceed $25,000. G.L. c. 231, § 104. This limitation applies to original damages only and not multiple damages. G.L. c. 218, § 19.

(c) **Criminal Jurisdiction**

The Superior Court Department has original jurisdiction over all crimes. G.L. c. 212, § 6. As explained below, however, certain crimes also fall within the jurisdiction of the District Court Department and are tried there. See § 5.6, below.

(d) **Rulemaking Power**

The Superior Court Department, as is true of all the courts of the Commonwealth, has been granted authority to promulgate rules to regulate the practice and business of its courts. These are subject to approval of the Supreme Judicial Court. G.L. c. 213, § 3. It is important to become familiar with the rules and standing orders of the court, which can be found in the Massachusetts Rules of Court (West) and the Annotated Laws of Massachusetts Court Rules, (LexisNexis). Of particular importance are the rules governing motions (Rules 9A –9E inclusive); Standing Order, 1-83 relating to civil action cover sheets (failure to file a timely civil action cover sheet will result in the imposition of sanctions); and Standing Order 1-88, relating to time standards. There also are guidelines for appellate division proceedings (G.L. c. 278, §§ 28A-28D) and administrative directives.

(e) **Business Litigation Session**

The Business Litigation session of the Superior Court was instituted by the Superior Court’s chief justice in October 2000 to handle complex business litigation. It is now a permanent session following the completion of its successful two-year pilot program. Based in Suffolk County, the Business Litigation Session now accepts cases from Essex, Norfolk, and Middlesex Counties. (See Superior Court Administrative Directive No. 03-1, dated February 12, 2003). In order to qualify for the special session, cases must involve one or both parties domiciled in these counties as well as the following types of claims: intellectual property/trade secret issues; shareholder derivative claims; or business disputes such as breach of contract or fraud. Opinions from the sessions can be accessed
using the Social Law Library’s substantive law database, the Massachusetts Law Reporter, LexisNexis, and Westlaw. See Exhibit A.

§ 5.3 Probate and Family Court Department

The Probate and Family Court Department of the trial court is made up of Probate and Family Courts in each county of the Commonwealth. G.L. c. 215, § 1. These Probate Courts exercise superior and general jurisdiction over cases and matters within the expressly defined terms of their jurisdiction. G.L. c. 215, § 2.

There are currently fifty-one Probate Court justices. G.L. c. 211B, § 2. One serves as the chief justice. G.L. c. 217, § 8. Unlike Superior Court justices, Probate and Family Court justices generally are appointed to specified “divisions” of the Probate and Family Court Department, which means appointment to a Probate and Family Court in a particular county. G.L. c. 215, § 1; see G.L. c. 211B, § 2. Nevertheless, there are some circuit justices who rotate, and every Probate and Family Court justice may be assigned to sit in a division other than the one to which he or she was appointed, as well as in other departments of the trial court. G.L. c. 211B, §§ 3, 9.

The cases and matters within Probate and Family Court Department jurisdiction are generally those relating to wills; trusts; appointment of guardians, conservators, and trustees; the administration and settlement of estates; divorce; and the protection, adoption, and custody of minor children. G.L. c. 215, § 3. With respect to divorce actions (or actions for affirming or annulling marriages), as the result of legislation enacted in 1986, the Probate and Family Court Department has exclusive original jurisdiction. Before 1986, the Superior Court had concurrent original jurisdiction over divorce proceedings, although few such actions were brought there. See G.L. c. 215, § 3; G.L. c. 208, § 6. The Probate and Family Court Department also has exclusive original jurisdiction over all actions for the execution and validity of health care proxies created pursuant to G.L. c. 201D or disputes arising from them (G.L. c. 215, § 3), for abuse prevention of the elderly or disabled (G.L. c. 19A, §§ 14 and 20), for entertainment contracts for child performers (G.L. c. 231, § 85P½), and for French Spoliation awards (G.L. c. 215, § 5). Originally, the Probate and Family Court Department had exclusive jurisdiction over petitions to partition under G.L. c. 241; now it shares jurisdiction over such matters with the Land Court Department. G.L. c. 185, § 1(t).

The Probate and Family Court Department also has concurrent jurisdiction with the Boston Municipal Court and District Court Departments for actions or proceedings for paternity and support under G.L. c. 209C and G.L. c. 209D (Uniform Interstate Family Support Act) and abuse prevention proceedings under G.L. c. 209A (as does the Superior Court unless a dating relationship is involved,
G.L. c. 209A, § 1), and concurrent jurisdiction with the Superior Court and the Supreme Judicial Court over actions cognizable under general principles of equity jurisprudence. See G.L. c. 215, § 6. Equity matters in the Probate and Family Court Department are governed by the Massachusetts Rules of Civil Procedure, while domestic relations matters are covered by the Massachusetts Rules of Domestic Relations Procedure.

Probate Courts are courts of record. G.L. c. 215, § 1. They have the power to make rules, subject to approval and amendment by the Supreme Judicial Court. See G.L. c. 215, § 30. In addition to procedural rules, the Probate and Family Court Department has published Probate Court Rules and an Appendix of Probate Forms, Supplemental Probate Court Rules, Standing Orders (including its time standards, and standards for guardians ad litem and investigators), Uniform Practices, and Uniform Fee Schedules. In addition, in any proceeding relating to child support, the court must apply the new Child Support Guidelines published by the chief justice for administration and management that became effective January 1, 2009; any deviation by a justice from the guidelines must be supported by written findings and rulings.

Finally, by Standing Order of the Supreme Judicial Court, three divisions of the Probate and Family Court Department (Norfolk, Suffolk, and Hampden Counties) have a limited representation pilot project for attorneys to assist pro se litigants without undertaking full representation.

All of these rules, standing orders, and practices can be found in M.G.L.A. Rules of Court (West) and A.L.M. Court Rules (LexisNexis). There are also updates available online: the Probate and Family Court Department has promulgated some new rules effective May 1, 2009, which can be accessed through http://lawlib.state.ma.us/source/mass/rules/.

§ 5.4 L and Court Department

The Land Court Department of the trial court is a court of limited jurisdiction that holds its sittings in Boston, Fall River, and Worcester, but may adjourn from time to time to such other places as public convenience may require. G.L. c. 185, § 1, as amended by 2006 Mass. Acts c. 205, § 14. There are now seven justices of the Land Court Department, one of whom serves as the chief justice. G.L. c. 185, § 2; G.L. c. 211B, § 2, as amended by 2006 Mass. Acts c. 205, § 16.

The Land Court’s jurisdiction has been expanded to include several matters. G.L. c. 185, § 1. It has exclusive original jurisdiction over a variety of matters determining title to land and easements, registration of land titles, and tax titles; city, town, and district boundaries; the validity and extent of municipal zoning
ordinances, bylaws, and regulations; and other statutory matters. See G.L. c. 185, § 1(a)-(j½) for a listing of the proceedings and actions within the exclusive jurisdiction of the Land Court Department.

The Land Court Department has original concurrent jurisdiction with the Probate and Family Court Department of petitions for partition under G.L. c. 241 and G.L. c. 185, § 1(t), and with the Supreme Judicial Court and the Superior Court Department over equity matters that deal with right, title, or interest in land or real estate, G.L. c. 185, § 1(k)-(s); this includes actions of specific performance of property agreements, declaratory relief, and appeals from decisions of local planning boards or zoning boards of appeal.

There is a new separate session known as the permit session of the Land Court Department relating to appeals from the granting of denials of various permits. G.L. c. 185, § 3A, added by 2006 Mass. Acts c. 205, § 15. Permit sessions are held in Suffolk, Middlesex, Essex, Norfolk, Worcester, and Hampden Counties and other counties designated by the chief justice of the Land Court Department. Permit sessions have original concurrent jurisdiction with the Superior Court Department over civil actions arising out of the appeal of any permit, order approved or denied in the use or development of real property, equitable or declaratory relief, as well as claims under G.L. c. 231, § 6F for torts of abuse of process, intentional or negligent interference with contractual relations that are based on appeal of any permit, or approval concerning a development of real property. To qualify for the permit session, the property must consist of twenty-five or more dwelling units or construction or alteration of 25,000 square feet or gross floor area. If a party claims a valid right to a jury trial, the case is transferred to the Superior Court Department.

The Land Court Department has power to make general rules and forms, subject to approval by the Supreme Judicial Court or by a single justice of that court. G.L. c. 185, § 1. Its chief justice also may establish procedures for mediation of disputes, subject to the approval of the chief justice for administration and management. There are published Land Court Department rules, forms, and standing orders (including time standards and judicial review of administrative agency proceedings) (also published in A.L.M. Court Rules and M.G.L.A. Rules of Court). The permit session statute has its own track time standard (average, fast, and accelerated); a single justice is assigned to the session and the chief justice and chief justice for administration and management are directed to assign justices with land use and environmental expertise. G.L. c. 185, § 3A.
§ 5.5 Housing Court Department

The Housing Court Department of the trial court is a fairly recent addition to the Massachusetts court system. The Housing Court Department for the city of Boston was established by the legislature in 1971. Since then, the legislature has created four additional divisions. Accordingly, the Housing Court Department now has five divisions—the Western Division, which includes Hampden, Hampshire, Berkshire, and Franklin Counties; the Worcester County Division, including the Norfolk County town of Bellingham and the Middlesex County towns of Ashby, Hudson, Marlborough, Townsend, and the jurisdiction known as Devens (2003 Mass. Acts c. 498); the Northeastern Division, which covers Essex County as well as the Middlesex County city of Lowell and towns of Acton, Ayer, Billerica, Boxborough, Carlisle, Chelmsford, Concord, Dracut, Dunstable, Groton, Littleton, Maynard, Pepperell, Shirley, Stow, Tewksbury, Tyngsborough, and Westford; the Southeastern Division for Bristol and Plymouth Counties; and the division for the city of Boston (Suffolk County). G.L. c. 185C, § 1, as amended by 2002 Mass. Acts c. 184, § 110.

There are ten justices of the Housing Court Department. The Western Division, Worcester County Division, Southeastern Division, and Boston Division each have two justices assigned to them, one justice sits in the Northeastern Division, and there is one circuit justice. G.L. c. 185C, § 8. The chief justice of the Housing Court Department, subject to the approval of the chief justice for administration and management, shall designate one justice to be the first justice of each court. G.L. c. 185C, § 38. The first justice may appoint housing specialists knowledgeable in the maintenance, repair, and rehabilitation of dwelling units.

The jurisdiction of the Housing Court Department originally was limited primarily to landlord-tenant issues. Statutory changes expanded the geographical area of the Housing Court Department, as well as including a more expansive description of what constitutes housing-related subject matter. Generally, all actions are covered that arise from the use of any real property and activity conducted thereon that affects the health, welfare, and safety of any resident, occupant, user, or member of the general public. Originally, the jurisdiction of the court was limited to places that were used or intended to be used for human habitation. The Housing Court Department now has jurisdiction relative to fire safety over nonresidential, as well as residential, property, 2004 Mass. Acts c. 304, § 6, along with the District Court and Superior Court, and equitable powers to enforce the lawful order of a fire marshal. G.L. c. 148, § 34D.

Any activity is included that is subject to regulation by local cities and towns under the state building code, state specialized codes, state sanitary codes, and other applicable statutes and orders. See 2003 Mass. Acts c. 26. Also included are...
claims for unfair and deceptive practices under G.L. c. 93A, §§ 2, 9, and 11, as long as they relate to housing issues as described above. The Housing Court Department has concurrent jurisdiction with the Superior Court and District Court Departments over certain statutorily defined crimes and other civil actions. G.L. c. 185C, § 3. Zoning appeals may be taken to a division of the Housing Court Department (or Superior Court Department) if the land is situated in a county, region, or area served by that division. See G.L. c. 40A, § 17, as amended by 1989 Mass. Acts c. 649, § 2. See Exhibit B for a copy of 1989 Mass. Acts c. 649, § 2.

Any civil action within the Housing Court Department’s jurisdiction and commenced in another department of the trial court can be transferred to the Housing Court Department. G.L. c. 185C, § 20. In matters within its jurisdiction, the Housing Court Department has all powers of the Superior Court Department. Actions may be tried to a jury to the extent that a jury trial is required by the Massachusetts Constitution or U.S. Constitution. G.L. c. 185C, § 21.

The Housing Court Department has promulgated rules and forms of procedure pursuant to G.L. c. 185C, § 7. See Uniform Rules of the Housing Court and Standing Orders (e.g., Time Standards for Summary Process Actions, No. 1-04).

§ 5.6 District Court Department

The District Court Department of the trial court consists of one or more “divisions” in each county. See G.L. c. 218, § 1, defining the territorial jurisdiction of each District Court. The District Courts operate within statutorily specified limits on their civil and criminal jurisdiction. They are an integral part of the Commonwealth’s trial court and they serve as local courts as well as generally the first level of judicial forum available. The District Courts are courts of record with superior and general jurisdiction over all cases and matters over which they have jurisdiction. G.L. c. 218, § 4. The District Courts currently are authorized to have 158 justices and special justices. G.L. c. 211B, § 2. This number does not include the thirty justices appointed to the Boston Municipal Court Department, which is an independent department of the trial court, and serves as the District Court Department for certain parts of the city of Boston. G.L. c. 218, §§ 50–56.

(a) Civil Jurisdiction

District Courts have concurrent original jurisdiction with the Superior Court over all civil actions seeking monetary damages. G.L. c. 218, § 19. However, if an action brought in the District Court includes a claim, counterclaim, compulsory counterclaim, or cross-claim for more than $25,000, the action may be removed
and tried in the Superior Court. On the other hand, actions originally brought in the Superior Court may be remanded for trial in the District Court if it appears unlikely that the damages will exceed $25,000. G.L. c. 231, §§ 102C, 104; G.L. c. 212, §§ 2, 3, 3A.

The amount-in-controversy limit has been construed as procedural rather than jurisdictional; however, the judge has no discretion to refuse to dismiss an action that has a reasonable likelihood of exceeding the $25,000 limit. Sperounes v. Farese, 449 Mass. 800 (2007). Summary process actions (evictions) are not subject to a money damages limitation. If the Superior Court dismissed the case because of the limitation amount, the plaintiff may appeal to a single justice of the Appeals Court within seven days. G.L. c. 213, § 3A.

In 1996, legislation was passed that established an experimental system in Middlesex and Norfolk Counties for the handling of most money damages cases within the concurrent jurisdiction of the District and Superior Courts, as well as summary process cases; this pilot system was continued in these counties. See 1998 Mass. Acts c. 157. Effective September 1, 2000, Berkshire and Essex Counties were added to the experiment. See 1996 Mass. Acts c. 358, as amended by 2000 Mass. Acts c. 142. Additional counties (Barnstable, Bristol, Dukes, Franklin, Hampden, Hampshire, and Nantucket) were authorized for one-trial pilot programs in 2002. See 2002 Mass. Acts c. 70. The experimental system effectively establishes one trial for the covered money damage cases, either in the District Court or the Superior Court. The legislation provided for jury trials (with juries of six persons) in the District Court, and eliminated all remand and removal procedures. This one-trial civil system was adopted statewide on a permanent basis in 2004 under legislation that added the remaining counties, Plymouth, Worcester, and Suffolk. See 2004 Mass. Acts c. 252.

The District Court Department and the Boston Municipal Court Department have concurrent jurisdiction with the Superior Court Department for equitable powers under G.L. c. 214 and the same authority with regard to declaratory judgments under G.L. c. 231A for the purpose of summary process (evictions) actions and civil actions for money damages under G.L. c. 218, § 19. See G.L. c. 218, § 19C, as amended by 2004 Mass. Acts c. 252, § 8. They may grant equitable relief in actions brought to enforce the State Sanitary (housing) Code, see G.L. c. 111, §§ 27A–27K, inclusive; paternity and support actions, G.L. c. 209C; and actions brought under the nonsupport statute and the Uniform Interstate Family Support Act, G.L. c. 273 and G.L. c. 209D, respectively. The District Courts may exercise jurisdiction over summary process actions in the judicial district in which the land lies, G.L. c. 239, § 2. They also have concurrent jurisdiction with the Superior Court to hear appeals of local zoning board decisions, although any party can remove a zoning appeal originally brought in the District Court to the Superior Court. G.L. c. 40A, § 17.
The District Courts are responsible for establishing procedures for, and for administering, the small claims sessions, which are designed to provide an easy, efficient, and simple way of resolving disputes involving $2,000 or less; the dollar limitation does not apply to an action for property damage caused by a motor vehicle. G.L. c. 218, § 21 et seq.

These actions may be heard in the first instance by a clerk-magistrate, G.L. c. 218, § 21, or may be mediated, G.L. c. 218, § 22; however, any case heard before a jury of six must be heard by a justice. G.L. c. 218, § 22. Following a jury trial, the only review is to request a report of questions of law to the appellate division of the District Court. See Christopher v. Porter, 450 Mass. 1007 (2007).

Each District Court has an appellate division made up of a rotating group of District Court justices. The appellate division of the Boston Municipal Court Department has three justices who are designated from time to time by its chief justice. The chief justice for the other District Courts assigns a certain number of justices as set forth in G.L. c. 231, § 108, as amended by 2004 Mass. Acts c. 252, § 15.

A party aggrieved by any ruling on a matter of law by the trial justice may as of right appeal the ruling to the appellate division. A trial court justice also may report questions of law. G.L. c. 231, § 108; see Eresian v. Hall, 442 Mass. 1022, 1023 (2004) (no right to appeal to Appeals Court for small claims claimant).

The District Courts have original criminal jurisdiction, concurrently with the Superior Court, over violations of city and town ordinances, bylaws, rules, and regulations, etc.; all misdemeanors except libels; felonies punishable with a maximum sentence of five years in a state prison; and specific statutory offenses. G.L. c. 218, § 26. Trial is to a jury of six unless the defendant files a written waiver and consents to be tried without a jury. G.L. c. 218, §§ 26A, 27A; see Commonwealth v. Taylor, 69 Mass. App. Ct. 526 (2007). An appeal from a conviction in a District Court jury or jury-waived trial is to the Appeals Court. The District Court judges must bind over for trial in the Superior Court persons who may be guilty of crimes not within the District Court’s final jurisdiction, G.L. c. 218, § 30, but they also may bind over defendants who appear to be guilty of offenses that are within the District Court’s jurisdiction.

The chief justice of the District Court has authority to promulgate uniform rules of practice and procedure for the District Courts, subject to the approval of the Supreme Judicial Court. G.L. c. 218, § 43. In addition to the rules of civil and criminal procedure, the District Court Department has promulgated supplemental rules and special rules, court forms, and standing orders. The Trial Court Rules include Uniform Summary Process Rules and Forms; Uniform Magistrate Rules; Uniform Small Claims Rules, Forms, and Standards (including time standards);
Uniform Rules and Forms in Civil Motor Vehicle Infractions (CMVIs) applicable to the Boston Municipal Court, District Court, and Juvenile Court Departments; Uniform Rules on Impoundment Procedure; and other rules.

Finally, there are certain sessions in District Court that are called “drug courts,” applying a therapeutic model rather than prison for certain drug offenders. See generally J. Matt, “Jurisprudence and Judicial Roles in Massachusetts Drug Courts,” 30 N.E. J. on Crim. & Civil Confinement 151 (No. 2 Summer 2004). For a list of drug courts (as of July 2005), see http://www.mass.gov/courts/admin/planning/drugcourtslist.html.

§ 5.7 Boston Municipal Court Department

The Boston Municipal Court Department of the trial court (BMC) functions as the District Court for certain parts of the city of Boston in civil matters, and exercises concurrent criminal jurisdiction with other specified District Courts. G.L. c. 218, § 1. The Boston Municipal Court Department exercises special civil jurisdiction over certain cases if one or more of the defendants lives or has a usual place of business in Suffolk County, or if the trustee in an action in which trustee process is sought lives or has a usual place of business in Suffolk County. G.L. c. 218, § 54. Certain divisions of the Boston Municipal Court Department have concurrent criminal jurisdiction with each other over certain waters and islands. G.L. c. 218, § 3.

There are thirty Boston Municipal Court Department justices, one of whom serves as chief justice. G.L. c. 211B, § 2; G.L. c. 218, §§ 50–56; G.L. c. 218, § 51A. The Boston Municipal Court Department has concurrent jurisdiction with the District Court Department, as described above, as well as the jurisdiction over the same criminal matters. There is also a small claims procedure, G.L. c. 218, § 21, and a drug court in the central division and also in Brighton, Dorchester, East Boston, Roxbury, and South Boston.

Three years ago, a “gun court” was established in the Boston Municipal Court Department, formally known as the Firearm Prosecution Disposition Sessions. Its purpose was to reduce the one-year arrearage that a gun case spent in court. It has been reported that the average time between arraignment and resolution of the case was cut by more than one-half in the first year.

In June 2007, as part of its voluntary Mental Health Diversion Initiative, the Central Division of the Boston Municipal Court Department added a weekly specialized criminal session; this gives a defendant who is charged with a misdemeanor or nonviolent felony an opportunity for medical treatment as part of a supervised pretrial or probation program.
Practice Note
Drug courts are in the Boston Municipal Court Department and thirteen District Courts. Firearm sessions are conducted in the Central Division of Boston Municipal Court and in District Courts in Lynn and Fall River.

§ 5.8 Juvenile Court Department

The 1992 court reform legislation significantly expanded the Juvenile Court Department. As of the year 2000, the number of judges increased to forty-one. There are eleven divisions of the Juvenile Court Department. See G.L. c. 211B, § 2 (as amended by 2000 Mass. Acts c. 159, § 254); G.L. c. 218, § 58 (as amended by 2000 Mass. Acts c. 159, §§ 271–75). There are four circuit justices; the remaining justices are assigned to the divisions as follows:

- seven to the Suffolk County division,
- six to Middlesex County,
- four to Worcester County,
- one to Franklin and Hampden Counties,
- three to Bristol County,
- four to Essex County,
- two to Norfolk County,
- three to Plymouth County,
- one to Barnstable County and the town of Plymouth, and
- four to the Berkshire and Hampden Counties divisions.

The chief justice of the District Court Department also may assign a special justice to sit in any court of the Juvenile Court Department at the request of the chief justice of the Juvenile Court Department. G.L. c. 218, § 58, as amended by 2007 Mass. Acts c. 61, §§ 25, 26.

The Juvenile Court Department has general jurisdiction over delinquency, child in need of services (CHINS), and care and protection cases. Ancillary proceedings include adoptions, guardianships, termination of parental rights, paternity, and equity.

The Juvenile Courts provide for appeals to jury sessions in cases involving delinquency charges, and in cases of children adjudicated as being in need of services. G.L. c. 119, §§ 39, 56; G.L. c. 218, § 57.
The Juvenile Courts exercise the same powers and duties as District Courts, except that, within each division's territorial jurisdiction, the court exercises jurisdiction exclusive of the District Courts over matters involving juvenile offenders under the age of seventeen and statutory actions involving neglected, wayward, and delinquent children. G.L. c. 218, §§ 59–60. The Juvenile Court also has concurrent equity jurisdiction with the Supreme Judicial Court and the Superior Court in all cases under the provisions of G.L. c. 119 and G.L. c. 210. See G.L. c. 218, § 59.

The chief justice of the Juvenile Court Department may require uniform practice and procedures forms. See G.L. c. 218, § 57A. See Standing Order 1-04 (time standards forms updated as of Jan. 21, 2009); Standing Order 1-07 (violation of probation).

§ 6  STATE COURT DECISIONS

§ 6.1  Supreme Judicial Court and Appeals Court Decisions

(a)  Official Publications

The decisions of the Supreme Judicial Court and of the Appeals Court, sitting respectively as full courts, are both officially and unofficially reported and published. The Supreme Judicial Court opinions are published officially in the Massachusetts Reports, the official publication of opinions in cases dating from September 1804 to the present. Hudson House Associates, 60 Main Street, Dobbs Ferry, NY 10522, publishes the Reports from Volume 1 to Volume 366 on microfilm. The Law Library Microform Consortium, P.O. Box 11033, Honolulu, HI 96828, publishes the Reports to Volume 254 on microfiche. The opinions of the Massachusetts Appeals Court are published officially under the title Massachusetts Appeals Court Reports. All opinions of the Appeals Court from its creation in 1972 are published. The opinions and decisions rendered by single justices of the Supreme Judicial Court and of the Appeals Court are not formally reported or published. They may be reported and summarized on an informal basis in Massachusetts Lawyers Weekly, a weekly legal newspaper published in Boston. Decisions of a single justice of the Supreme Judicial Court in lawyer discipline cases are always published in the legal newspaper, but no other category of single justice decisions of either court is regularly reported. The official publication of the Supreme Judicial Court's decisions is prescribed by statute, G.L. c. 221, §§ 64–66, and is the responsibility of a reporter of decisions appointed by the chief justice of the Supreme Judicial Court. G.L. c. 221, § 63. The statute also directs the reporter of decisions to report and publish the decisions of the Appeals Court. G.L. c. 221, § 64A; G.L. c. 211A, § 9.
The Massachusetts Reports contain

- the opinions of the Supreme Judicial Court in all civil and criminal cases it decides;

- the court’s advisory opinions, called Opinions of the Justices and Answers of the Justices, in response to questions posed by the legislature, the governor, or the Governor’s Council (see Mass. Const. pt. 2, c. 3, art. 20);

- the texts of rules promulgated directly by the Supreme Judicial Court (including the Rules of the Supreme Judicial Court, as well as the Massachusetts Rules of Civil Procedure, the Massachusetts Rules of Appellate Procedure, and the Massachusetts Rules of Criminal Procedure, among others) and amendments thereto; and

- the court’s disposition of every application to it for further appellate review of a decision of the Appeals Court. (The court does not cause its dispositions of requests for direct appellate review or requests for rehearing to be reported.)

The Massachusetts Appeals Court Reports contain the Appeals Court’s decisions in all cases in which it issues a full or rescript opinion (see the discussion in next paragraph), and the text of any rules it adopts or amends.

Decisions of both the Supreme Judicial Court and the Appeals Court are usually written by one of the justices sitting on the panel that heard the case. There may be concurring or dissenting opinions as well. Both courts also issue much shorter per curiam decisions, which are called “rescript” opinions. See G.L. c. 211, § 9. All of these opinions or decisions are published in the official reports. Finally, the Appeals Court decides appeals by “summary order,” a disposition authorized by G.L. c. 211A, § 9 and Rule 1:28 of the Appeals Court Rules. Summary orders almost always take the form of a short per curiam opinion. The disposition of a case pursuant to Rule 1:28 is reported, and may now be cited as persuasive authority but not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258 (2008).

(b) Official Advance Sheets

Before the decisions of the two appellate courts appear in the official bound volumes, they are reported and published daily as slip opinions and weekly as “Advance Sheets.” The advance sheets of both courts are published by Thomson West under contract with the courts, and are available to interested persons on a subscription basis. Slip opinions may be obtained from the Reporter of Decisions
(usually after 10 a.m.) and are also sent by electronic mail to members of the Social Law Library. The slip opinions are superseded by the advance sheets and thus are removed from the Web site of the Reporter of Decisions after fourteen days. See http://www.massreports.com.

(c) Official Headnotes

Both the official bound volumes of the two appellate courts’ decisions and the advance sheets contain brief headnotes summarizing and indexing the main legal points of each full opinion. The headnotes are prepared by the reporter of decisions and his or her staff. While not numbered, the headnotes are picked up and reflected in Shepard’s Massachusetts Citations. The officially reported “full” decisions also identify the lower court; the name of the judge rendering the decision, judgment, or order appealed from, or reporting the case; the names of the parties; the names of counsel for the parties; and the names of individuals or organizations submitting briefs as amici curiae as well as the names of their counsel.

(d) Unofficial Publications

Thomson West publishes all the opinions of the Supreme Judicial Court and Appeals Court and the rules of these two courts in its North Eastern Reporter, as well as in its series entitled Massachusetts Decisions. The latter is simply a separate publication of the pages of the North Eastern Reporter containing the decisions of the two Massachusetts appellate courts: the Supreme Judicial Court from 1886 to date and the Appeals Court from 1976 to date. The North Eastern Reporter contains decisions from the Supreme Judicial Court from 1885 to date, and the Appeals Court from 1972 to date. (Thomson West does not publish the Supreme Judicial Court’s disposition of requests for further appellate review.) Both series also publish the appellate courts’ opinions in paperbound volumes in advance of their appearance in hard cover, but the delay between issuance of a decision and its publication by Thomson West in paperbound version is quite a bit longer than is the case with the official advance sheets.

The North Eastern Reporter is available from Thomson West on ultrafiche.

(e) Electronic Access to Opinions

The decisions of the two appellate courts are available free on the following Internet sites:

- http://www.socialaw.com/ (last six months);
- http://www.malawyersweekly.com (1997–date);
Commercial services offering fee-based access to court opinions include: BloombergLaw, Casemaker, LexisNexis, Loislaw.com, Quicklaw, Versuslaw, and Westlaw.

Exhibit C is a chart summarizing published sources for decisions of the Supreme Judicial Court. Exhibit D is a chart providing the same information for decisions of the Appeals Court.

§ 6.2 Citation of Supreme Judicial Court and Appeals Court Decisions

The Supreme Judicial Court by rule requires that all case citations in briefs filed in that court be to the official report of the case. This holds true of Massachusetts case decisions as well. As a result, briefs are not required to contain any parallel references to the North Eastern Reporter for cited Massachusetts appellate decisions. (Certainly the court’s own opinions never contain such parallel references.)

For Volumes 17 through 97 of the Massachusetts Reports, the court requires that the citation refer to the name of the reporter of decisions rather than the volume number. For example, the proper reference to a case appearing in Volume 64 of the Reports would be Low v. Howard, 10 Cush. [Cushing] 159 (1852), rather than Low v. Howard, 64 Mass. 159 (1852). See Mass. R. App. P. 16(g). References to volumes of the Massachusetts Reports before Volume 17 or after Volume 97 should be to the volume number. Always include the date of the decision cited, as well as the pages of the decision relied on. All references to decisions of the Appeals Court should be to the appropriate volume of the Massachusetts Appeals Court Reports. The proper abbreviation is as follows: Commonwealth v. Cote, 5 Mass. App. Ct. 365 (1977).

§ 6.3 Trial Court Decisions

There are no official reports of the decisions of any department of the trial court. The decisions of the appellate division of the District Court Department are, however, reported and published. The years 1936 to 1950 are reported in Massachusetts Appellate Division Reports, 15 volumes, Boston: Lawyer’s Brief and Publishing Co., 1936–1950. The years from May 1941 to February 1977 are reported in Massachusetts Appellate Decisions, 59 volumes, Boston: Wilson-Hill Co., 1960–1978. In 1977, the name of the series was changed to Reports of the Massachusetts Appellate Division. The decisions from 1977 to 1979 have been
published only in advance sheet form, first by Bateman & Slade of Boston, later by Massachusetts Lawyers Weekly. Since 1980, Massachusetts Lawyers Weekly has issued bound volumes and publishes advance sheets for current decisions. Subsequent case history of the Appellate Decisions may be obtained by using the “Auto-Cite” service provided by LexisNexis and the “Insta-Cite” service provided by Westlaw. See § 7.5, below. These decisions are annotated in Massachusetts Digest and are covered in Shepard’s Massachusetts Citations.


Massachusetts Lawyers Weekly reports on selected decisions by judges of the Superior Court, the Probate and Family Court, the Land Court, the District Courts, and the appellate division of the District Court. Lawyers Weekly does not publish these decisions verbatim, but rather describes their contents and makes the opinions available for copying.

The Land Court Reporter has been published by Landlaw, Inc., 675 VFW Parkway, #354 Chestnut Hill, Massachusetts, since 1993.

§ 6.4 Superior Court Opinions

Selected Superior Court opinions are published in paper format by Massachusetts Lawyers Weekly in digest form. The full text may be requested for a fee. The Massachusetts Law Reporter, a subscription service published weekly by the Massachusetts Law Book Company in Guilford, Connecticut, prints selected decisions of the Superior Court verbatim.

Superior Court decisions for the current year may be browsed for free on the Social Law Library’s Web site http://sociallaw.com/slips.htm?sid=121. Electronic access to selected Superior Court decisions is offered by BloombergLaw (2005 to present), Westlaw (from 1993 to present), LexisNexis (from 1993 to present), and Loislaw.com (September 1995 to present) on a fee basis.

Exhibit E is a chart summarizing published sources for Appellate Division decisions. Exhibit F provides the same information for Superior Court decisions.

§ 6.5 Administrative Decisions

The Code of Massachusetts Regulations (C.M.R.) is available at the secretary of state’s office, from 1987 to date. The regulations first appear in the Massachusetts Register (1976 to date), which is published biweekly. There is a cumulative
table reporting amendments with citations to the Massachusetts Register. These are available from the State Book Store, Room 116, The State House, Boston. There is a microfiche edition monthly from William S. Hein Co., Inc. The Code of Massachusetts Regulations (but not the Massachusetts Register) is published by Weil Publishing, a division of LexisNexis; there are twenty-eight volumes that are updated eleven times a year. Those administrative regulations which agencies publish on their Web sites can be found on the trial court law libraries’ Web site, available at http://www.lawlib.state.ma.us/cmr.html. Note that the entire C.M.R. is not available on the free Web. See Chapter 6 for more detailed information concerning the administrative code and decisions. Selected administrative decisions, updated quarterly, are available online for members of the Social Law Library (http://www.socialaw.com).

§ 7 RESEARCHING AIDS FOR STATE COURT DECISIONS

§ 7.1 Digests

Thomson West publishes a multivolume series digesting reported Massachusetts cases, both state (including the decisions of the Supreme Judicial Court, the Appeals Court, and the appellate division of the District Court Department) and federal (including the decisions of the U.S. Supreme Court in cases originating in the Massachusetts state and federal courts, as well as published decisions of the First Circuit Court of Appeals in Massachusetts cases, and the published decisions of the U.S. District Court for the District of Massachusetts), according to subject matter and West’s key number system. In 1986, it published the second edition of the series, called Massachusetts Digest 2d, which digests cases from 1933 to date. (The first edition digests cases purportedly from 1761.) Each volume of the Digest 2d is updated by annual pocket parts and updated weekly by West’s Reporter Advance Sheets or Westlaw. The series also includes volumes containing a table of cases, a defendant-plaintiff table, “words and phrases,” and a descriptive word index for other finding aids.

§ 7.2 Indexes

Each bound volume of the Massachusetts Reports and the Massachusetts Appeals Court Reports contains a subject index and an alphabetically arranged table of cases. Volumes 111 through 356 of the Massachusetts Reports also contain tables of cases cited. From time to time during every year, the publisher of the advance sheets for the two courts publishes an alphabetical case-name index of
the cases decided and a subject index. These advance sheet indexes are distributed as part of the subscription service.

All volumes of the Thomson West North Eastern Reporter and Massachusetts Decisions contain subject indexes based on the key number system. The paperbound volumes also include this type of index. Both series also contain an index of cases decided and of statutes and court rules construed. Finally, Thomson West publishes the National Reporter Blue Book, a series that is updated annually, and which provides parallel citation tables for the North Eastern Reporter and the official reports of the two Massachusetts appellate courts. Parallel citations for the North Eastern Reporter and the Massachusetts Reports are also included in Thomson West’s Massachusetts Decisions, both bound and paper volumes.

Twice each year, Massachusetts Lawyers Weekly publishes a full-scale index that cross-references case name, the deciding court, subject matter, etc.

Shepard’s publishes a volume entitled Massachusetts Case Name Citator that covers cases decided by the Supreme Judicial Court and Appeals Court from 1940 to the present.

§ 7.3 Annotations

The Massachusetts General Laws Annotated (Thomson West) and the Annotated Laws of Massachusetts (LexisNexis) annotate every statute with short headnotes summarizing court decisions and opinions of the Massachusetts Attorney General that relate to the statute. The annotations are not always complete. The pocket part supplements of both publications also contain annotations. As stated in Chapter 2 herein, it is important to read the actual case cited rather than relying on the headnote alone.

Another useful source of case annotation by subject matter is the Massachusetts Practice Series published by Thomson West. The authors of the different volumes in most instances attempt to provide fairly exhaustive references to Massachusetts decisions on point. The Series volumes are updated periodically but not necessarily annually.

§ 7.4 Shepard’s Massachusetts Citations

Shepard’s Massachusetts Citations compiles citations of the decisions of the Supreme Judicial Court, the Appeals Court, and the appellate division. It is kept up-to-date with case and statute supplements. Shepard’s Massachusetts Case Name Citator compiles citations of both appellate courts’ decisions by case name. It too is kept current with periodic supplements. It also includes the Superior Court and opinions of the State Ethics Commission, Massachusetts statutes, and Massachusetts constitutional citations.

Shepard’s Massachusetts Citations is on LexisNexis as well as on CD-ROM.

§ 7.5 Electronic Citation Services

Shepard’s Massachusetts Citations is now available exclusively on LexisNexis. This allows searches on citations to opinions of the Supreme Judicial Court, Appeals Court, and appellate division of the District Court Department, as well as on newly released appellate court opinions that have only LexisNexis document numbers.

Westlaw offers its own citation service, known as KeyCite. KeyCite provides for searching the Supreme Judicial Court, Appeals Court, appellate division of the District Court Department, and Superior Court Department. Newly released appellate court opinions, with Westlaw document citations only, may also be searched in KeyCite, as well as statutes and regulations.

BloombergLaw has created BCite, its own citator to indicate history and treatment of a case. Its companion service, Ecosearch, allows a researcher to research cases "Citing" and/or "Cited" by the reference case.

Wolters/Kluwer/Loislaw.com has its own unique citation checking service, known as Globalcite. Citation services may be run against Supreme Judicial Court, Appeals Court, Superior Court, and appellate division citations, as well as statutes, acts, or regulations.

Material in this chapter represents the opinions of the authors and not necessarily those of the Supreme Judicial Court.
EXHIBIT A — Massachusetts Court System

Committees on subject to SJC oversight

SUPREME JUDICIAL COURT

APPEALS COURT

TRIAL COURT

Office of Commissioner of Probation

Office of Jury Commissioner

Boston Municipal Court Dep't
District Court Dep't
Housing Court Dep't
Juvenile Court Dep't
Land Court Dep't
Probate and Family Court Dep't
Superior Court Dep't

Chapter 649. AN ACT RELATIVE TO THE JURISDICTION OF THE HOUSING COURT DIVISION OF THE TRIAL COURT.

SECTION 2. The first paragraph of section 17 of chapter 40A of the General Laws, as so appearing, is hereby amended by striking out the first sentence and inserting in place thereof the following sentence:—Any person aggrieved by a decision of the board of appeals or any special permit granting authority or by the failure of the board of appeals to take final action concerning any appeal, application or petition within the required time or by the failure of any special permit granting authority to take final action concerning any application for a special permit within the required time, whether or not previously a party to the proceeding, or any municipal officer or board may appeal to the land court department, the superior court department in which the land concerned is situated or, if the land is situated in Hampden county, either to said superior court department or to the division of the housing court department for said county, or if the land is situated in a county, region or area served by a division of the housing court department either to said superior court department or to the division of said housing court department for said county, region or area, or to the division of the district court department within whose jurisdiction the land is situated except in Hampden county, by bringing an action within twenty days after the decision has been filed in the office of the city or town clerk.

**EXHIBIT C — Massachusetts Case Law: Supreme Judicial Court**

**Electronic Access to Decisions**

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Supreme Judicial Court Electronic Decisions
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* Selective information on CD-ROM products was available from various sources. Prices listed on publisher’s Web site or based on 2011 edition of Legal Information Buyer’s Guide and Reference Manual by Ken Svengalis.
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Appeals Court
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* Selective information on CD-ROM products was available from various sources. Prices listed on publisher’s Web site or based on 2011 edition of Legal Information Buyer’s Guide and Reference Manual by Ken Svengalis.
## EXHIBIT E — Massachusetts Appellate Division

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## Appellate Division
### Decisions Available in Print **

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EXHIBIT F—Massachusetts Superior Court
(Selected Decisions)

Electronic Decisions Available Online

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SECTION 4

An Introduction to the Bar Disciplinary System

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James S. Bolan, Esq.
Brecher, Wyner, Simons, Fox & Bolan LLP, Newton

§ 4.2 The Attorney and Consumer Assistance Program (ACAP) .......................... 4–65
Board of Bar Overseers/Office of the Bar Counsel
The Disciplinary Process

James S. Bolan, Esq.
Brecher, Wyner, Simons, Fox & Bolan LLP, Newton

Scope Note
This chapter acquaints the reader with the particulars of the disciplinary process. The chapter discusses who the various players are in the disciplinary process, details how an investigation would proceed, and, finally, addresses the prosecution of a discipline case, including possible outcomes and the stages in a formal proceeding.

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Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
§ 1  THE PLAYERS AND THE PROCESS

Any attorney admitted to or engaged in the practice of law in the Commonwealth is subject to the exclusive disciplinary jurisdiction of the Supreme Judicial Court. SJC Rule 4:01, § 1. On January 1, 1998, Massachusetts became the forty-fourth state to adopt a version of the ABA’s so-called Model Rules of Professional Conduct. In substitution for the old Disciplinary Rules, the new Massachusetts Rules of Professional Conduct changed not only the linguistic landscape (gone are the old “DRs”), but also the organizational format of lawyer discipline.

Most recently, SJC Rule 4:01 and the Rules of the Board of Bar Overseers were amended as of September 1, 2009.

The Supreme Judicial Court appoints a twelve-member Board of Bar Overseers (BBO)—currently eight lawyers and four lay members—to undertake investigations and oversight of lawyer conduct. SJC Rule 4:01, § 5. The BBO serves not only as the “trial court,” via three-member hearing committees or special hearing officers, but also as the “appellate court” for cases pending before it on appeal or review of hearing committee or officer determinations. In each case, the BBO not only reviews decisions by bar counsel and the hearing committees, but also
advocates a position in each case. Under SJC Rule 4:01, § 5(3)(C), a hearing committee may contain one nonlawyer member.

The parties in every proceeding are the bar counsel, as prosecutor, and the attorney complained about, as the respondent.

A bar counsel is appointed by the BBO, but bar counsel (and his or her assistants) serves at the pleasure of the court, not the BBO. SJC Rule 4:01, § 5(3)(b). There is a separate office of the bar counsel that physically resides at the BBO and serves as part of it. Although initially viewed as an integral part of the BBO and, thus, subject to the BBO’s direction in every respect, bar counsel has achieved an independent role as the disciplinary prosecutor. The BBO has its own counsel who represent its position separately before the court, leaving bar counsel to act as the prosecutor without the BBO’s cloak.

The BBO, pursuant to SJC Rule 4:01, § 6, has the authority to appoint a single special hearing officer in lieu of a three-person hearing committee.

§ 2 INVESTIGATIVE PROCESS

§ 2.1 Overview

The procedural steps that the bar discipline process may take in Massachusetts are outlined in Exhibit A. As a review of the exhibit will indicate, disciplinary proceedings may play out in a number of different ways, depending on the results of the initial investigation, the course of proceedings before the hearing committee or officer, and review by the BBO or the Supreme Judicial Court.

Bar discipline proceedings are administrative undertakings under G.L. c. 30A. Rights of due process, as described below, are more limited than in criminal or civil proceedings, in that this process is one that has been described as “quasi-criminal/quasi-civil” in nature. In Massachusetts, control and membership of the bar is the sole prerogative of the judiciary. In re Opinion of the Justices, 279 Mass. 607, 609–11 (1932) (interpreting Article 30 of the Declaration of Rights of the Massachusetts Constitution). The only limitation on the judiciary’s authority in this regard is the requirement that the “essential elements of notice and opportunity to be heard must be preserved.” In re Keenan, 313 Mass. 186, 204 (1943). There is no right to a jury trial. See In re Gargano, 27 Mass. Att’y Disc. R. __ (2011) (citing SJC Rule 4:01, § 8, which governs bar disciplinary procedure and does not provide the respondent with the right to a jury trial, as “dispositive of the issue”).
§ 2.2 Initial Complaint

Every investigation before the BBO is initiated by a complaint filed as a request for investigation. BBO Rules § 2.1. Complaints may be received from former or present clients, opposing counsel, opposing parties in litigation, beneficiaries of estates or trusts, judges, or any percipient person. The BBO or bar counsel may also generate a complaint sua sponte. SJC Rule 4:01, §§ 5(3)(a), 7(1); see also BBO Rules § 2.1(b). In accordance with revised Section 7(1) bar counsel is given greater discretion to refuse to open files or investigate a matter if it seems to be frivolous; however, bar counsel must notify the complainant if he or she wishes to seek an appeal of that decision to the BBO. SJC Rule 4:01, § 7(1); see BBO Rules §§ 2.1, 2.10. Bar counsel does not require a complaint to be filed by a complaining witness in order to investigate a lawyer or his or her behavior. The attorney who is the subject of such an investigation is referred to as the respondent. The complaints need not be under oath or verified. BBO Rules § 2.2.


If, in the assistant’s opinion, the complaint passes initial muster and raises a question of possible disciplinary rule violation, the complainant’s complaint, usually in the form of correspondence or a complaint form provided by the BBO, is sent to the respondent for reply. Probable cause is not a prerequisite to seeking an answer to a complaint. Hence, when one receives a “bouquet” from bar counsel, one must do the following four things:

- **Open it.** Do not throw it in the wastebasket or use it to start a barbecue, because you will only get more mail, not less. Be assured that neither the complaint nor bar counsel will go away. The bar counsel’s office is too single-minded of purpose to lose the file or forget about you.

- **Read it.** You will have to do so sooner or later and, if later, the repercussions will likely be greater.
THE DISCIPLINARY PROCESS

• **Do not throw it away.** Instead, put the date on which a reply is due (usually twenty days from the date of the cover letter) on your calendar, as you would any other due date.

• **Consider seeking independent counsel.** Aside from the anger and fear generated by receiving the complaint, the distress of having to deal with it often blinds the critical eye we, as attorneys, would cast upon a client’s problem. Respondents who represent themselves may act out of such anger and fear, at the expense of good judgment. The anger may generate irrelevant and inappropriate responses, while fear may generate unlawyerlike responses, even to the extent of answering the allegations raised (and only those raised), failing to assert defenses, or failing to seek alternative forms of disposition when such might be available. In addition, many lawyers deny their complicity in any complaint. This denial invariably clouds the lawyer’s vision and understanding.

Currently, all complaints filed with the BBO or bar counsel are confidential and absolutely privileged. The complainant shall be immune from civil liability based on his or her complaint, provided, however, that such immunity from suit shall apply only to communications to the BBO or bar counsel and shall not apply to public disclosure of information contained in or relating to the complaint.

The complainant and each witness giving sworn testimony or otherwise communicating with the Board or the bar counsel during the course of any investigation or proceedings under this rule shall be immune from civil liability based on any such testimony or communications made to the Board or the bar counsel and shall not apply to public disclosure of information attested to or communicated during the course of the investigation or proceedings.

SJC Rule 4:01, § 9(2).

All BBO members and staff, including hearing committee members, and bar counsel and his or her staff are absolutely immune from liability for any conduct in the course of their official duties. SJC Rule 4:01, § 9.
§ 2.3 Publicity, Public Access, and Media Access

In October 2011, the BBO adopted a series of policies and practices, among which was one related to media and public access to BBO proceedings. It reads as follows:

BBO proceedings are open to the public, and, subject to SJC Rule 4:01, § 20, the BBO will permit and make appropriate arrangements for public access to its proceedings. Public access will include making arrangements for members of the public, including media, to view public documents and to attend oral arguments and hearings conducted by the board and its hearing committees. The media normally will be permitted to set up audio-visual equipment at such hearings. The board chair, the chair of the hearing committee or board panel may limit the number of pieces of such equipment, may require that the equipment be set up in advance of the hearing, and may make such other rulings regarding media access as are necessary to avoid disruption and to preserve the dignity of the hearing.

Board members and hearing officers are asked not to comment to the media on any aspect of disciplinary matters, regardless of whether such matters are pending, on appeal, or have finally been decided. All inquiries from the media to a board member should be referred to the board’s chair or to general counsel.

BBO Policies and Procedures (approved October 2011).

In addition, disciplinary decisions of the Supreme Judicial Court and the BBO are published on the BBO’s Web site (http://www.mass.gov/obcbbo/decisions.htm), in the Massachusetts Attorney Discipline Reports (which the BBO publishes), in Massachusetts Lawyers Weekly, on the BBO database at the Social Law Library, and via press releases sent to newspapers where the disciplined lawyer lives and works.

The BBO decided not to do anything to limit search-engine access to these decisions even though such searches result in republication on Google and other search sites. In a recent decision, the court ordered that bar counsel and the BBO could disclose to a former client’s new counsel information otherwise deemed to be confidential under SJC Rule 4:01, § 20. The information sought related to
when the attorney “learned or probably learned” that bar counsel intended to file disciplinary charges against the lawyer so that the former client could pursue a fee claim. See In re Taylor, No. BD-2007-065 (Feb. 10, 2011).

In a related matter, the Supreme Judicial Court amended Rule 4:02 by adding a new Section 10, which provides that residential addresses of attorneys listed on registration statements will now be treated as “confidential” for use solely by bar counsel or the BBO. If a lawyer lists his or her home address as the office address, this rule will not apply.

§ 2.4 Answer

Once a complaint has been docketed, every communication from bar counsel’s office necessitates a response. The invitation to tender a reply is not open to discussion. Failure to respond may in certain instances create an impression (if not an inference) of guilt or exacerbate the problem. For example, the lack of a response to a complaint alleging neglect may be viewed or interpreted as a continuation of the same behavior. Moreover, “failure to cooperate” has been held to be grounds for disciplinary action, in and of itself.

In addition, the rules of the Supreme Judicial Court identify a number of types of inaction that “constitute misconduct and . . . grounds for appropriate discipline,” including without limitation:

the failure without good cause to (a) comply with a subpoena validly issued under [SJC Rule 4:01, § 3(22)], (b) to respond to requests for information by the bar counsel or the Board made in the course of the processing of a complaint; (c) to comply with procedures of the Board consistent herewith for the processing of a petition for discipline or for the imposition of public reprimand or admonition (See [SJC Rule 4:01, § 4}); or (d) to comply with a condition of probation or diversion to an alternative educational, remedial, or rehabilitative program . . . .

SJC Rule 4:01, § 3(1). For further discussion of the issues arising under SJC Rule 4:01, § 3, see § 3.2, Beginning Formal Proceedings, below.

A complaint need not recite in chapter and verse a violation of any rule on its face. They do not need to be attested or under oath nor do they need to satisfy a prima facie standard of any kind. However, if bar counsel determines that the complaint requires an answer, an answer must be forthcoming, even if the
respondent does not believe that the complainant has stated a violation. Because a respondent is ultimately obligated to respond to a complaint, SJC Rule 4:01, § 3; BBO Rules § 2.6, the simple but critical act of acknowledging the existence of the complaint is often the first step in dealing with the reality of being an active, albeit involuntary, part of the disciplinary process.

The court has held that a respondent has the “obligation to cooperate” with bar counsel in the course of his or her investigation. This obligation arises out of SJC Rule 4:01, § 3. The rule states that “failure without good cause . . . to respond to requests for information by the bar counsel or the Board of Bar Overseers made in the course of the processing of a complaint . . . shall constitute misconduct and shall be grounds for appropriate discipline.” SJC Rule 4:01, § 3 (emphasis added). See also In re Garabedian, 416 Mass. 20 (1993).

In In re Cohen, 3 Mass. Att’y Disc. R. 43 (1983), the respondent failed, without good cause, to respond to notices or letters or even to appear to receive a private reprimand ordered by the BBO that would have concluded the disposition of the underlying complaint. In the opinion of Justice Wilkins, “circumstances may warrant public censure of an attorney who consistently ignores requests for information from, and declines to cooperate with, bar counsel, even when it is shown in time that the underlying complaint was frivolous.” In re Cohen, 3 Mass. Att’y Disc. R. at 46.

As a consequence of his failure to cooperate, the court held that Cohen had violated SJC Rule 4:01, § 3 and warranted additional disciplinary measures; accordingly, public censure, rather than private reprimand, was ordered.

In an earlier case, In re Kelly, 2 Mass. Att’y Disc. R. 133 (1981), the court held that the “unexcused failure” to provide any response was a critical factor in its determination to impose public, rather than private, discipline. “A member of the Bar of this Commonwealth cannot successfully isolate himself from disciplinary proceedings by attempting to throw up a barrier around himself by ignoring notices, by making himself unavailable, and by refusing to respond to notices.” In re Kelly, 2 Mass. Att’y Disc. R. at 134.

See, for further example, In re Garabedian, 416 Mass. 20 (1993) (instances of repeated failures to cooperate will be sanctioned in and of themselves or considered to be an aggravating circumstance), and In re Goldstein, 25 Mass. Att’y Disc. R. 228 (2008).

Many attorneys view the obligation to cooperate as tantamount to carrying the rope to one’s own hanging. While the scope of the obligation to cooperate has not yet been fully determined by the Supreme Judicial Court, and there is a potential conflict of constitutional proportions, the obligation exists, nonetheless,
and only if it is constitutionally inappropriate should the lawyer’s “failure” to cooperate not result in the imposition of a sanction.

(a) Right Against Self-Incrimination

The extension of an attorney’s right to claim the privilege against self-incrimination during disciplinary proceedings has been, and remains, a subject of substantial comment.

In Spevack v. Klein, 385 U.S. 511 (1967), the Supreme Court extended the protection of the Fifth Amendment to attorneys facing disbarment. In Spevack, the Court held that a lawyer should not be made to choose between the threat of disbarment, with the loss of professional reputation and of livelihood, and self-incrimination, because the former are such “powerful forms of compulsion [as] to make a lawyer relinquish the privilege.” Spevack v. Klein, 385 U.S. at 516.

Lawyers have a constitutionally protected interest (but not right) in their license to practice law. In re Ruffalo, 390 U.S. 544 (1968); In re Kenney, 399 Mass. 431 (1987). See also Mathews v. Eldridge, 424 U.S. 319, 333 (1976), in which the court reaffirmed the entitlement to a due process hearing before any property interest is withdrawn or a “grievous loss of any kind” is suffered.

Some courts have construed Spevack to limit the privilege to only those disclosures that might be used in a criminal proceeding or to evidence that might lead to other evidence that might be so used. But the Supreme Judicial Court has held in In re Kenney, 399 Mass. 431, 437 (1987) that no lawyer may be sanctioned as a penalty for asserting the privilege against self-incrimination.

Indeed, in In re Elias, 418 Mass. 723 (1994), the court stated that the respondent was not compelled to give evidence in violation of her rights against self-incrimination. The court thus noted the applicability of the right against self-incrimination in a disciplinary action in which a suspension was the proposed remedy (although the end result was disbarment).

The scope of the privilege has been held to extend to a lawyer’s personal papers, Boyd v. United States, 116 U.S. 616 (1886), but it has been denied as to records that the lawyer is “required” to retain, as enunciated in Shapiro v. United States, 335 U.S. 1 (1948). Shapiro held that the privilege against disclosure applicable to private records is not applicable to public records or records “required by law to be kept in order that there may be suitable information or transactions which are the appropriate subjects of governmental regulation.” Shapiro v. United States, 335 U.S. at 17 & n.23. The Supreme Judicial Court held in 1988 that a lawyer’s bank statements and a list of all matters in which a lawyer acts as fiduciary, holds client funds in escrow or has access to funds, securities or properties
were “required records” and must be produced. In re Kenney, 399 Mass. 431, 437 (1987). The court concluded that production of the records sought was not testimonial. It is only an admission that the required records exist and are in the lawyer’s possession. In In re Boxer, 14 Mass. Att’ry Disc. R. 74, 78–79 (1998), the court restated its position on the nature of bar discipline proceedings and the relationship to constitutional privilege.

While a lawyer may not be disciplined solely for having invoked the privilege, Spevack v. Klein, 385 U.S. 511 (1967), the drawing of an adverse inference in a civil proceeding is appropriate. “An inference adverse to a defendant may properly be drawn . . . from his or her failure to testify in a civil matter . . ., even if criminal proceedings are pending or might be brought against the defendant.”

(b) Effect of the Answer

The answer to any complaint is critical, not only to comply with the aforementioned obligation to reply, but also to provide an appropriate response to the charges that have been alleged and that might be alleged. From bar counsel’s perspective, the answer provides an opportunity to obtain a factual history, as well as direct responses to the allegations in the complaint. It also gives a chance to assess the credibility of the respondent and, should the matter proceed further and become the subject of a disciplinary proceeding, it provides a writing for use as an admission against interest or impeachment. In sum, every writing by a respondent can and may be used against you.
From the respondent’s perspective, the answer provides an opportunity to respond and “clear one’s name,” but it is also laden with evidentiary weight, as just noted.

Respondents are also advised by bar counsel that the answer may be sent to the complainant for comment. BBO Rules § 2.6(3).

(c) Closing or Dismissal

At any stage of the investigative process, the complaint may be dismissed and the file closed if there is no basis or an insufficient basis to recommend discipline, if there is no jurisdiction in the BBO (such as a fee dispute) or if the matter is stale. Bar counsel has the authority to investigate and prosecute illegal or excessive fees charged, sought or collected. See Mass. R. Prof. C. 1.5. But fee disputes are often referred to the Massachusetts Bar Association (MBA) or Boston Bar Association (BBA) fee arbitration boards. See also First Nat’l Bank of Boston v. Brink, 372 Mass. 257 (1977). The Office of Bar Counsel has established a program called Attorney and Consumer Assistance Program (ACAP), through which minor complaints are being handled “informally.” See Mass. R. Prof. C. 1.5 (and former DR 2-106). ACAP seeks to divert and resolve minor matters, such as fee disputes, by alternative dispute resolution means. See Anne Kaufmann, “Five Years of ACAP,” available at http://www.mass.gov/obcbbo/acap5.htm; and http://www.mass.gov/obcbbo/fy2006.pdf, http://www.mass.gov/obcbbo/fy2007.pdf, and http://www.mass.gov/obcbbo/fy2008.pdf (which set forth the statistics for matters before the Office of Bar Counsel in recent years).

Following completion of any investigation of the complaint that bar counsel deems appropriate and after consideration of any statement of position filed by the Respondent, he or she may take any one of the following actions:

- close the complaint or make a determination that a complaint need not be pursued, subject to the notification requirements of Section 2.10;
- close a matter after adjustment, informal conference, or reference to and completion of diversion to an alternative educational, remedial, or rehabilitative program; or
- recommend to the BBO
  - that an admonition be administered in those cases in which a violation of the Rules of Professional Conduct is found which is determined to be of insufficient gravity to warrant the prosecution of formal charges; or
Bar counsel’s notice to the complainant must include a letter from the BBO advising the complainant of his or her right to request review of the decision by a member of the BBO to close the complaint, and that such request must be made in writing no later than fourteen days after the date of the notification by bar counsel.

If, under Section 2.7 of the BBO Rules, a complainant requests review of the closing of a complaint, bar counsel must transmit the file to the BBO for review. BBO Rules § 2.8.

At this point, the BBO has the right to adopt, reject or modify bar counsel’s recommendation. If the reviewing member of the BBO determines to modify or reject the recommendation of bar counsel, he or she must set forth this determination and the reasons for it on the recommendation form. BBO Rules § 2.8. This determination is further appealable to the board chair, who has discretion to adopt or modify any action. BBO Rules § 2.9. The board chair’s determination as to bar counsel’s recommendation of an admonition shall be final and not subject to objection under Section 2.9(e). BBO Rules § 2.9(c).

In addition, the investigative process may also continue for some time after the receipt of an answer from the respondent, and may then be closed.

(d) Communication with Bar Counsel by Reviewing Board Members

Board members who review bar counsel’s requests to prosecute, dismiss or otherwise dispose of grievances are encouraged, in the course of their duty review process, to communicate directly with the Office of Bar Counsel when they have questions about OBC’s recommendation on whether to close, prosecute, or otherwise dispose of a case. Approval or rejection of the recommendation is an ex parte process. Reviewing board members are recused from participating in later consideration of appeals of the outcome of the matters in which they reviewed bar counsel’s recommendations.

(e) **Diversion Program**

Bar counsel has established a diversion program under which disciplinary matters can be resolved as an alternative to formal discipline and allow for a confidential disposition. The Diversion Program Policy Statement was issued by bar counsel and has been adopted as a policy of the BBO as well. See Exhibit B.

(f) **Sufficient Cause**

**Bar Counsel’s Recommendation**

When the prosecution of formal charges is recommended pursuant to Section 2.8 of the BBO Rules or when bar counsel seeks to amend a previously approved petition for discipline by adding or deleting charges, bar counsel shall prepare a petition for discipline or an amended petition for discipline and a confidential charging memorandum or revised charging memorandum. Section 2.8(5) of the BBO Rules now provides that “[t]he Charging Memorandum shall be considered only by the Reviewing Board Member and by the Board Chair on appeal pursuant to Section 2.9 of these Rules and shall not be provided to the hearing committee, hearing panel, or special hearing officer, or the Board.”

**Transmission of File**

Bar counsel shall forward to the reviewing board member the documents set forth in Section 2.8(b)(1) of the BBO Rules, the parties’ agreement, if any, and the file.

**Standard of Review**

In reviewing a recommendation to prosecute formal charges or to add or delete previously approved charges, the reviewing board member shall make a determination

- whether the charging memorandum or revised charging memorandum supports the charges in the petition for discipline or the amended petition for discipline, and, if applicable, whether the revised charging memorandum adequately justifies the deletion of previously approved charges; and

- whether, if the charges in the petition for discipline or amended petition for discipline were to be proved by a preponderance of the evidence, the case would warrant public discipline.
Action by Reviewing Board Member

The reviewing board member may approve, modify or reject bar counsel’s recommendations under Section 2.8(b)(1). If the reviewing board member modifies or rejects bar counsel’s recommendation, he or she shall set forth this determination and the reasons for it on the recommendation forms. The reviewing board member may confer with bar counsel in making his or her determination.

Role of General Counsel’s Staff in Reviewing Bar Counsel’s Recommendation to Reviewing Board Member for Formal Prosecution

Board Office of General Counsel will review bar counsel’s charging memo, the proposed petition for discipline, and the underlying investigatory file to see that the facts uncovered by the investigation support the charges, and that, if proven, public discipline would be warranted. Board Office of General Counsel will note for the reviewing board member any factual matters the latter may wish to examine more closely. To assist in this process, the charging memorandum should describe any information obtained during the investigation that supports or detracts from bar counsel’s determination that the respondent has committed the charged violations of the Rules of Professional Conduct (preferably with corresponding tabs in the file).

Despite the availability to the reviewing board member of the file and discussion with the assistant bar counsel involved, there are limits to the time available to a reviewing board member in deciding whether to approve or disapprove a recommendation, and it is important that the reviewing board member receive not only bar counsel’s support for the recommendation, but also the information developed in the course of the investigation that might lead to a different conclusion, that is, information that detracts from bar counsel’s determination that the respondent has committed the violations sought to be charged. Given the importance to the process of the facts and the basis for the factual allegations underlying bar counsel’s recommendations, the assistance of bar counsel and
Board Office of General Counsel in this way should result in sounder decisions. A Board Office of General Counsel staff member involved in this process is not thereby recused from further participation in the matter, as the Board Office of General Counsel staff member is assisting the reviewing board member in the performance of his or her duty and has no decision-making authority.

See BBO Policies and Procedures (approved October 2011).

§ 2.5 Deferment

In certain circumstances, the respondent may seek to defer any action by bar counsel in matters involving related civil or criminal litigation. Supreme Judicial Court Rule 4:01, § 11 states that a deferment may be granted at the discretion of the BBO or the court “for good cause shown.” Dismissal, favorable judgment or acquittal in the collateral proceeding does not require the dropping of disciplinary charges, however. See also BBO Rules § 2.13.

§ 2.6 Expunction

The BBO Rules generally provide that the records of matters dismissed or closed and not reopened within six years will be destroyed and expunged. BBO Rules § 4.2. Section 4.2(a) states that

> the records of a matter that Bar Counsel in his or her discretion has determined does not warrant investigation pursuant to Section 2.1(b)(1) and of a complaint against a lawyer that has been dismissed and not subsequently reopened, shall be destroyed and expunged following the expiration of six years from the date the complaint was closed unless a complaint has been filed in the intervening six-year period. In the event a complaint is so filed or reopened, the records shall not be destroyed and expunged until the expiration of six years from the date on which all complaints have been closed and not reopened.

The expunction provisions do not apply, however, to “the records of a complaint which gave rise to an admonition even if such complaint has been dismissed pursuant to [BBO Rules § 4.3(a)].” BBO Rules § 4.2(e). In the case of a grievance...
or complaint “docketed solely on account of” an “error by a financial institution in dishonoring a check drawn on an attorney’s trust account”, the attorney is entitled to have the records of the matter destroyed “upon request made after the closing of the complaint.” BBO Rules § 4.2(c).

§ 2.7 Withdrawal of the Complaint

Often, a complainant decides to withdraw a previously filed complaint. However, because the complainant is not a party but only a witness to any proceedings, bar counsel is not obligated to honor the request. The Rules of the Supreme Judicial Court provide as follows:

A abatement of an investigation into the conduct of a lawyer or other related proceedings shall not be required by the unwillingness or neglect of the complainant to cooperate in the investigation, or by any settlement, compromise or restitution. A lawyer shall not, as a condition of settlement, compromise or restitution, require the complainant to refrain from filing a complaint, to withdraw the complaint, or to fail to cooperate with the bar counsel.

SJC Rule 4:01, § 10; see also Callahan v. BBO, 417 Mass. 516, 518 (1994) (“An individual who files a complaint with the board does not have standing to appeal from the board’s decision to dismiss that complaint.”) (citations omitted).

§ 2.8 Perspective of the Players

Many lawyers believe that there is an “us against them” mentality within the bar counsel’s office. Such is not avowedly the case. The bar counsel and the BBO perform an essential function in policing the profession in order to protect the public interest. Yet, as in any district attorney’s office, an advocate’s view of cases can generate an “unexpected” welcome for lawyers who come before the BBO believing that the bar counsel’s staff will naturally think well of them. The disciplinary staff does not exist to “protect” lawyers, but to protect the legal system and the public. Often, a respondent’s perspective on how his or her complaint should be handled by bar counsel is expressed in the question, “How can you do this to one of your own?” The reality is that the disciplinary system serves to determine whether probable cause exists to institute and prosecute a disciplinary proceeding, not to protect (or vilify) every lawyer who comes through the door.
The BBO, bar counsel, respondents and their counsel must keep this reality in mind. It is not easy to “investigate” a peer, and there is always the possibility that overzealousness will occur. Respondents’ responses to complaints that “demand” brotherly or sisterly treatment are inappropriate and only serve to heighten the perceived differences in role.

§ 2.9 Disciplinary Process as Litigation

After a lawyer overcomes the fear of having had a complaint filed against him or her, as well as the shock that the disciplinary office is actually going to do its appointed task and investigate the lawyer, reality begins to set in. While many respondents view the disciplinary process as a “foreign” procedure, it is actually largely administrative in nature, with both quasi-criminal and quasi-civil overtones. However, this hybrid is manageable through standard litigation techniques that few respondents utilize. Often, respondents do not begin to litigate until a hearing is scheduled, and by then, it is too late.

One of the advantages of seeking independent counsel is to avoid reliance on a lawyer “friend” who really does not know whether you want counsel. Too often, friends who seek to serve as counsel for respondents do not wear the two hats (as friend and critical counsel) well. The new relationship not only strains the friendship, but also impairs the open discourse essential to the lawyer-client relationship. Use the same logic you would apply in other situations—when in doubt, seek counsel.

§ 3 THE PROSECUTION PROCESS

§ 3.1 Possible Dispositions

Lawyer discipline may occur through one of the following dispositions:

- admonition by bar counsel,
- public reprimand by the BBO, or
- formal discipline in the form of
  - public reprimand,
  - a definite term of suspension up to and including five years,
  - an indefinite term of suspension, or
  - disbarment.
(a) Private Discipline—Admonition

A matter may be disposed of through an "admonition," the only form of private discipline. Admonitions are recommended in cases that bar counsel contends warrant discipline, but involve either "minor" or "technical" offenses. Before July 1, 1993, there were two forms of private discipline: an admonition and a private reprimand. The rule changes "combined" those steps of discipline into one measure. In the past, for example, failing to take a notary acknowledgment in a proper manner without fraudulent intent (such as by attesting that the signatory personally appeared before the lawyer as notary, when in fact there was no such personal appearance) warranted a private reprimand. Private Reprimand (PR) 84-15, 4 Mass. Att'y Disc. R. 207 (1984–85); PR 84–19, 4 Mass. Att'y Disc. R. 211 (1984–85); PR 82–17, 3 Mass. Att'y Disc. R. 224 (1982).

One indication that an admonition is intended to be more of a "slap on the wrist" than a matter of permanent disposition is that an admonition is vacated and the complaint is dismissed after the expiration of eight years, as long as there has been no intervening discipline and there are no complaints pending at the time of the request. BBO Rules § 4.3(a).

In this regard, it is treated somewhat like a continuance without a finding in a criminal case that is dismissed after a successful probationary period.

If bar counsel recommends that a lawyer receive an admonition, the lawyer can respond in one of three ways:

- agree to accept the imposition of the admonition and conclude the matter;
- receive the admonition and, within thirty days thereafter, vacate it and seek a formal hearing; or
- refuse to accept the admonition and go to a formal hearing.

With each option, the lawyer must appear on a certain date, at a specified time, to receive the admonition from bar counsel or an assistant bar counsel. BBO Rules § 2.11. When the matter is being disposed of by an admonition, bar counsel shall make service of the admonition on the respondent, together with a summary of the basis for the admonition and written notice of the respondent's right to demand in writing within fourteen days of the date of service that the admonition be vacated and a hearing provided, as set forth in Section 2.12. The notice served with the admonition shall advise the respondent that failure to demand within fourteen days that the admonition be vacated and to submit a written statement of objections as provided in Section 2.12 constitutes consent to the
THE DISCIPLINARY PROCESS

SECTION 4.1

admonition and that failure to set forth matters in mitigation constitutes waiver of the right to introduce evidence of mitigation at the hearing. A record shall be made of the fact of and basis for the admonition, which record shall be retained as provided in Section 5.10 of the BBO Rules.

Failure to appear without good cause shall be deemed an act of professional misconduct in violation of SJC Rule 4:01, § 3(1)(c) and BBO Rules § 2.11, and will result in the filing of a formal petition for discipline on the grounds of failure to appear, as well as the underlying misconduct for which the respondent was initially going to be admonished. BBO Rules § 2.11. In this event, the scope of discipline that would be sought by bar counsel and that would be warranted under these circumstances would be determined on a case-by-case basis. But see In re Cohen, 3 Mass. Att'y Disc. R. 43 (1983). If one vacates an admonition, the matter will proceed as though it had been refused or rejected by the respondent.

In the event that the respondent refuses to accept the admonition, bar counsel will prepare and file a formal petition for discipline and the hearing will proceed on an expedited basis. See BBO Rules § 2.12. Bar counsel may or may not continue to assert at any hearing held thereafter that an admonition will be the recommended discipline. In any particular case, the admonition may have been proposed as a compromise or plea bargain and, in a hearing, bar counsel may seek to obtain a more serious disposition.

Under SJC Rule 4:01, § 8(2),

(a) On appeal by Bar Counsel pursuant to subsection (1), the decision of the Board Chair to approve, modify, or reject the recommendation of an admonition shall be final.

(b) If an admonition is approved by either the designated Board member or the Board Chair on appeal, the Bar Counsel shall make service of the admonition on the Respondent-lawyer together with a summary of the basis for the admonition. Bar Counsel shall also provide written notice to the Respondent-lawyer of the right to demand in writing within fourteen days of the date of service that the admonition be vacated and a hearing provided; the requirement that the Respondent-lawyer submit with the demand a written statement of objections to the factual allegations and disciplinary violations set forth in the summary and all matters in mitigation; that failure of the Respondent-lawyer to demand within fourteen days after service
that the admonition be vacated and to submit a state-
ment of objections constitutes consent to the admoni-
tion; and that failure to set forth matters in mitigation
constitutes a waiver of the right to present evidence
in mitigation at the hearing.

c) In the event of a demand that the admonition be
vacated, the matter shall be disposed of accordance
with the procedure set forth in section 8(4) for expe-
dited hearings.

d) Eight years after the administration of an admoni-
tion, it shall be vacated, and the complaint which
gave rise to it dismissed, unless during such period
another complaint has resulted in the imposition of
discipline or is then pending.

Supreme Judicial Court Rule 4:01, § 8(4) states as follows:

(4) Expedited Hearing

(a) When the Respondent-lawyer has requested a
hearing in lieu of an admonition, Bar Counsel shall file
the admonition summary with the Board, along with
the Respondent's demand for hearing and statement of
objections and matters in mitigation, if any, and the
matter shall be assigned to a special hearing officer.

After hearing, the special hearing officer shall file
with the Board a report containing his or her written
findings of fact and conclusions of law, and shall rec-
ommend that: (1) the Respondent receive an admoni-
tion, (2) the charges be dismissed, or (3) the matter
warrants a more substantial sanction than admonition
and should be remanded for formal proceedings in
accordance with section 8(3) of this rule.

(b) Respondent and Bar Counsel shall have the right
to seek review by the Board of the decision by the
special hearing officer in accordance with the procedure
set forth in subsection (5)(a) of this rule, but any such
review shall be on the briefs only and there shall be no
oral argument. In the event the Board determines that
the matter shall be remanded for formal proceedings, it
shall assign the matter to a hearing committee or special hearing officer other than the one who heard the case initially. The Board’s decision shall otherwise be final and there shall be no right by either Bar Counsel or the Respondent-lawyer to demand after conclusion of an expedited hearing that an Information be filed.

(b) **Public Reprimand**

The next level of discipline is the imposition of a public reprimand. Such dispositions are recommended by bar counsel in cases that are more serious than the “technical” offenses covered by admonitions. All cases that bar counsel believes warrant a disposition more serious than admonition can result in the filing of a petition for discipline and presentation to a hearing committee or officer. See § 3.2, Beginning Formal Proceedings, and § 3.2(d), Prosecuting the Petition, below. In the case of an agreed-on disposition, however, if the respondent agrees to accept the discipline and end the prosecution, it is possible to avoid filing the petition with a hearing committee or officer. In this event, the case is presented directly to the BBO as an “agreed-on” public reprimand or suspension, wherein the answer of the respondent-attorney admitting the allegations against him or her is filed with the petition and the respondent waives the opportunity to present any evidence, including evidence in mitigation. BBO Rules § 2.7. It is possible to negotiate the language of the petition that will be admitted thereafter, but the respondent should expect to be bound by the facts to which he or she admitted.

There is a possibility that the BBO will reject an agreement regarding the language of the petition, in which event, the matter shall be assigned to an appropriate hearing committee, to a special hearing officer or to the BBO or a panel of the BBO for hearing. A tie vote of the BBO on such a recommendation shall constitute a rejection of the recommendation. SJC Rule 4:01, § 8(3); BBO Rules § 3.19; see, e.g., In re Luongo, 416 Mass. 308 (1993). The third paragraph of SJC Rule 4:01, § 8(3) reads as follows:

In the event the respondent-lawyer files an answer admitting the charges and does not request the opportunity to be heard in mitigation, the Bar Counsel and the respondent-lawyer may jointly recommend to the Board that the respondent-lawyer receive a public reprimand or a suspension. If the Board accepts a joint recommendation for a public reprimand, it shall issue such reprimand. If the Board accepts a joint recommendation for suspension, the Board shall file with the Clerk of this court for Suffolk County an information,
together with the entire record of its proceedings. If the parties do not make such a joint recommendation, or if the Board rejects such recommendation, the matter shall be assigned to an appropriate hearing committee, to a special hearing officer, or to the Board or a panel of the Board, for hearing. A tie vote of the Board on such a recommendation shall constitute a rejection of the recommendation.

(c) Formal Discipline

In all matters wherein bar counsel believes that there is sufficient cause to warrant discipline, the BBO-4 form, with the recommendation for discipline, is presented to a single member of the BBO for review. BBO Rules § 2.8(a).

As stated above, in cases where a plea bargain is rejected, the respondent should reconfirm that any answer filed as confessus in judicio can be withdrawn.

Section 2.8(b) of the BBO Rules states as follows:

(b) **Recommendation That Formal Charges Be Prosecuted.**

(1) Bar Counsel’s Recommendation. When the prosecution of formal charges is recommended pursuant to Section 2.7(2)(C) or when Bar Counsel seeks to amend a previously approved petition for discipline by adding or deleting charges, Bar Counsel shall prepare a petition for discipline or an amended petition for discipline and a charging memorandum or revised charging memorandum.

(2) Transmission of File. Bar Counsel shall forward to the Reviewing Board Member the documents set forth in Section (b)(1), the parties’ agreement, if any, and the file.

(3) Standard of Review. In reviewing a recommendation to prosecute formal charges or to add or delete previously approved charges, the Reviewing Board Member shall make a determination

(A) whether the charging memorandum or revised charging memorandum supports the charges in the...
petition for discipline or the amended petition for discipline, and, if applicable, whether the revised charging memorandum adequately justifies the deletion of previously approved charges, and

(B) whether, if the charges in the petition for discipline or amended petition for discipline were to be proved by a preponderance of the evidence, the case would warrant public discipline.

(4) Action by Reviewing Board Member. The Reviewing Board Member may approve, modify, or reject Bar Counsel’s recommendations under Section (b)(1). If the Reviewing Board Member modifies or rejects Bar Counsel’s recommendation, he or she shall set forth this determination and the reasons therefor on the recommendation forms. The Reviewing Board Member may confer with Bar Counsel in making his or her determination.

Practice Note
The equivalent of a probable cause hearing before a complaint issues does not exist. Arguably, in matters in which disbarment or suspension might be sought, a respondent might seek to argue that a preliminary hearing is appropriate. Procedurally, a motion to dismiss at the inception of the formal proceeding would suffice to raise the issue and preserve it for argument on appeal. The new rules no longer provide for an appeal by the respondent.

(5) The Charging Memorandum shall be considered only by the Reviewing Board Member and by the Board Chair on appeal pursuant to section 2.9 of these rules and shall not be provided to the hearing committee, hearing panel, or special hearing officer, or to the Board.

BBO Rules § 2.8(b).

The rules also provide for disposition by agreement under Section 2.8(c) of the BBO Rules, as follows:

(c) Recommendation that Public Discipline be Imposed by Agreement.
When the parties recommend under Section 2.7(2)(B) of these rules that public discipline be imposed by agreement, Bar Counsel shall prepare a petition for discipline and the matter shall be referred directly to the Board under the procedures set forth in Section 3.19(d) and (e).

§ 3.2 Beginning Formal Proceedings

(a) Initial Procedures in General

Bar counsel institutes a formal proceeding by filing a petition for discipline. The format of the petition is also prescribed by rule. BBO Rules § 3.14. The petition must contain specific allegations of misconduct, and it must cite to the disciplinary rule allegedly violated. Answers must be filed within twenty days after service of a petition for discipline, after which the BBO’s proceedings are open to the public, except for the following:

1. deliberations of the hearing committee, the hearing panel, the special hearing officer or the Board, and documents reflective of those deliberations, including without limitation charging memoranda, draft reports, and minutes of Board meetings;

2. information with respect to which the Board has issued a protective order under paragraph (d) hereof;

3. information with respect to which the Supreme Judicial Court has issued a protective order on appeal from a Board decision denying such order; or

4. further proceedings following the recommendation by a hearing committee, a hearing panel, a special hearing officer or an appeal panel, or following an order of the Board or the Supreme Judicial Court, that an admonition be imposed or that a petition for discipline be dismissed. In such event, the record shall be sealed and the proceedings shall be closed until and unless the Board or the Supreme Judicial Court orders otherwise.

BBO Rules § 3.22(c)(1)-(4).
In addition, under Section (d) of Section 3.22(d),

[i]n order to protect the interests of a complainant, witness, third party or Respondent-attorney, the Board may, upon application of Bar Counsel or any affected person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application. If bar discipline or other professional discipline has been imposed on the Respondent on a prior occasion, in this Commonwealth or elsewhere, the fact that the discipline imposed is or has been confidential shall not constitute good cause for the issuance of a protective order. Bar Counsel or any affected person may appeal from an order granting or denying an application for a protective order by filing a notice of appeal with the Clerk of the Supreme Judicial Court for Suffolk County within seven days after the date of the notice of the Board’s action, which time limit shall be jurisdictional. The pendency of such an appeal shall not be grounds to stay proceedings before a hearing committee, a hearing panel, a special hearing officer, or any panel of the Board.

BBO Rules § 3.22(d); see also SJC Rule 4:01, § 20.

Respondents are entitled to be represented by counsel. BBO Rules § 3.4. The form of pleadings is prescribed. BBO Rules § 3.5. Service of pleadings must be in hand by acceptance of counsel or by mail. BBO Rules §§ 3.8, 3.9; see also BBO Rules §§ 3.10–3.12 (concerning date, proof and form of service). The answer must be in writing, admit or deny specifically each allegation or charge and state the nature of any defense. BBO Rules § 3.15(d). Section 3.15(d) of the BBO Rules states as follows:

(d) Contents of Answer. The answer shall be in writing, and shall state fully and completely the nature of the defense. The answer shall admit or deny specifically, and in reasonable detail, each material allegation of the petition and state clearly and concisely the
facts and matters of law relied on. Averments in the petition are admitted when not denied in the answer.

In addition, under section (e), the charges in the petition for discipline “shall be deemed admitted if the respondent fails to file a timely answer.”

All proceedings before the BBO “shall conform generally” to G.L. c. 30A. BBO Rules § 3.2 (emphasis added).

Failure to answer may result in disciplinary action being sought under SJC Rule 4:01, § 3. BBO Rules § 3.15(a)(3). There is no provision for a default judgment, but the failure to answer the petition will result in the allegations being deemed as admitted. Because the respondent, unlike in a criminal proceeding, may be called as a witness against himself or herself, subject to Fifth Amendment and Massachusetts constitutional prerogatives (see § 2.4(a), Right Against Self-Incrimination, above), prior correspondence from the respondent to bar counsel during the course of the investigation may be introduced in a hearing as evidence of admissions against interest.

(b) Redaction of Personal Identifying Data

The BBO follows the Supreme Judicial Court’s interim guidelines for the protection of personal identifying data, and the policy now is as follows:

The parties are to redact personal identifiers (social security number, taxpayer ID, credit card or financial account number, driver’s license number or passport number to the last four digits, birth date to year only) in all pleadings and exhibits. On occasion, the board staff will do this. If there are too many personal identifiers or if the identifiers must be disclosed for some reason, the board will consider issuing a protective order impounding the material in question.

(c) Discovery

Interview

At any time during an investigation, bar counsel may seek to “interview” a respondent. Because an appearance before bar counsel may be compelled by subpoena (see below), arrangements generally are made to appear voluntarily, absent an anticipated challenge to the subpoena. The “interview” will be recorded
and transcribed under oath, and can and will be used as if it were testimony or for impeachment in a later proceeding.

Section 3.17 (Discovery) of the BBO Rules states as follows:

(a) **Scope.** Within 20 days following the filing of an answer, Bar Counsel and the Respondent shall exchange the names and addresses of all persons having knowledge of facts relevant to the proceedings. Bar Counsel and the Respondent shall, within 10 days, comply with reasonable requests made within 30 days following the filing of an answer for (1) non-privileged information and evidence relevant to the charges or the Respondent, and (2) other material upon good cause shown to the chair of the hearing committee, hearing panel or special hearing officer. Applications for depositions may be made pursuant to Sections 4.9 or 4.10.

(b) **Resolution of Disputes.** Any dispute arising under this rule shall be resolved by the chair of the hearing committee or hearing panel or by the special hearing officer, as the case may be, upon written application. All discovery orders by the chair or special hearing officer are interlocutory and may not be appealed or reviewed prior to the filing of a hearing report.

**Subpoena Power**

At any stage of the investigation, bar counsel may seek the issuance of a subpoena requiring the appearance and pretrial testimony of any witness, including the respondent. BBO Rules § 4.4. This subpoena may seek document production from the respondent’s bank for client trust fund records or from the respondent for office records or client files.

This broad subpoena power raises a number of issues both in terms of procedural and substantive due process, including the following:

- Evidence taken need not be recorded. “Bar Counsel may take the testimony electronically or otherwise.” BBO Rules § 4.4(c) (emphasis added).

- The testimony given (and presumably the documents produced) is provided to the respondent only if the conference is recorded.
If the subpoenaed appearance occurs before a petition for discipline is filed, neither the respondent nor his or her counsel is entitled to be present, BBO Rules § 4.4(c)-(d), although notice will be given that the subpoena was issued. Revised BBO Rules § 4.4(d) states that “[n]o investigatory subpoena shall be issued after expedited disciplinary proceedings are commenced” pursuant to BBO Rules § 2.12.

The lack of a requirement that any subpoenaed appearance or document production be recorded accords bar counsel the opportunity to compel a witness’s appearance and the production of documents in secret without the obligation to preserve both inculpatory and exculpatory evidence. In that these proceedings are quasi-civil and quasi-criminal in nature, such secrecy places the respondent at a potentially substantial disadvantage. This disadvantage is exacerbated by the ability to preclude the respondent from attending or participating in such a prepetition conference. (Although the rules provide for depositions to be taken, as well, BBO Rules §§ 4.9–4.15, the testimonial appearance under a subpoena may be tantamount to a deposition if the testimony is recorded and transcribed or if documents are produced. In this event, the respondent gets the transcript, but does not get an opportunity to examine the witness.)

Because Section 4.4(c) of the BBO Rules provides that only a transcript of recorded testimony, but not documents produced, must be disclosed to the respondent before a hearing, a motion to produce all investigative records may lie before the hearing committee or officer to acquire all documents turned over.

If bar counsel sought, at trial, to use any of the pretrial recorded testimony for substantive proof or impeachment purposes, a motion to quash might lie because of the respondent’s having been excluded from the interrogation.

These rules do not provide for any advance notice to the respondent of any such subpoenaed testimony or production. However, bar counsel is required to provide respondents with a copy of the subpoena as approved and served on any witness, including recordkeepers (e.g., banks or insurance companies), so the respondent can seek to file a motion to quash the subpoena. BBO Rules § 4.8.

Service of a subpoena to the respondent’s bank for client trust fund records raises the issue of the protection of the privacy of client records. It also provides for the possibility that bar counsel may acquire the records as to clients and other matters not related to the complaint in issue, which might include incriminating evidence about another client who is not the subject of any investigation. Bar counsel has several times succeeded in obtaining the right to subpoena such records in motions argued before single justices. Other states have permitted such broad investigating searches. See, e.g., Doyle v. State Bar of Cal., 648 P.2d 942 (Cal. 1982). The discovery of misconduct in the latter circumstance when a
complaint has not yet been filed raises additional questions. It is possible that a complaint could be received by bar counsel that raises vague allegations, such as “my lawyer never communicated with me after our real estate closing, and I don’t understand what happened at the closing.” The respondent, for whatever reason, fails to answer the complaint. Bar counsel gets the name of the respondent’s bank from the closing papers and seeks a subpoena for the bank to produce copies of all of the respondent’s office and client fund account records for the six-month period surrounding the closing.

In this instance, there is no evidence of wrongdoing—there is merely an arguable failure to cooperate by the lawyer and, perhaps, a confused client. Should bar counsel be allowed to gain by subpoena the lawyer’s records in these circumstances?

Assume, alternatively, that the lawyer responds to bar counsel and states that the client is in error—that everything was clear at the closing and all funds were properly distributed. Bar counsel asks for copies of all checks, but the lawyer refuses or says that he or she did not keep copies. Is there now sufficient reason to seek the documents by subpoena?

Assume further that, completely unrelated to this particular transaction, the respondent, one month after the closing, for a brief period of time floated certain checks and his or her bank carried the lawyer on an overdraft in the client’s account. The respondent made good the overdraft from his or her own funds. Should bar counsel be allowed to obtain the evidence of such misconduct that is completely unrelated to the complaint at hand, and about which no one has ever complained?

Should the subpoena—from which the later fruits of a possible disbarment arose—be permitted, and should the evidence stumbled on be allowed to be used against the respondent?

The requirements for service of subpoenas are set forth in Section 4.6 of the BBO Rules:

Each subpoena issued in accordance with this subchapter shall be served in the manner provided for service of summonses in the Courts of the Commonwealth. Alternatively, service may be made upon any lawyer in hand or by certified, registered, or first class mail addressed to the lawyer at either the residence or office address furnished in the last registration statement filed by the lawyer in accordance with S.J.C. Rule 4:02. A copy of each investigative subpoena served on a person other than
the respondent shall be mailed to the respondent. No witness fee or travel allowance shall be paid or tendered to any respondent subpoenaed hereunder.

Depositions

The rules relating to discovery by deposition have been substantially amended recently. Rule 4.9(a) states, in a general rule, “where appropriate, testimony may be taken within or without the Commonwealth by deposition or by commission.” It has been argued that, notwithstanding the caption of the subchapter, this general rule permits the taking of depositions in any circumstances where appropriate. Nonetheless, the BBO has, to date, universally held that depositions are permitted only where a witness is going to be unavailable at trial.

As stated, it is possible with the hearing committee or officer’s approval to obtain testimony by means of a formal deposition in the event that the witness is not subject to subpoena and is then unavailable at the time of hearing. In this case, the deposition may be introduced, if it has been inspected and signed by the witness or notarial officer. BBO Rules § 4.9. Sections 4.10 through 4.15 of the BBO Rules set forth further provisions relating to depositions.

While the rules permit bar counsel to subpoena a witness to appear and give a statement in a prepetition investigatory stage, there is no basis in the rules for obtaining or preserving evidence by deposition until a petition for discipline has been filed. The rules make it clear that the respondent is not permitted to be present at an investigatory meeting where a statement is taken. See BBO Rules §§ 4.4, 4.9.

Section 4.9 (Availability of Depositions) of the BBO Rules states as follows:

(a) **Discovery Depositions.** After the institution of formal disciplinary proceedings pursuant to Rule 4:01, section 8(3), and the filing of an answer by the Respondent, a party may obtain discovery by deposition upon oral examination, subject to the following terms and conditions:

1. Any party may file a written notice and application with the Board Chair or the Chair’s designee pursuant to Section 4.11(a), requesting the deposition upon oral examination, or by telephone or audio-visual means, of any person and that any evidence, including books, records, correspondence or documents, relating to the matter be produced at the same time. Any other
party may file and serve a response to an application within 7 days after service of the application.

(2) The Board Chair or the Chair’s designee may allow an application to take a discovery deposition only upon a showing of a substantial need for the deposition in the preparation of the applicant’s case, taking into consideration:

(A) The nature and complexity of the case and the need to assure an expeditious, economical and fair proceeding.

(B) Whether the information sought or its substantial equivalent has been provided or was available by other means, taking into consideration the formal or informal discovery that has already occurred.

(C) The prevention of embarrassment, oppression, or undue burden, including economic burden, that the deposition may cause the deponent. The order permitting the deposition may specify or restrict the subject matter upon which the deponent may be examined.

(b) **Discovery depositions** shall be conducted as set forth in Sections 4.11 through 4.15, subject to such terms and conditions as the Board Chair or the Chair’s designee may order, including supervision, length, location, and timing of the deposition. Depositions must be completed within 21 days prior to the commencement of hearing, unless otherwise ordered for good cause shown.

Section 4.10(b) of the BBO Rules states that, after the institution of formal disciplinary proceedings pursuant to SJC Rule 4:01, § 8(3), and the filing of an answer by the respondent,

applications for the taking of testimony by deposition of those witnesses not subject to service of a subpoena or unable to attend a hearing due to age, illness or other infirmity shall be approved by the Board Chair or the Chair’s designee or by the hearing committee, hearing panel, or special hearing officer to which the matter has been referred. Depositions must be completed within 21
days prior to the commencement of the hearing, unless otherwise ordered for good cause shown.

Sections 4.10(c) and (d) of the BBO Rules state as follows:

(c) **Notice and Application.** A written notice and application to take a testimonial deposition pursuant to subsections (a) and (b) when the matter has not been referred to a special hearing officer, hearing committee, or hearing panel shall be submitted by the party proposing to take such deposition to the other parties and to the Board Chair. Otherwise, written notice and application shall be submitted to the other parties and to the special hearing officer, hearing committee or hearing panel.

(d) **Testimonial Depositions** under this section shall be conducted as set forth in Sections 4.11 through 4.15.

Section 4.11 of the BBO Rules sets forth the process by which an application to take a deposition is made. Section 4.14 of the BBO Rules sets forth the scope and conduct of the deposition authorized to be taken. And, BBO Rules § 4.15 describes the limitation on use of a deposition at a hearing.

The BBO has issued a new rule, Section 4.5B, regarding taking out-of-state depositions per a subpoena. The rule permits either bar counsel or the respondent to seek a subpoena from the disciplinary agency in the jurisdiction where the deposition will occur, or to apply to a single justice of the Supreme Judicial Court for leave to take the deposition pursuant to G.L. c. 223A, § 10, the Letters Rogatory Act.

**Other Pretrial Discovery**

There is presently no provision in the rules for other forms of pretrial discovery, such as interrogatories or formal requests for production of documents.

(d) **Prosecuting the Petition**

As stated, the petition for discipline prepared by bar counsel is filed with the BBO. The petition is served on the respondent for an answer within twenty days.

The BBO then assigns the matter to be heard by a three-person hearing committee or special hearing officer located in the district in which the respondent practices.
The hearing committees are each made up of three individuals, one of whom may be a nonlawyer. The committees are appointed by the BBO for three-year terms. One member of each committee is designated as the chairperson, who will preside and has the authority to rule on the admissibility of evidence and other procedural matters that arise during the pendency of cases. BBO Rules § 5.12.

All pleadings must be on letter-size paper with double-spaced type. Photocopies may be substituted for typewritten documents. Each requires a caption. Whenever a pleading is filed, it must be accompanied by enough copies for the hearing committee or officer. BBO Rules § 3.5.

Prehearing motions, other than motions to dismiss, must be filed with the BBO and served at least ten days prior to the hearing. Responses are due at least seven days in advance. See BBO Rules §§ 3.5, 3.6 for detailed format and execution requirements.

1. Motions to dismiss the petition for discipline or any charges contained therein shall be determined by the Chair of the Board or another member of the Board designated by the Board Chair.

2. The filing of such motion shall not stay a scheduled hearing except by order of the Board Chair or other member of the Board designated by the Board Chair for good cause shown.

3. A party may appeal from a dismissal of a petition or charge by filing a brief on appeal within 7 days after service of the decision. An opposing party may file a response within 7 days after service of such appeal. The appeal shall be decided by the Board at its next meeting after the response period has expired. Dismissal of a charge does not stay proceedings on other charges in the petition for discipline.

BBO Rules § 3.18(b).

The hearing committee or officer schedules a mandatory prehearing conference. Typically, such a conference closely parallels civil pretrial conferences in intent and substance. The parties should be prepared to review “all relevant material.” BBO Rules § 3.23.

Section 3.23(a) of the BBO Rules states, in part, as follows:

(1) In all cases, except for matters arising from a conviction of a crime and expedited hearings pursu-
ant to Section 2.12, a prehearing conference shall be held. A prehearing conference shall be held in conviction cases if a party requests such a conference within 30 days after the answer is filed. Except for good cause shown, a prehearing conference shall not be held prior to an expedited disciplinary hearing pursuant to Section 2.12 of these Rules.

(2) The conference shall be conducted by the chair of the hearing committee or hearing panel or the special hearing officer. Additional conferences may be held as necessary.

(3) The Respondent, the Respondent’s attorney if the Respondent is represented by counsel, and Bar Counsel shall attend the prehearing conference.

(4) The parties and counsel shall be fully prepared for a useful discussion and resolution, to the extent possible, of all procedural and substantive issues in the proceeding and shall be fully authorized to make commitments regarding those matters.

(5) Except as to orders that the moving party alleges exceed the jurisdiction or authority of the chair of the hearing committee or panel, special hearing officer, or Board Chair, orders entered at a prehearing conference shall control the subsequent course of the proceeding and shall not be appealed or reviewed prior to the issuance of the hearing report.

The hearing committee member presiding at such a conference is authorized to rule on any procedural matter that the committee might rule on during a proceeding. BBO Rules § 3.25. Any rulings that are made must be followed unless they are modified “for good cause shown.” BBO Rules § 3.26. The rule does not delineate from whom a modification would be sought, but Section 3.18 of the BBO Rules, governing motion practice, seems to control.

The hearing committee or officer will schedule a hearing at a date and time that is convenient for all of the parties and counsel. The hearing will usually be held at the BBO offices, if the parties are in Boston, or at the offices of one of the attorneys on the committee.
(e) **Proceedings Before the Hearing Committee or Special Hearing Officer**

All proceedings are now open, except as otherwise may occur under SJC Rule 4:01, § 20, which states, in part, as follows:

(4) In order to protect the interests of a complainant, witness, third party, or respondent-lawyer, the Board may, upon application of the bar counsel or any affected person and for good cause shown, issue a protective order prohibiting the public disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application. If bar discipline or other professional discipline has been imposed on the respondent-lawyer on a prior occasion, in this Commonwealth or elsewhere, the fact that the discipline imposed is or has been confidential shall not constitute good cause for the issuance of a protective order. The bar counsel or any affected person may appeal from an order granting or denying an application for a protective order by filing a notice of appeal with the clerk of this court for Suffolk County within seven days after the date of the notice of the Board's action, which time limit shall be jurisdictional. The pendency of such an appeal shall not be grounds to stay proceedings before a hearing committee, a special hearing officer, or any panel of the Board.

(5) The provisions of this section shall not be construed to prohibit the Board from notifying a complainant concerning the Board's disposition of the complaint and the reasons therefor, or to deny access to relevant information to the Clients' Security Board, or to authorized agencies investigating the qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or considering reciprocal disciplinary action, or to law enforcement agencies investigating qualifications for government employment where discipline
under this Chapter Four has been imposed, or, except as the court may direct, where the proceedings are pending and the Board in its discretion believes disclosure is warranted. In addition, the clerk of this court for Suffolk County shall transmit notice of all public discipline imposed by this court to the National Discipline Data Bank maintained by the American Bar Association.

(6) When an investigation by the bar counsel or the Board concerns allegations of a serious crime as defined in section 12 herein, or disciplinary charges in another jurisdiction, the bar counsel or the Board may disclose information not otherwise public under this rule to the appropriate agency responsible for criminal or disciplinary enforcement and exchange such information with such agency during the course of its investigation of the same lawyer. When requested by an appropriate disciplinary agency investigating disciplinary charges in another jurisdiction, the bar counsel or the Board may also disclose the existence of any prior discipline.

Bar counsel has the burden of proof by a preponderance of the evidence and the burden of going forward with evidence. BBO Rules § 3.28. Both parties have the right to present evidence, cross-examine, object, argue and make appropriate motions. BBO Rules § 3.29.

The number of witnesses may be limited to prevent repetitive or cumulative evidence. BBO Rules § 3.30.

(f) Relevance and Admissibility of Expert Testimony

In any disciplinary hearing in which the hearing committee determines that the attorney’s compliance with the degree of learning and skill required to be possessed by attorneys practicing in a particular area or areas of the law is relevant to the decision of the committee, expert testimony concerning the standard of care applicable to the attorney’s conduct may, in the discretion of the committee, be admitted into evidence, subject to the caveat that an expert’s opinion to the effect either (1) that there has or has not been a
violation of law or (2) that there has or has not been an ethical violation, is not admissible and must be rejected. As in the case of other evidence, the committee is not required to credit such expert testimony if it is admitted or because it is uncontradicted. Matter of Minkel, 13 Mass. Att'y Disc. R. 548 (1997), and, if credited, may determine what weight is to be given to it. Whether the proposed expert testimony may well be required in order to prove allegations that a fee charged or collected was clearly excessive, because the governing rule, Mass. R. Prof. C. 1.5, itself provides that the challenged fee is to be tested against what other lawyers would charge for similar services. See Matter of Fordham, 423 Mass. 481, 12 Mass. Att'y Disc. R. 161 (1996). In other circumstances, the committee, in the exercise of its discretion, may determine that expert testimony concerning the applicable standard of care would be relevant and helpful to the committee in its consideration of the matter or in its deliberations, e.g., in order to prove or rebut an allegation that the conduct alleged constituted neglect, incompetence or fairly to keep the client adequately informed, where a key issue may be whether or not the attorney met the degree of learning and skill possessed by attorneys practicing in this area of the law. This is not intended to be an exhaustive list of such circumstances. The governing principle is that stated in G.L. c. 30A, § 11(2), that evidence may be “admitted and given probative effect if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.”

BBO Policies and Procedures (approved October 2011).

Motions made and served during a hearing will be determined by the committee after a reasonable opportunity to respond. Motions to dismiss will be determined by the BBO at the conclusion of the case. BBO Rules § 3.32.

All hearings are recorded stenographically and a transcript is prepared. BBO Rules § 3.33. Additional documentary evidence may be presented after a hearing. BBO Rules § 3.31. The respondent may order, at his or her expense, a copy of the transcript from the reporter. BBO Rules § 3.35.
The committee is not obligated to utilize the rules of evidence observed in civil or criminal proceedings. In fact, the rules provide that the rules observed under G.L. c. 30 administrative law proceedings will govern. BBO Rules § 3.39. However, as a matter of practicality, the rules applied by each committee may vary greatly on a case-by-case basis.

One cannot overemphasize the applicability of evidence in mitigation of the conduct, as well as evidence in defense, at this stage. It is appropriate for the committee (and later the BBO and the court) to consider such evidence. See, for example, the ABA standards on sanctions.

Posthearing briefs may be filed and should contain a concise statement of the case, a discussion of the evidence with transcript references, and proposed findings and conclusions. BBO Rules § 3.34.

Thereafter, the committee will prepare a report that will include findings of fact, conclusions of law and a recommendation for discipline. BBO Rules § 3.47. It is not stated within the rules whether the finding of the committee must be unanimous and, therefore, a majority (two out of three) vote will suffice.

Prior to the filing of a report, a party may petition to reopen the proceedings to take additional evidence. BBO Rules § 3.59. This petition should state clearly the reasons, such as a material change in law or fact since the conclusion of the hearing.

(g) Collateral Estoppel

There are often matters pending in a civil or criminal forum, as well as before the BBO. In such cases, preclusion may apply as to findings of fact. In 1995, the Supreme Judicial Court held that there is no basis for “withholding preclusive effect of civil findings in a subsequent disciplinary action against an attorney.” Bar Counsel v. Bd. of Bar Overseers, 420 Mass. 6, 10 (1995).

[Both bar counsel and the Board of Bar Overseers] argue that the attorney should be precluded from re-litigating issues in his pending disciplinary proceedings that he had previously litigated unsuccessfully in Federal court. We agree. The offensive use of collateral estoppel is a generally accepted practice in American courts.

Bar Counsel v. Bd. of Bar Overseers, 420 Mass. at 9 (internal quotation and citation omitted); see In re Gaucher, No. BD-2005-065 (2005) (Spina, J.), available at http://www.mass.gov/obcbbo/bd05-065.htm (The single justice concluded that the offensive use of collateral estoppel was appropriate because the respondent
had had a full and fair opportunity to litigate the facts in the adversary proceeding. The single justice rejected the respondent's argument that collateral estoppel was unfair because he could not afford counsel in the bankruptcy proceeding and represented himself pro se. The respondent had been an attorney for thirty-five years, and pro se litigants “are held to the same standards as represented parties”); see also In re Brauer, 452 Mass. 56 (2008); In re Goldstone, 445 Mass. 551 (2005); In re Cohen, 435 Mass. 7 (2001).

Before collateral estoppel should be employed, the court said that “the fact finder should be afforded wide discretion” in determining whether such a result would be fair. Bar Counsel v. Bd. of Bar overseers, 420 Mass. 6, 11 (1995).

The Supreme Judicial Court recently addressed the issue in In re Brauer, 452 Mass. 56 (2008). “The offensive use of collateral estoppel is appropriate in bar disciplinary proceedings.” Bar Counsel v. Bd. of Bar overseers, 420 Mass. 6, 10-11 (1995) (relitigation “would not comport with the judicial goals of finality, efficiency, consistency, and fairness”); see In re Cohen, 435 Mass. 7, 15 (2001). The offensive use of collateral estoppel “occurs when a plaintiff seeks to prevent a defendant from litigating issues which the defendant has previously litigated unsuccessfully in an action against another party.” Bar Counsel v. Bd. of Bar overseers, 420 Mass. at 9. “For the doctrine to apply, there must be ‘an identity of issues, a finding adverse to the party against whom it is being asserted, and a judgment by a court or tribunal of competent jurisdiction.’” In re Cohen, 435 Mass. at 15 (2001). “A defendant must also have a ‘full and fair opportunity to litigate the issue in the first action.’” In re Cohen, 435 Mass. at 15 (quoting Miles v. Aetna Cas. & Sur. Co., 412 Mass. 424, 427 (1992)). “For the doctrine to apply, there must be an identity of issues, a finding adverse to the party against whom it is being asserted, and a judgment by a court or tribunal of competent jurisdiction.” In re Cohen, 435 Mass. at 15 (2001) (quoting Miles v. Aetna Cas. & Sur. Co., 412 Mass. 424, 427 (1992)). “A defendant must also have a ‘full and fair opportunity to litigate the issue in the first action.’” In re Cohen, 435 Mass. at 15 (quoting Restatement (Second) of Judgments § 29 (1982)); see Restatement (Second) of Judgments § 27, cmt. d (1982) (“When an issue is properly raised ... and is submitted for determination, and is determined, the issue is actually litigated . . . .”). Further, the determination of the issues for which preclusion is sought must have been essential to the underlying judgment. See Jarosz v. Palmer, 436 Mass. 526, 532-33 (2002). The fact finder is afforded wide discretion in deciding whether collateral estoppel should be applied in a particular case. See Bar Counsel v. Bd. of Bar overseers, 420 Mass. at 12 (and cases cited).

Once the initial criteria for application of the doctrine of collateral estoppel have been satisfied, we consider whether such application would be “fair” in a particular case. See In re Cohen, 435 Mass. 7, 16-17 (2001) (and cases cited); see also Bar Counsel v. Bd. of Bar overseers, 420 Mass. at 11-12. In making that determination, courts generally ask whether (1) the party in whose favor the estoppel would operate could have joined the original action, (2) the party against whom it would operate had an adequate incentive to defend the orig-
inal action vigorously, (3) ‘the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant’ and (4) ‘the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.’


More recently, the court reiterated the status of collateral estoppel in In re O’Leary, 25 Mass. Att’y Disc. R. 461 (2009). The court said that

[t]here is no question that principles of issue preclusion may be applied in bar discipline proceedings. Matter of Brauer, 452 Mass. 56, 66–67 (2008); Matter of Cohen, 435 Mass. 7, 15–17 (2001); Bar Counsel v. Board of Bar Overseers, 420 Mass. 6, 10–12 (1995). . . . The record demonstrates that the respondent had a fair opportunity to litigate and did litigate in the Superior Court the issue whether his conduct was insubstantial, frivolous, and lacking in good faith . . . . See Matter of Cohen, 435 Mass. at 15. Accordingly, it was proper for the board to apply principles of issue preclusion and to bar the respondent from seeking to challenge this finding in the subsequent disciplinary proceedings against him. See Matter of Brauer, 452 Mass. at 68.

The court also noted that issue preclusion was not a bar to a proffer of mitigation evidence in a bar discipline proceeding.

The respondent’s challenge is not to the overall application of issue preclusion, but to the portion of the order that focused on offering evidence in mitigation. The respondent appears to be misreading the order of preclusion, as the Appeal Panel and the board recognized. The order prohibited him from introducing evidence in mitigation only insofar as such evidence would “contradict any fact or issue of law determined in the underlying [Superior Court] proceeding and essential to the [Superior Court] judgment”; it was not a bar against the introduction of evidence in mitigation.
generally. Insofar as the respondent offered evidence in mitigation that was not determined in the Superior Court action . . . . [T]here is nothing in the order on issue preclusion that would bar that evidence. What would be barred, and properly so, would be evidence that sought to explain or justify why the respondent brought the Superior Court action. In his report, the special hearing officer—the factfinder—states, “there was no evidence presented warranting any mitigation.” I do not interpret this sentence to mean that he did not consider mitigating evidence that was properly before him, if there was any; the sentence may better be understood to indicate that in his view, none of the evidence offered, whether proper or improper, justified mitigation. In any event, I conclude that there was a satisfactory basis for the offensive use of collateral estoppel or issue preclusion in this case, and no basis on which to reverse the order of preclusion.


(h) Review and Appeal

Any party may object to the findings, conclusions or recommendations of the committee’s report within twenty days after service by means of a brief on appeal. BBO Rules § 3.50(a); see also SJC Rule 4:01, § 8(3). An opposing brief may be filed within twenty days thereafter. No responsive brief will be allowed without permission of the BBO or a single board member. Briefs on appeal should contain a short statement of the case, summaries of positions, grounds for the appeal, argument and alternative proposed findings. BBO Rules § 3.51; see also SJC Rule 4:01, § 8(3).

Oral argument on appeal must be expressly requested. BBO Rules § 3.50(c); see also SJC Rule 4:01, § 8(3).

Each appeal will be reviewed by the full board or a three-member panel. BBO Rules § 3.50(e); see also SJC Rule 4:01, § 8(3). The panel may take further evidence, under the same rules as set forth above, and, in this event, will report in like fashion to the full board. BBO Rules § 3.50(f); see also SJC Rule 4:01, § 8(3). Objections must be filed within seven days on service of this report.
The full board will then review the record. Members of the board panel that may have reviewed the case or taken evidence may still participate in the full review. BBO Rules § 3.50(h); see also SJC Rule 4:01, § 8(3).

Even if there has been no appeal by either party, the BBO shall still review each case. If the BBO determines preliminarily not to affirm the committee’s finding, the case then proceeds as if an appeal had been taken. BBO Rules § 3.52; see also SJC Rule 4:01, § 8(3).

The BBO can adopt, revise or modify any findings of the committee, recognizing that the committee has been the sole judge of credibility of the evidence. BBO Rules § 3.53.

The BBO must vote and state its reasons for so voting. BBO Rules § 3.53; see also SJC Rule 4:01, § 8(3). The board member who authorized the filing of formal discipline in the first place must remove himself or herself from these deliberations on appeal or otherwise. BBO Rules § 3.54; see also SJC Rule 4:01, § 8(3).

At this point, the BBO can reach one of the following four conclusions:

- to dismiss the case, BBO Rules § 3.55; see also SJC Rule 4:01, § 8(3);
- to admonish the lawyer, BBO Rules § 3.56; see also SJC Rule 4:01, § 8(3);
- to publicly reprimand the lawyer, BBO Rules § 3.57 (“(a) In the event the Respondent or Bar Counsel is unwilling to accede to the determination of the Board that formal proceedings should be concluded by dismissal, admonition, or public reprimand, the party aggrieved may demand that the Board file an Information. The demand shall be in writing and shall be filed with the Board within 20 days after the date of service of the Board’s vote and memorandum, which time limit is jurisdictional. (b) The decision of the Board following an appeal by either party from the determination of a special hearing officer after an expedited disciplinary hearing shall be final and there shall be no right by either Bar Counsel or the Respondent to demand that an Information be filed.”); see also SJC Rule 4:01, § 8(3); or
- to authorize the filing of an information seeking suspension or disbarment with the Supreme Judicial Court, BBO Rules § 3.58; see also SJC Rule 4:01, § 8(3).
As with the committee below, a petition to reopen the proceedings may be filed prior to the issuance of the BBO’s decision.

(i) Proceedings Before the Court

Information

Section 3.58 of the BBO Rules has been amended to provide as follows as to filing an Information:

In the event that the Board shall determine that the matter should be concluded by suspension or disbarment, or in the event the Respondent or Bar Counsel files a written demand for the filing of an Information as authorized by section 3.57 of these rules, the Board shall file with the Clerk of the Supreme Judicial Court for Suffolk County an Information, together with the entire record of its proceedings.

The court will assign a single justice to hear every case in the first instance. The single justice will schedule a hearing to take argument and, occasionally, evidence, including evidence in mitigation.

The findings of fact, including subsidiary facts found by the BBO, will be affirmed by the court if supported by substantial evidence on consideration of the entire record, which is the standard of review by the court. Neither clear and convincing proof, nor proof beyond a reasonable doubt, is required. SJC Rule 4:01, § 8(3). The court is not bound by the board’s recommendation, but will give it substantial deference. In re Alter, 389 Mass. 153, 157–58 (1983).

“[A]s long as there is substantial evidence, we do not disturb the board’s finding, even if we would have come to a different conclusion if considering the matter de novo.” In re Murray, 455 Mass. 872, 879 (2009) (quoting In re Segal, 430 Mass. 359, 364 (1999)). “Substantial evidence” means “such evidence as a reasonable mind might accept as adequate to support a conclusion.” In re Segal, 430 Mass. at 364 (quoting G.L. c. 30A, § 1(6)).

Upon entry of an order or judgment, or both, there is a right of appeal to the full bench, under the rules of appellate procedure. The standard on appeal is to determine whether the single justice’s opinion is supported by “sufficient evidence, free from errors of law, and free from any abuse of discretion.” In re Kenney, 399 Mass. 431, 434 (1987); In re Tobin, 417 Mass. 81, 86 (1994). Moreover, the full court will determine whether the single justice’s judgment is “marked-
ly disparate” from those “ordinarily entered” in similar cases. In re Alter, 389 Mass. at 156.

There remains in effect a court rule modifying the procedure of appeal to the full bench from a single-justice decision.

**Supreme Judicial Court Order Establishing a Modified Procedure for Appeals**

The Supreme Judicial Court has issued a standing order establishing a modified procedure for appeals in bar discipline cases. The order states in part as follows:

> To expedite the resolution of bar discipline appeals in this court, while ensuring that the rights of all litigants involved in such cases are protected, the Supreme Judicial Court has approved a pilot program as follows. There shall be a modified procedure for appeals from decisions of the court’s single justices in bar discipline cases. All bar discipline cases entered in the Supreme Judicial Court for Suffolk County after April 1, 2009 shall be subject to this order, and to the extent that its provisions are inconsistent with the Massachusetts Rules of Appellate Procedure, this standing order shall govern.

The court’s order has been extended twice, most recently to April 1, 2015. The full text of the court’s order is included as Exhibit C.

The first two cases that were handled under the court’s modified appellate procedure are remarkable in that the court affirmed the single justice’s decision based on the respondent’s submissions alone, without asking for bar counsel to respond at all. See In re Gargano, 460 Mass. 1022 (2011); In re Weiss, 460 Mass. 1012 (2011).

**Temporary Suspension**

Under SJC Rule 4:01, § 12A, bar counsel may file with the court a petition alleging facts that an attorney “poses a threat of substantial harm to his clients or prospective clients.” This petition may be filed at any time during the pendency of a disciplinary proceeding, on receipt of evidence of such a threat or on notice that the attorney has been convicted of a serious crime. SJC Rule 4:01, § 12A.
The court, after hearing, may either suspend the attorney or restrict his or her practice. An order of temporary suspension is subject to interlocutory appeal to the full bench.

**Disability Inactive Status**

When an attorney has been declared incompetent, she or he may either resign or be placed on disability inactive status, in a case not involving discipline. SJC Rule 4:01, § 13(1). If incapacitated by alcohol, drugs, or mental infirmity, the lawyer may also resign or be placed on disability inactive status. SJC Rule 4:01, § 13(2). If the lawyer is partially disabled, probation may be imposed, with conditions. SJC Rule 4:01, § 13(3).

If the attorney does not concur voluntarily with the imposition of inactive status, a petition may be brought to determine such incapacity or disability. SJC Rule 4:01, § 13(4). This would necessitate an evidentiary hearing before the court, in a single justice session. An appeal to the full bench would apply on entry of an adverse order.

The court may also appoint a "commissioner" to make an inventory of the disabled lawyer’s files (or those of a deceased lawyer or one who has disappeared), with authority to take action that is appropriate to protect the interests of the lawyer’s clients, as well as the attorney’s interests. SJC Rule 4:01, § 14(1).

The commissioner will keep confidential information contained in any files, except with the client’s consent or as is necessary to effectuate the court’s order to make the inventory. SJC Rule 4:01, § 14(2).

**Resignations**

A lawyer may seek to resign, whether or not he or she is under disciplinary investigation. If under investigation, the lawyer must submit an affidavit to the BBO acknowledging that he or she is acting freely and without coercion or duress, that he or she understands the implications of such act, that there is an investigation pending and that the material facts of the charges against him or her in whole or part as alleged are true. SJC Rule 4:01, § 15.

The BBO then files the affidavit with the court, along with its and bar counsel’s recommendations.

If the court accepts the resignation, an order allowing a resignation will enter. Note that although the rule provides that the affidavit be impounded “except upon order of the court,” recent experience shows that the justices are nearly routinely not impounding the affidavits. SJC Rule 4:01, § 15.
A nondisciplinary resignation where there is no investigation pending may also be allowed, although one could instead seek administrative inactive status in such circumstances. In either event, resigning from the bar means that a lawyer’s name is stricken from the roll of attorneys and that he or she must seek reinstatement to the bar in the future if he or she wants to resume the practice of law.

In recent years, three categories of resignation have evolved, including a resignation as a disciplinary sanction and resignation in lieu of suspension, as well as a resignation in lieu of disbarment, to distinguish the levels of severity of the underlying acts. See, e.g., In re Harrison, No. BD-2006-016 (2006) (Greaney, J.) available at http://www.mass.gov/obcbbo/bd06-016.htm (resignation accepted as a disciplinary sanction).

The BBO will usually accept a disciplinary resignation (defined as a resignation submitted under SJC Rule 4:01, § 15 while the attorney is the subject of formal proceedings, regardless of the point the proceedings have reached, or the subject of a complaint that has not yet resulted in the initiation of formal proceedings) as a matter of course, as long as the attorney has made sufficient factual admissions to warrant acceptance of the resignation. Bar counsel may choose to recommend not only that the resignation be accepted or rejected, but also whether the lawyer should be disbarred. The lawyer is to be advised of the policy, and if the lawyer thereafter submits an affidavit of resignation, he or she is also agreeing that the BBO’s recommendation to the Supreme Judicial Court may include disbarment.

This policy concerns how bar counsel’s time, and the board’s time, should be spent in circumstances in which it is a foregone conclusion that the respondent is no longer going to be a member of the bar. Whether the respondent’s resignation is accepted, without disbarment, or whether the respondent is disbarred, makes no practical procedural difference to a possible future petition for reinstatement because the respondent will have to go through the same reinstatement process, after the same period of time, in order to gain reinstatement. What does make a difference is whether the respondent has made sufficient factual admissions binding on him or her in such a future proceeding, thereby obviating the need for bar counsel to prove those facts in a later proceeding.

BBO Policies and Procedures (approved October 2011).
Reciprocal Discipline

Massachusetts, like other states, has adopted a rule that establishes that, if a lawyer has been publicly disciplined in another state, the same discipline may be imposed in the Commonwealth. Rule 4:01, § 16, of the Rules of the Supreme Judicial Court provides as follows:

(1) Upon receipt of a certified copy of an order that a lawyer admitted to practice in this Commonwealth has been suspended or disbarred from the practice of law in another jurisdiction (including any federal court and any state or federal administrative body or tribunal) or has resigned during the pendency of a disciplinary investigation or proceeding, this court shall issue a notice directed to the respondent-lawyer containing: (a) a copy of the order from the other jurisdiction; and (b) an order directing that the respondent-lawyer inform the court within thirty days from service of the notice of any claim that the imposition of the identical or other discipline in this Commonwealth would be unwarranted and the reasons therefor. The bar counsel shall cause this notice to be served on the respondent-lawyer in accordance with this rule.

(2) In the event that the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in the Commonwealth may (but need not) be deferred.

(3) Upon the expiration of thirty days from service of the notice under subsection (1) above, the court, after hearing, may enter such order as the facts brought to its attention may justify. The judgment of suspension or disbarment shall be conclusive evidence of the misconduct unless the bar counsel or the respondent-lawyer establishes, or the court concludes, that the procedure in the other jurisdiction did not provide reasonable notice or opportunity to be heard or there was significant infirmity of proof establishing the misconduct. The court may impose the identical discipline unless (a) imposition of the same discipline would result in grave injustice; (b) the misconduct established does not justify the same disci-
plene in this Commonwealth; or (c) the misconduct established is not adequately sanctioned by the same discipline in this Commonwealth.

(4) Upon receipt of a certified copy of an order that a lawyer admitted to practice in this Commonwealth has been subjected to public discipline other than suspension or disbarment in another jurisdiction (including any federal court and any state or federal administrative body or tribunal), the Board and the clerk of this court for Suffolk County shall file it and make it available to the public to the extent that the record of any other public disciplinary proceeding would be made available.

(5) A final adjudication in another jurisdiction that a lawyer has been guilty of misconduct or an admission in connection with a resignation in another jurisdiction may be treated as establishing the misconduct for purposes of a disciplinary proceeding in the Commonwealth.

(6) A lawyer subject to public or private discipline in another jurisdiction (including any federal court and any state or federal administrative body or tribunal), or whose right to practice law has otherwise been curtailed or limited in such other jurisdiction, shall provide certified copies of the order imposing such discipline or other disposition to the Board and to the bar counsel within ten days of the issuance of such order.

(7) A lawyer admitted to practice in this Commonwealth who is denied admission to the bar of another jurisdiction (including any federal court and any state or federal administrative body or tribunal), for reasons other than failure to pass the bar examination, shall provide certified copies of any such decision, notice or order to the Board and the bar counsel within ten days of its issuance.

Throughout the nation, reciprocal discipline has uniformly been effectuated. One sanction need not run concurrently with the other.
As stated above, according to SJC Rule 4:01, § 16, a lawyer who has been publicly disciplined in another state is required to inform the court of such discipline within ten days thereof. Presumably, the failure to do so is itself a matter of discipline. The court may, after hearing, order that the identical discipline be imposed unless it is established or the court concludes that the proceeding in the other jurisdiction failed to provide due process, there was a “significant infirmity” of proof, the imposition of the same discipline would result in “grave injustice,” or that the misconduct established does not justify the same discipline in Massachusetts.

Recently, there has been an increase in reported decisions in Massachusetts involving reciprocal discipline. In In re Colson, 1 Mass. Att’y Disc. R. 64 (1975), the Supreme Judicial Court had the first opportunity to opine on the availability of some form of hearing before the court in a reciprocal discipline case. The court described the requirements for due process in such a case: after notice and hearing, the Supreme Judicial Court may enter such order as the facts may justify when a record is received that the attorney has been disciplined in another jurisdiction. The court may impose the identical discipline, without a rehearing by it of the facts unless particular circumstances show that such identical discipline would be unfair or inappropriate.

The court determined that an “independent analysis” of the facts brought to the court’s attention was appropriate, and a hearing was held before the single justice. In re Colson, 1 Mass. Att’y Disc. R. 67 (1975).

The court, notwithstanding the exceptions that it built into the rule, will undoubtedly support the notion of comity and impose identical discipline, except in unusual cases.

In an unusual case, In re Diekan, 10 Mass. Att’y Disc. R. 52 (1994), the court concluded that a lawyer should be suspended for six months when he had previously been suspended from practice before the Military Courts of Justice after having been dismissed from the service for disciplinary violations. The court independently sought to determine, in the absence of measured “reciprocal” discipline, the proper measure of discipline to be applied in this jurisdiction. The court compared the type of conduct committed in the military with that committed in this jurisdiction and then concluded a fair disposition.

In In re Daley, 11 Mass. Att’y Disc. R. 57 (1995), the question was presented whether, in a matter of reciprocal discipline, the court can impose greater discipline than what was imposed in another jurisdiction. The court held that it could. There is no prohibition in the rule; there is discretionary power in the Court to impose any level of discipline appropriate and the “interests of consistency” in discipline in Massachusetts should not be affected by what other jurisdictions determine to do. See, e.g., In re Sheridan, No. BD-2006-026 (2006) (Greaney, J.),
In a recent case, In re Ngobeni, 453 Mass. 233 (2009), the Supreme Judicial Court held that reciprocal discipline may be imposed on a Massachusetts attorney under SJC Rule 4:01, §16, based upon a resignation from the Connecticut bar while disciplinary charges were pending, even though the respondent made no admissions regarding the charges. Following the filing of disciplinary proceedings in Connecticut involving extensive charges of misconduct, the respondent was disbarred after he failed to attend the hearing. Thereafter, the Connecticut court vacated the disbarment order at the respondent’s request to permit him to submit his resignation. In resigning, the respondent expressly disavowed any admission of wrongdoing or misconduct.

Disbarment by Consent

An attorney accused of professional misconduct may consent to the entry of an order of disbarment. SJC Rule 4:01, § 8(5).

Convictions

If a lawyer has been convicted of a serious crime, he or she may be immediately temporarily suspended. The requirements for suspension on these grounds are set forth in SJC Rule 4:01, § 12. A “conviction” for these purposes will include “any guilty verdict or finding of guilt and any admission to or finding of sufficient facts and any plea of guilty or nolo contendere which has been accepted by the court, whether or not sentence has been imposed.” SJC Rule 4:01, § 12(1). “Serious crimes,” in turn, include not only felonies but also any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another, to commit a “serious crime.” SJC Rule 4:01, § 12(3)(b).

Procedures for implementing a suspension on these grounds are described in part in Section 12(4) of the SJC Rules:

Upon the filing with this court of a certificate establishing a lawyer’s conviction of a serious crime, this court shall enter an order to show cause why the lawyer should not be immediately suspended from the practice of law, regardless of the pendency of an ap-
peal, pending final disposition of any disciplinary proceeding commenced upon such conviction. The court or a justice, after affording the lawyer opportunity to be heard, may make such order of suspension or restriction as protection of the public may make appropriate. The court shall also refer the matter to the Board to take appropriate action, which may include investigation by the bar counsel or the institution of a formal proceeding. A disciplinary proceeding so instituted need not be brought to hearing until all appeals from the conviction are concluded.

As with reciprocal discipline cases, the lawyer has the obligation to report the conviction to the bar counsel. SJC Rule 4:01, § 12(8).

**Commissioners**

Whenever a lawyer is disbarred, suspended, resigns, dies, disappears, is disabled or inactive, a lawyer may be appointed by the court as a commissioner to make an inventory of the lawyer’s files and take appropriate action to protect the clients’ interests, as well as the lawyer’s. SJC Rule 4:01, §§ 13, 14. See In re Cook, 2 Mass. Att’y Disc. R. 34 (1980), in which the commissioner was invested with broad powers to handle the hundreds of client files of a disbarred lawyer.

**Costs and Restitution**

In any case, the court may order that a respondent pay the costs incurred with processing the case or in attempting to gain information from the lawyer.

In a case where the lawyer has been found to have misappropriated funds or property, the court may order that the lawyer make restitution or reimburse the Clients’ Security Board (see discussion below) for any payments made on account of such misappropriation. SJC Rule 4:01, §§ 23, 24. But, in a matter where bar counsel did not wholly prevail, pursuant to SJC Rule 4:01, § 23, the single justice was within his discretion to conclude that the respondent should not have been required to pay the full amount of costs sought. “In the circumstances of this case, where a considerable portion of the transcript and bar counsel’s effort were devoted to charges on which the respondent ultimately prevailed, we conclude that the award of costs should be reduced.” In re Hoicka, 20 Mass. Att’y Disc. R. 239 (2004).
Clients’ Security Board

There is a Clients’ Security Board, appointed by the court and funded with bar registration fees, that has the authority to make payments to clients who suffer losses as a result of defalcations caused by members of the bar (acting as attorneys or fiduciaries). All payments are discretionary, may be made pro rata or to the extent funds are available. The fund is comparable to the Massachusetts Insolvency Insurance Fund but any payments are to be a “matter of grace” and not of right. SJC Rules 4:04, 4:05.

(j) Reinstatement

The rule regarding reinstatement, SJC Rule 4:01, § 18, has changed effective September 1, 2009. The form of the reinstatement questionnaire has also substantially changed. The text of SJC Rule 4:01, § 18 follows.

(1) Eligibility for Reinstatement— Short-term Suspensions.

(a) A lawyer who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension by filing with the court and serving upon the bar counsel an affidavit stating that the lawyer (i) has fully complied with the requirements of the suspension order, (ii) has paid any required fees and costs, and (iii) has repaid the Clients’ Security Board any funds awarded on account of the lawyer’s misconduct.

(b) A lawyer who has been suspended for more than six months but not more than one year pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension by filing with the court and serving upon the bar counsel an affidavit stating that the lawyer (i) has fully complied with the requirements of the suspension order, (ii) has taken the Multi-State Professional Responsibility Examination during the period of suspension and received a passing grade as established by the Board of Bar Examiners, (iii) has paid any required fees and costs, and (iv) has repaid the Clients’ Security Board any funds awarded on account of the lawyer’s misconduct.

(c) Reinstatement under this subsection (1) will be effective automatically ten days after the filing of the affidavit unless the bar counsel, prior to the expiration of the ten-day period, files
a notice of objections with the Court. In such instances, the Court shall hold a hearing to determine if the filing of a petition for reinstatement and a reinstatement hearing as provided elsewhere in this section 18 shall be required.

(d) The right to automatic reinstatement under this subsection (1) shall not apply to any lawyer who fails to file the required affidavit within six months after the original term of suspension has expired. In such a case the lawyer must file a petition for reinstatement under paragraph (2) of this section.


(a) Except as the court by order may direct, a lawyer who has been disbarred, or whose resignation has been allowed under section 15 of this rule, may not petition for reinstatement until three months prior to the expiration of at least eight years from the effective date of the order of disbarment or allowance of resignation.

(b) Except as the court by order may direct, a lawyer who has been suspended for an indefinite period may not petition for reinstatement until the expiration of at least three months prior to five years from the effective date of the order of suspension.

(c) Except as the court by order may direct, a lawyer who has been suspended for a specific period of more than one year may not petition for reinstatement until three months prior to the expiration of the period specified in the order of suspension.

(3) Employment as Paralegal.

At any time after the expiration of the period of suspension specified in an order of suspension, or after the expiration of four years in a case in which an indefinite suspension has been ordered, or after the expiration of seven years in a case in which disbarment has been ordered or a resignation has been allowed under section 15 of this rule, a lawyer may move for leave to engage in employment as a paralegal. When the term of suspension or disbarment or resignation has been extended pursuant to the provisions of section 17(8) of this rule, the lawyer may not petition to be employed as a paralegal until the expiration of the extended term. The court may allow such motion subject to whatever conditions
it deems necessary to protect the public interest, the integrity and standing of the bar, and the administration of justice.

(4) Petitions for Reinstatement.

Petitions for reinstatement required under this section 18 and those required under section 13 of this rule shall be filed with the clerk of this court for Suffolk County and

(a) shall state whether the petitioner has complied with all the terms and conditions of the order imposing suspension or disbarment, accepting a resignation, or placing the petitioner on disability inactive status, as the case may be;

(b) shall state whether the petitioner has paid any costs assessed by the court under section 23 of this rule;

(c) shall state the extent to which the petitioner has made restitution to, or otherwise made whole, all clients or others injured by the petitioner’s misconduct;

(d) shall state whether the petitioner has repaid the Clients’ Security Board any funds awarded on account of the petitioner’s misconduct;

(e) shall state that the petitioner has taken the Multi-State Professional Responsibility Examination after entry of the order of suspension, disbarment, or acceptance of resignation, and has received a passing grade as established by the Board of Bar Examiners;

(f) shall state that the petitioner has posted with the Board any bond it has required under paragraph 6 of this section 18; and

(g) shall state that the petitioner has filed with the Board and served upon the bar counsel copies of the petition and the completed questionnaire required by the Board under its rules.

(5) Procedure on Petitions for Reinstatement.

The clerk shall transmit a copy of the petition for reinstatement to the Board within three days after filing. Except with the written consent of the Board or the bar counsel, no hearing upon the merits of such a petition shall be held prior to the expiration of the full term of suspension, indefinite suspension, disbarment, or resignation
pursuant to section 15 of this rule and in no event earlier than sixty days after transmittal of the petition to the Board or such further time as the court may allow to permit reasonable consideration of the petition by the Board. Upon receipt of such a petition the Board may hear the petition itself or may refer it to an appropriate hearing committee, to a special hearing officer, or to a panel of the Board designated by the chair. On any petition the Board, the hearing committee, special hearing officer, or panel shall promptly hear the petitioner who shall have the burden of demonstrating that he or she has the moral qualifications, competency and learning in law required for admission to practice law in this Commonwealth, and that his or her resumption of the practice of law will not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest. On any petition referred, the hearing committee, special hearing officer, or panel shall transmit to the Board its findings and recommendations, together with any record. The Board shall file the Board's recommendations and findings with the court, together with any record. The subsidiary facts found by the Board shall be upheld if supported by substantial evidence, upon consideration of the record, or such portions as may be cited by the parties.

(6) Costs and Expenses.

The court in its discretion may direct that the petitioning lawyer pay all necessary expenses incurred in connection with a petition for reinstatement, and the Board may require the posting of a reasonable bond to cover such expenses before acting on any petition assigned for hearing under this section 18.

(7) Waiver of Hearing.

The court may on motion of the bar counsel assented to by the Board and the petitioner waive the requirement of a hearing under this section and allow the petition for reinstatement.

(8) Further Petitions for Reinstatement.

Except as the court by order may direct, no lawyer shall be permitted to reapply for reinstatement or readmission within one year following the final disposition of an adverse judgment upon a petition for reinstatement or readmission.
Although the Supreme Judicial Court has, in the context of bar discipline, stated that "'[a] fundamental precept of our system ... is that men can be rehabilitated,'" In re Allen, 400 Mass. 417, 425 (1987), and that "no offense is so grave as to preclude a showing of present moral fitness," In re Prager, 422 Mass. 86, 91 (1996), there is no guarantee of reinstatement. In a number of cases, readmission has been denied or not allowed for years after the applicable period of suspension or disbarment has passed. See In re Pool, 401 Mass. 460 (1988); In re Allen, 400 Mass. 417 (1987); In re Gordon, 385 Mass. 48 (1982); In re Hiss, 368 Mass. 447 (1975); In re Markella, 5 Mass. Att'y Disc. R. 395 (1986).

The standard for reinstatement as to a resigned attorney will be the same as a suspended or disbarred attorney. See In re Woods, 5 Mass. Att'y Disc. R. 395 (1987) (opinion of Wilkins, J.).

(k) Clearance Letters

There are many occasions where an attorney needs to obtain a certificate of good standing and, thus, a clearance letter from the BBO to support the request for such a certificate. One example is where a firm is opening a branch and the attorneys involved need to establish their bona fides in order to do so.

As a result, the BBO has clarified its policy on clearance letters to coincide with that of the court, as follows:

Before the Court issues a certificate of good standing, the board determines that the lawyer is in good standing (i.e., not suspended and license not otherwise restricted) and that bar counsel is not expecting or intending to seek the lawyer’s suspension or disbarment in the next thirty days. The board will not disclose the pendency of complaints or proceedings concerning a lawyer otherwise in good standing unless something is about to occur such that the Court would not have wanted to issue the certificate.

BBO Policies and Procedures (approved October 2011).
EXHIBIT A — Outline of the Bar Discipline Process

1. Complaint filed—investigation begins
2. Reply by Respondent
3. Investigation concludes by dismissal of complaint, agreed-upon discipline or prosecution
4. Dismissal or disposition
   a. Dismissal
   b. Admonition or other agreed-upon disposition, unless admonition is rejected and an expedited hearing ensues.
   c. Petition for discipline
      i. Motion to dismiss, if appropriate
      ii. Answer filed, if motion denied
      iii. Hearing committee or officer chosen
      iv. Prehearing motions (exculpatory evidence; bifurcation, if appropriate; dismissal, etc.)
      v. Prehearing conference
         a. Stipulations
         b. Exhibits
         c. Witnesses
         d. Memoranda
      vi. Hearing before hearing committee or single hearing officer
   vii. Posthearing submissions
      a. Request for findings of fact and rulings of law
      b. Motions
viii. Hearing committee or officer report
   a. Postreport motions (further hearing, recommittal, etc.)
ix. Appeal brief or opposition to appeal brief of bar counsel
x. Proceedings before board
   a. Postreport motion (further hearing, recommittal, reconsideration, etc.)
   b. Oral argument
   c. Board memorandum and vote
d. Post-board decision motions (reconsideration, etc.)
   e. Board final vote
xi. Information filed with SJC
xii. Memorandum and other submissions to Court
xiii. Oral argument
xiv. Postargument submissions
 xv. Memorandum and order
xvi. Appeal to full bench
EXHIBIT B— Diversion Program Policy Statement

The purpose of the diversion program is to protect the public by improving the professional competency of and providing educational, remedial and rehabilitative programs to members of the Massachusetts Bar through operation of the following goals:

A. the early identification of attorneys whose violations of the Massachusetts Rules of Professional Conduct arise from his or her practice administration or organization, health or competence but do not raise questions about the lawyer's moral fitness or integrity;

B. the prevention of similar ethical violations by altering the circumstances that caused the violation, and

C. reducing recidivism and affording bar counsel more time in addressing serious disciplinary matters.

The diversion program is not an alternative to discipline in cases involving serious misconduct that will likely result in public discipline or misconduct that cannot be addressed by diversion.

Guidelines

1. Referral to the Program  Prior to the commencement of a disciplinary hearing, bar counsel may offer diversion to a respondent if bar counsel concludes that the professional misconduct was not the result of any willful or dishonest conduct, the basis of the misconduct or incapacity is subject to remediation or resolution through alternative mechanisms, and the public interest and the welfare of the respondent's clients and prospective clients will not be harmed if the respondent complies with the program. Diversion may include, but is not limited to, participation in fee arbitration; law office management assistance; evaluation and treatment for substance abuse; psychological evaluation and treatment; medical evaluation and treatment; monitoring of the respondent's practice or accounting procedures; continuing legal education; passing the multistate professional responsibility examination; or other programs appropriate to the circumstances.

2. Participation in the Program As an alternative to discipline, bar counsel may offer a respondent participation in a diversion program in cases where there is little likelihood that the respondent will harm the public during the period of participation, where bar counsel can adequately supervise the conditions of diversion, and where participation in the program is likely to benefit the respondent.
and accomplish the goals of the program. A matter generally will not be diverted when:

(1) the presumptive form of discipline in the matter is likely to result in public discipline;

(2) the misconduct involves misappropriation of funds or property of a client or a third party;

(3) the misconduct involves conviction of a crime as defined by Rule 4:01, sec. 12;

(4) the misconduct involves violence;

(5) the misconduct resulted in or is likely to result in actual injury (loss of money, legal rights, or valuable property rights) to a client or other person, unless restitution is made a condition of diversion;

(6) the respondent has been publicly disciplined in the last three years;

(7) the matter is of the same nature as misconduct for which the respondent has been disciplined in the last five years;

(8) the respondent has previously been referred to a diversion program for similar misconduct;

(9) the misconduct involves dishonesty, deceit, fraud or misrepresentation; or

(10) other facts and circumstances render diversion inappropriate.

3. Diversion Agreement If a respondent agrees to an offer of diversion, the terms of the diversion shall be set forth in a written agreement. The agreement shall specify the program(s) to which the respondent shall be referred, the general purpose of the diversion, the manner in which compliance is to be monitored, and any requirement for payment of restitution or costs. The agreement will also require an admission to facts, and it will identify the rules violations bar counsel claims are implicated. The diversion agreement may include a full or partial waiver of confidentiality, as appropriate, to allow reporting of any alleged breach of the contract.

4. Effect of Diversion Upon the respondent’s entry into the diversion program(s), the underlying matter shall be stayed pending full compliance with the terms and conditions of the diversion agreement. Diversion shall not constitute a disciplinary sanction.

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5. **Effect of Successful Completion of the Diversion Program** If bar counsel determines that the respondent has successfully completed all requirements of the diversion program, bar counsel shall close the file.

6. **Effect of Failure to Complete Diversion Agreement and Use in Subsequent Proceedings** If a respondent fails to fully complete all requirements of the agreement, bar counsel may elect to modify the agreement or terminate the agreement and reopen the disciplinary file. If the disciplinary file is reopened, the diversion agreement shall be admitted in evidence at any subsequent disciplinary hearing. All reports and submissions from providers participating in the diversion agreement are admissible at any subsequent disciplinary hearing on the underlying complaint(s). Failure to complete the agreement shall be admissible in evidence and may be considered as a matter of aggravation when imposing a disciplinary sanction. A breach of the agreement by the respondent may also constitute a separate disciplinary offense if the facts and circumstances so warrant.

The diversion agreement shall also be admitted in evidence in subsequent proceedings on later complaints in which the respondent is alleged to have committed misconduct, as evidence bearing upon the issue of sanction to be imposed if misconduct is found.

7. **Effect of Rejection of Recommendation for Diversion** If a respondent rejects a diversion recommendation, the matter shall proceed as otherwise provided in S.J.C. Rule 4:01 and the Rules of the Board of Bar Overseers.

8. **Confidentiality Files** and records resulting from the diversion of a matter are subject to S.J.C. Rule 4:01, section 20. Upon approval of an agreement, bar counsel shall inform the complainant that a diversion agreement has been entered into, that the disciplinary proceeding has been stayed, and that, if the respondent complies with the agreement, the proceeding will be terminated.
EXHIBIT C — Supreme Judicial Court Standing Order Regarding Appeals in Bar Discipline Cases

ORDER ESTABLISHING A MODIFIED PROCEDURE FOR APPEALS IN BAR DISCIPLINE CASES

To expedite the resolution of bar discipline appeals in this court, while ensuring that the rights of all litigants involved in such cases are protected, the Supreme Judicial Court has approved a pilot program as follows. There shall be a modified procedure for appeals from decisions of the court’s single justices in bar discipline cases. All bar discipline cases entered in the Supreme Judicial Court for Suffolk County after April 1, 2009 shall be subject to this order, and to the extent that its provisions are inconsistent with the Massachusetts Rules of Appellate Procedure, this standing order shall govern. This following pilot program will be conducted for a period of two years, or until such other time as the court orders:

(a) A party aggrieved by a final order or judgment of the single justice may appeal to the full court for review of the order or judgment. A notice of appeal must be filed with the clerk of the Supreme Judicial Court for Suffolk County within ten days of entry of the final order or judgment for which review is sought. An appeal shall not stay any order or judgment of suspension or disbarment unless the single justice or this court so orders.

(b) The appeal shall initially be presented to the full court on the record that was before the single justice, together with a preliminary memorandum from the appellant and, if requested, from the appellee. The appellant shall be responsible for preparing and filing a record appendix containing copies of all the relevant papers from the single justice proceeding, including but not limited to the hearing committee report, appeal panel report, if any, board of bar overseers memorandum, the order or judgment of the single justice, and any memorandum of decision of the single justice. The appellant’s preliminary memorandum, which shall not exceed twenty pages, double spaced, shall set forth the relevant background and summarize the appellant’s arguments on appeal, with citations to applicable authority. It is incumbent on the appellant to demonstrate in this memorandum that there has been an error of law or abuse of discretion by the single justice; that the decision is not supported by substantial evidence; that the sanction is markedly disparate from the sanctions imposed in other cases involving similar circumstances; or that for other reasons the decision will result in a substantial injustice. Nine copies of the record appendix and preliminary memorandum shall be filed with the clerk of the Supreme Judicial Court for the Commonwealth...
within thirty days after the appeal has been docketed in the full court; one copy of the record appendix and memorandum shall be served on each other party. In the case of multiple appellants or cross-appellants, each appellant shall be permitted to file a preliminary memorandum within this time frame, but in such a case, the appellants shall submit, and share the cost of, a single record appendix. If requested by the court, the appellee may file a responsive memorandum, not to exceed twenty pages, double spaced, within twenty days of the court’s request. Extensions of time for filing memoranda will rarely be granted and should not be anticipated.

(c) Based on its review of the parties’ memoranda and the record appendix, the full court may affirm, reverse, or modify the order or judgment of the single justice without oral argument; alternatively, if any three Justices so vote, the court may direct the appeal to proceed in the regular course, in which case the parties will be permitted to file full briefs conformably with the Rules of Appellate Procedure and the case will be scheduled for oral argument.

(d) The Rules of Appellate Procedure shall apply to appeals covered by this standing order to the extent they are not inconsistent with this order.

(e) The clerk of this court for Suffolk County shall provide a copy of this standing order to the respondent attorney or his or her legal representative in each bar discipline case at the time the case is commenced in the county court, and shall remind the parties of their obligations under the order at the time she notifies them that the record has been assembled for appeal.
SECTION 4.2

Attorney and Consumer Assistance Program (ACAP)*

Board of Bar Overseers/Office of the Bar Counsel

What is the Attorney and Consumer Assistance Program (ACAP)?

The Attorney and Consumer Assistance Program (ACAP) is part of the Office of the Bar Counsel of the Board of Bar Overseers. ACAP is a source of assistance to people with questions or problems with their Massachusetts lawyer. When someone calls the Office of the Bar Counsel with a grievance concerning a lawyer, a member of the ACAP staff will respond promptly to that inquiry and attempt to identify the problem. Many problems can be resolved by providing information, calling the lawyer, or suggesting alternative ways of dealing with the dispute. A complaint form will be sent immediately where serious unethical conduct may be involved.

What can ACAP do?

What follows are some typical problems and what ACAP will do to help:

“My lawyer will not return my telephone calls.”

If the client wishes, ACAP will call the lawyer and ask the lawyer to contact the client. If the client does not wish ACAP to communicate with the lawyer, ACAP will make suggestions to the client for a self-help plan.

“I do not think my lawyer is working on my case.”

Where appropriate, ACAP will send a complaint form to the client. Where the problem appears to be short-term or involve a communication problem, ACAP

* Source: Board of Bar Overseers/Office of the Bar Counsel (http://www.mass.gov/obcbbo/acap.htm). Reprinted with permission. Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
will offer to call the lawyer for an update on the status of the case. If the client
does not wish ACAP to contact the lawyer, ACAP will make suggestions to the
client for a self-help plan.

“My former lawyer will not release my files.”

ACAP will call the lawyer to help obtain the release of any material to which the
client is entitled.

“Can my lawyer withdraw from my case?”

ACAP will discuss the limitations on a lawyer’s ability to withdraw and the
steps the lawyer must take before doing so. ACAP will also refer the client to
lawyer referral services when appropriate.

“My lawyer provided ineffective assistance of counsel in my
criminal case.”

If the case is over, ACAP will generally advise the caller that the Board of Bar
Overseers and the Office of the Bar Counsel cannot assist with this claim, which
should be decided by a court in the first instance. We will also refer the client to
legal services that can assist in the filing of such a claim.

“I want to file a complaint against the judge on my case.”

ACAP will refer the caller to the Judicial Conduct Committee because the Board
of Bar Overseers and the Office of Bar Counsel do not have jurisdiction over
complaints concerning judges.

“My lawyer’s bill is too high.”

Fee disputes, except in rare circumstances, are outside the jurisdiction of the
Board of Bar Overseers and the Office of the Bar Counsel. ACAP will attempt to
clarify the fee arrangement for the client, urge the client to compare the bill to
the work the client knows was accomplished, and suggest that the client write to
or meet with the lawyer to attempt to resolve the dispute. The client may also be
referred to fee arbitration.

“I am afraid to fire my lawyer because I paid a fee in advance.”

ACAP will explain that the lawyer is obligated to return the unearned portion of
any retainer promptly. The client is advised to ask for an itemized bill and to
request the immediate refund of any unearned fees and the return of the file when the lawyer is discharged.

"My spouse's divorce lawyer said things that are not true to the judge."

ACAP will explain that unless the lawyer made willful misrepresentations of fact or law, this claim should be raised with the caller's own attorney since there may be nothing the Board of Bar Overseers or the Office of the Bar Counsel can do. However, the caller is advised that if there is proof establishing that the lawyer engaged in deliberate misrepresentations to the court, a complaint form will be sent.

What ACAP cannot do.

ACAP deals with problems that can be resolved without extensive investigation and the disciplinary procedures of the Board of Bar Overseers and the Office of the Bar Counsel. When a caller alleges serious misconduct, such as the mishandling of client funds, ACAP will provide a complaint form and urge the caller to file it with the Office of the Bar Counsel. Although ACAP cannot give legal advice, when a caller needs legal assistance, we will direct the caller to other resources for assistance.

How does ACAP assist attorneys?

ACAP helps attorneys by providing an informal means of addressing minor complaints from dissatisfied clients and others. We also give information and suggestions about effective resolution of disputes in an ethical and professional manner.

Most problems with clients can be prevented by returning the client's calls promptly, keeping clients informed about the status of the case, written fee agreements, regular billing practices, meeting deadlines, and managing a caseload efficiently.

In some cases, ACAP will refer lawyers to Lawyers Concerned for Lawyers, peer assistance and practice management assistance through local bar associations, and the Office of the Bar Counsel ethics hotline for information and help.

NOTE
The ACAP program is not a "Lawyer Assistance Program" as defined in Rule 1.6(c) of the Massachusetts Rules of Professional Conduct.
Confidentiality

As an arm of the Office of the Bar Counsel, ACAP is governed by the Supreme Judicial Court rules which mandate that the Office of the Bar Counsel and the Board of Bar Overseers keep complaints confidential. Thus, ACAP cannot disclose that someone has contacted us about an attorney. However, ACAP’s connection to the Office of the Bar Counsel also requires that ACAP’s records be available to Bar Counsel and that ACAP advise Bar Counsel if it receives information indicating that a lawyer is engaging in serious misconduct. A consumer who makes a written or telephone inquiry to ACAP is immune from liability based on the inquiry. This immunity does not extend to public disclosure by the consumer of information contained in or relating to the complaint.

How can I get more information?

Call ACAP at (617) 728-8750 any Monday through Friday between 9 a.m. and 5 p.m. The fax number is (617) 482-2992. You may also write to the following address:

Attorney and Consumer Assistance Program
The Office of the Bar Counsel
99 High Street
Boston, Massachusetts 02110

ACAP does not accept inquiries over the Internet.
SECTION 5

Managing the Attorney-Client Relationship

§ 5.1 The Attorney-Client Relationship
Margaret D. Xifaras, Esq.
Lang, Xifaras & Bullard, PA, New Bedford
SECTION 5.1

The Attorney-Client Relationship*

Margaret D. Xifaras, Esq.
Lang, Xifaras & Bullard, PA, New Bedford

Scope Note

This chapter guides the reader through the particular issues that arise in the course of establishing the attorney-client relationship. Featured are discussions regarding prerepresentation contacts, the elements of successful representations, and caveats pertaining to particular situations, such as business relationships and intimacy between attorney and client.

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* Reprinted from Ethical Lawyering in Massachusetts (MCLE, Inc. 3d ed. 2009 & Supp. 2013). Updated for the 2013 Supplement by MCLE. Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
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§ 1 PREREPRESENTATION CONTACTS AND CAVEATS

§ 1.1 Phone Inquiries

Potential clients get law firms’ or lawyers’ names from an interesting range of sources: the phone book, paid advertisements, solicitation letters from law firms, word of mouth, former clients, family, friends, community activities, business associates, the hairdresser, etc. Often, their first contact with your office is the initial phone call. Therefore, your firm should have a system in place that efficiently and discreetly routes all prospective clients to the lawyer in your office who can best answer the preliminary questions being asked. Receptionists and administrative assistants should not be expected or allowed to offer legal advice or guidance, but they should be sufficiently briefed and trained to allow for immediate redirection of the call to an attorney. If the appropriate attorney is not immediately available, a message should be taken that highlights the type of case and notes that the caller is a potential new client. Returning these calls should be a top priority, as you are making first impressions on potential new
Failure to provide training that distinguishes between clerical functions and the proffer of legal advice or consultation can result in serious consequences for the lawyer. In *DeVaux v. American Home Assurance Co.*, 387 Mass. 814 (1983), a secretary advised a caller to write to the alleged tortfeasor and to the defendant regarding a claim. The caller did so, but the letter to the law firm was misfiled. Subsequent calls from the client were not referred to the lawyer. After the statute of limitations had run on the claim, the client visited the lawyer, who discovered his office’s error. The client sued the lawyer for malpractice. The defendant’s motion for summary judgment was granted by the trial court on the ground that no attorney-client relationship had ever been established. The Supreme Judicial Court reversed. There was a question of fact, the court ruled, whether the secretary had actual or apparent authority to bind the firm. In so ruling, the court cautioned lawyers against delegating to employees any task that could or might be interpreted as the practice of law or that might bind the lawyer to a representation.

Returned calls should review the background facts and the status of the case, but, generally speaking, a live follow-up appointment should be scheduled. In this way, not only can the client be evaluated in person, but a more detailed intake and exchange can take place before anyone offers too much prerepresentation advice. In addition, you can and should clearly establish for the prospective client the steps that need to be taken to retain your representation so it is clear that you have not yet bound yourself to the case.

§ 1.2 Roles of Receptionists and Administrative Assistants

First-phone-call impressions are important, but just as important is the ongoing impression left by your office’s receptionists and administrative assistants. They should always be efficient, organized, and trained to listen for and transmit messages accurately. However, ethically, they should never offer advice or commentary nor retain any detailed or confidential information about any client’s business or personal affairs. The client has hired you, and you have obligations of confidentiality and communication that cannot and should not be delegated.

However, there are many occasions when you may be out of the office for court appearances or meetings. Administrative assistants, paralegals, and associates should tell callers that Lawyer X is unavailable and will call them back as soon as possible. Following up on these calls is the lawyer’s responsibility. Work with your staff on standard, clear approaches.
§ 1.3  “Second Opinion” or Successor Counsel

New clients often call seeking successor counsel or second opinions on his or her case. That is the client’s prerogative. However, if the client is seeking new counsel, certain practical and ethical cautions should be kept in mind.

First, it is always best to meet the new client for an introductory session. Assess the facts. Make certain that the client’s goals and your responsibilities and tasks are very clearly articulated. Determine the status of the case. Review the client’s concerns and dissatisfactions with his or her current counsel, making certain not to second-guess or undercut or comment on the current counsel. It is often best to leave it to the client to obtain his or her file and settle accounts with prior counsel. If at all possible, avoid becoming involved in the client’s closeout of the relationship with prior counsel, although you may assist the client in preparing a clear discharge letter of former counsel. Beware of the client who jumps from counsel to counsel whenever he or she does not like the advice received (or whenever the bill balance gets too high). If prior counsel is a reasonable and professional colleague, you may even get some insight into the client with a courtesy call, if the client consents to the contact. By initially setting up an introductory appointment only, you and the client have the option of deciding not to establish the new representation. Note that you may also need to make special provisions for securing or ensuring that your fees are paid. On occasion, when the case is pending before a tribunal, the prior lawyer may have a lien for fees. The effect of such a lien should be explained to the client. Ethically and professionally, this is all permissible as long as you avoid the pitfalls of solicitation or excessive fees.

The Supreme Judicial Court has promulgated a specific rule that spells out the obligations of a lawyer who is asked by a client to return a file—Mass. R. Prof. C. 1.16(e). Failure to return a file in contravention of this rule could result in a disciplinary sanction. Admonition No. 94–43, 10 Mass. Att’y Disc. Rep. 406; Admonition No. 94–53, 10 Mass. Att’y Disc. Rep. 423.

§ 1.4  Initial “Consultation Interview”

For the initial consultation interview, it is always best to set aside sufficient uninterrupted time for an in-depth and personalized review and assessment of the prospective client’s case. Depending on the type of case, you may want to use standardized intake forms. However, be careful of leaving the prospective client with the impression that his or her case is being fit into a prepackaged mold. Also, beware of leaving the proposed client with the impression that his or her particular concerns and confidences are falling on insensitive or uncaring ears. Listen carefully. Ask follow-up questions. Size up the prospective client, just as
the client is sizing you up. Remember that the initial client interview may be your only live contact for weeks or months, so you need to develop a solid understanding of the background of the case, a solid interpersonal relationship with your client, and a sound sense of how the case will be managed by you as counsel if you are retained.

You should make clear to the prospective client that this first consultation is when you will decide whether to assume the responsibilities of representation. Be sure that the client understands that representation is available through you, but only if he or she decides to retain you and pays your retainer, and you accept your role as the client's attorney. However, understand that your discussions are confidential and may be deemed sufficient to disqualify you from representing any adverse party even if you decline to accept the case. Deloury v. Deloury, 22 Mass. App. Ct. 611 (1986). But see Int'l Strategies Group, Ltd. v. Greenberg Traurig, LLP, 482 F.3d 1 (1st Cir. 2007) (finding no express attorney-client relationship existed).

Fees should be reviewed and can be charged for initial interviews, but care should be taken to distinguish any one-time consultation fee from a retainer. A simple letter from you to the client following the initial meeting will help confirm and memorialize the exact nature of the initial contact. Generally speaking, if you do not yet represent the client, make this clear by setting out the steps to be taken to secure your services. A simple line such as, “Please feel free to re-contact the office if you wish to retain our services,” should make clear that you do not consider yourself to be retained on the case.

§ 1.5 Safeguards to Avoid Early or Problematic Representations

From the outset, work into any discussion of the case facts and strategy the conditions precedent to representation: the decision by the client to retain you, the actual payment or execution of agreements related to a retainer or fees, and the acceptance by you of the same. Short of these, you should not be representing or be perceived to be representing the client. For example, use of the phrase, “once you decide whether you will retain the office,” is helpful when a client is charging on about all the things he or she wants to happen but has yet to actually retain the office.

There are limits on the types of cases a lawyer can agree to handle. Rule 1.16(a) of the Massachusetts Rules of Professional Conduct prohibits a lawyer from representing a client if the representation will result in the violation of a rule of professional conduct or if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client. The lawyer must also be able to provide “competent representation.” Mass. R. Prof. C. 1.1.
SECTION 5.1  PRACTICING WITH PROFESSIONALISM

You may wish, or be asked, to limit the objectives of your representation. For example, you may wish to handle the negotiation of a contract dispute but may not want to be responsible for putting the case in suit. You may do so, as long as the client consents after consultation and as long as the scope of the representation is not so limited that you cannot ethically carry out your responsibilities to the client. Mass. R. Prof. C. 1.2, cmts. [4], [5]. Provide the client with written confirmation of any limitations.

§ 1.6  Information Storage and Retrieval on Preliminary Contacts

A client may consult you, but then choose either not to pursue his or her case or to pursue it with other counsel. Do not take such client losses personally. Clients are consumers. They have a right to counsel of their own choice and you have an obligation to respect this right. However, almost as often, someone with whom you met months or even years ago will return to the office seeking to retain your services. Your office should have a system for pulling out and updating preliminary intake notes so you are ready to act efficiently once the fee basis is established and your office is formally retained. However, whether you are ultimately retained or not, you should protect these initial consultation notes and materials, as they are privileged and confidential whether or not an attorney-client relationship is established with those with whom you have consulted. Additionally, you need a master list of “consults” (but not retained), as it will often happen that months and sometimes years later you will do yet another consult, only to realize at the outset of or at some point during your discussion with the client that you know this case; the facts are “ringing a bell.” Stop! To the extent that you did a consult (even if you were not retained) there is the potential for a conflict.

§ 1.7  Client Questionnaires and Standardized Intake Forms

The proverbial yellow pad remains the lawyer’s best friend, but color-coded standardized forms are often used where basic facts are required. For example, in a worker’s compensation case, employee and employer data, wage records, and work- and accident-related details are all essential. In a divorce, proper names, addresses, Social Security numbers, dates of birth, dates of marriage and separation, and extensive details as to family and business finances are elementary. Systematically taken in, these facts and details can be systematically retrieved by the lawyer or by an associate, paralegal, or administrative assistant as standardized filings are prepared. In addition, much ground can then be efficiently covered at the first interview and a case can be more thoroughly and accurately evaluated.
when the initial intake is systematic. And, given that obligations of confidentiality and privilege run to all attorney-client conferences, even those preliminary or prior to representation, the client is protected.

§ 1.8 Determining Who Is the Client

Sometimes, a third party may seek representation for another. A parent may come to you with a child who has a problem. A grandparent may not only bring in, but also pay the legal bills for, a granddaughter who is estranged from her parents. A friend may introduce you to a friend with a business issue. A neighbor may call you about a family member who is having problems with an estate. A nursing home may call about a resident whose family seems neglectful or even abusive. In every case, you must clearly establish that the client is the person at issue, not the referring friend or the paying relative.

Rule 1.8(f) of the Massachusetts Rules of Professional Conduct defines the professional obligations attendant to accepting compensation for representing a client from one other than the client. See In re Discipline of an Attorney, 451 Mass. 131 (2008) (discussing contingency fee arrangements). The rule requires that the lawyer obtain the client’s consent after consultation, not permit any interference with the lawyer’s professional judgment on behalf of the client or with the attorney-client relationship, and protect all information relating to the representation of the client as required by Mass. R. Prof. C. 1.6.

Special problems arise, too, when the client is an organization or a corporation. Rule 1.13 of the Massachusetts Rules of Professional Conduct governs the obligations of a lawyer for an organization. Officers or employees of the organization may look to you for legal assistance and advice. However, your loyalty and obligations are to the organization, not to its constituents. Failure to make clear the identity of your client— the organization— in dealing with its constituents may result in your compromising confidential information and in being disqualified from representing the organization or any of its constituents.

§ 1.9 Follow-Up Steps to Confirm Representation

To confirm representation, follow up promptly with a letter of proposed representation that clearly reiterates the fee agreement, the area of representation, and the tasks to be performed. See Exhibit A for a sample letter. Arguably, a letter of representation can mark and memorialize the formal beginning of the attorney-client relationship. It is easily understood as such by the client. If written correctly, it can also leave the client with the impression that you are ready to roll up your sleeves and fight the good fight on the client’s behalf. You also have the oppor-
tunity to set forth specific follow-up tasks for the client to perform, as well as the first steps in your strategy of representation. For example, link your first follow-up act, such as the sending of an introductory letter of representation to opposing counsel or the filing of an appearance, with a specific step by the client, such as delivery of a fixed retainer or certain background documents.

Rule 1.5 of the Massachusetts Rules of Professional Conduct, as amended effective January 1, 2013, requires that the client be informed in writing of “the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible . . . before or within a reasonable time after commencing the representation,” with limited exceptions. Mass. R. Prof. C. 1.5(b)(1). See the sample fee agreement in Exhibit B. Exceptions apply only in the case of a regularly represented client handled on the same basis or rate or “a single-session legal consultation or where the lawyer reasonably expects the total fee to be charged to the client to be less than $500.” Mass. R. Prof. C. 1.5(b)(2).

In addition, any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

Be as specific as possible about tasks to be performed in the next week or month so the client has confidence in you and some clarity about how his or her case is being handled. Do not predict, guarantee, or presume a good result. You may subject yourself to a contract liability or, more likely, you will establish expectations in the client that are unrealistic.

Schedule a follow-up conference within a reasonable period—usually within a month of the initial conference. Specific names, faces, and fact patterns blur, particularly in high-volume offices, so additional live contact is important. Tickler and follow-up systems are critical.

Introduce your administrative assistant, paralegal, or associate or gradually phase in him or her, as this person will most likely be handling day-to-day communication with the client if your practice takes you out of the office for a significant percentage of the time. This is a wise practice and is ethically permissible, provided that you, your staff, and the client always know and remember that you, as the attorney, are ultimately responsible and in charge. Rule 5.3 of the Massachusetts Rules of Professional Conduct specifies the responsibilities of lawyers for nonlawyer assistants. See generally Rodriguez v. Montalvo, 337 F. Supp. 2d 212 (D. Mass. 2004). A lawyer may be held responsible for an employee’s conduct if the conduct would be a violation of the rules if engaged in by a lawyer.
§ 1.10 Retainers and Fee Agreements with Time-Based Cases

Every practice guide and every experienced attorney will advise you to discuss fee arrangements at your initial meeting with any prospective client. Retainers, hourly rates, systems for keeping time records, billing practices, and expectations should be a part of the initial presentation.

Fee arrangements should be discussed in specific terms (retainer, hourly rate, periodic billing, out-of-pocket expense reimbursement, etc.). In addition, there should be a written fee agreement that spells out the details of the arrangement, which the client can review later, before deciding whether to hire you as counsel. This way, the client’s rights as a consumer are emphasized without your having to shortchange yourself on fees. The better the fee arrangement is understood, the more likely it is that the client will pay the fee.

Discussions as to fee arrangements and the contracts themselves should include the following:

• the scope of the representation;
• the range of tasks to be performed;
• systems for time and expense recordkeeping and accounting;
• a caveat on any awards of counsel fees;
• a specific restriction on any obligations to appeal without specific subsequent agreement between counsel and client (see In the Matter of Kerlinsky, 406 Mass. 67 (1989), for the proposition that a contingent fee agreement that does not explicitly exclude the obligation to appeal requires the lawyer to pursue the appeal for no additional fee); and
• a general acknowledgment that both the client and the attorney have rights to terminate the representation under certain circumstances.

See Exhibit B for a sample fee agreement.
§ 1.11  Fee Agreements and Expenses for Contingent Fee Cases

Rule 1.5(c) of the Massachusetts Rules of Professional Conduct requires that contingent fee agreements be in writing, signed in duplicate by both the client and the lawyer, and retained by the lawyer (along with proof of delivery of the duplicate copy to the client) for a period of seven years after the conclusion of the contingent fee matter. The rule sets forth two model contingent fee agreements. For a detailed discussion of these agreements and other issues related to contingent fees, see Ethical Lawyering in Massachusetts § 5.4 (3d ed. 2009 & Supp. 2013).

Contingent fee agreements can help clarify the distinction between fees for your services and out-of-pocket expenses for reports, experts, exhibit preparation, and the like. Review this distinction in detail and include it in your written contingent fee agreement. Remember, it is always best to review and fully disclose and discuss fee arrangements early on in your representation. Rule 1.8(e) of the Massachusetts Rules of Professional Conduct permits a lawyer to pay the court costs and expenses of litigation for an indigent client and to advance the court costs and expenses of litigation for any client, with repayment contingent on the outcome of the matter.

However, care should be taken in expense and fee advances, as tax enforcement developments and audit procedures arguably make the advancing of costs nondeductible. Special care should be taken to ensure timely client payment of costs, lest an unreimbursed expense be characterized by the IRS as a “loan”—a characterization that implicates Mass. R. Prof. C. 1.8(e), which prohibits financial assistance to clients in connection with pending or contemplated litigation except as specified above. Similarly, the IRS has indicated that it will characterize retainers as earned income earned in full on receipt, irrespective of an attorney’s ethical obligations to segregate unearned from earned portions of retainers. Check with your accountant for information as to these developments to ensure proper bookkeeping and tax characterization on advanced expenses and retainers.

§ 1.12  Attorney’s Lien

When personal injury attorneys representing plaintiffs are discharged by their clients, the attorneys often assert an attorney’s lien with either the insurance company with which the attorney expected to settle his or her client’s claim or with successor counsel. General Laws c. 221, § 50, the “attorney’s lien statute,” provides the parameters of the lien. It provides in relevant part as follows:
From the authorized commencement of an action, counterclaim, or other proceeding in any court, or appearance in any proceeding before any state or federal department, board or commission, the attorney who appears for a client in such proceeding shall have a lien for his reasonable fees and expenses upon his client’s cause of action, counterclaim or claim, upon the judgment, decree, or other order in his client’s favor entered or made in such proceeding, and upon the proceeds derived therefrom.

G.L. c. 221, § 50. The lien may be asserted only after a judicial or administrative proceeding has begun. It may charge proceeds derived from an order entered in the proceeding, where the order is in the client’s favor. In re Engage, Inc., 544 F.3d 50 (1st Cir. 2008) (discussing goals of statutory section).


§ 1.13 Ongoing Case and Client Communication

You must faithfully, honestly, and consistently represent the interests and protect the rights of the client. The attorney is bound to discharge these duties with the strictest fidelity and the utmost good faith. Further, the attorney is obligated to inform the client promptly of any known information important to the client. An attorney may not withhold from the client information acquired in the attorney’s capacity as attorney for the client, nor may the information be divulged to others or used by the attorney to his or her own advantage unless the attorney is specifically authorized to do so by the client personally. See Mass. R. Prof. C. 1.1–1.4, 1.6.

One of the simplest ways to adhere to the ethical and professional duties summarized above is to keep the client continuously informed of developments or dealings related to the client’s case. Indeed, lack of adequate communication is, next to fee disputes, the most common source of client complaints about lawyers, and a leading cause of malpractice litigation. Copies of all correspondence and pleadings should routinely be forwarded to the client. A short handwritten note on the client’s copy can serve to communicate with and direct the client to the next steps in the handling of the case. When calls come in that pertain to case developments or negotiations, dated notes should be kept for placement in the
client's file. Whenever possible or necessary, a call should go out to the client to update him or her on developments. The lawyer must communicate any offers of settlement, and it is important that these calls be documented in your file. Be sure to remember to record calls to review settlements in your time records.

When critical case junctures are reached or are particularly complex, or when the case is near settlement, an actual face-to-face appointment is clearly the better practice.

You should confirm in writing authorizations to act, information imparted, and directions or tasks transmitted. A clear written record is valuable for many reasons, the least of which is self-protection.

§ 1.14 Periodic Updates and Tickler Systems

Some cases do not move smoothly, but rather take months or even years before they are ready to settle or be reached for trial. Accordingly, no standardized or automatic system for updating cases is appropriate in all instances, but there must be some method whereby “back burner” cases are periodically reviewed or advanced to avoid neglecting them. Periodic updating can be done with a weekly, monthly, quarterly, or year-end comprehensive review of all open files. Alternatively, it can be managed with a case-by-case tickler system whereby no action is taken without a specific follow-up notation as to when that action should be reviewed or the next action taken. In technologically advanced offices, ticklers are an integral part of the law office management program. The ethical requirements are diligence and competency. The practical side of this requirement is a need to create management systems where nothing sits on your desk like a time bomb. Statutes of limitation, filing deadlines, appeal periods, the ripening of entitlements, performance deadlines, closing dates—all of these are your professional responsibility when you take on a case. Additionally, in a general sense, reaching systematic closure is also your responsibility. Management systems help to make certain that nothing falls through the cracks. Disorganization can lead to neglect and, as case after case at the Board of Bar Overseers shows, neglect can lead to misrepresentation, fraud, cover-ups, misuse of funds, and, ultimately, severe sanctions, including the possible loss of your license to practice.

§ 1.15 Client Assistance in Case Development

In many cases, the client is the best source of primary data. Who better knows the history of the partnership or the nature of the business? Who better knows the specifics of the problems with the shoddy construction of the new house? Who better can list out all of the history of the real and personal property of the
marriage? While the client may not be the expert business evaluator, contractor, or appraiser you would require at trial, the client can certainly assist in basic data collection. It is cost-efficient and helps the client develop a more realistic assessment of the strengths and weaknesses of the case. In particular, the client must be sent copies of requests for the production of documents and interrogatories. The client is required to participate in the preliminary review and information gathering that discovery requires. While you, as the attorney, are responsible for understanding the formal presentation of the documents and answers, your client must and should be intimately involved, particularly where he or she signs the bottom line on production and answers.

§ 1.16  Experts and Other Professionals in Case Development

In many cases, the development of the case requires the work of other experts or professionals. These include medical and technical experts, educational consultants, employment specialists, accountants, actuaries, business evaluators, financial planners, and private investigators. Ethically and practice-wise, there are two key considerations:

• If a client is going to pay for these services, you need to send notice to and receive consent from the client before retaining the ancillary expert or professional.

• If you wish to shield the information developed by the ancillary expert or professional from pretrial discovery, you, as the attorney—not the client—need to retain and receive the information. This way, their product is arguably the attorney's work product and, as such, is privileged until you move toward trial. See Comm'r v. Comcast Corp., 453 Mass. 293 (2009)

§ 1.17  Differences of Opinion as to Tactics and Representation

For openers, the client determines just what scope and objective he or she is seeking in retaining counsel, and you should be aware of and generally attendant to them. See Mass. R. Prof. C. 1.2. Further, you have a duty to consult with the client as to the means by which the scope and objective are to be pursued.

However, you have an ethical duty not to counsel or assist a client in conduct that you know is criminal or fraudulent. Under certain circumstances, an attorney
may be compelled to disclose certain information to authorities or to the adverse party. See Mass. R. Prof. C. 1.6, 3.3, 4.1(b).

An attorney also has a professional obligation to guide the client toward realistic expectations in the handling of the case. Often, the easiest way to assist the client in understanding unfavorable, but possible, consequences is to present such information as coming generally from the courts based on your experience. The bottom line is listen well and advocate zealously, but never forget your higher obligations as a professional and attorney licensed by the state through the Supreme Judicial Court. Clients do not like to hear negative information or advice. They often have a stake in the correctness of their cause that may be disproportionate to reality or the likelihood of success. You have an obligation to inform your client of the good and the bad, and your client will probably appreciate the advice.

§ 1.18 Declining or Terminating Representation; Withdrawal

If you feel—due to fee questions, limits on independence, illegalities, conflicts, or even simple time constraints—that you cannot or do not wish to take a case, this is your prerogative. Declining representation based on gender, race, national origin, or sexual orientation may constitute unlawful discrimination. In Stropnicky v. Nathanson, MCAD Docket No. 91-BPA-0061 (July 26, 1999), a lawyer was found to have violated G.L. c. 272, § 98, the public accommodations law, by refusing to represent a husband in a domestic relations case because the lawyer confined her representation to women.

An attorney, however, may have obligations to a person even when the case is declined. In Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980), a lawyer was held liable for failing to warn a rejected client properly regarding the statute of limitations applicable to a medical malpractice claim. When declining to represent a client, it is essential to write to the individual with whom you have met or communicated regarding the possibility of legal representation and explain that you will not provide legal services. While you should avoid stating in your letter information that could be misconstrued as legal advice, identifying key issues, such as statutes of limitations and the desirability of seeking the advice of another lawyer if the individual wants to pursue the claim, is recommended.

If, however, there is an established relationship, then, in general, the lawyer must take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other
counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned.

Mass. R. Prof. C. 1.16(d).

A lawyer must withdraw from employment when

- the representation will result in violation of the rules of professional conduct or other laws,
- the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client, or
- the lawyer is discharged.

Mass. R. Prof. C. 1.16(a)(1)-(3).

In all other instances, generally speaking, you should not withdraw or request permission to withdraw unless

- the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent,
- the client has used the lawyer’s services to perpetrate a crime or fraud,
- a client insists on pursuing an objective that the lawyer considers repugnant or imprudent,
- the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled,
- the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client, or
- other good cause for withdrawal exists.

Mass. R. Prof. C. 1.16(b)(1)-(6).

Notwithstanding any of the above or other “good cause” reasons for withdrawal, the court may order counsel to continue the representation where prejudice to the client or to the administration of justice might occur were withdrawal to be allowed.

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In such a case, counsel is stuck with the representation and must slog through often murky or tricky waters, often for no reasonable monetary compensation. Therefore, anticipate potential problems and avoid the representation in the first place if you can. Otherwise, press on as you would with your best client.

An attorney may not withdraw from a case without permission from the tribunal and without protecting his or her client’s interests. The Supreme Judicial Court found that an attorney had violated DR 2-110(A)(1) and (2), the predecessor rule to Mass. R. Prof. C. 1.16, by instructing his associate not to appear at their client’s trial on her complaint for modification because she had failed to pay her fee in full. The attorney received a public censure; the associate was privately reprimanded. In re Dembrowsky, 8 Mass. Att’y Disc. R. 75 (1992).

Where an attorney is unable to zealously represent a client’s position, he or she may seek permission to withdraw; however, the attorney should be careful not to disclose his or her client’s confidences and secrets when requesting permission to withdraw. PR 92–34; see also MBA Ethics Op. 93–6.

§ 2 ELEMENTS OF SUCCESSFUL REPRESENTATION

§ 2.1 Competency

You have been hired by a client not solely because of your charm or good looks, but because you have an understanding of the law and legal procedures and the training necessary to advocate thoroughly and effectively for your client. (Indeed, such an understanding is presumed by our law. See Varney Enters., Inc. v. WMF, Inc., 402 Mass. 79, 81 (1988). If you cannot meet this basic premise of competence, decline the representation or assume responsibility for quickly coming up to speed, most probably on your own time and at your own expense, unless the legal issues and facts are very narrow or unique. (See In re Fordham, 423 Mass. 481 (1996), for an example of the risks involved in expecting clients to pay for a lawyer’s learning process in an unfamiliar area of the law.) Rule 1.1 of the Massachusetts Rules of Professional Conduct specifically requires that a lawyer provide “competent representation,” and defines this term to include “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” Note, too, that there are limitations on limiting your liability for malpractice. Mass. R. Prof. C. 1.8(h). Further, do not be ashamed or reluctant to take on cocounsel experienced in the matter, with your client’s consent. The loss in fee will be more than compensated by the amount of knowledge you will gain from such an association.
Several attorneys have received admonitions from the Board of Bar Overseers for mishandling probate estate cases. Often, the attorneys failed to seek the advice of experienced probate estate attorneys, with the result that estate tax returns were filed late, thereby triggering substantial payments for accrued interest and penalties. In one matter, an attorney was admonished because he failed adequately to research the impact of the death of two heirs on finalizing an estate. The estate remained open and the attorney continued to pay, year after year, the annual premium on the fiduciary bond, thereby depleting the estate assets.

§ 2.2  Confidentiality and Discretion

Rule 1.6(a) of the Massachusetts Rules of Professional Conduct prohibits an attorney from revealing confidential information relating to the representation of a client—a prohibition that continues even after the client’s death. Rule 1.9(c) of the Massachusetts Rules of Professional Conduct provides that a lawyer may not disclose confidential information relating to the representation of a former client to the disadvantage of that client or for the advantage of the lawyer or another person without the former client’s consent. Commonwealth v. Perkins, 450 Mass. 834, 851 (2008) (“It is axiomatic that among the highest duties an attorney owes a client is the duty to maintain the confidentiality of client information.”); see also In re John Doe Grand Jury Investigation, 408 Mass. 480 (1990) (holding that attorney-client privilege survives death).

In PR 94–2, the Board of Bar Overseers found that an itemized bill for legal services, when given by an attorney who had withdrawn from representing a wife in a postdivorce proceeding to the wife’s former husband’s attorney for collection purposes, constituted a “secret” as defined in DR 4-101(A) (now included in “confidential information” as used in Mass. R. Prof. C. 1.6). The former husband’s attorney filed a civil action against the wife and obtained an ex parte trustee attachment of her bank account. Both attorneys received private reprimands for engaging in conduct violating DR 4-101(B)(1) and (2) and DR 1-102(A)(6), which prohibits engaging in conduct that adversely reflects on one’s fitness to practice law. See also In re Discipline of Two Attorneys, 421 Mass. 619 (1996), in which two lawyers, partners in a law firm, both received informal admonitions because they simultaneously represented both the buyer of real estate and a judgment creditor of the seller and used client secrets obtained in representing the buyer to attach proceeds of the sale for the benefit of their creditor client.

Note that your obligations run even to any appearances that you have not lived up to your professional obligations. Beware of telling war stories at cocktail parties, even with names changed, as you may appear to be or inadvertently be revealing confidences. In addition, inadvertent disclosure of privileged information may destroy the privilege, particularly if you do not have in place procedures for

§ 2.3 Electronic Communications and the Attorney-Client Relationship

The protections afforded by the attorney-client relationship extend to confidential electronic communications, more specifically e-mails. However, an attorney should be cautious not to have his or her confidences or legal strategies discovered through improper handling of e-mails or through unintentionally waiving the privilege when producing electronic records. See Nat’l Econ. Research Assocs., Inc. v. Evans, No. 04-2618-BLS2, Memorandum and Order on Plaintiffs’ Motion to Compel, at 5–6 (Mass. Super. Ct. August 2, 2006) (finding that e-mails sent on company network could be read by administrator therefore client had no reasonable basis to believe he was communicating in confidence with his attorney). But see Transocean Capital, Inc. v. Fortin, 21 Mass. L. Rptr. 597 (Super. Ct. 2006) (upholding the attorney-client privilege where evidence failed to show that employee should have recognized that his personal communications by e-mail could be viewed by others). For a more detailed discussion of electronic discovery, see the Sedona Principles reflecting the 2006 amendments to the Federal Rules of Civil Procedure. See The Sedona Conference Glossary: E-Discovery & Digital Information Management, available at http://www.thesedonaconference.org.

The Massachusetts Superior Court Rules require attorneys to be particularly mindful when serving papers related to summary judgment. Rule 9A(b)(5) was amended in March 2009 to add the following language:

the statement of material facts shall be contemporaneously sent in electronic form by email to all parties against whom summary judgment is sought in order to facilitate the requirements of the following paragraph. The statement of material facts in electronic form shall be sent as an attachment to an email and shall be in Rich Text Format (RTF) unless the parties agree to use another word processing format.
Rule 9A (b)(5). These new service procedures compel attorneys to be more mindful in communicating with other attorneys by e-mail so as to not inadvertently divulge client confidences or legal strategies.

§ 2.4 Zealous Advocacy with Realistic and Responsible Representation

We all seek to be zealous in our advocacy and thereby live up to our professional and personal goals as attorneys. However, beware of going so far with your advocacy as to emerge with a reputation as an untrustworthy or generally unethical adversary.

Rule 3.1 of the Massachusetts Rules of Professional Conduct provides that a lawyer “shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous.” See also G.L. c. 221, § 38.

Further, an attorney has affirmative duties if the lawyer learns that he or she has offered, or the client or the client’s witnesses have given, material evidence to a tribunal that is false. The lawyer must take reasonable steps to correct the falsehood, including disclosing confidential information, if this is required to remediate the situation. Mass. R. Prof. C. 3.3(b). This duty exists until the conclusion of the proceedings, including appeals. There is a particular exception in the case of the testimony of a criminal client in a trial. Under these circumstances, if the client insists on testifying falsely, the lawyer may present the testimony in narrative form, but the truth of the testimony may not be referred to or relied on in argument to the court or to the jury. Mass. R. Prof. C. 3.3(e).

A lawyer is also required to disclose information, including confidential information, to a third person “when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.” Mass. R. Prof. C. 4.1(b). Rule 1.6 permits a lawyer to reveal confidential information, for among other reasons, “to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interest or property of another, or to prevent the wrongful execution or incarceration of another.”

In being zealous, do not forget to apply common sense. Lawyers should rely on the ethical training they received in law school, and on more senior lawyers. Such mentoring usually provides new lawyers with excellent examples of advocacy within the parameters of the Massachusetts Rules of Professional Conduct. Rule 5.2(b) of the Massachusetts Rules of Professional Conduct provides that a subordinate lawyer does not violate the Rules of Professional Conduct if the lawyer acts in reliance on a supervisory lawyer’s “reasonable resolution of an
arguable question of professional duty.” The key elements here are “reasonable resolution” and “arguable.” If the resolution is not reasonable and the question is not arguable, the subordinate lawyer may not defend against a disciplinary charge by claiming to have acted on the directions of a supervisor. Mass. R. Prof. C. 5.2(a). Subordinate lawyers may be disciplined based on conduct approved by supervisory lawyers in their firms.

§ 2.5 Representing Clients, Not Causes

When you represent a client, it does not automatically or necessarily follow that you embrace or even agree with the client’s political, economic, social, or moral views. Mass. R. Prof. C. 1.2(b). Remember that, ethically, people have a right to representation and a right to their views. As an attorney, you have a generalized obligation to assist in the representation, but if the terms of the representation as to fees or independence are unacceptable, then you, as an attorney, have collateral rights to decline the representation or withdraw (but see § 1.18, above, regarding discriminatory refusal of representation). Your only obligation is to take reasonable steps to ensure that the client is not prejudiced.

§ 2.6 Fair and Accurate Billing

You have an ethical obligation to establish a system for accurately and efficiently keeping track of the time that you expend on behalf of your client. Management systems for assisting attorneys in this task vary from the elementary to the highly sophisticated. For example, at one end of the spectrum are old-fashioned time cards or time sheets that are kept with each file. As calls come in or work is performed, notations are put directly into the file. Periodically, the time involved is totaled up and the client is billed. The time frame for billing may be fixed on a monthly or quarterly basis, or alternatively may rise and fall with the developments in the case, not the least of which is the availability or unavailability of liquid resources. Alternatively, some systems provide for a time clock on the attorney’s desk that is punched at the beginning of any discussion, including phone conversations, and is then repunched at the end of the discussion, with the clock recording the exact amount of time expended in dealing with the client. These individual contact records are then transmitted to the master ledger so that every minute and every ounce of effort is carefully recorded, and then summarized in a monthly billing statement that can be generated with the punch of a few buttons on a properly programmed computer.

There is no ethical requirement that demands the use of one system versus the other, but there is a generalized requirement that you be able to account for specific time and the tasks performed for the client if you intend to bill the client (or
if you hope to recover a reasonable fee and expenses in situations in which a statute or rule allows such an award by the court to a prevailing party or against a frivolous opponent). One thing that is certain is that notations scribbled on loose pieces of paper or backs of envelopes or phone messages noting time expended in a case will either be lost or the details as to the service performed will be thin. Given that all of those scraps of paper, if properly noted into a file, could result in hundreds, if not thousands, of dollars in fees, then it certainly behooves all attorneys to have management systems in place that can accurately and efficiently record the real time expended on a client’s behalf.

Even in a contingent fee case, the best practice is to keep careful records in the event that the client departs. The fair fee that you ultimately receive when successor counsel settles the case will be determined not on a contingency basis, but on a quantum meruit basis. In these cases, time records are very important to be certain that you do not lose out on a case where you have invested significant time, but have not been able to win your fee because the case is out of your hands and is being closed out by others. See Salem Realty Co. v. Matera, 384 Mass. 803 (1981), and the earlier decision at 10 Mass. App. Ct. 571 (1980).

When the lawyer is in possession of property in which both the lawyer and another person claim an interest (for example, a settlement check subject to the lawyer’s contingent fee), the lawyer must keep the property separate until there is an accounting and severance of the interests. Mass. R. Prof. C. 1.15(c). If a dispute over the division of the property arises, the property must be held intact and in a separate account until the dispute is resolved.

§ 2.7 Client Funds

All client and third-party funds must be held either in an IOLTA account or an interest-bearing segregated trust account. Mass. R. Prof. C. 1.15. This rule was substantially revised effective July 1, 2004. The lawyer must maintain complete records of the maintenance of such funds and any other property held for another and retain those records for a period of six years after final distribution. Mass. R. Prof. C. 1.15(f). An IOLTA account must be used when the funds are nominal in amount or will be held for a short period of time. Mass. R. Prof. C. 1.15(e)(5)(ii). For all other trust funds, the lawyer must create an individual account with the interest payable as directed by the client or third person on whose behalf the trust property is held. Mass. R. Prof. C. 1.15(e)(5)(ii).

A lawyer may not commingle personal funds with client or third-party funds. Retainers for anticipated work and settlement funds must be deposited to trust accounts. Withdrawals from a trust account for payment of a fee now require the following procedural steps:
On or before the date on which a withdrawal from a trust account is made for the purpose of paying fees due to a lawyer, the lawyer shall deliver to the client in writing (i) an itemized bill or other accounting showing the services rendered, (ii) written notice of amount and date of the withdrawal, and (iii) a statement of the balance of the client’s funds in the trust account after the withdrawal.

Mass. R. Prof. C. 1.15(d)(2). Failure to do so constitutes commingling.

Rule 1.15(h) of the Massachusetts Rules of Professional Conduct requires lawyers who hold funds in trust to deposit them only at financial institutions that have agreed to notify the Board of Bar Overseers whenever a properly payable instrument is presented against a trust account that contains insufficient funds and the institution dishonors the instrument for that reason. A “bounced” check drawn on a trust fund account may be an early warning sign of trouble in a lawyer’s accounting practices. Rule 1.15(g) pertains to accounts in which an attorney has any client or escrow funds on deposit.

For more information on trust property and trust accounts, see the Office of Bar Counsel’s Web site at http://www.mass.gov/obcbbo. See also In re Osamwonyi Ehi Osagiede, 453 Mass. 1001 (2009) (imposing sanctions).

§ 3 SPECIAL CAVEATS

§ 3.1 Lawyer and Client in Business Relationships: Counsel Beware

Clearly, lawyers are businesspersons as well as professionals. They too must keep a proverbial eye on the bottom line, and they too are entitled to earn a profit in their operations. But what about lawyers as lenders, joint venturers, assignees, or purchasers when these ostensibly objective business transactions are with a client? These seemingly ordinary, legitimate business transactions may be fraught with ethical pitfalls and problems.

First, the attorney to whom the client entrusted his or her legal affairs is now a business associate with his or her own needs and objectives, which may, particularly in the face of misunderstandings or nonperformance, be in conflict with those of the client.
Second, the client customarily left the “details” and the paperwork to this same attorney, so arguably there is an unfair advantage to the attorney-business partner.

Third, the attorney, as the client’s trusted advisor, might have financial and other information that, when used by the attorney as business partner, might again create an unfair and unethical advantage.

The law looks with great disfavor upon an attorney who has business dealings with his client which result in gains to the attorney at the expense of the client. “The attorney is not permitted by the law to take any advantage of his client. The principles holding the attorney to a conspicuous degree of faithfulness and forbidding him to take personal advantage of his client are thoroughly established.” When an attorney bargains with his client in a business transaction which is advantageous to himself, and if that transaction is later called into question, the court will subject it to close scrutiny. In such a case, the attorney has the burden of showing that the transaction “was in all respects fairly and equitably conducted; that he fully and faithfully discharged all his duties to his client, not only by refraining from any misrepresentation or concealment of any material fact, but by active diligence to see that his client was fully informed of the nature and effect of the transaction proposed and of his own rights and interests in the subject matter involved, and by seeing to it that his client either has independent advice in the matter or else receives from the attorney such advice as the latter would have been expected to give had the transaction been one between his client and a stranger.”


Rule 1.8(a) of the Massachusetts Rules of Professional Conduct provides as follows:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to
the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

§ 3.2 Attorney-Client Social and Sexual Relations: Counsel Beware

In all of your dealings with clients, be ever mindful of the professional and ethical perspectives on every exchange or dealing. Many practitioners would caution you to avoid social and sexual relationships with your clients.

On many grounds, this is a sensitive subject. Lawyers, like everyone else, are entitled to sexual freedom in adult consensual relations. However, when the partner is also a client, the risks are significant.

First, violations of the criminal code can lead to criminal convictions. Criminal convictions against lawyers in Massachusetts almost always lead to some form of disciplinary action, usually at least a suspension from the practice of law, with its collateral requirements of suspension notice to clients and a requirement to seek reinstatement before resuming practice. To say the least, this is a practice chiller and it can take years to recover.

Second, lawyers may be subject to civil suits alleging sexual harassment or assault and battery or intentional infliction of emotional distress, which not only can be destructive to your reputation and goodwill when reported by the media, but also can prove costly and difficult to defend against, particularly when brought into the very courts where you practice regularly.

Third, fee balances in cases where business and pleasure have mixed can be very difficult and awkward to collect. A simple District Court suit for a fee can turn into a major embarrassment whether the defenses and counterclaims are true or untrue.

Fourth, inadvertently, you may undercut the attorney-client privilege, as some of your privileged conversations may have occurred under circumstances more social and sexual than legal.

Finally, and most important, as with business dealings with clients, you are inevitably inviting conflicts of interest. Your obligation is one of utmost allegiance
and loyalty to your client, without conflict or impairment of your judgment because of your own personal stake in the case. Surely, if you become involved with a client socially, then sexually, you run the risk of a conflict. Further, you are a fiduciary and, as such, there is a relationship of reliance and trust between you and the client. Therefore, notwithstanding sophisticated arguments about consenting adults, the courts have set a higher standard when evaluating attorney conduct and assessing both civil liability and fitness to practice law. See Barbara A. v. John G., 193 Cal. Rptr. 422, 432 (Cal. Ct. App. 1983) (dictum).

California, Minnesota, New York, and Oregon have adopted rules regulating sexual relations between attorneys and clients. California prohibits any coercion or undue influence to obtain sex. Minnesota and Oregon prohibit all sexual relations with a current client unless a consensual sexual relationship predated the attorney-client relationship. New York’s rule applies only to domestic relations representations. Similar rules are now pending before the courts of Florida and Washington. Partners and associates of a lawyer who is involved in a sexual relationship with a client may face discipline for failure to supervise or failure to report the misconduct to the bar disciplinary authority. See Vallinoto v. DiSandro, No. 93-379A (R.I. Super. Ct. July 19, 1993). See also the Office of Bar Counsel/BBO Web site at http://www.mass.gov/obcbbo, and search recent Bar Counsel articles.
Dear Mr. X:

Thank you for contacting our office to review the problems you have been experiencing with sewer backup into your basement at times of high-volume rain.

As we discussed, our office welcomes the opportunity to work with you to make preliminary contact with the town, the sewer contractor and your builder. Information provided by them will help to determine responsibility for the damage to your personal property stored in the basement of your home.

After further consultation with you and further review of estimated expenses and fees, we stand ready to litigate this issue if this proves necessary.

In order to begin our representation, kindly forward the $2,500 retainer we discussed. This amount will be drawn down against as our office works on your case. At the present time, the rate for Attorney Y’s legal services is $175 per hour. His associate, Attorney Z, is billed at $130 per hour. Work done by paralegals is billed at $60 per hour. Out-of-pocket expenses for appraisals, expert evaluation, exhibits, service of process, depositions, and the like will be billed separately for immediate payment or reimbursement by you directly.

If you have any questions, please contact me directly.

Thank you.

Sincerely yours,
EXHIBIT B—Sample Fee Agreement

INFORMATION ABOUT FEES

Once we have spoken with you and reviewed the background of your current legal problems and concerns, you as the client will want to know the probable costs of any legal services I would be providing for you. Although I cannot say with absolute certainty what the legal fees will be or what results will be achieved in your case, we can set forth a clear statement as to our agreement concerning fees:

1. You as the CLIENT and I as the ATTORNEY acknowledge $_____ as a retainer for legal services in conjunction with _____.

This retainer is a payment on account in connection with legal services, costs and expenses with reference to the above-described matter.

2. The hourly rate for legal services performed by me is $_____ per hour. This hourly time charge for legal services will include, but is not limited to, receipt and review of file materials, negotiation and conferences, telephone calls, office memoranda, correspondence, legal research, drafting of pleadings or instruments, discovery including depositions, preparation for hearings and trial, court appearances, extraordinary travel and all other appropriate and reasonable activity which is directed toward achieving a favorable result for you.

3. Detailed time records will be kept and used as the basis for periodic billings to the client. In the event the time charges exceed the initial retainer payment on account, the client agrees to bring the account current and, if so requested by the attorney, place an additional retainer on account.

4. In determining fees, it is acknowledged that the final bill to be rendered by the attorney may reflect the following in accordance with Supreme Judicial Court Rule Mass.R.Prof.C. 1.5(a)(1)-(8): (a) the time and labor required, the novelty and difficulty of questions involved and the skill requisite to perform the legal services properly; (b) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney; (c) the amount involved and the results obtained; (d) the time limitations imposed by the client or by the circumstances; (e) the nature and length of the professional relationship with the client; (f) the experience, reputation and ability of the attorney or attorneys performing the services.

5. Out-of-pocket expenses in connection with this matter (e.g., filing fees, witness fees, sheriff’s and constable’s fees, expert fees, travel, expenses of depositions,
investigative surveillance expenses, copying, long-distance telephone charges, extraordinary postage and delivery services and other incidental expenses) are the responsibility of the client and the client hereby generally authorizes their payment, provided specific approval is obtained before incurring any specific disbursement in excess of $100.

6. The client and attorney acknowledge that the client shall at all times have the right to be kept apprised by the attorney as to the status of the case and the fees billed and costs incurred to date. The attorney agrees to forward the client copies of all pertinent correspondence, pleadings and other materials whenever practicable.

7. Upon the completion of the within matter or on the termination of representation of the client, the attorney shall prepare a final accounting for the total charges for legal fees and costs. Any balance due from the client or refund due from the attorney shall be paid forthwith.

8. Note that in some cases the court may award counsel fees to one party and order the other to pay the amount awarded. This is solely in the discretion of the court, it cannot be relied on by the client with certainty and decisions concerning fees are oftentimes made late in the deliberations and proceedings. Alternatively, settlement or separation agreements sometimes provide for contribution by one party to the other’s legal expenses. Again, it is difficult to predict whether this will materialize. Accordingly, no representation is made that any contribution by the other party will be obtained toward the client’s legal expenses. Therefore, the client remains primarily responsible for all fees and costs. In the event, however, that any such contribution is obtained for the benefit of the client, the amount in question, once received, will be credited against the client’s final bill or remitted to the client directly if that bill has already been paid in full.

9. This agreement provides for services through a final agreement or trial and judgment on the merits of the case. It does not provide for an appeal, if any, from the trial court or for any subsequent proceedings for enforcement of the agreement or judgment or advice or consultation or proceedings subsequent to entry of the agreement or judgment.

10. Finally, it is hereby acknowledged by the client and the attorney that the client retains the right to terminate this agreement at any time at which point a final bill for services to date will be rendered by the attorney to the client. Further, the attorney shall retain the right to terminate this agreement to provide services to the client provided the attorney seeks the permission of the court in appropriate cases and provided the client is not unfairly prejudiced by this withdrawal.
Each of us has carefully read the above information about fees. We agree that it fairly represents the basis of our agreement. We each understand its terms and each sign it as our free act and deed and acknowledge receipt of a signed copy.

CLIENT

ATTORNEY NAME

ADDRESS

ADDRESS

CITY/STATE

PHONE

TELEPHONE

DATE:

EXCEPTIONS:

________________________________________

________________________________________

________________________________________

________________________________________
PRACTICING WITH PROFESSIONALISM

5–30
SECTION 6

Starting a Successful Solo or Small Firm Law Practice

§ 6.1 Start Up Kit: Essentials for Success ................................. 6-1

Massachusetts Law Office Management Assistance Program
SECTION 6.1

Start Up Kit: Essentials for Success*

Massachusetts Law Office Management Assistance Program

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INTRODUCTION

You have made the decision to start your law office. This is a very exciting decision which, done properly and with care, will establish the basis for long term success. Planning for success includes a thoughtful analysis of what services you are qualified to provide, where you will provide those services, how will you market your services, how will you deliver your services, how will you charge and bill for your services, how will you finance your dream until your work translates to income. In planning for success you also need to plan to implement the best practices for operations and management. While a business plan must be flexible to take advantages of new opportunities, a thoughtful plan allows you to focus your energies on the plan for business success.

If done properly at the start of a law practice, thoughtful procedures and policies will stand the test of time and allow you to concentrate on the practice of law when you get busy. LOMAP will help you set the foundation by providing you
START UP KIT: ESSENTIALS FOR SUCCESS

this start-up kit, consulting services upon request, access to reference materials and referrals to experts in mission critical areas of operation.

Our mission is to assist Massachusetts attorneys in establishing and institutionalizing professional office practices and procedures to increase their ability to deliver high quality legal services, strengthen client relationships, and enhance their quality of life. Please feel free to contact LOMAP at 857-383-3250, or visit our web-site at www.masslomap.org, and follow our blog at http://www.masslomap.blogspot.com.

I. CHECKLIST FOR STARTING A LAW PRACTICE

This checklist strives to make you think about and discuss with others some basic, but critical issues related to beginning a law firm. The most basic step is to KNOW THYSELF (i.e. do a critical self-assessment) and KNOW YOUR CRITICAL SUPPORT (i.e., your spouse, parents, partner, friends, children, etc.). The process of creating an honest business plan shared with those who will support you and subject to a critical review will lend itself to a greater chance of success. This checklist has been compiled from a number of checklists provided by Practice Management Advisors from around the country including J.R. Phelps, Director of the Florida Bar Associations' LOMAS program, Pete Roberts, Practice Management Advisor of the Washington State Bar, and Jim Calloway, Director of the Oklahoma Bar Association's Management Assistance Program.

I) SELF-ASSESSMENT

- Tolerance for risk for you and partner/spouse
- Managerial skills
- Marketing skills
- Confidence level in legal skills
- Willingness to learn/improve skills
- Financial wherewithal (i.e., how do you pay start up costs?) Ability to work solo
- Ability to work/communicate with partner(s)

II) WRITE A BUSINESS PLAN

- Law firm description
  - Who are you and what are you selling?
Who are you competing with for clients and how will you do so successfully?

Skills
Experience
Ownership interest

Marketing plan
Area of expertise
Ideal client or target market
Why they need you and not any other attorney
How will they learn that you provide unique services?

Operational plan
Location of enterprise
Type of facility
Equipment
Employees/virtual employees

Capital investment—financing the office (start-up costs plus one year operation expenses and personal living expenses)
Credit sources
(1) Bank/credit union
(2) Personal/business loan (with personal guarantee)
(3) Home equity
(4) Line of credit
(5) Lease/equipment loans
(6) Family loans
Personal savings

Financial projections
Overhead and expenses
Gross receipts
Net receipts
Cash flow projections
Fee structure
(1) Hourly
   (a) Projection of hours worked
   (b) Projection of average hourly rate
(2) Flat fee
(3) Other
Estimated taxes—don’t get caught short

III) CHOICE OF ENTITY

Considerations if selecting entity
Taxation
Liability
Succession/dissolution
Massachusetts Rules of Professional Responsibility
Solo practice
Professional association
General partnership
Partnership agreement (see below)
Limited liability partnership
Limited liability company (?)
Articles of incorporation
Members
Professional corporation
Articles of incorporation
Partnership agreement
Capitalization
Withdrawal/retirement
Compensation and profit distribution
Role of partners
Buying a practice/into a practice

IV) OFFICE SPACE

Building
Image
Square feet needed
ADA considerations
Parking/public transportation
Access to courts
Services provided
Expansion opportunities
Renovation/cost
SECTION 6.1 PRACTICING WITH PROFESSIONALISM

- Location
- Office sharing
- Renting/leasing
- Purchasing building
- Home office

V) ACCOUNTING NEEDS
- Consult with CPA and bookkeeper
- Establish accounting procedures
  1. Chart of accounts
  2. Profit and loss statements
  3. Balance sheets
  4. Cash flow statement
  5. Work in progress (WIP) reports
- Estimated tax payments
- Tax returns
- Payroll services
- Bank
  1. Approved IOLTA accounts
  2. Business operating account
  3. Payroll account?
  4. Savings account
  5. Safe deposit box
  6. Firm credit card
  7. Checks, deposit slips, debit card
  8. Credit card account (to accept cards)

VI) TECHNOLOGY
- Software
  1. Word processing
  2. Case management
  3. Time and billing/accounting
  4. Calendaring and docketing
  5. Conflicts checking
- Document assembly
START UP KIT: ESSENTIALS FOR SUCCESS

SECTION 6.1

- Office Suite software
- Word processing
- E-mail
- Spreadsheet
- Presentation software (such as PowerPoint)
- Others
- Virus/spam (Trend/AVG)
- Voice recognition
- Other specialized or practice specific software

VII) HARDWARE

- Computers
- Operating system
- Back-up system
- Lease or purchase
- Printers
- Network/firewall
- Scanners
- CD-ROM
- Laptop computer
- Personal digital assistant (PDA) with or without e-mail

VIII) OFFICE EQUIPMENT/SERVICES/SUPPLIES

- Fax Machine—DO YOU STILL NEED?
- Photocopier
- Scanner
- Shredder
- Dictation equipment/voice recognition software
- Internet service provider
- E-mail address
q High speed Internet access or DSL line
q Telephone system
  q Equipment/answering machine
  q Voice mail/manual message system
  q Answering service
  q Local and long distance carrier/Skype/others
  q Conference calling—free services
  q Music on hold
q Cell phone/service
  q Pager
q Postage scale/mail equipment
q Establish UPS and FedEx accounts
q Office furniture for lawyer(s), staff, reception area, file cabinets, conference, room furniture, carpeting and area rugs, book shelves, artwork/office decorating needs
q Office supplies, paper, envelopes, pens, staplers, file folders, etc.
q Business cards, announcements (MUST DO)

IX) LIBRARY/LEGAL RESEARCH
q Social Law Library
q Online legal research provider
q Purchase new or used law books
q Local law library
q Law school library
q Court libraries
q Internet research
q CD-ROM

X) OFFICE SYSTEMS/PROCEDURES
q Develop office manual/operating procedures manual
  q Standard procedures/policies for practice
  q Personnel issues/benefits
q Docketing, calendaring, tickler system

6–8
- Computer (dual system is highly recommended)
- Manual
- File organization
- Alpha/numeric
- Centralized/decentralized
- Opening file procedures
- Closing file procedures/retention/storage/destruction
- Document maintenance
  - Offsite—safety deposit box
  - Computer backup
  - Fireproof files
- Forms used in practice
  - Client interview form
  - Engagement/non-engagement letters
  - Written fee agreements
  - Practice specific checklists
  - Billing statement form
  - General client correspondence, notices, etc.
  - Client survey form after conclusion of representation
  - Client billing procedures
  - Regular monthly statements even if no amount due
  - Detailed billing statement
  - Expense billing
  - Costs to be billed
    - (1) legal assistant time/paralegal time
    - (2) telephone expenses
    - (3) duplicating expenses
    - (4) computerized legal research
    - (5) mailing costs
    - (6) others
- Collection policy
- Credit cards for payment
- Client relations policy
  - Setting appointments, introducing staff
SECTION 6.1 PRACTICING WITH PROFESSIONALISM

- Returning phone calls, e-mail messages
- Client intake form/survey at conclusion of representation
- Keeping clients informed
- Send copies of work, documents
- Communicating fees
- Clear discussion about fees
- Written fee agreements/engagement letters
- Accounting procedures
  - Bank account reconciliation
  - Cash flow statement
  - Accounts receivables/payables
- Aging review
- Expense approval system
- Counter signature requirement on checks
- Others

XI) INSURANCE PROTECTION

- Professional liability
- Workers’ compensation
- Health plan
- Car insurance for business use
- Property (liability, wind, fire, earthquake, etc.)
- Loss of valuable documents
- Life
- Disability
- Business interruption

XII) PERSONNEL

- Legal assistant/paralegal
  - Full-time
  - Part-time
  - Temporary
  - Hours, flex-time
Sharing personnel with other professionals

Training

Employee benefits

Vacation, holidays

Sick leave

Overtime policy

Medical insurance

Retirement plan

Others

Secure I-9 forms, W-4 forms, confidentiality agreement, employment applications, etc.

XI) MISCELLANEOUS

Call Law Practice Management Assistance Program, 888-545-6627, or e-mail at Rodney@masslomap.org for assistance

Lending library

Locate or become notary

Develop disaster plan for illness, incapacity, death, or natural disaster

Keep BBO informed of business and personal contact information

Call ethics hotlines with ethics questions

FIND A MENTOR

KEEP A FORM FILE

II. WRITING A BUSINESS PLAN—STRATEGIC PLANNING IS A MUST

The legal profession is becoming an increasingly competitive business in Massachusetts with a growing number of attorneys and population that has either a low growth or is in actual decline. In many ways the practice of law in many practice areas being commoditized resulting in increasing low fees. A financially successful law practice requires more than merely hanging out a shingle, but now requires careful strategic planning to position oneself to gain market share without discounting the value of your services. Creating a business plan allows you to evaluate all facets of your proposed business and thereby create a viable blueprint for success. To determine if you are truly prepared for running a law
practice as a business, and your livelihood, draft your business plan looking reality squarely in the eyes. A business plan should include the following:

**A. Law Firm Description**
1. Who are you and what are you selling?
2. Who are you competing with for clients and how will you do so successfully?

**B. Principals**
1. Skills of each attorney
2. Experience
3. Ownership interest

**C. Marketing Plan**
1. Area of expertise
2. Ideal client or target market
3. Why they need you and not any other attorney
4. How will they learn that you provide unique services

**D. Operational Plan**
1. Location of enterprise
2. Type of facility
3. Equipment

**E. Employees/virtual employees**

**F. Financial Projections**
1. Overhead and expenses
2. Gross receipts
3. Net receipts
4. Cash flow projections
5. Fee structure

6. Start-up or emergency funds

G. References


- Massachusetts Bar Association, How to Start and Run a Successful Solo or Small-Firm Practice, October 2006, ch. 6, p. 68-85, Budget, Billing and Time Keeping, Frederick R. Levy.

- Web Sites
  - United States Small Business Administration, Small Business Planner, http://www.sba.gov/smallbusinessplanner/plan/writeabusinessplan
  - Commonwealth of Massachusetts, Getting Started in Business, http://www.mass.gov/?pageID=mg2topic&L=3&sid=massgov2&L0=Home&L1=Business&L2=Getting+Started
  - City of Boston, Starting a Business: http://www.cityofboston.gov/business/str_bus.asp

III. BUDGET AND FINANCIAL PLANNING FOR THE FIRST YEAR

By Connie Rudnick, Esq., Professor at Law, Massachusetts School of Law and Rob Armano.

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¹ This outline should not be confused with a business plan, something which all lawyers opening their own practices should have. A business plan includes specific marketing strategies and practice concentrations which are beyond the scope of this piece. The Small Business Administration has seminars on this topic, and assistance is available from the U.S. Small Business Association Small Business Development Center; 409 Third St. SW, Washington, DC 20416; 800-205-6400; or its Web site www.sbaonline.sba.gov.
A. Overhead and expenses

The first step is to identify all fixed costs and expenses. They include:

- Lease/mortgage payments
- Telephone, facsimile, internet, computer, copier, printer, scanner (buy or lease)
- Advertising and marketing
- Insurance (professional liability, workers’ compensation, renters insurance, health, disability and/or business interruption insurance, etc.)
- Utilities
- Payroll and payroll related costs (payroll taxes, unemployment insurance, and self-employment taxes)
- Bank charges (for IOLTA, other client funds and business accounts)
- Software (word-processing, case management, time and billing, accounting, docketing, and tickler system)

These expenses can be tracked by employing the use of financial software like QuickBooks, or by developing a spreadsheet within Microsoft Excel. If software costs are a concern, Staples carries general ledgers. If you’re really conservative, a legal pad will do. Make sure whatever form you use, you include and highlight due dates for installment payments. Check your local Bar Associations for other resources.\(^2\) It’s a good idea to review all overhead and expenses with your CPA with an eye toward end of the year tax planning.

Discretionary costs:

- Secretary and/or receptionist (sharing or part time should be considered)
- Law clerk or associates (many law schools have internship programs where students work in offices for credit, not pay)

\(^2\) The MBA, the ABA and some local Bar Associations have sections devoted to small or solo practices or law office management.
• Library, secondary source materials or computer research tools such as Westlaw or Lexis/Nexis. Discount rates are available to small or solo practices

• Furniture (try a used furniture store)

B. Gross Receipts

Gross receipts are your total income generated by your practice. Unless you already have a ready-made clientele, a client base can be built by advertising, word of mouth (friends & family), associations with other or community organizations, (Rotary, Chamber of Commerce, coaching little league, etc.), bar advocacy groups, CPCS, or by simply networking with other attorneys for case referrals in areas they do not generally practice in.

Tracking gross receipts can be accomplished by utilizing any of the methods referred to in paragraph (A) above. It’s a good idea to set aside a fixed percentage of your gross receipts, say 20% to 25%, into a “tax reserve savings account.” Quarterly taxes can be paid out of this account, rather than your general operating account, and you can avoid the shock/panic of paying taxes when due. Payroll withholdings can be treated in the same fashion.

C. Net Receipts

“It's not what you make, it's what you keep.” It is vitally important to contain expenses in an effort to maximize net gain. Again, a CPA is vital in helping you keep more of what you earn. Many attorneys like to take a “draw” each week, since it makes no sense to operate a business if you can’t pay yourself. However, many law practices are cyclical, that is, you may have long stretches with short cash flows. It is more important to keep the business afloat than to take a draw. Some say that you cannot expect to take anything out of the practice for a year after opening it, and you should have a significant amount of one year’s overall expenses in savings before starting out on your own. A draw should be deposited into your personal or business checking account.

D. Cash Flow Projections

This is probably the most difficult part of starting a new law practice. Accurate projections are managed by constantly reviewing your case load with an eye toward which cases are proving to be fruitful, and which are not. If, for example, you have been retained to represent a plaintiff with substantial personal injury,
you cannot expect that her matter will bear fruit within the initial 6 months to a year of opening the file, or even longer perhaps.

In fact, prosecuting the matter may well involve advancing costs that can prove to be a drain on your resources. This should be factored into the equation. Prior years, while helpful, are not always good indicators of what you can be expected to earn this year. Many attorneys plan for the ebbs and flow of cash flow by obtaining a line of credit. Cash flow as well as expenses should be reviewed monthly to update, and bring projections into line with reality.

E. Fee Structure

Fees are generally earned on an hourly or on a contingent basis. The types of cases that you handle and the disciplinary rules will generally dictate whether your fees are earned hourly or are contingent upon a result. Criminal and/or domestic relations matters cannot be handled on a contingency fee basis. Personal injury matters are generally handled on a contingency fee basis. In some instances, clients may be expected to advance costs associated with litigating a particular matter. In all cases, a fee agreement is vital. Consult with other lawyers in your geographic area with roughly the same experience in the same kind of law to determine a reasonable hourly rate.

F. Projection of Hours Worked

Typically, attorneys in private practice can expect to work an average of at least 2600 to 3000 hours a year! However, only a fraction, maybe 50%, will be billable and the rest will go to administrative and marketing efforts. If your practice is devoted to Hourly work, there is an obvious correlation between the hours worked and the fees generated.

G. Resources

There are an infinite number of resources for lawyers starting out a new practice. They include:

Periodicals:

• GPSolo, Law Practice and Law Practice Today, all published by the American Bar Association, are excellent resources.
Books:

- Solo by Choice, How to Be the Lawyer You Always Wanted to Be, C. Elefant, 2008

Seminars, etc.:

- MCLE and bar associations frequently have seminars on starting a law practice. Many practice oriented law schools also have courses on the subject that can be audited.
- Institute of Management and Administration Inc. offers resources and information on law office management

IV. CHOOSING A LEGAL STRUCTURE

How are you going to practice? As a solo, in an association of attorneys, as a professional corporation, or as a professional limited liability partnership? A number of issues impact this question, but enter into a professional relationship with the same care as if you were entering into a long-term romantic relationship. Such relationships are easy to start, but often difficult to end. To make this decision you must consider the following points.

- Trustworthy partner(s)
- Tax consequences
- Liability issues
• Transferability of interest
• Limitations imposed by statute

A. Sole Proprietor

A sole proprietorship has no separate existence from its individual owner. Hence, the limitations of liability enjoyed by limited liability entities do not apply to sole proprietors. The debts of the entity are the debts of the individual. A sole proprietorship's income is taxed as the personal income taxes of the individual and the income is taxed on the profits made, making accounting much simpler. A sole proprietorship need not worry about double taxation like a corporate entity. You may also use a trade name or “Doing Business As”. See Mass.R.Prof.Conduct, 7.5. This allows the proprietor to do business with a name other than his or her legal name and also allows the proprietor to open a business account with banking institutions. However, under G.L. c. 110, §5, any person doing business under a name other than his own must file a business certificate (http://www.sec.state.ma.us/cor/coridx.htm) with the town or city hall where he or she maintains an office.

B. Professional Associations

A professional association is comprised of a number sole proprietors who wish to share expenses, often including having a shared letterhead. See Mass.R.Prof.Conduct, 7.5, Comment 2, for limitations and necessary disclaimers. This form has additional limitations related to obtaining malpractice insurance. A better practice is to formalize the relationship through either a partnership agreement or other limited liability entity agreement.

C. Partnership

This is a business entity in which partners share with each other the profits or losses of the business undertaking in which all have invested. See G.L. c. 108A. A partnership agreement should be used to define critical issues about how profits and losses will be divided, firm management undertaken, and how the partnership will be dissolved. Partners are jointly and severally liable.

D. The Professional Corporation

A professional corporation is comprised of “[o]ne or more individuals, each of whom is licensed to perform a professional service.” G.L. c. 156A, § 7. Corpora-
tion formation is governed by G.L. c. 156A. The shareholder's individual liability is limited as set forth in G.L. c. 156A, § 6(a) and SJC Rule 3:06, Use of Limited Liability Entities (infra). Again, a shareholder agreement shall be used to define the shareholders' investment, duties, obligations, means of departure, and how capital investment and division of corporate assets will be handled.

E. The Limited Liability Company

The formation of this legal entity is governed by G.L. c. 156C and provides certain advantages of limited liability and flow through taxation. But liability is again also governed by SJC Rule 3:06. The governance, investment, duties, obligations, and shareholder rights upon exit are all governed by the shareholder agreement.

F. The Limited Liability Partnership

The formation of an LLP is governed by G.L. c. 109. It requires two or more partners with one being designated the general partner. Unless otherwise agreed the general partner has management control and unlimited liability for third-party obligations. The limited partners have limited control and limited liability. See G.L. c. 109, §§ 17, 19, SJC Rule 3:06. Best practices again would suggest a comprehensive partnership agreement to govern essential issues of the partnership.

G. Supreme Judicial Court Rule 3:06—Use of Limited Liability Entities

(1) As used in this rule, the term “entity” shall mean a professional corporation, a limited liability company, or a limited liability partnership organized to practice law pursuant to the laws of any state or other jurisdiction of the United States and which practices law in the Commonwealth. The provisions of such laws shall be applicable to attorneys practicing law in the Commonwealth subject to the terms and conditions of this rule. Such terms and conditions are necessary and appropriate for the purpose of making the provisions of those laws applicable to attorneys. As used in this rule, the term “owner” shall mean a shareholder of a professional corporation, a member of a limited liability company, or a partner of a limited liability partnership.

(2) In addition to other provisions required by law, the articles of organization or similar organizational document (“Charter”) of each entity shall contain provisions to assure compliance with the following requirements:
(a) All owners shall be persons who are duly licensed by this court to practice law in the Commonwealth, if they are actively engaged in the practice of law in the Commonwealth, or duly licensed by the licensing authority of the jurisdiction in which they are actively engaged in the practice of law. All owners shall be in good standing before this court or before the licensing authority of the jurisdiction in which they are actively engaged in the practice of law, and all owners of the entity shall own their shares or other ownership interests in their own right. All owners shall be individuals who, except for temporary absence due to illness or accident, time spent in the Armed Services of the United States, vacations, and leaves of absence not to exceed two years, are actively engaged in the practice of law as employees or owners of the entity. Notwithstanding the foregoing, an owner may be an entity rather than an individual, provided that the owners of such entity are individuals who satisfy all of the other conditions of this rule.

(b) Any owner who ceases to be eligible to be an owner and the executor, administrator, or other legal representative of a deceased owner shall be required to dispose of his or her shares or other ownership interests as soon as reasonably possible either to the entity or to an individual or entity duly qualified to be an owner of the entity.

(c) The name of the entity shall contain words or abbreviations that indicate that it is a limited liability entity and shall also conform to the requirements of Mass. R. Prof. C. 7.5

(d) All owners of the entity shall, by becoming owners, agree to the provisions of this rule, including without limitation paragraph (3) of this rule.

(e) All directors of a professional corporation and managers of a limited liability company, as the case may be, shall be owners.

(3) The following provisions are established with respect to the liability of the owners of an entity with respect to damages which arise out of the performance of legal services by the entity, such provisions to be in addition to any statutory or common law rules of general application which deal with the liability of entities and their owners:

(a) Each owner of the entity shall be personally liable for damages which arise out of the performance of legal services on behalf of the entity and which are caused by his or her own negligent or wrongful act, error, or omission. Owners of the entity whose acts, errors, or omissions did not cause the damages shall not be personally liable therefor, whether or not they have agreed with any owners or employees or other persons to contribute to the payment of the liability, except to the extent provided in subparagraphs (b), (c), and (d). {Italics added for emphasis}
(b) All the owners of an entity which is a professional corporation at the time of any negligent or wrongful act, error, or omission of any owner or employee of said entity which occurs in the performance of legal services by said entity and which results in damages to the person or persons for whom the services were being performed shall be jointly and severally liable for such damages, but only to the extent of the excess, if any, of (1) the sum of $50,000 plus the product of $15,000 multiplied by the number of owners and employees of said entity at the time of such act, error, or omission who are duly licensed by this court to practice law in the Commonwealth, or duly licensed to practice law by the licensing authority in the jurisdiction in which they practice, and who are owners of or employed by said entity as lawyers, but not in excess of $500,000 in the aggregate, over (2) the sum of the assets of said entity and the proceeds of any insurance policy issued to it which are applied to the payment of such damages.

(c) Each entity which is not a professional corporation shall maintain at all times either (a) professional liability insurance covering negligence, wrongful acts, errors, and omissions of said entity and its owners and employees in connection with their performance of legal services in an amount per claim and in an annual aggregate limit, exclusive of any deductible or retention, not less than the Designated Amount, or (b) a specifically designated and segregated fund for the satisfaction of judgments against said entity or its owners or employees based on their professional negligence, wrongful acts, errors, or omissions in connection with their performance of legal services in not less than the Designated Amount, United States Treasury obligations, or (ii) a bank letter of credit or an insurance company bond. As used herein the term “Designated Amount” shall mean $50,000 plus the product of $15,000 multiplied by the number of owners and employees of said entity who are licensed to practice law in the Commonwealth or another jurisdiction, but not in excess of $500,000 in the aggregate. If such an entity fails to maintain insurance or a fund in the Designated Amount in compliance with this rule, its owners at the time when a professional liability claim is asserted shall be jointly and severally liable to the claimant for an amount not to exceed the Designated Amount applicable at that time, less the sum of the assets of said entity and the proceeds of any professional liability insurance policy issued to it which are applied to the payment of said liability.

(d) If an entity is an owner (an “ownership entity”) or a partner in a general partnership, the provisions of subparagraphs (a), (b), and (c) shall apply to each of the individual owners of such ownership entity or such partners, and the formulas in subparagraphs (b) and (c) shall be based on all of the individual owners, partners, and employees of the entity or general partnership and of each ownership entity and partner thereof who is licensed to practice law.

(4) The entity shall at all times comply with all applicable standards of professional conduct which may be established by this court or by the licensing authority.
of any jurisdiction in which the entity practices law. Any violation of such standards shall be grounds for this court, after hearing and if it deems the circumstances appropriate, to terminate or suspend the right of the entity to practice law in the Commonwealth.

(5) Nothing in this rule shall be deemed to diminish or change the obligation of each attorney who is an owner of or who is employed by the entity or an ownership entity to conduct the practice of law in accordance with generally recognized standards of professional conduct and in accordance with any specific standards which may be promulgated by this court or the licensing authority of the jurisdiction in which the attorney practices. Any attorney who by act or omission causes the entity to act or fail to act in a way which violates any applicable standard of professional conduct, including any provision of this rule, shall be personally responsible for such act or omission and shall be subject to discipline therefore.

(6) Nothing in this rule shall be deemed to modify, abrogate, or reduce the attorney-client privilege or any comparable privilege or relationship whether statutory or deriving from the common law.

(7) Nothing in this rule shall prohibit the use of a voting trust to hold stock of a professional corporation. For all purposes under this rule, a person who holds a beneficial interest in such a voting trust shall be treated as a shareholder of the corporation, and, additionally, shall be deemed to own in his or her own right a percentage of shares in the corporation equal to his or her percentage of beneficial interest in the shares held by the voting trust.

(8) An entity which is a limited liability partnership or a limited liability company shall not be deemed to be an “association” pursuant to G.L. c. 221, § 46.

H. Agreements for your entity

Treat your decision to begin a practice with another attorney as seriously as any other relationship that you will enter into. Remember that your will be spending almost as many waking hours with this person as with your family. Also, you will be involved in potentially difficult financial decisions regarding the practice such as appropriate expenses, how expenses will be shared, how profits and losses will be shared, and how clients will be shared. While there are many issues to discuss, the critical four issues are: 1) capitalization; 2) withdrawal/retirement; 3) compensation and profit/loss distribution; and 4) role of partners. See the references below.
I. **Buying a Practice**


J. **References**

a) Massachusetts Bar Association, How to Start and Run a Successful Solo or Small-Firm Practice, October 2006, ch. 7, p. 68–85, Choosing the Right Form for Your Firm, Leo J. Cushing

b) Hillman on Lawyer Mobility, Robert W. Hillman


V. **CHOOSING OFFICE SPACE**

Most attorneys beginning their solo or small firm will begin practicing either at home or in a share office arrangement. Each of these office arrangements has some benefits and determents for the newly formed practice. When making the decision where to practice you must consider the cost, the convenience, the issue of image, do you want your clients in your home, professional contact with other attorneys, potential referral sources, convenience of your clients, access to courts, registry or administrative agency, office operational efficiency, expansion opportunities, etc. You should carefully consider these issues because in an ideal world you want to present an image as an established stable attorney that the client knows where to find and knows will be there in the future.

A. **Home Office**

An excellent discussion of establishing a home office can be found in Donald Lassman’s article “Technology for the Home Law Office,” Massachusetts Bar Institute, Section Review, Vol. 8, No. 3 (2006).
B. Shared Office—Ethics and Practicalities

There are significant advantages to going into a shared office with other attorneys, but there are also significant ethical issues of which you must be aware. The advantages for a young attorney include, usually, lower overhead, built-in infrastructure, access to potential mentors and referral sources.

An excellent outline, developed by Professor of Law, Connie Rudnick, is set forth below and discusses a number of the critical ethical pitfalls that attorneys must watch for when sharing an office.

**IMPORTANT PRACTICAL AND ETHICAL POINTS IN SPACE SHARING**

By Connie Rudnick, Esq., Professor of Law, Massachusetts School of Law.

Sharing space with other lawyers or non-lawyers, while an attractive set up for practical and financial reasons, gives rise to liability and disciplinary issues:

**Firm Name**

1. Rule 7.5(d) and Comment [2] prohibit using a firm name that implies a partnership when one does not exist, unless a disclaimer is also included, for example, Smith & Jones, “An association of independently practicing attorneys, not responsible for the liability of any other attorney in this office.” The goal is to insure that the public is not misled into thinking a partnership exists when it does not.

2. It is deceptive to call your “firm” Smith & Associates, when you are in fact a solo practitioner.

**Advertising**

1. Use of firm name above requires disclaimer wherever the firm name is used.

2. Sole practitioners should maintain separate signs on the door, separate business cards and stationary.

**Sharing Technological Services—Computers, Faxes, Phones**

1. Sharing fax line has been held in some jurisdictions to create an unintended and unwanted relationship between the attorneys. Thus, all telecommunications equipment should be separate whenever possible.

2. Maintain separate phone lines, voice mail should be accessible only by attorney and his/her support staff. Same with e-mail.
3. If one computer is used for multiple lawyers, work product should be stored only in password protected part of computer or on jump drive.

Sharing Assistants—Lawyer and Non-Lawyer

1. Lawyers must instruct subordinates—lawyers and non-lawyers—concerning their ethical obligations, which include the duty not to share confidential information of one client with anyone not directly associated with the attorney handling the case.

2. Employees should be careful to make sure snail mail is directed to the proper attorney, particularly if the practice is to remove it from an envelope first.

Malpractice Insurance and Other Financial Considerations

1. Whether a “group practice” (group of sole practitioners sharing space on one policy) can purchase one group policy was covered in Space Sharers, Beware! By Daniel Crane, former Bar Counsel, and John Marshall, First Assistant Bar Counsel, accessible on the Office of Bar Counsel website (www.mass.gov/obcbbo). The authors questioned whether joint coverage on one policy would eliminate the need for a disclaimer under Rule 7.5(d) and Comment [2]. Further, some policies may exclude coverage for liability resulting from acts of other attorneys who appear to be, but are not intended to be, partners. Check with your malpractice insurer for the latest coverages available.

2. Each attorney must maintain separate operating, IOLTA or other client accounts.

3. Expenses shared by the group should reflect actual costs incurred or to be incurred; over or under allocating costs could be construed as creating a relationship not intended to exist. Put terms in writing.

4. Group should not maintain one joint bank account for payment of expenses. Expenses should be paid separately by each member of the group. Do not volunteer to “front” another lawyer’s financial obligation unless strict record is kept of the transaction in writing.

Sharing Files, File Storage and Conference Rooms/Libraries

1. Each lawyer’s files should be kept in separate file drawers, which can be locked. Only the attorney and dedicated (working for one attorney only) subordinates should have the key. Do not keep keys in a place where other lawyers or employees can have ready access.
**Miscellaneous**

1. Don’t refer to your colleagues with whom you share space as “my partner.”

2. When paying a referral fee to another attorney in the group, include that attorney specifically on the fee agreement as you would if he/she were in another office entirely. See Saggesse v. Kelley, 445 Mass. 434 (2005), on the requirement of advance client consent in writing to a referral fee arrangement.

3. If possible, each individual lawyer should be on the lease. If that is not possible or practicable, then sub-leases should be executed providing that is permitted by the lease agreement.

4. Configure office so that attorney-client communications cannot be heard by other lawyers or support personnel in the office.

**Sharing Space with Non-Lawyers**

1. Take care not to publicize the relationship in a way that implies you have a legal relationship with the space sharer(s). Just as with sharing space with other lawyers, maintain independent public identity.

2. Protect client confidences; store files in separate room if possible, or in separate locked file if not.

3. Do not take or give referral fees or share fees with the non-lawyer.

4. Allocate expenses according to actual amount incurred or to be incurred; over or under allocating expenses can look like fee sharing.

**Consequences of Imperfect Division**

1. Joint civil liability/partnership by estoppel.
2. Disqualification for conflict of interest

- In re Custody of a Minor, 432 N.E.2d 546 (Mass. App. Ct. 1982) (foster parents’ lawyer not disqualified even though she shared offices with lawyer who had represented natural mother earlier in proceeding, when each lawyer had own offices and files and was not connected with other’s cases).


Note: If lawyers sharing space routinely work jointly on cases, or “cover for each other” in situations that require some knowledge of the case or access to it file(s), court could find disqualifiable conflict. See generally Rule 1.10, Comment [1] (definition of “firm”).

3. Discipline Cases


4. Reference Materials

VI. TECHNOLOGY FOR THE SOLO

What I have learned over the years is that there is no one right answer as to the specific technology you should purchase and every time that I think I have the best answer someone shows me how to do a task better, or the technology changes and I am running behind again. However, saying all that I do have some strong ideas as to some basics that you need in a modern law office and best practices to ensure that you protect yourself and your clients.

A. My Minimum Hardware Requirements

- Desktop or laptop computer (PC or Mac). This computer should have a big hard drive and lots of memory (3GB)
- Two monitors (you will never look back)
- Multifunction laser printer/scanner/facsimile/copier (the best that you can afford)
- Desktop scanner
- Smartphone (Blackberry, iPhone, Palm Treo, other) (looking for wireless sync)
- Backup hardware—USB flash drive (daily backups); USB external hard drive (weekly backup), and—although it is not your hardware—online/offsite backup system such as Mozy and Carbonite
- Internet hardware
  - Router
  - Firewall (maybe built into router)
  - Wired connection to computer (faster than wireless and more easily secured)
- Fire safe—to secure backup hardware and other valuables

B. My Minimum Software Requirements

- MOST IMPORTANT—SECURITY SOFTWARE
  - Antivirus Protection (AVG, Trend Micro, Norton, McAfee, others)
— Antispyware Protection (Webroot Spy Sweeper, Spyware Doctor, CounterSpy 2.0—check reviews and current cost).

— Antispam Protection (IHatespam, Katharion.com, Symantec, check reviews and cost).

• E-mail. As discussed below, you will get e-mail programs with Microsoft Office (Outlook) and Corel Suite. You can also use excellent email programs like Thunderbird, or web-based programs like Yahoo mail, Gmail, or live.com. I use Outlook for my critical business email and use Gmail for all non-critical business email like list serves, newsletters, etc.

• Internet Browser: For Windows machines I like both Internet Explorer and Firefox.

• Desktop Search: Google Desktop, Copernic, X1 Professional Client.

• Productivity Software (word processing, presentations, spreadsheets). The critical question here is whether you need to collaborate with clients (i.e., will your client expect you to be able to provide them a document in a given format?)

— Microsoft Office—the #1 productivity software with clients. At a minimum you will want Microsoft Office Basic with Word, Excel, and Outlook.

— Corel Suite—includes WordPerfect, which is still required by many federal courts. If you practice in federal courts that require documents filed with an electronic WordPerfect version or if you like “reveal codes,” you want WordPerfect.

— OpenOffice—a free software office suite that gets good feedback from individuals that are not collaborating in document creation with high maintenance clients, that do not need a lot of support, and don’t mind a steep learning curve.

• PDF Conversion—you must have the ability to convert documents into PDF, especially if you practice in federal courts.

— The industry leader—Adobe Acrobat—provides many powerful tools, and with training you can use it to redact information, remove metadata, and Bates stamp discovery for electronic production.
– Nuance—has various levels of software for creating PDF documents, OCR (optical character recognition), and document management.

– PDFCreator and CutePDF are low cost or free alternatives. They obviously have some significant limitations.

• Integrated practice management software—don’t live without it. These products integrate what the vendors now call front office (case management) and back office (billing and accounting). Leading products are PracticeMaster/TABS III, Amicus Attorney, TimeMatters/Billing Matters, PCLaw (has a pared down version of case management or can be paired with TimeMatters), and Abacus with many other alternatives. These programs tend to be sold as software modules so if you do not want the entire integrated product you can buy that portion that you believe is adequate. All of these software products can be purchased to only provide case management, time and billing, or accounting. Key issues for success are:
  – Cost/usability
  – Integration with your email system
  – Ability to synchronize with PDA or Smartphone
  – BUY-IN by everyone in firm
  – Training (essential)

• Time and Billing and Accounting Software. If you do not purchase an integrated program then you can purchase the modules of the above programs for time and billing and accounting. You can also purchase products such as Quickbooks and Microsoft Accounting that have some functionality for time and billing and also provide robust accounting. Timeslips is a well-known time and billing program. TurboLaw, a Massachusetts-based company, has a product. There are many programs and you can find more by contacting LOMAP for a full list.

• Remote Access to your computer. Log in to your computer from afar. You have to set these tools up before you are on vacation.
  – Microsoft’s server operating systems allow remote access. You will probably need help setting it up.
Software solutions are offered by GotoMyPC.com, pcAnywhere, LapLink Everywhere, and LogMeIn.com, among others.

C. Additional Software and Internet Products I Like

- Dragon NaturallySpeaking and Philips digital recorder with Voice Tracer
- Microsoft OneNote
- TimeBridget.com for scheduling meetings
- Darik’s Boot and Nuke (hard-drive disk wipe) (be careful because you are not getting it back)
- Nuance (voice-to-text services)
- Yousendit.com provides a way to send large emails that are otherwise blocked. For long-term storage of documents I will share I use drop.io.
- TrueCrypt.com. This is free open-source disk encryption software for your computer and external drives.
- iGoogle with RSS feed
- GrandCentral—a single telephone number that rings on all of your phones. Do you want to be available?

D. References and Resources

- ABA Legal Technology Resource Center, Helping Lawyers Solve the Technology Puzzle: http://www.abanet.org/tech/ltc/fyidocs/rm.html
- CLIENT TRUST ACCOUNTS INCLUDING AN IOLTA (OR TAKING CARE OF OTHER PEOPLE’S MONEY)
– Setting up an IOLTA account.

When you are entrusted with a client’s funds you are obligated under Mass. R. Prof. C. 1.15 to hold it in trust. Money which is received from a client that has not been earned must be placed in either an IOLTA account or, depending on the amount held and the time held, a separate trust account. Most funds received by a new firm will probably go into an IOLTA account. Therefore you should set up an account as soon as possible and certainly before you receive any money from a client.

You can find a list of approved banks, most are approved, at Board of Bar Overseers’s web-site: http://www.mass.gov/obcbbo/faq.htm#q9. An appropriate name for the account must be selected. The naming convention is governed by Mass. R. Prof. C. 1.15(e) which requires words such as “trust account”, “escrow account”, “client funds account”, “conveyance account” or “IOLTA Account”. I also make the following two suggests when opening an account: (1) First, order checks which are a different color from your operating account. (2) Two, keep approximately $150.00 in the account for bank charges. This will keep you from inadvertently using client funds to pay for firm expenses.

The Board of Bar Overseers have put together a number of excellent articles about the use of trust accounts and the operational requirements. A summary article has been included below:

E. Trust Account Basics from the BBO

RECORD TIME: Countdown to the New Rule on Trust Accounting
by Daniel C. Crane, Bar Counsel

The long-anticipated revisions to the record keeping rule, Mass. R. Prof. C. 1.15, finally take effect on July 1, 2004. With that deadline in mind (and although most of you have no doubt already conformed your records to the new requirements), this article will attempt to review some of the issues and questions likely to arise.

What’s New

First, a preliminary matter: as of the date that this article will be published, there is one more scheduled training program upcoming on Rule 1.15, on June 17,
2004 from 4:00 7:00 p.m. at MCLE in Boston. Five other programs were given in April and May, with even more last fall and winter.

Second, the revisions to Rule 1.15 were examined in an earlier article in this space, “Records for Other People’s Money” (Lawyers Weekly, 10/20/03)), available—along with a comprehensive booklet from the IOLTA Committee, “Managing Clients’ Funds and Avoiding Ethical Problems”—on the BBO website, www.mass.gov/obcbbo. The information provided in the article and booklet, including forms and samples, will not be repeated here. In very brief summary, however, here are some of the important changes:

- Records that lawyers are required to make and keep of the receipt and disposition of trust funds— including a check register, individual client ledgers and an additional individual ledger for the small amount of the lawyer’s own funds on deposit to pay bank charges— are described in detail. Rule 1.15(f).

- Lawyers must perform a three-way reconciliation (of the sum of the individual ledgers, including the bank charges ledger, the check register, and the bank statements) of the account at least every sixty days. Rule 1.15(f)(1)(E).

- Lawyers are required to mail or deliver written itemized bills to clients at or before the time that the lawyer withdraws funds from a trust account to pay herself for services, showing the services provided and the amount of funds the lawyer continues to hold for the client after withdrawal of the fee. Rule 1.15(d).

- Lawyers are prohibited from making withdrawals from trust accounts by ATM or checks payable to “Cash” and are required to use only prenumbered checks. Rule 1.15(e)(3).

The remainder of this article will attempt to address some of the confusion over what has not changed, as well two questions asked most frequently since the revisions to the rule were approved.

What’s Not New

The basic IOLTA account model remains the same. You must deposit all trust funds that are either nominal in amount or to be held for a short period of time to a pooled IOLTA account, with interest payable to the IOLTA Committee. There is one narrow exception for a conveyancing account that is maintained in the lending bank and used exclusively for loan transactions for that bank only; accounts meeting these conditions are permitted, but not required, to be IOLTA
accounts. If these types of conveyancing accounts are not IOLTA accounts, however, they must be non-interest-bearing.

All other trust funds must be maintained in separate individual trust accounts, with interest payable as directed by the client or third party for whom the funds are held. Rule 1.15(e)(5). The check register for an individual trust account is in fact the client ledger, so that for individual accounts, only a two-way reconciliation of the check register to the bank statement is required.

The concept of what constitutes trust property also remains essentially the same. It includes both tangible property—for example, securities, jewelry, original documents such as marriage certificates or wills—and funds. The definition of trust funds has always included, and continues to include, funds of clients or third persons in a lawyer's possession in connection with a representation. The obvious examples are items such as settlement funds from a claim or lawsuit, mortgage proceeds, deposits on sales of real estate, and other traditional receipts. Also included are trust funds held in any fiduciary capacity, such as executor, guardian, or escrow agent. As to these latter, and unless for some reason the funds received are a one-time, short-term deposit, funds held for these purposes must be maintained in an individual trust account with interest payable to the estate or beneficiary, rather than in an IOLTA account.

The definition of trust funds also continues to include retainers, that is advance fees paid by clients to be earned in the future on an hourly or other basis. Retainers and other trust funds belonging in part to a lawyer and in part to a client must be deposited to a trust account. Rule 1.15(b)(2)(ii). On the other hand, earned fees—that is fees paid only after services have already been rendered—cannot be deposited to a trust account and must be deposited to a business or personal account.

Subject to the strict new notification and billing requirements in Rule 1.15(d) and to other requirements concerning disputed fees in Rule 1.15(b)(iii), lawyers must withdraw fees from the trust account in full when earned. This rule requiring that fees be withdrawn at the earliest reasonable time after the lawyer's interest becomes fixed is again not new; a lawyer who leaves earned fees in a trust account is commingling. Thus, if the lawyer is due a one-third contingent fee on a settlement of $10,000, then the entire $3333 must be withdrawn promptly. You cannot withdraw $500 this week, $1000 next week, and so on until the full amount is paid.

You also cannot withdraw fees by paying your bills, or writing checks to your spouse, directly from your trust account. This practice has long been deemed commingling and the new rule now is explicit that funds withdrawn from a trust account to pay fees must be payable to the lawyer or law firm. Combined with
the new requirement that no withdrawals can be made in cash or by ATM (again, a course of action that was always improper, but has now been spelled out), the bottom line is that fees must be paid only to the lawyer or law firm and only by check or electronic funds transfer.

Even the requirement of individual client ledgers is not really new. Lawyers have routinely been disciplined for errors, particularly negligent misuse of funds, caused by inadequate record keeping including the absence of an individual ledger. The rule states expressly that the individual ledger can never be negative. It is unstated, but obvious, that the ledger must also zero out at the conclusion of a case. A ledger for a long-settled personal injury case, for example, should not show $350 undisbursed month after month. Either a bill hasn’t been settled or compromised, fees haven't been withdrawn in full, or the client is due a small balance. Whatever the reason, the matter needs to be addressed and the funds paid out in full.

And, of course, the dishonored check provisions of Rule 1.15 remain. Financial institutions offering IOLTA and other trust accounts are still required to notify Bar Counsel when a check drawn on a trust account is returned unpaid. Bear in mind that Bar Counsel’s examination of a lawyer’s trust account records in conjunction with receipt of a notice of dishonored check will now by necessity trigger an examination of the lawyer’s compliance with the new record keeping requirements.

**FAQs**

In the course of the many CLE programs on the new rule over the last year, a few questions have been raised that deserve repeating in a wider forum. One is the issue of how flat fees should be handled. Flat fees occupy a gray area between retainers and earned fees. Bar Counsel’s position is that flat fees can be deposited to a business or personal account (and thus that the notification requirements of Rule 1.15(d) would not apply). That said, flat fees are still subject to the requirements of Rule 1.16(d) that unearned fees must be refunded. If the client pays $5,000 for an OUI defense today, and tomorrow decides to terminate your services and hire the latest hotshot, you must promptly refund the unearned portion, in this instance probably most of what was paid.

Another FAQ concerns investment accounts, that is, to what extent do the record-keeping requirements of Rule 1.15 apply to trust accounts held at brokerage firms or other similar institutions. Lawyers of course have the same general fiduciary obligations for these accounts that they would have for any trust property. For example, every account statement must be examined when received for obvious errors and to insure that the transactions recorded comport with the lawyer’s directions. However, the detailed record keeping requirements of Rule 1.15 need
only apply to the so-called cash portion of the account against which the attorney has checkwriting privileges. As to such funds, the attorney must comply with all requirements of Rule 1.15, including maintaining a separate check register, reconciling the check register to the cash portion of the account statement, and complying with the notification requirements when withdrawing fees.

The Transition

Most of you have probably already implemented the necessary changes to your accounts and record keeping. For those few of you who put it off to the last minute, here are a few helpful tips.

First and foremost, you must be able to identify who the clients or third parties are whose funds comprise the current balance in your IOLTA account and exactly what amounts you are holding for each. Your check register should identify an opening balance split among those persons, noting the amounts held for each both in the check register and then in the clients’ individual ledgers.

If you cannot identify precisely whose funds you are currently holding and in what amounts, you may need to retain an accountant to assist you. While the problem is being addressed, however, you should not be depositing new funds to this account. Open a new IOLTA account for new trust funds received going forward (and as to which records will be maintained in compliance with the revised rule). You should transfer to this new account funds held in the old IOLTA account the source of which you can ascertain. For example, if you know that you received a retainer of $2000 from Joe Jones and that you have paid yourself $500 from this retainer, you should transfer $1500 to the new trust account, identifying the deposit as the Joe Jones retainer both in the check register and on an individual Joe Jones ledger.

If you have funds being held for missing clients, you may be obligated to commence an escheat of the property to the Commonwealth, in compliance with the Abandoned Property Act, G.L.c.200A, and the regulations of the state treasurer. See “Lost and Found—What to Do with Missing Client’s Funds” at the BBO website.

If these steps are followed, the only funds that will remain in the old IOLTA account are those that cannot be pegged to a particular client in either name or dollar amount. If the old account does not wind down in a few months as outstanding checks clear, you will have to retain an accountant.

Finally, if you have questions about any of these issues, please feel free to call Bar Counsel’s helpline on Monday, Wednesday and Friday afternoons. http://www.mass.gov/obcbbo/recordtime.htm
F. How to Do a Three-Way Reconciliation

Three-Way Reconciliation sounds a lot harder than it actually is. Attorney James Bolan has authored an excellent article, “Reconciliation,” explaining what is entailed and the process of reconciliation. In addition, the Massachusetts IOLTA Committee has authored a booklet, “Managing Clients’ Funds and Avoiding Ethical Problems” (http://www.maiolta.org/attorneys/index_21_3762736560.pdf), which is well worth reading.

Examples of how to use Quicken and QuickBooks to set up and track IOLTA accounts are available. LOMAP has put together a booklet showing how to set up IOLTA client accounts and do the three-way reconciliation with QuickBooks Simple Start Edition 2007. This can be obtained by contacting LOMAP. Also, the Minnesota Office of Lawyers Professional Responsibility has prepared a guide to using Quicken 2002 Basic. A link to this guide can be found on the Board of Bar Overseers’ website, at http://www.mass.gov/obcbbo/rules.htm.

VII. FEE AGREEMENTS, NON-ENGAGEMENT LETTERS AND DIS-ENGAGEMENT LETTERS

A. Fee Agreements

Rule 1.5 of the Massachusetts Rules of Professional Conduct, as amended effective January 1, 2013, requires that the client be informed in writing of “the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible . . . before or within a reasonable time after commencing the representation,” with limited exceptions. Mass. R. Prof. C. 1.5(b)(1). Exceptions apply only in the case of a regularly represented client handled on the same basis or rate or “a single-session legal consultation or where the lawyer reasonably expects the total fee to be charged to the client to be less than $500.” Mass. R. Prof. C. 1.5(b)(2). Any changes to the basis or rate of the fee or expenses must also be communicated in writing to the client.

A written fee agreement serves a number of important purposes. First, it allows you to clearly define the scope of your relationship with the client. Generally, you want a limited scope of engagement to limit future claims that you represented a party about an issue of which you are not even aware. Second, it allows you to clearly communicate with your client your fees, what you charge for, and when you expect to be paid. In addition, you can discuss whether interest will be charged for unpaid amounts due and what will happen if the client continues to not pay. Third, you WILL talk about how a RETAINER must be paid before you
begin work on a project. You will go over the fee agreement with the client and have an executed copy for both the client and for you. Mass. R. Prof. C. 1.5 sets forth the basic rules governing fees and fee agreements, although to a large degree fee agreements are subject to negotiation, as is any agreement. There are however certain types of cases in which contingent fee cases are not allowed and, for contingent fee cases, contract provisions beyond the model contingent fee agreement set forth in the rules must be pointed out to the client with an explanation of the difference between the model contingent fee agreement and the proposed contingent fee agreement.

PRACTICE POINTER:
1. If the client cannot pay a retainer now, why do you think they will be able to pay later? 2. Set a retainer that is a significant portion of the anticipated total fee. It may be the only portion of the fee you will ever see.

1. Contingent Fee Agreements

You cannot use a contingent fee agreement for domestic relations matter if the contingency is based on (1) securing a divorce or (2) the amount of alimony or support or property settlement in lieu thereof. You also cannot use this fee agreement for a criminal case. The model contingent fee agreements set forth in Mass. R. Prof. C. 1.5 are set forth below:

CONTINGENT FEE AGREEMENT, FORM A

To be Executed in Duplicate

Date: __________, 20__

The Client __________________________________________
(Name) (Street & Number) (City or Town)
retains the Lawyer _______________________________________
(Name) (Street & Number) (City or Town)

to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:
(2) The contingency upon which compensation is to be paid is recovery of damages, whether by settlement, judgment or otherwise.

(3) The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay court costs and expenses of litigation, other than from amounts collected for the client by the lawyer.

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a descending or ascending scale in relation to the amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney’s fees awarded by a court or included in a settlement. The lawyer’s compensation shall be such attorney’s fees or the amount determined by the percentage calculation described above, whichever is greater.

(5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.

(6) [IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will receive any payment for the work done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7) [USE IF LAWYER IS SUCCESSOR COUNSEL] The lawyer is responsible for payment of former counsel’s reasonable attorney’s fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures

Signatures of client and lawyer

(To client) ___________________________ ___________________________
CONTINGENT FEE AGREEMENT, FORM B

To be Executed in Duplicate

Date: __________, 20__

The Client

(Name) (Street & Number) (City or Town)

retains the Lawyer

(Name) (Street & Number) (City or Town)

to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is:

(3) Costs and Expenses. The client should initial next to the option selected.

(i) The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay court costs and expenses of litigation, other than from amounts collected for the client by the lawyer; or

(ii) The client is not to be liable to pay compensation or court costs and expenses of litigation otherwise than from amounts collected for the client by the lawyer, except as follows:

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a descending or ascending scale in relation to the amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney’s fees awarded by a court or included in a settlement. The lawyer’s compensation shall be such attorney’s fees or the amount determined by the percentage calculation described above, whichever is greater. [Modify the last two sentences as appropriate if the parties agree on some other basis for calculation.]

6–40
(5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.

(6) [IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will be entitled to receive any payment for the work done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7) [USE IF LAWYER IS SUCCESSOR COUNSEL] Payment of any fees owed to former counsel. The client should initial next to the option selected.

(i) The lawyer is responsible for payment of former counsel’s reasonable attorney’s fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses; or

(ii) The client is responsible for payment of former counsel’s reasonable attorney’s fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures

(To client) ____________________________

(Signature of client)

(To lawyer) ____________________________

(Signature of lawyer)

(Rule 1.5 and the accompanying comments provide important guidance on the use of these forms and on required explanations to clients in the case of Form B.)
2. Hourly Fee Agreements

Also provided below are examples of fee agreements which were provided by Attorney Jim Bolan. As with all forms, you are solely responsible to review the applicable rules and determine if the forms comply with current ethical rules and best practices.

CLIENT’S FEE AGREEMENT

(Litigation)

I, _____, of _____, (the “Client”), hereby agrees to retain the law firm of _____-Massachusetts, 02459-3210, (the "Firm"), in connection with _____.

1. The Client hereby agrees to reimburse the Firm for all costs and disbursements incurred by it and to pay for all legal services performed on the Client’s behalf at the hourly rates set forth herein below.3 This Agreement is not contingent upon the outcome of the above-referenced litigation.

2.a. The Firm hereby acknowledges receipt of Five Thousand Dollars ($5,000.00) as an initial retainer deposit in this matter, and, in consideration of the payment thereof, agrees to provide legal services in connection therewith. In the event that the sum of money being held as a retainer falls below the amount of Two Thousand Five Hundred Dollars ($2,500.00), the Firm will notify the Client and the Client shall, on each occasion, as requested, replenish all amounts necessary to bring the Client’s retainer account balance to Five Thousand Dollars ($5,000.00). The Client shall complete, execute and return to the Firm, along with this Fee Agreement, IRS Form W-9, a copy of which is attached hereto.

b. In the event that the matter proceeds beyond the initial response or the scope of the initial engagement changes, the retainer shall then be increased to the amount of Ten Thousand Dollars ($10,000.00). In the event that the new retainer falls below the amount of Five Thousand Dollars ($5,000.00), the client shall, on each occasion, as requested, replenish all amounts necessary to bring the Client’s retainer account balance to Ten Thousand Dollars ($10,000.00).

c. In the event that a determination is made by any party, the Client, or the Firm, that the matter is likely to proceed to a trial or hearing, the retainer shall then be increased to the amount of Twenty Thousand Dollars

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3 These rates are subject to the Firm’s annual increases as of each January 1, beginning with January 1, 2008.
In the event that the new retainer falls below the amount of Ten Thousand Dollars ($10,000.00), the client shall, on each occasion, as requested, replenish all amounts necessary to bring the Client's retainer account balance to Twenty Thousand Dollars ($20,000.00).

d. In the event that the money being held as a retainer is insufficient to satisfy any of the Firm's invoices, the Client shall promptly pay such invoices in full, and replenish the retainer. The Client understands that no precise estimate of legal fees can be given. The total amount of attorneys' fees, costs, and disbursements may be substantially more, or less, than the retainers. The Firm's present estimate to complete this representation is not known.

In addition, in the event that the Firm, in its sole discretion, determines that the money being held as a retainer or the estimate of legal fees to be incurred in the matter is insufficient to satisfy any of the Firm's prior or future anticipated invoices, the Client shall provide a financial statement or other evidence of available assets by which to secure the payment of future legal fees and Client shall execute instruments, such as a promissory note, revolving credit agreement and/or a mortgage or other security, to guarantee and secure the payment of legal fees. The Firm will inform the Client of its determination to seek security and present the client with the forms to be signed and that Client will have the opportunity in the ten (10) days after being informed to seek advice from independent counsel prior to the execution of such instrument(s) and the provision of such security. The Client shall have the ten (10) days from the presentation by the Firm of such forms to be signed. The failure of the Client to execute such instruments within the ten (10) day period, will permit the Firm, after notice to the Client, to terminate the representation of the Client.

3. It is agreed by and between the Client and the Firm that the retainer paid herein by the Client shall be applied against legal services actually performed, and disbursements made, by the Firm for the Client, which services shall be charged at the following current hourly rates:4

Primary lawyer(s)
Other lawyers
Partners
Associates
Paralegals

4 These rates are subject to the Firm's annual increases as of each January 1, beginning with January 1, 2008.
4. It is understood and agreed by and between the Client and the Firm that the bills/invoices rendered, including a final bill, shall, in addition to the time expended, take into account the following factors described by the Supreme Judicial Court as to the reasonableness of fees for legal services:

- the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;
- the likelihood, if apparent to the Client, that the acceptance of the particular employment, will preclude other employment by the lawyer;
- the fee customarily charged in the locality for similar legal services;
- the amount involved and the results obtained;
- the time limitations imposed by the Client or by the circumstances;
- the nature and length of the professional relationship with the Client;
- the experience, reputation and ability of the lawyer or lawyers performing the services; and,
- whether the fee is fixed or contingent.

Invoices will be submitted to the Client from time to time (generally monthly) and the outstanding sum of time charges and disbursements of the Firm will be deducted from the retainer.

All interim billings shall be due and payable upon receipt unless otherwise stated. Failure to pay interim billings promptly, to make the payments as set forth herein or to promptly replenish the retainers, will permit the Firm, after notice to the Client, to terminate the representation of the Client. The Client agrees that the final bill submitted by the Firm for legal fees and costs will be due and payable at the conclusion of the matter or at the termination of the Attorney-Client relationship.

5. The Client agrees to assume and pay for all out-of-pocket disbursements incurred in connection with this matter (e.g., filing fees, witness fees, travel and mileage costs, sheriff's and constable's fees, expenses of depositions, including transcript costs, investigative expenses, expert witness fees, outside consultant fees, charges for photocopies, including any outside photocopying, postage, Federal Express, courier, file retrieval, Lexis-Nexis and/or any other computer research, and other incidental expenses); and the Firm agrees to obtain Client's prior approval, excepting costs associated with deposition transcripts, before incurring any specific disbursement expected to be in excess of Five Hundred Dollars ($500.00). In the event that the Firm determines that it is appropriate to consult with and/or retain an expert witness or consultant, the Firm will notify the Client and obtain the Client's consent to consult with or retain such expert witness and/or consultant for the benefit of the Client. In such an
event, the Client agrees to pay for all costs and fees associated with the retention of such expert and/or consultant.

6. In the event that, upon either the completion of the within matter, or, the termination of the Firm’s representation of the Client, the total cost of the legal services performed and disbursements made by the Firm shall be less than the amount of any retainers paid by the Client, the balance shall be refunded to the Client by the Firm.

7. It is understood and agreed that the hourly time charge for legal services includes, but is not limited to, the following: Appearances (including travel time to and from Court, the Board of Bar Overseers, Bar Counsel Office, or other administrative, juridical or investigative entity, department or body); conferences, whether with the Client, opposing counsel, lawyers within the Firm or potential witnesses; telephone calls; correspondence; legal research and writing, depositions, drafting and filing legal documents; reading and reviewing of file materials and preparation for any hearings and trial. Telephone calls and correspondence shall be billed at either actual time or a minimum of one-tenth (1/10) of one hour.

8. In some cases the Court awards counsel fees to one party and orders the other party to pay the amount awarded; such awards are solely in the discretion of the Court and cannot be relied on with certainty. Also, in some cases, if there is a settlement agreed to by any of the parties thereby avoiding a contested trial, the settlement contract may provide that one of the parties will contribute an agreed amount towards the other party’s legal expenses. In the initial stages of a case it is impossible to predict whether either of the above situations will materialize and therefore no representation is made in this Agreement that any contribution by the other party will be obtained towards the Client’s legal expenses. In the event, however, that any such contributions are obtained for the benefit of the Client, the amount in question will be credited against the Firm’s final bill to the Client.

9. If the Client and Firm are unable to resolve their differences on the question of any fee, and/or expenses, they hereby agree to make a good faith effort at resolving their disputes. If the dispute cannot be resolved, the Client and Firm agree to place the matter before the Fee Arbitration Board of the Massachusetts Bar Association and agree to be bound by the decision.

10. If the Firm is discharged by the Client prior to the conclusion of this representation, the Firm is entitled to be then compensated for the value of the services rendered to the Client under this Agreement up to the time of discharge, and for its reasonable expenses and disbursements.
11. The Firm and the Client state that the Firm has made no promise or guarantee as to the successful resolution or eventual outcome of this matter, and that this Agreement is not based upon any such promises or anticipated results.

**THIS IS A LEGALLY BINDING CONTRACT. ASK TO HAVE EACH TERM YOU DO NOT UNDERSTAND FULLY EXPLAINED TO YOU SO THAT YOU UNDERSTAND THE AGREEMENT YOU ARE MAKING.**

12. The Client has read this Agreement carefully and understands the terms hereof.

**SIGNED IN DUPLICATE**

Date   xxxxxxxxxxxxxxxx

By:  ________________

3. **Non-Engagement Letters**

A non-engagement letter simply tells your potential client that you are not representing them as their attorney. This action is critical for risk management purposes. You want to prevent future claims of malpractice and disciplinary complaints based on an individual’s baseless belief that you were supposed to be acting as their attorney and that you failed to act on their behalf. The letter should be simple, but also should be done in a manner that will not offend individuals that may have an appropriate case in the future. I have seen at least one excellent example posted on SoloSez from a Massachusetts based attorney. The following is a simple example of a non-engagement letter:

**NON-ENGAGEMENT LETTER**

(May be sent by certified mail, with a return receipt requested)

DATE

NAME
ADDRESS
CITY, STATE & ZIP

RE: [SUBJECT]

Dear :

6–46
The purpose of this letter is to confirm, based on our conversation of [date], that [insert firm name] will not represent you in [describe matter] because [insert reason for declination, if possible and appropriate to state it]. Our decision to decline this case should not be construed as a statement of the merits of your case.

You should be aware that any action in this matter must be filed within the applicable statute of limitations. I strongly recommend that you consult with another lawyer concerning your rights in this matter.

Very truly yours,

4. Disengagement or Termination Letter

A disengagement letter is the final correspondence you send your client when the attorney/client relationship is complete. The circumstances where the letter is necessary are varied and include the completion of all work that was in the scope of the initial engagement, a client’s failure to pay for services, a client orally terminating the services, or if you wish to fire a client. Ideally, this letter serves multiple functions, risk management and marketing. First, the letter clearly notifies the client that you are done working on the case. Second, under appropriate circumstances, it is an excellent opportunity to market your firm to a satisfied client. In addition to clearly stating that the attorney/client relationship is complete you will also want to communicate about fees, either what is owed by the client, or returning unearned retainers. You will also want to discuss the return of property, how documents will be returned, stored or destroyed (as appropriate), and you should specify any further action that the client will need to take in the future to protect their interest. A generic example of a termination letter with options for multiple circumstances can be found at: http://eric_goldman.tripod.com/ethics/disengagementletter.htm.

B. References and Resources


VIII. RECORDS RETENTION

(Don’t let it weight you down).

A. WHAT DOCUMENTS DO I RETAIN
SECTION 6.1 PRACTICING WITH PROFESSIONALISM

B. HOW LONG DO I “HAVE TO” RETAIN DOCUMENTS

C. HOW SHOULD I RETAIN DOCUMENTS
   1. Going Paperless

D. REFERENCE MATERIALS

IX. MARKETING
   A. Firm Name/Logo
   B. Business Cards/letterhead
   C. Website

X. AVOID PROCRASTINATION AND GET THINGS DONE (6 TIPS)

What is the value of avoiding procrastination or becoming more efficient? The easiest measure is in dollars. Assume that you lose a ½ every workday due to either inefficiency or procrastination. Also assume that your realization rate is $100.00 per hour, and that you work 48 weeks a year, 5 days a week. The value of the lost time is: $12,000. The lost time also increases stress, loss of personal and family time. Set goals, schedule your time, avoid duplication of efforts and avoid interruptions. Below we set forth a discussion put together by Dr. Jeffrey Fortgang, LCL, Inc.

Five Steps for Effectively Dealing with Procrastination

While many of us tend to procrastinate in one area of life or another, when lawyers put off key tasks there can be serious consequences for their clients, their colleagues, and themselves. Naturally, the tendency to avoid tasks is greatest when we anticipate a certain amount of unpleasantness, e.g., when we see the task at hand as beyond our current knowledge, or it is likely that our efforts will elicit negative reactions. Beyond that, patterns of procrastination may also re-
flect fundamental beliefs that we have about ourselves. In her book It’s About Time, Dr. Linda Sapadin gives labels to six procrastination patterns that convey the kinds of thinking/motivation involved: The Perfectionist, The Crisis-Maker, The Dreamer, The Defier, The Worrier, and The Overdoer. Along similar lines, Dr. William Knaus’s book Do It Now! Break the Procrastination Habit addresses the need to identify thoughts that promote task-avoiding behaviors and replace automatic responses with conscious choice.

Putting off a task is rewarding on an immediate level (i.e., “I’ll worry about that tomorrow” means an immediate decrease in pressure even if it makes for more pressure later on), so the behavior can easily be learned— but it can also be un-learned. There are many, many ways to attempt to tackle procrastination, and what works best for one person might not work for another.

You might, for example, try approaches like these:

- **Start with small steps**, e.g., in a writing task, one might initially settle for one poorly worded paragraph or sentence, just to get some kind of process rolling. If you expect too much of yourself at one sitting, the idea of avoidance becomes very appealing.

- **Impose a schedule** on yourself, e.g., “I will work on my most difficult cases every day from 11 AM to noon.” If an hour produces too much discomfort, try a half-hour; over time, your “tolerance” will probably increase.

- **Reward yourself** for time spent on tasks that have not yet reached their “last minute.” For example, you might allow yourself some unstructured internet time (or a nap, a walk, etc.) after spending time on a target activity.

- **Limit avoidant behaviors** to a certain schedule as well, e.g., “I will only check my email or surf the web, etc., from 9 to 10 and 3 to 4.”

- **Involve someone else**, like a colleague, spouse, therapist, or coach. You might meet weekly to review your progress on the work that you tend to avoid, or “break the ice” by telling that person your thoughts about the task and how it might be addressed. You are much more likely to sustain changes in your habitual behaviors if you have someone to “answer to” over an extended
time. Certain kinds of professional coaches are particularly accustomed to this role.5

Time Management Skills

Effectively managing your time in the law office often raises the same issues as dealing with procrastination. Time management requires that you seize control of your time and not allow others, to the extent possible, dictate your actions. It also requires the willingness to schedule a time to deal with the worst clients/matters/attorneys and sticking to the scheduled commitment. My favorite recommendations to effectively manage time are:

• **Do not duplicate efforts.** The most effective ways to avoid duplication of efforts is (1) the implementation of an integrated front and back office case management system, and (2) create form banks and use document automation (where appropriate).

• **Schedule your day with focused goals.** You must strategically determine your goals by developing a comprehensive to do list. You need to then prioritize the lists based things such as, but not necessarily weighted in the following order, client service, risk management, deadlines, client development, professional development, and office administration. Schedule the most important goals (based on time pressure, risk management issues, difficulty of task, etc.) for the time of day where you work most effectively. However, within your schedule leave time to manage unexpected events. DON’T WASTE YOUR BEST TIME ADMINISTERING EMAIL OR TELEPHONE MESSAGES.

• **Avoid distractions.** There are times that interruptions are unavoidable, but you should minimize distractions while working on high priority items. Put your telephone and e-mail on “do not disturb.” Studies show that modern employees stay on task for approximately 3 minutes due to e-mail. Additional studies show that if you act upon an email notification it takes, on average, approximately 16 minutes to get back on task.

ACHIEVE QUIET TIME.

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5 Doctor Jeffrey Fortgang, LCL, Inc., 617-482-9600, 31 Milk Street, Suite 810, Boston, MA 02109. Contact LCL to strategize how you will effectively learn to quit procrastination.
**Delegate effectively.** Even solos need to delegate. This essentially means outsourcing the work that you are least efficient at and enjoy the least. I find that most attorneys are fairly bad at maintaining financial records (operating and trust accounts) because they do not enjoy the task and often do not understand how to do the task. The failure to do this task also often leads to attorneys failing to issue invoices for their work. Therefore, this is an excellent task to outsource to a bookkeeper or accountant.

Another area which can be successfully delegated is filing documents. Again, this is a job that must be done, but few solos enjoy the task. The second area that solos can effectively delegate is filing. With a little training most college students can do this job fairly quickly and efficiently on a part-time basis. For additional information on filing systems, see http://masslomap.blogspot.com or contact LOMAP.

**REFERENCE MATERIALS**

SECTION 7

Law Office Management: Best Practices and Caveats

§ 7.1 Lawyer Marketing ............................................................... 7-1
Ronald F. Kehoe, Esq.
Office of the Attorney General, Boston

§ 7.2 Getting Paid ........................................................................ 7-29
Elaine M. Epstein, Esq.
Todd & Weld LLP, Boston

§ 7.3 Formulating a Comprehensive Written Information Security Program ............................................................... 7-55
Massachusetts Office of Consumer Affairs and Business Regulation
SECTION 7.1

Lawyer Marketing*

Ronald F. Kehoe, Esq.
Office of the Attorney General, Boston

Scope Note
This chapter concerns advertising and other legal marketing practices. It discusses the applicable Rules of Professional Conduct, addressing issues such as specific areas of practice and use of firm letterhead. The chapter concludes with a discussion of e-mail and the Internet.

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* Reprinted from Ethical Lawyering in Massachusetts (MCLE, Inc. 3d ed. 2009 & Supp. 2013). Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
Thirty years after the “dawn” of lawyer advertising, many jurisdictions are accelerating a pendulum-like review of their advertising and solicitation rules in reaction to what is perceived as the increasingly aggressive and pervasive nature of lawyer ads. As always, the major thrust of this consumerist-generated review has been generated by nonadvertising lawyers who see the practice as becoming more unseemly. As of 2007, nearly every state had finally adopted a version of the American Bar Association (ABA) Model Rules of Professional Conduct. Some states, including New York, West Virginia, California, and Florida, have been reviewing their approach to regulation. For example, new rules that became effective in New York on February 1, 2007, seek to ban monikers—nicknames or mottoes (such as “heavy hitter” or “dream team”)—because they create an unjustified expectation of results and success. The majority of these new rules apply to all forms of media, and now define “advertising” as all “public and private communication” for the primary purpose of retaining the lawyer, excluding only existing clients or other lawyers. The consumerist trend will continue to urge states to review the style, as well as the substance, of lawyer advertising. And, it is expected that constitutional challenges will, again, arise if the pendulum swings too heavily in the name of regulation.

§ 2 LIBERALIZED RULES ON ADVERTISING AND SOLICITATION

§ 2.1 Overview

The first ethical rules on advertising and solicitation by Massachusetts lawyers were adopted by the Supreme Judicial Court in 1983 and have been partially amended several times since then. Significant liberalizing amendments were adopted effective October 1, 1999. The current rules make it easier than ever for lawyers to market their services ethically.

The principal rules on lawyer advertising and solicitation are Rules 7.1 through 7.5 of the Massachusetts Rules of Professional Conduct. They boil down to only two substantive prohibitions:
• marketing materials may not be “false or misleading,” and

• an attorney may not personally solicit individuals who are strangers to the attorney or who are deemed to be in a vulnerable physical, mental, or emotional state.

Otherwise, virtually “anything goes.” Massachusetts is now as permissive as any other state in the country. The rules impose no restrictions on the basis of potentially, rather than actually, misleading statements, or of good taste or professional dignity.

§ 2.2 Background of 1999 Amendments

The 1999 liberalizing amendments were vigorously debated for several years by lawyers and bar associations before their adoption by the Supreme Judicial Court. Consideration was also given to proposals that would have restricted lawyer advertising.

The principal restrictive proposal originated with the Massachusetts Bar Association (MBA), and was wholly unsuccessful. In 1995 the MBA proposed significant new restrictions on lawyer marketing materials. Under the MBA’s proposal, attorneys would have been required to observe the following limitations, none of which were adopted by the Supreme Judicial Court:

• lawyer “brokers” (i.e., advertisers who will probably refer cases to other attorneys) would have to disclose referral arrangements in their ads;

• lawyers who advertise their fees would not be allowed to charge more than the advertised amounts;

• the then-existing requirement that printed solicitations be “clearly labeled” as advertising would be detailed so as to require printing the legend in red ink in minimum type sizes;

• advertisements and solicitations would include a mandatory disclaimer stating, “The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely on advertisements or self-proclaimed expertise”; and

• dramatizations and testimonials would be outlawed as “inherently deceptive.”
The Supreme Judicial Court rejected every one of the MBA proposals. In doing so, the court has clearly signaled its intent to impose minimum, rather than significant, restrictions on lawyer marketing methods.

Attempts to significantly curb lawyer advertising and solicitation in Massachusetts have usually originated with other lawyers and the MBA, rather than with consumer advocates, the Office of Bar Counsel, or the Board of Bar Overseers. The majority of advertising and solicitation complaints to the Office of Bar Counsel have come from lawyers, not consumers. The MBA called its proposals “consumer friendly” and designed to protect the public. Its critics denounced them as unconstitutional censorship that was intended to discourage lawyer advertising in order to protect law firms and practitioners with established client bases and “old fogy” prejudices. The critics prevailed.

In 1997 the Supreme Judicial Court established a twenty-three-member advisory committee on lawyer advertising to study and recommend changes to Mass. R. Prof. C. 7.1–7.5, which were then being promulgated without substantive change as part of the new Rules of Professional Conduct. See Opinion of the Justices, 426 Mass. 1206 (1998). The advisory committee was asked to review the entire subject of lawyer advertising and solicitation, including the MBA proposals, and to submit recommendations for changes to the court.

The advisory committee submitted its report and the Supreme Judicial Court subsequently promulgated the new amendments, effective October 1, 1999. The advisory committee did not recommend the adoption of any of the MBA’s restrictive proposals, primarily on the grounds that they were unnecessary and probably unconstitutional. Likewise, the Supreme Judicial Court rejected all of the MBA proposals, and in several instances sided with the minority recommendations of the advisory committee, which favored even greater liberalization of the rules than the committee majority.

The key consideration in all of the debate, and the key to understanding the newly liberalized rules, is the First Amendment. In a series of constitutional decisions over the last two decades, the U.S. Supreme Court has extended the free speech and free press protections of the First Amendment to commercial speech, provided that an advertisement is not deceptive. See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557 (1980). This protection extends to marketing efforts of lawyers and other state-licensed professions. Shapero v. Ky. Bar Ass’n, 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977). Although it is clear that false or misleading advertising may be constitutionally prohibited, the Supreme Court is unlikely to accept an argument that a given advertisement is “potentially” misleading. The Court has emphasized that state regulators will bear the burden of
proving in each case that the harm of a particular advertisement is real, rather than supposed, and that an ethical restriction will, in fact, materially alleviate that harm. See, e.g., Florida Bar v. Went For It, 515 U.S. 618 (1995).

The Supreme Judicial Court and its advisory committee have recognized the First Amendment context in which state ethical rules on lawyer marketing must ultimately be judged. The 1999 iteration of Mass. R. Prof. C. 7.1–7.5 reflects this recognition throughout. In rejecting the MBA proposals, the Supreme Judicial Court and the advisory committee observed that these proposals, if adopted, would have gone against the trend of the Supreme Court’s decisions and were of doubtful constitutionality.

§ 2.3 Summary of 1999 Changes

Rules 7.1, 7.2, and 7.3 of the Massachusetts Rules of Professional Conduct and the Supreme Judicial Court’s official comments to these rules have been completely rewritten. Minor changes have been made in the text of Mass. R. Prof. C. 7.4 and in the Supreme Judicial Court comments to Mass. R. Prof. C. 7.4 and 7.5.

The following three significant changes are embodied in the 1999 amendments:

- The ban on in-person and telephone solicitations has been removed in cases where the solicitee is a close family member, a former client, or a member of the bar (unless the individual is in a vulnerable condition), or where the solicitee is a business, nonprofit entity, or government agency.

- The requirement that targeted written communications be labeled “Advertising” has been abolished.

- The requirement that lawyers retain copies of targeted written solicitations for two years has been expanded to include all advertising materials.

Two less important changes have also been adopted:

- The rules on electronic and computer-accessed communications and on the use of trade names in professional practice have been clarified.

- “Qualified legal assistance organizations” are permitted to share in statutory fee awards or court-approved settlements. This is a new exception to the continuing ban on lawyers paying nonlawyers to act as “runners” or brokers in obtaining business.
The Supreme Judicial Court has also rewritten the official comments that accompany each rule of professional conduct. These comments were submitted to the court in draft form by the advisory committee. They are a helpful guide to practitioners who seek to understand the basis and scope of each rule.

In the following discussion of the amended rules, the text of each rule, as amended in 1999, is followed by the official comments published by the Supreme Judicial Court, and then by the author’s comments and some practice tips.

§ 3 RULE 7.1—COMMUNICATIONS CONCERNING A LAWYER’S SERVICES

Rule 7.1 of the Massachusetts Rules of Professional Conduct states as follows:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

§ 3.1 Supreme Judicial Court Comments

Comment [1] to Mass. R. Prof. C. 7.1 states as follows:

[1] This Rule governs all communications about a lawyer’s services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer’s services, statements about them should be truthful. Statements that compare a lawyer’s services with another lawyer’s services and statements that create unjustified expectations about the results the lawyer can achieve would violate Rule 7.1 if they constitute “false or misleading” communications under the Rule.

Corresponding ABA Model Rule. Identical to Model Rule 7.1.

Corresponding Former Massachusetts Rule. DR 2-101(A).
§ 3.2 Author’s Comments

Liberal as they now are, the Massachusetts Rules of Professional Conduct still prohibit advertising material that is deemed to be a “false or misleading communication.” In re Lucas, 317 B.R. 195 (Bankr. D. Mass. 2004) (regarding misleading letterhead). This remains the fundamental substantive standard governing all forms of lawyer advertising materials. (Compare the oath, required of every admitted attorney since 1702, in G.L. c. 221, § 38: “I solemnly swear that I will do no falsehood, nor consent to the doing of any in court; [nor] . . . wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same . . . .”)

For practitioners who advertise aggressively, a possible problem is that the rules do not elaborate or define the “false or misleading communication” standard, and there is no Massachusetts case law to clarify the phrase when applied to lawyer advertising. If a test case arises, the courts may be expected to look to Federal Trade Commission cases on false advertising, to common law fraud and deceit cases, and to decisions in other states, or even to cases under the federal securities laws. Based on the general principles that underlie these cases, and on lawyer-advertising decisions in other jurisdictions, two strong general themes emerge. Lawyer advertisements are most likely to be found “false or misleading” if they

• leave out important information about fees or fee components, or

• promise or guarantee results or create unjustified or unverifiable expectations of success by not adding caveats or qualifications.

Lawyers are more likely to run into trouble by carelessly omitting material facts necessary to make their advertisements as a whole not significantly misleading (especially about their fees) than by affirmatively misrepresenting ascertainable facts, such as their professional background or experience. No disciplinary cases or proceedings have been found involving lawyers accused of making false statements about the law.

The amended Mass. R. Prof. C. 7.1 eliminates the former paragraphs (b) and (c), which had defined “false or misleading communication” to include statements that are “likely to create an unjustified expectation about results the lawyer can achieve,” or that compare the lawyer’s services with other lawyers’ services “unless the comparison can be factually substantiated.” These strictures were jettisoned at the advisory committee’s recommendation, which deemed the phrase “likely to create an unjustified expectation” to be unduly vague, and the restriction on comparative advertising to be so sweeping that it would effectively foreclose nearly all opinion advertising. But the Supreme Judicial Court’s comment to this rule expressly leaves open the possibility that some such claims might be deemed
“false or misleading communications.” The MBA’s call for a ban on all dramatizations and testimonials as “inherently deceptive” was rejected as unfounded.

Several recent bar discipline decisions highlight the need to be factually accurate and truthful. In Admonition No. 05-05, the respondent, who was admitted to practice in 2002, is a sole practitioner with no lawyer associates in his employ. For over a year, the respondent used a firm name on his letterhead that implied that the respondent employed associates or had partners. The respondent’s use of misleading letterhead is in violation of Mass. R. Prof. C. 7.1 and 7.5(d). And, in Admonition No. 06-07, the respondent, upon relocating to California, began using letterhead that identified his law practice as respondent “& Associates.” However, the respondent was a sole practitioner who did not employ any associates during the months that he used this letterhead. The use of this letterhead was deceptive in violation of Mass. R. Prof. C. 7.1 and 7.5. In In the Matter of O’Keefe, No. Bd-2005-015, available at http://www.mass.gov/obcbbo/decisions.htm, the respondent was disciplined as a result of his use between February 2000 and September 2002 of a firm name that consisted of his name and the name of his associate as a professional corporation. The associate was an employee but not a shareholder in the firm. The respondent’s use of a firm name implying the existence of a professional corporation when it was not incorporated as such and when the associate was not a shareholder was in violation of Mass. R. Prof. C. 7.1 and 7.5.

Practice Note

- Don’t risk becoming the Massachusetts test case. Think about a planned advertisement before publishing it, and use common sense to avoid having to defend a “false or misleading” charge.
- Be careful not to be seen as guaranteeing results in a particular case by citing previous successes in other, different cases.
- Don’t omit information about your fees that a reasonable nonlawyer would want to know, such as whether a contingent fee will be a percentage of the client’s gross recovery or of the net recovery after deducting costs.
- If you feel a need to compare yourself to other lawyers, don’t be overly grandiose in your comparisons.
§ 4 RULE 7.2—ADVERTISING

Rule 7.2 of the Massachusetts Rules of Professional Conduct states as follows:

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory including an electronic or computer-accessed directory, newspaper or other periodical, outdoor advertising, radio or television, or through written communication not involving solicitation prohibited in Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization;

(3) pay for a law practice in accordance with Rule 1.17;

(4) pay referral fees permitted by Rule 1.5(e); and

(5) share a statutory fee award or court-approved settlement in lieu thereof with a qualified legal assistance organization in accordance with Rule 5.4(a)(4).

(d) Any communication made pursuant to this rule shall include the name of the lawyer, group of lawyers, or firm responsible for its content.
§ 4.1 Supreme Judicial Court Comments

The comments to Mass. R. Prof. C. 7.2 state as follows:

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising.

[2] [Reserved]

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Television and other electronic media, including computer-accessed communications, are now among the most powerful media for getting information to the public. Prohibiting such advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[3A] The advertising and solicitation rules can generally be applied to computer-accessed or other similar types of communications by analogizing the communication to its hard-copy form. Thus, because it is not a communication directed to a specific recipient, a web site or home page would generally be considered advertising subject to this rule, rather than solicitation subject to Rule 7.3. For example, when a targeted e-mail solicitation of a person known to be in need of legal services contains a hot-link to a home page, the e-mail message is subject to Rule 7.3 but the home page itself need not be because the recipient must make an affirmative decision to go to the sender’s home page. Depending upon the circumstances, posting of comments to a newsgroup, bulletin board or chat group may constitute targeted or direct contact with prospective clients known to be in need of legal services and may therefore be subject to Rule 7.3. Depending upon the topic or purpose of the newsgroup, bulletin board, or chat group, the posting might also
constitute an association of the lawyer or law firm’s name with a particular service, field, or area of law amounting to a claim of specialization under Rule 7.4 and would therefore be subject to the restrictions of that rule. In addition, if the lawyer or law firm uses an interactive forum such as a chat group to solicit for a fee professional employment that the prospective client has not requested, this conduct may constitute prohibited personal solicitation under Rule 7.3(d).

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

[6] A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. However, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule. Paragraph (c) also excepts from its prohibition the referral fees permitted by Rule 1.5(e).

Corresponding ABA Model Rule. Substantially similar to Model Rule 7.2, except minor differences
in (a) and (b), subclauses (4) and (5) were added to paragraph (c), and paragraph (d) was modified.

**Corresponding Former Massachusetts Rule.**

DR 2-101(B); see DR 2-103.

§ 4.2 **Author’s Comments**

The cardinal rule remains unchanged: avoid “false or misleading” advertising. See § 3, above. The big news about Mass. R. Prof. C. 7.2 is what was not changed in 1999. This is the rule that the MBA unsuccessfully tried to persuade the Supreme Judicial Court to make more restrictive.

One change in Mass. R. Prof. C. 7.2 should be noted. Attorneys who advertise are now required by Mass. R. Prof. C. 7.2(b) to keep a copy or recording of the ad for two years (prior to 1998, the retention requirement applied only to target-ed solicitations). This applies to direct mail (including e-mail), materials that are published in print or on the Internet, and to audio or video ads.

Rule 7.2 replaces DR 2-101(B) and portions of DR 2-103. It clarifies the type of communications that may be employed by the lawyer. The rule is premised on a need to expand the public’s knowledge about legal services, as opposed to a rule rooted in tradition. The rule permits public dissemination of information concerning the following:

- a lawyer’s name or firm name, address, and telephone number;
- the kinds of services the lawyer will undertake;
- the basis on which the lawyer’s fees are determined, including prices for specific services and payment and credit arrangements;
- a lawyer’s foreign language ability;
- names of references and, with their consent, names of clients regularly represented; and
- other information that might invite others to seek legal assistance.

Advertising effectiveness and taste are not addressed by this rule because of their subjective nature. Testimonials and dramatizations are permitted. Neither this rule nor Mass. R. Prof. C. 7.3 prohibits any communications authorized by law.
Practice Note

- If your advertising becomes the subject of a complaint to Bar Counsel, you will be expected to produce a copy of your ad, along with a record of when and where it was used. When you first start to advertise, create a simple filing system to preserve this information. Failure to retain and produce it at the request of Bar Counsel can be an independent basis for disciplinary action, even if your advertisement itself does not violate the rules. See Mass. R. Prof. C. 8.4(g); SJC Rule 4:01, § 3(1).

- If you want to list the names of clients in your marketing materials, get their written permission first. Although Mass. R. Prof. C. 7.1–7.5 do not require the client's permission, the fact of the representation is arguably confidential information under Mass. R. Prof. C. 1.6. It is good practice, as well as good manners, to get permission.

- If you publish a newsletter or the like, consider inserting a disclaimer to advise readers that they should not rely on newsletter materials as they might rely on the advice of a lawyer who knows their particular circumstances. Again, Mass. R. Prof. C. 7.1–7.5 do not require such a disclaimer, but it is good practice, and may protect you from unexpected malpractice claims.

- Follow the advice addressing Mass. R. Prof. C. 7.1 in the practice note contained in § 3.2, above.

§ 5 RULE 7.3—SOLICITATION OF PROFESSIONAL EMPLOYMENT

Rule 7.3 of the Massachusetts Rules of Professional Conduct states as follows:

(a) In soliciting professional employment, a lawyer shall not coerce or harass a prospective client and shall not make a false or misleading communication.

(b) A lawyer shall not solicit professional employment if:

(1) the lawyer knows or reasonably should know that the physical, mental, or emotional state of the prospective client is such that there is a substantial potential that the person
cannot exercise reasonable judgment in employing a lawyer, provided, however, that this prohibition shall not apply to solicitation not for a fee; or

(2) the prospective client has made known to the lawyer a desire not to be solicited.

(c) Except as provided in paragraph (e), a lawyer shall not solicit professional employment for a fee from a prospective client known to be in need of legal services in a particular matter by written communication, including audio or video cassette or other electronic communication, unless the lawyer retains a copy of such communication for two years.

(d) Except as provided in paragraph (e), a lawyer shall not solicit professional employment for a fee from a prospective client in person or by personal communication by telephone, electronic device, or otherwise.

(e) The following communications shall be exempt from the provisions of paragraphs (c) and (d) above:

(1) communications to members of the bar of any state or jurisdiction;

(2) communications to individuals who are

(A) the grandparents of the lawyer or the lawyer’s spouse,

(B) descendants of the grandparents of the lawyer or the lawyer’s spouse, or

(C) the spouse of any of the foregoing persons;

(3) communications to prospective clients with whom the lawyer had a prior attorney-client relationship; and
(4) communications with (i) organizations, including non-profit or government entities, in connection with the activities of such organizations, and (ii) with persons engaged in trade or commerce as defined in G.L. c. 93A, § 1(b), in connection with such persons' trade or commerce.

(f) A lawyer shall not give anything of value to any person or organization to solicit professional employment for the lawyer from a prospective client. However, this rule does not prohibit a lawyer or a partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm from requesting referrals from a lawyer referral service operated, sponsored, or approved by a bar association or from cooperating with any qualified legal assistance organization. Such requests for referrals or cooperation may include a sharing of fees as provided in Rule 5.4(a)(4).

§ 5.1   Supreme Judicial Court Comments

The comments to Mass. R. Prof. C. 7.3 state as follows:

[1] This rule applies to solicitation, the obtaining of business through letter, e-mail, telephone, in-person or other communications directed to particular prospective clients. It does not apply to non-targeted advertising, the obtaining of business through communications circulated more generally and more indirectly than that, such as through web sites, newspapers, or placards in mass transit vehicles. This rule allows lawyers to conduct some form of solicitation of employment from all prospective clients, except in a small number of very special circumstances, and hence permits prospective clients to receive information about legal services that may be useful to them. At the same time it recognizes the possibility of undue influence, intimidation, and overreaching presented by personal solicitation in the circumstances prohibited by this rule and seeks to limit them by regulating the form and
manner of solicitation by rules that reach no further
than the danger that is perceived.

[2] Paragraphs (a) and (b) apply whenever a lawyer is
engaging in solicitation that is not prohibited under
another paragraph of this Rule. In determining whether
a contact is permissible under Rule 7.3(b)(1), it is rele-
vant to consider the times and circumstances under
which the contact is initiated. For example, a person
undergoing active medical treatment for traumatic in-
jury is unlikely to be in an emotional state in which
reasonable judgment about employing a lawyer can be
exercised. The reference to the “physical, mental, or
emotional state of the prospective client” is intended
to be all-inclusive of the condition of such person and
includes a prospective client who for any reason lacks
sufficient sophistication to be able to select a lawyer.
A proviso in subparagraph (b)(1) makes clear that it
is not intended to reduce the ability possessed by
non-profit organizations to contact the elderly and the
mentally disturbed or disabled. A buse of the right to
solicit such persons by non-profit organizations
would probably constitute a violation of para-
graph (a) of the rule or Rule 8.4(c), (d), or (h). The
references in paragraph (b)(1), (c), and (d) of the rule
to solicitation “for a fee” are intended to carry for-
ward the exemption in former DR 2-103 for non-
profit organizations. Where such an organization is
involved, the fact that there may be a statutory enti-
tlement to a fee is not intended by itself to bring the
solicitation within the scope of the rule. There is no
blanket exemption from regulation for all solicitation
that is not done “for a fee.” Non-profit organizations
are subject to the general prohibitions of para-
graphs (a) and (f) and subparagraph (b)(2).

[3] Paragraph (c) imposes minimum regulations on
solicitation by written and other communication that
is not interactive. Paragraph (c) applies only in situa-
tions where the person is known to be in need of ser-
vice in a particular matter. For purposes of para-
graph (c) a prospective client is “known to be in need
of legal services in a particular matter” in circum-
stances...
stances including, but not limited to, all instances in which the communication by the lawyer concerns an event specific to the person solicited that is pending or has already occurred, such as a personal injury, a criminal charge, or a real estate purchase or foreclosure.

[4] While paragraph (c) permits written and other nondirect solicitation of any prospective client, except under the special circumstances set forth in paragraphs (a) and (b), paragraph (d) prohibits solicitation in person or by personal communication except in the situations described in paragraph (e). See also Comment 3A to Rule 7.2, discussing prohibited personal solicitation through chat groups or other interactive computer-accessed or similar types of communications. The prohibitions of paragraph (d) do not of course apply to in-person solicitation after contact has been initiated by the prospective client.

[4A] Paragraph (e) acknowledges that there are certain situations and relationships in which concerns about overreaching and undue influence do not have sufficient force to justify banning all in-person solicitation. The risk of overreaching and undue influence is diminished where the prospective client is a former client or a member of the lawyer’s immediate family. The word “descendant” is intended to include adopted and step-members of the family. Similarly, other lawyers and those who manage commercial, non-profit, and governmental entities generally have the experience and judgment to make reasonable decisions with respect to the importunings of trained advocates soliciting legal business. Subparagraph (e)(4) permits in-person solicitation of organizations, whether the organization is a non-profit or governmental organization, in connection with the activities of such organization, and of individuals engaged in trade or commerce, in connection with the trade or commerce of such individuals.

[5] Paragraph (f) prohibits lawyers [from] paying a person or organization to solicit on their behalf. The provision should be read together with Rule 8.4(a), which prohibits a lawyer from violating these rules
through the acts of another. The rule contains an exception for requests for referrals from described organizations.

**Corresponding ABA Model Rule.** Different from Model Rule 7.3.

**Corresponding Former Massachusetts Rule.**
DR 2-103.

§ 5.2 **Author’s Comments**

This rule governs solicitation—i.e., personal communications directed to “particular prospective clients,” such as in-person visits, telephone calls, and direct mail and e-mail ads— as distinguished from advertising (“non-targeted” communication), which is directed to the general public via mass media. The pre-1998 predecessor of Mass. R. Prof. C. 7.3, DR 2-103, had somewhat confused the two terms by requiring lawyers to label targeted written solicitations as “advertising.”

Rule 7.3 contains the most sweeping liberalizing provisions of the 1999 amendments. The Supreme Judicial Court has implicitly recognized that the previous total ban on in-person solicitation was unrealistic and unwarranted in the highly competitive modern marketplace for legal services. This ban had been highly controversial since its adoption in 1986. See the majority and concurring opinions in In re Amendment to SJC Rule 3:07, 398 Mass. 73 (1986). The liberalized new rule, while still protecting persons who have told the lawyer not to solicit them and persons who are deemed to be vulnerable, does permit direct in-person solicitation of all businesses, and of individuals with whom the lawyer has one of the three relationships that are now exempted from the continuing ban on soliciting individuals. As such, it has a good chance of surviving First Amendment scrutiny. See Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (5–4 decision upholding a limited thirty-day ban on lawyers soliciting accident victims or their relatives by mail); Edenfield v. Fane, 507 U.S. 761 (1993) (striking down a total ban on all in-person solicitations by accountants).

The new Massachusetts version of Rule 7.3 makes two major liberalizing changes concerning solicitation:

- It abolishes the requirement that written solicitations be labeled as advertising. In this respect, the Supreme Judicial Court went beyond the recommendation of its advisory committee. This change will eliminate most of the advertising complaints that had been made to Bar Counsel.
• It vastly expands the population of prospective clients who may be directly solicited in person or by telephone and e-mail so as to include all businesses, government agencies, and non-profit entities, as well as former clients, fellow lawyers, and members of the soliciting lawyer’s extended family (as defined in Mass. R. Prof. C. 7.3(e)(2)). In the case of businesses, the Supreme Judicial Court again went beyond the recommendations of its advisory committee, which would have limited the new provision to businesses having publicly traded stock. Instead, Mass. R. Prof. C. 7.3(e)(4) applies broadly to all organizations “engaged in trade or commerce as defined in G.L. c. 93A, § 1(b),” which includes closely held businesses, sole proprietorships, and so-called Mom and Pop operations. Note that the definition of a lawyer’s relatives is more inclusive than in Mass. R. Prof. C. 1.8(c) (prohibiting the drafting of a will or other instrument that gives a substantial gift to the lawyer or certain relatives of the lawyer).

Other aspects of the solicitation rule have not been changed:

• The rule narrows, but does not entirely eliminate, the ban on direct, personal solicitation of individuals for employment for a fee. Soliciting individuals in person, or by phone or interactive e-mail, is still prohibited unless the prospective client is a fellow lawyer, a relative, or a former client. An attorney may not, for example, directly ask for business from friends or neighbors, or fellow members of the attorney’s church, synagogue, or fraternal organization (unless of course, the prospect brings up the subject first). Nonpersonal solicitations via letter, noninteractive e-mail, or audio- or videocassettes to such persons are permitted.

• Solicitations may not be made in a coercive or harassing manner, or to persons who are in a vulnerable condition or who have made known their desire not to be solicited. See Mass. R. Prof. C. 7.3(a), 7.3(b)(1), 7.3(b)(2). “Ambulance chasing” and the use of paid nonlawyer “runners” are still forbidden. See Mass. R. Prof. C. 7.3(b)(1), 7.3(f); In re Holzberg, 12 Mass. Att’y Disc. R. 200 (1996).

**Practice Note**

• Be aware of the continuing prohibition on personally soliciting individuals who are not relatives, former clients, or fellow lawyers. For example, if you are an estate planner, you still may not call or solicit in person the business of wealthy individuals who are not in
these exempt categories, even if you know them well socially. You may not ask for their business on the golf course or at the Kiwanis dinner. You may send a letter, and you no longer need to label it “advertising.”

• Set up a system for retaining copies of solicitation letters, brochures, audio- or videocassettes, and e-mails that you send to individuals, even to persons who are included in the exemptions of Mass. R. Prof. C. 7.3(e).

• Don’t make a pest of yourself. If prospective clients tell you to stay away from them or ask to be removed from your mailing list, do it immediately.

• Use common sense and sensitivity. “Ambulance chasing” is still prohibited. Don’t solicit a tort case in a hospital room or a funeral home, even from a relative, a fellow lawyer, or a former client. Wait for a decent interval before offering to handle a decedent’s estate, even if the family are former clients or related to you. Don’t even send a letter to someone who might be seen as vulnerable to overreaching or undue influence.

• Follow the advice in the practice note to Rule 7.1, in § 3.2, above.

§ 6 RULE 7.4—COMMUNICATION OF FIELDS OF PRACTICE

Rule 7.4 of the Massachusetts Rules of Professional Conduct states as follows:

(a) Lawyers may hold themselves out publicly as specialists in particular services, fields, and areas of law if the holding out does not include a false or misleading communication. Such holding out includes

(1) a statement that the lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular service, field, or area of law,

(2) directory listings, including electronic, computer-accessed or other similar types of directory listings, by particular service, field, or area of law, and
(3) any other association of the lawyer’s name with a particular service, field, or area of law.

(b) Lawyers who hold themselves out as “certified” in a particular service, field, or area of law must name the certifying organization and must state that the certifying organization is “a private organization, whose standards for certification are not regulated by the Commonwealth of Massachusetts,” if that is the case, or, if the certifying organization is a governmental body, must name the governmental body.

(c) Except as provided in this paragraph, lawyers who associate their names with a particular service, field, or area of law imply an expertise and shall be held to the standard of performance of specialists in that particular service, field, or area. Lawyers may limit responsibility with respect to a particular service, field, or area of the law to the standard of an ordinary lawyer by holding themselves out in a fashion that does not imply expertise, such as by advertising that they “handle” or “welcome” cases, “but are not specialists in” a specific service, field, or area of law.

§ 6.1 Supreme Judicial Court Comments

The comments to Mass. R. Prof. C. 7.4 state as follows:

[1] This Rule is substantially similar to DR 2-105 which replaced a rule prohibiting lawyers, except for patent, trademark, and admiralty lawyers, from holding themselves out as recognized or certified specialists. The Rule removes prohibitions against holding oneself out as a specialist or expert in a particular field or area of law so long as such holding out does not include any false or misleading communication but provides a broad definition of what is included in the term “holding out.” See also Comment 3A to Rule 7.2, discussing computer-accessed or other similar types of newsgroups, bulletin boards, and chat groups. The phrase “false or misleading communication,”
defined in Rule 7.1, replaces the phrase “deceptive statement or claim” in DR 2-105 to conform to the terminology of Rules 7.1 and 7.3. The Rule merely expands to all claims of expertise the language of the former rule, which permitted nondeceptive statements about limiting practice to, or concentrating in, specified fields or areas of law. There is no longer any need to deal specifically with patent, trademark, or admiralty specialization. To the extent that such practices have fallen within federal jurisdiction, they will continue to do so.

[2] The Rule deals with the problem that the public might perceive that the Commonwealth is involved in certification of lawyers as specialists. It therefore requires lawyers holding themselves out as certified to identify the certifying organization with specifically prescribed language when it is a private organization and to name the certifying governmental organization when that is the case. Nothing in the Rule prevents lawyers from adding truthful language to the prescribed language.

[3] The Rule also specifies that lawyers who imply expertise in a particular field or area of law should be held to the standard of practice of a recognized expert in the field or area. It gives specific examples of commonly used forms of advertising that fall within that description. The Rule also recognizes that there may be good reasons for lawyers to wish to associate their names with a particular field or area of law without wishing to imply expertise or to accept the responsibility of a higher standard of conduct. Such a situation might describe, for example, a lawyer who wishes to develop expertise in a particular or field area [sic] without yet having it. The Rule identifies specific language that might be used to avoid any implication of expertise that would trigger the imposition of a higher standard of conduct.

Corresponding ABA Model Rule. Different from Model Rule 7.4.
Corresponding Former Massachusetts Rule.
DR 2-105.

§ 6.2  Author’s Comments

Rule 7.4 incorporates the prior Massachusetts DR 2-105. It allows a lawyer to hold himself or herself out as a specialist or expert in a particular field or area of law, as long as such holding out does not include any false or misleading statement or claim. Although the rule deals with the problem that the public might perceive that the Commonwealth is involved in certification of lawyers as specialists by prescribing disclaimer language, “[n]othing in the Rule prevents lawyers from adding truthful language to the prescribed language.” Mass. R. Prof. C. 7.4, cmt. [2].

The rule also specifies that lawyers who imply expertise in a particular field or area of law should, for purposes of malpractice and disciplinary claims, be held to the standard of practice of a recognized expert in the field or area. The rule identifies specific language that might be used to avoid any implication of expertise that would trigger the imposition of a higher standard of conduct.

The 1999 amendment made minor clarifying amendments relating to electronic and similar communications in the second sentence of Mass. R. Prof. C. 7.4(a) and in the court’s Comment [1].

Practice Note
Avoid puffery that could expand your exposure to malpractice claims and possible discipline. For example, if you are a general practitioner without a strong current grasp of federal estate and gift tax law, don’t call yourself an “estate planner.” Just say that you prepare wills and trusts, and let it go at that.

§ 7  RULE 7.5—FIRM NAMES AND LETTERHEADS

Rule 7.5 of the Massachusetts Rules of Professional Conduct states as follows:

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in a private practice if it does not imply a connection with a government agency or with a public or
SECTION 7.1 PRACTICING WITH PROFESSIONALISM

charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

§ 7.1 Supreme Judicial Court Comments

The comments to Mass. R. Prof. C. 7.5 state as follows:

[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity or by a trade name such as the “ABC Legal Clinic.” Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as “Springfield Legal Clinic,” an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased or retired partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.
[2] With regard to paragraph (d), lawyers who are not in fact partners, such as those who are only sharing office facilities, may not denominate themselves as, for example, “Smith and Jones,” or “Smith and Jones, A Professional Association,” for those titles, in the absence of an effective disclaimer of joint responsibility, suggest partnership in the practice of law. Likewise, the use of the term “associates” by a group of lawyers implies practice in either a partnership or sole proprietorship form and may not be used by a group in which the individual members disclaim the joint or vicarious responsibility inherent in such forms of business in the absence of an effective disclaimer of such responsibility.

[3] S.J.C. Rule 3:06 imposes further restrictions on trade names for firms that are professional corporations, limited liability companies or limited liability partnerships.

**Corresponding ABA Model Rule.** Identical to Model Rule 7.5.

**Corresponding Former Massachusetts Rule.**
DR 2-102.

### § 7.2 Author’s Comments

Rule 7.5 incorporates the comparable language from DR 2-102(A) but also states that a lawyer may use a “trade name” as long as it does not violate Rule 7.1 or imply “a connection with a government agency or with a public or charitable legal services organization.” See Gosselin v. Webb, 242 F.3d 412 (1st Cir. 2001) (addressing “trade name”). Since 1998, this rule has required that the name of a law firm lawyer holding a “public office” needs to be removed during any “substantial period in which the lawyer is not actively and regularly practicing with the firm.” Mass. R. Prof. C. 7.5(c).

Lawyers can hold themselves out as being part of a partnership or other professional organization or association only when it is true. At the advisory committee’s recommendation, the Supreme Judicial Court’s 1999 amendment made minor changes to the official comments, clarifying that any holding out on letterhead or in advertising may not imply the existence of a partnership or group.
SECTION 7.1 PRACTICING WITH PROFESSIONALISM

practice where none exists. See Mass. R. Prof. C. 7.5, cmt. [2]. This clarification serves two purposes:

• it protects consumers from being misled into relying on more resources than exist; and

• it helps lawyers avoid incurring unintended liability for the negligent professional conduct of other lawyers with whom they share office space, on a theory of partnership by estoppel.


The 1999 amendments also clarified that groups of lawyers who practice in limited liability partnerships or companies must include words or abbreviations in the name of the entity that indicate that it is a limited liability entity. See SJC Rule 3:06, subpar. 2(c) (amended 1999).


Practice Note

• If you share space with one or more other lawyers, review your letterhead and be sure to obey the newly clarified prohibition on using a name that may imply the existence of a partnership. A violation of this rule is now a ground for discipline as well as vicarious liability.

• If your firm is a limited liability entity, check to be sure that your letterhead, business cards, and all advertising include the LLP or LLC legend.

§ 8 INTERNET AND E-MAIL ISSUES

Besides new Rules of Professional Conduct, the late 1990s brought to the legal marketplace the revolutionary new electronic media of the Internet and electronic communication (e-mail). These media present new issues relating to the advertising and solicitation rules.

These issues have been elucidated in an article authored by Constance Vecchione, chief bar counsel, entitled “Tangled Web: Advertising, Solicitation, Ethics and the Internet,” which is available at the Bar Counsel/Board of Bar Overseers Web site, http://www.state.ma.us/obcbbo/web.htm. Now that the Supreme
Judicial Court has amended the rules to specify that electronic and computer-accessed advertising and solicitation are covered, Ms. Vecchione’s thoughtful article will be the most reliable guide for practitioners who wish to seek legal business electronically, even though it was written before the 1999 rules had been promulgated. It appears that her article influenced the wording of the court’s official comments to the 1999 amendments, particularly Comment [3A] to Rule 7.2.

Practice Note

- A good rule of thumb for applying the rules to high-tech communications is to analogize to the low-tech or hard-copy equivalent. An unsolicited e-mail to an individual will ordinarily be permissible as the equivalent of a letter, but it may also be viewed as an unpermitted personal communication, akin to a phone call, if it is interactive. See Mass. R. Prof. C. 7.2, cmt. [3A].

- To comply with the record-retention requirement that now applies to both solicitations and advertisements, and to facilitate the recovery of electronic communications if you are asked to demonstrate your compliance, print out your e-mail solicitations and your Web site in hard copy form and keep them in a master file. Each time you update your Web site, print out the new version with a notation of its date.

- Online Web sites are interstate in nature. They constitute advertising, which must comply with Mass. R. Prof. C. 7.2. See Mass. R. Prof. C. 7.2, cmt. [3A]. To avoid misleading out-of-state viewers as to whether a lawyer who is identified in the Web site text is licensed in their jurisdiction, include the office addresses and information on the bar admissions of identified firm members. Of course, an online communication also must comply with the ethical rules on advertising in each state where the lawyer or firm members are licensed, so be sure you know each jurisdiction’s rules.

For other articles and information relating to Internet ethical issues, including links to numerous Internet legal research resources, see http://www.legalethics.com, a service of Internet Legal Services, a private consulting company.
SECTION 7.2

Getting Paid*

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Scope Note
This chapter provides practical guidance on the matter of payment for legal services. It covers the proper ways to establish and document a fee arrangement so as to prevent problems later; it also provides caveats as to practices that may result in confusion or disputes regarding fees. Finally, the chapter addresses practices and procedures that apply to situations in which a fee or payment dispute is inevitable.

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Updated for the 2013 Supplement by MCLE. Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
§ 1 INTRODUCTION

[A lawyer is] bound by professional standards of conduct and duties of loyalty and confidentiality that need not trouble a merchant. [The attorney] has every right to collect his bills, but he must do so in compliance with the ethics of the profession which command that he not sink entirely to that level of ruthlessness which may pass unnoticed in the ruck of the marketplace.

Bar Counsel v. Spallina, Boston BBO 99–0001–BD at 18 (Jan. 22, 1999) (citing PR–94–2, 10 Mass. Att’y Disc. R. 309, 315). Perhaps no area of law presents as many potential pitfalls for the unsuspecting attorney as managing the minor miracle of getting paid in full for work performed. It is a challenge to maintain one’s ethical (and emotional) cool when confronted with the possibility of getting “stiffed” for a substantial fee. This chapter offers some guidance in that crucial moment when the adrenaline is still flowing and your instinct is to “sue the bastard.”

This chapter is intended to primarily address fee arrangements for payment from your clients, although it touches on fees to be paid by others for a client or from the proceeds of a settlement, sale, or business undertaking. Substantive treatment of the myriad of avenues for recovery of fees set by statute in specialized areas, e.g., workers’ compensation, or such issues as attorney fees awarded as part of damages judgments, is beyond the scope of this chapter. Rather, the suggestions below are meant to be of assistance in setting and collecting fees from clients and in providing some guidelines before resorting to unusual fee arrangements or “self-help.”

§ 2 AN OUNCE OF PREVENTION

You can avoid financial heartache by taking preventive measures at the outset and weeding out particular situations or clients who may later be problematic. What follows are some guidelines in an area where you will never win them all.

§ 2.1 Fee Agreements

(a) Written Communication Required

Rule 1.5 of the Massachusetts Rules of Professional Conduct, as amended effective January 1, 2013, requires that the client be informed in writing of “the scope of the representation and the basis or rate of the fee and expenses for which the
client will be responsible . . . before or within a reasonable time after commenc-
ing the representation.” Mass. R. Prof. C. 1.5(b)(1). Exceptions apply only in the
case of a regularly represented client handled on the same basis or rate or “a
single-session legal consultation or where the lawyer reasonably expects the total
fee to be charged to the client to be less than $500.” Mass. R. Prof. C. 1.5(b)(2).

(b) Contingent Fee Agreements

Mass. R. Prof. C. 1.5 requires that with limited exceptions (applicable to com-
mercial account collections and insurance company subrogation claims) all con-
tingent fee agreements must be in writing and satisfy a number of specific re-
quirements. Mass. R. Prof. C. 1.5(c), (f). Model forms for this purpose are set
forth in Mass. R. Prof. C. 1.5(f).

Note that you cannot contract for a contingent fee in criminal matters or domes-
 tic relations cases that are contingent on securing a divorce, property division, or
support. Mass. R. Prof. C. 1.5(d). However, once a divorce is final, you may
enter into a contingent fee agreement for the collection of delinquent child sup-
port or other payments. See BBA Ethics Op. 2001-A. This must not include fu-
ture child support payments, and is often a dubious practice where the amount
owed is readily established. This does not allow you to attempt to enforce such
obligations through criminal contempt proceedings. See MBA Ethics Op. 94-4.

In drafting contingent fee agreements and seeking to enforce them, it is im-
portant to be aware of a 2001 amendment to Mass. R. Prof. C. 1.5(c)(5) that ad-
dresses the manner of calculating the contingent fee where an award of attorney
fees is included in the amount recovered. The rule provides that unless the par-
ties otherwise agree in writing, “the lawyer shall be entitled to the greater of
(i) the amount of any attorney’s fees awarded by the court or included in the
settlement or (ii) the amount determined by application of the percentage or oth-
er formula applied to the recovery amount not including such attorney’s fees.”

This amendment, which became effective on January 2, 2001, was promulgated
in response to the Supreme Judicial Court’s enunciation of a “default rule” for
calculation of attorney fees in situations like the one described in Cambridge
Trust Co. v. Hanify & King Professional Corp., 430 Mass. 472 (1999). In that
case, the client and the firm disagreed as to whether the contingent fee percent-
age was to be applied to the total settlement amount (which included damages
and attorney fees) or just to the damages. The court held that “where a conti-
genent fee agreement is ambiguous or silent as to how attorney’s fees are to be
treated, the contingent percentage must be calculated on the total amount minus
the court-awarded fees, with the attorney awarded the greater of the two amounts.”
Cambridge Trust Co. v. Hanify & King Prof’l Corp., 430 Mass. at 478–79. Thus,
if the court-awarded fee is greater, the attorney receives the court-awarded fee only. If the contingent fee is greater, the court-awarded fee offsets the amount owed the attorney under the contingent fee agreement, and the client “should be directed to pay to counsel only the difference between the statutory award and the contingent fee.” Cambridge Trust Co. v. Hanify & King Prof’l Corp., 430 Mass. at 481; see R.W. Granger & Sons, Inc. v. J & S Insulation, Inc., 61 Mass. App. Ct. 92, 97–99 (2004) (discussing structure of contingent fee agreement).

Unless the default rule is acceptable, contingent fee agreements must specifically address the issue of whether attorney fees awarded by a court or included in a settlement are to be included in the amount against which the contingent fee percentage is to be applied. Thus, while it is not unethical to provide for a contingent fee percentage of the total amount recovered, including attorney fees, this provision must be specified or the default rule will be applied. Agreement Form A in Mass. R. Prof. C. 1.5(f) sets forth the default rule; Paragraph 4 of Form B sets forth the default rule with a bracketed instruction to modify the rule “as appropriate.”

“A lawyer who uses Form A does not need to provide any additional explanation to a client beyond that otherwise required by [Rule 1.5].” Mass. R. Prof. C. 1.5(f)(2). Form B contains alternative provisions in Paragraphs (3) and (7), concerning costs and expenses and responsibility for payments to former counsel; these provisions must be shown and explained to the client and may be incorporated only after the client’s informed consent is confirmed in writing for each selected option. Other forms consistent with Rule 1.5 may be used in lieu of Forms A and B, subject to the limitations set forth in Mass. R. Prof. C. 1.5(f)(3).

§ 2.2 Retainers

Particularly when a new client is involved, setting an inadequate retainer may be a prescription for a later dispute. There is no better time to determine whether a client is willing to pay your fee than at the outset of the case. In some cases, e.g., criminal defense, the retainer should be sufficient to cover all or substantially all anticipated work. In other areas of practice, a retainer typically should likely cover at least half of the estimated work, assuming a worst-case scenario. However, it must be acknowledged that few retainers, no matter how large, begin to cover the costs of trial, and such estimated costs should be discussed with the client up front. Note that you cannot charge a minimum nonrefundable fee. See Mass. R. Prof. C. 1.16(d); Mass. R. Prof. C. 1.5, cmt. [2]; MBA Ethics Op. 95-2. Retainers should always be held in an IOLTA (Interest on Lawyer Trust Account) or interest-bearing escrow account for the individual client. See Mass. R. Prof. C. 1.15(d) et seq.
It is permissible to enter into general retainer agreements in which standard monthly or other periodic retainers are charged to a client for the privilege of reserving your time whether or not the client requires your services. However, you cannot enforce payments due under such an agreement if you cannot document how you earned the payments. “[A] client’s discharge of an attorney ends the attorney’s right to recover on the contract of employment and, thereafter, an attorney can recover only for the reasonable value of his services on the basis of quantum meruit.” Provanzano v. Nat’l Auto Credit, Inc., 10 F. Supp. 2d 44, 51 (D. Mass. 1998) (citing Salem Realty Co. v. Matera, 384 Mass. 803, 804 (1981)) (noting that “fiduciary principles governing the attorney-client relationship are inconsistent with general retainer agreements” even where an attorney provides a lower rate based on a guaranteed monthly fee).

Even if competition in a particular area is pushing fees downward, underestimating fees or taking inadequate retainers is always dangerous. A withdrawal in midstream for nonpayment of fees may be difficult and land you in an ethical quandary. A judge may well be disinclined to allow concern about your fees to prejudice your client in any ongoing case. Furthermore, Mass. R. Prof. C. 1.5, cmt. [5] supports the argument that if you initially underestimate the fee to complete the transaction or proceeding, you may be unethically requiring the client to bargain later at a disadvantage for the assistance he or she needs.

§ 2.3 Billings
Especially for hourly fees, statements should be sent with appropriate frequency and additional retainers obtained as soon as necessary. No client wants to be surprised by a large and unexpected bill. Also, regular billings from the outset establish reasonable expectations and an appreciation of the costs of all services. Itemization is usually advisable; it allows you to remind the client of all the work performed and (hopefully) the good results achieved. Avoid favoring the client with a nondescriptive statement for a very large fee six months into the litigation, when the retainer was depleted months earlier.

Determine as soon as possible whether additional funds will be forthcoming from the client or whether there is a source of additional funds, e.g., from a sale of property. Obtain agreement in advance as to how these amounts are to be paid and confirm this in writing. As is discussed below, a request to withdraw from a case is always better earlier than later.

§ 2.4 Selectivity
The ability to be selective and look with a critical eye on a potential client can avoid later fee disputes. Analyze with the client the potential for recovery and
the expected results in the case in relation to the expenditure of fees and other
costs, such as experts, and discuss this in advance with the client. Be realistic.
No one is less willing to pay a fee than a client who is disappointed in his or her
inflated expectations. If you cannot abide the client, or if the client has had five
other attorneys, none of whom have done a satisfactory job in the client's estimation,
this may well be a case you will ultimately regret taking.

It is not unethical to decline to take a case. However, you may create an attor-
ey-client relationship even without formally accepting a client or receiving a
fee. Be careful not to inadvertently create reliance so as to form an attorney-
817–20 (1983) (finding an attorney liable for malpractice although the attorney
did not formally accept the plaintiff as a client); Mass. R. Prof. C., Scope (3)
(“Whether a client-lawyer relationship exists for any specific purpose can de-
pend on the circumstances and may be a question of fact”). Learning how to say
“no” gracefully is a valuable art and should be used as soon as needed. Referrals
to other attorneys may be a welcome way to manage this problem.

§ 2.5 Securing the Fee

If your fee will be paid from sources other than the client's own funds, such as
proceeds of other litigation or proceeds of a sale, confirm the arrangement in
writing. Should documents other than the fee agreement be necessary to secure
these arrangements (e.g., a note or mortgage), draft and obtain signatures on
these now. Other attorneys who are responsible for handling the proceeds in such
transactions may well request confirmation in writing from the client directing
them to make payment to you. Later, you will have to chase the funds or possi-
bly sue the client. Other attorneys cannot protect your fee if you have not pro-
tected it yourself. However, beware of overreaching: business transactions with
clients or notes and mortgages in some situations may not be ethical, as discussed
in § 3, Pitfalls to Avoid in Securing the Fee, below.

§ 2.6 Time Records

Even when your fee arrangement with the client is not hourly, if a dispute later
arises, you may rue not having kept records of your time expended. If there is
ever a fee dispute, or if your client wishes to change attorneys, the value of your
services and the amount that you may be able to recover will depend on a num-
ber of factors. These include both your contract with the client and the extent of
the work you actually performed.
In a worst-case scenario, failure to substantiate your bills could subject you to a Chapter 93A action. The court could require you to pay your former client’s counsel’s attorney fees for his or her defense against your suit for undocumented and thus “unfair” fees. See Sears, Roebuck & Co. v. Goldstone & Sudalter, P.C., 128 F.3d 10, 19–20 (1st Cir. 1997) (applying Massachusetts law). In Sears, Attorney Goldstone purchased Attorney Sudalter’s practice and billed a former client, Sears, for past work. Sears paid most of the bills but then sued for an accounting. Goldstone was held liable for almost more than $1 million in past payments, as well as $112,000 in opposing counsel’s attorney fees on his admission that he had no personal knowledge of Sudalter’s billing practices.

Rendering legal advice and representation is not in itself engaging in trade or commerce with a client within the meaning of Chapter 93A. See Provanzano v. Nat’l Auto Credit, Inc., 10 F. Supp. 2d 44, 52 (D. Mass. 1998) (citing Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 462–63 (1997)). Nor can a claimant make a Chapter 93A claim or counterclaim against an attorney merely for commencing litigation without other evidence of the attorney’s participation in trade and commerce with the claimant. See First Enters., Ltd. v. Cooper, 425 Mass. 344, 347–48 (1997). However, as mentioned above, it may be a Chapter 93A violation for attorneys to fail to keep sufficient records. Moreover, G.L. c. 93, § 49 targets attorneys who collect debts for a third-party creditor in an “unfair, deceptive, or unreasonable manner,” and creates liability under G.L. c. 93A, § 9(3) actions.

Horror stories aside, there is a positive incentive to maintain good records. Even if your client takes his or her lucrative contingent fee case to another attorney just before settlement, you can at least receive payment for the value of the services you have already performed on a quantum meruit basis. If you contracted for a contingent fee and received a settlement offer, you should document this in writing, as it supports at least a baseline value for your services.

Based on your clearly documented contingent fee agreement, the court may uphold your right to a percentage fee and not limit your fee to a “lodestar” standard in a complicated settlement award, even if you withdrew from the case. See Smith v. Consalvo, 37 Mass. App. Ct. 192, 196–99 (1994) (holding that 42 U.S.C. § 1988’s legal expense standards do not necessarily make a contingent fee agreement inapplicable). In other cases, while “narrative bills” may suffice, “contemporaneous time records go a long way to document a claim for attorney’s fees.” Arlington Trust Co. v. Caimi, 414 Mass. 839, 848 (1993).

It is a great waste of what could otherwise be fee-producing hours to later try to resurrect the history of work performed months or years before. Much time, such as telephone conversations, will never be reclaimed. A lack of good records can result in a substantial financial loss.
§ 3 PITFALLS TO AVOID IN SECURING THE FEE

The good business practice of making suitable arrangements to obtain security for the payment of a fee at the outset is a delicate matter with the potential to run afoul of the Massachusetts Rules of Professional Conduct and other guidelines for attorneys’ behavior. In general, disclosure requirements may apply to some of these transactions. The attorney must be careful to avoid acquiring an interest in any property that is the subject matter of the litigation for which he or she has been retained. In addition, once funds to cover the fee have been secured, if an amount remains in dispute, it must be held in escrow pending resolution. See § 3.3, Escrow Funds or Joint Checks, below.

The following paragraphs describe situations that require particular caution.

§ 3.1 Business Transactions with Clients

An attorney may wish to enter into a potentially lucrative business deal with a client or take an ownership position in a client’s business, all or a portion of which may relate to securing a fee. The fee might be one already owed to the attorney or the fee for services to be performed in the business or other transaction.

In these situations, be aware of Mass. R. Prof. C. 1.8 and the courts’ interpretations of unethical transactions between clients and their attorneys. Rule 1.8 provides as follows:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.
A family relationship does not relieve attorneys of the burden of proving that they did not breach their fiduciary duty in performing a dual role as insurance agent and attorney-in-fact. See Cleary v. Cleary, 427 Mass. 286, 292–94 (1998). An attorney’s failure to advise his or her client to seek independent advice is evidence, if not proof, that the transaction is not fair and that the attorney violated his or her fiduciary duty. See Cleary v. Cleary, 427 Mass. at 290–91.

Attorneys who act as both legal counsel and real estate brokers for their clients may be disciplined, especially where they fail to fully disclose the potential conflicts inherent in such a dual role, and fail to obtain their clients’ informed consent. See In re Lake, 428 Mass. 440, 442–45 (1998).

Rule 1.8(a)(1) of the Massachusetts Rules of Professional Conduct requires an agreement between an attorney and a client to be “reasonably understood by the client.” Rule 1.4(b) states, “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Thus, you should fully disclose any potential conflicts with dual relationships with your clients, and obtain their informed consent by having them sign a plainly worded agreement.

Entering into business transactions with a client can also open you up to claims by nonclients or adversaries. See Coggins v. Mooney, No. 94-0844, 1998 WL 156998, at *13–14 (Mass. Super. Ct. Apr. 3, 1998) (Chapter 93A liability may be incurred when an attorney or firm “joins its client in marketplace communications to the adversary rather than merely relays its clients’ positions; and if those marketplace communications knowingly or carelessly turn out to be false, misleading, and harmful”), judgment aff’d sub nom. Miller v. Mooney, 431 Mass. 57 (2000). Thus, you should use caution before engaging in business or “marketplace communications” that are not necessarily on the clients’ behalf.

The Supreme Judicial Court appears to have set somewhat differing standards for disclosure by attorneys depending on whether the business transaction involves only security for attorney fees or is unrelated to fees. If the transaction is unrelated to attorney fees, the attorney has the burden of showing that he or she had no undue influence over the client as a result of the attorney-client relationship or that any such undue influence has been neutralized by the client’s obtaining independent legal advice or other means. In Pollock v. Marshall, 391 Mass. 543, 556–60 (1984), the Supreme Judicial Court found that the financial sophistication of the client, who fully understood and consented to all aspects of the transactions, was sufficient to negate any presumption of undue influence or unfairness. In two earlier cases, the court set aside attorney-client business transactions where the clients were less sophisticated. See Israel v. Sommer, 292 Mass. 113, 122–23 (1935) (where client was reluctant to enter the transaction and neither knew of nor understood all its terms); Goldman v. Kane, 3 Mass.
App. Ct. 336, 341 (1975) (where the transaction was fundamentally unfair and the attorney was overreaching).

Entering into a business arrangement with a client, when it also involves securing your fee (whether in the same or in other matters), always brings into question whether you will be able to exercise independent professional judgment for the client where this may conflict with your own interests. You may also run afoul of Mass. R. Prof. C. 1.8 if the matter is in litigation, as discussed below. For example, you may wish to sell a property you own with a client to obtain substantial fees that are due to you, while the client wishes to retain the property for other reasons. Therefore, if you enter a business arrangement with a client, whether to secure fees or otherwise, be careful to do the following:

- Make certain that the client understands that you may have different financial and other interests in the transaction than the client, and that these may affect your professional judgment. Also make sure that the client has consented after full disclosure, as required by Mass. R. Prof. C. 1.8(a)(1).

- Advise the client to obtain independent legal advice before entering into the transaction with you, particularly if your client is not sophisticated in business or finance. You may be presumed to have undue influence over an unsophisticated client that can be neutralized only by advising the client to obtain independent counsel ahead of time. See Mass. R. Prof. C. 1.8(a)(2).

- Make certain that your disclosures to the client and advice to obtain independent counsel are all confirmed in writing, plainly worded, and preferably signed by both you and the client. See Mass. R. Prof. C. 1.8(a)(3).

§ 3.2 Notes and Mortgages

Rule 1.8(j) of the Massachusetts Rules of Professional Conduct prohibits a lawyer from acquiring a proprietary interest in the cause of action or subject matter of litigation that he or she is conducting for a client. However, the rule provides that an attorney may acquire “a lien granted by law” to secure attorney fees or expenses and may contract with a client for a reasonable contingent fee in a civil case. Attorneys may also advance court costs and expenses of litigation with repayment contingent on the outcome of the case. Mass. R. Prof. C. 1.8(e)(1).

In general, an attorney is not prohibited from taking a note and mortgage from a client to secure a fee except if the property in question is the subject of the litigation.
in which he or she is representing the client. Clearly, if the litigation involves a question of ownership, title or other issues pertaining to certain property, an attorney cannot secure fees by taking a mortgage or other interest in that property. In a domestic relations or other case where ownership of property is at issue, whether you can take a mortgage on property depends on whether proceedings have been concluded and ownership of the property has been determined, as discussed below.

Taking a note or mortgage to secure fees from a client can potentially be fraught with the same difficulties discussed above regarding business transactions with clients. For example, if the attorney wishes to establish an interest rate for the amount due, this begins to look like a business transaction in which the appropriate disclosures and advice to obtain independent counsel may apply. In addition, it may be best to have the note, mortgage, or any other documents prepared by another attorney or an independent attorney for the client.

In Widett & Widett v. Snyder, 392 Mass. 778 (1984), the Supreme Judicial Court upheld an arrangement by which an individual signed a note to a law firm for unpaid fees and secured it by a fourth mortgage on the home owned by him and his wife, both parties signing the mortgage themselves. The court found that this was not a “business transaction” between the attorney and the client but rather “an arrangement, made by sophisticated clients, to pay an amount admittedly due the law firm for legal services rendered.” Widett & Widett v. Snyder, 392 Mass. at 782. In these circumstances, the court found that the firm was not obligated to advise the clients to seek independent legal advice. However, these were found to be sophisticated clients. As (former) Bar Counsel Klubock and chief Bar Counsel Vecchione note, disclosure requirements applying to business transactions could be found to apply to such arrangements “at least to the extent that the attorney may be obligated to insure that the client understands and consents freely to the transaction.” D. Klubock & C. Vecchione, “Entering Into Business Transactions with Clients,” 13 M.L.W. 1776. Klubock and Vecchione promise that bar counsel will “carefully scrutinize” any complaints involving such transactions and “the fact that the attorney may not have believed that he was expected to protect the client’s interest under such circumstances will not be the end of the inquiry.” D. Klubock & C. Vecchione, “Entering Into Business Transactions with Clients,” 13 M.L.W. 1776; see also Fanaras Enters., Inc. v. Doane, 423 Mass. 121 (1996).

Under certain circumstances, a court may at least partially enforce a client’s agreement to assign an attorney a claim in a pending action. In an exceptional case, attorneys recovered as assignees on their client’s claims, and the court permitted the attorneys to maintain a claim in their own names against the defendant. The client had previously given to the attorneys, and then defaulted on, a promissory note. See Berman v. Linnane, 424 Mass. 867, 869–71 (1997), appeal
after remand, 434 Mass. 301 (2001). The client’s defaulted note was secured by a mortgage on a property that was the subject of the litigation. The court emphasized that the client gave the note to the attorneys for services previously rendered, and that therefore, the attorneys had a prior independent interest in the claim. The court refused, however, to award the attorneys their fees in collecting against the client on the defaulted note. The court also refused to enforce the fee agreement fully. The agreement awarded the attorneys an additional 40 percent of any proceeds that remained after satisfying both the client’s preexisting debt and the attorneys’ additional fees in pursuing the claim against the defendant. Noting that Mass. R. Prof. C. 1.5(a) prohibits attorneys from agreeing to take a clearly excessive fee, the court limited the attorneys to their “reasonable” hourly fees and refused to enforce recovery of an additional percentage of the remaining balance.

In domestic relations cases, the question as to the propriety of an attorney taking a note or mortgage to secure fees may depend on the status of the proceedings and the properties at issue. The Massachusetts Bar Association Committee on Professional Ethics has issued Opinion 91-1, 19 M.L.W. 1847, which found that a promissory note secured by a mortgage on the marital home was unethical. The mortgage was taken as a retainer for the divorce and the home was “foreseeably part of the subject matter of the divorce.” However, on a second set of facts discussed in the same opinion, the committee determined that it was not unethical for an attorney to take a note and mortgage from a client after the conclusion of the divorce proceeding on property that had been awarded to the client in that proceeding. The committee also advised that an assignment to the attorney of a promissory note given by the adverse spouse to the client was proper, after the conclusion of all proceedings.

Although not specifically addressed in the above opinions, an attorney taking a mortgage on property of a client must also make certain that all parties who own the property have signed the mortgage, if necessary. For example, a mortgage given by one party to a tenancy by an entirety will probably be of no force and effect. These opinions also do not address the question of the status of other creditors at the time of the taking of the note or mortgage. Clearly, if the attorney has knowledge of financial circumstances that could lead to the conclusion that a court might consider such a transaction a fraudulent conveyance, it is certainly best to avoid the transaction.

§ 3.3 Escrow Funds or Joint Checks

You must establish an IOLTA escrow account to hold funds specifically intended for attorney fees, or you must hold such funds in a separate account in trust for the client. Rule 1.15(d)(2) of the Massachusetts Rules of Professional Conduct allows an attorney to withdraw funds for earned fees directly from such an ac-
count unless there is a dispute. Establish an agreement on the procedure with your client beforehand, preferably in writing. For example, your fee agreement should confirm that the fund’s purpose is to pay attorney fees in the first place, or you may need to document the client’s assent to paying your fees from a particular fund, e.g., an escrow for sale proceeds. Preferably, the client should receive the bill for services in advance or at least contemporaneously with the removal of the fees, and will have already approved of this procedure. For example, you have just received fees from a sale of the client’s real estate and you wish to deduct fees owed to your office for this or other matters from these proceeds. Be certain that you have confirmed this with the client in advance. If the client has not already assented in writing, confirm in writing your oral agreement with the client. As a practical matter, do not wait until you receive funds to present the client with bills for years of work on other matters, which will almost certainly result in a fee dispute.

Often, attorneys receive checks made payable to both the client and the attorney or made payable to the attorney for the client. Of course, it is not proper to endorse the client’s name without express written authorization by the client. These funds should be treated no differently than any other funds held for a client; only fees that the attorney and client have agreed can be taken from these funds may be withdrawn.

If a client disputes all or a portion of the fee that you are planning to remove from an escrow account, you must comply with Mass. R. Prof. C. 1.15(c). This rule provides that “the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.” For example, if your client owes you $2,500 and the client disputes $1,000 of this, you may only remove $1,500 from the account and the balance must be held in escrow until all questions regarding the fee are resolved. For any fee that a client has disputed or questioned, endeavor to obtain the client’s agreement in writing confirming that the funds may be withdrawn.

Finally, be aware of G.L. c. 221, § 51, which targets attorneys who unreasonably neglect to transfer money collected for a client to the client on demand. This obscure statute makes an attorney liable for the original debt plus five times the lawful interest on the money from the time of demand, and “expresses the public abhorrence for the breach of the obligation of an attorney at law promptly and fully to account to clients for collections made on their behalf.” Griffiths v. Powers, 216 Mass. 169, 170 (1913), cited in Alperin, Howard J., Summary of Basic Law (14C Massachusetts Practice Series) § 20.367 (West 1996)); see also In re Johnson, 444 Mass. 1002 (2005) (imposing disbarment).
**§ 3.4 Receipt of Other Property or Services**

Clients without funds are prone to offer everything from diamond rings to painting your house in exchange for legal services. Under Mass. R. Prof. C. 1.8, cmt. [1], an attorney may agree to accept products and services that the client “generally markets to others,” where the lawyer has no advantage in dealing with the client. Thus, bartering for “in-kind” payment is permissible as long as the attorney receives the bartered goods at the standard price at which the client markets them to others. Mass. R. Prof. C. 1.8, cmt. [1].

While there is nothing that directly prohibits receipt of such items of value or services in exchange for your services, this course of action is fraught with difficulties. Keep in mind the following:

- Make certain that the property is not going to become the subject of the litigation or is not otherwise problematic, such as stolen property.

- Determine what the property would otherwise sell for and have this confirmed in writing by an impartial third party. You do not want to exchange $10,000 of legal services for property that has been marketed, and even insured, for $10,000, but that would fetch only $4,000 if resold. Conversely, if the property appraises at $10,000 and the legal services were worth only $4,000, you may be liable for exploiting the fiduciary relationship.

- If services are to be exchanged, how are they valued? What if the client wishes to change attorneys in midstream or the client cannot complete the services?

- Remember that you must report the value of such goods or services as income for tax purposes. Be certain to consult your accountant for advice on the appropriate way to handle these transactions for tax purposes.

**§ 4 FEE DISPUTES**

[T]he beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

Mass. R. Prof. C. 1.6(b)(2), cmt. [19].
There comes a time in every attorney’s life when, despite the diligence and competency of your representation, the excellence of the results, and the reasonableness of your bill for services, the client simply refuses to pay. You may be in the middle of a highly contested case, the client may or may not wish to have you continue representation, or you may just have achieved a favorable settlement for the client. The considerations are different at each stage of the proceedings.

Consider the following, which are discussed in the order in which they are likely to arise.

§ 4.1  Negotiating an Accommodation with the Client

Often, a client may question or dispute only a particular charge or portion of a bill. Rather than holding your ground for every last dime, sometimes small concessions can avoid what can become a larger fee dispute. Handling the client’s questions in a courteous, rather than defensive, manner and giving credit for the disputed charge may reap payment of the bill and salvage the attorney-client relationship, if that is your goal.

If the client objects to payment of a large portion of the bill, consider the other alternatives set forth below before rejecting a compromise amount. If the case is at an end point, inquiring as to what the client feels is “fair” and making some adjustments is often far more productive than expending additional hours in arbitration, suit, or defending your fee. It is best to confirm such arrangements in writing with the client, e.g., that you will deduct a given amount from the bill if paid within a certain time. Remember that you can never attempt to obtain a release from any alleged malpractice claims in fee negotiations. See Mass. R. Prof. C. 1.8(h).

§ 4.2  Withdrawing from Representation

You may be in the midst of an ongoing case, with the client unwilling to either pay an outstanding bill or pay the additional retainer requested. You must decide relatively quickly whether there are acceptable and ethical means for securing your fee so that you can continue with the case or whether it will be necessary for you to withdraw from representation of the client. Depending on the procedural posture of the case, you may need court approval to withdraw. The court may refuse to grant this approval, leaving you in the unenviable position of having to continue representing a nonpaying client who is now also infuriated that you tried to ditch him or her in the middle of the case. This is not an auspicious scenario for getting paid. No doubt, next time you will get a more adequate retainer; however, in the interim, consider the following.
Except for specific situations involving an attorney becoming a witness in a case, Mass. R. Prof. C. 3.7, or conflicts of interest, Mass. R. Prof. C. 1.7, applicable court rules and Mass. R. Prof. C. 1.16 govern withdrawal from employment. Even if the client has discharged you, you still must obtain the permission of the court or other tribunal if required by its rules, as set forth in Mass. R. Prof. C. 1.16(c). Whether or not your client agrees to your withdrawal or even wrongly discharges you, Mass. R. Prof. C. 1.16(d) requires the attorney to first take “steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned.” Furthermore, Mass. R. Prof. C. 1.16(e), discussed in greater detail below, provides a checklist of work product that a withdrawing attorney must make available to the former client within a reasonable time on request.

Remember that your obligations to represent a client competently, Mass. R. Prof. C. 1.1, and zealously within the bounds of the law, Mass. R. Prof. C. 1.3, are independent of your right to be paid. Until the client discharges you or the court allows you to withdraw from ongoing litigation, you may not withhold services or stint on necessary work in the hope of prompting payment. While you should make the client aware that you may request withdrawal, you may not, for example, fail to file a document with the court in a timely fashion because you have not been paid. On the other hand, it is not necessary for you to undertake costly and time-consuming work that is not required by any time schedule or order of the court, such as depositions, if the client is unable to make satisfactory fee arrangements. However, it is important to determine as soon as possible whether you will continue to represent the client so that the case may proceed.

Discuss your possible withdrawal from the case ahead of time with your client. As a matter of simple courtesy, your client is entitled to know of your proposed withdrawal before you send such a request to the court or inform opposing counsel. A frank and courteous discussion of this option with your client, who mercifully may not be aware that it may be difficult for you to withdraw, often produces newly found resources for payment of your fee.

It is important to avoid any possible prejudice to your client. Do not time your attempt to withdraw immediately before important scheduled dates in the case, e.g., depositions, filing deadlines, or the like. Do not disclose to the other side the nature of any disagreements between you and your client, some of which may have a bearing on the litigation at hand. Thus, be circumspect and honor client confidences in the drafting of motions to withdraw or affidavits.

If a trial or other contested hearing date has already been scheduled in the relatively near future, a court may well not allow you to withdraw. This is a delicate situa-
tion and the maintenance of a good relationship with your client now may be cru-
cial to your getting paid later. If you are required to stay in the case, it is always
possible that there will be assets or other means of obtaining payment in the future,
and an ongoing amicable relationship with your client will serve you well.

If you withdraw in the middle of the case and the client already owes you funds
on outstanding bills, unless it is a suitable case for an attorney’s lien, discussed
below, do not hold your breath waiting for payment. You have cut your losses
and if either a later attorney or your ex-client is good enough to take care of your
bill, consider it a windfall.

Even if the client has not paid your fee, under Mass. R. Prof. C. 1.16(e), an attor-
ney must deliver to the client the following:

- all documents and materials the attorney received from the client,
  although the attorney may retain copies at his or her own expense;

- all pleadings and any papers filed in or by the court or served by
  or on any party (the attorney may charge the client his or her ac-
tual costs for photocopying, unless the client has already paid for
  these materials);

- all discovery and investigatory materials for which the client has
  already paid the attorney’s out-of-pocket expenses, although the
  attorney may keep copies; and

- that portion of the attorney’s work product (e.g., drafts) for which
  the client has paid (except if there is a contingent fee agreement,
  in which case all work product must be given to the client); the
  client may be required to pay the attorney’s actual costs for copies.

Your contract with the client may control the payment of copying costs for the
file, which may be significant; thus, fee agreements should now specifically
provide for such charges. See MBA Ethics Op. 92-4.

Therefore, when a client for any reason requests his or her file, whether you or
the client is the disgruntled party, immediately do the following:

- Promptly deliver to the client all original documents or other
  items turned over to your office, all investigative materials for
  which the costs have been paid, and any work product for which
  the client has paid.

- Prepare a complete list of all items you are turning over to the cli-
  ent and have the client sign a receipt for these items at the time of
delivery. You should keep the original receipt and give your client (or former client) a copy.

- Unless subsequent counsel has already been retained and filed an appearance, or the court has already approved your withdrawal, try to keep copies of all items turned over to the client. The client, however unhappy, may not be able to obtain new counsel or the court may not let you withdraw. You may, therefore, have to continue representation and will have need of these documents. In addition, if the client later questions any of your actions or complains about your services or fees, you will want to have all of these materials available.

- Prepare a final statement of your services and forward it to the client and new counsel, particularly if there is some possibility that your fee will later be paid. The diligence with which you pursue these fees will depend on the likelihood of recovery of the fee in the circumstances and perhaps on the degree of your relief at having no further obligations in the case.

§ 4.3 Enforcing an Attorney’s Lien

Despite statutory provision, much scholarly writing, numerous cases, and an encouraging-sounding ring to the words, the attorney’s lien in Massachusetts is often difficult to enforce and cumbersome in application. Nonetheless, the attorney’s lien may be a more effective tool than a contract action in protecting attorneys “against the knavery of their clients, by disabling the clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained.” Boswell v. Zephyr Lines, Inc., 414 Mass. 241, 248 (1993) (quoting In re Heinsheimer, 108 N.E. 636, 637 (N.Y. 1915)).

Under G.L. c. 221, § 50, attorneys may assert a claim for reasonable attorney fees and expenses against proceeds derived from a judgment related to these fees and expenses. This statutory lien is distinct from a common law contract or quantum meruit claim to reimburse an attorney for services performed for another, unrelated matter.

The statutory attorney’s lien is a “charging lien,” and is distinct from a “retaining” lien. A “retaining” lien is a claim in which an attorney asserts an interest in retained fees or files. Notwithstanding an obscure reference in G.L. c. 255, § 32 to dissolving attorneys’ claims on “books, papers, documents or other personal property,” Mass. R. Prof. C. 1.16(e)(7) implicitly prohibits retaining liens. “[A] lawyer may not refuse, on grounds of nonpayment, to make available materials
in the client’s file when retention would prejudice the client unfairly.” Mass. R. Prof. C. 1.16(e)(7).

Charging liens, in contrast, merely protect attorneys’ interests after judgment, as well as serving the public’s interest in encouraging attorneys to provide legal services to clients who might not otherwise have access to legal services.

Which body of law applies to an attorney’s lien in an action in federal court? Whether the underlying case regards a federal question or diversity action, the lien is a “fee dispute” that probably falls within the ancillary or supplemental jurisdiction of the court, which will probably apply the forum state’s lien laws. “A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.” Servicios Comerciales Andinos, S.A. v. Gen. Elec. del Caribe, Inc., 145 F.3d 463, 479 (1st Cir. 1998) (citing the Restatement (Second) of Conflict of Laws § 122) (holding that attorney fees should be determined under the laws of the forum state). Furthermore, the question may be moot. “A federal court sitting in diversity need not make a finding regarding which state’s law is to be applied where the case’s resolution would be identical under either state’s law.” Fratus v. Republic W. Ins. Co., 147 F.3d 25, 28 (1st Cir. 1998).

Keep in mind the following points with respect to the enforcement of statutory (“charging”) attorney’s liens:

- You must not continue to represent a client while seeking to enforce a lien against him or her. See Bar Counsel v. Spallina, Boston BBO, 99–001–BD at 18 (Jan. 22, 1999) (finding a conflict of interest in contemporaneously suing a client and representing him).

- You can only seek to enforce a lien for reasonable fees and expenses against the proceeds obtained from a judgment entered in the client’s favor in the same proceeding in which you represented the client and incurred the fees. Any type of court order, including a settlement or decree in your former client’s favor, may constitute a “proceeds of a judgment” for the purposes of the lien. See Cohen v. Lindsey, 38 Mass. App. Ct. 1, 4–5 (1995). The attorney can recover costs and the reasonable value of services rendered in that particular action. This is not a general lien for other amounts due, past balances, or work performed on other cases.

- For the purpose of enforcing a lien, a dismissal (even if by agreement) is a judgment. In Craft v. Kane, 51 Mass. App. Ct. 648 (2001), an attorney was found to be entitled to a statutory lien against fire insurance proceeds held by an executor under a con-
structive trust for the client. Finding that the lien arose on the commencement of the client’s suit against the executor, the court held that it remained unaffected by a subsequent stipulation and order of dismissal. Allowing the dismissal of the suit to wipe out the attorney’s lien, the court reasoned, would “violate the policy established by the statute, namely, ‘protect[ing] attorneys . . . by disabling the clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained.’” Craft v. Kane, 51 Mass. App. Ct. at 652 (quoting PGR Mgmt. Co. v. Credle, 427 Mass. 636, 640 (1998)).

- You must have either a well-documented quantum meruit claim or a valid contract for the fees. While this need not be in writing, a written fee agreement’s value will be inestimable here. If the agreement does not cover your work as an associated attorney, compensation for your time may not be recoverable. See Boswell v. Zephyr Lines, Inc., 414 Mass. 241, 246–47, 249–51 (1993).

- You must file a timely petition to ask the court to enforce the statutory lien. You can bring the petition in Superior Court if the proceeding is not pending in another court. You need not itemize your bill in this petition, and you may later amend the amount. See Cohen v. Lindsey, 38 Mass. App. Ct. 1, 6 (1995) (“Filing an attorney’s lien for a specific amount does not entitle an attorney to fees in that amount, nor does it limit the court in its determination of reasonable fees for services rendered.”).

- Once the court accepts your motion to “enforce” the lien, it must “determine” the amount of the lien, which will typically require a hearing on your detailed statement of services rendered. A judge may determine the amount of reasonable fees based on his or her own “observations of the relevant factors during trial.” Cohen v. Lindsey, 38 Mass. App. Ct. at 6 n.10. In some cases, the attorney will have to sue the client in a separate contract (or tort, in the case of a counterclaim for malpractice) action, which may require a jury. Depending on the fee agreement, the attorney might bear the burden of identifying the nature of the work conducted for the client and providing documentation.

- Give notice to the party holding the funds to pay the judgment or settlement so that the funds to pay any lien established are not turned over directly to the client. In order to preserve your priority in a dispute among other creditors, you should also give timely notice of your claim to any interested or potentially interested par-
ties, including your former client and his or her new counsel. You may still have to argue for priority where a judgment involves “setoffs” for other parties. However, the Supreme Judicial Court has found that public policy compels enforcement of attorney’s liens over setoffs to encourage attorneys to provide legal services for the indigent. See PGR Mgmt. Co. v. Credle, 427 Mass. 636, 639–40 (1998).

- The attorney’s lien does not apply to specific real or personal property that is the subject matter of the litigation, or to property that the attorney or another may be holding for the client. It is also not a lien on the cause of action itself, but only on the proceeds of a judgment.

Forms for establishing, determining, and enforcing the lien, as well as to provide notice of the lien to the defendant and opposing counsel once the court has filed a judgment in your (former) client’s case, can be found at M. Perlin & S. Blum, Procedural Forms Annotated (10A Massachusetts Practice Series) § 2919 (West); R. Kenney, Jr. & T. Farris, Motor Vehicle Law and Practice (11 Massachusetts Practice Series) § 19.12 (West); and G.L. c. 221, § 50.

§ 4.4 Fee Arbitration

Attorneys should seek arbitration before suing their client in court. See Mass. R. Prof. C. 1.5, cmt. [9] (“[T]he lawyer should conscientiously consider submitting to mediation or an established fee arbitration service.”). The Massachusetts Bar Association (MBA) Legal Fee Arbitration Board may, however, arbitrate fee disputes already in suit, unless there has been a final adjudication by the court. The Legal Fee Arbitration Board does not have jurisdiction to make awards for matters pending before the Board of Bar Overseers (BBO). The BBO, however, frequently refers fee-related matters to the Legal Fee Arbitration Board if they do not involve other issues.

Many attorneys include a provision in their written fee agreements that both attorney and client agree to submit any fee disputes to the MBA (or other) Legal Fee Arbitration Board. Both parties must agree to be bound by the award of the arbitrators and the rules of the Legal Fee Arbitration Board. For a dispute in which the fee is more than $10,000, the board selects a three-member panel, made up of two attorneys and one layperson. For amounts of $10,000 or less, a single attorney arbitrator will hear the case. To find out what occurs at a hearing and other information, see A Guide to the Legal Fee Arbitration Board, available at http://www.massbar.org/for-attorneys/resources--services/fee-arbitration, and Rules of the Legal Fee Arbitration Board, available at http://
If arbitration awards you all or a portion of your fees and the client is still not forthcoming with payment, you may then enforce the award in Superior Court. Of course, actually collecting the fee from a client who had no funds to pay in the first place will remain as problematic after the decision of the arbitration board as before.

For a “Petition to Arbitrate a Fee Dispute,” model agreement forms, or for general information about MBA Legal Fee Arbitration, call the MBA at 617-338-0500.

§ 4.5 Suing Your Client

There is no prohibition against suing a client, presumably now a former client. Why not? After all, isn’t this what we do best? Before taking this step in haste, analyze all other options and weigh the pros and cons of such a suit. As Jeffrey M. Smith notes in an excellent article, “The Pitfalls of Suing Clients for Fees,” 69 ABA Journal 776 (June 1983): “It is not a step taken lightly. If it is taken precipitously, an attorney may collect only an ethics complaint, or a counterclaim for malpractice or breach of fiduciary duty—and no money.” For an extreme example, see Fishman v. Brooks, 396 Mass. 643 (1986). In this case, an attorney started by filing a complaint for declaratory relief for a nominal amount of attorney fees, and ended up paying his client $10,000 for “abuse of process” and $350,500, plus interest, in a malpractice award. More recently, a client lost his malpractice and Chapter 93A claim while his attorney won a counterclaim for more than $25,000 in unpaid fees. See Altschuler v. Flynn, Altschuler v. McCormack, Nos. 92–1628, 93–7229, 1998 Mass. Super. LEXIS 113 (May 27, 1998) (holding that to assert defense of breach of fiduciary duty against a suit for legal fees, the client must show a nexus between the fees claimed and the breach of duty).

At a time when moral certainties appeared more attainable, our legal ancestors preferred a principled rather than pragmatic approach to this problem, as stated in Canon 14 of the 1908 Canon of Ethics:

Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

Such restraint continues to be a praiseworthy goal.
In “The Pitfalls of Suing Clients for Fees,” Smith analyzes the economics of such a suit. An attorney should reduce any anticipated recovery by fees to others, costs, additional expenditure of billable time, after-tax dollars, risks of increased malpractice premiums due to counterclaims, and adverse public relations. As Smith aptly states:

These calculations are theoretical unless the money can be collected. This requires an analysis of the status of clients. Those who do not pay can be divided roughly into three categories:

1. Those with no money;
2. Those with some money but they need to use it for the necessities of life; and,
3. Those who have money but do not feel the services rendered were useful or at least not worth what the firm is charging.

None of these groups is a particularly attractive target for collection efforts since each has motivation to file counterclaims.


Certainly, the chief reason not to sue a client is the risk of an almost certain counterclaim for malpractice. No matter how unfounded, you will have to report this claim to your insurance carrier. This may or may not eventually result in an increase in your premiums. Smith estimates that at least 20 percent and perhaps more than 30 percent of all malpractice claims and counterclaims arise directly or indirectly from disputes over fees. Counterclaims are most likely to allege negligent rendering of services or breach of fiduciary duty.

Before deciding to sue a client, consider carefully all of the following:

- Are there funds or property from which the client will be able to pay the fee if you prevail? If the client or subsequent counsel is holding funds that may not be subject to an attorney’s lien but may be subject to trustee process, you at least have a fighting chance of seeing some recovery. However, in seeking a trustee process or other attachment, you must reveal only so much confidential information obtained from the client, e.g., bank accounts, as is “necessary” to effect collection. See the discussion of
Does the amount of the fee make the expenditure of additional time and funds worthwhile? If the fee is sufficiently large, you should retain other counsel, and this will be an additional expense. Your own time and effort in preparing for the suit and defending possible counterclaims must be taken into account in calculating the amount of any recovery.

Does the client have cause to complain about your services or the reasonableness of the fee? Even with no cause for complaint, is the client likely to complain anyway? A client who is already irate over your handling of a particular matter is not a good candidate for suit, even if you feel your conduct was beyond reproach.

Are you willing to run the risk of a complaint to the Board of Bar Overseers or a counterclaim for malpractice? Even if these are ultimately found to be frivolous, you must consider the time and aggravation involved in defending yourself.

If the answers to these considerations still persuade you that this is an appropriate case for a suit for legal fees, keep in mind the provisions of Mass. R. Prof. C. 1.6 that require the preservation of a client’s confidential information. Rule 1.6(b)(2) of the Massachusetts Rules of Professional Conduct allows an attorney to reveal so much of the client’s confidential information as is “necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.” A comment explicitly construes this to permit a lawyer entitled to a fee to prove the services rendered in an action to collect it. Nonetheless, it remains important to be circumspect in what information you select to reveal. The lawyer must make “every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.” Mass. R. Prof. C. 1.6(b)(2), cmt. [19]. While “the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary,” Mass. R. Prof. C. 1.6(b)(2), cmt. [19], a fee dispute does not provide an excuse to malign a client or reveal embarrassing information unrelated to the collection of the fee. Further, MBA Ethics Opinion 00-3 advises that “[a] lawyer may not report the failure of his clients to pay his bills to the major credit reporting services whether or not he institutes legal proceedings to collect those debts.”

Generally, prevention is the best medicine to ensure that you receive compensation for your hard work. Carefully assessing a potential client, his or her past
representation, and available resources, and maintaining written records of communications and billable work time will be your most effective means of avoiding the many pitfalls of getting paid after the fact. While even the most cautious measures cannot guarantee perfect results, they can deflect some of the difficulties and make the right choices easier to make.
SECTION 7.3

Formulating a Comprehensive Written Information Security Program*

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While the contents of any comprehensive written information security program required by 201 CMR 17.00 must always satisfy the detailed provisions of those regulations; and while the development of each individual program will take into account (i) the size, scope and type of business of the person obligated to safeguard the personal information under such comprehensive information security program, (ii) the amount of resources available to such person, (iii) the amount of stored data, and (iv) the need for security and confidentiality of both consumer and employee information, the Office of Consumer Affairs and Business Regulation is issuing this guide to help small businesses in their compliance efforts. This Guide is not a substitute for compliance with 201 CMR 17.00. It is simply a tool designed to aid in the development of a written information security program for a small business, including the self employed, that handles “personal information.”

Having in mind that wherever there is a conflict found between this guide and the provisions of 201 CMR 17.00, it is the latter that will govern. We set out

* Source: Office of Consumer Affairs and Business Regulation
below this “guide” to devising a security program (references below to “we” and “our” are references to the small business to whom the real WISP will relate):

**COMPREHENSIVE WRITTEN INFORMATION SECURITY PROGRAM**

**I. OBJECTIVE:**

Our objective, in the development and implementation of this comprehensive written information security program (“WISP”), is to create effective administrative, technical and physical safeguards for the protection of personal information of residents of the Commonwealth of Massachusetts, and to comply with obligations under 201 CMR 17.00. The WISP sets forth our procedure for evaluating our electronic and physical methods of accessing, collecting, storing, using, transmitting, and protecting personal information of residents of the Commonwealth of Massachusetts. For purposes of this WISP, “personal information” means a Massachusetts resident’s first name and last name or first initial and last name in combination with any one or more of the following data elements that relate to such resident: (a) Social Security number; (b) driver’s license number or state-issued identification card number; or (c) financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or password, that would permit access to a resident’s financial account; provided, however, that “personal information” shall not include information that is lawfully obtained from publicly available information, or from federal, state or local government records lawfully made available to the general public.

**II. PURPOSE:**

The purpose of the WISP is to:

(a) Ensure the security and confidentiality of personal information;

(b) Protect against any anticipated threats or hazards to the security or integrity of such information

(c) Protect against unauthorized access to or use of such information in a manner that creates a substantial risk of identity theft or fraud.

**III. SCOPE:**

In formulating and implementing the WISP, (1) identify reasonably foreseeable internal and external risks to the security, confidentiality, and/or integrity of any electronic, paper or other records containing personal information; (2) assess
the likelihood and potential damage of these threats, taking into consideration the sensitivity of the personal information; (3) evaluate the sufficiency of existing policies, procedures, customer information systems, and other safeguards in place to control risks; (4) design and implement a WISP that puts safeguards in place to minimize those risks, consistent with the requirements of 201 CMR 17.00; and (5) regularly monitor the effectiveness of those safeguards:

**DATA SECURITY COORDINATOR:**

We have designated _____ to implement, supervise and maintain the WISP. That designated employee (the “Data Security Coordinator”) will be responsible for:

(a) Initial implementation of the WISP;

(b) Training employees;

(c) Regular testing of the WISP’s safeguards;

(d) Evaluating the ability of each of our third party service providers to implement and maintain appropriate security measures for the personal information to which we have permitted them access, consistent with 201 CMR 17.00; and requiring such third party service providers by contract to implement and maintain appropriate security measures.

(e) Reviewing the scope of the security measures in the WISP at least annually, or whenever there is a material change in our business practices that may impact the security or integrity of records containing personal information.

(f) Conducting an annual training session for all owners, managers, employees and independent contractors, including temporary and contract employees who have access to personal information on the elements of the WISP. All attendees at such training sessions are required to certify their attendance at the training, and their familiarity with the firm’s requirements for ensuring the protection of personal information.

**INTERNAL RISKS:**

To combat internal risks to the security, confidentiality, and/or integrity of any electronic, paper or other records containing personal information, and evaluating and improving, where necessary, the effectiveness of the current safeguards for limiting such risks, the following measures are mandatory and are effective immediately. To the extent that any of these measures require a phase-in period, such phase-in must be completed on or before March 1, 2010:
Internal Threats

- A copy of the WISP must be distributed to each employee who shall, upon receipt of the WISP, acknowledge in writing that he/she has received a copy of the WISP.

- There must be immediate retraining of employees on the detailed provisions of the WISP.

- Employment contracts must be amended immediately to require all employees to comply with the provisions of the WISP, and to prohibit any nonconforming use of personal information during or after employment; with mandatory disciplinary action to be taken for violation of security provisions of the WISP (The nature of the disciplinary measures may depend on a number of factors including the nature of the violation and the nature of the personal information affected by the violation).

- The amount of personal information collected should be limited to that amount reasonably necessary to accomplish our legitimate business purposes, or necessary to us to comply with other state or federal regulations.

- Access to records containing personal information shall be limited to those persons who are reasonably required to know such information in order to accomplish your legitimate business purpose or to enable us comply with other state or federal regulations.

- Electronic access to user identification after multiple unsuccessful attempts to gain access must be blocked.

- All security measures shall be reviewed at least annually, or whenever there is a material change in our business practices that may reasonably implicate the security or integrity of records containing personal information. The Data Security Coordinator shall be responsible for this review and shall fully apprise management of the results of that review and any recommendations for improved security arising out of that review.

- Terminated employees must return all records containing personal information, in any form, that may at the time of such termination be in the former employee’s possession (including all such information stored on laptops or other portable devices or media, and in files, records, work papers, etc.)
• A terminated employee’s physical and electronic access to personal information must be immediately blocked. Such terminated employee shall be required to surrender all keys, IDs or access codes or badges, business cards, and the like, that permit access to the firm’s premises or information. Moreover, such terminated employee’s remote electronic access to personal information must be disabled; his/her voicemail access, e-mail access, internet access, and passwords must be invalidated. The Data Security Coordinator shall maintain a highly secured master list of all lock combinations, passwords and keys.

• Current employees’ user ID’s and passwords must be changed periodically.

• Access to personal information shall be restricted to active users and active user accounts only.

• Employees are encouraged to report any suspicious or unauthorized use of customer information.

• Whenever there is an incident that requires notification under M.G.L. c. 93H, §3, there shall be an immediate mandatory post-incident review of events and actions taken, if any, with a view to determining whether any changes in our security practices are required to improve the security of personal information for which we are responsible.

• Employees are prohibited from keeping open files containing personal information on their desks when they are not at their desks.

• At the end of the work day, all files and other records containing personal information must be secured in a manner that is consistent with the WISP’s rules for protecting the security of personal information.

• Each department shall develop rules (bearing in mind the business needs of that department) that ensure that reasonable restrictions upon physical access to records containing personal information are in place, including a written procedure that sets forth the manner in which physical access to such records in that department is to be restricted; and each department must store such records and data in locked facilities, secure storage areas or locked containers.
• Access to electronically stored personal information shall be electronically limited to those employees having a unique log-in ID; and re-log-in shall be required when a computer has been inactive for more than a few minutes.

• Visitors’ access must be restricted to one entry point for each building in which personal information is stored, and visitors shall be required to present a photo ID, sign-in and wear a plainly visible “GUEST” badge or tag. Visitors shall not be permitted to visit unescorted any area within our premises that contains personal information.

• Paper or electronic records (including records stored on hard drives or other electronic media) containing personal information shall be disposed of only in a manner that complies with M.G.L. c. 93I.

EXTERNAL RISKS

To combat external risks to the security, confidentiality, and/or integrity of any electronic, paper or other records containing personal information, and evaluating and improving, where necessary, the effectiveness of the current safeguards for limiting such risks, the following measures must be completed on or before March 1, 2010:

External Threats

• There must be reasonably up-to-date firewall protection and operating system security patches, reasonably designed to maintain the integrity of the personal information, installed on all systems processing personal information.

• There must be reasonably up-to-date versions of system security agent software which must include malware protection and reasonably up-to-date patches and virus definitions, installed on all systems processing personal information.

• To the extent technically feasible, all personal information stored on laptops or other portable devices must be encrypted, as must all records and files transmitted across public networks or wirelessly, to the extent technically feasible. Encryption here means the transformation of data into a form in which meaning cannot be assigned without the use of a confidential process or key, un-
less further defined by regulation by the Office of Consumer Affairs and Business Regulation.

• All computer systems must be monitored for unauthorized use of or access to personal information.

• There must be secure user authentication protocols in place, including: protocols for control of user IDs and other identifiers; (2) a reasonably secure method of assigning and selecting passwords, or use of unique identifier technologies, such as biometrics or token devices; (3) control of data security passwords to ensure that such passwords are kept in a location.
Exhibit A — 201 CMR 17.00 Compliance Checklist

The Office of Consumer Affairs and Business Regulation has compiled this checklist to help small businesses in their effort to comply with 201 CMR 17.00. **This Checklist is not a substitute for compliance with 201 CMR 17.00.** Rather, it is designed as a useful tool to aid in the development of a written information security program for a small business or individual that handles “personal information.” Each item, presented in question form, highlights a feature of 201 CMR 17.00 that will require proactive attention in order for a plan to be compliant.

### The Comprehensive Written Information Security Program (WISP)

- **Q** Do you have a comprehensive, written information security program (“WISP”) applicable to all records containing personal information about a resident of the Commonwealth of Massachusetts (“PI”)?
- **Q** Does the WISP include administrative, technical, and physical safeguards for PI protection?
- **Q** Have you designated one or more employees to maintain and supervise WISP implementation and performance?
- **Q** Have you identified the paper, electronic and other records, computing systems, and storage media, including laptops and portable devices, that contain personal information?
- **Q** Have you chosen, as an alternative, to treat all your records as if they all contained PI?
- **Q** Have you identified and evaluated reasonably foreseeable internal and external risks to paper and electronic records containing PI?
- **Q** Have you evaluated the effectiveness of current safeguards?
- **Q** Does the WISP include regular ongoing employee training, and procedures for monitoring employee compliance?
- **Q** Does the WISP include disciplinary measures for violators?
- **Q** Does the WISP include policies and procedures for when and how records containing PI should be kept, accessed or transported off your business premises?
Does the WISP provide for immediately blocking terminated employees' physical and electronic access to PI records (including deactivating their passwords and user names)?

Have you taken reasonable steps to select and retain a third-party service provider that is capable of maintaining appropriate security measures consistent with 201 CMR 17.00?

Have you required such third-party service provider by contract to implement and maintain such appropriate security measures?

Is the amount of PI that you have collected limited to the amount reasonably necessary to accomplish your legitimate business purposes, or to comply with state or federal regulations?

Is the length of time that you are storing records containing PI limited to the time reasonably necessary to accomplish your legitimate business purpose or to comply with state or federal regulations?

Is access to PI records limited to those persons who have a "need to know" in connection with your legitimate business purpose, or in order to comply with state or federal regulations?

In your WISP, have you specified the manner in which physical access to PI records is to be restricted?

Have you stored your records and data containing PI in locked facilities, storage areas or containers?

Have you instituted a procedure for regularly monitoring to ensure that the WISP is operating in a manner reasonably calculated to prevent unauthorized access to or unauthorized use of PI; and for upgrading it as necessary?

Are your security measures reviewed at least annually, or whenever there is a material change in business practices that may affect the security or integrity of PI records?

Do you have in place a procedure for documenting any actions taken in connection with any breach of security; and does that procedure require post-incident review of events and actions taken to improve security?
Additional Requirements for Electronic Records

- Do you have in place secure authentication protocols that provide for:
  - Control of user IDs and other identifiers?
  - A reasonably secure method of assigning/selecting passwords, or for use of unique identifier technologies (such as biometrics or token devices)?
  - Control of data security passwords such that passwords are kept in a location and/or format that does not compromise the security of the data they protect?
  - Restricting access to PI to active users and active user accounts?
  - Blocking access after multiple unsuccessful attempts to gain access?

- Do you have secure access control measures that restrict access, on a need-to-know basis, to PI records and files?
  - Do you assign unique identifications plus passwords (which are not vendor supplied default passwords) to each person with computer access; and are those IDs and passwords reasonably designed to maintain the security of those access controls?
  - Do you, to the extent technically feasible, encrypt all PI records and files that are transmitted across public networks, and that are to be transmitted wirelessly?
  - Do you, to the extent technically feasible, encrypt all PI stored on laptops or other portable devices?
  - Do you have monitoring in place to alert you to the occurrence of unauthorized use of or access to PI?

- On any system that is connected to the Internet, do you have reasonably up-to-date firewall protection for files containing PI; and operating system security patches to maintain the integrity of the PI?

- Do you have reasonably up-to-date versions of system security agent software (including malware protection) and reasonably up-to-date security patches and virus definitions?

- Do you have in place training for employees on the proper use of your computer security system, and the importance of PI security?
SECTION 8

Interest on Lawyer Trust Accounts

§ 8.1 Understanding Client Fund Accounts
Stephen M. Casey
  Massachusetts IOLTA Committee, Boston
Jayne B. Tyrrell, Esq.
  Massachusetts IOLTA Committee, Boston

§ 8.2 Records for Other People’s Money
Hon. Daniel C. Crane
  District Court, Commonwealth of Massachusetts
SECTION 8.1

Understanding Client Fund Accounts*

Stephen M. Casey
Massachusetts IOLTA Committee, Boston

Jayne B. Tyrrell, Esq.
Massachusetts IOLTA Committee, Boston

Scope Note
This chapter addresses attorneys' obligations to protect and maintain client funds, placing particular emphasis on the provisions of Rule 1.15 of the Massachusetts Rules of Professional Conduct. It begins with an overview of attorneys' responsibilities for client funds and the scope of Rule 1.15. It then sets forth guidelines for the deposit and disbursement of client funds and provides practical guidance on the handling of retainers. It concludes with a discussion of recordkeeping and reporting requirements.

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* Reprinted from the Massachusetts Basic Practice Manual (MCLE, Inc. 5th ed. 2015). Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct, including Mass. R. Prof. C. 1.15. The amendments are effective July 1, 2015.
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§ 1 INTRODUCTION

Rule 1.15 of the Massachusetts Rules of Professional Conduct ("Safekeeping Property") establishes the standards and guidelines by which lawyers are expected to manage client and third-party funds. In addition, the record-keeping rules provide minimum standards for trust fund account record keeping. See Exhibit A. (As amended in 2004, Rule 1.15 now refers to client funds as "trust funds" to encompass property of both clients and third persons in the lawyer's possession.)

Rule 1.15

- provides that withdrawals not be made by ATM or checks made out to cash, Mass. R. Prof. C. 1.15(e)(3);
- describes the specified types of account documentation needed, Mass. R. Prof. C. 1.15(d)(2); and
- mandates that lawyers reconcile accounts at least every sixty days, Mass. R. Prof. C. 1.15(f)(1)(E).

As of March 15, 2011, lawyers need to be more specific than they were previously about the fees and expenses they charge clients and how these charges are calculated. The amended rule requires lawyers to secure clients' consent about all fee-related issues before or at the outset of the attorney-client relationship. This chapter describes the application of the amended provisions to the attorney-client relationship and suggests guidelines for lawyers to follow in order to meet their obligations under Mass. R. Prof. C. Rule 1.15.

The Massachusetts Rules of Professional Conduct, including Rule 1.15, are based substantially on the American Bar Association Model Rules of Professional Conduct (Model Rules). They were adopted in 1997 by the Supreme Judicial Court Justices and became effective January 1, 1998, replacing the Disciplinary Rules (DRs) of the Code of Professional Responsibility (CPR).

Rule 1.15(e) was preceded by Disciplinary Rule 9-102(C), as amended January 1, 1990, which established a comprehensive Interest on Lawyers' Trust Account (IOLTA) program in Massachusetts. Through interest generated on certain trust fund accounts, the IOLTA program funds legal services to the disadvantaged and projects that improve the administration of justice.
§ 2 A STANDARD OF STRICT ACCOUNTABILITY

Under Mass. R. Prof. C. 1.15, a lawyer should hold the property of others with the care required of a professional fiduciary. This means that a lawyer handling client funds should act for the benefit of the client in the context of a relationship characterized by great confidence and trust on the part of the client and good faith and candor on the part of the lawyer.

The fiduciary nature of the relationship and the need for public confidence in the legal profession place several burdens on the lawyer. First, in handling client funds, the lawyer must not only act properly but also avoid even the appearance of acting improperly. Therefore, the lawyer is obligated to follow certain protective procedures to minimize the possibility of wrongdoing. For example, securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third parties should be kept separate from the lawyer's business and personal property; monies should be placed in one or more trust fund accounts. Separate trust accounts are warranted when administering money from estates or acting in similar fiduciary capacities.

Second, each lawyer is personally responsible for the proper deposit and maintenance of clients' and third-party funds. While necessity often requires delegation of administrative duties within a law practice, the lawyer still must establish adequate procedures for the handling of client funds and ensure that they are properly followed. Specifically, lawyers who delegate any part of their trust fund account responsibilities to their staff must provide effective guidelines for the proper handling and maintenance of these accounts and supervise staff activities. The record-keeping provisions must be integrated into the law practice.

In summary, the basic premise that underlies the rule is that a lawyer who, incident to professional practice, holds money any part of which belongs to another, must keep that money in a separate account maintained in a financial institution. The funds must be deposited either in a pooled IOLTA account, which pays interest to the Massachusetts IOLTA Committee, or in an interest-bearing account for the client's benefit. This money may not be commingled with money belonging to the law office or to the lawyer personally except to pay bank service charges.
§ 3 WHAT FUNDS ARE “TRUST FUNDS”?

§ 3.1 Definition

Rule 1.15(a) and (e) define trust funds as funds that are held in trust for clients or others or held in any other fiduciary capacity in connection with a representation, except “advances for costs and expenses.” (For a discussion of costs and expenses, see § 4, below.) The rule requires that trust funds be deposited in one or more identifiable bank accounts in Massachusetts (assuming the law office is located in this state) in which no other funds are deposited except those necessary to pay bank service charges or to meet minimum balance requirements.

Among the monies that are to be treated as trust funds are

- all advances for fees and most retainers received from clients until they are actually earned by the lawyer (see § 3.4, below);
- funds that belong in part to the client and in part to the lawyer;
- funds of the client that are being held for disbursement at a later time;
- funds of third parties to be distributed at a later time; and
- personal injury awards, including PIP funds; alimony payments; real estate conveyancing monies; and litigation settlements.

Practice Note

With regard to retainers, note Massachusetts Bar Association Committee on Professional Ethics Opinion 78-11 (1978), which states that

[a] retainer is usually a payment on account of future services. It may or may not be sufficient to cover all of the services necessary in the particular matter. It may also exceed the amount necessary in the matter, in which case the lawyer is obligated to account for the return of the unused portion to the client. In any event, . . . the lawyer is required to keep the retainer separated from his own funds until he has earned it . . . ."
§ 3.2 Handling of Client Funds

All trust funds must be deposited in one of two types of interest-bearing accounts: a pooled IOLTA account or an individual client account. A pooled IOLTA account contains all client funds that, in the judgment of the lawyer, are nominal in amount or are to be held for a short period of time. An individual client account, separately established for each client, is used for all other client funds. Interest earned on pooled IOLTA accounts is transferred by the bank to the IOLTA committee. Interest earned on an individual client account accrues to the benefit of the individual client and is payable as directed by the client.

In contrast to trust fund accounts, a lawyer’s operating account is used to hold the lawyer’s earned fees and to pay the lawyer’s operating expenses. A lawyer must not deposit client funds to an operating account or to a personal checking or savings account. As of January 1, 2004, a lawyer is required to maintain a separate business and/or personal account for the lawyer’s own funds for clearer record keeping. Mass. R. Prof. C. 1.15(f)(G)(2) (“Each lawyer who receives trust funds must maintain at least one bank account, other than the trust account, for funds received and disbursed other than in the lawyer’s fiduciary capacity.”).

§ 3.3 Conveyancing Accounts

There is one narrow exception to the requirement that client funds be deposited to either an IOLTA or an individual interest-bearing client account. See Connie Vecchione, “Ethics Q&A,” Massachusetts Bar Association Small Firm Management Section News, May 1994, at 4–5. That exception is for conveyancing accounts, but only in certain limited circumstances. A conveyancing account is exempt from the IOLTA requirements under Mass. R. Prof. C. 1.15(e)(5) if it is an account “in a lending bank in the name of a lawyer representing the lending bank and used exclusively for depositing and disbursing funds in connection with that particular bank’s loan transactions.”

The rationale behind this exemption is that interest earned will be retained by the banks making the loans. Note that the exception applies only to banks, not mortgage companies, although a mortgage company that is simply the mortgage arm of a bank would appear to qualify for the exemption.

As an example, a conveyancing account at Bank A does not have to be an IOLTA account if all the monies deposited to and disbursed from the account involve closings for Bank A. However, a closing for Bank B cannot be done from a Bank A account unless the account at Bank A is an IOLTA account. Thus, if a lawyer does closings for several lending institutions from the same client account, the account must be an IOLTA account. It is only when closings are being
done for the lending bank at which the account is maintained, and only for that lending bank, that the conveyancing exception applies.

Closings for mortgage companies generally must be done through an IOLTA account. As noted above, the only exception might be for closings being done for a mortgage company that is the mortgage arm of a bank. In that case, if the account is maintained at that same bank and only closings for that bank’s mortgage company are transacted through the account, an exempt conveyancing account could be established. In other words, an exempt account could be established at Bank C for closings for Bank C Mortgage Corporation only.

Even if the conveyancing exception is applicable, the rule provides that the lawyer is permitted to establish the account as an IOLTA account. Also, if the conveyancing account is not established as an IOLTA account, it should be a noninterest-bearing client account and not a NOW (Negotiable Order of Withdrawal) account or other account earning interest. Finally, the account in all circumstances must be properly denominated as an IOLTA account, conveyancing account, trust fund account, or similar designation. See Mass. R. Prof. C. 1.15(e)(5).

Note that conveyancers sometimes find themselves holding client funds for some period of time after the closing while title problems are resolved. The conveyancing exception is not applicable to this circumstance. Unless the parties direct otherwise, such funds should be moved to an individual interest-bearing trust account. To the extent that the funds are retained in either an exempt conveyancing account or an IOLTA account in the expectation that the title will be quickly cleared, the lawyer must monitor the situation and transfer the funds to an individual interest-bearing escrow account when it becomes apparent that resolution of the problem will be delayed and interest can be earned for the client.

Practice Note
Practitioners sometimes use the term “conveyancing accounts” in referring to accounts used in the course of the conveyancing process. It is important to remember that not all such accounts will fall within the scope of Mass. R. Prof. C. 1.15(e)(5). Accounts must satisfy the particular conditions described above in order to qualify for the exemption.

§ 3.4 Advanced Fees and Retainers

Questions about attorney fees generate more complaints to the Office of the Bar Counsel than any other issue. The handling of retainers or advanced fees and whether they should be treated as clients’ funds seems to engender much confusion. The words “advanced fees” and “retainers” are used interchangeably throughout the profession.
(a) **Definition**

An advanced fee or retainer is the payment of funds in advance to a lawyer for a particular service or for a particular case. Most retainers or advanced fees are payments to a lawyer to be earned as services are provided. (See discussion on narrow exception below.) In such cases, the funds belong to the client until they are earned through the services provided by the lawyers. C. Wolfram, Legal Ethics 505–06 (1986). Such advanced fees/retainers are always subject to refund if they are not earned.

(b) **Deposit of Retainers**

Retainers or advanced fees as defined above, paid in advance for the handling of a particular case, are client funds and must be deposited to an interest-bearing account until earned by the lawyer. Since the lawyer may not commingle personal funds with client funds, the lawyer must promptly withdraw the fee from the client fund account as it is earned. Mass. R. Prof. C. 1.15(b)(2)(ii).

(c) **Attorney Fees**

Under the new provisions of Mass. R. Prof. C. 1.5, lawyers are prohibited from charging clients an unreasonable amount for expenses as well as illegal or clearly excessive fees. See Exhibit B for the full text of this rule. The revised rule contains two fee agreement forms. Form A requires no additional explanation to clients (beyond what is required by Rule 1.5), while Form B sets forth options that require clients’ written consent.

(d) **Accounting to Client for Fees Earned**

Rule 1.15(d) requires lawyers, on or before the date of withdrawing funds to pay fees earned, to mail or “deliver” to the client

- a written itemized bill accounting for services rendered;
- written notice of the amount and date of withdrawal; and
- a statement of the balance of the client’s fund in the trust account after the withdrawal. Mass R. Prof. C. 1.15(d)(2).

Rule 1.15(f) requires lawyers to maintain complete records regarding the receipt, maintenance, and disposition of client funds. Retainers and advanced fees fall within this category. In addition, the lawyer must render “a full accounting” to the client or third party, upon request, for the disposition of all funds.
(e) "Nonrefundable" and Flat Fees

There are no fees that are not refundable. Bar counsel will review whether a portion of the fee should be returned regardless of whether the lawyer views the fee as nonrefundable or flat. The fee may not interfere with the client's right to discharge the lawyer at any time. Mass. R. Prof. C. 1.16(d). In Smith v. Binder, 20 Mass. App. Ct. 21 (1985), attorneys were paid a retainer of $8,500 for representation in a criminal case. The attorneys' clients sued them for an accounting and refund three weeks after the attorneys were discharged. The attorneys claimed that the fee was nonrefundable and asked the court to take judicial notice that "it is an accepted custom and practice among attorneys of the criminal bar that retainers taken in connection with representation of criminal defendants are nonrefundable." Smith v. Binder, 20 Mass. App. Ct. at 22. The trial judge granted a Rule 41 motion and found that the plaintiffs knew the fee was nonrefundable. The Appeals Court reversed, finding no evidence to support that finding. In a footnote, the Appeals Court noted authority holding that requiring a client to agree to a nonrefundable fee was unethical. In the text of its opinion, the Appeals Court observed that the right to change lawyers at any time was "[e]ssential to the lawyer-client relationship" and that, if the lawyer were permitted to keep the unearned portion of the fee, the "right to change lawyers would be of little value." Smith v. Binder, 20 Mass. App. Ct. at 23.

There is one narrow exception to the "retainer" discussion. There is one type of retainer, known as a "classic" retainer, in which the client binds the attorney to employment to the exclusion of adverse parties. The retainer is seen as payment for the establishment of this exclusive relationship—not for specific, pending services required. The advantage to the client is in securing the services of the lawyer of choice over a period of time, whereas the lawyer forgoes the possibility of employment by others whose interest might be adverse to the client. The payment is in return for the attorney's agreement to be bound to the client and is therefore "earned" when paid. Blair v. Columbian Fireproofing Co., 191 Mass. 333 (1906).

§ 4 DEPOSITING FUNDS INTO AN IOLTA ACCOUNT OR A SEPARATE INTEREST-BEARING ACCOUNT

Rule 1.15 provides that client or third-party funds must be placed in interest-bearing accounts and that the interest must be credited to the client's account or deposited in an IOLTA account for the benefit of legal services to the poor and for the improvement of the administration of justice. Under Mass. R. Prof. C. 1.15(e)(5), it is the lawyer's responsibility to exercise good faith judgment
in determining initially whether funds of a client are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should be placed in an IOLTA account. If the lawyer determines the amounts are not nominal or short-term, the lawyer must establish a separate client fund account for the benefit of the individual client. In this case, the lawyer will need to obtain the client’s social security number or employer identification number to give to the bank so that the tax on any earned interest can be assigned to the client.

Although funds such as advances for costs and expenses are not required to be deposited in client fund accounts, the lawyer has the same accounting, record-keeping, and payment responsibilities for these types of funds held in a general office account as for funds held in the client fund accounts. Advances for costs and expenses may be deposited in an IOLTA account.

The obvious question is when to use the pooled account where the interest is paid to the IOLTA committee and when to use an account where the interest is paid to the client.

The guideline to the rule explains how to determine which account to use. The sole question that the lawyer must answer is whether the client funds “could be utilized to provide a positive net return to the client.” In deciding whether there will be a positive net return, the lawyer must consider

- the amount of interest the funds would earn during the period they are to be deposited;
- the cost of establishing and administering the account, including a reasonable cost for the lawyer’s services and the cost of preparing the necessary tax reports; and
- the capability and cost of the financial institution to calculate and pay the interest to the individual client.

There is no “bright line” by which a lawyer can know where to deposit the funds. Instituting procedures to make sure that this issue is considered and resolved when dealing with client funds will help you comply with the Massachusetts Rules of Professional Conduct and avoid potential financial liability.
§ 5  DEPOSITS TO TRUST FUND ACCOUNTS

§ 5.1  Which Funds?
All funds that qualify as client funds as defined in § 3.1, above, must be deposited into a trust fund account. The law firm should have a clearly expressed written policy, for all attorneys and staff, as to what funds are deposited into a trust fund account.

§ 5.2  When?
Deposit of client or third-party funds should be made daily.

§ 5.3  Where?
Under Mass. R. Prof. C. 1.15(g), funds must be deposited in a bank, savings and loan association, or credit union authorized by federal or state law to do business in Massachusetts and insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration. The financial institution holding the account must have agreed to abide by the Board of Bar Overseers’ Dishonored Check Rule. A copy of the notice of enrollment form used in establishing an IOLTA account is attached as Exhibit C.

Client or third-party funds should not be deposited, hidden, or concealed in the law office. All securities and properties of a client should be identified and labeled and promptly placed in a safe deposit box or other place of safekeeping as soon as practical. The same attentive care and precautionary procedures should be adopted for the receipt, holding, and disbursement of these properties as is given to the safe maintenance of trust accounts for client funds.

§ 5.4  How?
Sound accounting advice is never to transmit money without written communication. A voucher or other documentation for receipt should be prepared by the attorney, instructing the person performing the bookkeeping function to deposit the funds into the client fund account on behalf of the client named in the voucher or receipt. Written communication avoids later confusion about the source and purpose of client fund deposits and provides a needed audit trail.
§ 5.5  Notify Client

Mass. R. Prof. C. 1.15(c) provides as follows:

Upon receiving trust funds or other trust property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or as otherwise permitted by law or by agreement with the client or third person on whose behalf a lawyer holds trust property, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third persons entitled to receive.

Rule 1.15(c) is particularly important with respect to funds received from third parties. Compliance avoids misunderstanding, mistakes, and mistrust.

§ 6  DISBURSEMENT OF CLIENT FUNDS

§ 6.1  Timing

Before disbursement of trust funds, the check from the client or third party should have cleared through the banking process. If this precaution is not taken, and the initially receipted check is returned for insufficient funds or a stop-payment order is issued, the trust funds of other clients may be disbursed wrongfully. Since even cashier’s checks and certified checks are occasionally dishonored, the best policy is to be assured that the initial receipts have cleared the banking process.

§ 6.2  Amounts

Trust fund disbursements from the client’s ledger must not exceed the funds received from or on behalf of that client. Otherwise, a wrongful taking of other client trust funds occurs, resulting in both civil and disciplinary liability. As a precautionary measure, both the person requesting the disbursement and the individual signing the check should have a copy of the particular client’s subsidiary ledger before requesting or authorizing the disbursement of trust funds.
§ 6.3 Identify the Transaction

There should be built into the process, through voucher request or other documentation, a clear description of each disbursement, including the identity of the file to be charged and the reason for the transaction.

§ 6.4 Signature

Who will sign trust checks is probably best left for each firm to decide. Generally, the person who prepares the checks should not have signatory authority. Regardless, no individual should sign a check unless presented with written documentation indicating that the disbursement is proper, principally that the original receipted funds have cleared the banking process and that the client’s subsidiary ledger account contains adequate funds. Disbursement procedures should be clearly stated in established rules for the firm.

Practice Note

It is recommended that two signatures be required for large check amounts.

§ 6.5 Internal Controls

Proper disbursement of trust funds is greatly enhanced by a strong system of internal controls. Job functions should be structured to allow for an adequate segregation of all duties relating to the handling of trust funds. For example, the reconciliation process should be performed by personnel who are not involved in the bookkeeping process, ideally by the lawyer or the firm administrator. Also, internal controls are weakened when the same person who prepares the check signs the check. Other important control procedures include

• proper authorization, recording, and documentation of all trust fund transactions;

• limited access to trust fund accounts and client property;

• periodic independent verification of client accounting records; and

• sound personnel practices.

No system of internal controls can function effectively without the active involvement of the lawyers responsible for the trust funds.
§ 6.6 Interests of Third Parties

The trust and fiduciary obligations imposed by Mass. R. Prof. C. 1.15 extend beyond the client to third parties who have an interest in the disposition of the funds. The rule applies to all clients’ fund accounts—including IOLTA, trust, and escrow accounts. In addition, the rule pertains to any funds being held by a lawyer even if the lawyer is holding those funds in another capacity, as in the case of a trustee or conservator for a family member or other person. If the property is being held on a pro bono basis as a custodian for a minor family member, the property is not subject to the operational requirements for trust accounts set out in Rule 1.15(e) or (f). Mass. R. Prof. C. 1.15(e)(6) (noting that “family member” for purposes of this provision refers to the individuals specified in Mass. R. Prof. C. 7.3(e)(2)).

§ 7 OPERATIONAL REQUIREMENTS

The ability to precisely document the complete history and disposition of all client funds is the central requirement when accounting for trust accounts. Rule 1.15 does not mandate any particular client trust accounting system, but it spells out the required components. The system described below will provide the basics to account for clients’ funds.

Rule 1.15 requires two basic kinds of records:

- records created by the bank that show what went into and out of the lawyer’s client trust bank accounts, and
- records created by the lawyer to explain the transactions reflected in the bank documents.

§ 7.1 Length of Time Records Need to Be Retained

Rule 1.15(f) requires keeping trust accounting records for six years after the funds are paid out and after termination of the representation of the client.

§ 7.2 The Use of Computerized Records

Although most law firms and lawyers now routinely rely on computerized systems for trust fund accounts, a lawyer using a computerized accounting system must still maintain the check register, client ledgers, bank-charges ledger, and reconciliation reports in a form that can be reproduced and printed in hard copy. Additionally, because computer data can be lost through electrical storms, fire,
power or equipment failure, software malfunction, and human error, electronic records must be regularly backed up by an appropriate storage device. Mass. R. Prof. C. 1.15(f)(1)(G).

§ 7.3 The Types of Bank-Created Documents That Need to Be Retained

Rule 1.15(f) requires retention by the lawyer of all documents recording transactions that the bank returns to the lawyer. This may include such documents as client trust bank account statements, canceled checks, and records of electronic transactions. Banks no longer automatically provide canceled checks to customers, but lawyers will want to make sure their bank provides either the originals or photo images of canceled checks (including both sides of the checks).

§ 7.4 Suggestion for Filing Bank-Created Documents

A basic system would involve keeping a separate binder (or folder) for each client trust bank account. Each folder should have

- one section for bank statements;
- one section for originals or photo images of canceled checks and records of electronic and other transactions;
- one section for copies of deposit slips; and
- one section for checkbook stubs or records, computer-generated equivalents, or copies of checks created by “one-write” methods as the checks are written.

Deposit slips and checkbook stubs or records provide a complete audit trail. In this system, each document is filed in date order in the appropriate section of the binder for the account it refers to. Label each binder with the name of the client trust bank account and the period it covers. Note that binders for a pooled account will have canceled checks pertaining to all of the clients whose funds are in the pooled account.
§ 7.5 Types of Client Accounting Records Required to Be Retained

Rule 1.15(f)(1)(A) requires lawyers to record

- the name and address of the bank or other depository,
- the account number,
- the account title,
- the opening and closing dates, and
- the type of account (whether it is an IOLTA account or a separate client fund account for the client).

For each account, there are three types of accounting records that must be maintained by the lawyer. They are the check register, client ledgers, and a ledger for bank fees and charges.

(a) The Client Ledgers

Rule 1.15(f)(1)(C) requires keeping individual client records for each separate matter in which the lawyer holds funds for the client. This client ledger must give the name of the client, detail all money received and paid out on behalf of the client or third party, and show the client's balance following every receipt or payment. See Exhibit D.

Maintaining a client ledger is like keeping a separate checkbook for each client, regardless of whether or not the client’s money is being held in an IOLTA account or a separate account. Every receipt and payment of money for a client must be recorded in that client's client ledger. If depositing more than one check but using a single deposit slip, record each check as a separate deposit in the client ledger. For every receipt, list the date, amount, and source of the money. For every payment, list the date, the amount, the check number, the payee, and the purpose of the payment. After you record each receipt, add the amount to the client's old balance and write in the new total. After recording each payment, subtract the amount from the client’s old balance and write in the new total.

The following is a description of opening and maintaining a client ledger for a new client, Mark Twain (MT). At the first meeting on January 5, 2011, MT gives a check for $1,500 as an advance fee. If the decision is made to place the funds in an IOLTA account, the lawyer will deposit MT’s money into the account and create a new client ledger for him. The new client ledger could look like the following (see also the ledger in Exhibit D).
On February 5, the lawyer sends the client a description of services provided to him, including an accounting of the $500 fee for which the lawyer is writing a check to his or her firm.

(b) Bank Charges Ledger

Rule 1.15(f)(1)(D) rule requires lawyers to record every bank charge against the client trust fund account in the check register and permits the lawyer to keep his or her money in the account to pay these charges and fees. Lawyers should keep a bank-fees-and-charges ledger the same way that client ledgers are kept, as part of a check register system. Record every deposit of lawyer funds, every charge the bank makes against the account, and the running balance in both the client ledger and the check register.
(c) **Check Register**

Rule 1.15(f)(1)(B) requires

- a check register in chronological order with the date and amount of all deposits;
- the date, check or transaction number, amount, and payee of all disbursements, whether by check, electronic transfer, or other means; and
- the date and amount of every credit or debit, the identity of the client matter, and the current balance in the account.

A sample check register format is set forth in Exhibit E.

Maintaining a check register is very similar to keeping a client ledger. For your pooled accounts, keeping the check register is the only way to know how much money is in the account at any given time and is essential for performing required reconciliations. If maintained and used properly, this journal will help prevent bounced checks (unless there is a bank error).

**Sample Check Register**

<table>
<thead>
<tr>
<th>Date</th>
<th>Chk. No.</th>
<th>Payee or Source of Deposit</th>
<th>Description of Transaction</th>
<th>Client ID</th>
<th>Amount Paid</th>
<th>Amount Received</th>
<th>Running Balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>12/31/09</td>
<td></td>
<td>Balance Forward</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>14,800</td>
</tr>
<tr>
<td>1/4/10</td>
<td>215</td>
<td>Law Firm X</td>
<td>Prof. Fee Invoice No. 7</td>
<td>AZ</td>
<td>$1,800</td>
<td></td>
<td>13,000</td>
</tr>
<tr>
<td>1/5/10</td>
<td>MT</td>
<td>Retainer</td>
<td></td>
<td>MT</td>
<td>$1,500</td>
<td></td>
<td>14,500</td>
</tr>
<tr>
<td>1/7/10</td>
<td>Insurance Company</td>
<td>Settlement, Bodily Injury</td>
<td>EF#7</td>
<td></td>
<td>$3,500</td>
<td></td>
<td>18,000</td>
</tr>
<tr>
<td>1/7/10</td>
<td>216</td>
<td>George Hanson</td>
<td>Final Disbursement of Settlement Proceeds</td>
<td>GH</td>
<td>$6,500</td>
<td></td>
<td>11,500</td>
</tr>
</tbody>
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(d) **Reconciliation**

Rule 1.15(f)(1)(E) requires lawyers to keep records of reconciliation (balancing) of the client ledgers, bank charges ledger, check register, and bank statements. Reconciliation means checking the basic records—the bank statements, the client ledgers, the bank charges ledger, and the check register—against each other.
so any mistakes can be corrected. Rule 1.15 requires that client trust account records be reconciled every sixty days and that a written record that shows the records were reconciled be kept. It is recommended, however, that you reconcile these accounts on a monthly basis.

There are four main steps in reconciliation:

1. Comparing the check register with the client ledgers and bank charges ledger to make sure the sum of the running balances in all client ledgers plus the bank charges ledger is equal to the running balance in the check register.

2. Entering previously unrecorded bank charges and interest shown on the bank statement into the check register and client ledgers or bank charges ledger as appropriate.

3. Reconciling each check register with the corresponding bank statement to make sure that the lawyer’s records agree with the bank statement. This requires adjusting the bank statement’s balance by adding deposits made after the bank statement’s closing date and subtracting checks not received by the bank until after the bank statement’s closing date.

4. Entering corrections (explanations of errors found, not just a note that the numbers did not balance) in the client ledgers and check register so that the running balances are the same as the bank statement balance.

Exhibit F is a sample worksheet for use in completing periodic reconciliations.

The foregoing functions are now routinely handled in many law offices by an automated accounting system. Many systems have the capability of generating reports as to each of the factors set forth above. Thus, for example, a few keystrokes or mouse clicks can generate a cash receipts journal for a given period of time or allow a lawyer to create a client ledger. Some systems, but not all, have trust-accounting capabilities. Regardless of whether a manual or automated system is used, however, the system is only as good as the information provided to it.

§ 8 DISHONORED CHECK NOTIFICATION RULE

As of October 1, 1995, all financial institutions that want to qualify to handle lawyer client fund accounts must agree to report all client fund account checks that are dishonored because of insufficient funds to the Board of Bar Overseers (BBO). The dishonored check rule is set forth at Mass. R. Prof. C. 1.15(h). See Exhibit A. In addition, all lawyers who are notified of a dishonored check are
required to provide the BBO with a written explanation of the reasons for the dishonored check.

The Board of Bar Overseers maintains a central registry of all banking institutions whose agreements to abide by the dishonored check rule have been approved. The list of approved institutions is also posted on the board’s Web site, http://www.mass.gov/obcbbo. It is important to note that it is the lawyer’s responsibility to ensure that the banking institutions he or she uses are those that have agreed to the rule. The bank in which the client fund account is maintained must provide dishonored-check reports to the BBO. Such a notification must be generated whenever a check that would otherwise be properly payable is dishonored because of insufficient funds.

Once the BBO receives a dishonored check notice from a bank, a report is made and a file opened on the lawyer. Bar counsel then sends a letter to each lawyer, requesting an explanation as to why the check was dishonored. If the check was dishonored because of a bank error, the file may be expunged. If the BBO is satisfied with the lawyer’s response as to why the check was dishonored, the file is closed. If the BBO is not satisfied with a lawyer’s explanation of why a check was dishonored, further investigation will be conducted into the lawyer’s accounting methods and business practices.

Experience with this rule indicates that there are several causes of dishonored checks that can be eliminated. The following steps will help avoid this problem:

- Make sure that you have deposited the client funds and they have cleared the banking process before you disburse funds.
- Keep accurate deposit records in case there is ever a question of depositing to the correct account. Banks occasionally credit the wrong accounts of law firms or otherwise inaccurately record transactions.
- Determine the amount and timing of service fees, especially the cost of check printing. It is permissible to maintain a minimal amount of lawyer funds in the account to cover service charges, check charges, and minimum balances. Treat these funds as a separate “client” and keep track of them on their own ledger. Deduct these charges from the account balance.
- Reconcile your account regularly so that mistakes do not multiply into a dishonored check.
- Find out how your bank handles the closing of accounts and ensure that all outstanding checks have cleared before closing a client fund account.
§ 9  REFUND POLICY

In the event a lawyer notifies the IOLTA committee in writing that funds of a client or a third person were erroneously deposited into or kept in an IOLTA account, the executive director will review the request, and a refund of any interest paid to the committee as a result of the error will be made. The lawyer must provide due proof and substantiate with acceptable documentation the following:

- the dates the funds were deposited,
- the amount of money on which the interest was paid,
- the length of time the funds were in the IOLTA account, and
- the circumstances that led to the error.

§ 10  INTERNET SCAMS TARGETING LAWYERS

Recently, several lawyers in Massachusetts have fallen victim to tricky e-mail scams. Losses have run from $100 to $375,000. The scams often run through IOLTA accounts.

Often, a fraudulent client from another country contacts a law firm via e-mail indicating they are involved in some legal issue with a domestic company. That company will either settle a claim within the next few days or the parties will go to court. The law firm is asked to act as a settlement agent or possibly represent the foreign client going forward. Shortly afterwards, a counterfeit check comes to the law firm with the other party listed as remitter. The law firm takes its cut from the check and is asked to wire the rest. These checks may pass initial deposit-fraud review.

There are ways to avoid becoming a victim. Know who you are doing business with. If you deposit a large check, have a clear idea where that money is coming from. Do not be too quick to take on a new client unknown to you. As hard as it may be to turn down business in a slow economy, prudence and due diligence still pay high rewards. Ask questions. Be up front about needing confirmation that the contact is who and what they claim to be. Be wary of the need for great speed in processing the money.

If you suspect that an e-mail is a scam and have not yet established a client relationship with the sender, you can generally report the contact to the Internet Crime Complaint Center (ICCC). In and of itself, this information is not confidential except in rare cases. It gets more complicated if you have begun the relationship and then suspect that you are being scammed. If you think a client is scamming you,
you would normally confront the client, evaluate the response, and continue the relationship or withdraw from it. If you suffered losses from being scammed, after withdrawal you could pursue civil or criminal remedies, respecting the duty to preserve confidentiality as appropriate, or simply write off the loss.

According to cyber experts, Internet scams are not going to stop anytime soon. If you think you might be the target of a scam, make a report immediately to the Internet Crime Complaint Center (http://www.ic3.gov). If money has been lost, also notify local police or the FBI.
EXHIBIT A—Text of Mass. R. Prof. C. 1.15—Safekeeping Property

(a) Definitions:

(1) “Trust property” means property of clients or third persons that is in a lawyer’s possession in connection with a representation and includes property held in any fiduciary capacity in connection with a representation, whether as trustee, agent, escrow agent, guardian, executor, or otherwise. Trust property does not include documents or other property received by a lawyer as investigatory material or potential evidence. Trust property in the form of funds is referred to as “trust funds.”

(2) “Trust account” means an account in a financial institution in which trust funds are deposited. Trust accounts must conform to the requirements of this rule.

(b) Segregation of Trust Property. A lawyer shall hold trust property separate from the lawyer’s own property.

(1) Trust funds shall be held in a trust account, except that advances for costs and expenses may be held in a business account.

(2) No funds belonging to the lawyer shall be deposited or retained in a trust account except that:

(i) Funds reasonably sufficient to pay bank charges may be deposited therein, and

(ii) Trust funds belonging in part to a client or third person and in part currently or potentially to the lawyer shall be deposited in a trust account, but the portion belonging to the lawyer must be withdrawn at the earliest reasonable time after the lawyer’s interest in that portion becomes fixed. A lawyer who knows that the right of the lawyer or law firm to receive such portion is disputed shall not withdraw the funds until the dispute is resolved. If the right of the lawyer or law firm to receive such portion is disputed within a reasonable time after notice is given that the funds have been withdrawn, the disputed portion must be restored to a trust account until the dispute is resolved.
(3) Trust property other than funds shall be identified as such and appropriately safeguarded.

(c) Prompt Notice and Delivery of Trust Property to Client or Third Person. Upon receiving trust funds or other trust property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or as otherwise permitted by law or by agreement with the client or third person on whose behalf a lawyer holds trust property, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.

(d) Accounting.

(1) Upon final distribution of any trust property or upon request by the client or third person on whose behalf a lawyer holds trust property, the lawyer shall promptly render a full written accounting regarding such property.

(2) On or before the date on which a withdrawal from a trust account is made for the purpose of paying fees due to a lawyer, the lawyer shall deliver to the client in writing (i) an itemized bill or other accounting showing the services rendered, (ii) written notice of amount and date of the withdrawal, and (iii) a statement of the balance of the client’s funds in the trust account after the withdrawal.

(e) Operational Requirements for Trust Accounts.

(1) All trust accounts shall be maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person on whose behalf the trust property is held, except that all funds required by this rule to be deposited in an IOLTA account shall be maintained in this Commonwealth.

(2) Each trust account title shall include the words “trust account,” “escrow account,” “client funds account,” “conveyancing account,” “IOLTA account,” or words of similar import indicating the fiduciary nature of the account. Lawyers maintaining trust accounts shall take all steps necessary to inform the depository institution of the purpose and identity of such accounts.

(3) No withdrawal from a trust account shall be made by a check which is not prenumbered. No withdrawal shall be made in cash or by automatic teller machine or any similar method. No withdrawal shall be made by
a check payable to “cash” or “bearer” or by any other method which
does not identify the recipient of the funds.

(4) Every withdrawal from a trust account for the purpose of paying fees to
a lawyer or reimbursing a lawyer for costs and expenses shall be payable
to the lawyer or the lawyer’s law firm.

(5) Each lawyer who has a law office in this Commonwealth and who
holds trust funds shall deposit such funds, as appropriate, in one of two
types of interest-bearing accounts: either (i) a pooled account (“IOLTA
account”) for all trust funds which in the judgment of the lawyer are
nominal in amount, or are to be held for a short period of time, or (ii)
for all other trust funds, an individual account with the interest payable
as directed by the client or third person on whose behalf the trust prop-
erty is held. The foregoing deposit requirements apply to funds received
by lawyers in connection with real estate transactions and loan closings,
provided, however, that a trust account in a lending bank in the name of
a lawyer representing the lending bank and used exclusively for depos-
iting and disbursing funds in connection with that particular bank’s loan
transactions, shall not be required but is permitted to be established as
an IOLTA account. All IOLTA accounts shall be established in compli-
ance with the provisions of paragraph (g) of this rule.

(6) Property held for no compensation as a custodian for a minor family
member is not subject to the Operational Requirements for Trust Ac-
counts set out in this paragraph (e) or to the Required Accounts and Rec-
ords in paragraph (f) of this rule. As used in this subsection, “family
member” refers to those individuals specified in section (e)(2) of rule
7.3.

(f) Required Accounts and Records: Every lawyer who is engaged in the pra-
cice of law in this Commonwealth and who holds trust property in connec-
tion with a representation shall maintain complete records of the receipt,
maintenance, and disposition of that trust property, including all records re-
quired by this subsection. Records shall be preserved for a period of six
years after termination of the representation and after distribution of the
property. Records may be maintained by computer subject to the requir-
ements of subparagraph 1G of this paragraph (f) or they may be prepared
manually.

(1) Trust Account Records. The following books and records must be
maintained for each trust account:
A. Account Documentation. A record of the name and address of the bank or other depository; account number; account title; opening and closing dates; and the type of account, whether pooled, with net interest paid to the IOLTA Committee (IOLTA account), or account with interest paid to the client or third person on whose behalf the trust property is held (including master or umbrella accounts with individual subaccounts).

B. Check Register. A check register recording in chronological order the date and amount of all deposits; the date, check or transaction number, amount, and payee of all disbursements, whether by check, electronic transfer, or other means; the date and amount of every other credit or debit of whatever nature; the identity of the client matter for which funds were deposited or disbursed; and the current balance in the account.

C. Individual Client Records. A record for each client or third person for whom the lawyer received trust funds documenting each receipt and disbursement of the funds of the client or third person, the identity of the client matter for which funds were deposited or disbursed, and the balance held for the client or third person, including a subsidiary ledger or record for each client matter for which the lawyer receives trust funds documenting each receipt and disbursement of the funds of the client or third person with respect to such matter. A lawyer shall not disburse funds from the trust account that would create a negative balance with respect to any individual client.

D. Bank Fees and Charges. A ledger or other record for funds of the lawyer deposited in the trust account pursuant to paragraph (b)(2)(i) of this rule to accommodate reasonably expected bank charges. This ledger shall document each deposit and expenditure of the lawyer's funds in the account and the balance remaining.

E. Reconciliation Reports. For each trust account, the lawyer shall prepare and retain a reconciliation report on a regular and periodic basis but in any event no less frequently than every sixty days. Each reconciliation report shall show the following balances and verify that they are identical:

(i) The balance which appears in the check register as of the reporting date.

(ii) The adjusted bank statement balance, determined by adding outstanding deposits and other credits to the bank statement
balance and subtracting outstanding checks and other debits from the bank statement balance.

(iii) For any account in which funds are held for more than one client matter, the total of all client matter balances, determined by listing each of the individual client matter records and the balance which appears in each record as of the reporting date, and calculating the total. For the purpose of the calculation required by this paragraph, bank fees and charges shall be considered an individual client record. No balance for an individual client may be negative at any time.

F. Account Documentation. For each trust account, the lawyer shall retain contemporaneous records of transactions as necessary to document the transactions. The lawyer must retain:

(i) bank statements.

(ii) all transaction records returned by the bank, including canceled checks and records of electronic transactions.

(iii) records of deposits separately listing each deposited item and the client or third person for whom the deposit is being made.

G. Electronic Record Retention. A lawyer who maintains a trust account record by computer must maintain the check register, client ledgers, and reconciliation reports in a form that can be reproduced in printed hard copy. Electronic records must be regularly backed up by an appropriate storage device.

(2) Business Accounts. Each lawyer who receives trust funds must maintain at least one bank account, other than the trust account, for funds received and disbursed other than in the lawyer's fiduciary capacity.

(3) Trust Property Other than Funds. A lawyer who receives trust property other than funds must maintain a record showing the identity, location, and disposition of all such property.

(g) Interest on Lawyers' Trust Accounts.

(1) The IOLTA account shall be established with any bank, savings and loan association, or credit union authorized by Federal or State law to do business in Massachusetts and insured by the Federal Deposit Insurance Corporation or similar State insurance programs for State-chartered institutions. At the direction of the lawyer, funds in the IOLTA
account in excess of $100,000 may be temporarily reinvested in repur-
chase agreements fully collateralized by U.S. Government obligations. 
Funds in the IOLTA account shall be subject to withdrawal upon re-
quest and without delay.

(2) Lawyers creating and maintaining an IOLTA account shall direct the 
depository institution:

(i) to remit interest or dividends, net of any service charges or fees, on 
the average monthly balance in the account, or as otherwise com-
puted in accordance with an institution’s standard accounting prac-
tice, at least quarterly, to the IOLTA Committee;

(ii) to transmit with each remittance to the IOLTA Committee a state-
ment showing the name of the lawyer who or law firm which de-
posited the funds; and

(iii) at the same time to transmit to the depositing lawyer a report show-
ing the amount paid, the rate of interest applied, and the method by 
which the interest was computed.

(3) Lawyers shall certify their compliance with this rule as required by 
S.J.C. Rule 4:02, subsection (2).

(4) This court shall appoint members of a permanent IOLTA Committee to 
fixed terms on a staggered basis. The representatives appointed to the 
committee shall oversee the operation of a comprehensive IOLTA pro-
gram, including:

(i) the receipt of all IOLTA funds and their disbursement, net of actual 
expenses, to the designated charitable entities, as follows: sixty-
seven percent (67%) to the Massachusetts Legal Assistance Corpo-
ratio and the remaining thirty-three percent (33%) to other desi 
gnated charitable entities in such proportions as the Supreme Judi-
cial Court may order;

(ii) the education of lawyers as to their obligation to create and main-
tain IOLTA accounts under Rule 1.15(h);

(iii) the encouragement of the banking community and the public to 
support the IOLTA program;

(iv) the obtaining of tax rulings and other administrative approval for a 
comprehensive IOLTA program as appropriate;
(v) the preparation of such guidelines and rules, subject to court approval, as may be deemed necessary or advisable for the operation of a comprehensive IOLTA program;

(vi) establishment of standards for reserve accounts by the recipient charitable entities for the deposit of IOLTA funds which the charitable entity intends to preserve for future use; and

(vii) reporting to the court in such manner as the court may direct.

(5) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall receive IOLTA funds from the IOLTA Committee and distribute such funds for approved purposes. The Massachusetts Legal Assistance Corporation may use IOLTA funds to further its corporate purpose and other designated charitable entities may use IOLTA funds either for (a) improving the administration of justice or (b) delivering civil legal services to those who cannot afford them.

(6) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall submit an annual report to the court describing their IOLTA activities for the year and providing a statement of the application of IOLTA funds received pursuant to this rule.

(h) Dishonored Check Notification.

All trust accounts shall be established in compliance with the following provisions on dishonored check notification:

(1) A lawyer shall maintain trust accounts only in financial institutions which have filed with the Board of Bar Overseers an agreement, in a form provided by the Board, to report to the Board in the event any properly payable instrument is presented against any trust account that contains insufficient funds, and the financial institution dishonors the instrument for that reason.

(2) Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon thirty days notice in writing to the Board.

(3) The Board shall publish annually a list of financial institutions which have signed agreements to comply with this rule, and shall establish rules and procedures governing amendments to the list.

(4) The dishonored check notification agreement shall provide that all reports made by the financial institution shall be identical to the notice of
dishonor customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors. Such reports shall be made simultaneously with the notice of dishonor and within the time provided by law for such notice, if any.

(5) Every lawyer practicing or admitted to practice in this Commonwealth shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(6) The following definitions shall be applicable to this subparagraph:

(i) “Financial institution” includes (a) any bank, savings and loan association, credit union, or savings bank, and (b) with the written consent of the client or third person on whose behalf the trust property is held, any other business or person which accepts for deposit funds held in trust by lawyers.

(ii) “Notice of dishonor” refers to the notice which a financial institution is required to give, under the laws of this Commonwealth, upon presentation of an instrument which the institution dishonors.

(iii) “Properly payable” refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this Commonwealth.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. Separate trust accounts are warranted when administering estate monies or acting in similar fiduciary capacities.

[2] In general, the phrase “in connection with a representation” includes all situations where a lawyer holds property as a fiduciary, including as an escrow agent. For example, an attorney serving as a trustee under a trust instrument or by court appointment holds property “in connection with a representation”. Likewise, a lawyer serving as an escrow agent in connection with litigation or a transaction holds that property “in connection with a representation”. However, a lawyer serving as a fiduciary who is not actively practicing law does not hold property “in connection with a representation.”

[3] Lawyers often receive funds from third parties from which the lawyer’s fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be
paid. However, a lawyer may not hold funds to coerce a client into accepting the
lawyer’s contention. The disputed portion of the funds must be kept in trust and
the lawyer should suggest means for prompt resolution of the dispute, such as
arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Third parties, such as a client’s creditors, may have just claims against funds
or other property in a lawyer’s custody. A lawyer may have a duty under applic-
able law to protect such third-party claims against wrongful interference by the
client, and accordingly may refuse to surrender the property to the client. How-
ever, a lawyer should not unilaterally assume to arbitrate a dispute between the
client and the third party.

[5] The obligations of a lawyer under this Rule are independent of those arising
from activity other than rendering legal services. For example, a lawyer who
serves as an escrow agent is governed by the applicable law relating to fiduciaries
even though the lawyer does not render legal services in the transaction.

[6] How much time should elapse between the receipt of funds by the lawyer
and notice to the client or third person for whom the funds are held depends on
the circumstances. By example, notice must be furnished immediately upon re-
cipt of funds in settlement of a disputed matter, but a lawyer acting as an es-
crow agent or trustee routinely collecting various items of income may give no-
tice by furnishing a complete statement of receipts and expenses on a regular
periodic basis satisfactory to the client or third person.

Notice to a client or third person is not ordinarily required for payments of inter-
est and dividends in the normal course, provided that the lawyer properly in-
cludes all such payments in regular periodic statements or accountings for the
funds held by the lawyer.

[7] Paragraph (e)(3) states the general rule that all withdrawals and disburse-
ments from trust account must be made in a manner which permits the recipient
or payee of the withdrawal to be identified. It does not prohibit electronic trans-
fers or foreclose means of withdrawal which may be developed in the future,
provided that the recipient of the payment is identified as part of the transaction.
When payment is made by check, the check must be payable to a specific person
or entity. A prenumbered check must be used, except that starter checks may be
used for a brief period between the opening of a new account and issuance of
numbered checks by the bank or depository.

[8] Paragraph (f) lists records that a lawyer is obliged to keep in order to comply
with the requirement that “complete records” be maintained. Additional records
may be required to document financial transactions with clients or third persons.
Depending on the circumstances, these records could include retainer, fee, and
escrow agreements and accountings, including RESPA or other real estate closing statements, accountings in contingent fee matters, and any other statement furnished to a client or third person to document receipt and disbursement of funds.

[9] The “Check Register,” “Individual Client Ledger,” and “Ledger for Bank Fees and Charges” required by paragraph (f)(1) are all chronological records of transactions. Each entry made in the check register must have a corresponding entry in one of the ledgers. This requirement is consistent with manual record keeping and also comports with most software packages. In addition to the data required by paragraph (f)(1)(B), the source of the deposit and the purpose of the disbursement should be recorded in the check register and appropriate ledger. For non-IOLTA accounts, the dates and amounts of interest accrual and disbursement, including disbursements from accrued interest to defray the costs of maintaining the account, are among the transactions which must be recorded. Check register and ledger balances should be calculated and recorded after each transaction or series of related transactions.

[10] Periodic reconciliation of trust accounts is also required. Generally, trust accounts should be reconciled on a monthly basis so that any errors can be corrected promptly. Active, high-volume accounts may require more frequent reconciliations. A lawyer must reconcile all trust accounts at least every sixty days.

The three-way reconciliation described in paragraph (f)(1)(E) must be performed for any account in which funds related to more than one client matter are held. The reconciliation described in paragraph (f)(1)(E)(iii) need not be performed for accounts which only hold the funds of a single client or third person, but the lawyer must be sure that the balance in that account corresponds to the balance in the individual ledger maintained for that client or third person.

The method of preparation and form of the periodic reconciliation report will depend upon the volume of transactions in the accounts during the period covered by the report and whether the lawyer maintains records of the account manually or electronically. By example, for an inactive single-client account for which the lawyer keeps records manually, a written record that the lawyer has reconciled the account statement from the financial institution with the check register maintained by the lawyer may be sufficient.

[11] Lawyers who maintain records electronically should back up data on a regular basis. For moderate to high-volume trust accounts, weekly or even daily backups may be appropriate.

Corresponding ABA Model Rule. Different from Model Rule 1.15.
Corresponding Former Massachusetts Rule. DR 9-102, DR 9-103.
EXHIBIT B—Mass. R. Prof. C. 1.5—Fees

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses. 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.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Except for contingent fee arrangements concerning the collection of commercial accounts and of insurance company subrogation claims, a contingent fee agreement shall be in writing and signed in duplicate by both the attorney and the client within a reasonable time after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the lawyer for a period of seven years after the conclusion of the contingent fee matter. The writing shall state the following:
(1) the name and address of each client;
(2) the name and address of the lawyer or lawyers to be retained;
(3) the nature of the claim, controversy, and other matters with reference to which the services are to be performed;
(4) the contingency upon which compensation will be paid, whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected for him or her by the lawyer, and if the lawyer is to be paid any fee for the representation that will not be determined on a contingency, the method by which this fee will be determined;
(5) the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer out of amounts collected, and unless the parties otherwise agree in writing, that the attorney shall be entitled to the greater of (i) the amount of any attorney's fees awarded by the court or included in the settlement or (ii) the amount determined by application of the percentage or other formula to the recovery amount not including such attorney's fees;
(6) the method by which litigation and other expenses are to be calculated and paid or reimbursed, whether expenses are to be paid or reimbursed only from the recovery, and whether such expenses are to be deducted from the recovery before or after the contingent fee is calculated;
(7) if the lawyer intends to pursue such a claim, the client's potential liability for expenses and reasonable attorney's fees if the attorney-client relationship is terminated before the conclusion of the case for any reason, including a statement of the basis on which such expenses and fees will be claimed, and, if applicable, the method by which such expenses and fees will be calculated; and
(8) if the lawyer is the successor to a lawyer whose representation has terminated before the conclusion of the case, whether the client or the successor lawyer is to be responsible for payment of former counsel's attorney's fees and expenses, if any such payment is due.

Upon conclusion of a contingent fee matter for which a writing is required under this paragraph, the lawyer shall provide the client with a written statement explaining the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. At any time prior to the occurrence of the contingency, the lawyer shall, within twenty days after either 1) the termination of the attorney-client relationship or 2) receipt of a written request from the client when the relationship has not terminated, provide the
client with a written itemized statement of services rendered and expenses incurred; except, however, that the lawyer shall not be required to provide the statement if the lawyer informs the client in writing that he or she does not intend to claim entitlement to a fee or expenses in the event the relationship is terminated before the conclusion of the contingent fee matter.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee (including a referral fee) between lawyers who are not in the same firm may be made only if the client is notified before or at the time the client enters into a fee agreement for the matter that a division of fees will be made and consents to the joint participation in writing and the total fee is reasonable. This limitation does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

(f) (1) 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.

(2) A lawyer who uses Form A does not need to provide any additional explanation to a client beyond that otherwise required by this rule. The form contingent fee agreement identified as Form B includes two alternative provisions in paragraphs (3) and (7). A lawyer who uses Form B shall show and explain these options to the client, and obtain the client’s informed consent confirmed in writing to each selected option. A client’s initialing next to the selected option meets the “confirmed in writing” requirement.

(3) 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. For purposes of this rule, a fee agreement that omits option (i) in paragraph (3), and, where applicable, option (i) in paragraph (7) of Form B is an agreement that materially differs from the model forms. 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” re-
quirement.

(4) The requirements of paragraphs (f)(1) – (3) shall not apply when the
client is an organization, including a non-profit or governmental entity.

[Forms A and B and the comments accompanying the rule are omitted.]
EXHIBIT C — Attorney’s Notice of Enrollment

ATTORNEY’S NOTICE OF ENROLLMENT
Notice to Financial Institution to Establish an IOLTA Account

ATTORNEY INFORMATION

INSTRUCTIONS TO ATTORNEYS: (1) COMPLETE THE “ATTORNEY INFORMATION” SECTION, (2) BRING THIS FORM TO THE FINANCIAL INSTITUTION OF YOUR CHOICE, (3) AFTER THE INSTITUTION HAS COMPLETED ITS SECTION BELOW, SEND THE PINK COPY TO THE IOLTA COMMITTEE ALONG WITH A DEPOSIT SLIP OR VOIED CHECK.

Firm Name: ____________________________

Attorney Name: ________________________

Mailing Address: ________________________

City __________________ State: _________ Zip Code: _______ Telephone: __________________

The undersigned hereby enrolls in the comprehensive Interest on Lawyers’ Trust Accounts (IOLTA) program established by the Massachusetts Supreme Judicial Court. Under this program, please open an account subject to negotiable orders of withdrawal (NOW, SuperNOW Account or other suitable interest-bearing account).

Authorized Signatories:

____________________________________

____________________________________

(Attach additional sheets for additional signatories)

FINANCIAL INSTITUTION INFORMATION

NOTE TO FINANCIAL INSTITUTIONS: Please call (617) 723-9993 if you require assistance in setting up this account.

Financial Institution Name: ______________________

Mailing Address: _________________________

City __________________ State: _________ Zip: _______ Telephone: __________________

Date Opened: __________ By: __________________________

(Financial Institution Representative)

Account Name: _______________________

Account Number: _______________________

Interest as computed in accordance with your standard account disclosure should be remitted monthly or quarterly to:

THE MASSACHUSETTS IOLTA COMMITTEE
7 WINTHROP SQUARE, 3RD FLOOR
BOSTON, MA 02110-1245
(617) 723-9093

TAXPAYER I.D. NO. 94-3166608

Remittance of interest may be made by your bank check via U.S. mail to the above address, or by Electronic Funds Transfer. Please call the IOLTA Committee for specific instructions on electronic payments. For each remittance, please submit a complete “Interest Remittance Report” and “IOLTA Summary Sheet”.

For more complete instructions on opening and remitting interest on IOLTA accounts, contact the IOLTA Committee and request the “Operations Handbook for Financial Institutions”.

WHITE ~ BANK  YELLOW ~ ATTORNEY  PINK ~ SEND TO IOLTA
EXHIBIT D — Client Ledger

CLIENT LEDGER

[use one client ledger for each client matter]

Client Name:

Legal Matter or Adverse Party:

File or Case Number:

<table>
<thead>
<tr>
<th>Date</th>
<th>Chk. No.</th>
<th>Payee or Source of Deposit</th>
<th>Description of Transaction</th>
<th>Amount Paid</th>
<th>Amount Received</th>
<th>Running Balance</th>
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</table>
EXHIBIT E — Client Funds Check Register

Account #: ______________________

Account Title: ______________________

Month: __________ Year: __________

<table>
<thead>
<tr>
<th>Date</th>
<th>Chk. No.</th>
<th>Payee or Source of Deposit</th>
<th>Description of Transaction</th>
<th>Client ID</th>
<th>Amount Paid</th>
<th>Amount Received</th>
<th>Running Balance</th>
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**EXHIBIT F — Reconciliation Worksheet**

As of Period Ending: ________

### Client Ledger Balances

<table>
<thead>
<tr>
<th>Name or Client ID</th>
<th>Amount</th>
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<td>1.</td>
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<td>11.</td>
<td>$</td>
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<tr>
<td>12.</td>
<td>$</td>
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<tr>
<td>13. Attorney Funds (for bank charges)</td>
<td>$</td>
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</tbody>
</table>

Total Client Ledger Balances: $________

Client Fund Account Check Register Balance: $________

Bank Statement Balance: $________

- Less: Outstanding Checks: $________
- Add: Outstanding Deposits: $________

Reconciled Bank Statement Balance: $________

completed by ________ date ________ approved by ________

*These amounts must be identical.*
EXHIBIT G—Ten Frequently Asked Questions

1. I usually request a retainer in some amount before undertaking to represent a client. May I deposit the retainer into my general operating account upon receipt?

Fees or retainers paid in advance are the property of the client until earned and must be deposited into an IOLTA account or a separate client fund account.

2. My client has paid me an advance toward the costs and expenses of the litigation. May these funds be deposited in my client trust account?

Advances for costs and expenses may be deposited into a client trust account or an IOLTA account. The lawyer is responsible for keeping proper records of the distribution of those funds.

3. May I permit a client to pay my advanced fee or retainers by credit card?

Ethics opinions in Massachusetts state that credit card charges for retainers or advanced fees must be deposited to client trust accounts. Although there is no prohibition against credit cards, the mechanics of accepting a credit card for advanced fees or retainers can pose some difficulties. Specific provisions must be made for dealing with potential chargebacks to the account and discount fees and other service charges assessed by the credit card processor so that client funds are not impacted. Based on these complications, it can often be simpler to limit credit card payments to earned fees.

4. How long must I retain client files after a matter has been concluded?

A lawyer must maintain complete records of the handling, maintenance, and disposition of all funds, securities, and other properties of a client for six years after termination of the representation and after distribution of the property.

5. Clients sometimes turn over to me, as collateral for their fee, valuables such as jewelry or stock certificates. Where should I hold these items?

Securities should be kept in a safe-deposit box except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third parties should be kept separate from the lawyer’s business and personal property.
6. Are all lawyers required to establish IOLTA accounts?

There are several categories of exemptions. Lawyers who do not hold clients’ funds because they are government employees, lawyers employed in a legal field but who do not hold themselves out as lawyers, lawyers employed in a nonlegal field, lawyers who maintain their law offices in another state, and lawyers who do not engage in the private practice of law are all exempt.

7. What are a lawyer’s duties in dealing with client funds?

Client funds must be deposited in one of two types of interest-bearing accounts: a pooled IOLTA account or an individual client account. The pooled IOLTA account contains all client funds that, in the judgment of the lawyer, are nominal in amount or held for a short time. This money may not be commingled with money belonging to the law office or to the lawyer personally except to pay bank service charges.

8. Must clients receive notice of lawyers placing funds in an IOLTA account?

No notice is required. Nor do clients have any decision to make as to the destination of the funds, which cannot be placed at interest for them.

9. Who is responsible for paying taxes on the interest paid on IOLTA accounts?

According to the Internal Revenue Service, the interest earned on IOLTA accounts is not taxable to the lawyer, the law firm, or the client. Any lawyer who receives a Form 1099 for interest earned on an IOLTA account should contact the IOLTA committee.

10. Are there fees that are not refundable?

There are no attorney fees that are not refundable. The fee may not interfere with the client’s right to discharge the lawyer at any time. Therefore, lawyers are not permitted to keep the unearned portion of the fee. This is an essential premise of the lawyer-client relationship.
SECTION 8.2

Records for Other People’s Money*

Hon. Daniel C. Crane
District Court, Commonwealth of Massachusetts

As a result of amendments to Mass. R. Prof. C. 1.15, new requirements for keeping records of money that lawyers hold for clients or others take effect on January 1, 2004. Massachusetts has now joined eighteen other states with similar provisions detailing the obligations inherent in the lawyer’s duty to keep accurate and detailed records of money he or she holds for clients and others in the course of a representation. The accounting and record keeping that the amendments require are nothing more than what any client or third person would expect from a professional who holds his or her money.

Every lawyer in Massachusetts who holds money for clients or others should evaluate the system that the lawyer uses to keep records. Many lawyers will find that they already conform to the requirements of the amended rule or just need to make minor adjustments to their existing systems and practices. A few will need to make major changes, and some will also decide that it is better to start fresh with a new IOLTA and accounting system before January 1.

Some of the important changes are:

• Lawyers are required to mail or deliver written itemized bills to clients at or before the time that the lawyer withdraws funds from a trust account to pay herself for services, showing the services provided and the amount of funds the lawyer continues to hold for the client after withdrawal of the fee.

* Source: Board of Bar Overseers/Office of the Bar Counsel, http://www.mass.gov/obcbbo/money.htm; published in October 2003, when Judge Crane served as Massachusetts Bar Counsel. Reprinted with permission. Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct, including Mass. R. Prof. C. 1.15. The amendments are effective July 1, 2015.
• Lawyers are prohibited from making withdrawals from trust accounts by ATM or checks payable to “Cash” and are required to use only prenumbered checks.

• Records that lawyers are required to make and keep of the receipt and disposition of funds held for clients or others are described in detail.

• Lawyers must perform a “three-way” reconciliation of the account at least every sixty days.

The accounting and record keeping obligations imposed by Mass. R. Prof. C., Rule 1.15 extend beyond the client to third parties who have an interest in the disposition of the funds. The rule applies to all clients’ funds accounts, including IOLTA, trust, estate and escrow accounts. In addition, the rule pertains to any funds being held by a lawyer in connection with a representation even if the lawyer is holding those funds in another capacity, such as a trustee or conservator for a family member or other person. There is an exception to the Operational Requirements for Trust Accounts set out in Rule 1.15(e) and (f) for property or funds being held as a custodian for a minor family member of the lawyer without compensation to the lawyer.

Rule 1.15 requires two basic kinds of records: (1) records created by the bank that show what went into and out of the lawyer’s client trust bank accounts; and (2) records created by the lawyer to explain the transactions reflected in the bank documents.

**Bank Created Records.** Rule 1.15(f) requires retention by the lawyer of all documents recording transactions that the bank returns to the lawyer. This may include such documents as client trust bank account statements, cancelled checks and records of electronic transactions. Banks no longer automatically provide cancelled checks to customers, but lawyers will want to make sure their bank provides either the originals or photo images of cancelled checks.

A basic system might involve keeping a separate binder (or folder) for each client trust bank account. Each folder should have one section for bank statements, one section for originals or photo images of cancelled checks and records of electronic and other transactions, one section for copies of deposit slips and one section for checkbook stubs or records, computer-generated equivalents or copies of checks created by “one-write” methods as the checks are written. Deposit slips and checkbook stubs or records provide a complete audit trail. In this system, each document is filed in date order in the appropriate section of the binder for the account they refer to. Note that binders for a pooled account will have cancelled checks pertaining to all of the clients whose funds are in the pooled account.
Records to Be Made and Kept by Lawyers. Rule 1.15(f)(1)(A) requires lawyers to record the name and address of the bank or other depository, the account number, the account title, the opening and closing dates, and the type of account (whether it is an IOLTA account or a separate client fund account for the client). For each account, there are three types of accounting records that must be kept by the lawyer. They are the ledgers for each client matter, a ledger for bank fees and charges, and a check register.

A Ledger for Each Client Matter. Rule 1.15(f)(1)(C) requires keeping individual client records for each separate matter in which the lawyer holds funds for the client.

This client ledger must give the name of the client, detail all money received and paid out on behalf of the client or third party, and show the client's balance following every receipt or payment. This means that a lawyer who represents a lender or creditor on multiple matters must keep a separate client ledger for each matter in which the lawyer holds money for the client.

Maintaining a client ledger is like keeping a separate checkbook for each client matter, regardless of whether or not the client's money is being held in the IOLTA account or a separate trust account. Every receipt and payment of money for a client must be recorded in the ledger for that client matter. For every receipt, list the date, amount and source of the money. For every payment, list the date, the amount, the check number, the payee and the purpose of the payment. After each receipt or payment is recorded, the new balance held for the client must be recorded.

Ledger for Bank Fees and Charges. Rule 1.15(f)(1)(D) requires lawyers to record every bank charge against the client trust fund account in the check register and permits the lawyer to keep his or her money in the account to pay these charges and fees. Lawyers should keep a bank fees and charges ledger the same way that client ledgers are kept, as part of a check register system. Record every deposit of the lawyer's funds, every charge the bank makes against the account, and the running balance in both the client ledger and the check register.

Check Register. Rule 1.15(f)(1)(B) requires a check register in chronological order with the date and amount of all deposits; the date, check or transaction number, amount and payee of all disbursements, whether by check, electronic transfer, or other means; the date and amount of every credit or debit and the identity of the client matter and the current balance in the account. Maintaining a check register is very similar to keeping a client ledger. For pooled accounts, keeping the check register is the only way to know how much money is in the account at any given time and is essential for performing required reconciliations. If maintained and used properly, this journal will help prevent bounced checks (unless there is a bank error).
“Three-way” Reconciliation. Rule 1.15(f)(1)(E) requires lawyers to keep records of reconciliation (balancing) of the client ledgers, bank charges ledger, check register and bank statements. The “three-way” reconciliation requires the lawyer to add all of the individual client ledgers and the ledger for bank charges and compare the total of the ledgers to the balance in the check register. Both amounts should be the same. If they are not, the basic records—the bank statements, the client ledgers, the bank charges ledger and the check register—need to be checked for mistakes and corrected. When both amounts are the same the lawyer goes on to reconcile this amount against the bank statement in the usual manner that any checkbook would be balanced. Rule 1.15 requires that client trust account records be reconciled at least every sixty days and that a written record that shows the records were reconciled be kept. It is recommended, however, that you reconcile these accounts on a monthly basis or more frequently if the account is particularly active such as a high volume conveyancing account.

Keeping Records by Computer. The amendments do not direct lawyers to keep the required records using a computer. It is fine for lawyers to continue to keep records manually as long as they include all of the required information and an appropriate record is made that the “three-way” reconciliation was performed in a timely manner. However, many of the required records and activities are now routinely handled in many law offices by computerized accounting systems. Many systems have the capability of performing a complete “three-way” reconciliation and generating the required records of the reconciliation. There are several relatively inexpensive software applications that are widely available that can accomplish this. Thus, for example, a few keystrokes, or mouse clicks, can generate the client and bank ledgers, the check register, and the record of the “three-way” reconciliation.

A lawyer using a computerized accounting system must maintain the check register, client ledgers, bank charges ledger and reconciliation reports in a form that can be reproduced and printed in hard copy. Because computer data can be lost through electrical storms, fire, power or equipment failure, software malfunction and human error, electronic records must be regularly backed up by an appropriate storage device. Rule 1.15(f)(1)(G). Whether by computer or manually, Rule 1.15(f) requires keeping trust accounting records for six years after the termination of the representation and the funds are paid out.

The ability to precisely document the complete history and disposition of all client funds is the central requirement when accounting for trust funds. Rule 1.15 does not mandate any particular client trust accounting system, but it spells out the required components.

Before January 1, 2004, bar counsel will participate in more than a dozen trainings sponsored by MCLE and bar associations. These programs are being conducted
throughout the state. For a schedule of these programs and other information on this subject, go to the website of the Office of Bar Counsel, www.mass.gov/obcbbo. The IOLTA Committee has published a very useful booklet on the nuts and bolts of trust accounting, "Managing Clients’ Funds and Avoiding Ethical Problems," by Jayne B. Tyrrell, Esq., and Stephen M. Casey. It is available at the IOLTA Committee’s website http://www.maiolta.org or call them at 617-723-9093. It may take some effort in the next few months to review systems and change practices, but the result will be better service to clients and better protection of client funds.
SECTION 9

Social Media: Best Practices and Caveats

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   Robert J. Ambrogi, Esq.
   Law Office of Robert J. Ambrogi, Rockport

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   James S. Bolan, Esq.
   Brecher, Wyner, Simons, Fox & Bolan LLP, Newton

§ 9.3 Ethical Considerations for Attorneys Who Use Social Media to Network, Advertise, Blog, Communicate with Clients and Potential Clients, and Research Witnesses ................................................................. 9-13
   Jeffrey D. Woolf, Esq.
   Board of Bar Overseers, Boston

§ 9.4 Tangled Web: Advertising, Solicitation, Ethics, and the Internet ................................................................. 9-21
   Constance V. Vecchione, Esq.
   Board of Bar Overseers/Office of the Bar Counsel, Boston

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   Sarah A. Chambers, Esq.
   Board of Bar Overseers/Office of the Bar Counsel, Boston
SECTION 9.1

Social Media Mischief and Malaise

Robert J. Ambrogi, Esq.
Law Office of Robert J. Ambrogi, Rockport

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2. Do Not Betray Client Confidences ...................................................... 9–2
3. Avoid Inadvertently Forming Attorney-Client Relationships .......... 9–3
4. Do Not Solicit ........................................................................................  9–3
5. Steer Clear of Unauthorized Practice ................................................. 9–3
6. Understand the Rules on Recommendations ................................. 9–4
7. Remember the Rule on Trial Publicity ............................................ 9–4
8. Make No False or Misleading Statements ......................................... 9–4
10. Use Common Sense .............................................................................. 9–5

Ethics 101 ..............................................................................................  9–5

There's trouble in social media, with a capital “t” and that rhymes with “e” and that stands for ethics. For legal professionals, social media offer a powerful and economical set of tools for marketing, research, networking, collaboration and more. But as with any emerging media, there are uncharted pitfalls as well.

* Source: “Mischief and Malaise,” Law Technology News. Note that this article was originally published in August 2012 and does not reflect changes in law and technology that have occurred since that date. Reprinted with the permission of Robert J. Ambrogi and ALM Media Properties, LLC (see note following article). Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
Ethics and social media will be front and center at the American Bar Association’s annual meeting this month in its hometown, Chicago. The ABA’s House of Delegates—its governing body—will consider the recommendations of the ABA Commission on Ethics 20/20, which has proposed revisions to the Model Rules of Professional Conduct to address changes in technology. (See “Too Late & Too Little,” by Michael Arkfeld, page 45, and “ABA to Tackle Technology Issues,” by John Barkett.)

Meanwhile, staying out of trouble when using social media is not difficult, provided you are aware of the dangers, and use some common sense.

**1. Remember That the Same Rules Apply**

Blogs, social networks, Twitter, and the like remain relatively new forms of media, but the same old ethical rules apply. In fact, these new media generally do not require new rules.

Even the Ethics 20/20 Commission, after studying these issues for three years, concluded in a Dec. 28, 2011, report, “In general, we have found that the principles underlying our current Model Rules are applicable to these new developments. As a result, many of our recommendations involve clarifications and expansions of existing Rules and policies rather than an overhaul.”

**2. Do Not Betray Client Confidences**

Exhibit A for how lawyers can get themselves into trouble online is Kristine Ann Peshek, the former Illinois assistant public defender whose law license was suspended for 60 days because of her blog postings that authorities said exposed client confidences.

Peshek believed and maintained that she was blogging about her clients anonymously. Bar authorities, however, concluded that she provided sufficient detail in some posts to allow specific clients to be identified.

My advice: Do not blog about your own clients or cases, except as to details that have unequivocally become public, such as when a case of yours is reported in an appellate opinion. There is plenty else for you to blog about.
3. **Avoid Inadvertently Forming Attorney-Client Relationships**

Many lawyers don’t answer consumer questions in Q&A forums on sites such as Avvo and LinkedIn for fear of forming an attorney-client relationship.

The Ethics 20/20 Commission takes a reasonable approach to this issue, suggesting that this danger exists only when the lawyer gives the prospective client a “reasonable expectation” that he or she is willing to form an attorney-client relationship.

A lawyer can participate in these forums but also disavow any “reasonable expectation” by expressly using cautionary language and disclaimers in an answer. Keep your answers generic, avoid addressing highly specific facts, and expressly state that your answer should not be considered legal advice.

4. **Do Not Solicit**

Ethical rules prohibit lawyers from soliciting potential clients for pecuniary gain. Fear of solicitation keeps lawyers off of Twitter, Facebook and other social networks. Such fear is unfounded.

No question, a lawyer could solicit through any of these media—but the lawyer would have to be trying very hard to do so. For it to be a solicitation, it has to be targeted at a specific individual and intended to be perceived as an offer to provide legal services. Merely engaging with the public in an online forum of any kind is not solicitation.

5. **Steer Clear of Unauthorized Practice**

In my opinion, the current rules against unauthorized and multijurisdictional practice are archaic and senseless in today’s highly connected world. But they remain the rules. If you are admitted only in one state, you cannot give legal advice in another state.

To my knowledge, there has never been an ethics complaint against a lawyer for answering questions online in a Q&A forum or for participating in a discussion on Twitter or elsewhere online.

Even so, lawyers are well advised to refrain from giving fact-specific advice online—and to include disclaimers in any answers they provide to consumer questions. There is a big difference between educating about law and advising about law.
6. **Understand the Rules on Recommendations**

ABA Model Rule 7.2 says, “A lawyer shall not give anything of value to a person for recommending the lawyer’s services.” Does this mean you cannot provide an endorsement of a colleague on sites such as LinkedIn or Avvo? Absolutely not, provided nothing of value is exchanged. But can you promise to provide an endorsement if the other attorney promises to endorse you in return? That quid pro quo could be seen as an exchange of value.

The ABA 20/20 Commission provided a very different example. One law firm distributed free T-shirts emblazoned with its name. It then offered a chance to win a prize to anyone who posted a photo on Facebook wearing the firm’s shirt. “The firm arguably gave people something ‘of value’ (the shirt and the opportunity to win a prize) for ‘recommending the lawyer’s services’ and thus might be viewed as running afoul of the existing version of Rule 7.2,” the commission wrote.

7. **Remember the Rule on Trial Publicity**

ABA Model Rule 3.6 limits what a lawyer can say about his or her own cases. The rule says that you cannot say anything that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”

Consider Florida lawyer Mark O’Mara, who recently launched a social media campaign on behalf of his client George Zimmerman, a neighborhood watch volunteer accused of killing teenager Trayvon Martin. O’Mara’s efforts included a blog, Twitter account and Facebook page—was that not meant to somehow “prejudice” the matter? This is a very gray area, but one lawyers should be mindful of when they blog or tweet about their cases—and another good reason not to blog about your own cases in the first place.

8. **Make No False or Misleading Statements**

If the profession were to have only one ethical rule, it would be this: Do not misrepresent yourself, your services or your capabilities. This is embodied in ABA Model Rule 7.1, which prohibits false or misleading communications. Social media offer a powerful form of marketing, especially for young and less-experienced lawyers.

In the enthusiasm to build a practice, lawyers should be cautious not to overstate their capabilities and experience.
9. Become Competent in Technology and Social Media

You will not find anything in the ABA Model Rules or your own state's ethical rules about competence in technology. Yet it only makes sense: The best way to stay out of trouble with any medium is to understand how it works. If you are uneducated about technology and social media, you are more susceptible to tripping up.

Although the Model Rules are silent on this, the ABA 20/20 Commission has proposed to change that. The commission has suggested that the comment to Model Rule 1.1, on competence, be amended to require that lawyers not only maintain competence in law and practice, but also in "the benefits and risks associated with technology."

10. Use Common Sense

To me, it all comes back to this. Exercise common sense in your use of social media and you are unlikely to get into trouble.

Think carefully about that blog post before you hit publish. Consider all 140 of those characters before you send out a tweet.

Always be mindful of that now-old saw, "If you wouldn't want to read it on the front page of The New York Times, don’t post it online."

Ethics 101

To learn more about ethics and social media, a good place to start is the website of the ABA Commission on Ethics 20/20, www.americanbar.org/ethics2020. It has a library of reports, issue papers, meeting minutes, and other documents compiled during the commission’s three years of study.

If you want to get right to the meat of the issues, read the reports the commission filed with the ABA House of Delegates for consideration at the August meeting. There are six reports plus an overview. But the two that most directly relate to social media are the reports on technology and confidentiality, and technology and client development.
Transcendental Lawyering—
To Boldly Go Where No Lawyer
Has Gone Before:
The Interrelationship Between
Ethics and Social Networking*

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Application of Disciplinary Rules to Cyberspace

Do Not Inadvertently Create an Attorney-Client Relationship
(a) UPL and MJP
(b) Creation of Attorney Client Relationships, Confidentiality, Privacy, and Access

Be Aware of Advertising and Solicitation Rules

Protect Client Confidences

Be Careful Who You Give Access to in Your Network

Fitness and the First Amendment

Virtual World Rights and Duties

Conclusion

Google, YouTube, Facebook, LinkedIn, Plaxo, Second Life, email, internet, social networks, chat rooms, forums, bulletin boards, listservs, newsgroups and virtual reality sites. These are the forms of 21st Century communications among

* Source: Old Rules: New Tools—The Challenge of Social Media for Bar Associations and Lawyers (American Bar Association 2012). Reprinted with permission. Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
one’s peers, third parties, clients and potential clients. Lawyers are using the web in exponential measure, but such communication does not change one’s duties and responsibilities under real world ethics rules. Henry David Thoreau meet Dick Tracy. Dick Tracy meet Philip Rosedale.

Application of Disciplinary Rules to Cyberspace

Under the Massachusetts Rules of Professional Conduct, lawyers are required to abide by ethics rules where they are licensed, where they have offices, and where they direct communications, regardless of where the conduct occurs. Mass. R. Prof. C., Rule 8.5. A lawyer not admitted in Massachusetts is nonetheless subject to the disciplinary authority of this and one’s home jurisdiction if the lawyer provides any legal services here. Providing legal services in a jurisdiction where one is not admitted can result in unauthorized practice of law (UPL) issues. See below for more on that subject.

Do Not Inadvertently Create an Attorney-Client Relationship

(a) UPL and MJP

How does one know where the person on-line is located, or even how old they are? All of which leads to the possibility that one could be engaging in unauthorized practice of law when communicating in the ether. Protection against UPL ought to include disclaimers in online communications as to one’s licensure and geographic limitation on practice. Do not take on a relationship in a jurisdiction where one is not admitted. UPL violations can result in fee disgorgement (see, Birbrower, Montalbano, Condon & Frank v. Superior Court, 17 Cal.4th 119, 949 P.2d 1 (1998)), civil and/or criminal penalties, as well as bar regulation. One additional issue facing lawyers in cyberspace is determining which states’ rules apply. See, e.g., Choice Of Law In Online Legal Ethics: Changing A Vague Standard For Attorney Advertising On The Internet, 70 Fordham L. Rev. 2409 (2002).

(b) Creation of Attorney Client Relationships, Confidentiality, Privacy, and Access

One could, by communicating in cyberspace, unintentionally create an attorney-client relationship. For example, in 2007, the Massachusetts Bar Association Ethics Committee issued an opinion (2007-01) that, in the absence of an effective disclaimer, a lawyer who receives unsolicited information from a prospective client through an e-mail link on a law firm web site must hold the information in...
confidence even if the lawyer declines the representation. The subtext of that opinion was that “click-throughs” via email could establish an attorney-client relationship unless disclaimers or permissions on the website made it clear that no such relationship was being created.

Be Aware of Advertising and Solicitation Rules


ABA Model Rule 7.2 was amended to include internet advertising. See, Massachusetts Rule of Professional Conduct 7.2(a) that includes public media or written non-solicitation communication. Advertising rules may apply even if the site is a non-confidential chat room, thus, rendering a lawyer not only subject to disciplinary rules, but risking confidentiality. While websites/pages constitute advertising, is the same true for virtual world or MySpace pages? Are these activities more akin to solicitation than advertising?

While websites constitute advertising, no rules expressly state that online offices in “virtual” communities do. In virtual cyberspace, the level of interaction surpasses chat rooms. Some state ethics committees (California and Arizona) have conditionally blessed communication with prospective clients through real-time electronic contact. Others (Michigan, West Virginia, Virginia and Utah) have opined that in-person solicitation rules apply to interactive communications. At least one state (Florida) has decided that a lawyer may not solicit prospective clients through real-time communications. Rule 7.3 of the Massachusetts Rules of Professional Conduct precludes personal communication by electronic device “or otherwise.”

Is social surfing just free speech, or is it trolling for clients? Instant messaging, for example, allows real-time communication, akin to in-person contact. But, see, Cal. Bar Op. 2004-166 (attorney’s communication with prospective fee-
paying client in a mass-disaster victims internet chat room violated solicitation rules); Pa. Op. 96-17 (1997) (internet communication in a chat room alone did not violate rules on solicitation, but such communication should be very carefully approached). See also, Cal. Bar Op. 2001-155 (website is not necessarily a solicitation even if it includes electronic mail to and from the attorney).

If your network page contains comments from clients or colleagues about how fabulous you are (hold the applause!), you may run afoul of testimonial prohibitions in some states. Massachusetts does not expressly prohibit testimonials, but California, New York and others do.

And, the Constitution notwithstanding, many states (Kentucky, New Jersey, Florida and Nevada, for example, but not Massachusetts) still have rules requiring filing and pre-screening of ads. Some states (New York) still require labeling of "Attorney Advertising" which is applicable to internet activity. Finally, mandatory disclaimers are required in some states, including “The choice of a lawyer is an important decision that should not be based solely upon advertisements”; “No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers”; “The Wyoming State Bar does not certify any lawyer as a specialist or expert. Anyone considering a lawyer should independently investigate the lawyer’s credentials and ability, and not rely upon advertisements or self-proclaimed expertise”; “While this firm maintains joint responsibility, most cases of this type are referred to other attorneys for principal responsibility”; and, “FREE BACKGROUND INFORMATION AVAILABLE UPON REQUEST.”

A number of states are now insisting that social websites or video sharing sites must comply with advertising rules. See new Texas rules August 2008.

No matter what, one must ensure that what you say in cyberspace is true and not misleading. See Mass. R. Prof. C., Rule 7.1. Keep social network sites and posts separate from your law firm websites.

**Protect Client Confidences**

Twitter is no different from the conversation in the courthouse elevator. Attorneys need to make sure that when they post on a blog or on Twitter that they aren’t revealing any attorney-client confidences. See, In Re Peshek, -- Ill. -- (2009). Your “tweet” about a case could disclose information that you would not otherwise think is risky, but the ease and familiarity of use in a society where the pressure is to move fast or die is inherently dangerous. “I’m drafting a summary judgment motion” or a post with enough information about that the case is apparent is FATAL.
As with any other substantive communication, a second lawyer should check your communications before they go out.

If you just cannot wait, then give me your bar card on the way out the door and Tweet away...

**Be Careful Who You Give Access to in Your Network**

The rule was always, if you don’t mind seeing what you write or say on the front page of “the Herald”, then fire away! Facebook and LinkedIn and other sites allow anyone to peruse fellow members’ networks and connections. Letting someone into your network means your data can be mined. That may be fine. But, not if it contains information about clients or contacts that you do not want someone else to use or misuse. In addition, there are an increasing number of reported incidents where judges have “friended” list users and lawyers have “friended” clients and others, each with concomitant consequences.

**Fitness and the First Amendment**

Notwithstanding First Amendment protections, one can imagine a bar complaint being filed by an “aggrieved” person for statements made by a lawyer in a blog, a listserv, a chat room or a virtual world. A missive in cyberspace belies the discretion borne of patience found in old-fashioned letters. Note that lawyers are subject to regulation for conduct occurring in one’s private, as well as professional, life. Kiting a check or engaging in misrepresentation in cyberspace, even if not in the act of practicing law, could subject one to discipline. See, e.g. Matter of Ring, 427 Mass. 186 (1998).

**Virtual World Rights and Duties**

Second Life is a virtual online community, in which “residents” are represented by avatars that can communicate, socialize, buy, sell, barter and provide services. Virtual (and real) law firms “exist” in such worlds. Some lawyers are using Second Life to recruit real-world clients. By chatting, advertising, and participating in virtual activities, lawyers are looking for potential clients in this alternative medium. (See, Stephanie Francis Ward, Fantasy Life, Real Law, A.B.A. J., Mar. 2007.) Advertisement or solicitation will generate real world oversight. In one instance, lawyers used social networking sites to gain information to defend a criminal client. They then posted a story online explaining how they used social networking sites with success, thus running the risk of advertising or other violations in some states.
Some state bar associations believe that virtual activity that is “sufficiently game-like” might avoid bar scrutiny even if it generates real work. See, Stephanie Francis Ward, Fantasy Life, Real Law, A.B.A. J., Mar. 2007. Some bar officials have stated, informally, that regulation of such “game like” activity in a virtual environment might not even be worth undertaking. But, misconduct even within a virtual site runs the risk of bar regulation, as well as disgorgement of ill-gained fees, civil exposure and certain potential criminal exposure (UPL, for example). Non game-like activity in cyberspace is increasingly attracting the attention of real world regulators and prosecutors. See, e.g., Amsterdam, Netherlands: 10/08: Dutch court convicts two youths of theft for stealing virtual items in a computer game (“These virtual goods are goods (under Dutch law) so this is theft,” the court said Tuesday in a summary of its ruling) (http://www.nzherald.co.nz/technology/news/article.cfm?c_id=5&objectid=10538822); and, Tokyo 10/08: Online divorcee jailed after killing virtual hubby (Woman is accused of illegally using login information she got from a 33-year-old office worker when their characters were happily married to access the virtual world and kill the character. The man complained to police when he discovered that his beloved online avatar was dead). (http://news.yahoo.com/s/ap/20081023/ap_on_re_as/as_japan_avatar_murder)

Lawyer complaints won’t be far behind!

Conclusion

The risks and rewards in cyberspace parallel conventional world activity. “Boldly go” where lawyers have not gone before, but “look before you leap”!
SECTION 9.3

Ethical Considerations for Attorneys Who Use Social Media to Network, Advertise, Blog, Communicate with Clients and Potential Clients, and Research Witnesses*

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Since 1999, the Office of the Bar Counsel has posted several articles on its website concerning various issues touching on the use of the internet to advertise, solicit clients, and communicate with clients and potential clients. While the use of social media has developed substantially since the publication of the last arti-

* Source: Employment Landmines in Social Media: Navigating the Risks and Opportunities in the Workplace and Practice (© 2011 MCLE, Inc.). Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
cle, the basic principle remains the same: the conduct of Massachusetts attorneys is governed by the Rules of Professional Conduct. If you are not permitted to do it in the “brick and mortar” world, then you cannot do it in cyberspace.

I. Advertising Versus Solicitation of Clients

Advertising and solicitation of clients are related but not synonymous. “Advertising” is directed to the public and is governed by Mass. R. Prof. C. 7.1, 7.2, 7.4 and 7.5, while “solicitation of professional employment” is governed by Mass. R. Prof. C. 7.3. Just as a lawyer cannot make a false or misleading advertising statement in print media, he or she cannot do so using electronic media. For example, in 2003, two lawyers received an admonition for violating Rule 7.1, because their Yellow Pages (and later, their website) contained false or misleading statements about bar memberships and where some of the attorneys were licensed to practice law. Admonition 03-47, 19 Mass. Att’y Disc. R. 609 (2003).

While there are currently no reported cases involving the use of social media, a lawyer cannot make false or misleading statements on Craigslist, a Facebook page or other social media site, any more than he or she could do so on a web page.

A lawyer also cannot list the names of clients on a social networking site or website without the clients’ permission, as the identity of a client is generally considered to be confidential information within the meaning of Rule 1.6. In re: Advisory Opinion 544, 103 N.J. 399, 511 A.2d 609 (1986) (reversing advisory opinion no. 544 and holding that legal services organization cannot disclose client-identifying information, even to public and private funding agencies). This might be true even though the client asked to “friend” the lawyer on the lawyer’s Facebook page.


II. Blogging—Advertising or Otherwise

Some attorneys maintain web logs or “blogs,” either in connection with websites or separately. To the extent that these tout a lawyer’s successes (and therefore impliedly are soliciting clients), they cannot contain false or misleading statements in violation of Rule 7.1, such as false or misleading statements about the lawyer’s expertise, field or area of practice in violation of Rule 7.4. They likewise
cannot contain or make false or misleading statements about the lawyer’s firm name, affiliation or the nature of the law practice, in violation of Rule 7.5. What a client cannot put in a print advertisement or on a web page cannot be put in an e-mail, blog post or on a social networking page. E.g., S.C. Ethics Advisory Op. 09-10 (2009).

A lawyer’s obligation to maintain the confidentiality of information relating to the representation of a client extends to blogs and websites (including Facebook pages). Matter of Barbara Johnson, 450 Mass. 165, 877 N.E.2d 249 (2007) (lawyer posted impounded information on her website from a care and protection action involving alleged sexual abuse, and identities of clients without their permission). Thinly veiled disclosures that permit discovery of otherwise confidential information can result in disciplinary sanctions. In Matter of Peshek, M.R. 23794 (Ill. 2010), a public defender was suspended from the practice of law for 60 days because of postings on her blog that thinly veiled the identities of clients and confidential details of cases. 2 Under Rule 3.6(a), lawyers may not, with regard to their own cases or those of their firm or government agency, make out-of-court public statements “that the lawyer knows or reasonably should know * * * will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” Most of the reported cases involve letters to newspapers, or other media contacts; however, the same prohibition would apply to blogs and websites.

Lawyers also do not have unlimited First Amendment rights to make disparaging remarks on their blogs. In Fla. Bar v. Conway, 996 So.2d 213 (Fla. 2008), a lawyer received a public reprimand and was fined $1,250.00 for intemperate remarks on a blog, including calling a judge an “evil, unfair witch.” Discipline of lawyers for statements made outside the courtroom is not a new concept. In re Sawyer, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959) (Frankfurter, J., dissenting); Gentile v. State Bar of Nev., 501 U.S. 1030, 1071, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). See Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1871) (disbarment of lawyer for verbally “accosting” the trial judge and making accusations in the courtroom while the trial was recessed for the day).

Even a lawyer who attempts to blog anonymously may not be able to avoid being identified, if the subject of the blog claims he has been defamed. A cursory review of reported cases shows that subpoenas to compel internet service providers to identify people who speak anonymously over the internet are infrequently upheld. E.g., In re Subpoena Duces Tecum to America Online, Inc., 2000 WL 1210372 (Va. Cir. Ct. Jan. 31, 2000). However, the courts that have quashed such subpoenas have often established criteria that would presumably allow the plaintiff to obtain the requested information. E.g., Solers, Inc. v. Doe, 977 A.2d 941 (D.C. Ct. App. 2009) (as a matter of first impression, establishing a five-part test to determine whether to quash or enforce a subpoena to obtain the identity
of someone speaking anonymously over the internet); Doe No. 1 v. Cahill, 884 A.2d 451 (Del. 2005) (defamation summary judgment standard to be used to obtain the identity of an anonymous defendant through discovery); Krinsky v. Doe 6, 159 Cal.App.4th 1154, 72 Cal.Rptr.3d 231 (Ct. App. 2008) (plaintiff required to make a prima facie showing of tort for issuance of subpoena); Dendrite Int’l, Inc. v. Doe No. 3, 342 N.J.Super. 134, 775 A.2d 756 (N.J. Super. 2001) (must show harm from statement). The opposite result was reached in Yoder v. University of Louisville, 2009 WL 2406235 (W.D. Ky. Aug. 3, 2009), where a nursing student had been dismissed because of a blog concerning her maternity ward experience. The court decided the lawsuit seeking reinstatement on narrow contractual grounds, concluding that the comments on a personal blog were outside of a professional context and did not violate the school’s Honor Code of Confidential Agreement because it did not contain any information that could lead to the identity of the mother who was the subject of the blog.

Massachusetts has previously held that while “statements by an attorney critical of a judge in a pending case in which the attorney is engaged are especially disfavored,” a lawyer “may make statements critical of a judge in a pending case in which the attorney is a participant.” However, the lawyer “must have a reasonable factual basis for making such statements before he makes them.” Matter of Cobb, 445 Mass. 452, 838 N.E.2d 1197 (2005). Moreover, the “safe harbor” provision of Rule 3.6, which was adopted when the rule was revised following Gentile, supra, would not apply to ad hominem attacks on judges. Cobb, at 475 n.7 (no safe harbor for impugning the integrity of a judge, without an objectively reasonable basis).

III. Direct Solicitation

Rules 7.3(c) and 7.3(d), which restrict “solicitation of professional employment for a fee from a prospective client,” respectively refer to “electronic communications” and “electronic devices.” Just as a lawyer cannot send a solicitation letter to an accident victim (or other potential consumer client) who is not a former client or family member as described in Rule 7.3(g)(2), he or she cannot solicit by e-mail, text message, or posting on the recipient’s Facebook page. Matter of Holzberg, 12 Mass. Att’y Disc. R. 200 (1996) (public reprimand for sending solicitation letter to 17 year-old victim the day after he was seriously injured in a car accident).

IV. Investigation by Pretext

Rule 4.1(a) prohibits a lawyer from knowingly making a false statement of material fact or law to a third person. Rule 4.1(b) requires a lawyer to disclose a material fact to a third person when such disclosure is necessary to avoid assisting a crim-
inal or fraudulent act by a client, unless the disclosure is prohibited by Rule 1.6. Rule 4.4 prohibits a lawyer from using “methods of obtaining evidence that violate the legal rights of [a third] person.” In addition, Rule 8.4(c) says it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Moreover, if the person being investigated is represented by counsel, Rule 4.2 prohibits direct contact in cyberspace, just as it prohibits direct contact in the physical world. Just as the lawyer cannot make such direct cyberspace contact, he or she cannot have it done by a subordinate attorney (see Rule 5.1) or by a nonlawyer assistant (see Rule 5.3). For example, the Philadelphia Bar Ass’n Prof. Guidance Commission, in Opinion 2009-02 (March 2009), stated than an attorney may not mislead a witness into granting access to her Facebook page, nor may the lawyer have a nonlawyer (whose name the witness would not recognize) to obtain such access, as this would violate Rules 4.1, 5.3(c), 8.4(a) and 8.4(c).

While lawyers can have avatars for gaming and social purposes, a lawyer cannot impersonate a real person, particularly when there is harm to the impersonated individual. E.g., Matter of Carpenter, 337 Or. 226, 95 P.3d 203 (2004) (lawyer pretended, in posting on classmates.com, to be a real person (a teacher, in whose name he opened an account), and stated (as a joke) he was having sex with students; public discipline, with factors in mitigation). Pretexting is not permitted in Massachusetts in an effort to uncover information or to discredit a witness. Matter of Crossen, 450 Mass. 533 (2008) (attorney violated Rule 4.1 when he engaged in misrepresentation of fact to a law clerk for the purpose of inducing him to make statements about the deliberative process of a judge). An attorney may not engage in an undercover sting operation or “testing” or direct others to do so, where the conduct employs “excessively intrusive investigative techniques,” “entrapment,” or involves “an actionable invasion of privacy”). Matter of Gross, 435 Mass. 445, 759 N.E.2d 288 (2001) (18-month suspension for having a prospective witness pose as the criminal defendant in answering the call of the list in an effort to confuse the victim and prompt a misidentification).

If a lawyer learns that a client has used a pretext to obtain information from a litigation adversary or witness, the attorney must comply with Rule 3.3 (a)(2) and 3.3(b) concerning the client’s actions. Presumably there would be a different result if undercover police officers obtained access using assumed identities. E.g., Guest v. Leis, 255 F.3d 325 (6th Cir. 2001), where government task force agents, gained access to password protected pornographic internet chatrooms, bulletin boards and websites. United States v. Stults, 575 F.3d 834 (8th Cir. 2009) (undercover agent conducted search for users accessing known child pornography sites; affirmed denial of motion to suppress). United States v. Bailey, 272 F.Supp.2d 822 (D. Neb. 2003) (undercover FBI gained access to child pornography e-group and received e-mails containing images of child pornography).
While there are no Massachusetts cases expressly on point concerning social networking websites, the foregoing cases suggest that pretexting is not permitted, e.g., to gain access to a person’s Facebook page or get them to “friend” a lawyer or other person at the lawyer’s direction as being in violation of these rules.

V. Coerced Access

While not a case involving the Rules of Professional Conduct for lawyers, the New Jersey case of Pietrylo v. Hillstone Restaurant Group is worth noting. One of the plaintiffs, employed by Hillstone, started a group on MySpace where employees could “vent” about their employer. While the site was intended to be private, at least one of the employees who had access to the site gave her password, on several occasions, to two different managers, who then accessed the site and read derogatory remarks about the company (including “references to violence and illegal drug use”). As a result, two of the employees (but not the one who provided her password) were terminated. The discharged employees sued their former employer for wrongful termination, invasion of privacy and violations of the federal and state versions of the Stored Communications Act. The district court initially granted partially summary judgment for the employer but allowed other counts to proceed. 2008 WL 6085437 (D. N.J., July 25, 2008) (unpublished decision). Following a trial, the jury found for the employees and awarded modest damages. The court then denied motions for a judgment as a matter of law under Fed. R. Civ. P. 50(b) and for a new trial under Fed. R. Civ. P. 59. It concluded the jury could have correctly inferred that the employee who provided her password did so because she felt “coerced” or did so “under pressure,” even though the employee admitted that no threats were made, because she would have not provided her password if the requestor had not been her manager. It also upheld the implicit finding that the actions of the managers were “malicious.” 2009 WL 3128420 (D. N.J., Sept. 25, 2009) (unpublished decision). Presumably, if the comments had been made on the company e-mail system or in public, there would have been no violation in terminating the employees. Law firms must therefore be careful about the information they require an employee to provide and how they use it, and correspondingly about the advice given to clients in the same regard.

Another case for employers to watch is Jackson v. Pearl Public School District, 3:09-cv-00353-HTW-LRA (S.D. Miss., Jackson Div., filed June 16, 2009). In Jackson, the plaintiffs claimed that a teacher wrongfully requested that a minor student provide her password to her Facebook account and using the password, accessed the student’s account, and disseminated information on it to other school employees. The complaint further alleges that the student was publicly reprimanded and punished for content on the Facebook page, including private communications with another student. The complaint also alleges violations of the student’s
right to privacy, due process, free speech, as well as civil conspiracy and intentional infliction of emotional distress. As of this writing, a motion to dismiss is pending.

VI. Investigation Without Pretext or Coercion

If a person has no privacy settings on a social networking page, then presumably there are no restrictions on the issue of the information contained on it. E.g., Marshall v. Mayor and Alderman of the City of Savannah, 366 Fed.Appx. 91, 2010 WL 537852 (11th Cir. 2010, unpublished) (public employee terminated for inappropriate postings on unrestricted MySpace page; rejecting claims of wrongful termination and gender discrimination). Likewise, employees can be disciplined or even terminated for violating an employer’s policies about sexually explicit materials, including text-messaging on employer-issued equipment. City of Ontario v. Quon, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010) (city police officer disciplined for sending sexually explicit text messages during work hours). United States v. Angevine, 281 F.3d 1130 (10th Cir. 2002) (conviction for child pornography deleted from employer’s computer but retrieved by employer). In the case of child pornography, an employer may even have a duty to investigate an employee’s Internet activities and take action, to avoid harm to third persons. In Doe v. XYZ Corp., 382 N.J.Super. 122, 887 A.2d 1156 (Super. Ct. App. Div. 2005), the mother of a victim of child pornography sued the employer of a man who had posted nude pictures of her daughter on a child pornography website using his workplace computer. The Appellate Division reversed summary judgment for the employer, noting the employer’s policy allowed the employer to monitor an employee’s website activity and e-mails and that it could have implemented software to do so. 887 A.2d at 1161, 1164. It held that “with actual or imputed knowledge that [an] Employee was viewing child pornography on his computer,” it was “under a duty to act, either by terminating [the] Employee or by reporting his activities, or both.” 887 A.2d at 1167.

VII. Waiver of the Attorney-Client Privilege by Using the Employee’s Computer

Generally speaking, courts have bent over backwards to avoid finding a waiver of the attorney-client privilege when an employee uses the employer’s computer to e-mail or otherwise communicate with counsel. E.g., Curto v. Medical World Communications, Inc., 2006 W.L. 1318387 (E.D. N.Y. 2006) (finding employee was “lulled” into a “false sense of security” that policy of not using computers for personal use “would not be enforced”); Mason v. ILS Technologies, LLC, 2008 W.L. 731557 (W.D. N.C. 2008) (sealing copies of plaintiff’s e-mails with his attorney retrieved from employer’s server and computer based on plaintiff’s affidavit that he did not know the employer had a policy concerning personal use of computers and that the employer did not alert him that his e-mails could be
searched or reviewed). Contrast Long v. Marubeni Amer. Corp., 2006 WL 2998671 (S.D. N.Y. 2006) (employee’s claimed ignorance of company policy “incredible”; attorney-client privilege held waived as to e-mails exchanged using employer’s computer). Usually, this takes the form of finding that, despite whatever notice was given by the employer and whatever the employee consented to, it was insufficient. E.g., In re Asia Global Crossing, Ltd., 322 B.R. 247 (Bankr. S.D. N.Y. 2005); Long v. Marubeni Am. Corp., 2006 WL 2998671 (S.D. N.Y. Oct. 19, 2006); National Economic Research Assocs., Inc. v. Evans LECG Corp., 21 Mass. L. Rptr. 337 (Mass.Super., Gants, J., Aug. 3, 2006) (no waiver when employee used his Yahoo e-mail account instead of the company’s account; manual said that “e-mails on the network could be read by NERA network administrators” but did not expressly declare that it would monitor the content of Internet communications”; emphasis in the original). Contrast United States v. Angevine, 281 F.3d 1130 (10th Cir. 2002) (affirming search of computer of professor at public university and retrieval of deleted child pornography; university policy warned concerning logs of deleted files; defendant made “careless effort” to maintain privacy interest). Even without falling back on shortcomings in the employer’s notice, a New Jersey court still held that lawfully intercepted attorney-client emails (between the employee and her attorney using the company’s computer) are nevertheless privileged and reversed a trial court order finding a waiver of the attorney-client privilege. Stengart v. Loving Care Agency, Inc., 408 N.J.Super. 54, 74-75, 973 A.2d 390 (Super. Ct. App. Div. 2009). The court also found a violation by the employer’s counsel of the New Jersey version of Rule 4.4 (not adopted by Massachusetts), concerning inadvertently produced attorney-client communications. Massachusetts would probably not reach the same result as to lawfully intercepted attorney communications, Hoy v. Morris, 79 Mass. (13 Gray) 519 (1859). Even if an attorney-client communication was stolen or disclosed in bad faith, the privilege might still be waived unless reasonable precautionary measures were taken. In the Matter of the Reorganization of Electric Mut. Liability Ins. Co. [“EMLICO”], 425 Mass. 419, 681 N.E.2d 838 (1997) (citing Hoy for “want of proper precaution”). Moreover, Massachusetts did not adopt Rule 4.4(b) of the ABA model rules, that states: “A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should have known that the document was inadvertently sent shall promptly notify the sender.” In NERA v. Evans, supra, the judge distinguished EMLICO, saying the employee had in fact taken “reasonable precautions.” Unlike most states, New Jersey has recognized a right to “informational privacy.” State v. Reid, 914 A.2d 310 (N.J. Super. 2007).
On November 19, 1998, the Supreme Judicial Court’s Advisory Committee on Lawyer Advertising submitted its draft report to the Court. The report, among numerous other proposals, attempts to update the language of the Mass. R. Prof. C. 7.1 to 7.5 to clarify that electronic and computer-accessed advertising and solicitation are covered, and, in comments to the rules, to provide guidance as to how the rules apply to issues raised by these forms of marketing.

Until the advertising committee’s report is acted upon by the Court, however, the Massachusetts Rules of Professional Conduct do not explicitly address lawyers’ conduct on-line. Nonetheless, in most instances the rules can be applied to Internet communications by the simple expedient of analogizing to the low tech or hard-copy equivalent.

Any communication by an attorney, in whatever form and whatever the technology, is subject to Mass. R. Prof. C. 7.1, 7.2, 7.4, and 7.5. Mass. R. Prof. C. 7.1 prohibits use of a communication containing a false or misleading statement or claim. Mass. R. Prof. C. 7.5 is to similar effect as to firm names, letterhead, or other professional designation.

Mass. R. Prof. C. 7.2 requires the communication to contain the name of the responsible lawyer or law firm and includes a new requirement that a copy or recording of an advertisement or communication be retained for two years. Because of its interstate nature, and to avoid misleading out-of-state viewers as to

* Source: Employment Landmines in Social Media: Navigating the Risks and Opportunities in the Workplace and Practice (© 2011 MCLE, Inc.). Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
whether the lawyer is licensed in their jurisdiction, it is preferable that an on-line communication also include the office address and, very importantly, information on bar admissions of the firm members. Similarly, an on-line communication probably should comply with the ethics rules on advertising in all states in which the lawyer or firm members are licensed.

Mass. R. Prof. C. 7.4 is the specialization rule. It permits lawyers to hold themselves out publicly as specialists, if true, and includes in this term any claim of expertise, any claim to concentrate in or limit practice to a certain field, any directory listings (such as the Yellow Pages) by field, and “any other association of the lawyer’s name with a particular field of law.” Thus, even without any express assertion of expertise, “Mary Smith, Esq.; real estate and personal injury,” constitutes a claim of specialization. There are additional requirements for claiming certification by a private organization. This rule obviously applies in its entirety to on-line communications. Lawyers engaging in marketing on the Internet should exercise care either to offer their services only in fields in which they are in fact specialists or to include appropriate disclaimers.

Finally, Mass. R. Prof. C. 7.3 is the solicitation rule. The terms “solicitation” as used throughout the disciplinary rules contemplates communications directed at specific individuals or groups for the purpose of obtaining business or securing employment. Subject to limitations concerning the prospective client’s physical, emotional or mental condition, solicitation by written communication, audio or video cassette, or other electronic materials is permitted if clearly labeled “advertising” on its face and on the envelope or container and if copies are retained for two years. No in-person communication, or personal communication by telephone or electronic device, is permitted. Again, this rule clearly applies without difficulty to the Internet. Targeted electronic communication is allowed if labeled “advertising” and if not live or interactive but, with some exceptions, “real time” conversations may be prohibited.

Application to Specific Types of Online Communications

A Web site or home page generally does not involve live or interactive communication. Further, the contact is not unsolicited; the user who visits the site has chosen to do so. The same would seem to be true even if the site is or can be customized according to input from the visitor. Such communications are clearly permissible, and—although the communication obviously cannot be false or misleading and must comply with the specialization and retention rules—need not be labeled advertising.

Similarly, unsolicited postings to newsgroups seeking employment would seem to be similar to newspaper or magazine ads. If so, such postings are permissible.
and need not be labeled advertising. Note, however, that this type of message to
a newsgroup with a particular interest or purpose almost by definition constitutes
a claim of specialization, much like a directory listing by field of practice. Only
lawyers who qualify as experts should market in this manner.

A further question is whether lawyers may respond to newsgroup postings by
individuals with legal questions. To the extent that the lawyer’s response—even
if “addressed” to the individual—is a public notice, open to any reader, it again
would seem to be permissible if true and would not seem to be required to be
labeled as advertising. However, lawyers and law firms should exercise caution
in responding to such postings if the underlying matter arises in a jurisdiction
where no firm member or associate is admitted to practice. A response in that
circumstance may raise questions of unauthorized practice of law in violation of
Mass. R. Prof. C. 5.5(a). In addition, lawyers need to consider issues of confi-
dentiality or screening for conflicts of interest and the problem of when an attor-
ey/client relationship is established.

Communications by e-mail to or on behalf of existing clients raise questions of
protecting client confidentiality. The trend among jurisdictions that have recently
considered the e-mail issue seems to be that it is not a violation of client confi-
dentiality to send confidential client communications by unencrypted e-mail and
that the lawyer need not obtain the client’s consent to do so. See District of Co-
lumbia Bar Legal Ethics Comm., Op. 281, 2/12/98, released 5/15/98. It may
nonetheless be wise to encrypt particularly sensitive communications, for exa-
mple, those that the lawyer would hesitate to transmit by fax or even telephone.

Unsolicited e-mail communications to prospective clients are equivalent to direct
mail solicitation and must be clearly labeled as “advertising” and retained for two
years. Lawyers soliciting by e-mail should pay particular attention to the provi-
sions of Mass. R. Prof. C. 7.3 prohibiting harassment or coercion and forbidding
communications with prospective clients who the lawyers knows or reasonably
should know are not in physical, emotional, or mental condition to be solicited.

Finally, there is the issue of “real time” chat groups. A forum that has been set
up by a lawyer or law firm to allow consumer inquiries—that is, the consumers are
asking to “speak” with the law firm—is probably no different than a telephone call
from a potential client or perhaps a radio call-in show. Such a forum is therefore in
theory permissible, although again, serious attention will need to be paid to prob-
lems such as unauthorized practice, confidentiality, and screening for conflicts, as
well as to the question of when an attorney/client relationship is established.
However, unsolicited messages from lawyers sent to “real time” chat groups are
easily analogized to in-person or live telephone communication. This type of
communication is prohibited if the content could be construed as a solicitation.
Whatever the mode of contact, lawyers communicating with clients or prospective clients on-line would also be well-advised to consider including a disclaimer beyond those specifically required by the Rules of Professional Conduct. An e-mail disclaimer might be similar to those usually associated with faxes—for example, a warning that the recipient should not read, copy or disseminate unless he or she is the addressee, with a further statement as to confidentiality or privilege and a request that the recipient notify the sender if the communication is received in error. Typical Web page and newsgroup disclaimers may contain information as to where the lawyers in the firm are licensed or statements that the information provided is not legal advice and/or that no attorney-client relationship has been created or will be created until a contract is signed. These disclaimer suggestions are not intended as exhaustive.
Lawyers in private practice are simultaneously professionals serving their clients’ needs and businesspeople trying to make a living. Attracting clients, often through reputation but also through advertising and solicitation, may be critical to a successful business. The Supreme Court in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977), eliminated a blanket ban on lawyer advertising and ruled that the first amendment protected truthful advertising. However, the Court held that false, deceptive, or misleading advertising would be subject to regulation. It is therefore critical for lawyers to understand the applicable Massachusetts Rules of Professional Conduct. This article will review the basic rules governing advertising and solicitation, discuss the interface between these rules and the Internet, and address some frequently asked questions.

Mass. R. Prof. C. 7.1 to 7.5 govern the dissemination of information about legal services. The mantra running through all of these rules is that a communication, whether in the form of an advertisement, a solicitation, office letterhead, or other media, cannot be false or misleading. A false or misleading communication, as defined by Mass. R. Prof. C. 7.1, includes material misrepresentations as well as omissions of material facts.

Mass. R. Prof. C. 7.2 is the advertising rule. It provides that lawyers may advertise their services through the public media or through written, electronic, computer-accessed or similar types of communication not involving solicitation pro-

* Source: Board of Bar Overseers/Office of the Bar Counsel (March 2005) (http://www.mass.gov/obcbbo/pickme.htm). Reprinted with permission. Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
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It is prohibited in Mass. R. Prof. C. 7.3. It requires that a copy of the communication be retained for two years after its last dissemination, along with a record of where and when it was used. Any such communication must include the name of the lawyer, group of lawyers, or firm responsible for it.

The rule includes a list of examples of public media through which a lawyer may advertise, such as public directories, newspapers, radio, or television, and includes forms of public media that are computer-accessed. For firms with members or associates who are admitted in other jurisdictions and which advertise or solicit outside of Massachusetts, their communications must comply with the ethics rules in the other states, which may vary substantially from ours. Unlike the current rule in Massachusetts, some states require labeling of an advertisement as such or advance submission of an advertisement for review. Record-keeping requirements also vary; some states require that advertisements be maintained for up to five years. Bear in mind that when an advertisement on the Internet, television, or radio reaches an audience in another state that state might try to assert jurisdiction to impose discipline, if its rules have been violated.

When applying the advertising and solicitation rules to computer-accessed or other similar types of communications, Comment [3A] to Mass. R. Prof. C. 7.2 suggests analogizing the computer-accessed communication to the hard-copy form. For example, a website or homepage would be analogous to a brochure or a placard on a bus. It does not target a specific recipient and viewers actively perform a search to find and view the website. It would therefore generally be considered an advertisement subject to Mass. R. Prof. C. 7.2. However, because the Internet has no geographic boundaries, a lawyer who posts an advertisement on the Internet in the form of a website or homepage is disseminating this information to the world. To avoid misleading viewers from jurisdictions other than that of the posting lawyer, it is preferable to include the office address and the bar admissions of all the firm members.

In general, lawyers can pay for advertising, but cannot pay for referrals unless the payments fall within one of the exceptions set forth in Mass. R. Prof. C. 7.2(c). These include paying for the purchase of a law practice and paying a referral fee to another lawyer as permitted by Mass. R. Prof. C. 1.5(e). Another exception to Rule 7.2(c) permits a lawyer to participate in a not-for-profit lawyer referral program and pay the usual fees charged by the program, such as the Massachusetts Bar Association's Lawyers Referral Service. Lawyers may also, and in accordance with Mass. R. Prof. C. 5.4(c)(4), share a statutory award or court-approved settlement with a qualified legal assistance organization as defined by Mass. R. Prof. C. 9.1(i). See also Mass. R. Prof. C. 7.3(f), which prohibits paying another to solicit employment from a prospective client, with exceptions similar to some of those set forth in Rule 7.2(c).
Bar counsel frequently receives inquiries from attorneys interested in participating in Internet referral services or business referral clubs. Some of these services effectively constitute paying for advertising, which is permitted. Otherwise, unless the referring entity is a not-for-profit lawyer referral service or a qualified legal service organization, lawyers cannot pay or give anything of value to receive referrals from such groups. This prohibition would include such quid pro quo as giving referrals to members of the club in exchange for receiving referrals from members of the club, since doing so would be to give something of value to receive a referral.

Mass. R. Prof. C. 7.3 governs solicitation of professional employment, as opposed to advertising. Rule 7.3(b) sets forth two categories of prospective clients whom a lawyer may never solicit for a fee: a person who because of their physical, mental, or emotional state is potentially unable to exercise reasonable judgment in employing a lawyer and a person who has made known a desire not to be solicited. For a detailed discussion of whether a contact is permissible under Mass. R. Prof. C. 7.3(b)(1) see Comment [2] of Mass. R. Prof. C. 7.3 and N. Kaufman, “Rules of Engagement: Limitations on lawyers’ solicitation of clients”, www.mass.gov/obcbbo/articles (November, 2001).

Assuming the prospective client is not off-limits, the parameters of permitted solicitation of professional employment are set forth in Mass. R. Prof. C. 7.3(c), (d) and (e). Under Mass. R. Prof. C. 7.3(c), lawyers are permitted to solicit professional employment for a fee from a prospective client known to be in need of legal services only by written communication, including an audio or videotape or other electronic communication such as an e-mail, and only if the lawyer retains a copy of the communication for two years.

Mass. R. Prof. C. 7.3(d) imposes an absolute ban on solicitation of employment for a fee by in-person or personal communication, thus prohibiting solicitation that is direct or interactive such as a telephone call. There are very limited exceptions to this prohibition contained in Mass. R. Prof. C. 7.3(e). Generally, a lawyer is permitted to communicate a solicitation of professional employment for a fee to members of the bar, members of the lawyer’s family, former clients, and organizations and persons engaged in trade.

The rapid growth of the Internet and the use made of it by lawyers and consumers of legal services raises interesting ethical questions as to the application of the Rules of Professional Conduct to e-mail, chat rooms, forums, bulletin boards, listservs, and newsgroups.

- An e-mail is a written, nondirect communication, analogous to a letter, and if sent to a targeted person or group know to be in need
of legal services, would generally be considered a solicitation subject to Mass. R. Prof. C. 7.3.

- Chat rooms and forums generally offer conversation that is live, interactive and conducted in real-time or near real-time. Because of this, these venues are probably analogous to call-in radio programs or telephone call-in lines. Attorneys considering participating in such activities must heed the prohibitions on personal solicitation and be aware of other ethical issues lurking, such as when and if an attorney-client relationship is being established, attorney-client confidentiality, conflicts, and the unauthorized practice of law. Comment [4] to Mass. R. Prof. C. 7.3 advises that solicitation through such interactive computer-accessed chat rooms is prohibited as in-person solicitation.

- Bulletin boards, which display information in cyberspace and allow people to post and respond to messages, and listservs and newsgroups, which allow subscribers to explode messages to all of the other subscribers, do not involve real-time, live interaction between lawyers and prospective clients. However, lawyers using these venues must adhere to both the advertising and solicitation rules and again be aware of other ethical issues that might be present.

Mass. R. Prof. C. 7.4 is the specialization rule and permits lawyers to hold themselves out publicly as specialists providing the claim is not false or misleading. Such holding out includes statements that a lawyer concentrates in, specializes in, is certified in, has expertise in, or limits practice to a particular field or area of law. It would also include directory listings, computer-accessed or otherwise, and any association of the lawyer’s name with a particular field. New lawyers, or lawyers new to or inexperienced in a particular area of practice, cannot advertise or list themselves as having any association with a particular field of law absent adequate disclaimers that they are not specialists.

Lawyers who hold themselves out to be certified in a particular area are required to name the certifying organization and state that it is a private organization, whose standards are not regulated by the Commonwealth of Massachusetts, or that it is a named governmental body. Mass. R. Prof. C. 7.4(c) provides that lawyers who do hold themselves out to be specialists shall be held to the standard of performance of a specialist in that particular field. The rule provides that lawyers who wish to advertise for particular cases without being held to the standard of a specialist can advertise that they “welcome” or “handle” cases in that area of practice “but are not specialists in” that area of the law.
Finally, Mass. R. Prof. C. 7.5 governs firm names and letterheads. Bar Counsel frequently receives inquiries about the use of the “of counsel” designation in connection with a firm name. For a discussion of this issue see N. Kaufman, “The Of Counsel Relationship”, www.mass.gov/obcbbo/articles (October 2000). Another area about which Bar Counsel receives inquiries is space-sharers who practice under a firm name. Note that Mass. R. Prof. C. 7.5(d) specifies that lawyers may state or imply that they practice in a partnership or other organization only when that is the fact. See Comment [2] of Mass. R. Prof. C. 7.5(d) and D. C. Crane and J. W. Marshall, “Space-Sharers, Beware!”, www.mass.gov— /obcbbo/articles (January 2000). A law firm with offices in more than one jurisdiction is permitted to use the same firm name, letterhead, or other professional designation in each jurisdiction, providing that the jurisdictional limitations of the firm’s lawyers not licensed in each jurisdiction be disclosed.

Although these rules may seem complicated, the basics are very simple and consistent: advertisements and solicitations of employment must not be false or misleading or involve coercion, and in-person or direct solicitation is not allowed unless it falls within one of the exceptions. Lawyers with questions on these issues are encouraged to call bar counsel’s helpline, 617-728-8750, on Monday, Wednesday and Friday afternoons between the hours of 2:00 and 4:00 p.m.
SECTION 10

Personal and Professional Challenges

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No Lawyer Is an Island*

Jeffrey Fortgang, Ph.D.
Newton Highlands and Boston

Most lawyers are acculturated to present an image of themselves as knowing, capable, even invulnerable or self-sufficient. Yet lawyers are human beings, and thus subject to vulnerabilities and setbacks. It is on that basis that, when speaking to groups of attorneys I advocate for contacting Lawyers Concerned for Lawyers (LCL) and other sources of assistance sooner rather than later, ideally before one’s practice is in danger of being compromised.

My specific intent in this post is to remind you of how helpful and important it can be to have “practice buddies”—colleagues with whom you have regular, mutually supportive interactions. These may be more readily available if you work at a law firm, and less so if you practice alone, and yet more crucial. For years, I ran a Solo Practitioners group here at LCL (soon to re-emerge as a joint LCL-LOMAP enterprise), and learned how isolated and unsupported the solo practice life can be.

Beyond the problems of professional solitude in regular practice situations, what happens when you are out of commission for a while, whether because of physical illness, family crisis, depression, need for alcohol/drug treatment, etc.? There is no organized system, no committee or agency set up to take over for you in circumstances when you are ill, impaired, or worse. (This is unfortunate, since under the auspices of such an organization the lawyers providing coverage would be immune from liability.) You cannot ethically leave your clients unattended, but arranging for their coverage is entirely up to you. Imagine how much easier things are, then, if you have regular contact with one or more of your peers (e.g., who meet as a group once a month to discuss tough cases or developments in the law, or with whom you have lunch individually on a regular basis), with the understanding that each of you is ready to step in for the other(s) as needed. And when the time comes that you are summoned to Highest Court, there is no mystery as to what happens to your open cases.

As you might imagine, at Lawyers Concerned for Lawyers (LCL) we repeatedly see lawyers who really are in no shape to practice for the time being, but who keep attempting to do so because they have no back-up - for their computers, maybe, but not for themselves. So, much as I myself resist articles providing unsolicited advice, may I suggest that you take a few minutes right now to think about who your professional buddies might be— and maybe make a lunch date.

Two afterthoughts:

• If you are interested our planned time-limited group for solo practitioners, email me at Drjeff@LCLMA.org—we hope to get it started in a couple of months;

• My perspectives are psychological— to get more lawyerly advice on topics such as covering for an impaired colleague or taking over the practice of a deceased professional peer, review the illuminating articles by bar counsel on the BBO web site at http://www.mass.gov/obcbbo/articles.htm.
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Stress is a fact of life for all of us, and lawyers are certainly no exception. Stressful events can vary greatly in severity, but they activate a series of common biological and behavioral responses that help us cope with the situation. While these changes are adaptive in the short-term, prolonged stress can lead to physical and mental illness.

Workplace challenges can have a particularly profound impact on wellbeing. Indeed, the professional and interpersonal environment in which lawyers function appears at times to have been tailored to elicit feelings of distress! Read on to find out more about stress and the human response, and how lawyers can take steps to cope with stress in their everyday lives.

HOW STRESS WORKS

Early civilization may hold the key to understanding how we respond to stressful events. Take the example of an attack by a predator. Imagine a group of early humans collecting water from the local river. From over the riverbank a lion appears and heads slowly towards the group. One of the individuals on the edge of the group looks up and suddenly notices the lion... scary stuff... or is it?

A fundamental aspect of the stress response is appraisal of the event to determine whether it poses a threat or not. While this appraisal occurs rapidly, it is influenced by the individual's prior experiences ("I've been attacked by a lion before!"), the controllability of the event ("It's okay, I have a way of defending myself?"), the predictability of the event ("The lion always attacks") and finally, the duration of the event ("It will be gone in a minute"). The more uncontrollable, unpredictable, and longer-lasting the event, the more stressful the event appears.

If the lion is appraised as a threat, a series of physical and behavioural processes are initiated to help the individual survive the encounter.

Physical changes include an increase in blood pressure, heart rate, blood flow to muscles and the release of adrenaline and cortisol (a stress hormone) from the adrenal gland, all of which prepare the individual for either "flight or fight". Additionally, neurochemical messengers are released in the brain to further help the individual cope with the stressor. These changes act in concert to afford the individual the best possible chance of successfully evading or confronting the lion.

Behavioral changes include a reduction in feeding and sexual activity (it would obviously have been a bad idea for our ancestors to stop for a snack or start mating while being pursued by a lion!). As well, the individual may use a variety of behavioral/emotional coping strategies. These include problem-focused strategies aimed at impacting the stressful event directly (e.g., finding a rock to throw at the lion), and emotion-focused strategies geared towards reducing negative emotions associated with the situation (e.g., blaming others for not alerting you to the presence of the lion earlier). In general, problem-focused strategies may be most useful when the outcome is controllable; however, as you may have experienced, the effectiveness of a particular coping strategy depends on the context in which it is employed.

While these adaptations are well suited for dealing with short-lived stressful events, they are less ideal for the myriad of chronic, uncontrollable and unpredictable stressors that characterize modern life as a lawyer.

Today the proverbial lion has been replaced by the demanding partner, daunting billable hour targets, unpredictable schedules and unreasonable clients— all of
which can seem inescapable, uncontrollable and unremitting. Over the long-
term, prolonged activation of the stress response by these types of chronic stress-
ful events can cause excessive "wear and tear" on the body and lead to the de-
velopment of a host of physical illnesses, including heart-disease and Type II
diabetes, as well as mental illnesses such as depression and anxiety.

**STRESSORS FOR LAWYERS**

It's no secret that lawyers confront daily challenges that cause significant dis-
tress. In particular, solo and small-firm lawyers often face unique challenges in
their day-to-day work-life:

**Workload**

Solo and small-firm lawyers are often expected to perform a variety of tasks that
might otherwise be handled by teams of professionals in larger practices (human
resources, accounting, marketing, etc.). Additionally, while a larger firm may be
able to devote considerable resources to a given task, a smaller firm may be
forced to place individuals under intense strain for prolonged periods of time.
Workload can take on an air of uncontrollability that may exacerbate an already
stressful situation.

**Long Hours**

The tendency of lawyers to work long hours comprises a chronic, unremitting
stressor, which is often viewed as uncontrollable and something that must simply
be tolerated. Working long hours can be particularly harmful because it re-
moves the lawyer from important sources of social support, including family and
friends, which can ordinarily help buffer against the negative effects of stressful
events.

In addition, long-hours may be at odds with maintaining a healthy lifestyle,
which is necessary to deal with the demands of our busy lives. For example, it
may be difficult to find the motivation or energy to prepare a healthy meal or go
to the gym after three straight 14-hour days.
Lack of Vacation

Many lawyers complain of a real (or perceived) inability to take a vacation. Of course, this has potentially serious implications for both mental and physical health, and can be attributed to a variety of factors.

First, workload and demanding clients may simply not permit them to be away from the office for extended periods of time. There is also a pressure on lawyers, especially those who are self-employed, to take on projects to remain competitive in the marketplace or to keep from feeling like they are “missing out” on potential business. Similarly, cues from coworkers and management may make the individual feel as though it would be unwise for them to take an extended vacation, even when entitled to it. Of course, even when a lawyer is able to sneak away for a week or two, modern technology ensures that we are never out of reach of those who are trying to contact us.

Billable Hour Expectations

Billable hours can, in effect, penalize efficient lawyers, as well as the use of time-saving technology. In addition, expectations surrounding billable hours may deter lawyers from engaging in a sound cost-benefit analysis of a case. Indeed, lawyers may end up spending hours on an exceedingly stressful case or file that they may have been better off passing on in the first place. Furthermore, some may find it hard to balance the expectation of billable hours with the distress caused by charging clients for each hour worked, especially if they know that the client may have limited funds.

Lawyers may also find themselves pressured by clients to perform their job in a certain fashion to ensure that the process is expedited in the most cost-efficient manner. Of course, the client’s perception concerning the hours billed comes after the fact, and is often predicated on “the problems they have” or whether the case was dealt with to their advantage. So, for the lawyer, there is a degree of unpredictability with respect to the client’s behavior.

Interpersonal Difficulties

Whether facing criminal prosecution, financial distress, family or marital breakdown or public humiliation, lawyers must often interact with individuals who find themselves in perilous circumstances. To put it politely, clients may not always interact with their lawyers in a constructive fashion.
Lawyers are acutely aware that their client may be depending on them for freedom, quality of life, custody of a child or financial viability. Lawyers may feel enormous pressure to preserve some aspect of a client’s wellbeing. For self-employed lawyers and those in smaller firms, they may have to negotiate sensitive issues with clients themselves (e.g., missed payments). To make matters worse, a lawyer’s hard work for his or her clients often goes unrecognized. The fact that “lawyer jokes”, almost invariably unflattering, remain commonplace is testament to this.

Finally, lawyers may have to frequently deal with colleagues that are under similar pressures, which itself may be stressful.

RECOGNIZING AND COPING WITH DEPRESSION

The chronic, unpredictable and uncontrollable nature of events experienced by lawyers can lead to a downward spiral, culminating in burnout (low grade depression, anxiety, dissatisfaction, lack of motivation and negative perceptions) and major depression. Indeed, lawyers report substantially higher levels of burnout, depression and suicide than most other professions. Unfortunately, some lawyers may seek relief from these symptoms by abusing alcohol or other drugs, which puts the lawyer at risk for disciplinarily action, as well as legal and financial troubles.

It is important that lawyers recognize symptoms of depression in themselves, as well as in their colleagues. While everyone feels sad or blue at one time or another, depressed individuals experience symptoms for prolonged periods of time, and in the absence of circumstances that might otherwise reasonably account for their symptoms (e.g., death of a spouse).

Symptoms of major depression include:

- depressed mood
- decreased interest in previously enjoyable activities
- changes in body weight
- sleep disturbance
- fatigue
- feelings of worthlessness or guilt and recurrent thoughts of death.
• atypical symptoms (often found in women) such as moodiness, hyperactivity, weight gain, increased sleep and heightened sensitivity to rejection by others.

Both atypical and typical depression can be treated successfully with antidepressants (e.g., Prozac) or through cognitive behavioral therapy.

Because lawyers suffer from depression at particularly high rates, they are also at increased risk for suicide. Here are some signs that an individual may be contemplating suicide:

• a family history of suicide
• substance abuse
• prior suicide attempts
• intense perfectionism
• feelings of hopelessness, guilt or worthlessness
• suicidal ideations (i.e. joking about suicide)

Obviously, the suicidal individual should be strongly encouraged to seek professional help, such as a family physician, psychiatrist or trained counselor.

10 STRESS-COPING TECHNIQUES FOR LAWYERS

These 10 tips can help lawyers deal more effectively with distress, and to avoid the negative effects of day-to-day stress:

1. **Get adequate sleep**: although sleep is vitally important to the restoration of the body and mind, many of us practice sleep deprivation on a daily basis by using an alarm clock. Sleep deprivation has many deleterious effects that impair our ability to deal with stressful events, including irritability and reduced cognitive function. It is generally thought that 7-8 hours of sleep is necessary in order to feel refreshed for the coming day, and of course, as we age, a nap during the day may be of benefit, even if it means slightly fewer billable minutes.

2. **Exercise frequently**: research suggests a positive association between exercise and the improvement of symptoms of depression and anxiety. Exercise can also serve to promote self-esteem and contribute to better overall health, both of which foster resiliency in the face of stressful events.
3. **Use social support**: Friends, family, colleagues and intimate partners can be an important source of social support; a vital coping resource. They can help us to see the situation differently, solve problems, lend tangible assistance and provide emotional support. Social support has even been demonstrated to reduce the body’s physiological response to stressful events. Be sure to identify and effectively use sources of social support, and use them for the right reasons.

4. **Participate in activities**: Activities can be a great temporary distraction from day-to-day hassles, as well as serious stressful events. Activities put us into contact with individuals who share similar interests, as well as provide opportunities to spend time alone. By occasionally getting lost in these activities, we remind ourselves that there is more to life than work.

5. **Take vacations**: We all need the occasional vacation to recharge our batteries and avoid burnout. Take personal responsibility for taking the vacation time you are entitled to and leave the cell phone and laptop at home. If possible, plan vacations well in advance and schedule work around them.

6. **Gain control**: Controllability is a major factor in how stressful an event appears to us. Where possible, take steps to gain a tangible sense of control over your environment. However, keep in mind that despite our best efforts, certain events will remain beyond our control. Focus only on those aspects of the situation that you can reasonably expect to influence.

7. **Use problem-focused coping strategies**: Use problem-focused coping (e.g., talking openly about a problem, politely but firmly confronting a problem client, making a “to-do” list and carrying it out) as opposed to emotion-focused coping (blaming others or yourself, ruminating about the problem without doing anything).

8. **Remain flexible**: Look beyond your initial impression of a stressful event and try reframing it in another light—perhaps there is an upside you’ve overlooked (e.g., “we lost the revenue of a demanding client, but hey, that’s one less headache to deal with”). Similarly, if one coping method doesn’t appear to be effective in a particular situation, try alternative strategies. By remaining flexible, you will be able to meet the shifting demands of your environment.

9. **Manage your workload**: While tempting, you don’t have to do everything yourself! If you have your own practice or are in a management position, ensure that you hire competent people from the outset and give them plenty of responsibility. If you are working in a small team, don’t be afraid to ask for help if you are feeling disproportionately burdened by a case or file. Finally, where possible, insist on scheduling projects or cases in a way that avoids you having to work extended hours.
10. Create numerous short-term goals: all of us need periodic reinforcement to feel as though we are accomplishing our goals and to keep us motivated. Make sure you set a series of small goals, in addition to a few larger, long-term aspirations. The completion of each small task will foster a sense of accomplishment, diminish your worry about your workload and motivate you to pursue further objectives.

HELP IS AVAILABLE

Despite your best efforts, you may need occasional outside advice on how to best cope with work-related stress. Fortunately, services and outlets are available to help lawyers deal with stressful aspects of their profession:

1. The CBA’s Legal Profession Assistance Conference (LPAC) — Dedicated to helping lawyers, judges and law students and their families with personal, emotional, health and lifestyle issues through a network of Lawyer Assistance Programs, a national 24-hour helpline and through provincial programs.

2. Family physician — Your family doctor is a vital resource for dealing with stress-related problems, as he/she can provide you with information, resources and treatment for a variety of illnesses, including depression and anxiety. If he/she refers you to a psychiatrist, forget the stigma associated with a shrink. Instead, remember that depression is a common problem, likely reflecting excessive use of biological resources.

3. Professional stress management consultants — Stress management consultants can provide up-to-date and effective advice on how to create a less stressful work environment, as well as facilitate the education of both management and employees on the harmful aspects of stress and stress prevention.
SECTION 10.3

Assisting the Depressed Lawyer*

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FIND OUT MORE ABOUT DEPRESSION

What is depression?

Depression is more than the blues or the blahs; it is more than the normal, everyday ups and downs. When that “down” mood, along with other symptoms, lasts for more than a couple of weeks, the condition may be clinical depression. Clinical depression is a serious health problem that affects the total person. In addition to feelings, it can change behavior, physical health, appearance, professional

performance, social activity, and the ability to handle everyday decisions and pressures.

What causes clinical depression?

We do not know all the causes of depression but there seem to be biological and emotional factors that may increase the likelihood that an individual will develop a depressive disorder. Research over the past decade strongly suggests a genetic link to depressive disorders; depression can run in families. Difficult life experiences and certain personal patterns such as difficulty handling stress, low self-esteem, or extreme pessimism about the future can increase the chances of becoming depressed.

How common is it?

Clinical depression is a lot more common than most people think. It will affect more than 19 million Americans this year. Early 1990s research indicated that lawyers might be more vulnerable to depression than other professionals. Almost half of all callers to the Texas Lawyers’ Assistance Program hotline talk about symptoms that sound like depression.

Is it serious?

Depression can be very serious. Suicide is often linked to depression. Male lawyers in the United States are two times more likely to commit suicide than men in the general population.

Are all depressive disorders alike?

There are various forms or types of depression. Some people experience only one episode of depression in their whole life, but many have several recurrences. Some depressive episodes begin suddenly for no apparent reason, while others can be associated with a life situation or stress. Sometimes people who are depressed cannot perform even the simplest daily activities like getting out of bed or getting dressed. Others go through the motions but it is clear that they are not acting or thinking as usual. Some people suffer from bipolar disorder in which their moods cycle between two extremes—from the depth of desperation to frenzied talking or activity or grandiose ideas about their own competence.
Can it be treated?

Yes, depression is treatable. Between 80 and 90 percent of people with depression can be helped. There are a variety of antidepressant medications and psychotherapies that can be used to treat depressive disorders. Some people with milder forms may do well with psychotherapy alone. People with moderate to severe depression most often benefit from antidepressants. Most do best with combined treatment: medication to gain relatively quick symptom relief and psychotherapy to learn more effective ways to deal with life's problems, including depression.

The most important step toward overcoming depression—and sometimes the most difficult—is asking for help.

Why don’t people get the help they need?

Often people don’t know they are depressed so they don’t ask for or get the right help. Most people fail to recognize the symptoms of depression in themselves or in other people. Also, depression can sap energy and self-esteem and thereby interfere with a person’s ability or wish to get help.

BE ABLE TO TELL FACT FROM FICTION

Myths about depression often separate people from the effective treatments now available. Friends and colleagues need to know the facts. Some of the most common myths are these:

Myth: He’s such a great lawyer, he just can’t be depressed!

Fact: Lawyers get depression too. Intelligence, success, or position in the community are not barriers to depression. Depression can affect people of any age, gender, race/ethnicity, or economic group.

Myth: Lawyers who claim to be depressed are whiners and weak and just need to pull themselves together. There's nothing that we can do to help.

Fact: Depression is not a weakness but a serious health disorder. People who are depressed need professional treatment. A trained therapist or counselor can help them learn more positive ways to think about themselves, change behaviors, cope with stress and problems, or handle relationships. A physician can prescribe medications to help relieve the symptoms of depression. For most, a combination of psychotherapy and medication is beneficial.
 Myth: Talking about depression only makes it worse.

Fact: Talking about things may help a friend or colleague recognize the need for professional help. By showing friendship and caring concern and by giving un-critical support, you can encourage your friend or colleague to talk to another trusted adult, TLAP, or mental health professional about getting treatment.

**KNOW THE SYMPTOMS**

The first step toward defeating depression is to define it. People who are depressed often have a hard time thinking clearly or recognizing their own symptoms. They may need your help.

Check the following boxes if you notice a friend or colleague with any of these symptoms persisting longer than two weeks:

**Do they express feelings of:**

- sadness or emptiness?
- hopelessness, pessimism, or guilt?
- helplessness or worthlessness?

**Do they seem:**

- unable to make decisions?
- unable to concentrate and remember?
- to have lost interest or pleasure in ordinary activities like sports, hobbies, or social activities?
- to have more problems at work and at home?

**Do they complain of:**

- loss of energy and drive—so they seem “slowed down”?
- trouble falling asleep, staying asleep, or getting up?
- appetite problems: are they losing or gaining weight?
q headaches, stomach aches, or back aches?
q chronic aches and pains in joints and muscles?

**Has their behavior changed suddenly so that:**
q they are restless and more irritable?
q they want to be alone most of the time?
q they’ve started missing work, deadlines, appointments, or dropped hobbies or activities?
q you think they may be drinking heavily or taking drugs?

**Have they talked about:**
q death?
q suicide—or have they attempted suicide?

**HOW TO HELP**

If you checked several of the boxes above, your friend or colleague may need help. The most important thing you can do for someone who is depressed is to get him or her to a professional for an appropriate diagnosis and treatment. Don’t assume that someone else is taking care of the problem. Negative thinking, inappropriate behavior, or physical changes need to be addressed as quickly as possible. Your help may include the following:

- Give suggestions of names and phone numbers of reputable therapists or psychiatrists.
- Encourage or help the individual to make an appointment with a professional and accompany the individual to the doctor.
- Encourage the individual to stay with treatment until symptoms begin to abate.
- Encourage continued communication with doctor about different treatment options if no improvement occurs.
• Offer emotional support, understanding, patience, friendship, and encouragement.

• Engage in conversation and fellowship. Listen.

• Refrain from disparaging feelings; point out realities and offer hope.

• Take remarks about suicide seriously, do not ignore them and don’t agree to keep them confidential. Report them to the individual’s therapist or doctor if your friend or colleague is reluctant to discuss the issue with you or his or her doctor.

• Invite the individual for walks, outings, to the movies, and other activities. Be gently insistent if your invitation is refused.

• Encourage participation in some activity that once gave pleasure—hobbies, sports, religious, or cultural activities.

• Don’t push the depressed person to undertake too much too soon; too many demands may increase feelings of failure.

• Eventually with treatment, most people get better. Keep that in mind and keep reassuring the depressed person that with time and help, he or she will feel better.

WHERE TO GET HELP

The Texas Lawyers’ Assistance Program (TLAP) can help you in a variety of ways by providing crisis counseling, education and training resources, assistance with identifying reputable mental health professionals and treatment options in your community, strategies and coaching for conversations with your friends or colleague, and information about suicide prevention resources. In certain circumstances, TLAP may be able to directly assist in your conversations with your colleagues or friends.

If you don’t access TLAP, please consider contacting other resources who can help prepare you with names, phone numbers, and other information about where to send your friend or colleague for assessment and treatment. These resources may include family doctors, psychiatrists, psychologists, social workers, licensed professional counselors, community mental health organizations, hospital psychiatric departments and out-patient clinics, university or medical school affiliated programs, state hospital outpatient clinics, family service and social services.
agencies, clergy, private clinics, employee assistance programs, and local medical or psychiatric societies.

**ACT NOW**

Early and professional treatments for depression can lessen the severity of the illness, reduce the duration of symptoms, and may also prevent additional bouts of depression.
The anecdotes are all too familiar for those of us within the legal community. The law student—top of his class, federal clerkship, youngest partner at his big law firm. On the surface, this young partner seems to have it all: the car, the house, the loving family, and the firm’s adoration. However, when the surface is scratched, the beast rears its head. No longer can the young partner handle the daily stresses: his desk overflowing with paperwork; impossible to meet deadlines, hundreds of new e-mail every hour; the constant pressure to generate new business. This young partner turns to his vices telling himself it’s just a way to “take the edge off.” Little by little the substance addiction begins to take its toll.

His work is initially exceptional, but problems soon arise and colleagues begin to notice a slip in his work. He arrives at the office late and leaves early. He begins losing documents. His exceptional work is now marred with indolent mistakes. The young associates that initially idolized him now cover for his mistakes, too tremulous to intervene. The senior partners stand silent, not wishing to offend one of the firm’s big up and comers. Finally, a concerned colleague intercedes; however, this is an addict in denial, a partner who refuses to admit he has a problem. Shortly thereafter, the young partner reassures the colleague that he has everything under control. But sure enough, he doesn’t. Within another year his family and co-workers are mourning his untimely death, asking “what could we have done?”

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While not every addiction scenario plays out fatally, the statistics of substance abuse and other addictions are startling. Addictions can vary greatly and can include alcohol and drug abuse, gambling, eating disorders, financial issues (i.e. overspending) and various other types of abuses. For purposes of this article, the discussion will center on substance abuse, as statistics show it is the most prevalent addiction among attorneys. It is estimated that between 10 to 13 percent of the general adult population in America suffers from alcoholism. Among lawyers, that rate is higher. More than one third of attorneys say they are dissatisfied and would choose another profession if they could and it is estimated that one fourth of all attorneys are depressed. As lawyers, we all remember the speech when we began law school that attorneys have the highest rates of depression and suicide of any profession. In fact, among male lawyers, the suicide rate is approximately twice that of men in the general population. The depression rate for female attorneys is even higher.

For law firms these staggering statistics can bring about significant legal liability. Lawyers with substance abuse problems are far more likely to have disciplinary complaints or malpractice suits filed against them. Substance abuse may be involved in as many as 50 to 75 percent of major disciplinary cases, and state bar statistics show that 75 percent of attorneys who sought help with substance abuse in 2008 were also involved in disciplinary proceedings. In turn, lawyer partners and law firms generally can be subject to liability through respondeat superior. If an attorney is having these types of problems and no one in the firm addresses the issue, the firm may face significant malpractice liability. Evidence of substance abuse is relevant in a malpractice case, especially when that abuse translates into conduct falling below the applicable standard of care. Given the practical concerns for the firm it is imperative that law firms deal with potential addiction issues.

As members of the bar, lawyers have a duty to uphold the highest standards of professional conduct. The ABA model rules make clear that firm members have a duty to make reasonable efforts to ensure the ethical conduct of all lawyers in the firm. Members who possess knowledge of misconduct must inform the appropriate disciplinary agency. Failing to report evident substance abuse issues is a clear violation of the Rules of Professional Conduct. The ABA has recommended that when an impaired lawyer is unable or unwilling to deal with the consequences of addiction, the firm and its partners are obligated to take reasonable steps to assure his or her compliance with the ABA Model Rules. The firm’s “paramount obligation is to take steps to protect the interests of its clients.”

For far too long, law firms have been reluctant to deal with impaired attorneys even though involvement may be career and life saving. In this day and age, addiction need no longer be treated as taboo. It is absolutely essential that law firms work diligently to institute effective addiction policies that are narrowly
tailored to the firm’s specific setting with an emphasis on helping the at-risk individual manage and overcome his or her addiction issues. This policy should be outlined in the law firm’s code of professional responsibility in order to send a resolute message that the firm considers work or personal habits that undermine work quality to be professionally irresponsible and a violation of ABA Model Rule 1.1 relating to attorney competency. It should outline what the firm deems acceptable social practice, as well as other preventive measures. The focus of the policy should not be on punishing attorneys for addiction problems, but to provide identification and education, as well as outlining treatment possibilities. The firm once viewed its now impaired attorney as an asset, and as such the firm should always strive to help rehabilitate the impaired attorney, rather than punish. The firm must attempt to develop awareness of substance addiction and the behavioral signs of attorney impairment. To do so, the firm should host educational seminars. Larger firms should also consider appointing an in-house committee with individual committee members acting as a resource for struggling attorneys. Additionally, the firm should not wait for individuals to refer themselves for assistance, but should take proactive steps to intervene upon discovery of an attorney suffering from addiction. The firm should refer the attorney to a medical professional and require the impaired attorney to undergo treatment. The firm must then continue to monitor the attorney’s progress and ensure that his health and work product improves.

One of the greatest assets for law firms in assisting attorneys with addition problems is their state Lawyer Assistance Programs (LAP), which provide free and confidential assistance to attorneys with addiction, behavior, and personal problems that affect their well being and professional performance. The ABA created the Commission on Impaired Attorneys (now the Commission on Lawyer Assistance Programs) in 1988, and in 1995, the ABA adopted the Model Lawyer Assistance Program. While an in-house firm committee may be able to recognize that one of their associates or partners is impaired, these committee members likely are not well adept at treating addiction. A LAP can be an important source for helping the attorney. The firm can refer the impaired attorney confidentially and anonymously to the LAP so that the impaired attorney can obtain the proper professional services, receive intervention, and obtain peer guidance and support in the form of group counseling. Thereafter, the LAP can continue the assistance by monitoring the attorney’s recovery and progress. In fact, the LAP approach of “lawyer-assisting-lawyer” is consistent with the highest traditions of the bar.

Clearly, attorney addiction is a serious problem. However, as the research has shown, addiction is treatable. Therefore, if firms take a proactive approach to implementing addiction assistance through their own measures as well as using the resources of the LAP, the impediments to a meaningful life and promising career caused by addiction can be overcome.
How do you explain to the court that you were late because you couldn’t choose which shoes to wear? And that after you had chosen your shoes, polished them, and put on your suit and tie, you decided that you didn’t like the way the tie looked with that suit, requiring a change of suit and, of course, different shoes? There was a time when a simple activity such as getting dressed made my life extremely complicated.

I had come to accept the fact that I was always running late, and had to agree with those who were left to wait: I must be lazy and inconsiderate. Others organized their days, their lives; why couldn’t I? I obviously wasn’t stupid; I graduated cum laude from a good law school, loved to try cases—the more difficult the better—and got excellent results. So why was it so difficult to get those status reports and bills out?

As my frustrations mounted over the years, I found a solution to the increasingly uncomfortable emotions: marijuana! It worked quite well in relieving some of my anxiety, and, remarkably, it seemed to help me focus on one thing at a time. I opened my own firm and reveled in the excitement of it all. As long as things were interesting, I was on top of it. I hired others to handle the less interesting aspects of the practice. When things slowed in the mid-nineties, I took more of the responsibilities upon myself. Sometimes, they just didn’t get done. I was working 60 to 70 hours a week; what more could people expect of me?

Nine years after opening my practice, I had to move my office into my home. There, I would stare at the computer for hours, my fingers refusing to cooperate with my brain. A routine declaration that should have taken 30 minutes to complete would take days instead. What in the world had happened to me?

At last, a psychiatrist sat me down and asked me to answer a few simple questions, then a few more. “Oh, you’re ADD,” he said. “Read Driven to Distraction, and we’ll start some medications.” At last, I had a name for my condition, a

medical explanation for many of my difficulties. I could now start to understand what made me tick. Unfortunately, even with the correct diagnosis, my life continued to spiral downward. I eventually lost my car and home, and somehow ended up living on a sofa in some guy’s living room. Looking back today, I understand that I probably needed to go through that journey in order to make a complete recovery.

People have asked me how I did so well in law school with undiagnosed and untreated ADD. The simple answer is that the rigid structure of law school kept me on track. Interestingly, it turns out that litigation ranks high on the list of professions to which we ADDers are drawn. While ADD is generally marked by a lack of focus, it is often coupled with an intense “hyperfocus” that can be quite useful in a deposition or trial.

How can an adult determine if he or she has Attention Deficit Disorder? The official diagnostic reference, the DSM-IV, presents criteria applicable only to children. While ADD behavior has to have been present since childhood for a finding of ADD in an adult, behaviors can morph over time as we attempt to cope with what Thom Hartmann calls “a hunter’s mind in a farmer’s world.” Edward M. Hallowell, M.D., and John J. Ratey, M.D., authors of the ADD “bible,” Driven to Distraction, have come up with a list of 20 diagnostic criteria, most of which must be present in the patient “considerably more frequently than [in] most people of the same mental age” to be considered significant. Among those criteria:

- Difficulty getting organized; tendency toward procrastination (or trouble getting started).
- Many projects going at once; trouble with follow-through.
- Tendency toward impulsiveness, verbally or in action, regardless of consequences or appropriateness.
- Tendency to be easily bored; great effort expended to avoid boredom; searching for stimulation; restlessness.
- Difficulty focusing attention; tendency to tune out; easily distracted, but often an ability to selectively hyperfocus.
- Low tolerance for frustration; trouble going through established channels or following proper procedure.
- Tendency to worry needlessly and endlessly, coupled with inattention to actual dangers; a sense of impending doom or insecurity, coupled with high risk taking.
• Chronic problems with self-esteem; inaccurate self-observation; mood swings; depression, especially when “disengaged.”

• Tendency toward addictive behavior (whether related to drugs, alcohol, shopping, eating, gambling, or work).

• A sense of underachievement, regardless of what one has actually accomplished.

• Often highly creative and intelligent (usually nonlinear thinkers, with flashes of brilliance).

More details about the diagnostic criteria can be found at www.netacc.net/~gradda/sp94addu.html, or by using any search engine on the phrase “Adult Attention Deficit Disorder.”

I have found that the hardest issue for me in dealing with ADD is my sense of time. Dr. Hallowell describes an ADDer’s perception of time as a feeling that “everything is happening all at once,” causing a loss of perspective, difficulty prioritizing, and often a sense of inner turmoil or panic. I have found structure to be the critical factor for getting things done within the ADD world. Throughout my formal education, that structure was imposed by school, study groups, and classmates. Of course, in the “real” world, structure often must be self-imposed. Such self-regulation and structure obviously run against the grain of many ADD traits. Many ADDers turn, either formally or informally, to ADD “coaches”—people who understand how the ADD mind works—to help keep them on track with their lives.

Perhaps ADD is much like an addiction: before people become willing to give up a way of life to which they have become accustomed (and which used to work), they must often hit bottom. This was certainly the case with me. I am now willing to accept structure in my life because the alternative is far less pleasant.

After some three years away from the practice of law, I have been able to return, slowly but steadily, with a greater confidence than ever before. I have come to accept myself as I am. I take medication to help alleviate some of the more problematic aspects of the condition, and I have discontinued my prior self-medication. I am finally able to stop wasting my time uselessly beating myself up, and instead I am continuing the process of moving my life forward. Now if only I could only get this article in on time.
Five Ways to Sabotage Your Career: And How to Avoid Them*

Lawyers Concerned for Lawyers, Inc.

Most of the other chapters of this informative book offer valuable information and resources for establishing a successful practice. This chapter is meant to help you prevent the loss of your practice.

LCL’s 20+ years of experience providing service to the lawyers, judges and other law professionals of Massachusetts have shown the following pitfalls to be the most common, and ultimately, the most destructive:

1. **Addictive behaviors.** These can be hard to identify by yourself and are often more noticeable to others. Behaviors such as drinking or use of other mood-changing substances usually develop incrementally and begin to create problems that may seem unrelated to the alcohol or drug use. Other common addictive behaviors are compulsive gambling, compulsive sex, and food compulsions (that may include excessive or restricted food intake, bingeing, purging, and use of laxatives). As psychological dependence develops and strengthens over time, unconscious defenses arise that can blind you to the source of mounting consequent problems – such as work errors, irresponsible management of client funds, neglect of work, and many other health and relational problems. Thus, problems that originally seemed to be diminished or avoided by the addictive behavior begin to multiply as new ones appear. Unsuccessful attempts to cut back on behaviors that have become habitual or addictive, guilt feelings about them, or concerned feedback from others suggest that at least a clinical evaluation is warranted.

2. **Depression.** Not simply feeling blue, depression is a constellation of symptoms often including loss of interest, pleasure, motivation, hope, and energy, and can further manifest in irritability, problems with concentration or memory, and social withdrawal. It is probably the 2nd most common cause of behavior leading to disciplinary complaints, in that it often leads to neglect of cases, errors

because of impaired concentration, loss of sleep, apathy, etc. Depression often runs in families genetically, but is also commonly a response to circumstances such as a personal loss, or feeling trapped or helpless. The good news is that depression is highly treatable, with either psychotherapy/counseling or medications or both.

3. **Attention.** Formerly thought to be only a childhood issue, we now recognize attention problems (sometimes but not always accompanied by hyperactivity) as a life-long concern for a great many people. Although people with “ADD” are often very creative and intuitive, they may find it very difficult to organize, prioritize, and stay focused. The result can be missed deadlines, incomplete projects, and sometimes complaints to the disciplinary committee for (unintentional) neglect of cases. Following accurate assessment, helpful remedies are available which may include medication, coaching on how to stay organized, and career choices that utilize strengths (such as an ability to think on your feet) and that de-emphasize weaker areas (such as organizing or prioritizing).

4. **Stress/Life Imbalance.** Lawyering can be workaholic heaven – or hell, depending on how you look at it. The new lawyer working to establish a thriving solo practice, or the new associate’s pressure to move up the ladder of a large firm can work mightily against prioritizing personal, family and spiritual needs. While some admittedly seem to adjust well to such a life, long-term consequences may result, such as relationship or marital problems, problem behavior in children, or stress-related illness. You may not see the “forest for the trees” until it’s too late.

5. **Avoidance.** Procrastination and avoidance behavior may reflect any number of underlying issues. It may, for example, indicate an anxiety or phobic problem. Or it may be a covert expression of anger. It may suggest a sense of meaninglessness or poor fit with the work at hand. It could also pertain to a fear of failure, or even a fear of success. The motivations, often not conscious, are myriad. Consistent with the nature of the problem, most lawyers seem to avoid addressing this behavior until the inevitable crisis erupts, quite possibly with career-damaging effects.

So, what can you do to prevent problems such as those on this non-exhaustive list, or to nip them in the bud?

FIRST: Stay awake to your own behavior.

When you find yourself hungry, angry, lonely or too tired, too often, something is out of balance. Talk to trusted friends, family members, minister, priest or rabbi, or seek professional assistance from a qualified counselor.
SECOND: Listen to what others tell you about yourself.

When others, especially those closest to you – spouse, partner, sibling or friend, tell you things and you find yourself reacting defensively, e.g., refusing to listen, arguing/blaming, rationalizing or avoiding them, they may be seeing something important. Stop! Take a deep breath, and listen until you clearly understand what they are saying. Take time to think about it and follow up at an agreed-upon time. If you find yourself unable to do this, it is time to seek help.

THIRD: Do not be afraid to ask for help.

Attorneys who are typically more comfortable having the answers and giving the help, tell themselves that they should be able to handle their own problems. However, lawyers are no less subject to the human condition than anyone else. It takes courage and humility to acknowledge a need for help, and can prevent a lot of damage in the long run. Massachusetts’s lawyers, judges and law students have their own free and confidential assessment and referral service: Lawyers Concerned for Lawyers, Inc., Massachusetts’ Lawyers Assistance Program.

Established in 1978, LCL’s services were originally limited to assisting legal professionals having difficulty with their practice of law due to alcohol and other drug dependence, including prescription abuse/dependence. In 1992, in recognition of the value of LCL’s services, the Supreme Judicial Court ordered a small add-on assessment to the annual Bar registration fees to support LCL’s operating expenses and to expand its services to address mental health and other life problems.

Calls to LCL’s confidential help line are numerous, frequently complex, and reflect the highly competitive and often overwhelming nature of today’s legal profession. Nearly 50% of lawyers seeking assistance are solo practitioners. Unlike their colleagues who work in firms or corporate settings, lawyers who work alone have little or no collegial contact or support. Asking for help before a situation gets out of hand is key to an ultimately successful resolution.

In addition to assessment and referral services performed by our expert clinicians, LCL offers peer support (both individual and group), facilitated groups, educational outreach, and (when requested by an impaired lawyer who has been disciplined) monitored probation.

Regardless of what type or how excellent a lawyer you are, solutions to your own personal problems can be elusive. When you need a sounding board for your personal concerns, please give LCL a call.
Work Dissatisfaction: Common Causes, Uncommon Solutions*

Michael E. Hall, Ph.D.
Charlotte, NC

“I’m one of them,” quipped Jesse in a staccato voice. “One of whom,” replied the professional counselor. “Oh, you know, one of those lawyers branded a success. It looks like it’s working; that is, on the outside. But, on the inside it’s not happening!” Jesse continued, “I’m thinking: ‘Is this really what I want from my career in law? Or do I need to make a change? And if so, what kind of change and how would it fit with the rest of my life?’”

Jesse’s work satisfaction quagmire is not unique to attorneys; in fact it is a national, if not global, workforce phenomenon. Less than half (49%) of United States workers, right behind Spain (50%) and Switzerland (53%), reported being completely or very satisfied with their jobs, according to a recent edition of The Career Management Letter (Association of Outplacement Consulting Firms International, 2002). In Lynn Grodzki’s The New Private Practice, psychologist and life coach to lawyers, Ellen Ostrow, observed, “ABA surveys indicate that approximately 30% of lawyers are dissatisfied with their jobs.” And the NCBA 1991 quality of life study, revealing a North Carolina lawyer’s dissatisfaction rate of around 20%, is further corroboration of this trend.

In contrast to this “gloom-and-doom” data, there is a positive opportunity in the intensely personal and uncannily elusive phenomenon of work satisfaction for attorneys.

Seven Markers of Work Satisfaction

The relatively high percentages of unhappy workers suggest people want more from employment than they are getting. Unlike their predecessors for whom a steady pay check or prestige were sufficient, Millennial workers want work that

* Source: North Carolina Lawyer Assistance Program. Reprinted with permission of the author and the Mecklenburg County Bar.
nourishes personal fulfillment. And while the criteria for what it takes to be satisfied at work vary across such variables as culture, race/ethnicity, and gender, there are some common indicators of work satisfaction.

Reminiscent of the proverbial vacationing family, complete with kids in the backseat asking, “Are we having fun yet,” you can tell you’re work satisfied when you...

- Look forward to being at work
- Find your job tasks energizing
- See your contributions appreciated and respected
- Describe your profession to others with pride
- Respect and enjoy co-workers and clients
- Hold your future as positive
- Have opportunity to learn about self, others, important subjects.

**Who Me, Work Satisfied?**

To gauge how you weigh-in, rate your present level, from 1 (Definitely Untrue) to 5 (Definitely True), on each of the above seven markers of work satisfaction. Next, repeat the exercise but rate your preferred level. If you are uncomfortable with the discrepancy between your present and preferred level on either a single item or group of items, as a start, at least commit now to enhance your satisfaction. Honor the part of you thirsting for more; it’s your perfect right!

Work dissatisfaction often begins with a flawed thought-pattern: “Okay, I finally admit to myself that I haven’t really been happy with work for some time now. I wonder what all this means?” “Oh no, I must be in the wrong field!” “My choices are to find another profession or put-up with gnawing disaffection. But don’t I have too much invested in law to jettison now?”

The cycle of self-defeating thinking reflects the following fallacies.

**Myth #1** A dissatisfying present is due to a wrong past choice.

**Myth #2** Alleviation of the present dissatisfaction will require undoing the original choice.
Myth #3 To avoid forfeiture of my original career investment, either a radical change or no change must be taken.

Confusion then frustration—substitute anxiousness, sadness, or whatever constellation of internal states most accurately reflects your experience—subtly set-in when self-defeating thinking is unchecked. While all this is usually outside of a person’s awareness, what gets their attention is the kind of paralysis of action that follows. Then, full-blown, certifiable work dissatisfaction is manifest.

Breaking the Self-Defeating Cycle

If this seems all too familiar, then know that with definite action, mythical thinking can be relinquished. A path to career satisfaction is to...

- Validate your choice for a legal career,
- Identify options for increased job satisfaction, and
- Activate options which are self-validating and congruent with other life realms.

For lawyers like Jesse, those with a sense of work dissatisfaction, a first important task is to determine the source of disaffection. Is it career dissatisfaction or job dissatisfaction? In the case of career dissatisfaction, the question is, “Is my work unhappiness due to career choice misalignment—being in law for the wrong reasons?

What’s the Deal?

Here’s more of Jesse’s story. “It was the classic approach-avoidance thing from Psychology 101. My self-talk went something like this: Okay Jesse, look at why you are in law? There was the whole family-expectations-encouragement-of-college-professors-want-to-help-people thing. So, I got into a top-ten law school; no big deal. I graduated and parlayed my clerkship with a small firm into a descent first job; kind of a big deal then. Now, years later-Well, I just don’t know anymore. I mean, I’m not a standout associate. The partners seem at least okay with my performance, overall. But I’m thinking, is ‘okay’ sufficient, given all the pressure that comes with lawyering? There has to be more, doesn’t it? If not, I should do something else. But what; maybe become a teacher? This is now a big, big deal!”
Validating Career Choice

To challenge mythical thinking, the specific source of Jesse’s work unhappiness—career versus job dissatisfaction—must be pinpointed. And this can be accomplished by examining the initial career choice.

Here is how a local lawyer’s career choice was validated. Kara (a pseudonym) approached friends with her work satisfaction dilemma. “Two things: Surprise and then surprise-of-surprises. When I turned to my faith community, they didn’t give me the follow-your-heart, be-whatever-you-want-to-be saga. Instead, their first big message was, ‘Kara, stick with what you know until you’re clear on what needs to be altered.’

“But what is it that I know for sure? I didn’t take any of the career tests that are out there. But my friends asked me the right questions causing me to uncover my motivations, assumptions, and beliefs about law and about Kara as a person. To my surprise, what was revealed was that my legal career was not an accident; I didn’t fall into law school, but I entered with a clear purpose.”

“It was funny, by affirming my original career choice, I felt like I could bloom where I was planted—remain in law with at least a modicum of satisfaction. And surprise-of-surprises was that I experienced a readiness to explore a wide field of alternatives, both in and outside of law, for avenues to enhance my career-life satisfaction.”

Avoiding the common practice of overcorrection—applying the wrong remedy to a career dilemma, Kara is now enjoying the first marker of work satisfaction: looking forward to being at work. Although career fulfillment has yet to be evident, this is a vital beginning. Also, Kara’s experience shows how to use what experts call “natural helpers” to assist with clarification between career and job satisfaction.

So, there are three steps you can take today. First assess your present level of work satisfaction. Then make a commitment to not live without enhanced satisfaction. And finally, marshal your unique resource of natural helpers. Select widely from your sphere of influence—family, faith, and civic—people who are easily accessible, and themselves emotionally and vocationally healthy. Solicit their candid observations about how law allows you to express various aspects of yourself. This can minimize the frequently occurring experience of reading work dissatisfaction as a sign that an exodus from law is required or that unhappiness must be suffered in silence.

Job satisfaction is an attitudinal variable that is generally thought of as an indicator of emotional or psychological well-being. An index of the degree to which people like or dislike their job overall, job satisfaction is simply informative.
However, it can be more useful to think of job satisfaction as a constellation of attitudes about various facets of one’s job.

While there are a plethora of possibilities, researcher Paul E. Spector (Department of Psychology, University of South Florida) suggests the indicators fall into the following categories:

1. **Rewards** (e.g., pay, promotions, benefits)
2. **People** (e.g., co-workers, supervision, management)
3. **Nature of the work**
4. **Organizational context** (e.g., operating procedures and communication)

When it comes to dissatisfaction among attorneys, Deborah Aaron, former Seattle bar association leader and civil litigator-turned-career consultant, finds that the following six factors are most frequently reported:

1. **Unrealistic expectations about law practice**
2. **Uncomfortable phase of career development**
3. **Inadequate limits with clients, colleagues, and management**
4. **Work/nonwork-life imbalance**
5. **Uncomfortable work setting**
6. **Under use of skills and preferences**

For a self-audit, rate your current job experience, on each of the above six indicators of job dissatisfaction. Use a scale of 1 (Definitely Untrue) to 5 (Definitely True). If you are displeased with the number of indicators receiving ratings at or above 3 (Somewhat True) or find disturbing a single item at the 5 (Definitely True) point, then as a start, commit now to lessen or eliminate that item.

Among the six factors of dissatisfaction, note the progression from the internal to the external. The first and second items are intra-personal, as they reflect your personally held assumptions and beliefs. Particularly for those recent entrants to careers in law, ask yourself three questions: “What was I expecting the practice of law to be like?” “What is the reality of law practice?” “Has my career growth been consistent with present opportunities?” Be brutally honest and be specific. (Hint: You are likely to find it helpful to do more than just reflecting or contemplating an answer; writing this out helps make it concrete.)
When your career in law does not match your expectations, dissatisfaction is a predictable outcome. Essentially, you have two major options to avoid dissonance: changing from law or changing your attitude about law. Embracing reality, accept what is, can be a first step toward achieving career congruence.

The third and fourth items—ineffective limit setting and work/nonwork life imbalance—reflect interpersonal well-being. Taken together, these two items can be an index of the quality of your most significant human or person-to-person relationship. Across gender, age, race/ethnicity, dis-ability status, it is generally accepted that the number of pro-social relationships one has in a given setting (e.g., work, home, and community), the greater one’s mental, as well as physical health. Life-career dissatisfaction is predictable when healthy boundaries are not established and maintained between oneself and others. Attorney assistance programs from various states report hyper-responsibility and over-reaching control needs as a frequently occurring phenomenon.

At play here is the tendency to define responsibility as an obligation to others, without consideration of its effect on you. An unwillingness to live with the disappointment of others is a result. The underlying dynamic is fear. The list of specific fears is almost limitless: fear of being disliked, unloved, unappreciated, disrespected, overlooked for promotion, reprisal, etc.

Your solution can be two-fold. First, identify your specific fears by answering the question, “What prevents me from setting appropriate limits with clients (substitute co-workers, senior partners, and family members) is.... To be effective, answer this question more than once and go for specifics. Uncompromising self-honesty is critical. (Hint: Again, you are likely to find it most helpful to do more than just reflecting or contemplating an answer; writing this out helps make it real.) Next, challenge that fear by making detailed notes about the successful coping tactics of someone you admire. Finally, select one relationship where your boundaries can be improved and develop a plan (e.g., limit client interruptions). For your first one, pick an area where the negative repercussions for your attempts at self-change are less likely to be career-limiting.

The fifth and sixth job dissatisfiers—unpleasant work setting and underutilization of capabilities—can be extra-personal or related to the external world of your employing organization. Particularly for those at the latter-end of their career, the question arises, “What’s wrong with this work picture?” The concept of a “toxic work environment,” in this instance, is not about the physical as much as it is about the psycho-social and communication aspects of your work setting.

To determine when you need to make an effort to change your environment (or leave), Aaron suggests starting with these questions: “I am more likely to..."
• “Approach work tasks with enthusiasm or lethargy”
• “Seek or avoid work initiatives”
• “Join or lead activities or complain and withdraw”
• “Find new assignments stimulating or boring”
• “Find that achievements engender feelings of pride or relief”

Being knowledgeable about the differences between career- and job-dissatisfaction is necessary but insufficient for the achievement of optimal work satisfaction within law. Just as there are no easy remedies in law, only right choices; there are no quick fixes when it comes to work dissatisfaction. Commitment to the judicious application of proven strategies presented in this article is recommended. When more intractable cases of work dissatisfaction are evidenced, the assistance of counseling or other healthcare professionals may be useful.

An earlier version of this article first appeared in a two-part series in The Mecklenburg Bar News.
SECTION 10.8

Overcoming Procrastination*

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Procrastinate 1. to put off taking action until a future time; be dilatory 2. To defer or postpone. From pro (forward) and crastinus (pertaining to the morrow).
— Funk & Wagnalls Dictionary

Nothing is so fatiguing as the eternal hanging on of an uncompleted task.
— William James

When I spoke to several lawyers recently about procrastination, all agreed they know of others for whom it is a real problem and— no surprise— even see the tendency in themselves. Clearly, it’s normal for most people to procrastinate some of the time and about some tasks— making income tax filings on time and meeting 401k deadlines are common examples.

The seriousness of the problem and the impact it has on career and professional success vary substantially. While lawyers are not alone in their struggles to get work done on time, law is a time-sensitive profession and includes many deadlines outside of an individual lawyer’s control. Therefore, most lawyers do not have the luxury, if it can be called that, of a procrastination habit.

Work struggles that may be related to procrastination include consistently missing deadlines, not returning client calls and repeatedly delaying court matters. These behaviors often provide the first red flags of difficulties, although the underlying causes are diverse.

Several lawyers have spoken to me of overwhelming workloads and the sense of immobilization or inability to act that can be experienced by even the most productive and efficient lawyers from time to time. This sense of panic or feeling

out of control can happen most often during times of unusually high work demands, for example during long and complex trials, when a person realizes the volume of work and tight time lines in the weeks ahead. Whether lawyers are in private practice or not, chronic procrastination can present a serious barrier to success in the legal profession and in life.

These practical tips may help you in avoiding procrastination:

1. **Face the problem.** It is very easy to avoid doing this, particularly when under stress. Often we delude ourselves with the illusion of work. You know the signs. Browsing the net, sending and reading e-mails, filling time with non-essential administrative tasks … anything to avoid working on that problematic file.

2. **Recognize your weak spots.** One of the reasons for procrastination is that we don’t do what we’re not good at. If you don’t like handling issues on the phone or have difficulties with certain clients, for example, you may find you will delay in dealing with those issues or those clients. Once you recognize this, dealing with the solution becomes easier. You may need to tackle the problem directly yourself or, in some cases, you may find colleagues more suited to the task than you and with whom you can exchange work.

3. **Trick yourself into starting.** If you’ve been avoiding a particular task, start by telling yourself you will just work on the file for 15 minutes. At the end of that time, see if you can continue. Before putting it away, jot down a few notes on next steps or ideas for follow-up and place them in the file. This will help you transition back into the work more readily the next time.

4. **Set your priorities daily—and act on them.** One experienced Crown Counsel described her process as follows:

   I review everything that’s on my desk. Then I do a couple of things. I make a list of everything that has to be done. Then I number them in order of importance and urgency. I ask myself: what must be done today? What can wait? Once I decide what the top two items for the day are, I set about working on them. At the end of the day, if I have accomplished only those two items, I’m happy. Once I’m able to start crossing things off my list I feel calmer and more in control. I also physically organize and number my files in order of priority, which helps me focus and reinforces those top items. I also review my list at the end of each day and decide what the next day’s top two priorities will be.

5. **Break down complex tasks into smaller ones.** Frequently, we put off starting because the overall job looks so daunting. Map out a detailed outline of all the separate tasks that need to be completed on a file, such as through comprehensive practice and project management checklists.
6. **Set mini-deadlines.** Use a technique called “back-timing,” described by Rita Emmett in her book *The Procrastinator’s Handbook: Mastering the Art of Doing It Now.* Work backwards from your final deadline to set interim deadlines for each of the separate tasks. For example, if you are presenting a paper at an upcoming legal conference, set and record earlier deadlines prior to the presentation date, including dates for completion of research, first draft, review and feedback from colleagues, further drafts, final proofing by a trusted peer, final proofing and revisions by yourself and submission of the paper.

7. **Find rituals and routines that work for you.** Identify and work within your personal rhythms. If you are most productive in the morning, use that time for challenging tasks and save routine administrative chores for the afternoon. Identify distractions and eliminate or contain them: close out of email, turn on your phone’s “do not disturb,” shut the door and let uninvited visitors know you have a commitment. Repeat rituals that work for you: a favourite pen, getting coffee before you begin. In short, build in cues that remind you it’s time to begin. Use a timer and tell yourself you will give your entire concentration to your most onerous task for 60 minutes.

8. **Get the help you need.** Once you have faced the problem, identify your barriers and needed resources. Do you need someone who’s an expert at managing time to coach you? Administrative or paralegal support? Help getting your office organized, de-cluttered of distractions? Or, do you need to consult with a colleague who has expertise in a complex area of law relevant to your file?

9. **Visualize.** See yourself at the end of the day having been productive and focused. Think about the sense of satisfaction you will feel once you’ve completed a long-delayed task.

10. **Reward and reinforce.** Find a way to reward yourself when you’ve stuck to your goals for the day, if only to mentally remind yourself what you’ve accomplished. After long periods of a heavy workload, plan a weekend getaway or relaxing family activity as a way to reward yourself and reconnect with loved ones. Life should be more than just work.

**Recommended reading**


The Massachusetts Law Office Management Program (www.masslomap.org) and Lawyers Concerned for Lawyers, Inc. (www.lclma.org), assist lawyers with the challenges of managing a law practice and personal, behavioral, and mental health impairments that may diminish their ability to address these challenges.
Mentoring programs and other resources are available through area bar associations such as the Boston Bar Association (www.bba.org) and Massachusetts Bar Association (www.massbar.org).
Bar Membership, Mentoring, and CLE

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Richard C. Van Nostrand, Esq.
Mirick, O’Connell, Demallie & Lougee LLP, Worcester

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Boston Bar Association

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Thomas F. Maffei, Esq.
Sherin and Lodgen LLP, Boston
SECTION 11.1

Why Should I Join a Bar Association?

Richard C. Van Nostrand, Esq.
Mirick, O'Connell, DeMallie & Lougee LLP, Worcester

As a public citizen, a lawyer should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. ... A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Massachusetts Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities.

In these few words, our Supreme Judicial Court articulates the highest aspirations that each of us as lawyers should seek. Those few words also exemplify the mission and objectives of virtually every bar association. More pointedly, they also serve to underscore the potential value to be gained from bar association membership.

What does one gain from that membership?

The answer to that question is as varied as those who make up its membership. The very short list of "benefits" would include professional development and education, mentoring, networking opportunities, participation in advocacy efforts, leadership opportunities and the financial advantages that come from a bar association’s collective purchasing power.

For those new to the bar, the first few years are the most critical for laying the foundation of a successful career. Although formal law school education may end, practicing law means a lifetime of learning. Virtually all bar associations offer continuing legal education at reduced rates or free to their members. These programs range from introductory "how to" seminars to advanced courses on sophisticated topics. Instructors are almost always drawn from the practicing bar
so one will typically receive heavy doses of practical advice along with the legal education. Where the subject matter lends itself, it is also very common for judges or agency officials to donate their time to lend a “view from the bench.”

Aside from what can be learned in the formal educational programs, even more can be gained from the mentoring and networking opportunities that come with bar membership. Most bar associations are structured to include practice group committees and sections, usually open to all interested in the specific topic or area of interest. Membership and active participation in those committees and sections allows one to get to know others with similar interests. This interaction can pay significant dividends in professional development, not to mention building lasting relationships that can span a career.

Participation can also lead to greater impact. As set forth in the quote above, bar membership provides an opportunity for lawyers to impact not just their own and their clients’ lives, but also to lead reform for the improvement of the profession and the betterment of society.

If one is so inclined, active advocacy through the organized bar can move mountains, great and small. If one lawyer has a vision for change and tries, alone, to make that vision a reality, he or she may be effective; but think of the power of an association of likeminded lawyers working together on a collective vision. Together lawyers can effect change that might not have been possible but for their combined resources of time, talent, energy and vision. Advancing civil rights, expanding access to justice for the poor, ensuring equitable treatment for all and improving the administration of justice are just a few of the many areas where lawyers have joined forces to great effect.

It is also a fair statement that many are attracted to the law because they are high achievers and potential leaders. Bar association membership can also serve as a training ground for lawyers to develop and refine their leadership skills. For those so inclined, it is not unusual to see a leadership arc that begins with active involvement with a new lawyers committee, grows to participation on an educational panel, progresses to invitation to serve on a subcommittee or task force, evolves into chairmanship of a section, and expands into continued leadership opportunities inside or outside the association. Along the way, one is exposed to numerous leadership styles and techniques and given the opportunity to fashion the style that fits with one’s own interests, strengths and personality.

Finally for some, membership in a bar association may also have a direct positive impact on your pocketbook. With most attorneys practicing in a small firm or solo practice, bar associations provide collective purchasing power for a wide variety of goods and services that the individual attorney may not be able to cost effectively access. This very long list includes a variety of insurance products
WHY SHOULD I JOIN A BAR ASSOCIATION

including, health, life and disability, computerized research, travel services, office services and supplies, court reporting services, etc.

From an historic perspective, Massachusetts and its bar are somewhat unique. Bar associations exist within two environments - mandatory and voluntary. The majority of states have mandatory, also referred to as integrated or unified, bars. An integrated bar is one in which membership in a state-sanctioned bar organization is a requisite for a lawyer to practice law. In those states, an external body, usually the state legislature, has made that determination and imposed it upon the profession. One of the outgrowths of that type of system is that the unified bar association has significant limitations on its advocacy ability.

By contrast, a voluntary bar exists in an environment where bar members are free to choose whether or not to join bar associations and, if so desired, participate in driving its advocacy agenda. No doubt because of the strength of its voluntary bar associations in maintaining high standards within the profession, the Massachusetts legislature has not seen the need to impose a unified bar upon attorneys practicing in this state. This is a testament to the Commonwealth’s lawyers and to the strength of the voluntary organized bar.

Voluntary bar association membership has a long and vibrant history in Massachusetts. It is a tradition that dates back to the era of the second president of the United States, John Adams, who convened meetings with other lawyers who ultimately formed the Boston Bar Association (BBA). The Massachusetts Bar Association (MBA) was founded in 1910 and also has a long and influential history as the Commonwealth’s only statewide general interest bar association.

The MBA and the BBA are only two of a vast array of bar associations that stand ready to serve its members, the legal profession and society in general. A lawyer who is interested in becoming a part of the Massachusetts organized legal community has a diverse spectrum of bar associations from which to choose. Virtually every county and many local areas have geographically based bar associations. There are also a wide variety of practice area bar associations from real estate to intellectual property to municipal law to criminal defense and so on. Many bar associations also serve a specific social cohort such as the Massachusetts Black Lawyers Association, the Women's Bar Association, the Massachusetts LGBTQ Bar Association, the Massachusetts Association of Hispanic Attorneys, or the Asian-American Lawyers Association of Massachusetts, to name a few. Regardless of one’s location or interest, there is certain to be an association that fits.

As with voluntary bar membership, Massachusetts is also one of a very small handful of states that does not impose mandatory continuing legal education requirements upon practitioners. Participation in continuing legal education is a deeply-held tradition in Massachusetts, driven by the desire of lawyers to learn...
and to teach and train other bar members in practical skills and ethical practices. It is a credit to lawyers in the Commonwealth that even in the absence of a formal mandate, voluntary attendance at educational programs is high.

Much of what has just been described would not have happened without the long and robust history of our bar associations. This is due to the fact that when professionals associate together to take responsibility for the welfare, health and ongoing effectiveness of their community, they make the profession better for all of us.

All things considered, associating with others in your profession who share your interests, values and vision can make your career in the law that much more rewarding and fulfilling. I encourage you to join and become active in the organized bar here in the Commonwealth of Massachusetts.
SECTION 11.2

Boston Bar Association Diversity & Inclusion Section Group Mentoring Program Handbook 2013–2014*

Co-Chairs of the Diversity & Inclusion Section’s Mentoring Committee

Jessica Massey
Assistant Attorney General, Massachusetts Office of the Attorney General

Richard Quinby
Shareholder, Craig and Macauley Professional Corporation

Co-Chairs of the Diversity & Inclusion Section

June Duchesne
Vice President & Assistant General Counsel, EMC Corporation

Christina Miller
Chief of District Court & Community Prosecutions, Suffolk County District Attorney’s Office

MENTORING PROGRAM OVERVIEW:

The Boston Bar Association’s Diversity Leadership Task Force concluded that a clear indicator of career success for lawyers in general -- and minority lawyers in particular -- is having a supportive mentoring environment to encourage the

creation of long lasting relationships within the legal community. To that end, the BBA established a group mentoring program to promote the development of a new generation of diverse leaders at the BBA, in the Boston legal profession, and throughout the community.

The goals of the program are to:

- Help diverse groups of lawyers connect with groups and organizations that can foster professional development
- Encourage the leadership and success of new and diverse lawyers
- Expose lawyers to the Boston community
- Create an environment where young, diverse lawyers can learn from and support each other
- Talk through career challenges
- Develop strategies for career advancement and career satisfaction

WHO IS INVOLVED WITH THE MENTORING PROGRAM?

The Diversity & Inclusion Section:

The Diversity & Inclusion Section is one of the 24 Sections of the Boston Bar Association. The Sections programs and initiatives addresses race, ethnicity, gender, and GBLT issues. All mentees are automatically enrolled in the Section and are encouraged to attend programs sponsored by the Section.

The Section is overseen by a Steering Committee which organizes of activities and programs pursuant to the diversity initiatives of the BBA in addition to providing oversight for the Mentoring Program.

The Mentoring Program Committee:

The Mentoring Program Committee is a committee of the Diversity & Inclusion Section that oversees the group mentoring program. Consisting of two co-chairs and the mentors, the committee meets regularly with the mentors to discuss the progress of the individual groups. The Mentoring Committee co-chairs report to and receive feedback from the Diversity & Inclusion Section.
Structure:

Each Mentoring group has two mentors and 8-10 mentees. After the year-long program, the mentees are automatically enrolled in a mentee alumni group and are encouraged to stay involved in the Diversity & Inclusion Section or other Section of the BBA.

WHAT ARE THE BENEFITS AND LIMITATIONS OF THE MENTORING PROGRAM?

Benefits of Mentoring Groups include:

- Access to a neutral platform on which to discuss professional challenges
- Opportunities to explore new ideas
- Introductions to new individuals, groups, organizations and events
- Information about networking and building professional relationships
- Ability to share own knowledge to succeed

Limitations:

The Mentoring Program is a way to foster group dynamics, build connections and encourage success. The BBA Mentoring Program is not to be used as a:

- job search tool
- client recruitment tool
- client exchange program
- way to seek legal advice
- way to supervise or provide training

As a participant, you are still obligated to comply with all rules of professional conduct, including maintaining your clients' confidentiality.

**Please note that the mentors are volunteering their time for this valuable program; mentees may have the desire to express their appreciation to their mentors. Because our mentors come from different backgrounds, some work for the gov-
SECTION 11.2 PRACTICING WITH PROFESSIONALISM

ernment, and are prohibited from receiving any gift of monetary value for ethical reasons. In order to avoid any uncomfortable or questionable situations, please restrict your appreciation to your mentors to a kind thank you note. Our mentors participate in this program because they value this experience and find the mentoring relationship rewarding.

EXPECTATIONS OF MENTORS:

Each mentor is committed to his/her group for 12 months. To be eligible as a mentor, one must have had significant leadership at a Bar Association and/or at least 8 years of practice experience.

- The co-mentors must arrange for a group meeting each month. Although it is ideal if both mentors can attend, one co-mentor can run the group if there is a schedule conflict. The BBA will also arrange program-wide events and seminars for all participants. These events can take the place of individual group meetings.

- Communicate with the BBA staff person about meeting times and dates and the progress of the group.

- Encourage leadership and provide ways in which mentees can demonstrate leadership abilities.

- Facilitate group discussion.

- Schedule and inform group of meetings date/time/topic.

- Serve as an advisor by listening, guiding and providing necessary feedback to mentees.

- Provide mentees with networking opportunities.

- Maintain ethics and professionalism.

- Serve as role model on how mentees should conduct themselves in the legal community.

- Maintain confidentiality and ensure the group is doing this as well.

- Communicate with mentees.

- Address their concerns/questions to the best of your ability.
• Exchange ideas with mentees.
• Inform mentees about bar association, firm and other appropriate organizational events

**EXPECTATIONS OF MENTEES**

A mentee must have 5 years or fewer of legal experience, commit to regularly attend monthly group meetings and respect the goals of the program. The mentees must actively participate in this group as it is expected that each mentee will benefit from discussing the experiences and challenges that their group members bring to the table.

• Mentees should be willing to accept advice from mentors and mentees.
• Provide feedback to the BBA about the mentoring program.
• Respect the time of the mentors.
• Attend mentoring related programs and events.
• Candidly discuss career goals, abilities and concerns.
• Maintain professionalism and ethics.
• Regularly attend and arrive on time for meetings.
• Take initiative and give feedback.
• Discuss other issues pertinent to succeeding in the mentee’s career.
• Inform mentor/groups about events at firm, bar associations or other organizational events.
• Maintain group/individual confidentiality.
• Be aware of the group’s time constraints when asking questions.
SUGGESTIONS AND ADVICE:

For Mentors:

• Ensure that discussions are open, secure and comfortable for everyone.

• Encourage mentees to attend different networking opportunities put on by the BBA and other organizations.

• Tell a career story. Share the highs and the lows of your career path.

• Help establish an action plan for the mentee.

• Discuss courtroom decorum

• Talk about what you do such as:
  – Personal qualities needed for this type of work;
  – How you acquired the specific skills for this job;
  – Your recommendations to others for acquiring these skills
  – Suggestions you would give someone applying for your job;
  – What you like most and least about your job;
  – Interpersonal skills most important in your work;
  – Attitudes and values that are important to you and how they are reflected in your work; and
  – Obstacles or barriers you had to overcome to get where you are now.

For Mentees:

• Identify professional goals for the year and discuss them with your mentor.

• Share successes with your mentor/group; a case you recently won, or a strategy that worked well in closing a deal.
• Discuss about career planning and goals.
• Discuss a legal issue you are exploring.
• Discuss your networking skills.
• Discuss the issue of integrating personal/family life with career objectives

Activities:
• Attend court
• Participate in professional development activities
• Participate in networking events put on by the BBA or other Bar Associations
• Attend Group Mentoring related brown bags
• Bar educational programs
• Collaborate on educational programs
• Work together on a public service program
• Share ideas

POINTS OF CONTACT:
For any questions, comments and concerns regarding the Mentoring Program

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Boston, MA 02108 (617) 778-1984
Fax: (617) 778-1985
shelm@bostonbar.org
BAR ASSOCIATIONS

Minority Bar Associations:

Asian American Lawyers Association
http://www.aalam.org

Boston Lawyers Group (BLG)
http://www.thebostonlawyersgroup.com/

Massachusetts Association of Hispanic Attorneys (MAHA)
http://www.mahaweb.org/

Massachusetts Black Lawyers Association (MBLA)
http://www.massblacklawyers.org/

Massachusetts LGBTQ Bar Association
http://www.masslgbtqbar.org

Mass Black Women Attorneys
http://www.massblackwomenattys.org

South Asian Bar Association of Greater Boston (SABA GB)
http://www.sabagb.org
In 1992, the American Bar Association, Section of Legal Education and Admissions to the Bar published the “Report of the Task Force on Law Schools and the Legal Profession: Narrowing the Gap (the MacCrate Report).” The report addressed the efforts that law schools make to prepare lawyers to practice with competence. A recurring theme of the MacCrate Report was the need for clinical education opportunities at the law school level, to ensure that, after graduation, new lawyers are prepared for practice. The report’s detailed findings are beyond the scope of this article; but one of the observations the MacCrate Report made has special relevance for continuing legal education (CLE)—it is the observation that educating law students to become competent and ethical is a responsibility that exists on a continuum shared by both law schools and the legal community:

The skills and values of the competent lawyer are developed along a continuum that starts before law school, reaches its most formative and intensive stage during the law school experience, and continues throughout a lawyer’s professional career. (p.3)

Judicial clerkships, internships, clinical externships, and summer associate programs are all points on the continuum referred to in the MacCrate Report; continuing legal education is another.

Forty-five states have adopted a mandatory CLE requirement and professional responsibility training requirement. Massachusetts has remained a “non-mandatory” state; and yet, the vast majority of new lawyers seek CLE. This is because in Massachusetts, the bar is fortunate to have a rich tradition of voluntary participation in CLE. Each year, thousands of lawyers seek out trainings, workshops, roundtable discussions, conferences and fast-track legislative alerts that shorten the learning curve and help them develop the critical skills necessary for successful practice.

Why should a lawyer invest in CLE – especially in a state that does not require lawyers to report having taken a certain number of “credits” each year? Because in Massachusetts, it’s more about learning to be a professional than fulfilling a
state-imposed obligation. The continuing legal education model, at its best, is a model where continuous learning takes place over the course of a lawyer's career.

There are some compelling reasons to seek out CLE – especially at the outset of a legal career:

- To ramp up quickly. Law school took three years, but a new lawyer can't wait another three years to start getting clients. Ramp-up is critical to becoming a practicing lawyer, and CLE provides the practical groundwork of applied law that a new lawyer needs in order to become an accomplished lawyer. Even what may appear to be uncomplicated transactions (e.g., conveyancing) involves complexities that require training beyond law school.

- To learn the elements of civility and professionalism. The lawyers and judges who teach CLE can be beneficial role models, not only in substantive areas of practice, but also in terms of the way they comport themselves as professionals. Ethics, professionalism and civility find their way into the practice tips they impart.

- To learn best practices in a supportive environment. CLE presents an extraordinary opportunity to put novices and experts in the same classroom and get them talking. Where else but in a CLE setting would a new lawyer have the undivided attention of a judge, senior partner, or regulatory expert who is ready to impart decades of experience? The CLE tradition is to teach best practices that otherwise would have to be learned through trial and error.

- To put what one has learned into practice. Workshops, hands-on clinics, critiques, and other experience-based trainings are the laboratory where a new lawyer can experiment, learn, polish practical skills, and gain confidence. In CLE workshops, there is a safety net where a new lawyer can make a mistake and learn from it without harming a client.

- To get the edge on the competition. The new lawyer who invests in continuing legal education is investing in his or her own marketability in a competitive profession. With experts ready to impart their practical knowledge and know-how, a new lawyer has a distinct advantage – he or she is already on the way to becoming successful in the profession.

- To make connections that can last throughout one's career. As with many professions, there is the danger of isolation in a new
lawyer’s career. Because it combines substantive learning with a social element, CLE can do much to counteract isolation and make a new lawyer feel connected to the legal community—especially within a particular subject area. Substantive learning and networking blend together to turn a lawyer fresh from law school into a well-connected member of the community who can draw from the experience and guidance of others.

• To audit and measure one’s expertise against that of others. Especially in a profession that is largely self-regulating, self-awareness is key—not only to becoming a competent practitioner, but also in terms of being an ethical, effective professional who can attract clients in the marketplace. Because those who teach CLE are experts in their fields, they can serve as extremely valuable models of professional competence in their subject areas.

• To develop a specialty. The most effective lawyers use CLE as a tool to delve deep into a practice area and to develop competence that will make them more competitive in the marketplace. There is an array of practice-specific CLE opportunities from which one can select and tailor a personal curriculum.

There is a spectrum of CLE opportunities in Massachusetts. Most bar associations, such as the American Bar Association, the Massachusetts Bar Association, the Boston Bar Association, and specialty bar associations offer continuing legal education programs. The past two decades have witnessed a trend of in-house CLE in law firms on both a local and national scale. Several Massachusetts law schools offer institutes for professional development and make them available to the legal community beyond their own alumni. Massachusetts Continuing Legal Education (MCLE | New England) is known to many as the gold standard for CLE in Massachusetts. MCLE’s annual curriculum spans every major practice area, and includes training on both breaking developments and annual topics of interest to new and seasoned lawyers alike. It offers programs in-person as well as online, accessible from your desktop, tablet, smartphone and even on your mp3 player. MCLE’s email alert system keeps lawyers in the loop as to what’s new and what the hot topics are—as well as to the programs that are especially designed to cover them.

Continuing legal education is not only a bridge between a law school education and the start of a legal career; it is also a necessary part of one’s development as a professional. Consider making an investment in yourself by seeking out opportunities for practical, experienced based learning. Then, as you attain the skills and knowledge you need to excel in your practice, consider giving back by teaching others what you have learned. You will not regret it.
Pro Bono Practice: Lawyering for the Public Good

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Sheila A. Hubbard, Esq.
Volunteer Lawyers Project, Boston
SECTION 12.1

Why (Should I Do) Pro Bono?*

Sheila A. Hubbard, Esq.
Volunteer Lawyers Project, Boston

Beginning a law practice can be overwhelming on many levels. Establishing a budget, finding paying clients, and learning the practical skills needed to survive in a very competitive marketplace all take their toll in terms of time, effort, concentration and deep commitment. So, why should you choose to represent people who cannot pay your legal fees?

The better question is, “Why not?” Your pro bono legal services experience may well be the first time you appear in court. It may be your first contact with a client. It is an important way for you to “do the public good” in the form of helping someone who has a legal problem but not the money to pay for a lawyer. 80% of low-income people have unmet civil legal representation needs. There are over 33,000 “working poor” families in Massachusetts, and over 44,000 lawyers admitted to the Massachusetts bar. These numbers suggest that there is more than enough capacity to “do the public good” through pro bono service. Finally, it is a key ingredient in your professionalism. It is a rite of entry into the practice of law.

There are more than a few reasons why every lawyer—novice and seasoned alike—should incorporate pro bono legal service into his or her practice. The first is Rule 6.1 of the Massachusetts Rules of Professional Conduct. This rule states that every lawyer, regardless of his or her professional status or work load, should provide a minimum of 25 hours of pro bono service each year, to persons of limited means, or to organizations that help people of limited means. In the alternative, a lawyer should contribute from $250 to 1% of his or her annual taxable, professional income to an organization that provides or supports the provision of legal services to persons of limited means. The rule is “aspiration-al,” which means that it is not a requirement for bar membership. Yet pro bono volunteerism is something that the courts and the bar view as one of the key aspects of the professional, ethics-driven and responsible work of a Massachusetts lawyer. When you think about the time commitment involved—the equivalent of

* Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
about three days per year—the pro bono proposition seems hardly burdensome. Moreover, those 25 hours have the potential to make a significant difference in your career in terms of whom you will help, what you will learn, the skills you will acquire, and the members of the legal community you will encounter.

So, how can you fulfill the aspirational requirement of Rule 6.1—and enjoy the experience? Here are a few directions others before you have taken:

- Those aspiring to be trial lawyers have signed on as a Limited Assistance Representation Courtroom Lawyer for the Day, even shadowing another lawyer to gain valuable experience representing clients in court.
- Lawyers who are interested in commercial law have assisted low-income debtors or creditors as the Fair Debt Collection Lawyers for the Day in the Boston Municipal Court.
- Individuals who are interested in elder law have served as Probate and Family Court Judicial Designees reviewing the care plans and annual reports filed by guardians of incapacitated adults.

The opportunities at the Volunteer Lawyers Project are varied. There are cases and projects to suit lawyers with a range of interests and levels of experience. Your first step is to become a member of VLP’s pro bono panel; do so by signing up online at www.vlpnet.org/join. You can explore opportunities of interest to you by contacting Referral Coordinator Russell Rennie at rrennie@vlpnet.org or 617-423-0648 x129. VLP offers its volunteers a comprehensive program of supports, including training, mentoring, sample practice materials, and foreign language interpreters, where needed.

The Massachusetts Bar Association also offers an array of volunteer opportunities. The MBA’s “Pro Bono Opportunities Guide” puts you in direct contact with 144 venues where lawyers can become involved in pro bono service. The opportunities span almost every practice area and type. They can range from regionally-based organizations such as Berkshire County Consumer Advocates, Inc. where lawyers can volunteer to provide guidance and mediation services to tenants who have been victimized in the marketplace—to church-based services, such as Catholic Charities Refugee and Immigration Services, where lawyers advocate and provide skilled legal services for immigrant populations—to court-based programs, such as the Administrative Office of the Trial Court/Intermediate Interpreter Training Program, where bilingual lawyers can assist persons who need interpretation services. Contact the MBA Community Services Department directly at (617) 338-0695 or via email at www.massbar.org/
for attorneys/volunteer-opportunities/volunteer-opportunities-menu for more information on how to become a pro bono volunteer.

In addition, the Boston Bar Association (BBA) provides volunteer lawyers opportunities to serve. For example, in partnership with VLP, Greater Boston Legal Services, WilmerHale Legal Services Center, and the Boston Housing Court, the BBA participates in the Lawyer for the Day in the Boston Housing Court to help unrepresented tenants and landlords with a range of services. In the 2012 tax season, BBA volunteers assisted more than 765 individuals through their Volunteer Income Tax Assistance. The BBA also provides several trainings to prepare volunteers for pro bono work. Through the Chapter 7 Pro Bono Training, VLP and the BBA Bankruptcy Section’s Pro Bono Committee offers training on Chapter 7 Bankruptcy law. Donate Your Time: Represent Claimants Seeking Unemployment Benefit Training, is a BBA program to guide attorneys through the intricacies of the unemployment system and the information they will need to represent clients at hearings. Those trained support the work of VLP with this client population.

Volunteering to do pro bono work can be a personally rewarding experience. Using one’s legal skills and knowledge to assist a person in need in solving a legal problem can be one of the most important things you will ever have the privilege of doing with your law degree. But the rewards extend far beyond personal fulfillment; pro bono volunteerism is work that the legal community upholds and supports publicly.

In 1988, the BBA established the John G. Brooks Legal Services Award, which is awarded annually to recognize career legal services lawyers.

The Supreme Judicial Court Standing Committee on Pro Bono Legal Services annually recognizes exemplary service by private sector lawyers, government attorneys, law firms, corporate law departments, and other institutions that demonstrate their outstanding commitment to volunteer legal services. It has established two programs:

- The Adams Pro Bono Publico Awards Program “seeks to identify and honor those in the legal profession who have enhanced the human dignity of others by improving or delivering volunteer legal services to the Commonwealth’s poor and disadvantaged.”
- The Pro Bono Recognition Program “acknowledges the extraordinary commitment to pro bono legal work by law firms, solo practitioners, in-house corporate counsel offices, government attorneys’ offices, non-profit organizations and law schools which certify they have met specific criteria established by the Committee.”
If you still have doubts about whether pro bono lawyering is something that you should incorporate into your career, it is important to remember that, as a lawyer, you are uniquely suited to provide the type of help so many need.

All that is needed is the desire to help.
# Supplemental Materials

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SECTION A2.1

Researching Ethical Issues*

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Scope Note
This chapter assists the reader in finding and utilizing sources for ethics law and authority in Massachusetts. The sources of rules include attorney discipline reports, criminal practice standards, and the Massachusetts Rules of Professional Conduct.

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* Reprinted from Ethical Lawyering in Massachusetts (MCLE, Inc. 3d ed. 2009 & Supp. 2013). Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
§ 1.1  Overview

A lawyer researching any ethical question in Massachusetts will employ as the primary source authority the Massachusetts Rules of Professional Conduct, which can be found at SJC Rule 3:07. The rules track in substance, but are not identical to, the American Bar Association’s (ABA’s) Model Rules of Professional Conduct (Model Rules). The ABA promulgated the Model Rules in 1983, and as of 2012 every jurisdiction except California had adopted some version of the Model Rules. The Massachusetts Rules of Professional Conduct may be found online at http://www.state.ma.us/obcbbo/rpcnet.htm. For comparison, the ABA Model Rules may be found online at http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

Nearly every rule adopted by the Supreme Judicial Court differs in some small or large respect from the corresponding ABA rule, but most of the Massachusetts rules are in substance equivalent to the ABA counterpart. A select few of the Massachusetts rules, however, are notably different from the ABA’s offering. Among the most important of the Massachusetts variations are the following:

- **Mass. R. Prof. C. 1.5 (Fees):** Massachusetts permits lawyers to pay referral fees without assuming proportional responsibility for the matter, contrary to the ABA version of Mass. R. Prof. C. 1.5.

- **Mass. R. Prof. C. 1.6 (Confidentiality):** Massachusetts is more protective of client information than the ABA by limiting revelations intended to protect against death or substantial bodily harm to crimes or frauds; less protective by limiting the scope of Rule 1.6 to “confidential information”; and less protective by permitting revelation of client information to prevent wrongful executions.

- **Mass. R. Prof. C. 1.14 (Disabled Client):** In 2008, the Supreme Judicial Court rewrote Rule 1.14 to address the responsibilities of lawyers who represent disabled or minor clients who risk suffering serious harm as a result of their choices. The Massachusetts Comments are more useful and nuanced than the Model Rule’s Comments.

- **Mass. R. Prof. C. 3.3 (Perjury):** Massachusetts has crafted an exception to the Model Rule’s obligation that a lawyer reveal perjury when the perjury is that of a criminal defendant.
Practice Note

The Massachusetts rules include, after each rule and its comments, a “Corresponding ABA Model Rule” notation listing the differences from the ABA’s version of that rule. In some instances (for example, at Mass. R. Prof. C. 4.2), the notation reads “Identical to the ABA Model Rule” where the rule’s language is identical but the comment’s language is different from the ABA version. Because the comments can matter a great deal, do not assume that an “identical” rule has identical comments.

§ 1.2 Understanding and Interpreting the Massachusetts Rules

The Supreme Judicial Court adopted a version of the ABA’s Model Rules in 1998, much later than most states. Some advantages of the Supreme Judicial Court’s adoption of a version of the Model Rules are the uniformity across jurisdictions and the wealth of interpretive data developing in the many states working with the Model Rules. The disadvantage of the introduction of the rules is the resulting uncertainty about the common law and ethics opinions issued within Massachusetts under the prior system, which was based on the ABA’s Code of Professional Responsibility.

The most reliable source of guidance, of course, is the text of the rules and comments themselves. If the rule’s language differs from some prior Supreme Judicial Court opinion or bar association ethics opinion, then obviously the Supreme Judicial Court intends its rule and comment language to overrule anything contrary that existed in Massachusetts prior to 1998.

There exists, however, extensive commentary on the ABA’s Model Rules, and that guidance will have direct relevance to Massachusetts lawyers to the extent that the Massachusetts rule is equivalent to the ABA’s version. The most prominent sources of interpretive authority on the Model Rules are given in the following Practice Note.

Practice Note

When researching ethics questions based on commentary about the ABA’s Model Rules or another state’s rules, be certain that the text in question is the same as the text in the Massachusetts rule. Most states, when adopting a version of the Model Rules, included some local options that differed from the ABA’s version.

Ethics Opinions, American Bar Association, Committee on Ethics and Professional Responsibility: The ABA’s Ethics
Committee issues opinions regularly on contested questions about the scope of the Model Rules. Because the ABA adopted the Model Rules some three decades ago, the committee has an impressive array of opinions on a variety of topics. The committee issues several Formal Opinions each year. (In the past, the ABA issued Informal Opinions as well, but the last Informal Opinion appeared in 1989.) The opinions are published. You may find them on LexisNexis using the following path: “Secondary Legal”— “ABA”—“ABA Codes, Constitution, and Opinions” and then choosing either “ABA Informal Ethics Opinions” or “ABA Formal Ethics Opinions.” On Westlaw Classic, use the database ABA-ETHOP or LS-ABAEO. On Westlaw Next, take the following path: “Secondary Sources”—“Texts & Treatises”—“Ethics & Professional Responsibility”—“ABA Ethics Materials”—“ABA Ethics Opinions.” On the ABA’s Web site, you may find selected opinions, headnotes, and purchase arrangements at http://www.abanet.org/cpr/pubs/ethicopinions.html.


Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyer (3d ed., supplemented through 2013): This book, coauthored by Geoffrey Hazard, the reporter for the Kutak Commission, which developed the first Model Rules in 1980, is simply the best authority on the meaning of the rules. The two-volume, loose-leaf book includes a separate chapter for each rule, and offers clear and helpful assessments of the meaning of the rules and comments. Each chapter also includes several examples to demonstrate the interpretations offered by the authors.

ABA/BNA Lawyers’ Manual on Professional Conduct: This loose-leaf reporter is one of the best sources available in researching ethical issues. The reporter is organized according to a topical index following the structure of the Model Rules. Each section contains summaries of ABA and state bar association opinions interpreting a particular rule. In addition to the basic manual, which serves as a form of updated treatise on different substantive areas, this service includes a binder on ethics opinions from all states (containing abstracts only, not full texts) and a “Current Developments” binder, which is indexed and contains almost all new court decisions and ethics committee opinions on lawyer conduct.
liability and ethics. The *ABA/BNA Lawyers’ Manual* can be found in most law libraries, and has a Web site at http://www.abanet.org/cpr/pubs/manual.html. (The electronic version of the manual requires a paid subscription, or payment for selected items.)

**Other States’ Ethics Opinions:** The ABA is hardly the final authority on how a rule should be interpreted. Each state has at least one bar association or similar authority issuing ethics opinions, and those opinions can be relied on by a practitioner seeking to understand how a rule ought to be interpreted. The difficulty is finding the opinions. More and more states are including the text of ethics opinions on-line, but that process remains somewhat unreliable. The best summary of state ethics opinions can be found in the *ABA/BNA Lawyers’ Manual*, described above. Also helpful is a resource on the Internet known as Legalethics.com, found at http://www.legalethics.com/legal.htm.

**Massachusetts Bar Association (MBA) and Boston Bar Association (BBA) Ethics Opinions:** The ethics committee of the MBA and, to a lesser extent, that of the BBA issue ethics opinions of interest to Massachusetts lawyers. For a fuller description of how these ethics committees operate, see § 6.1 and § 6.2, below.

**Case Law:** While the rules are intended as the basis of discipline only, and not as a source of authority for civil disputes such as malpractice claims, they are inevitably interpreted by courts within civil cases. Therefore, even though one might start with ethics opinions and the like, looking to Massachusetts court doctrine will often be rewarding.

### § 2 RESEARCHING AND UNDERSTANDING ATTORNEY DISCIPLINE IN MASSACHUSETTS

Supreme Judicial Court Rule 4:01 contains the rules governing bar discipline, including sections covering jurisdiction, grounds for discipline, the respective roles of the Board of Bar Overseers (BBO) and Office of the Bar Counsel, and the procedures governing imposition of discipline.

The reports of public disciplinary action, plus summaries of private reprimands, are published in the Massachusetts Attorney Discipline Reports. These reports contain all of the published opinions of the Supreme Judicial Court from 1974
through the present. Decisions of the court issued prior to the creation of the BBO in 1974 are found in the Massachusetts Reports.

In addition to the Massachusetts Attorney Discipline Reports, the results of disciplinary proceedings are published weekly in Massachusetts Lawyers Weekly.

The Office of the Bar Counsel and the BBO share a Web site, found at http://www.mass.gov/obcbbo.

§ 3 CRIMINAL PRACTICE STANDARDS IN MASSACHUSETTS (FORMER SJC RULE 3:08)

In addition to SJC Rule 3:07’s standards governing professional ethics and SJC Rule 4:01’s standards on discipline generally, the Supreme Judicial Court had promulgated, in SJC Rule 3:08, a series of disciplinary rules regulating the conduct of attorneys in criminal proceedings. Supreme Judicial Court Rule 3:08 contained Standards Relating to Prosecution Function (PF 1 through PF 15) and Standards Relating to Defense Function (DF 1 through DF 15). These rules were for the most part eliminated or subsumed within the Massachusetts Rules of Professional Conduct as of January 1, 1999. In one instance, Rule 3:08 PF 7(6) was restated within Rule 3:07 (Mass. R. Prof. C. 3.8).

§ 4 GOVERNANCE OF FEDERAL COURT PRACTICE IN MASSACHUSETTS

Lawyers appearing before the U.S. District Court for the District of Massachusetts are governed by those canons and rules adopted by the Supreme Judicial Court of Massachusetts, embodied in Rules 3:05, 3:07 and 3:08 of said court, as they may be amended from time to time by said court, except as otherwise provided by specific rule of this court after consideration of comments by representatives of bar associations within the Commonwealth.


§ 5 IMPORTANCE OF “OTHER” SUBSTANTIVE LAW

§ 5.1 General Principles

Lawyers faced with questions involving professional ethics tend to begin their research and thinking with reference to the applicable rules and their interpretation, as the above discussion has confirmed. That practice, though, ought not imply that the Supreme Judicial Court rules are the only authority applicable to and binding on Massachusetts lawyers when the question is the appropriateness or legality of lawyer conduct. Unless some explicit exception exists, lawyers are governed by all general substantive law, including regulatory authority, applicable to the rest of the populace. Lawyers sometimes believe that their special code of ethics relieves them of obligations toward third parties or toward governmental agencies that would otherwise apply were they not lawyers. Attorneys adopt this stance at their peril. See, e.g., United States v. Cintolo, 818 F.2d 980, 995–96 (1st Cir. 1987). Many feel, indeed, that the difficulties encountered in the infamous Kaye Scholer matter in the early 1990s (in which a prominent New York law firm paid $541 million in settlement to the federal Office of Thrift Supervision (OTS) after OTS challenged the firm’s actions on behalf of Lincoln Savings & Loan) were largely the result of Kaye Scholer’s assuming that certain federal reporting obligations would not apply to it as counsel. While that precise legal question has not yet been resolved, in light of the firm’s settlement with OTS, the assumption that lawyers are immune from such substantive obligations remains an uncertain and perhaps risky one.

The law of malpractice and professional liability plays a critical role in the operation of any law practice. For a comprehensive, five-volume treatise on this topic, see Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice (2012 ed.).

One of the most important legislative developments for corporate lawyers in recent years has been the passage of the Sarbanes-Oxley Act. In 2002, Congress enacted the Sarbanes-Oxley Act of 2002 (Pub. L. No. 107-204; 15 U.S.C. § 7245). Section 307 of the Act instructs the Securities and Exchange Commission (SEC) to adopt a new federal rule requiring all attorneys appearing and practicing before the SEC to report evidence of material violations of the securities laws and other misconduct “up the ladder” to the company’s senior management,
SECTION A2.1  PROFESSIONALISM SUPP. MATERIALS

and if necessary, to its board of directors. In 2003, the SEC issued its final rules on those obligations, at 17 C.F.R. pt. 205. Section 307 of the Act also contains language authorizing the SEC to adopt other “minimum standards of professional conduct” for attorneys appearing and practicing before the agency.


Practice Note
When evaluating whether certain conduct is problematic from a professional responsibility standpoint, be sure to ask whether the conduct would be problematic if performed by a layperson. For instance, while some lack of disclosure seems permitted lawyers in negotiations (see Mass. R. Prof. C. 4.1), consider whether that same lack of disclosure might amount to a form of fraud if performed by a merchant. See also Mass. R. Prof. C. 1.13, Organization as Client.

§ 5.2  American Law Institute’s Restatement of the Law Third, The Law Governing Lawyers

The above commentary regarding the importance of “other law” invites inquiry about the precise scope of the “law of lawyering.” In 1985, the American Law Institute (ALI) began a multiyear project to develop a Restatement of the Law Governing Lawyers, along the lines of other ALI Restatements of the Law, such as those for torts, contracts, agency and restitution. In 2000, the ALI completed that project with a two-volume treatise entitled Restatement of the Law Third, The Law Governing Lawyers. The Restatement’s purpose is to reflect the state of doctrine as it exists, rather than to propose doctrine. The official version of this long-awaited Restatement serves as an authoritative resource on questions of professional responsibility. (A one-volume paperback edition is also available. For either edition, contact the American Law Institute at http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=37.)

§ 6  SOURCES OF CONSULTATION

§ 6.1  MBA Committee on Professional Ethics

One helpful resource for an attorney faced with interpreting an ethical matter that may arise in everyday practice is the Massachusetts Bar Association’s
(MBA’s) Committee on Professional Ethics. The purpose of the Ethics Committee is to give advisory opinions on ethical and professional conduct to members of the MBA. Although the committee is without governmental status, and its opinions are not binding, its interpretations of the Supreme Judicial Court rules on professional conduct can be valuable.

To obtain an opinion of the Ethics Committee, a member of the MBA must submit a written request for an opinion by fax or e-mail. (A description of the process may be found at http://www.massbar.org/for-attorneys/ethical-inquiries.) The request is usually in the form of a letter setting out the facts of the inquiry and the advice requested. The request must be for the purpose of guiding a bar member on his or her own future conduct and may not be for the purpose of determining whether a fellow bar member has violated the disciplinary rules or for the purpose of determining whether the inquirer has violated the rules in the past. The committee will not give opinions on hypothetical questions, questions of law or questions of unauthorized practice of law, and it will not give an opinion on any matter that is currently pending before the Board of Bar Overseers or before any tribunal of the Commonwealth. Additionally, the committee may decline to give an opinion on any matter on which it does not choose to render an opinion.

The MBA Ethics Committee’s response to a request for advice is usually a private letter to the inquirer. Because the letter is the result of review and comment by the entire committee, an inquirer will not receive a response to a written request for advice for several weeks. Inquiries that require a rapid response should be designated as an emergency inquiry, and will be handled as quickly as possible. The emergency advice procedure does not allow for the precise communication of a letter request or for the input of the whole committee, and it is, therefore, a procedure that is used only rarely.

On occasion, a member of the bar will request advice on an area of the law that the committee considers to be of general interest to the bar as a whole. Such areas could include, for example, the circumstances under which an attorney may represent a bank and a borrower in closing mortgage loans. MBA Ethics Op. 90-3. In such cases, the committee will draft an opinion to be published, which is submitted to the Massachusetts Bar Association Board of Delegates for approval prior to publication. If approved, the opinions are published in Massachusetts Lawyers Weekly and in the Massachusetts Law Review, as well as on the MBA Web site at http://www.massbar.org/publications/ethics-opinions. They are also separately published in a volume of opinions of the MBA Committee on Professional Ethics. This volume is indexed according to the Massachusetts rules (or the predecessor code) and contains summaries of the opinions interpreting the particular rule. Summaries of the opinions of the Ethics Committee are also found in the ABA/BNA Lawyers’ Manual on Professional Conduct, described in § 1.2, above.
§ 6.2 BBA Ethics Committee

The Boston Bar Association (BBA), like the MBA, maintains an ethics committee, whose purpose is to give advisory opinions to its members with respect to the interpretation of rules promulgated by the Supreme Judicial Court relating to ethical and professional conduct of lawyers. Primarily, the BBA Ethics Committee’s opinions are formal, published responses to inquiries received in writing, and concerning matters of broad interest to the BBA’s members. The full texts of BBA Ethics Committee Opinions are published in the Boston Bar Journal and can be found on the BBA Web site at http://www.bostonbar.org/public-policy/ethics-opinions. Summaries are published in Massachusetts Lawyers Weekly and in the ABA/BNA Lawyers’ Manual on Professional Conduct (see § 1.2, above). The BBA Ethics Committee also is authorized to provide advice on an informal basis in urgent matters. Members with pressing ethical concerns may telephone the BBA to gain access to a member of the BBA Ethics Committee. The committee member is authorized to give telephonic advice to the inquiring party; the scope and substance of that advice will be reviewed by the full committee at its next meeting for purposes of future reference.

§ 6.3 Office of the Bar Counsel

It is not commonly known that the Office of the Bar Counsel will accept telephone inquiries from lawyers seeking opinions on ethical questions. An assistant bar counsel is on call during regular office hours to handle such requests.

As with all other sources of ethical opinion other than the courts, bar counsel “opinions” are not binding, nor will you receive an opinion about a pending complaint or matter. To contact the Office of the Bar Counsel for purposes of advice, telephone 617-728-8750 on Mondays, Wednesdays, and Fridays between 2:00 p.m. and 4:00 p.m.

§ 6.4 Legal Ethics on the Internet

Legal ethics research is now available over the Internet. Besides the Web site addresses listed in the sections above, some Web sites focus primarily on legal ethics across the country. Some important ones include the following:

- The American Legal Ethics Library: Cornell Law School’s Legal Information Institute offers a digital library on judicial and legal ethics. It may be found at http://www.law.cornell.edu/ethics/.
• **David Hricik’s Legal Ethics Site:** This site contains links to many state ethics opinions and state rules. It may be visited at http://www.hricik.com.

• **EthicSEARCH:** The ABA’s Center for Professional Responsibility offers a service called “EthicSEARCH,” which answers questions about legal ethics. The service is restricted to lawyers and other legal professionals, and may be found on the Internet at http://www.americanbar.org/groups/professional_responsibility/services/ethicsearch.html.

• **Freivogel on Conflicts:** Calling itself “[a] practical online guide to conflicts of interest for lawyers with sophisticated business and litigation practices,” this Web site has an extensive reference network on conflicts questions. It may be visited at http://www.freivogelonconflicts.com.

• **Legalethics.com:** Both legal and nonlegal ethics codes can be found at the Web site “Legalethics.com.” Browsers may visit the Legal Ethics Resources section at http://www.legalethics.com/legal.htm.

• **Internet Lawyering:** The American Bar Association hosts a Web site dedicated to questions of lawyering using the Internet, including risk-management advice and services to avoid conflicts and unauthorized practice in jurisdictions where the lawyers do not have a license to practice law. See http://apps.americanbar.org/dch/committee.cfm?com=EP024500. For a blog about Internet lawyering, go to http://www.elawyeringredux.com.

• **A Legal Ethics Blog:** An active legal ethics blog hosted by several law professors and lawyers specializing in legal ethics may be found at http://www.legalethicsforum.com.

### § 7 PROFESSIONAL ORGANIZATIONS

The Association of Professional Responsibility Lawyers (APRL) consists of members who are actively involved in the practice of law in the area of lawyer conduct and alleged misconduct. The APRL is an available resource for lawyers seeking direction or answers to sophisticated inquiries. For further information, see http://www.aprl.net. J. Charles Mokriski, of Boston’s Proskauer Rose LLP, is a recent Past President of APRL.
Several other professional organizations or public agencies have developed and published their own standards of professional responsibility. Lawyers seeking specialized guidance might wish to consult the following:

- **Alternative Dispute Resolution:**
  - ABA Symposium on Standards of Practice, Model Standards of Practice for Family and Divorce Mediation (2001), available at http://www.americanbar.org/content/dam/aba/migrated/family/reports/mediation.authcheckdam.pdf;
  - John Feerick et al., Standards of Professional Conduct in Alternative Dispute Resolution, 1995 J. Disp. Resol. 95 (1995);


- **Paralegals:**


- **Professional Codes (in general)**: Rena A. Gorlin, Codes of Professional Responsibility (4th ed. 1999).

- **Securities Practice**: Securities and Exchange Commission, 17 C.F.R. § 201.100 et seq.

- **Tax Practice**: Duties and Restrictions Relating to Practice Before the Internal Revenue Service, 31 C.F.R. §§ 10.20-.38.

### § 8 ADDITIONAL ABA STANDARDS

In addition to the ABA Model Rules, the ABA promulgates model guidelines for more specific areas of practice, including the following:


- **ABA Model Rules for Lawyer Disciplinary Enforcement (2007)**;


- **ABA Standards for Criminal Justice**, available at http://www2.americanbar.org/sections/criminaljustice/Pages/Standards.aspx;

- **ABA Standards for Imposing Lawyer Sanctions (2005)**, available at http://www.americanbar.org/content/dam/aba/migrated/cpr/regulation/standards_sanctions.authcheckdam.pdf; and

- **ABA Creed and Pledge of Professionalism (1988)**.

The author thanks Boston College Law School graduate Lauren Thompson for her assistance in updating this chapter for the 2013 Supplement.
SECTION A2.2

List of Ethics Research Web Sites and Resources*

I. Law School and Law Library Web Sites: Research Tools and Resources ................................................................................ A–15

II. Selected National and State Resources ........................................ A–16

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V. Appositional, Antipodal, and Other Informational Sites ............... A–20

VI. Treatises, Loose-Leafs, Etc. .......................................................... A–20

I. LAW SCHOOL AND LAW LIBRARY WEB SITES:
   RESEARCH TOOLS AND RESOURCES

Boston University Law School: Legal Ethics and Professional Responsibility Research Guide
http://www.bu.edu/lawlibrary/research/legalethics/index.html

Cornell—American Legal Ethics Library
http://www.law.cornell.edu/ethics

Cornell Law School Legal Information Institute (LII) http://www.law.cornell.edu

* This list, originally prepared by James S. Bolan, Esq., is reprinted from Ethical Lawyering in Massachusetts (MCLE, Inc. 3d ed. 2009 & Supp. 2013). It was updated for the 2013 Supplement by MCLE. The information contained herein does not constitute legal advice and is presented without any representation or warranty whatsoever, including as to the accuracy or completeness of the information. This compilation has been prepared for general information purposes; links to information on sites are for your convenience only and are not an endorsement or recommendation of those sites. Given the nature of the field and the fairly limited range of resources, many of the Web sites contain redundant references. In addition, some of the well-known “usual suspects” (texts, treatises, American Bar Association sources, desk books, etc.) are not specifically listed, but are well represented in the Web sites.
Cleveland Law Library: Legal Ethics and Professional Responsibility

Duke Law Library
http://law.duke.edu/lib/researchguides/legale

Georgetown Law Library
http://www.law.georgetown.edu/library/research/guides/legal_ethics.cfm

Harvard Law School Program on the Legal Profession
http://www.law.harvard.edu/programs/plp/

Hofstra Law School: Institute for the Study of Legal Ethics
http://law.hofstra.edu/centers/isle/index.html

Jenkins Law Library: Legal Ethics & Professional Conduct
http://www.jenkinslaw.org/research/resource-guides/legal-ethics-and-professional-conduct

Louis Stein Center for Law and Ethics
http://law.fordham.edu/stein.htm

University of Minnesota: Researching Legal Ethics
http://library.law.umn.edu/researchguides/legalethics.html

New York Law School Center for Professional Values and Practice
http://www.nyls.edu/centers/harlan_scholar_centers/center_for_professional_values_and_practice

University of San Francisco Law School: Legal Ethics and Professional Responsibility Research
http://legalresearch.usfca.edu/LegalEthicsResearch

Washington University Law Library: Legal Ethics Research Guide
http://law.wustl.edu/library/index.asp?id=1338

II. SELECTED NATIONAL AND STATE RESOURCES

American Bar Association Center for Professional Responsibility
http://www.americanbar.org/groups/professional_responsibility.html

Boston Bar Association Ethics Opinions
http://www.bostonbar.org/public-policy/ethics-opinions
WEB SITES AND RESOURCES

State Bar of California: Ethics Information
http://ethics.calbar.ca.gov

Legal Services of Northern California: Legal Research Tools (broad list)
http://lsnc.net/legal-research-tools/

Georgetown Journal of Legal Ethics
http://www.law.georgetown.edu/journals/ethics/

Massachusetts Bar Association Ethics Opinions
http://www.massbar.org/publications/ethics-opinions

Massachusetts Board of Bar Overseers/Office of the Bar Counsel
http://www.mass.gov/obcbbo/

Texas Center for Legal Ethics and Professionalism
http://www.legalethicstexas.com/Home.aspx

Virginia State Bar Ethics Opinions and Information
http://www.vsb.org/site/regulation/ethics-opinions/

Washburn University School of Law Legal Ethics List Serv
http://lists.washlaw.edu/mailman/listinfo/legalethics

West Virginia Bar Office of Disciplinary Counsel
(Contains Rules of Professional Conduct and Legal Ethics Opinions)
http://www.wvodc.org/

III. OTHER RESOURCES

A. Advertising and Marketing

Amazing Firms/A mazing Practices
http://www.gerryriskin.com

Larry Bodine’s Professional Marketing Blog
http://blog.larrybodine.com/

Will Hornsby—The Boundaries of Legal Marketing
http://www.willhornsby.com

LawBiz Blog
http://www.lawbizblog.com
Legal Marketing
http://www.legalmarketingblog.com

LexBlog and Real Lawyers Have Blogs
http://kevin.lexblog.com

My Shingle
http://www.myshingle.com

Reid My Blog—Reid Trautz
http://reidtrautz.typepad.com/reidmyblog

B. Other Web Sites, Blogs, and Blawgs

American Academy of Matrimonial Lawyers
http://www.aaml.org

The American College of Trust and Estate Counsel
http://www.actec.org

Association of Corporate Counsel Legal Resources
http://www.acc.com/legalresources/index.cfm

Association of Professional Responsibility Lawyers
http://www.aprl.net

Ethics Resources on the Web (broad sets of categories)

FindLaw.com
http://www.findlaw.com

Freivogel on Conflicts
http://www.freivogelonconflicts.com

Robert Ambrogi’s LawSites
http://www.lawsitesblog.com/

Internet Legal Research Weekly (Tom Mighell)
http://www.inter-alia.net/

Katsuey’s Legal Gateway—Ethics Legal Directory
http://www.katsuey.com/results.cfm?categoryid=13

Dennis Kennedy, Esq.—Internet Law and Consulting
http://www.denniskennedy.com/blog

LawGuru.com
http://www.lawguru.com

Law Research Service—Law and Internet Related Ethics
http://www.lawresearch.com/v2/cethics.htm

Lawyer Express (companion to CEO Express.com)
http://www.lawyerexpress.com/public

Legalethics.com (David Hricik and Peter Krakaur)
http://www.legalethics.com

Legal Ethics Forum (John Steele)
http://www.legalethicsforum.com

Legal Ethics Opinion Summaries
http://leo.mcguirewoods.com/

LEXIS: Zimmerman's Research Guide
http://law.lexisnexis.com/infopro/zimmermans/default.aspx

National Association of Criminal Defense Lawyers (NACDL) Ethics Opinions
http://www.nacdl.org/resourcecenter/ethics/

National Organization of Bar Counsel (NOBC)
http://nobc.org

http://www.laweb.org/

Questia: Legal Ethics Texts

Social Science Research Network: Legal Scholarship Network Research Paper Series

Source for Law & Legal Related Weblogs
http://www.blawg.com/

Virtual Chase Legal Ethics Guide
http://virtualchase.justia.com/wiki/legal-malpractice
IV. INTERNATIONAL ETHICS LINKS

Australasian Legal Information Institute
http://www.austlii.edu.au

Canadian Bar Association Code of Professional Conduct
http://www.cba.org/CBA/activities/code

Law Reform Commission of Western Australia—International Links

V. APPOSITIONAL, ANTIPODAL, AND OTHER INFORMATIONAL SITES

Help Abolish Legal Tyranny (HALT)
http://www.halt.org/

Overlawyered.com
http://overlawyered.com/tag/ethics/

VI. TREATISES, LOOSE-LEAFS, ETC.

American Bar Association/Bureau of National Affairs (ABA/BNA) Lawyers’ Manual on Professional Conduct

American Bar Association Ethics Opinions—available in the following bound volumes; most opinions are also available from the ABA Library on Westlaw and LEXIS.

1. Opinions on Professional Ethics
   Contains Formal Opinions 1 through 315 issued from 1924 to 1965. This volume also contains the ABA Canons of Professional Ethics that were adopted in 1908 and the Canons of Judicial Ethics that were adopted in 1924.

2. Informal Ethics Opinions: Volume 1

3. Informal Ethics Opinions: Volume 2


6. Recent Ethics Opinions
Contains Formal and Informal Opinions issued from 1998 to present, beginning with Formal Opinion 98-413. This volume also contains a citator to formal and informal ABA ethics opinions by opinion, and citators to the Model Code of Professional Responsibility and the Model Rules of Professional Conduct for all ABA formal and informal ethics opinions.

7. Formal Ethics Opinions
http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions.html

American Bar Association Model Rules of Professional Conduct

http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html

Legal Ethics—The Lawyer’s Deskbook on Professional Responsibility (Thomson West 2012–2013 ed.). Also available on Westlaw.

Legal Ethics Opinions—LEXIS: See Ethics—Administrative Materials & Regulations. Includes formal and informal ABA Ethics Opinions from 1924 and 1960 respectively; and selected state ethics materials.

Legal Malpractice—Ronald M. Allen, Jeffrey Smith & Allison Rhodes (Thomson Reuters 2013).


SECTION A4.1

Loss of License: Rules Governing Suspension or Disbarment*

Dorothy Anderson, Esq.
Board of Bar Overseers/Office of the Bar Counsel

The vast majority of lawyers will never face suspension or disbarment. But for the minority who do, proper navigation of the procedural requirements for suspension or disbarment is critical. Failure to do so may result in a contempt action or bar counsel’s opposition to the lawyer’s petition for reinstatement. This article is addressed to lawyers who face these issues. Note that these requirements also apply if you are placed on disability inactive status under Supreme Judicial Court Rule 4:01 § 13 or if you have resigned under § 15. Note also that these requirements take effect if you have been administratively suspended for more than 30 days, whether for failure to cooperate with bar counsel or for failure to register.

What to Do When You Have Just Been Suspended or Disbarred

If you are facing suspension, first and foremost, read Supreme Judicial Court Rule 4:01, § 17. The rule sets forth all the steps you will be required to take when the suspension order is entered. The order of suspension or disbarment will typically incorporate the requirements of the rule. A suspension or disbarment is effective thirty days after the entry of the order unless otherwise ordered by the court. A temporary suspension order is effective immediately.

Once the order issues, you will have 14 days to accomplish a variety of tasks. Get started as soon as possible.

* Source: Board of Bar Overseers/Office of the Bar Counsel (http://www.mass.gov/obcbbob/lossoflicense.htm) (published February 2010). Reprinted with permission. Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
1. Requirements of the Order and S.J.C. Rule 4:01, § 17

Within **fourteen days** of the entry of the order you must:

- file a notice of withdrawal with every court, agency, or tribunal in which you are counsel of record.
- resign all appointments as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary.
- provide notice to all clients and to all wards, heirs, and beneficiaries that you have been suspended or disbarred and that you are disqualified from acting as a lawyer after the effective date of the order. If important dates are imminent (court hearings, statute of limitations, appeal deadlines, etc.) call attention to those circumstances.
- provide notice that you have been suspended or disbarred to counsel for all parties (or, in the absence of counsel, the parties themselves) in pending matters.
- make the file available to the client or to new counsel selected by the client. See Mass. R. Prof. C. 1.16(e).
- close every IOLTA, client, trust or other fiduciary account and properly disburse or otherwise transfer all client and fiduciary funds. S.J.C. Rule 4:01, § 17(1)(g).
- refund fees paid in advance by the client that you have not earned.

All the notices described above must be sent by certified mail, return receipt requested, unless otherwise ordered by the SJC.

Within **twenty-one days** after the entry date of the order:

- file with bar counsel the required comprehensive “affidavit of compliance” attaching copies of notices and schedules, as described in your order and in S.J.C. Rule 4:01, § 17(5). Bar counsel will send you the forms and a model affidavit upon your suspension or disbarment. Make sure to read the affidavit carefully, choose which subsection of paragraph 2 is applicable to your circumstances (and cross out the subsection that does not pertain), and attach all required documentation.
- retain a copy of the everything you filed with bar counsel.
- file with the clerk of the SJC for Suffolk County, a copy of the affidavit of compliance, a list of all jurisdictions in which you are admitted to practice, and a street address where you can be reached.
What to Do and What Not to Do While You Are Suspended

1. Do Not Practice Law or Engage in Paralegal Work

This rule is strictly construed. There is no exception under which you may represent family members, or a corporation that is controlled by you, or provide pro bono legal services, although you of course may appear for yourself. Attorneys who practice law while suspended may face contempt charges. Your period of suspension may be increased if a court finds that you have practiced while suspended. See S.J.C. Rule 4:01, § 17(8). You may also jeopardize your chances of reinstatement.

The SJC has construed the term “paralegal” to include certain related jobs, such as title examiner (Matter of Eastwood, 10 Mass. Att’y Disc. R. 70, 77) and has also ruled that any preparation of documents for filing in court, even if signed by the client, constitutes the “practice of law” or paralegal work. Matter of Kafkas, 451 Mass. 1001 (2008); Opinion of the Justice, 289 Mass. 607, 612 (1935)

2. Take and Pass the MPRE

If you have been suspended for a period of longer than six months, including six months and a day, you must take and pass the Multi-State Professional Responsibility Examination before you will be readmitted. See S.J.C. Rule 4:01, § 18(1)(b). In Massachusetts, the examination is given three times per year. You should ascertain the dates of the examination as soon as possible so that you have time to register and prepare. Consult the Massachusetts Board of Bar Examiners website, http://www.mass.gov/bbe.

3. Comply with Any Conditions of Your Suspension

Some suspension orders contain specific conditions of reinstatement, such as participation in an educational program designated by bar counsel. If your order contains such conditions, make plans to comply as soon as possible.

4. Only Collect Fees and Partnership Shares Earned Prior to Suspension

If you earned fees prior to your suspension, but did not collect those fees, it is permissible to collect the fees while you are suspended. You may take legal action to collect an unpaid fee, but you may only represent yourself individually in such an action; not a partnership or LLC.

A contingent fee agreement where the contingency has not yet occurred is voided by your suspension or disbarment, but you may be able to collect fees on a
quantum meruit basis “unless the penalized misconduct was... related to the case in which the services were rendered and for which a fee is sought and impaired the value of the client's cause of action or otherwise imperiled the client's right to relief.” Kourouvacilis v. American Federation of State, County and Municipal Employees, 65 Mass. App. Ct. 521, 532 (2006). If it is a matter on which you were the referring attorney and for which you have no further responsibilities or obligations, a referral fee agreement, entered into with written client consent prior to the loss of license, may still be valid.

If you were a member of a law firm or LLP, you may collect the partnership or shareholder distribution shares attributable to a time period in which you were still licensed.

5. No Handling of Client Funds

You may not sign any client checks, handle any client funds or enter into any new fee agreements, including any referral agreements with other attorneys, while you are suspended or disbarred. And you should be removed as a signatory to any law firm IOLTA or trust accounts.

6. Non-Legal Work

You may, of course, engage in non-legal work. Be careful, however, not to venture into areas that may constitute the practice of law or paralegal work, such as drafting a purchase and sale agreement for a party to a real estate transaction. If you have concerns as to whether a given undertaking is permissible, seek clarification from the SJC.

7. Stationery, Cards, Telephone Lines, E-Mail & Websites

You may not use or distribute stationery, cards or other written materials in which you hold yourself out to be a practicing attorney. The same is true of your telephone voice mail recording, e-mail, websites or other electronic communications. Along the same lines, you should not use the titles “Esq.” or “J.D.” as both imply that you are a lawyer.

If you were practicing in a partnership or association with other attorneys, your name must be removed from letterhead, websites, and other promotional materials while you are suspended.
8. **Malpractice Insurance**

If you have malpractice insurance, consult with your agent or a company representative about the advisability of maintaining or discontinuing your coverage.

9. **Make Preliminary Preparation for Reinstatement Hearing**

If you have been suspended for a year and a day or longer or a reinstatement hearing is a condition of a shorter suspension, and if you intend to seek reinstatement, you may wish to begin preparation by reviewing the Massachusetts case law on reinstatements, as well as Supreme Judicial Court Rule 4:01, § 18; Rules of the Board of Bar Overseers, §§ 3.61-.67; and the reinstatement questionnaire included as an appendix to the Board rules, http://www.mass.gov/obcbbo/BBORules.pdf.

**Frequently Asked Questions**

Q. I have several matters that are virtually concluded. May I complete them after the order enters?

A. During the period between the entry date of the order and its effective date, you may complete matters that were pending. SJC Rule 4:01, § 17(3). However, you have to be both realistic and fair to your clients. If there is any chance that you will not be able to complete a matter in thirty days, or if rushing the matter to conclusion is not in the client’s interests, the client should be alerted to locate successor counsel.

Q. My suspension order entered yesterday. Today, a new client has offered me $10,000 to make one court appearance that will take place before the effective date of my suspension. May I accept it?

A. No, you may not accept any new retainer or new matter after the entry of the order. SJC Rule 4:01, § 17(3)

Q. I have no clients and no bank accounts and I do not serve as a fiduciary. Do I have to file an affidavit of compliance?

A. Yes. The form affidavit anticipates this response as one of the options.

Q. I have been suspended for only six months. Can I hand my entire practice over to another lawyer while I am suspended, with the understanding that I will take all of the clients back when I am reinstated?
A. No. You are required to withdraw from all representation upon your suspension and your clients have the right to select new counsel. If a client asks you for a recommendation, you may recommend an attorney competent to handle the case, and the client may accept or reject your recommendation. (You are not entitled to a referral fee in such circumstances.) You cannot inform your clients that a designated attorney will represent them during your absence, and that you will resume the representation upon your return.

Q. A lawyer to whom I referred a personal injury case several years ago has just notified me that he has settled it. Under our agreement, I am entitled to one-third of his one-third contingent fee. May I accept it?

A. Yes, assuming that you entered into the agreement while you were licensed, you may accept the fee.

Q. While I am suspended I intend to be in close touch with my partner and office staff concerning the ongoing cases of my former clients. Is that okay?

A. No. You may not run your practice from home. You may not have any involvement whatsoever in representation of any client while you are suspended. You can and should, of course, answer any questions that the client or successor counsel may have as to the status of the case or the work that was done prior to your suspension.

Q. A check arrived after the effective date of my suspension made out to me and a client jointly. May I endorse the check? If not, what should I do with it?

A. Either the check can be returned to the maker, with a request that it be voided and a substitute check be made payable and sent to the client (or the client and successor counsel) or you can endorse the check over to the client and send it to the client or successor counsel. In either instance, you may also send the client or successor counsel an invoice for any fees and expenses you are due. You cannot negotiate the check, even with the client's endorsement.

Q. I am a co-trustee of a family trust established by my grandparents of which my nieces and nephews are the sole beneficiaries. My entire family knows that I have been suspended. Do I have to resign as co-trustee?

A. Yes, you must resign unless you seek and receive authorization from the Supreme Judicial Court to remain as trustee. There is no exception for fiduciary positions involving family members.
SECTION A4.2

A Summary Overview of the Attorney Disciplinary Process

Board of Bar Overseers/Office of the Bar Counsel

Board of Bar Overseers.

The Board of Bar Overseers is appointed by the S.J.C. pursuant to the provisions of S.J.C. Rule 4:01 and is responsible for the registration and discipline of attorneys in the Commonwealth of Massachusetts. The Board consists of twelve volunteer members (eight attorneys and four public members) who are appointed for staggered four-year terms.

General Counsel's Office.

The General Counsel's office acts as legal counsel to the Board and its hearing committees. The office consists of five attorneys and two administrative staff members. General Counsel and Associate General Counsel work primarily with the Board members in cases involving convictions, reinstatements, and appeals of disciplinary matters. Three Assistant General Counsel work primarily with the volunteer hearing committee members in disciplinary cases. They attend pre-hearing conferences and hearings, provide advice on substantive law and procedure, and draft hearing reports. The administrative staff members are responsible for docketing, scheduling pre-hearing conferences and hearings, sending out notices and orders, and maintaining the record for all cases pending before the Board.

Office of Bar Counsel.

Pursuant to the provisions of S.J.C. Rule 4:01, the staff at the Office of Bar Counsel is responsible for investigating complaints of attorney misconduct, as well as questions of attorney misconduct that come to the attention of the office in the absence of a complaint, such as through news media or court decisions. The office also runs a “helpline,” answering questions on ethics from attorneys three afternoons each week.
ACAP.
The Attorney and Consumer Assistance Program is part of the Office of Bar Counsel and is designed to identify and attempt to resolve minor complaints against attorneys without docketing them as formal complaints. Inquiries concerning the professional conduct of an attorney admitted to practice in Massachusetts are initially referred to ACAP. Where possible, ACAP will attempt to assist in resolving attorney-client disputes by providing information, calling the lawyer, or suggesting alternative ways of dealing with the problem. When a complaint involves allegations of serious misconduct that might warrant discipline, ACAP provides a written complaint form and urges the person to file it directly with the Office of Bar Counsel.

Investigation by Bar Counsel.
Upon determining that a matter should be investigated, Bar Counsel notifies the attorney in writing of the written complaint. The attorney has a duty to respond to the written complaint and to cooperate in Bar Counsel’s investigation. Failure to do so may constitute a separate act of misconduct, and can result in immediate administrative suspension. S.J.C. Rule 4:01, § 3(2). Bar Counsel is not required to terminate an investigation because a complainant wishes to withdraw the complaint or because the parties have settled the underlying matter, and it is professional misconduct for a lawyer to condition the settlement of a dispute on a client’s withdrawing or forgoing the filing of a complaint to Bar Counsel. Investigation by Bar Counsel of a complaint may include such undertakings as obtaining records from (for example) banks, insurers, and courts; interviewing witnesses; and taking the respondent attorney’s statement under oath.

Recommendation by Bar Counsel.
After investigating a matter, Bar Counsel makes a recommendation for its disposition, which, in some instances, requires a Board member’s review and approval or modification. Bar Counsel may recommend the following:

(1) Bar counsel may decline to pursue a complaint or may close a complaint without discipline because no violation of the rules of professional conduct has occurred, because the violation does not warrant discipline, or because no violation can be proven. The complainant may request review of this decision by a Board member.

(2) Bar counsel may divert an attorney under investigation to an alternative educational, remedial or rehabilitative program where warranted.
(3) Upon approval by a Board member, an admonition may be imposed by Bar Counsel for relatively minor disciplinary violations, and the identity of the attorney receiving an admonition is not made public. If the attorney refuses to accept the admonition, he or she may demand an expedited, private hearing before a special hearing officer. A dissatisfied party may appeal from the results of the hearing to the Board.

(4) If Bar Counsel believes the misconduct, if proved, would warrant public discipline, Bar Counsel must obtain the approval of a Board member to file a petition for discipline seeking public discipline. If approved, the attorney is served and the matter is then scheduled for a public hearing.

(5) If the attorney and Bar Counsel agree that there has been a violation warranting public discipline and also agree on a sanction, a petition for discipline and an answer and stipulation of the parties are submitted to the Board for approval. If the agreement is approved, no hearing is required. If the agreement is for a public reprimand, the Board issues the public reprimand. If the agreement is for a suspension or disbarment, an information, consisting of the entire administrative record, is filed in the Supreme Judicial Court for Suffolk County.

**Disciplinary Proceedings Pre-Hearing.**

Petition for Discipline. Formal disciplinary proceedings are commenced by Bar Counsel’s filing of a petition for discipline with the Board. The petition must be sufficiently clear and specific to inform the respondent attorney of the charges of alleged misconduct, and must enumerate the specific rules of professional conduct alleged to have been violated by the respondent. BBO Rule 3.14. A hearing committee may not find a violation of a rule that has not been charged in the petition.

Answer. A copy of the petition is served upon the respondent. The accompanying letter informs the respondent that an answer must be filed with the Board with a copy served upon Bar Counsel within twenty days, that the allegations in the petition will be deemed admitted if no answer is filed, that failure to file an answer can result in immediate administrative suspension, S.J.C. Rule 4:01, § 8(3), and that General Counsel will assist the respondent in obtaining counsel, on a pro bono or reduced-fee basis if necessary.

Assignment to Hearing Committee. After a petition and answer have been filed with the Board, the Board assigns the case to a hearing committee or a special hearing officer. Hearing committee members are volunteer lawyers and members of the public appointed by the Board to serve three-year terms (once renewable). A hearing committee usually consists of two lawyers and one public member, with a lawyer designated as the chair. A special hearing officer is always a lawyer.
and sits alone. The case is usually assigned to a hearing committee or special hearing officer within the respondent’s district.

Pre-Hearing Conference. In most cases, a pre-hearing conference is scheduled to expedite the orderly presentation of the evidence and testimony at hearing, and may address such issues as the exchange of exhibits, the limitation of the number of witnesses, discovery, and evidentiary issues. After the conference, an order is issued scheduling all discovery and motion deadlines and hearing dates.

Discovery. Discovery is limited in scope, which is defined by BBO Rule 3.17. Within 20 days after the respondent’s answer is filed, bar counsel and the respondent are to exchange the names and addresses of all persons having knowledge of facts relevant to the proceedings. Bar counsel and the respondent must also comply with reasonable requests made within 30 days following the filing of an answer for non-privileged information and evidence relevant to the charges or the respondent, or other material upon good cause shown to the hearing committee chair. Discovery of work product is not permitted. Depositions are also not allowed for discovery purposes absent good cause shown, but may be authorized when a witness is otherwise unavailable. See BBO Rule 4.9.

The Disciplinary Hearing.

Public Hearings. Once a petition for discipline has been filed with the Board, all proceedings and documents, including pre-hearing conferences, hearings, orders, testimony, exhibits and pleadings, are open and available to the public, except those subject to a protective order. See S.J.C. Rule 4:01, § 20; BBO Rule 3.22.

Standard of Proof. At the hearing, both Bar Counsel and the respondent are given an opportunity to present evidence and testimony. The SJC has established that the standard of proof in attorney disciplinary proceedings is a preponderance of the evidence. Matter of Mayberry, 295 Mass. 155, 167 (1936); Matter of Ruby, 328 Mass. 542, 547 (1952). Bar Counsel bears the burden of proving the allegations of the petition. BBO Rule 3.28. The respondent bears the burden of presenting and proving facts in mitigation. Matter of Gustafson, 6 Mass. Att'y Disc. R. 140, 141 (1989).

Evidentiary Issues. The admissibility of evidence is governed by the rules of evidence observed in adjudicatory administrative proceedings pursuant to M.G.L. c. 30A (Administrative Procedures Act). See BBO Rule 3.39. As set forth in M.G.L. c. 30A, § 11(2), “agencies need not observe the rules of evidence observed by courts. . . . Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.”
Issues of Mitigation and Aggravation. At hearing, a respondent may introduce or present evidence on any defenses to the allegations set forth in the petition, or in mitigation. In determining the appropriate sanction, the SJC has held that little weight should be given to “typical” mitigating factors, such as (1) an otherwise excellent reputation in the community and a satisfactory record at the bar, (2) cooperation in the disciplinary proceedings and with governmental authorities, (3) the occurrence of criminal proceedings, (4) the pressures of practice, (5) the absence of dishonesty, and (6) the absence of harm. See, e.g., Matter of Alter, 389 Mass. 153, 157, 3 Mass. Att’y Disc. R. 3, 7–8 (1983).

The Court has identified the following as “special” mitigating factors: (1) disability, (2) inexperience in the practice of law, (3) severe personal problems, and (4) unexcused delay in disciplinary proceedings resulting in prejudice. See ABA Standards for Imposing Lawyer Sanctions § 9.3 (1992). If a respondent asserts a disability, such as alcoholism or depression, in mitigation, the disability must be shown to be causally related to the misconduct at issue. Matter of Schoepfer, 426 Mass. 183, 188, 13 Mass. Att’y Disc. R. 679, 685 (1997); Matter of Johnson, 444 Mass. 1002, 1004, 21 Mass. Att’y Disc. R. 355, 358–59 (2005). There must also be a showing of treatment and rehabilitation, and that, as a result of the treatment, recurrence of the misconduct is unlikely. ABA Standards for Imposing Lawyer Sanctions § 9.32(i).


Disciplinary Proceedings—Post-Hearing.

Hearing Committee Report. After the parties submit briefs setting forth their proposed findings of fact, conclusions of law, and recommendations on discipline, the hearing committee issues a report consisting of:

(1) a concise statement of the case, including rulings on procedural matters;

(2) detailed findings of fact with citation to the exhibits and testimony in evidence.

(3) conclusions of law with specific reference to the disciplinary rules charged and found to have been violated or not violated;

(4) detailed findings concerning the mitigating or aggravating circumstances as found by the hearing committee;
(5) a recommendation to the Board for disposition that articulates the reasons for
the recommendation with citation to applicable precedent. The hearing committee
may recommend dismissal of the petition, an admonition, a public reprimand, a
term or indefinite suspension, or disbarment. The hearing committee may also
recommend terms of probation, such as taking and passing a continuing legal edu-
cation course, or requiring regular financial audits for a period of time.

Post-Hearing Review.

After a hearing committee report is filed with the Board, the parties may appeal
from the report and request oral argument. Whether or not an appeal is filed, the
Board reviews every hearing committee report, and either approves or modifies
the hearing committee’s recommendation. The Board is required to review and
may revise findings of fact, conclusions of law, and recommendations for disci-
pline; provided, however, that the hearing committee is the sole judge of credi-
bility of the testimony presented at the hearing. S.J.C. Rule 4:01, § 8(5).

If the hearing committee recommends dismissal or admonition, or if the Board
determines to conclude a matter by dismissal or admonition, the record will be
sealed. If the Board determines that a proceeding should be concluded by sus-
pension or disbarment, or if a party appeals from the Board’s disposition, the
Board files an information with the Clerk of the Supreme Judicial Court for Suf-
folk County, together with the entire record of the proceedings. The matter is
heard first by a Single Justice specially assigned to the case. A further appeal
may be taken by either party or the Board to the full Court.

Website.

The website maintained by the Office of Bar Counsel, www.mass.gov/obcbbo,
provides information to the bar and the public on the functions of the Board of
Bar Overseers and Office of Bar Counsel, as well as explanations of how to file
complaints and of the disciplinary process. The site includes disciplinary deci-
sions since 1999, links to rules, and a collection of articles by staff on ethical
issues. In addition, a news section includes updates on matters of interest relat-
ing to professional responsibility and the disciplinary process, descriptions of
and links to rule changes, and synopses of new disciplinary decisions and other
ethics-related cases.

The office address and registration status of Massachusetts attorneys can be ob-
tained through a link to the website of the Board of Bar Overseers. The BBO
website also provides detailed information for attorneys on registration, including
online registration.
SECTION A5.1

A Lawyer’s Duties to Clients*

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Scope Note
Central to ethical lawyering is a lawyer’s duty to his or her client. This chapter addresses five basic concerns of the Massachusetts Rules of Professional Conduct relating to lawyers’ duties to clients, including issues of competence, scope of representation, diligence, communication, and confidentiality.

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§ 1 OVERVIEW
This chapter primarily discusses a lawyer’s duties to provide competent representation and to keep client confidences.

* Reprinted from Ethical Lawyering in Massachusetts (MCLE, Inc. 3d ed. 2009 & Supp. 2013). Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
Comment [1] to Mass. R. Prof. C. 1.7, the general rule on conflicts, states as follows:

Loyalty is an essential element in the lawyer’s relationship to a client.

Much of what is discussed in this chapter is grounded on the lawyer’s duty of “undivided loyalty,” McCourt Co. v. FPC Props., Inc., 386 Mass. 145, 146 (1982), to each client. However, the duty to keep client confidences is usually considered distinct from the duty of loyalty, perhaps because in some situations where no confidence was disclosed, the duty of loyalty may still prevent a lawyer from acting adversely to a client.

References are made below both to published opinions of the Massachusetts Bar Association (MBA) Committee on Professional Ethics and, in a manner that does not reveal confidences, to unpublished advice rendered by the committee. Where no citation is given below following a reference to the committee’s advice, the advice was not published. The text of published committee opinions is available on the MBA’s Web site, at http://www.massbar.org/ethics.

While the ethics committee’s views are often helpful, each of its opinions and unpublished letters states, “This advice is that of a committee without official governmental status.” One further caveat—ethical issues tend to be highly fact-sensitive, and factual settings are only briefly sketched in the examples discussed below.

§ 2 RULE 1.1—COMPETENCE

Rule 1.1 of the Massachusetts Rules of Professional Conduct states as follows:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

The first four comments to Mass. R. Prof. C. 1.1 discuss legal knowledge and skill. While indicating that in some cases, expertise in a particular field of law may be required, the comments do not generally discourage lawyers from accepting types of cases that deal with matters with which they are unfamiliar. Rather, the emphasis is on how much time the lawyer is able to give to the matter, whether he or she can consult or associate with a practitioner experienced in the relevant area, and whether the lawyer is required to act in an emergency.
Comment [5] deals with Thoroughness and Preparation, and sets the following standard:

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

As to Maintaining Competence, Comment [6] states that lawyers should engage in continuing study and education, and endorses the use of peer review, such as some bar associations provide, in appropriate circumstances.

Where insurance company guidelines required defense counsel to use paralegals to perform certain services, the MBA ethics committee advised that a lawyer’s assignments to paralegals had to be consistent with the lawyer’s obligation of competence under Mass. R. Prof. C. 1.1. MBA Ethics Op. 2000-4. Citing Mass. R. Prof. C. 5.3(b) (lawyer’s supervisory responsibilities over nonlawyers), Mass. R. Prof. C. 5.4(c) (prohibition on allowing someone who is paying for another’s legal services to regulate the lawyer’s professional judgment) and Mass. R. Prof. C. 5.5(b) (prohibition on assisting a nonlawyer in activities that constitute the unauthorized practice of law), the committee concluded that “the lawyer retains the authority to determine as to each task which the insurer’s litigation guidelines mandate be performed by a paralegal, whether, in the context of the particular representation at hand, the task is appropriate for delegation.” Thus, even if an insurer’s guidelines indicate that all deposition notices are to be prepared by paralegals, there may be particular circumstances where this task is sufficiently complicated that the lawyer should not delegate it.

An interesting issue concerning a lawyer’s obligation to provide competent representation arose from an inquiry by a Massachusetts lawyer residing in a state that was a considerable distance from Massachusetts. The lawyer maintained a Massachusetts practice by using a Massachusetts phone number from which calls would “bounce” to her out-of-state location. The committee advised the lawyer that she was in a better position than they to judge whether the location of her residence would adversely affect her work for Massachusetts clients, pointing out that Mass. R. Prof. C. 1.7(b) prohibits a lawyer from representing a client if the representation may be materially limited by the lawyer’s own interests. In addition, the committee noted, the obligation in Mass. R. Prof. C. 1.4 to keep clients sufficiently informed to be able to make decisions regarding the
representation required the lawyer to discuss her residence with her clients. The
committee also cited Mass. R. Prof. C. 1.3, concerning diligence.

The MBA ethics committee advised a Massachusetts lawyer that, as long as his
home office is his regular place of business where clients can see him, he could
list it as the Boston office of an out-of-state firm in which he is a partner.

§ 3 RULE 1.2—SCOPE OF REPRESENTATION

Under the nondescriptive heading “Scope of Representation” appears a hodge-
podge of rules. Rule 1.2(a) of the Massachusetts Rules of Professional Conduct
states as follows:

A lawyer shall seek the lawful objectives of his or her
client through reasonably available means permitted
by law and these rules. A lawyer does not violate
this rule, however, by acceding to reasonable requests
of opposing counsel which do not prejudice the rights
of his or her client, by being punctual in fulfilling all
professional commitments, by avoiding offensive tac-
tics, or by treating with courtesy and consideration all
persons involved in the legal process. A lawyer shall
abide by a client’s decision whether to accept an offer
of settlement of a matter. In a criminal case, the la-
wer shall abide by the client’s decision, after consulta-
tion with the lawyer, as to a plea to be entered, whether
to waive jury trial, and whether the client will testify.

The MBA ethics committee advised a lawyer representing a client on a claim
where the client could not be found, the statute of limitations was about to run,
and the adversary had made a settlement offer that Rule 1.2(a) prevented the
lawyer from accepting the settlement, but the lawyer might have implied authority
to bring suit before the statute had run.

A lawyer sought advice from the MBA ethics committee when her client in-
structed her to have no contact with adverse counsel outside of the courtroom.
The committee advised the lawyer to explain to the client why she could not
disregard professional courtesies and why doing so would not be in the client’s
interest. Courts, of course, often require counsel to confer before putting only
unresolved issues to the tribunal.
The remaining subsections of Mass. R. Prof. C. 1.2 provide that

- a lawyer’s representation of a client is not an endorsement of that client’s views;
- a lawyer may limit the objectives of the representation with the client’s informed consent;
- a lawyer shall not counsel or assist a client in criminal activity or fraud but may discuss the legal consequences of any proposed course of conduct with the client; and
- when necessary, the lawyer shall counsel the client on the ethical and legal limitations on the lawyer’s conduct.

Comment [3] puts a positive spin on the statement that representing a client does not constitute an endorsement of the client’s views by stating that

Legal representation should not be denied to people . . . whose cause is controversial or the subject of popular disapproval.

The express permission given to limit the objectives of representation with the client’s informed consent is elaborated on in Comments [4] and [5]. Of particular importance is the statement in Comment [5] that

the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [competence], or to surrender the right to terminate the lawyer’s services or the right to settle litigation that the lawyer might wish to continue.

Thus, a lawyer could be placed in the unenviable position of having acceded to a client’s request not to take depositions and then be met, after the case has been lost, with the client’s claim that the lawyer had no right to neglect discovery, even with the client’s informed consent, because this neglect denied the client competent representation. Some relief can be found in Comment [5] to Mass. R. Prof. C. 1.1, which recognizes that the required attention to and preparation of a case “are determined in part by what is at stake.” Nevertheless, if a lawyer is uncomfortable with client-imposed restraints on the thoroughness of the representation, the lawyer should consider withdrawing from the case.

Note that Rule 1.5(b), as amended effective January 1, 2013, requires that the “scope of the representation . . . be communicated to the client in writing before or within a reasonable time after commencing the representation.” The im-
portance of having a written engagement letter describing the scope of a representation is shown by AmBase Corp. v. Davis Polk & Wardwell, 8 N.Y.3d 428, 435 (2007), where the agreement engaging the firm to resolve tax issues currently before the IRS defeated the client’s malpractice claim that the firm should have determined whether the tax liability could be allocated to another entity.

MBA Ethics Opinion 98-1 deals with an interesting facet of limited representation. The committee opined that while a lawyer could provide limited background advice to pro se litigants, the lawyer could not ghostwrite pleadings because this would mislead the court and other parties.

Before undertaking limited representation in a Massachusetts state court, see the Supreme Judicial Court order captioned In re Limited Assistance Representation, effective May 1, 2009, and the implementing order, if any, of the relevant Massachusetts Trial Court Department.

Without further elaboration, Comment [8] to Mass. R. Prof. C. 1.2 states as follows:

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

§ 4 RULE 1.3—Diligence

This rule states in full as follows:

A lawyer shall act with reasonable diligence and promptness in representing a client. The lawyer should represent a client zealously within the bounds of the law.

In addition to stating that a lawyer’s obligations to the client must be pursued despite personal inconvenience to the lawyer, Comment [1] states, “A lawyer’s work load should be controlled so that each matter can be handled adequately.” In other words, it is an ethical violation for a lawyer to take on so much work that he or she fails to represent each client diligently.

According to Comment [1A], “It is implicit in the second sentence of the rule that a lawyer may not intentionally prejudice or damage his client during the course of the professional relationship.” Comment [2] warns against the common professional shortcoming of procrastination, and Comment [3] admonishes the lawyer to carry matters through to conclusion unless the attorney-client relationship has been terminated. This comment also makes the following statement that is important in evaluating whether a client is still a client or has become a former client:
If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal.

This statement is particularly significant because Mass. R. Prof. C. 1.7 has the effect of prohibiting a lawyer from engaging in any litigation against a current client, while Mass. R. Prof. C. 1.9 prohibits only litigation against a former client that is substantially related to the former representation of the client.

The MBA ethics committee advised a lawyer who had terminated his employment at a law firm that he had an obligation to a client, all of whose work had been performed by the departed lawyer, to make sure that the client’s work was not neglected. Under the facts, fulfilling this duty required the lawyer to notify the client both that the lawyer was willing to continue the representation at his new firm and that the client had the right to choose to remain at the old firm.

MBA Ethics Op. 1999-4 provides an interesting illustration of the lawyer’s obligation to represent a client zealously. A lawyer had received a letter addressed to the other side’s client that was mailed to the lawyer by mistake. When the lawyer revealed this mistake to the adversary, the adversary claimed that the letter was covered by the attorney-client privilege, and requested its return. The lawyer sought the committee’s advice. Because Massachusetts law is unclear on the lawyer’s obligation in this situation, the committee concluded that the lawyer’s obligation to represent his client zealously required him to reject opposing counsel’s request and, if opposing counsel sought a court order, to argue before the tribunal that the contents of the letter were not protected. It is of interest to note that the ABA Committee on Professional Ethics came to a different conclusion, recommending instead that all misdelivered documents be returned. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-368. Some clarity on the Massachusetts treatment of inadvertent communications to adversaries is provided by Charm v. Kohn, No. 08-2789-BLS2, 2010 WL 3816716 (Mass. Super. Ct. Sept. 30, 2010) (finding emerging consensus that inadvertent disclosure will not waive attorney-client privilege if reasonable steps were taken to preserve confidentiality).

Somewhat similarly, the committee advised a lawyer who had been given transcripts of an adverse witness’s testimony in another case that his duty of zealous representation required him to attempt to use the transcripts to impeach the witness in his case, even though the lawyer in the other case, who had provided the transcripts, changed her mind and did not want him to use them.
On another occasion, the MBA ethics committee advised a lawyer who could not locate an out-of-state client who had engaged the lawyer to commence action that his duty of diligence required him to file suit before the statute of limitations ran, rather than withdrawing without preserving the client’s rights. The issue of withdrawal could then be raised with the court.


§ 5 RULE 1.4—COMMUNICATION

Rule 1.4 of the Massachusetts Rules of Professional Conduct states as follows:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The comments to Mass. R. Prof. C. 1.4 flesh out its requirements:

[1] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client
delegates authority to the lawyer, the client should be kept advised of the status of the matter.

[2] Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is set forth in the comment to Rule 1.2(a).

[3] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Comment [4] recognizes that in some circumstances a lawyer may delay conveying information or may even withhold providing information to a client. Delaying communications might be justified “when the client would be likely to react imprudently to an immediate communication.” The comment also provides the following example of when withholding information might be justified:

Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer’s own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a
lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

The fact that a lawyer may not withhold information from a client “to serve the lawyer’s own interest” is well illustrated by MBA Ethics Op. 1999-2. In this opinion, a law firm partner discovered that her partners, without their clients’ knowledge, had made material misrepresentations to federal and state agencies in order to avoid the imposition of substantial penalties on the firm’s clients for the law firm’s failure to file timely reports. Rule 1.4 mandated that the lawyer inform the clients, if her partners were not willing to do so. Clearly, this was necessary if the clients were to have “sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they ought to be pursued.” (Rule 5.1(c)(2) imposed this obligation on the innocent partner if the partners who perpetrated the fraud were unwilling to disclose their wrongdoing to the clients.) As a result of the mandated communication, the clients might well consult other lawyers about the original law firm’s liability for malpractice, but this possible outcome did not relieve the lawyer of obligations under Mass. R. Prof. C. 1.4.

Comment [5] to Mass. R. Prof. C. 1.4 puts in a plug for alternative dispute resolution by stating the following:

There will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning the representation.

§ 6 RULE 1.6—CONFIDENTIALITY OF INFORMATION

§ 6.1 Text of Rule 1.6

Rule 1.6 of the Massachusetts Rules of Professional Conduct states as follows:

(a) A lawyer shall not reveal confidential information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
(b) A lawyer may reveal, and to the extent required by Rule 3.3 [candor toward tribunals], Rule 4.1(b) [disclosure to avoid assisting in client crime or fraud], or Rule 8.3 [informing bar counsel of another lawyer’s violation] must reveal, such information.

(1) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful execution or incarceration of another;

(2) to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(3) to the extent the lawyer reasonably believes necessary to rectify client fraud in which the lawyer’s services have been used, subject to Rule 3.3(e) [treating criminal cases];

(4) when permitted under these rules or required by law or court order.

(c) A lawyer participating in a lawyer assistance program, as hereinafter defined, shall treat the person so assisted as a client for the purposes of this rule. Lawyer assistance means assistance provided to a lawyer, judge, other legal professional, or law student by a lawyer participating in an organized nonprofit effort to provide assistance in the form of (a) counseling as to practice matters (which shall not include counseling a law student in a law school clinical program) or (b) education as to personal health matters, such as the treatment and rehabilitation from a mental, emotional, or psychological disorder, alcoholism, substance abuse, or other addiction, or both. A lawyer
named in an order of the Supreme Judicial Court or the Board of Bar Overseers concerning the monitoring or terms of probation of another attorney shall treat that other attorney as a client for the purposes of this rule. Any lawyer participating in a lawyer assistance program may require a person acting under the lawyer’s supervision or control to sign a nondisclosure form approved by the Supreme Judicial Court. Nothing in this paragraph (c) shall require a bar association–sponsored ethics advisory committee, the Office of Bar Counsel, or any other governmental agency advising on questions of professional responsibility to treat persons so assisted as clients for the purpose of this rule.

"Consultation," as used in Mass. R. Prof. C. 1.6(a), is defined in Mass. R. Prof. C. 9.1(c) as denoting “communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.”

§ 6.2 Analysis of Comments

That the simple concept of maintaining confidences yields complexity in application is evidenced by the presence of twenty-eight comments following Mass. R. Prof. C. 1.6. The first four comments state the traditional justification for the attorney-client privilege—namely, that by protecting clients’ communications to lawyers, clients are encouraged to consult lawyers and follow their advice. Comment [5] discusses the distinction between the attorney-client privilege, which is part of the law of evidence and protects communications between attorney and client, and the broader ethical obligation of lawyers to treat as confidential “virtually all information relating to the representation, whatever its source.” The distinction becomes obvious when a lawyer is deposed in litigation. Then, the lawyer’s ethical obligation to maintain unprivileged confidences is trumped by laws requiring the lawyer as a witness to give testimony, but the lawyer remains obligated to assert the privilege as to attorney-client communications. While commonly known facts that might be considered related to the representation need not be kept in confidence by a lawyer, there are times when even matters of public record, such as a client’s little-known criminal conviction, must be treated as confidential under the ethical rules. See Mass. R. Prof. C. 1.6 cmt. [5A].

MBA Ethics Op. 2005-6 treats the unusual situation where the source of a lawyer’s information (as to who vandalized his car) determines whether the information is a client confidence or, rather, unprotected information that the lawyer is free to give to the police.
As Comment [6] points out, government lawyers, even when they disagree with policy goals that their representation is designed to advance, are subject to the obligation to maintain confidences. Comment [8] contains a warning that before a lawyer in a firm agrees with a client not to disclose matters to others within the firm, the lawyer must be satisfied that the restriction will neither contravene firm governance rules nor prevent the discovery of disqualifying conflicts of interest.

Comments [9] through [17] elaborate on Mass. R. Prof. C. 1.6(b)(1) by covering when a lawyer may or must disclose client confidences. The requirement of a likely substantial bodily harm or financial or property injury precludes violating confidences when the consequences of not doing so would be trivial. Comment [9A] states that “bodily harm” does not necessarily require physical injury, giving as an example statutory rape. Practitioners should note that there is no requirement that the criminal or fraudulent act sought to be prevented would have been committed by the client. Nor does Mass. R. Prof. C. 1.6(b)(1) itself require that the lawyer’s services had to have been involved in assisting the commission of a criminal or fraudulent act. However, this concept does arise in Mass. R. Prof. C. 4.1(b), which states as follows:

In the course of representing a client, a lawyer shall not knowingly:

. . . (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment [3] to Mass. R. Prof. C. 4.1 states that the word “assisting” in Mass. R. Prof. C. 4.1(b) “refers to that level of assistance which would render a third party liable for another’s crime or fraud.”

When fraud on a tribunal is involved, the rule is somewhat different. Rule 3.3(a) of the Massachusetts Rules of Professional Conduct states as follows:

A lawyer shall not knowingly:

. . . (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, except as provided in Rule 3.3(e).

Here, “the concept of assisting has a special meaning . . . because it deals with a lawyer’s conduct before a tribunal. The term assisting in Mass. R. Prof. C. 3.3 is not limited to conduct that makes the lawyer liable as an aider, abetter or joint
tortfeasor. . . . Thus, for example, a lawyer who knows that a client has committed fraud on a tribunal and has refused to rectify it must disclose that fraud to avoid assisting the client's fraudulent act." Mass. R. Prof. C. 3.3 cmt. [2A].

Rule 8.3 of the Massachusetts Rules of Professional Conduct discusses reporting professional misconduct. After mandating that a lawyer who has knowledge of another lawyer's violation of the rules "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness" inform bar counsel, the rule states as follows:

(c) This rule does not authorize disclosure of information otherwise protected by Rule 1.6.

In MBA Ethics Op. 1999-2, the MBA ethics committee, in addition to reviewing the duty to keep clients informed, as previously discussed, addresses the obligation of the lawyer who had discovered her partners' fraud on federal and state agencies to reveal the fraud to the agencies and to bar counsel. The opinion noted that Mass. R. Prof. C. 1.6(b)(1) gave the lawyer discretion to reveal the unconsummated fraud to the state agency, which had yet to act on the fraudulent information supplied by the lawyer's partners. The committee specifically noted that in adopting the Massachusetts Rules of Professional Conduct, the Supreme Judicial Court had changed the language of Mass. R. Prof. C. 1.6 "to permit disclosure of a client's confidential information when the harm will be the result of the activities of third persons as well as of the client." Although by itself, Mass. R. Prof. C. 1.6(b)(1) only gave the lawyer discretion to reveal the fraud to the state agency, the addition of Mass. R. Prof. C. 5.1(c)(2), making the lawyer responsible for her partners' conduct if she could act to avoid or mitigate its effect but failed to do so, mandated that the lawyer act to prevent the consequences of fraud on the state agency. This might be accomplished simply by withdrawing the fraudulent papers from the agency, but if disclosure to the agency were necessary to prevent harm to it, the lawyer was required to make that disclosure.

Turning to disclosure to bar counsel, the ethics committee addressed Mass. R. Prof. C. 8.3 and concluded that because the lawyer had discretion under Mass. R. Prof. C. 1.6 to reveal the fraud, that rule did not protect the information. Thus, the lawyer was required to inform bar counsel of her partners' violation. As the committee noted, that "is the meaning of the language in Mass. R. Prof. C. 1.6(b) that a 'lawyer may reveal, and to the extent required by . . . Rule 8.3, must reveal, such information.'" For an example of where an otherwise required report to bar counsel could not be made without client consent, see MBA Ethics Op. 12-01.

Comment [15] to Mass. R. Prof. C. 1.6 states that if "the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Mass. R. Prof. C. 1.16(a)(1). If
the client has already used the lawyer’s services to commit fraud, the lawyer may reveal confidential information to rectify the fraud in accordance with Rule 1.6(b)(3).” Comment [16] to Mass. R. Prof. C. 1.6 states that the rules do not prevent “the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.”

As quoted above, Mass. R. Prof. C. 1.6(b)(2) permits a lawyer to reveal client confidences to the extent necessary to establish a claim or defense on behalf of the lawyer in a controversy or litigation pertaining to the representation. Comment [18] adds to the rule the following:

Where practicable and not prejudicial to the lawyer’s ability to establish the defense, the lawyer should advise the client of the third party’s assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Comment [19] recognizes that a lawyer is permitted to disclose client confidences as necessary in an action to collect the lawyer’s fee. Comment [19A] recognizes that in some instances it might even be “dangerous for the lawyer to advise the client of the intent to reveal confidential information either before or even after the fact.”

Comment [20] states in full as follows:

If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. Whether a lawyer should consider an appeal before complying with a court order depends on such considerations as the gravity of the harm to the client from compliance and the likelihood of prevailing on appeal.
By referring to “the privilege,” this comment seems to be discussing rules of evidence, rather than the ethical rule requiring the preservation of confidences. As suggested earlier, the difference is of everyday significance in taking depositions. Lawyer-witnesses commonly assert the attorney-client privilege where applicable but answer questions requiring revelation of confidences that are not privileged.

Comment [21] recognizes both that Mass. R. Prof. C. 1.6 is not the only rule dealing with confidentiality (see, e.g., Mass. R. Prof. C. 2.3, 3.3, 4.1, and 8.3) and that provisions of law outside the rules may require a lawyer to provide information about a client. See Comm'r of Revenue v. Comcast Corp., 453 Mass. 293 (2009) (discussing in detail the attorney-client privilege).

Comment [22] states as follows:

The duty of confidentiality continues after the client-lawyer relationship has terminated.

The MBA ethics committee advised a lawyer that he could not reveal to the supervisor of an administrative law judge that the lawyer had previously represented the judge, the representation had ended acrimoniously, and the lawyer feared that having the judge hear a case presented by the lawyer would prejudice the lawyer’s current client. In seeking removal of the judge, the lawyer could only tell the supervisor that a conflict existed without elaborating on its nature.

§ 6.3 Applications to Particular Facts

(a) E-Mail; Software Providers; Cloud Computing

The MBA ethics committee advised a lawyer that her use of unencrypted e-mail in communicating with a client did not violate Mass. R. Prof. C. 1.6. See MBA Ethics Op. 2000-2. However, before sending e-mail to the client’s place of employment, the lawyer should obtain the client’s consent. Also, particularly sensitive communications should not be sent by e-mail without client consent.

MBA Ethics Op. 2005-4 discusses a law firm’s duty to protect confidences when giving a computer software service provider access to confidential client information while performing software maintenance.

MBA Ethics Op. 12-03 generally permits lawyers to use cloud computing, provided they undertake reasonable steps to ensure that confidences are protected and access is readily available. Specific client instructions, however, must be followed.
(b)  **Sharing of Insured’s Confidences with Insurer**

Whether insurance companies are entitled to share confidences between the insured and the lawyer retained by the insurer has received considerable attention. The MBA ethics committee has advised that such confidences may not be conveyed without the insured’s consent. The lawyer must advise the insured about available choices and about whether the policy requires the insured to reveal confidences under a duty to cooperate.

(c)  **Sharing Client Confidences within Nonprofit Agency**

The MBA’s ethics committee advised a lawyer for a multiservice (legal, social, job, financial, etc.) nonprofit agency that he could not reveal client confidences in “team” discussions of agency clients or grant access to client legal files to agency internal auditors.

(d)  **Protecting Client Confidences from Client’s Father**

The lawyer for a 19-year-old tort victim, who was about to receive a large settlement, received a call from her father requesting that he be informed when the settlement arrived because he didn’t trust his daughter’s financial prudence. The MBA ethics committee advised the lawyer not to honor the father’s request and to inform the daughter of that request.

(e)  **Use of Client Confidences in Dispute with Client**

In the case of *In re Wise*, 433 Mass. 80 (2000), a six-month suspension from the practice of law was imposed on a lawyer for, among other things, disclosing client confidences in violation of the then-applicable DR 4-101(B). The respondent, an animal rights lawyer, represented Primarily Primates, Inc. (PPI), a Texas-based nonprofit corporation. After the attorney’s outstanding statements for about $59,000 had been approved by the corporation’s trustees for payment, the sole member of PPI, who was also its president, elected a new board of trustees and informed the attorney that he would not be paid until the new board and others had reviewed his statements. Siding with two former trustees, who claimed they had been illegally removed, the attorney informed the Texas attorney general of various allegations against PPI and its president. The attorney also sought to have two financial institutions freeze the client’s accounts because of the internal dispute.

The Supreme Judicial Court stated that “[t]he evidence does not show the respondent trying to prevent the commission of crimes against PPI. It shows him embroiled in an internal power struggle at PPI, which he tried to use to punish
[the president] and [another] for refusing to pay his bill, and to collect his fee."
In re Wise, 433 Mass. at 88. Under these circumstances, the attorney’s disclosures of confidential internal corporate matters to the attorney general and financial institutions violated his obligations to keep client confidences and not to use client information for his own advantage. In re Wise, 433 Mass. at 89.

(f) Use of Client Information to Secure Recovery in Fee Dispute

The MBA ethics committee has interpreted Mass. R. Prof. C. 1.6(b)(2), which permits a lawyer to reveal confidential information “necessary to establish a claim or defense on behalf of the lawyer,” to allow the lawyer when suing for a fee to attach client real estate that the lawyer learned about during the representation. See also BBA Ethics Op. 1993-2 (use of client information to facilitate trustee process with respect to client’s bank deposits and receivables).

(g) Confidences Learned from Prospective Client

The MBA ethics committee has also advised that confidences learned in an initial conversation with a prospective client, even if that person never becomes a client, prevent a lawyer from subsequently representing a third party in an action that is adverse to the prospective client and substantially related to the information disclosed in the initial conversation. See Scope, paragraph 3 of the Preamble and Scope to the Massachusetts Rules of Professional Conduct, included as Section 2.1 of these materials.

ABA Model Rule 1.18 (2002), titled “Duties to Prospective Client,” has not been adopted in Massachusetts. Nevertheless, that rule and discussions of it (see, e.g., Annotated Model Rules of Professional Conduct 283–88 (ABA 5th ed. 2003)) provide useful insight into dealings with prospective clients. An executed agreement between counsel and a sophisticated prospective client at or prior to their initial meeting, stating that the prospective client would disclose to counsel no more than necessary to identify possible conflicts and the nature of the representation, might prevent subsequent disqualification of that counsel from representing someone adverse to the former prospective client who was never represented.

Under ABA Model Rule 1.18, screening of a lawyer who is personally disqualified because of confidential information received from a prospective client is available, if specified conditions are met, to permit the lawyer’s firm to take a representation adverse to the prospective client who did not become a client. MBA Ethics Op. 07-01 advises that, in the absence of a Massachusetts Rule 1.18, screening is not available here with the consequence that the lawyer’s firm would also be disqualified.
(h) **Withdrawal from Representation**

In addition to the circumstances under which confidences may be revealed that are identified in Mass. R. Prof. C. 1.6(b), the MBA ethics committee has found that a lawyer has an implicit right to reveal confidences under Mass. R. Prof. C. 1.16(b) to the extent necessary to establish that “good cause” exists to permit withdrawal from a representation. See MBA Ethics Op. 96-3. The committee cautioned that disclosure should be limited to the bare minimum necessary and that, if the court wants to delve more deeply, the lawyer might request that the motion to withdraw be heard in camera by a judge other than the one expected to try the client’s case.

(i) **Error in Tax Return**

Where a lawyer discovered after a tax return had been filed that it was inaccurate due to an accountant’s error, the MBA ethics committee determined that Mass. R. Prof. C. 1.6 required the lawyer to inform the client about the error but that Mass. R. Prof. C. 1.6 prevented the lawyer, without client consent, from informing the IRS. None of the exceptions in Mass. R. Prof. C. 1.6(b) was available. The IRS is not a tribunal for purposes of Mass. R. Prof. C. 3.3, and the client had not engaged in any fraudulent act under Mass. R. Prof. C. 4.1, which in any case does not permit disclosure “prohibited by Rule 1.6.” When informing the client of the error, the lawyer should, of course, discuss whether the client should file an amended return.

(j) **Confidences Received from Deceased Client**

The lawyer for the estate of a deceased businessman asked the MBA ethics committee whether he could reveal to the widow-executor confidences received from the deceased concerning the honesty of an employee of his business, which the executor would be operating. In the absence of any indication that the deceased had wanted to keep the confidence from his wife, and with the possibility that the employee might cause substantial injury to the executor’s financial interests, the committee advised that the lawyer had the right to inform the executor of the confidence. Having that right, the lawyer ought to so inform her, because she, as his current client, would be entitled to know anything important concerning the representation that the lawyer is not barred from disclosing. Counsel should note that the attorney-client privilege survives the client’s death. In re John Doe Grand Jury Investigation, 408 Mass. 480 (1990).
(k) Joint Representation of Spouses

The MBA ethics committee advised a lawyer who had drafted estate plans for a husband and wife on what to do when the husband, announcing his intention to obtain a divorce, requested that his estate plan be changed without informing his wife. The lawyer had an equal duty of loyalty to each joint client, and each had the right to expect that the lawyer would disclose anything bearing on the representation. See Mass. R. Prof. C. 1.7 cmt. [12C]. Clearly, the lawyer should not draft a new will for the husband in secrecy. If at the time of the initial engagement, the lawyer had stated, and the husband and wife had agreed, that there would be no secrets between them concerning their estate planning, the lawyer should tell the wife of the husband’s present intention. In the absence of such an agreement, the committee advised that the lawyer should use his best judgment on whether to tell the wife. The law is too uncertain about a lawyer’s obligation of disclosure in this situation for the committee to be more definitive.

§ 7 RULE 1.14—CLIENT WITH DIMINISHED CAPACITY

Effective September 1, 2008, the Supreme Judicial Court replaced and renamed Rule 1.14. The text of the new rule is as follows;

(a) When a client’s ability to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action in connection with the representation, including consulting individuals or entities that have ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.

The text is followed by ten comments. Comments [1]-[4] recognize that even persons with diminished capacity, such as some children and people of advanced age, can participate in their representation. Comment [2] states that a “lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.” It may be appropriate to have family members or others participate in discussions. If the client has a legal representative, the lawyer should ordinarily look to that person to make decisions for the client.

Comments [5]-[7] authorize a lawyer to take action and suggest possible courses of action, when “a client is at risk of substantial physical, financial or other harm.” Comment [8] elaborates on the disclosure of confidences permitted by Rule 1.14(c), and Comments [9] and [10] treat situations in which a lawyer must act in an emergency.

The following four MBA ethics opinions were issued under old Rule 1.14, but the advice rendered would probably not change under the new rule.

When faced with a possibly suicidal client, a lawyer should consider Mass. R. Prof. C. 1.14. The ethics committee has advised that if a lawyer reasonably believes that a client who threatens suicide lacks sufficient capacity to make adequately considered decisions, the lawyer may contact persons whom he or she believes to be in a position to help the client, revealing only such information as is necessary to obtain the assistance. See MBA Ethics Op. 2001-2.

MBA Ethics Op. 2004-1 addresses a situation in which a lawyer has been discharged by a long-term client under circumstances strongly suggesting that the discharge was not an act of the client’s free will. Under the circumstances, if the lawyer believes that the client was at risk of substantial financial or other harm, the lawyer may consult with family members in order to protect the client’s interest and disclose confidential client information to them to the extent necessary.

Where a client’s depression appeared to render him unable to cooperate with his lawyer in preparing for a divorce trial, MBA Ethics Op. 2005-3 advised that the lawyer could enlist the aid of the client’s family and a close friend to persuade the client to cooperate. If unable to obtain the client’s cooperation, the lawyer
might have to decide whether it was in the client’s best interest to seek a continuance, which the client opposed, rather than risk proceeding to trial unprepared.

Where the son of a lawyer’s long-term client contacted the lawyer for assistance in seeking a guardianship for the client, it would be inappropriate for the lawyer to represent the son even though a psychiatrist recommended guardianship. It seemed likely that the client would oppose the guardianship and, also, that the lawyer would be a necessary witness in a guardianship proceeding. MBA Ethics Op. 2005-5. While Comment [7] to Rule 1.14 specifically authorizes a lawyer in some situations to “request the appointment of a guardian ad litem,” that does not authorize the lawyer to represent another who seeks a guardian for the lawyer’s client.

§ 8 COUNSELOR—RULE 2.1 ADVISOR

In full, this rule states as follows:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social, and political factors, that may be relevant to the client’s situation.

The comments to Mass. R. Prof. C. 2.1 contain the admonition that “a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.” Also, the comments advise that when “consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation.” Finally, the comments recognize that while a lawyer is normally not expected to give advice until requested to do so by the client, “when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Mass. R. Prof. C. 1.4 may require that the lawyer act if the client’s course of action is related to the representation.”
SECTION A5.2

Breaking Up Is Hard to Do*

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Getting out is harder than getting in. That’s one of the first rules to remember before undertaking to create an attorney-client relationship. This article is intended to describe issues that may arise in trying to extricate oneself from an attorney-client relationship.

I. Creation of the Relationship

Attorneys must, first, recognize that a relationship, not expressly created, may be deemed to exist in order, later, to declare it ended or take appropriate steps to end it. See, e.g., DeVaux v. American Home Assurance Co., 387 Mass. 814, 444 N.E.2d 355, 357 (1983). An attorney-client relationship can be created expressly, impliedly, or by detrimental reliance, as follows:

1. An express attorney-client relationship arises whenever: (1) a person seeks the advice of an attorney; (2) the advice is within counsel’s competence; and (3) the attorney expressly agrees to render such advice, the evidence of which is in the form of a fee agreement, engagement letter or other writing that bears the indicia of a contract as to the matters on which the advice was sought.

2. An implied attorney-client relationship arises whenever: (1) a person seeks the advice of an attorney; (2) the advice is within counsel’s competence; and (3) the attorney expressly or implicitly agrees to render assistance. The third element may be established by proof of reliance when the person seeking legal assistance reasonably relies upon the attorney, and the attorney is aware of this reliance but does nothing to negate that reliance. DeVaux v. American Home Assurance Co., 387 Mass. 814, 444 N.E.2d 355, 357 (1983).

* A version of this article appeared in 46 Boston B.J. 16 (2005). Reprinted with permission from the Boston Bar Journal, a publication of the Boston Bar Association. Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
3. In appropriate cases “the third element may be established by proof of detrimental reliance when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it.” DeVaux at 817–18. But see also Spinner v. Nutt, 417 Mass. 549, 550, 631 N.E.2d 542 (1994) and its progeny.

II. The Agreement and the Scope of the Relationship

Taking steps to describe the scope of the relationship (and the tasks to be performed) is critical so a determination can later be made as to when the relationship has ended or can be ended. Therefore, the engagement letter or fee agreement should set forth the scope of the engagement, including any limitation on the scope. If one has agreed to undertake a limited task and it has been completed, then it may be argued that the relationship has ended or been terminated upon the completion of that undertaking. If the scope changes during the term of the relationship, then the agreement should be amended to reflect the change.

One must also keep in mind the doctrine of “continuing representation” which was adopted by the Supreme Judicial Court in Murphy v. Smith, 411 Mass. 133, 579 N.E.2d 165 (1991) and has been commonly described as the act of continuing to employ and use counsel notwithstanding that an issue of malpractice may have arisen during the course of the representation. The doctrine, which is generally raised as a counter to a statute of limitations defense in malpractice claims, “recognizes that a person seeking professional assistance has a right to repose confidence in the professional’s ability and good faith, and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered.” Id. (quoting Greene v. Greene, 56 N.Y.2d 86, 94 (1982)). It is not “realistic to say that the client’s right of action [in malpractice] accrued before he terminated the relationship with the attorney.” Greene v. Greene, supra at 95. “The statute of limitations period [in malpractice claims] does not begin to run until ‘the termination of the undertaking.’” Murphy v. Smith, 411 Mass. at 137 (quoting McCormick v. Romans, 214 Va. 144, 148 (1973)); see also Eck v. Kellem, 51 Mass. App. Ct. 850 (2001); Lyons v. Nutt, 436 Mass. 244 (2002). As a result, the issue of when the relationship terminates may be affected by the possibility that the client will contend that there was a “continuing representation” and, thus, no termination actually occurred when expected.

III. Getting Out

In general, an attorney’s representation of a client discontinues, for purposes of the statute of limitations, when “the attorney is relieved of the obligation [to serve] by [either] the client or the court.” Estate of Mitchell v. Dougherty, 249 Mich. App. 668, 683, 644 N.W.2d 391 (2002); see also Hooper v. Hill Lewis,
An attorney-client relationship can be "terminated by implication."

No formal discharge by the client is required, and the termination of an attorney-client relationship can be implied by the actions or inactions of the client. . . . [T]he retention of alternate counsel is sufficient proof of the client's intent to terminate the attorney's representation. This Court has also held that a client terminated his attorney's representation by sending a letter stating that the attorney did not have the authority to act on his behalf. Further, where a client obtained legal advice from an attorney, then had no further contact with that attorney until filing a complaint for legal malpractice, we held that the client relieved the attorney of his obligations on the date the attorney last advised the client.

Mitchell, supra at 684 (citations omitted).

"The general rule does not apply where an attorney is retained to perform a specific legal service, e.g., the sale of a business, in which case the representation ends when the service is completed." Mitchell, supra at 683 n.6.

As stated above, a number of courts have ruled that this exception to the general rule does not apply where lawyers were performing ongoing services during the course of continuing litigation. See Rochlen v. Landau, 2002 Mich. App. Lexis 2010.

IV. Massachusetts Rules of Professional Conduct

The Rule

In Massachusetts, termination or withdrawal from representation is governed by SJC Rule 3:07, Massachusetts Rules of Professional Conduct Rule 1.16, in particular, which should be read carefully, along with the Comments to the Rule, which are particularly helpful.

Getting out of a relationship (prior to its natural termination) generally falls into one of the following categories:

1. Money issues.
2. Power struggles.
3. Conflicts of interest.
4. Actions against the lawyer's advice or failure of the client to fulfill obligations.
As Rule 1.16(c) states, “If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.”

Once the relationship terminates, one must protect the client’s interests first. See Rule 1.16(e) for a list of ways to treat file materials. Pay particular attention to Rule 1.16(e)(7), which makes it clear that “notwithstanding anything in this paragraph (e) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client’s file when retention would prejudice the client unfairly.”

**The Guidelines**

In the end, what gets lawyers into trouble and causes relationships to founder is failing to follow some simple rules that track the acronym “CHOICE”:

- **C**ommunication—Keep the client informed at all times.
- **H**onesty—Tell the truth: the cover-up is often worse than the crime and certainly makes it worse.
- **I**ntegrity—Don’t try to rescue something for a client, if reality doesn’t support it.
- **O**striches make bad lawyers—Not looking at a problem doesn’t make it disappear.
- **C**larity—Be clear in all communications.
- **E**xplanation—Give the client all of the options so the client can make up her/his mind.

**V. Post-Termination Duties**

Terminating a relationship has enormous implications and, in some instances, can be the independent source of a malpractice or disciplinary claim. Decisions from a number of jurisdictions demonstrate the impact of termination on representation and the substantial control the courts exercise over the process. Cf. In re Kelly, 119 N.M. 807, 808–09, 896 P.2d 487, 488–89 (1995) (holding that failure to protect client interests at termination was a factor warranting disbarment); In re Sparks, 108 N.M. 249, 251, 771 P.2d 182, 184 (1989) (holding that disorderly termination of attorney-client relationship, along with other factors in representation, warranted suspension from practice of law); Karlsson & Ng, P.C. v. Frank, 162 A.D.2d 269, 556 N.Y.S.2d 626 (App. Div. 1990) (discussing the need for specific act of termination in ending representation); State v. Cummings,
199 Wis. 2d 722, 546 N.W.2d 406, 416-18 (Wis. 1996) (setting court’s conditions for withdrawal from the attorney-client relationship at issue in the case). Other cases demonstrate that termination or withdrawal, carried out negligently, can serve as a basis for malpractice claims. See Wood v. Parker, 901 S.W.2d 374, 379 (Tenn. Ct. App. 1995) (discussing a legal malpractice claim based on alleged negligent withdrawal); see also Kirsch v. Duryea, 21 Cal. 3d 303, 578 P.2d 935, 939, 146 Cal. Rptr. 218 (Cal. 1978) (en banc) (same).

Thus, when an attorney-client relationship is terminated, the attorney is under a duty to act with reasonable care, in “full consideration of the rights of the client.” Sanders, Bruin, Coll & Worley, P.A. v. McKay Oil Corp., 123 N.M. 457, 943 P.2d 104 (1997).

VI. Summary of the Rules of “Engagement” and “Disengagement”

In sum, the “rules of the road” can be described as follows:

1. There has to be an attorney-client relationship in order to end one. Remember—it takes two to tango and to create a contract. At the outset, if no relationship was created, send a non-engagement letters.

2. The scope of the relationship is critical so a determination can be made as to when the relationship has ended or can be ended. Therefore, the engagement letter/fee agreement should set forth the scope of the engagement and duty.

3. If the scope changes during the term of the relationship, then memorialize it since that alters the agreement.

4. The agreement should create a mechanism for getting out, such as non-payment; failure to abide by the terms of the contract, including any limitation in the scope of the contract; material misrepresentation; failure to cooperate; failure to follow lawful advice of the lawyer; insistence by the client on a “repugnant or imprudent” objective; or the client engaging in conduct the lawyer reasonably believes is criminal or fraudulent.

5. When getting out, look at Rule 1.16 and follow it.

6. Send a Motion to Withdraw for assent or notice if required (see Rule 1.16).

7. Send disengagement letters or termination letters at the end, if for no other reason than to start the clock running on statutes of limitation.

8. Be clear—at the outset and at the end.
SECTION A6.1

Building a Great Business Plan for Your New Law Practice*

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INTRODUCTION—WHY YOU NEED A GREAT BUSINESS PLAN

“Opportunities multiply as they are seized.” – Sun Tzu

Yes, the economy is tough. But did you know that many small law firms are thriving? They are doing well both organizationally and financially. In fact, there is a new trend in the practice of law. The old partnership model is being replaced by the solo practice. The partnership model for law firms came out of the idea that “two heads are better than one, and several heads are better than two.” Today, two heads are not always better than one and several heads might be a few too many.

More and more lawyers are finding that sole practice has loads of advantages and that using the right tools brings success and profits. Today, solo owners go beyond being simply sole practitioners. They are building firms with fifteen or more attorneys and even more staff members.

While, every law practice starts with an idea, and many start with great ideas, not all law practices succeed. The challenge is to build a law firm that does more than solve the clients’ problems. And, the challenge is more than building a profitable law practice. The ultimate challenge is to build a law practice that you love.

If you are going to succeed by building your ideal law practice, you must know where you are starting, where you want to be, and how you will get there. To do that, you need a clear, well-defined, guide.

That guide is your business plan. Think of the plan as your law practice’s Global Positioning System. In fact, if you are serious about reaching your long-term goals, your business plan is the best tool that you can have.

The business plan describes your practice in detail. It defines how you will operate, your marketing strategies, the nature of your competition, and your financial structure.

The problem with business plans is that sometimes they become larger-than-life. If you open any book on how-to-start-your-own-business, it seems that the business plan is the equivalent of the Talisman of Penultimate Truth – an artifact that will allow you to fulfill your ultimate destiny. http://www.comicvine.com/swordquest-earthquest/37-110020.

Conventional wisdom will lead you to believe that your business plan is supposed to be the panacea for all of your business matters. And, like the Talisman of Penultimate Truth, the ideal business plan is nearly impossible to achieve.
Well, if the true business plan is as mythical as the Talisman of Penultimate Truth, why bother? In the words of Dwight D. Eisenhower, “[I]n preparing for battle I have always found that plans are useless, but planning is indispensable.” The same holds true for your law practice, the business planning process is essential. It forces you to take the time to envision your entire practice, from the type of entity you will use, to the type of building you will occupy, to the kind of printers you will buy. You will determine exactly how much you need to collect in order to pay your bills, and you will figure out what events will signal the end of the road.

The resulting written business plan will be useful for two reasons. It describes the fundamentals of your business idea and it provides the financial data to show that you will make good money. It should also address all of the major elements of the firm’s operation, outline its specific goals and objectives, and show which strategies and tactics are necessary to reach those goals.

Whether or not you need to raise money to start your venture, preparing financial forecasts is essential. The process of making financial projections for your business, including estimated start-up costs, break-even analysis, profit and loss forecasts, and a cash flow projection will help you decide if your law firm is worth starting or if you need to re-structure your foundation assumptions.

A well-constructed business plan dramatically increases your odds of succeeding and it helps you make money from the start by:

- Providing an estimate of start-up costs and how much you will need to finance or invest;
- Showing lenders why they should fund your firm;
- Helping define your market and your market share;
- Helping you to compete by defining your competition’s weaknesses; and,
- Identifying problems before they become disasters.

In short, the business plan shows where your firm starts, where it is going, and how it will get there. A good business plan will show you that starting your own law firm is the right thing to do – or not.
§ 1  IS THIS FOR YOU?

Success starts with commitment. If you are going to be a sole practitioner, you need to promise yourself that you will make a full commitment to the process of building your business plan. If you are going to be part of a multi-practitioner firm, each member must make the commitment. In this type of firm, business plans should be designed for the firm, for each practice group, and for the individual attorneys.

Before you reserve the conference room, take some time to examine yourself. Is starting your own practice right for you? Are you ready?

The fact that you passed the Bar exam does not mean that you are cut out to open and manage your own law practice. Running a practice requires entrepreneurial skills in addition to legal skills. If you like the idea of having a sign inscribed “The Buck Stops Here” on your desk, then starting your own practice could be the best decision you ever made. Even so, proper preparation is essential to your success.

As you consider stepping out on your own, give careful consideration to all of the unique factors involved in running a law practice. Use your common sense and logic as your move through the decision-making process. Talk to other lawyers, and use other professionals, including accountants, business consultants, and technical consultants to help you.

The first step in the business planning process is to examine your reasons for wanting to start your own practice. If you are striking out on your own for the wrong reasons, all of the precise planning in the world won’t ensure that you’ll make a successful transition to your own practice. Here are some of the wrong reasons:

- I’m sick and tired of my current job.
- I’m being forced to make a change.
- Anything would be better than what I’m doing now.
- My present job is not meeting my demands for pay, status, responsibility, or prestige.
- If only I were working on my own I would be happy.
- I’m scared to death of making a change but I’m going to do it anyway.

And, here are some of the right reasons:
• I know my strengths and my weaknesses and I have a clear vision of my future.

• I have established my priorities and I have set reasonable professional and financial goals.

• The risks of starting my own practice are acceptable.

• I am self-motivated and I manage my time wisely.

• I am determined to devote the time and effort necessary to reach my goals.

As you consider whether taking that leap of faith and opening your own law practice is for you, take stock of yourself. In general, entrepreneurs (and, yes, you are an entrepreneur) are inspired to start their business by one of several factors such as education, previous experience, personal interests, or identification of an un-met need.

Why are you starting your practice? Write it down.

Now, Use Worksheet #1 to help you identify areas where you might be at risk. Be brutally honest with yourself. Remember – this is your career and you are putting it at stake.

Once you’ve decided that starting your own practice is the right thing to do, and once you are committed to going out on your own, it is time to start developing your plan.

But, how do you build a great business plan?

A great business plan follows fairly standard guidelines for both form and content, and there are three main parts to it. They are: the business concept, your prospective clients, and Operations and Finance.

The first is the business concept. This section contains your executive summary, your description of the nature of your law firm, your firm's structure, your particular areas of practice, and how you will make your firm successful.

In the second section you describe and analyze the firm's prospective clients. That is: who they are, where they are, and why they need your services. You will also describe the competition and how you plan to beat it.

The operations and finance section is the last section. It will show how you plan to run your business on a day-to-day basis, your projected income and cash
flow statement, the projected balance sheet, and other financial data, including a break-even analysis. Usually you will need good spreadsheet software and the help of an accountant to complete this section.

You will break the three general categories down further in your business plan like this:

- **The Business Concept**
  - The executive summary (which you will write last);
  - Your law firm’s description;
  - Firm Structure;
  - Practice Areas;
  - Strategy for Success;

- **Prospective Clients**
  - Market strategy;
  - Competitive analysis;

- **Operations and Finance**
  - Operations;
  - Technology;
  - Management;
  - Financial data.

Of course, you’ll add a cover, a title page, and a table of contents. Even if you staple your business plan together rather than having it bound, protect your business plan with a strong cover and back page. Make the cover attractive. Include your practice logo if you have one, the name of your practice, and your practice address.

If anyone else will read your business plan, you need a neat, attractive title page that will attract attention and give the reader the best first impression of your practice. Be sure to include the Practice Logo (if you have one); the name of your practice; your practice address; the complete telephone number, the email address; the Web address; the names, titles, addresses, and telephone numbers of the principals, the names of the authors, the number of the copy (1 of 5, for example); and, a confidentiality statement.

The Title page is usually divided in thirds. The top third contains your logo, practice name, phone number, email address, and web address. The center section contains the information about the principal attorneys. The bottom third contains the remainder of the information.
Include the date that your plan was issued to show the reader that it is up to date. Lenders like to know that they are dealing with fresh information. They also like to know that the Plan is a collaboration of two or more of the principals. This lets them know that the key members of the practice are actively involved in its development.

Keep track of how many copies you print, and keep a log that tells you who has received each copy, when they received it, and their contact information. If you are seeking financing, keeping this log will help you follow up on your loan applications. And, it helps you keep track of who has access to all of the confidential information that your Plan contains. The Confidentiality Statement is a statement that expresses your expectation of privacy and it is a good way to put your readers on notice that you are serious about maintaining privacy.

If your business plan is more than three pages, you need a Table of Contents. A well-organized Table of Contents will help your readers find the information that they want quickly. More importantly, it will help you find what you need when you need it.

Since you will prepare the Table of Contents after your Plan is complete, you can use the headings from the Body of the Plan to develop the Table of Contents. Be sure to use enough detail so that any reader can find the key sections quickly and accurately. If your Business Plan is complex you may have many subsections in the Table, or you might have a simple plan that includes only the key topics in the Table. In any case, be sure to include:

- Executive Summary
- Practice Definition
- Marketing Plan
- Organizational Plan
- Financials
- Supporting Documents

Whether you are seeking funding, or hoping to engage a new partner, your plan must grab the reader’s attention and hold it. It may take you five months to complete your business plan. Unfortunately, your reader may only give it five minutes. The key aspects of your plan must stand out even to the most casual reader. An experienced business plan reader will spend about five minutes looking at: First: your Executive Summary; Second: your Financials; Third: your Management section; and, finally: your Exit strategy. And, an experienced reader will have questions like these in mind:

- Is the basic practice concept solid?
- Is potential client base large enough?
• Are the financial projections solid?
• Is (are) the principal attorney(s) qualified?
• Will the practice show a profit?

You have five minutes to prove to your reader that the answer to each of those questions is “yes.”

Summary: If you are determined, organized, self-motivated, and you love being a leader, then starting your own law practice can be the opportunity of a lifetime. To make the most of that opportunity, take the time to plan your business carefully and to write a thorough description of your practice in a formal business plan. The well-written business plan will show that your practice concept is solid, that your market is well defined and that your chances of success are excellent.

§ 2 THE FIRST SECTION OF YOUR PLAN—THE EXECUTIVE SUMMARY

The Executive Summary is the most important part of your business plan. Frankly, it may be the only part of your plan that anyone reads. The Executive Summary gives a very brief, but complete view of how your practice will work. Because it is a concise, precise, condensation of your entire plan, you must write it only after you have given every aspect of your new practice comprehensive consideration. Your Executive Summary is written last, but read first.

Since these materials are designed to help you build your law practice’s business plan step-by-step, the complete section on writing your Executive Summary appears at the end, in § 7.

§ 3 THE SECOND SECTION OF YOUR PLAN—IDENTIFY YOUR PRACTICE

§ 3.1 Just Exactly Who Are You?

Times have changed. The practice of law is highly competitive and the market is volatile. Your law practice might have the most elegant office in the city, but if your practice doesn’t solve a particular problem, or meet a particular need, no one will hire you and your practice will fail. You need to create a plan that addresses not only your start-up needs – but also the long-term needs of your practice. Now is the time to develop the strategies that will support the overall successful performance of your practice and that will keep you satisfied as well.
There are a number of factors that are fundamental to business success and they are the factors that should guide you as you build your plan. They are:

- The soundness of your basic business concept;
- Your understanding of the market;
- Maintaining a reliable business focus and solid strategic business position;
- Good management practices;
- Hiring, motivating and retaining excellent employees;
- Maintaining the highest integrity;
- Continuing financial control; and,
- Changing and adapting over time.

There is no substitute for a well-designed business plan. It is your blueprint for a successful practice.

Your business plan gives you the foundation for good external and internal decision-making. It will showcase management's capabilities and illustrate your practice's potential to those on the outside. Internally, it will allow you identify problems before they start. And, a good business plan will help you make the most of future opportunities.

§ 3.2 What Is Your Basic Business Concept?

Every successful business is founded on at least one of the following elements:

- Something new;
- Something better:
  - A new or underserved market;
  - A new delivery system;
- Increased integration.

And, any one of those factors can form the foundation of a new law practice.
• Something new. Yours might be the first law practice in town to offer services for divorcing non-traditional families.

• Something better. Perhaps you will offer a more efficient way to complete trademark applications;

• An underserved market. Your practice might address the needs of a particular ethnic community;

• A new delivery system. Your practice could offer 24/7 internet communication for clients;

• Increased integration. Your practice might offer both plaintiff’s tort litigation and special needs planning services.

If your new practice offers more than one of these elements, you increase your chance of success. As you complete Worksheet #2, think about how your practice will address the factors above and be sure to make it strong in at least one of the key elements.

Next, do your research. Start by writing down a general statement about the need that your law firm will satisfy. For example: “There is a substantial need for a law firm that addresses the problems of small retail businesses in Boston.”

Make a list of questions that come to mind. Such as:

• How many law firms serve Boston’s small retailers?

• How large are those firms?

• What services do they provide?

• How profitable are those firms?

• Are their clients generally satisfied with the service those firms provide?

• Is there more business than those firms can handle?

• What are the economic trends that affect retail business?

• What are the legal trends that affect retail business?

• What are the demographic trends in Boston?
Now, look for answers. You will find plenty of information on the Internet. You may also wish to use a paid research service. To find other answers you will need to talk to other attorneys, accountants, and to potential clients. Remember to look for trends and patterns as well as for specific details.

Keep track of your research and the answers you find. Organize your notes, ideas, contacts, and brainstorms carefully. It is best to make an individual file for each topic. Just as when you are researching a legal issue, keep track of your sources as you go. The last thing you want is information that you cannot verify.

As you gather information, remember to evaluate the data. At times you may find that you have more information than you can use.

- Use the most recent data that you can find. Two-year-old information is old information and it probably won’t be applicable anymore;
- Give the most reliable source the most weight;
- Integrate information from one source to another, but make sure that the data is from the same time period and that it is consistent;
- Use the most conservative figures. If your worst-case projections show that your firm will be profitable, then you know you have a good chance of success.

One good thing about the research process is that you will meet people who can help you later. You will interview potential clients, suppliers, resources, and advisors. Keep track of each person you meet, where they are located, how to reach them, and other key information so that it will be easy to locate and use later on.

The process of making your business plan is actually more valuable than the final plan itself. Developing your business plan is a critical learning process, and the more you learn the more you may change your plan. The planning process allows you to identify all of the key issues that need to be addressed before you open your doors. Now is the time to ask some hard questions:

- Is there a real market for the services you want to provide?
- Is there too much competition?
- What is the real financial picture?
- Does your new practice have a chance?
The next step is to do a hard evaluation of your business concept using the information that you have compiled. Use Worksheet #3.

If necessary, ask more questions, do more research, and go back over it again. Once you are satisfied that your new practice does have a chance, you should have enough information to describe your practice. Compile your answers from the worksheet into several concise, well-written paragraphs.

**Summary:** Louis Pasteur said, “Fortune favors the prepared mind.” The business planning process is your opportunity to prepare your mind to start and run a successful law practice. Producing your business plan is not merely a writing assignment, and purchasing an off-the-shelf product will not help you. This process gives you an amazing opportunity to understand your market and to understand exactly what your practice will do. The steps in your process include laying out your concept, gathering information, assessing that information and, finally, refocusing your basic business concept. An honest examination of your business concept increases your chances of success.

§ 3.3 **Define Your Practice**

You have established your practice’s basic concept. Now define your practice. Before you address the more complicated aspects of your practice such as your sales and marketing strategy or your technology plan, give the reader the basic information about your practice such as the entity you will use, the identities of the key individuals, your location, and immediate goals.

Some activities – such as choosing a name for your practice -- may take quite a bit of time. Keep in mind that while there are restrictions on the name you can choose for your practice, there are still many options, and once you’ve chosen a name, you should stick with it. Other activities may take very little time at all, but may be key factors to your success. Use Worksheet #4 to define your practice.

§ 3.4 **Summary**

By making a precise description of your business concept and taking the time to define your practice, you have established the foundation for a solid business plan. Each succeeding aspect of your business plan will be bounded by your business concept and your business definition.
§ 4   THE THIRD SECTION—YOUR CLIENTS

§ 4.1 What Is Your Market?

A great idea is not enough. You need a market. Enough people have to be ready, willing, and able to pay for your services. Otherwise you won't have a practice. You need a market. Begin by figuring out whether there is enough demand for your services.

First, know your industry. In law school, we are trained to view ourselves as professionals, to believe that our practice is something far different from a common "industry". But, in fact, a law firm is simply another form of business and our field - the practice of law - is another type of industry. Therefore, it is essential to know our industry. To be successful, you must know your industry inside and out. That is, you must know your practice areas and how they fit into the big picture.

Most legal practice areas have a life cycle, or market cycle. In other words, there are times when there is a great need for lawyers skilled in a given practice area, but eventually that need will change, or be eliminated completely. The industry’s stage in its market cycle is critical and it depends on a number of factors including, its growth rate, market share, competition, market stability and pricing patterns. Knowing the life cycle of the market is important so that you can determine your direction and your strategies. For each stage in the life cycle of a practice there are certain, appropriate strategies.

Determine your practice area’s life cycle. Start by writing a paragraph on the history and evolution of your particular areas of practice. For example:

The practice area is intellectual property and our firm will focus on a subset of that industry, trademark registration for small retail businesses. As recently as ten years ago, trademark registration was something that a small retail business rarely considered. As long as no other store in town had the same name, there was no need to go to the time and expense of registering a trademark. Retail Internet sales have changed all that. Now, a small retail crafts store in northeastern Massachusetts may find that its primary competitor is located in Miami, Florida, and that the competitor has copied the Massachusetts store's logo and trademark. The need for trademark registration and brand protection is growing for the area's small retail businesses.
Second, know your clients. You must know who your clients are, what they want, how they act, and what they can afford if you are going to be able to figure out how to meet their needs. This means doing a market analysis. A market analysis is not a marketing plan. The analysis helps you to identify your clients and learn to understand them. The marketing plan shows how you will reach the potential clients that you have identified.

Start by making a broad description of your target market. Include everyone who might potentially use your services. Then narrow your description by defining a set of specific characteristics by which you define your market.

Continuing with our focus on retail business clients in Boston’s Back Bay, the target market might be described as: “New and existing retail operations with no more than five initial participants, beginning or existing internet presence, active advertising plan, time sensitive, ages 30 to 50, with an available budget of $10,000 to $50,000.”

Use these criteria to make sure that the definition of your target market is useful:

- Use specifics to show what the potential clients have in common.
- Make sure the specifics relate to the buying decision.
- The target market must be large enough to sustain your practice.
- The size and the definition must give you an affordable way to reach your potential clients.

After you’ve defined your target market, evaluate its size and its trends.

(a) Demographics

You will identify your potential clients by determining their common characteristics. In other words, by studying their demographics – the various characteristics of the market that you hope to serve. Understanding the common characteristics of your market is critical if you are going to establish a reliable cash flow. Complete Worksheet #5 to build your understanding of the unique characteristics of your target market.

(b) Geographic Description

Give your readers a concrete definition of the geographic area that you will serve. Tell your readers whether you will serve a neighborhood, a city, a county, a state, the nation, or a section of the international market.
Pay attention to the density of your area. Density is important when you consider your ability to compete against existing practices. Two lawyers might be too many for a small rural town, while there might be plenty of business for two lawyers in the same building in a larger suburb. If your clients will be coming to your office indicate whether your office will be located in a business district, industrial area, or perhaps a residential neighborhood. Complete Worksheet #6.

(c) Style Description

Your target clients will have a particular lifestyle or business-style. What are their interests? What are their concerns? How do they relate to their families and their employees? Do some research to identify your potential clients’ lifestyles and business-styles. Where do they shop? What publications do they read? What television channels do they watch? Do they listen to the radio? Imagine how your clients spend their entire week and try to relate to them. This will allow you to be more responsive to their needs and it will give you an idea of how to approach your marketing. Complete Worksheet #7 to define your clients’ style.

(d) Psychological Factors

Your market analysis should include an investigation of the psychological factors that will be common to your clients. These variables, in the world of marketing, demographics, opinion research, and social research, are called IAO Variables (Interests, Attitudes, and Opinions.) These psychological components will affect your clients’ buying decisions. Even your business clients will have certain common psychological factors. Your business clients might view themselves as being on the cutting edge of their industry, or build their company on the highest fiscal responsibility. Knowing this can help you be more successful. Some categories of psychographic factors used in market segmentation include: Social class, Lifestyle, Behavior, Opinions, and Values. On Worksheet #8 add the IAO variables (for Interests, Attitudes, and Opinions) of your particular target clients.

(e) Buying Patterns

Some law practices build relationships with their clients that last for generations. Others complete only one project for each client. To ensure your best chance of success, you must understand the nature of your practice areas and whether your clients are likely to retain you again and again, or whether you must have a constant stream of new clients to survive. Complete Worksheet #9 to solidify your understanding of your clients’ purchasing patterns.
(f) **Buying Sensitivity**

Every client is influenced by key factors when selecting legal services. They may be motivated by a sense of panic (just arrested or a sudden death), or they may be shopping for a firm that offers the lowest price for incorporation services. Every client knows that tradeoffs will be part of their buying decision, such as retaining a firm farther out in the suburbs to find a lower price. However, there are always some factors that your clients are unwilling to give up. Knowing your potential clients’ sensitivity to various buying factors can help you define your marketing strategy more precisely. Complete Worksheet #10 and rate the factors that influence your potential clients’ buying decisions.

(g) **Market Size and Trends**

You know that your client base must be large enough to sustain your practice. It also must be large enough to allow your practice to grow to a size that will bring you a comfortable return on your investment. However, did you know that there are problems with markets that are too large? Very large markets attract large well-financed competitors—competitors who can out-advertise and out-market you. While you do not need to do a detailed scientific study to identify the size of your potential market, you should do enough research so that you feel comfortable that there are enough potential clients in your area. This is particularly important if you plan to start your practice in a rural or resort area. Start with the nearby city and town governments, the Chamber of Commerce, and local real estate brokers. They will be able to provide you with the basic demographic data.

Take time to evaluate the trends that may affect your practice. Changes in the law will have a continuing impact on every practice and every client base. However, your practice will also be affected by many other trends such as changes in the population, the economy, the arrival or dissolution of business competitors, and even social factors.

(h) **Strategic Opportunities**

Now that you’ve analyzed the nature and size of your market, and the trends you expect, identify your strategic opportunities. What services can you offer that will allow you to make the most of your market? List them. Use WORKSHEET #11 to summarize your Target Market Description. You might include more detailed information from your market research in an Appendix to your Plan.
(i) Summary

Knowing your target market is an essential part of developing your practice’s services and of forecasting your collections and expenses. Identifying the opportunities and the limitations of the market will help you to manage your expectations, and will reassure potential investors.

§ 4.2 Know Your Competition

Face it. The practice of law is highly competitive. “The great bulk of law business of the City is done by a comparatively small number of lawyers – probably 100 or 150. After these, the next 500 or 600 on the list have a practice ranging from very fair to a barely self-supporting basis, and after that a very few would be found who make a living at the law.”

Five hundred to six hundred competitors – just in Boston! How on earth will you make it? That news is bad enough, the worse news is that the quote comes from the New York Times article “Boston Lawyers. How Many There Are And Some Of Those Who Get The Big Fees” from August 14, 1886. Just imagine how much more competitive the law business is 122 years later.

Making an honest evaluation of your competition is essential if you are going to plan a practice that will succeed. Knowing your competition will help you distinguish your practice from theirs and it will help you find opportunities in the legal field. More importantly, analyzing your competition will tell you more about what your potential clients want. And, knowing what clients want is critical to your success.

As you build your competitive analysis, remember to stay focused on what matters. If you plan to have a practice that handles only plaintiff’s bodily injury cases, don’t spend time learning about the intellectual property practices in your neighborhood. Prepare your competitive analysis by identifying: 1) who are your major competitors? 2) What is the basis of the competition? And, 3) how do your services compare?

(a) Who Are Your Competitors?

“Carefully compare the opposing army with your own, so that you may know where strength is superabundant and where it is deficient.” - Sun-Tzu

Do your research. Start your search on the Internet. Find out which practices provide the kind of services that you plan to provide. Read all about them.
• Start with their websites.
  – How does it look?
  – What is the format?
  – Evaluate the content.
  – What practice areas do they highlight?
  – Who are the attorneys?
    – Read their bios
    – Note their strengths

• Broaden your web search
  – How well recognized are they?
    – Super Lawyers?
    – Avvo rating?
    – Martindale AV rating?
  – What are their publications?

• Where do they advertise
  – Local publications
  – Online
  – Radio
  – Television/Cable

• Figure out what they do best
• Determine their weaknesses
• Identify what they don’t do. How do you compare?

It is easy to think that your firm is superior to your competitors because you will offer better client service than the others, but you need to know far more about your own practice to build an effective comparison.

Use Worksheet #12 to compare your practice with your competitors. It is best to evaluate your respective positions in your internal operations and in client preferences. The Worksheet is divided into two portions, “Customer Perception” and “Operations.” Start with “Customer Perception.” Look at each variable and assign it a number in the “Maximum Points” column (1 being the lowest, and 10 being the highest) that is representative of its importance. For example, if your target market is made up of families that are attempting to obtain MassHealth coverage for long term care, price sensitivity might rate a 10 on the worksheet. Next, rate your competitors’ success in tailoring their practices to respond to these sensitivities and then rate your ability to do the same. Use the same technique with the “Operations” section of the Worksheet. Rate the importance of
each variable and then compare yourself to the competition. When you have finished Parts A and B, answer the questions in Part C to crystallize your own perceptions of your competitive advantages.

(b) **Summary**

If you are going to compete successfully, you must know your competitors. You must have a strong sense of what they offer, and what you offer that is better. Know how your clients perceive your competition, know how your clients perceive you. Understand their internal resources, and make an accurate assessment of your own. Keep your eyes open – competition always gets more intense and new competitors enter the market every day.

§ 4.3 **Sales and Advertising**

You've identified your target market and you've evaluated your competitors. You know how your practice compares and you've identified your strengths. The Sales and Advertising section of your business plan allows you to identify the specific techniques you will use to show your strengths to prospects and turn them into clients.

Unlike other businesses, lawyers are limited in the types of sales and advertising tools that they can use. The Appendix contains the relevant provisions from the Massachusetts Rules of Professional Conduct that you should be sure to consult before you embark on any sales or advertising campaign. Preparing your advertising and sales plan takes a number of steps. In fact, it is a mirror of your entire business plan. You will set goals, establish strategies, plan actions steps, and allow for review.

The primary goals of a sales and advertising plan are:

1) To build a strong identity;

2) To build a strong client base; and,

3) To build continuously increasing collections.

Your practice’s sales and advertising plan will be made up of the three major components; Advertising, Promotions, and Sales.
(a) Advertising

Either John Wanamaker (who is considered to be the father of modern advertising) or William Lever (one of the original Lever Brothers), said, “Half the money I spend on advertising is wasted; the trouble is, I don’t know which half.” You advertise when you pay to have your message delivered to the public through any given medium.

Lawyers use seemingly endless means of advertising including, billboards, flyers, bus stop benches, magazines, newspapers, sides of buses, and even supermarket receipts. Attorneys also advertise on broadcast and cable television, on the radio, and on the Internet. Establishing a solid advertising and sales plan is the first step toward making sure that you don’t end up wasting half of the hard-earned money that you spend on advertising.

(b) Promotion

Promotional activities supplement your advertising and they support the development of your “brand.” It is the process of “spreading the word” about your practice. Promotional activities for attorneys include establishing memberships in bar associations and other organizations that are related to your practice’s areas of concentration, obtaining leadership positions in those associations, delivering presentations and participating in seminars, writing and publishing articles, and teaching or lecturing. Each of these activities gives you the opportunity to showcase your expertise and to establish yourself as a competent practitioner.

(c) Sales

Yes, attorneys sell their services. Every person you meet is a prospective client, and to turn a prospect into a client you must make a sale. However, selling legal services is very different from selling consumer products. Usually, the sales conversations that occur between an attorney and a prospective client are considered to be a variety of the “consultative selling” technique.

Consultative selling is based on a dialogue between the potential client and the salesperson, and it is far more collaborative than more traditional means of selling. According to AskOxford.com, the word dialogue is derived from the Greek word dialogos, from dialogesthai, which means “converse with”. http://www.askoxford.com/concise_oed/dialogue?view=uk. Conversing with the prospective client about his needs before presenting information about the firm’s legal expertise is the key to a successful consultative sale.
The attorney’s initial conversation with a possible client is the prospecting phase of the sale, and it is the best time for the attorney to learn about the possible client’s needs and wants. The attorney uses carefully tailored questions and pays careful attention to the prospective client’s answers and other factors, such as body language, to make an accurate determination of the prospective client’s needs. Then the attorney presents detailed advice on how the practice will work to solve the client’s problems in an efficient and cost-effective manner.

Cross-selling and up-selling are two other common sales techniques that you can use to improve your practice’s collections. Up-selling is a simple cueing technique that allows you to present upgrades or add-ons to the client’s services. For example, you might suggest that your client consider filing a Declaration of Homestead when he purchases a new residence, or completing a Health Care Proxy along with a simple Will.

Cross-selling is the process of suggesting other services to your existing clients to extend their relationship with your practice. For example, while you are preparing your client to purchase a home and record the Declaration of Homestead that you up-sold, you might suggest that your client create an estate plan to ensure that the newly purchased home does not get caught up in a long probate process in the future.

To write your Advertising and Sales Plan, begin by allocating a budget. While there are no strict guidelines for a law practice’s advertising and sales budget, expect to set aside between 3% and 5% of your projected gross revenue. Determine what portion of this budget you will use for each type of external activity. Research the various types of media in your market area to determine the costs and advantages of each approach. Depending on the size of your budget, you may also wish to use the services of a marketing consultant to help you develop and execute your advertising and sales plan. There are marketing consultants who work exclusively with law practices, and who can help you make the most accurate determination of how to focus your advertising and sales efforts in order to achieve the best results. Next, use Worksheet #13 to establish your advertising and sales plan.

(d) Summary

Your advertising and sales plan is the foundation of your practice’s income. To stay in business you have to have a continual stream of new business. Take the time to learn about the best ways to promote, advertise, and sell your services. Build your plan carefully, and be sure to review it frequently to be sure that it is working for you.
§ 5  THE FOURTH SECTION—OPERATIONS AND FINANCE

§ 5.1  Operational Requirements

“Plans are only good intentions unless they immediately degenerate into hard work.” Peter Drucker

How will your law practice actually operate? Where will your office be? Who will answer the phone? How many computers will you need? What time is lunch? You will use the Operations section of your business plan to explain how your law firm will run on a day-to-day basis. This is a critical part of your business plan that often receives the least attention. However, planning for these mundane details can often be the difference between success and failure. Never take any activity in your practice for granted. Each step in the operation is important and should be evaluated, planned, and improved. The planning you do now will result in improved collections and profits once your law practice is up and running.

While you do need to plan every minute detail of your practice’s operations before you start, you should only include a brief description of the operational requirements in your formal business plan, especially if you are seeking outside funding. If you are starting your first practice, it makes sense to write a separate operations and procedures manual that you keep in-house and provide a summary of the key points in your formal business plan. Your written plan should show what distinguishes your practice from others. Emphasize your cost and time efficiency, the problems that you have overcome, and what gives you a competitive advantage.

(a) What to Include in the Operations Section

Limit the topics that you write in your Operations Section to the issues that are essential to your success, those that distinguish you from your competitors, and those that show how you overcome a distinct weakness in similar firms. But, before you write your Operations section, think about every aspect of your daily practice that you will need to address.

Facilities

Your Location

You have to work somewhere, and location can be the most critical factor in your success. Clients expect the location and look of a law practice to reflect the type and quality of service that they will receive. While you might do most of
your work at the kitchen table, you will need to have a special place to meet clients that gives them a sense of confidence. Think carefully about transportation, parking, your proximity to suppliers and support services, and the distance between you and your competitors.

Once you have found the right location, the way your actual office looks and functions is important as well. Is it accessible? Well lit? Clean? Attractively and comfortably furnished?

After you’ve found the right neighborhood, a great building, and just the right office space, obtaining the right lease is critical. If you are lucky, you might find a long-term, low-rent lease in a desirable area. In a new lease, you will need to negotiate a number of details such as free rent during the first few months before you open, ownership of leasehold improvements, and the amount of notice required before renewal and termination. Keep in mind that you should re-evaluate your location about every two years to make sure that it still meets your needs. A good measure for determining how much space you will need is to assume that three lawyers plus conference, kitchen and reception requires about 2500 square feet with 600-700 additional square feet for each attorney. Also keep in mind that it takes about six months to find a new location and to re-locate. Every time you move, your clients will have to re-adjust and you may experience a downturn in collections for several months after each move. Therefore, it makes good business sense to choose an initial location that will suit you for more than just a year or two.

Geography

Describe the neighborhood and the type of facility. Is this shared space in a downtown setting, or an office space in your home? List the square footage and how it is allocated (work area, conference space, secretarial, library, etc.) Include the access to parking, transportation, courts, and key support services (printing, messenger, etc.)

Lease

Before you write this section of your Business Plan, be sure you understand the key lease terms and how they affect you. Know the length and the term of the lease. Learn how the rent is structured, such as straight rent, rent plus a percentage of sales, or a “triple net” lease. Watch out for CAM charges (common area and maintenance), required general liability insurance, annual utility assessments, special maintenance and repair assessments, cleaning fees, extra parking fees, signage charges, after-hours utility access, security service charges, and extra fees for waste disposal. Certain landlords have restrictions on hours of op-
eration. Can you sublet? If you are planning to expand during the term of your lease, subleasing to other lawyers can be a good way to put the extra space to use before you need it. Be specific in the sublease agreement so you don’t get stuck.

Landlords will often make concessions on many lease terms, so ask for them. Liability is a key issue in negotiating a lease. So, be sure that you understand your landlord’s insurance requirements, and that you scrutinize the liability provisions in the lease. Also avoid a personal guarantee if at all possible. If you must sign a guarantee limit your liability to the actual leasing costs – or be credited with each month’s paid rent against the guarantee amount. Do not ever agree to a landlord’s lien.

Worksheet #14 asks the key questions that you will need to consider as you choose a location, and Worksheet #15 helps you establish your priorities for location, size, and the aspects of your office location.

Improvements

Explain the improvements that you will need to make to make the space work for you. It is very rare that a business can simply move into a space without making improvements. You may have to construct walls, install bathrooms, add electrical and communications services and wiring, and finish floors. State whether you or the landlord will pay for the improvements. Use Worksheet #16 to establish the leasehold improvements you will need to make.

Utilities/Maintenance

Be sure to calculate and list the costs for electricity, gas, and water. Who is responsible for maintaining the HVAC system? Don’t forget the costs of janitorial, trash-removal and snow plowing. Outline the carrying costs for your communications systems as well.

Key Factors

In this section, you should describe those factors about your facilities that you believe will have the greatest influence on your success. Do you have really favorable lease terms? Are you located in a prime market area? Is your address particularly prestigious? This is the time to emphasize the positive.

Production

Yes, a law firm has a production process. Every letter, memorandum, brief, or application must be “produced.” Take a look at each stage in the current prepara-
tion of your products. How will you improve on that production process in your new practice?

Think about how you use your work force now. Are you a lone wolf or do you use a team approach? Will it make sense to create an internship program to support your research and memorandum process rather than to hire a paralegal? Can you use a document production house such as CopyCop or do you need to hire a secretary? What other tasks can you outsource? How will you manage your discovery process? Now is the time to establish your quality standards. Poor quality can be the death of any practice. Whether you will work alone or in a group of 25, standardize your quality requirements before you begin.

**Staffing**

Employment costs can be the biggest expenses of a law practice because everything we do is labor intensive. Be careful not to underestimate your staffing needs, and be sure to reflect the true costs of maintaining that staff in your financial section.

How many people do you need? Even if you are starting a sole practice, give careful consideration to whether you will be able to manage all of the aspects of your practice on your own. Be hard on yourself. If your checkbook has not been balanced since your first day of college, it is folly to expect that you will be able to manage your practice’s finances and client funds responsibilities on your own. If you still have not figured out “mail merge” then it is unlikely that you’ll be able to stay on top of your client communications.

Take time to look at other law practices and see how they handle their staffing needs then, plan your staffing to meet your needs, reflect your strengths, and support your weaknesses. Use Worksheet # 17 to consolidate your plans and establish a staffing budget.

**Equipment and Furniture**

If clients will be coming to your office, its appearance is a key component in the formation of your client’s opinion about you. The appearance of your office should reflect the essence of your practice. Selecting the right equipment and furniture is a critical part of establishing your practice’s identity and in building your clients’ confidence in your services. As you did with your sales and advertising section, be careful as you establish your budget for your equipment and furniture. Shop carefully, and shop wisely. Use Worksheet #18 as a Furniture and Equipment Schedule. Be sure to list all of the furniture and equipment that you will need and specify the payment or lease obligations.
Supplies

Pens, pencils, paper clips, envelopes, paper towels, copy paper, the list seems endless. The last thing you need is to be spending your free time wandering the aisles of Staples trying to find the right kind of window envelope. Establish a solid supply list, and shop for suppliers who meet your needs before you start. Allocate time to inventory your supplies and build-in a regular procedure for re-ordering before you run out.

Also consider the other suppliers that you will need. Do you have a relationship with a stenographer service? Do you need one? Who will do your title examinations? Asset searches?

Take the time to find suppliers who will meet your needs and who will fit your budget. Be careful to avoid shopping solely based on price. You need to work with suppliers who understand your needs and who want to make the most of your business. Take time to make a complete supplier list using Worksheet #19 and determine which supplier will meet your needs for each product.

Customer Service

Will you call your clients back the same day that they call you, or will you call within two days? How often will you initiate contact with your clients during a case? How will your staff answer the telephone? Will you accept weekend appointments? All of these are customer service questions, and your answer to these questions and others will determine your practice’s particular customer service style. It is best to establish your customer service policies before you begin. Otherwise the inconsistencies that your clients experience may well drive them away.

Research and Development

Yes, law practices need research and development too. Just like real sharks, law practices must move forward or they will die. You must stay abreast of changes in the law and ahead of changes in your client base. When you write your Operations Section take time to plan how every member of your practice will maintain a solid awareness of developments and changes in the law and how your practice will adapt to those changes and the effects they have on your clients.

Other questions for research and development include:

- What can you do to improve or update the legal services that you offer?
What additional services can you provide to support your main focus?

- How can you penetrate new markets?

- How will you maintain your knowledge of developments in the law?

**Technology Plan**

Once upon a time, law office technology consisted of a typewriter and some carbon paper. Today, technology is the heart of effective office operations. Effective technology planning is not an option – it is a requirement. Begin with a technology assessment.

That is, figure out what you need and why you need it. If you are going to work with other attorneys, then they should be involved in the assessment process as well. And, your assessment process should follow a consistent pattern, that way you may find that one piece of information leads to other, critical, information. You do not necessarily need to hire a consultant to conduct your Technology Assessment, but if you know absolutely nothing about technology, or if you know just enough to be dangerous, then hiring an outsider is a good idea. The consultant’s job in that case is to collect the information and then present it along with recommendations and the costs.

To make a valuable technology assessment, think about every aspect of the technology that your practice will use. This should include hardware, computer software, networking, communications and staffing. Once you have made your assessment, you can move to developing your practice’s strategic technology plan.

Set Up a Table or a Spreadsheet for Your Assessment.

**The first page—Software Assessment**

Divide the software that your practice will need into these categories:

<table>
<thead>
<tr>
<th>Desktop Operating System(s)</th>
<th>Core Software Applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accounting Applications</td>
<td>Substantive Software Applications</td>
</tr>
<tr>
<td>Legal Research Applications</td>
<td>Utility Applications</td>
</tr>
</tbody>
</table>

A-89
If you are going to be working with others, keep in mind the criteria you have for standardization and what skill sets people will need to operate the software that you choose. If you are hoping to use some software that you already have, make a table that shows the software that you have and its licensing status. Indicate whether the software you have will run from a desktop or a server.

The second page— Hardware Assessment.

Start with servers and consider CPU capacity & speed, RAM, hard drives and RAID configurations, backup configurations (separate tape backups or an "all in one" solution) and backup strategies (daily complete backups, incremental or differential backups).

The third page— Computers, Notebooks, Printers

Knowing what you need for desktop and notebook computers is essential to your technology plan. This page of your table or spreadsheet should show your needs for CPU & speed, RAM, Hard Drive, and Monitor and Size. Establish your minimum configuration and be sure that the minimum configuration will be sufficient for your practice's needs. Watch out for the impulse to use notebook computers. While they can be convenient, there are also disadvantages. Using notebook computers means that you will need to learn how to make file transfers to and from your server, how to dial in to the server from remote locations, and how to access the Internet from outside the office. The biggest concern about using a notebook computer is the chance that it will be lost or stolen. What will you do if your notebook is stolen along with every single client's confidential information?

The fourth page— the Networking Assessment

Really, making a network assessment isn’t that hard. The important things are what you want to see on your desk, how the information gets there, how the information is sent elsewhere, and how fast the system works. You also want to make sure that your network doesn’t go down when you need it most. A stable network is one that hardly ever goes down and that has maintenance performed at scheduled, not unexpected, times. Consider how your server will be set up and connected. Think about how you want the cables and wires to run, what hubs you will need, and what switches will be appropriate. You may well be able to use a hub that just routes the signal on the computer network – a passive hub. If you are going to work with a larger group of people, you may need a managed hub.

The fifth page— Communications Assessment

Communications is part of your technology plan, so you’ll want to give thorough consideration to the various communications techniques and tools that you
will need for email, remote dial-in, and your Internet connection at the very least. Don’t forget to think about your firewall needs. Having access to your practice’s computer when you are out of the office can be a tremendous benefit. Finally, don’t forget to plan for virus protection.

**Think about Training**

Assess your own skills, and everyone else’s then make a plan for obtaining the training that each person needs so that your technology can do its best work for you.

**Finally—Think about Technology Staffing**

Can you, or must you, handle all of your practice’s technology issues in addition to everything else, or should you hire someone? If your new practice will have more than twenty users, you should have one full time IT staff person. Otherwise, make sure you plan for reliable consultants who can provide the service that you need when you need it.

When you’ve completed your assessment of your technology needs, you can begin to develop your technology plan. Your technology plan will allow you to plan how your technology will contribute to your profitability, and it will establish a budget and an implementation schedule. Planning your technology in advance will prevent you from spending extra money when you don’t have to.

As you make your technology plan, keep in mind that there are more costs to technology than just the price you pay from the vendor. There are plenty of hidden costs that include installation, maintenance, training, support and replacement parts, just to name a few. You should also keep in mind how your technology will help you to be more productive and efficient, and that there is a Return On Investment for your technology purchases.

Build your technology plan by answering these questions:

<table>
<thead>
<tr>
<th>Cost</th>
<th>Benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Will the technology require me to hire IT staff?</td>
<td>How will the technology help me serve my clients?</td>
</tr>
<tr>
<td>How much time will my staff (or I) spend maintaining and supporting the technology?</td>
<td>How will the technology improve productivity?</td>
</tr>
<tr>
<td>Are there continuing license fees or support fees that I will have to pay?</td>
<td>Will this hardware reduce my long-term hardware costs?</td>
</tr>
</tbody>
</table>
### Cost Benefit

<table>
<thead>
<tr>
<th>Cost</th>
<th>Benefit</th>
</tr>
</thead>
<tbody>
<tr>
<td>What kind of ongoing training will I need?</td>
<td>Will this technology (for example LCD monitors) reduce my utility costs?</td>
</tr>
<tr>
<td>What kind of bandwidth do I need and how much will it cost?</td>
<td></td>
</tr>
<tr>
<td>How much will I have to spend on hardware?</td>
<td></td>
</tr>
<tr>
<td>How much will I have to spend on software?</td>
<td></td>
</tr>
<tr>
<td>Should we consider shareware?</td>
<td></td>
</tr>
<tr>
<td>What kind of utility costs will there be? Will I have to upgrade the HVAC system, the electrical panel, or will we need new outlets?</td>
<td></td>
</tr>
<tr>
<td>How often will we have to replace things?</td>
<td></td>
</tr>
</tbody>
</table>

Once you have answered these questions in light of your initial tech assessment, you are ready to build your shopping list and incorporate your technology budget into your financial projections.

### Financial Control

How will your practice handle money? Many law firms run into trouble simply because they do not send out bills on time. Others waste countless dollars on processing charges, late fees, and additional interest because they don’t have a standard procedure for paying their bills.

Set up your financial information procedures now. Some key procedures include:

- A conflict of interest verification system;
- Time Standards and statutes of limitations monitoring;
- A fee schedule;
- Fee agreements;
- Billing procedures and schedules;
- Delinquent account procedures;
• Bookkeeping software;
• Tax filing processes;
• IOLTA account;
• Client funds isolation and security; and,
• Safeguards against theft.

Use Worksheet #20 to outline your Financial Control Section.

Disaster Planning

Your practice will face emergencies. Anything can happen from something small like a power surge to a fire or natural disaster that wipes out your entire office. Now is the time to plan for the worst. If you plan to practice alone, it is critical to arrange for another attorney to take care of your clients if you cannot. Make a written agreement with another attorney who you trust and respect to handle your clients and your cases if you are incapacitated. Make plans so that your bills will be paid, checks will be deposited, and payroll will go out if you cannot do it.

Make a plan to keep your data and client information safe. Set up data backups and offsite storage. Set up procedures so that you can stay in touch with your clients, your co-workers, and your employees during emergencies. And, make sure that you are more than adequately insured.

There are several critical types of insurance, in addition to health insurance, that you should consider for your law practice. They are, lawyer malpractice insurance, disability insurance, workers compensation insurance, general liability insurance, and umbrella coverage.

Malpractice Coverage

This may shock you: there is no requirement in Massachusetts that lawyers have malpractice insurance coverage. However, you are required to disclose whether or not you have malpractice insurance when you register with the Board of Bar Overseers and the information you provide is shown when an individual searches for your registration information on the Board of Bar Overseers website.

If you are starting a solo practice, your initial response to hearing the cost of a malpractice insurance premium might cause you to considering practicing without it. Moreover, depending on your areas of practice, such as Intellectual Property, you may have to search a bit to find a company that will cover you. However, it is extremely risky to practice without this means of protecting your assets, your livelihood, and yourself.
Disability Insurance

As you are building your Business Plan, consider what you will do if you become disabled and cannot work for a prolonged period of time. Frequently, the safest course of action is to purchase disability insurance. While no disability policy will replace all of your income for the entire length of your disability, it can supplement up to 80% of your income for a set number of years or until you reach retirement age. Shop carefully for your disability policy because they vary greatly. And, keep in mind that the plans with lower premiums may not be worth much at all because they have such strict definitions of disability that it can be virtually impossible to collect any benefits.

Workers’ Compensation Insurance

If you have employees, Massachusetts requires you to carry Workers Compensation insurance, which will provide medical and disability coverage for any employee who suffers a work related injury or illness whether or not it was caused by employer negligence.

General Liability Insurance Package Policy

Often referred to as a Business Owners Policy (BOP), a General Liability package policy protects your company in the event that a client is injured on your premises or if you or one of your employees injures someone or damages property at a client’s location. The General Liability coverage on a business liability insurance policy also meets your landlord’s requirement that you carry business premises liability insurance.

Umbrella Liability Insurance

Umbrella Liability, otherwise known as Excess Liability, insurance will give you coverage for any claims that exceed the amount of your General Liability policy. You may also wish to use your Umbrella Liability policy to add coverage on a commercial auto policy or the employer’s liability coverage on your Worker’s Compensation policy.

Summary: Making a detailed analysis of the myriad aspects of running your practice on a daily basis now will pay-off every day from the first day of your new practice. Now is the time to find ways to make your practice efficient, strong, and ready-for-anything.
Management

The Commander stands for the virtues of wisdom, sincerity, benevolence, courage and strictness. Sun-Tzu

The Management Structure

You must have a strong management structure if your practice is to succeed. The type of management you choose will vary with the type of practice that you establish. However, the management of any practice has three distinct aspects. They are planning, organizing, and controlling the activities that will bring your practice to its goals. Even if you are a firm of one, you still must (1) plan, (2) organize and (3) control your activities every day.

Planning: It is so easy to get completely wrapped up in the “lawyer-ing” required in your practice that you find yourself running entirely on impulse with no supplies in the closet, a stack of un-deposited checks on your desk, and a pile of bills marked “past due!” You must take time, scheduled time, structured time, to establish guidelines and to set specific measurable goals and priorities. Evaluate all of your obligations and goals. Note whether you are on schedule, ahead of schedule, or behind schedule. Then adjust your goals and your priorities.

Organizing: You’ve established your goals and your priorities. Now figure out what activities must be completed and when they must be completed so that you will reach your goals according to the priorities you set. Whether you are a practice of one, or you have a staff of twenty, you must motivate everyone to reach the practice’s goals. To be effective, reduce your plans to a series of activities and develop a coordinated schedule to keep your practice on track.

Controlling: Do not confuse your responsibility to control the events in your practice with controlling your employees. An effective manager uses coaching techniques to encourage the staff to perform according to expectations and schedule. Nevertheless, someone must be ultimately responsible for ensuring that deadlines are met and that the clients are happy. According to Dwight D. Eisenhower, “[L]eadership is the art of getting someone else to do something you want done because he wants to do it.”

To establish your effective management structure:

First: Establish Your Management Objectives: Clearly define the objective for management responsibility in your practice. These usually break down into four key categories: Marketing and Sales, Finance, Administration and IT, and Operations (the actual practice of law.)
Second: Describe Your Management Team: (don’t forget operations and finance and marketing). Your management team should be designed to ensure that the Firm performs the required planning, organizing, and controlling of all functions, such as marketing, operations, or finance that have been evaluated as necessary from the decisions made to this point in the process. Of course, your management team might be very small – it might just be you. Even so, take some time to describe the skills you have and that you will develop so that you can be effective in your practice.

Third: Describe Management Responsibilities: Be clear as you and the other managers determine exactly who is responsible for which outcomes.

Fourth: Define Necessary Management Qualifications: If you will be working with others who have management responsibilities, determine exactly which skills are necessary. Then, select the individuals who have the necessary skills to help you reach your goals.

Fifth: Management Compensation: These figures will become part of your financial estimates. Before you decide how and what types of compensation each manager will receive, do some research to determine what compensation managers in similar positions receive and how that compensation is structured. Then determine how you will pay your managers so that you have the best opportunity to attract the people with the skills that your practice needs.

Now: Make Your Organizational Chart: Your organization chart should show the various areas of management responsibility and identify the people who have management responsibility and those who report to them. Even if you are the only attorney in your practice and you hire a part-time secretary and a student intern, you should make a chart, describe everyone’s responsibilities, and review it with your staff frequently to ensure that the appropriate person has the right responsibilities. Complete Worksheet #21 as your Organizational Chart.

Development—Progress Markers and Your Exit Plan

So, if your business plan is your road map, what good is it if it doesn’t show you the landmarks along the way? How will you know when to turn? How will you know when you’ve reached your destination? Like a good road map, a good business plan sets out various progress markers so that you know you are on track.

Now is the time to set up the specific means you will use to judge the progress of your practice. If you are looking for financing, or if you are financing yourself, this is the time to acknowledge the risks that you face. Experienced lenders expect to see acknowledgement of the risks that are measured against clearly established goals.
You and your investors should understand that progress takes time and risk is a part of running any business—especially a law practice.

Start with your Goals.

Review the Worksheets you completed in Chapter One. It is important that the goals that you establish for your practice are consistent with the goals you have for yourself. Otherwise, the conflicts between your personal goals and your practice goals will make success on either level impossible. If you intend to practice on your own, and it is important for you to have plenty of time with your family and to take several weeks of vacation each year, it is not realistic to expect to have annual billings of 3000 hours.

Take some time to establish a clear vision of what you want your practice to be. Then, put that vision into words. It might be very specific like “Collections of $400,000 by the end of year two.” Or it might be more general, such as “I’d like to be known for providing caring and reliable legal services.” The vision that you have should form the basis for your progress markers so that you can grow into your vision. Think about which of these visions you have for your practice and for yourself:

- Niche Specialist: You want to establish a small, profitable practice that does only one thing and does it well.
- Leader in the Profession: You want your name to be well known and respected and you want to dominate your competitors in collections.
- Master of Opportunity: You want to make the most of legal trends to establish quick rewards.
- Steady Performer: You want to maintain a stable profit and earn a steady, comfortable income for yourself.

How will you reach your goals? Simply working hard and closing each case that comes your way will not be sufficient to provide financial success. As the practice manager—even if you are managing a practice of one—you must focus on using the appropriate means to help your reach your goals. Some of the strategies you can use are:

- Penetrate the Market
- Promote Yourself
• Develop A Repeat Client Base
• Expand Your Practice
• Focus Your Services
• Diversify

Once you've determined what strategies you will use, set your priorities. If you decide that your key strategies are to promote yourself and develop a repeat client base, then a priority for the use of your time and money will be marketing. If you decide that you want to diversify by purchasing or merging with another small practice, your priority will be to accumulate resources so that you can make the purchase. While you will not include the list of priorities in your final business plan, establishing them and maintaining them will be a critical tool for your practice. Knowing what is most important is critical to helping you make wise business decisions.

Now use Worksheet #22 to put your personal vision and practice goals all together.

What Have You Done So Far?

While you might be starting in practice for the very first time, but you may already have an impressive history. By relating your past history, you will inspire your reader's confidence in your ability to set and reach goals in your law practice. You will also show the commitment you've made to this new practice by writing down the goals that you met already in setting up your new practice.

Record what you've achieved so far on Worksheet #23. Consider adding these accomplishments to your Executive Summary.

How Will You Mark Your Progress?

Running a law practice is an all-consuming effort and it is easy to lose sight of your accomplishments when you're facing discovery deadlines and weekly payroll obligations. Making a progress list will remind you that you are making progress, and it will help you remember what else it is you need to do if you are to reach your long-term goals.

Your progress list should be made up of the specific things you intend to accomplish and when you expect to accomplish them. Be specific. Instead of writing "bring in enough money to pay my bills as soon as possible," write, "I will collect $237,000 by the end of year 2."
Be sure to address the risks that your practice faces in your Business Plan. If you are seeking financing, the lender will want to see that you’ve made a realistic assessment of the risks you face. If you are financing yourself, it is important to be aware of the pitfalls that you face and to incorporate them into your written plan.

Worksheet # 24 will help you establish a progress list and to identify your risk factors.

Exit Plan

Every race has a finish line. Every business has a life span. For most new entrepreneurs, not only those who are embarking on their first law practice, planning an end to the business before it starts seems very strange indeed. However, it is very rare today that anyone holds only one job a lifetime. Even with your own law practice you might decide to change your career path at some point – perhaps by going into teaching, or becoming in-house counsel. Finally, you may well maintain your own law practice until you retire. Therefore, you need to figure out how you will leave the business. You need to know how you will liquidate it.

Make your ultimate goals just as clear in your own mind as your first year’s goals. If you are smart, your ultimate goals will be the ones that truly guide the operation of your practice. For example, if you hope to move to an in-house counsel position, you must model your own practice areas to make your skills attractive to a future employer. If you are controlled only by your short-term goals, you may find yourself forever “putting out fires” rather than managing a successful practice.

Here’s a look at some of the more popular exit strategies:

Three Exit Approaches for Long-Term Involvement

- **Run It To The End**: This can work especially well in small practices or solo operations. In the years before you plan to exit, reduce the number of long-term clients you serve, increase your personal salary and pay yourself bonuses. Make sure you are on track to settle any remaining cases, resolve remaining debt, and then you can simply close the doors and liquidate any remaining assets.

- **Pass It To A Family Member**: If you have a child or other relative who practices law, you can transfer the practice as you gradually reduce your own involvement.
- **Sell Out:** This works particularly well in law practices. When you are ready to retire, you can sell your equity to the existing partners, or to a new employee who is eligible for partnership. You leave the firm cleanly, plus you gain the earnings from the sale.

**Two Exit Approaches for Short-Term Involvement**

- **Merge:** Sometimes, two practices can create more value as one firm. If you believe such an opportunity exists for your firm, then a merger may be a good exit strategy. If you're looking to leave entirely, then the merger would likely call for the head of the other involved practice to stay on. If you don't want to relinquish all involvement, consider staying on in an advisory, or of counsel, role.

- **Sell Out:** Selling outright can also allow for an easy exit. If you wish, you can take the money from the sale and sever yourself from the practice. You may also negotiate for equity in the buying firm, allowing you to earn dividends afterwards—it clearly is in your interest to ensure your firm is a good fit for the buyer and therefore more likely to prosper.

The way you set up and manage your practice will have an effect on the types of exit strategies that are available to you. So, take some time to think about these questions:

- How will you finance your practice? When you plan your exit you must allow for the payoff or transfer of your practice’s debt.

- What kind of market do you expect for your type of practice? If your market is very narrow or specialized, it may be difficult to find a complimentary firm for a merger.

- How big does your practice need to be to maximize its value? A practice that is operating at peak efficiency is a better prospect for an outright sale or a merger.

- Do you expect to stay on for a period of time? If so, you will need to consider the personalities of your successors.

- If you plan to pass the practice to a family member or younger associate, who will that be? Does the successor you have in mind have the right personality to run the practice that you worked so hard to build?
• How will you train your successor? Proper training increases your successor’s chances for prosperity.

• Will your successor be ready to take over when you are ready to leave? The worst thing that can happen is that your successor will be unable to make the most of the opportunity you provided.

• When will you need to begin the transition?

Your answers to those questions will affect some of the major decisions that you will make at the beginning of your practice including:

• Your business entity;
• Tax issues; and
• The source, type, and amount of capital that you will need.

Exit Planning for your law practice has some particular aspects that you must address. As you plan, be sure to consult the Rules of Professional Conduct.

Rule 1.16 (b) Change Cannot Have a Material Adverse Effect on Your Clients

You must have a comprehensive plan for an orderly transition and you must provide adequate notice to your clients. This is particularly challenging for sole practitioners and attorneys who merely share space with other lawyers.

First: Identify all of your client matters. Make a chart and be sure to include all of the critical dates and performance requirements.

Second: Determine how much time is necessary so that each client has enough notice to obtain new counsel. Make sure that all of your clients’ critical deadlines are covered during the transition period.

Third: Notify your clients. In writing by certified and first class mail as well as in person. The written notice must state clearly that the client is entitled to select his own new counsel and that the client’s file will be delivered to the client’s successor attorney, or that the file will be made available to the client. The type of notice that is usually used states that the files will be available in the lawyer’s office, or at another location where they will be readily available to the client until they go to a storage facility. If any files are not delivered to successor counsel or to the client, then they must be retained or discarded as permitted and where permitted.
Fourth: Obtain leave to withdraw from any courts and tribunals that are involved.


Rule 1.15 (a) Account For and Return Unearned Retainers or Advances

When you return or deliver a file to your former client, you must also account for any unearned retainers or advances, or other funds that the client paid to you. You also must return any other funds that you are holding on behalf of the client. You may return the funds directly to the client or pay the funds as the client directs. You will also have to make alternative arrangements for any escrow funds that you are holding for your clients or third persons. Be careful to account precisely and, it is best practice to review that accounting with the client and obtain the client’s approval of the final payment or disbursements. If you cannot locate the client, you may have to pay the funds into court for them or to the Commonwealth under the laws of escheat. You must retain records of all of these transactions for six years after the final distribution and termination of the representation.

Maintain Confidentiality

A lawyer must be careful to keep client information confidential throughout this process. Files may not be delivered to anyone but the client without the client’s consent. Unless the client has given consent to the lawyer to disclose information to prospective new counsel, the exiting lawyer cannot provide another lawyer or law firm selected by the exiting lawyer with information about the matter or permit access to the file. If files are to be left with anyone other than the lawyer’s staff to be held for delivery to clients, care must be taken that the files are held in a secure manner so that persons other than the lawyer’s staff do not have access to confidential client information.

Mind Your Insurance

While Massachusetts does not require attorneys to carry professional liability insurance, having it is a smart business decision. Be sure to consult with a competent broker and even your own attorney, before deciding whether and how to extend your professional liability coverage after you leave your practice.

Your professional liability insurance is established on a “claims made” basis. A “claims-made” policy requires that the claim be presented to the insurance company during the policy period. So, if you let your policy expire, you will not have any coverage if a former client sues you. Often, the best decision for your former clients and for yourself is to purchase “tail” coverage to protect against claims not known about at the end of the policy period.
Notify the BBO

Before you head to your new office, you must notify the Board of Bar Overseers of your new address. If you are leaving the practice of law, be sure that you notify the BBO of your new address and that you request inactive status. The last thing that you want is to find that you've been administratively suspended under S.J.C. Rule 4:02 because you failed to file an annual registration statement. See, R. Geller and S. Straus Weissberg, “Dues and Don’ts”, MBA Lawyers Journal, Jan. 2002. This information can also be used by the Board to help clients get in touch with you in certain situations.

If You Merge or Sell Your Practice There Are Special Requirements

Rule 1.17(b) allows you to sell your practice to another lawyer or law firm. However, you must sell the entire practice. Of course, you must notify all of your clients of the sale and that notice must include any changes in the terms of the fee agreement. The same rules regarding the client’s right to retain other counsel and to take possession of the file apply to the sale of your practice as to the close of your practice. However, under Rule 1.17(c), if the client does not take any action, object to the transfer, or take possession of the file within ninety days of receipt of the notice, then assent to the transfer of the file to the new practice is presumed. You must also follow all of the rules regarding transfer of funds, confidentiality, and protection of the client’s interest.

Of course, the sale or transfer of your practice affects work in progress especially when the fee for services due to the departing attorney cannot be determined at the end of the representation. The most common situation where this applies is when the work is being done on a contingency fee basis.

To avoid a fee dispute between the two lawyers after the funds have been collected, the client, the departing attorney, and the new attorney should agree— in writing— exactly how any fees that are collected and become due will be divided between the two lawyers.

When you pay careful attention to the Rules of Professional Conduct and the requirements of the Board of Bar Overseers, you help ensure that you can move on to your next life adventure without having the worst details of your old practice coming back to haunt you.

Now that you’ve focused your goals, defined your progress markers and planned a graceful exit, use Worksheet #25 to summarize your development plan.
Summary

Use the Development Plan Summary to write your Development Plan now. Use your Progress Markers Chart to give yourself a clear timetable for your growth and to establish a set of objective standards for measuring your progress. Describe your risks so that you can avoid critical mistakes and plan to overcome obstacles. Explain your exit plan to help you and those who read your plan focus on reaching the ultimate goal.

§ 6 THE FIFTH SECTION—FINANCIAL ESTIMATES

Oh Dear. Numbers. Let's face it. If you were good at numbers you would have become a Plastic Surgeon and you'd be lifting and tucking the entire Baby Boom for cash up front rather than struggling along in the practice of law. But, really, numbers are no big deal, nor should they be the primary motivation for starting your own law practice. According to Donald Trump, “Money was never a big motivation for me, except as a way to keep score. The real excitement is playing the game.” So, think of your financial estimates, and the accounting that you will do during the life of your practice, as simply a way of keeping score. The score reflects the business decisions that you make as you play the game.

Keeping score is why your financial estimates play such a key function in your business plan. They show whether your plan for your practice. Resist the urge to “get the financials over with” and write them first. It might seem easier to make a realistic financial plan and then fit the nature and operation of your firm to the financials. Unfortunately, practices designed that way usually do not work. You need to have a thorough understanding of all of the other elements of your planned practice before you can apply the numbers. However, once you have worked out your financials, you may find that you need to go back and modify other aspects of your plan so that you can operate profitably.

As you have used the Worksheets to develop your Business Plan, you have developed many of the key components of your financial estimates, and you will refer back to those worksheets as you work your way through this chapter.

Your financial statements contain four elements. The elements are:

1. The balance sheet. This shows what your practice is worth.
2. The income statement will show whether your practice is profitable.
3. The cash flow statement will illustrate whether your income is sufficient to pay your bills.

4. The sources and uses statement shows where you will obtain the money that you need and how you will allocate it.

5. The assumptions sheet explains the hypothetical basics that you used to build your forecasts.

Since you are embarking on a new adventure, your financial statements will be “pro forma” financial statements. In other words your financial statements are going to be based on a number of hypothetical situations and they will contain a number of assessments. http://www.investorwords.com/3889/pro_forma.html. If you are looking for a loan, or if you are hoping to attract partners who will invest in the venture be sure to label your figures as pro forma or as estimates.

Your financial estimates should emphasize your firm’s objectives (for example, is your firm profit oriented, or are you focused on limiting risk?) They should also serve to measure your firm’s performance and help your reach your goals for costs, profit ratios, timeliness, and even the quality of work that you do.

There are six key guidelines for developing your financial statements. They are:

1. Use a good accountant.

2. Choose the right accounting method. You have a choice of using a cash basis or an accrual bases. Usually a cash basis is the best choice for a small law practice.

3. Stick to the standards. Use standard forms and software. Don’t make things up.

4. Be conservative. Making the most optimistic projections for income and the most advantageous estimates for expenditures will just set you up for failure. Almost everyone makes less during their first years in practice than they hope, and almost everyone spends more during the first years than they expect.

5. Be honest. You will have to justify your numbers to someone at some time – if only to yourself.

6. Be consistent. Use the same assumptions and decisions for all of your financial estimates. Otherwise the estimates will be of no help to anyone. Develop your financial estimates one step at a time.
Step One: The Forecasted Balance Sheet - This shows how much your practice is worth. A balance sheet shows your assets, your liabilities and your net worth. If you have not started your practice yet, it will all be projected, so be sure to use solid reasoning. Use Worksheet #26 to make your pro forma Balance sheet.

Step Two: Create a forecasted income statement. Your income statement is also called a Profit and Loss Statement and it shows how much money your practice will make after you account for all of your expenses. Unlike the balance sheet, it does not show what your company is worth. And, it does not show how money flows in and out of your practice as a cash flow statement does.

You build your income statement from the top down. Start by recording your projected collections. Then, line by line, deduct your practice’s expenses. Be careful to include all of your costs such as, salaries, employee benefits, office supplies, marketing, travel, meals and entertainment, insurance, maintenance, communications costs, filing fees, annual license fees, and your own professional services such as marketing consultants and accountants. In addition, you should account for depreciation and amortization as expenses.

If you have ever completed a Schedule C with your annual tax return, the income sheet will be very familiar to you.

Use Worksheet #27 to develop your first year’s income statement. Since this is a first year’s statement, document your income and expenses on a monthly basis. Then move to a quarterly basis for the next two years, and to an annual basis after five years.

Step Three: Plan Your Cash Flow - This is your budget.

Whether you read the U.S. Business Association’s statistics, or USA Today, you are probably very well aware that only about 2/3 of small businesses that start survive the first two years and that less than half survive beyond the first five years. The biggest contributor to those failures is simply the lack of cash flow. In other words, the businesses do not bring in enough money to cover their bills as they come due. Strangely enough, your business might be losing money but still worth a great deal if it owns valuable property. And, you might be profitable but on the brink of closing your doors because your income is erratic while your accounts payable are due every thirty days.

To increase your chances of surviving well beyond five years in your own practice, you must establish a solid estimated cash flow statement before you start, then maintain accurate cash flow records and review them frequently throughout the life of your practice. That way, you will be able to structure your practice so that the money is collected in time to pay the bills that are due.
Your practice’s cash flow statement is actually your practice’s budget. It shows what you expect to collect and when you expect to collect it. It also shows what you must spend to pay bills and debts, and when they are due. Really, creating a pro forma cash flow statement is not that difficult even if you have never run a business before. If you had a paper route to earn spending money when you were a kid, or if you saved your allowance to buy a special toy, you have experience developing a budget. Use those skills, along with Worksheet #28 to build your practice’s pro forma cash flow statement.

**Step Four: Explain Your Sources and Uses of Cash**

You will need money to start your practice. You may need a little money, you may need a lot of money, but you will need money. And, you will need money for different purposes. Before you can identify your sources of cash, you must identify your capital needs. What, indeed, are your capital needs?

First, you will need **working capital**. Working capital is the money you need every month to pay your regular bills. Ordinarily, you should have at least enough money to pay your bills for one full year even if your firm does not collect a single dollar from a case. Working capital is repaid from your ordinary collections.

You may also need **growth capital**. As your practice matures, you may find yourself able to generate revenue and profits but unable to generate enough cash to fund a major acquisitions or an expansion. Growth capital is usually repaid over a short (several year) period. When you apply for growth capital you will be expected to show how the money will be used to increase your business profits and that those profits will be sufficient to re-pay the loan.

**Equity Capital** is otherwise known as stock. Your ability to use stock in a law practice is limited to the confines of the Professional Corporation. However, partnership interests can be used in a similar fashion. Equity capital is used for permanent needs.

Once you’ve identified the types of capital that you need, consider the possible sources of that money. There are three different general sources that are commonly used to finance a law practice.

Sources of Funds

**Owner Financing.** Ask yourself whether you really need additional funds to start your practice or can you simply change the way you manage money that you already have? Are you willing to risk your assets for your new venture? If
you are not willing or able to put your own assets at risk, then look to another source for your start up funds.

**Friends and Family.** It can be much easier and faster, and less expensive to obtain a loan from a friend or a family member, but the emotional costs can be very high. Even one late payment can make your Thanksgiving gathering very uncomfortable. What if your endeavor fails and you cannot repay the loan? Applying for and receiving a traditional loan can be more expensive, time consuming, and difficult, but your family and friends will not be affected by the ups and downs of your business.

**Debt Capital (Financial Institutions).** If you cannot finance the practice yourself, and you decide not to look to friends or family, the next source of financing is a traditional lending institution. The bank or finance company will want to see a completed business plan, but the loan officer will be less interested in your personal exit plan than in the institution’s exit – that is the final repayment of the loan along with the interest and any fees. They want to make sure that the practice will generate sufficient cash flow to ensure timely payments. Be prepared to make a personal guarantee and to provide additional collateral (such as a lien on your house.)

**Uses of Funds**

Once you’ve identified the types of funds you need, and where you will find them, detail how you expect to use those funds. If you are seeking debt capital, your lender will want to know that you have made careful plans for the loans you will receive. Lenders also want to see the other sources that you have for cash and whether you have contributed your own money. Use Worksheet #29 to identify your Capital Needs as well as your sources and uses of funds.

**Step Five: Write down the assumptions that you used.**

Your financial estimates are useless unless they are based on facts and decisions. For example, if you have estimated a certain amount of collections for your first year, you should be able to show that the market will support that amount of business, that you will be able to secure the appropriate percentage of that market, and that you will be able to collect the fees due from the business generated. Make your assumption sheet clear and concise, don’t include detailed descriptions or explanations. Worksheet #30 will help you establish an assumption sheet.

**Summary—** Your financial section will consist mostly of the pro forma financial statement that you created. Those forms are:

1. The balance sheet

A–108
2. The income statement
3. The cash flow statement
4. The sources and uses statement
5. The assumptions

Get professional help when you set up these statements and be sure to establish good financial procedures at the start. Finally, remember that the numbers are your way to keep score, so make a habit of reviewing your scorecard frequently.

§ 7 THE LAST SECTION THAT YOU WRITE, THE FIRST SECTION THAT THE READER SEES—YOUR EXECUTIVE SUMMARY

The first section of your plan is the Executive Summary. The executive summary is the first section of your business plan that will be read by potential lenders. If your executive summary is poorly written, it may be the only part of your business plan that the lender reads. Therefore, be sure to take the time to write a vibrant executive summary that describes the firm, accurately identifies your firm’s stage of development, explains its strategic direction, clearly shows the firm’s market and its marketing plan, discusses the background of the principal attorneys, and defines its revenue and profit expectations. Remember -- the Executive Summary is your only chance to make a superlative first impression. To build an effective Executive Summary, use the following steps:

STEP 1 Brief Identity of Your Practice
STEP 2 State Your Mission
STEP 3 Describe Where You Have Been
STEP 4 Determine Where You Are Now
STEP 5 Outline Where You Are Going
STEP 6 Include Financial Statements

Writing a brief identity of your practice is easy. Just state the basic information, who you are, where you are located, etc. The next step is to tackle the Mission Statement.
How Do I Write A Mission Statement?

In the world of corporate business planning, it seems that the Mission Statement has become larger than life, and virtually useless. Companies spend countless hours developing mission statements that are nothing more than stale strings of bland words that mean nothing.

What is your quest? What is the essence of your desire to start your own law practice? That is your mission statement. Make it strong. Make it loud. Make it clear. Repeat it over and over. Let it be what starts you going in the morning, and what gives you satisfaction at the end of the day.

This is the sentence or two that will tell your clients, your employees, your suppliers, your bankers, and the community what you are all about. Your Mission Statement should be one simple statement in plain English that explains why your law firm exists and what you will accomplish. Your Mission Statement should:

- State your purpose in a way that inspires commitment, innovation, and support;
- Describe what you do;
- Motivate everyone who is connected to your firm;
- Be utterly free of jargon;
- Be easy to understand;
- Be convincing; and,
- Be short enough so that everyone can remember it.

To focus your thoughts before writing your mission statement, use Worksheet #31.

Once you’ve completed the worksheet, resist the urge to turn the process of writing your mission statement into a group effort of mass drudgery and argument. Get comfortable, clear the table, turn off the phone, close your eyes and think.

- Why am I starting this firm?
- What do I want – for myself, my family, for my clients?
- What do I stand for?
- What exactly will I do?
• Why am I different from everyone else?
• Why does my law practice make the community a better place?

Now, open your eyes and write down the essence of your quest. That is your Mission Statement.

If your practice will be breaking new ground, or if you have a particularly impressive background on which you will build your practice, you should consider using a narrative style for your Executive Summary. Your narration gives you the opportunity to convey a sense of excitement to your reader, to show your excitement and enthusiasm – as long as you are careful not to exaggerate.

The narrative Executive Summary focuses primarily on the basic business concept of your practice and its distinctive features rather than giving each basic aspect of your business plan equal attention. It gives you the opportunity to be more personal. You can excite the reader and set the scene for your new practice by focusing on the factors that led you to set out on your own.

Use Worksheet #32 to build a Narrative Executive Summary.

If you are starting your own practice for the first time, or if your practice will be more traditional in nature, consider using a synopsis style for your Executive Summary.

While the synopsis style is less interesting to read than a narrative Executive Summary, it is more straightforward and, if you are looking for financing, it presents your financing needs right up front. When you write a synopsis style Executive Summary, you simply state the conclusion that you drew in each section giving all of the aspects of your Business Plan equal weight.

To Write a Synopsis Style Summary, complete Worksheet 33.

When you have completed both Worksheets, decide which style works best for you and complete your Executive Summary.

Summary

The Executive Summary gives a clear, bold, and compelling condensation of the contents of your business plan. Whether or not you are seeking outside funds, it is often the only part of the Business Plan that an outsider reads. That is why you write it last, but place it first.
Law Practice Business Plan Outline

A. Business Concept
   a. Executive Summary
   b. Nature of the Firm
      i. Basic Business Concept
      ii. Practice Definition
   c. Structure
   d. Areas of Practice
   e. Strategy for Success
B. Prospective Clients
   a. Target Market Description
   b. Competitive Analysis
   c. Sales and Advertising Plan
C. Operations and Finance
   a. Operations
      i. Facilities
      ii. Key Factors
      iii. Staffing
   b. Technology
   c. Management
   d. Development, Progress Markers and Exit Plan
   e. Finance
      i. Balance Sheet
      ii. Income Sheet
      iii. Cash Flow
      iv. Sources and Uses of Funds
      v. Assumptions
D. Appendix
# Worksheets

## Worksheet #1—Is This for You?

Use this worksheet to assess your risks.

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Why did you go to law school?</td>
<td></td>
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<tr>
<td>What field of law interests you the most?</td>
<td></td>
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<tr>
<td>What do you like most about your personal life?</td>
<td></td>
</tr>
<tr>
<td>What do you like least about your personal life?</td>
<td></td>
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<tr>
<td>If you have been employed, think about:</td>
<td></td>
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<tr>
<td>What do you like best about your work life?</td>
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<tr>
<td>What do you like least about your work life?</td>
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<tr>
<td>If you have held leadership positions in the past, think about:</td>
<td></td>
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<tr>
<td>Do you like being a leader?</td>
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<tr>
<td>What do you like most about being a leader?</td>
<td></td>
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<tr>
<td>What do you like least about being a leader?</td>
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<tr>
<td>If you have not held a leadership position, think about:</td>
<td></td>
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<tr>
<td>Are you a risk taker?</td>
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<tr>
<td>Do you enjoy having responsibility?</td>
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</tbody>
</table>
Describe your ideal work life five years from now.

Describe your ideal personal life five years from now.

How has your work life (or school life) affected your family life?

| Good things: |
| Bad things: |

Which has had the greater influence, the good things or the bad things?

How much money do you want to be making in five years?

When do you plan to retire?

What percentage of your current annual income do you expect to need when you retire?

Is your priority your family or your career?

Do you see yourself more as a businessperson or as a lawyer?

Do you plan to obtain more formal education?

Do you want to run for public office?

Do you plan to become a judge?

How much time off do you need each week?
<table>
<thead>
<tr>
<th>Question</th>
</tr>
</thead>
<tbody>
<tr>
<td>How do you like to spend your time off?</td>
</tr>
<tr>
<td>What are your travel dreams for the next five years?</td>
</tr>
<tr>
<td>How is your current health?</td>
</tr>
<tr>
<td>What are your health risks?</td>
</tr>
<tr>
<td>What are your fitness goals?</td>
</tr>
<tr>
<td>What are your relationship goals for the next five years?</td>
</tr>
<tr>
<td>Do you want to start a family in the next five years?</td>
</tr>
<tr>
<td>If you have children, how old are they?</td>
</tr>
<tr>
<td>What are your plans for their college?</td>
</tr>
<tr>
<td>What are your dreams?</td>
</tr>
<tr>
<td>How do you want to make your “mark” on society?</td>
</tr>
</tbody>
</table>
### PART II

**WHAT MAKES YOU TICK?**

Circle the answer that describes you best

<table>
<thead>
<tr>
<th></th>
<th>How are you motivated?</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>i. I’m self-winding. Nobody has to tell me to get going.</td>
</tr>
<tr>
<td></td>
<td>ii. I can keep going if someone else gets me started.</td>
</tr>
<tr>
<td></td>
<td>iii. I do best with regular supervision.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>How do you feel about other people?</th>
</tr>
</thead>
<tbody>
<tr>
<td>B</td>
<td>i. I can get along with almost anybody.</td>
</tr>
<tr>
<td></td>
<td>ii. I’m not comfortable with strangers but I get along fine with my friends.</td>
</tr>
<tr>
<td></td>
<td>iii. In general, I would rather do without people.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Are you a leader?</th>
</tr>
</thead>
<tbody>
<tr>
<td>C</td>
<td>i. I can get most people to go along with my ideas.</td>
</tr>
<tr>
<td></td>
<td>ii. I will take charge if I have to, but I would rather not.</td>
</tr>
<tr>
<td></td>
<td>iii. I would rather let someone else take charge.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>How well do you organize?</th>
</tr>
</thead>
<tbody>
<tr>
<td>D</td>
<td>i. I like to have a plan for everything.</td>
</tr>
<tr>
<td></td>
<td>ii. I generally set up the basics and then wing it.</td>
</tr>
<tr>
<td></td>
<td>iii. I generally just take things as they come -- things will work out.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>How’s your work stamina?</th>
</tr>
</thead>
<tbody>
<tr>
<td>E</td>
<td>i. I keep going and going and going...</td>
</tr>
<tr>
<td></td>
<td>ii. I will work hard if it is interesting, but I get tired if I’m bored.</td>
</tr>
<tr>
<td></td>
<td>iii. What’s in it for me? When’s lunch?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Can you stick with it?</th>
</tr>
</thead>
<tbody>
<tr>
<td>F</td>
<td>i. If I make up my mind to do something, I won’t let anything stop me.</td>
</tr>
<tr>
<td></td>
<td>ii. I usually finish what I start if it all goes well.</td>
</tr>
<tr>
<td></td>
<td>iii. If it doesn’t go well right away, I tend to give up.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>How’s your energy?</th>
</tr>
</thead>
<tbody>
<tr>
<td>G</td>
<td>i. I never get run down.</td>
</tr>
<tr>
<td></td>
<td>ii. I have enough energy for most things as long as I get enough rest in between.</td>
</tr>
<tr>
<td></td>
<td>iii. I generally run out of energy sooner than most people.</td>
</tr>
</tbody>
</table>
Total number of “i” answers = [ ] low risk factors
Total number of “ii” answers = [ ] medium low risk factors
Total number of “iii” answers = [ ] high risk factors

Look at your results. If you have circled “i” more than the other numbers, it looks like you have what it takes to run your own law practice. If you circled “ii” more than the others, then consider joining forces whose strengths compliment yours. And, if “iii” was your favorite answer, you should re-consider going into practice for yourself – even with a strong partner.
PART III

ARE YOU READY FOR THE FINANCIAL RISKS OF A NEW PRACTICE?

Many law practices, like other small businesses, fail simply because they don’t have enough money set aside to survive the natural ups and downs of cash flow. The last thing in the world that you want to have to worry about when an unexpected financial disaster happens is how you will pay your regular personal and office bills. To reduce your risk of failure, you need to have enough cash and credit available to keep your practice afloat during lean times. The following questions help identify your current financial risk factors.

<table>
<thead>
<tr>
<th>A. How many months of potential living and operating expenses do you have in savings?</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>i. More than 6 months.</td>
<td></td>
</tr>
<tr>
<td>ii. 4 - 6 months.</td>
<td></td>
</tr>
<tr>
<td>iii. Less than 3 months.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>B. What is the average monthly balance you carry on credit cards (personal and business)?</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>i. $0 all bills paid in full each month.</td>
<td></td>
</tr>
<tr>
<td>ii. Less than the equivalent of one month’s gross income.</td>
<td></td>
</tr>
<tr>
<td>iii. More than the equivalent of one month’s gross income.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>C. What percentage of monthly income do you spend on home mortgage or rent?</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>i. Less than 20%.</td>
<td></td>
</tr>
<tr>
<td>ii. 20% to 30%.</td>
<td></td>
</tr>
<tr>
<td>iii. More than 30%.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>D. What percentage of total annual family income is used to pay mortgage and consumer debt?</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>i. Less than 30%.</td>
<td></td>
</tr>
<tr>
<td>ii. 30% to 40%.</td>
<td></td>
</tr>
<tr>
<td>iii. More than 40%.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>E. Last year, did you have to pay the IRS, get a large refund check or break even?</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>i. Broke even.</td>
<td></td>
</tr>
<tr>
<td>ii. Received large refund.</td>
<td></td>
</tr>
<tr>
<td>iii. Had to pay a significant additional amount.</td>
<td></td>
</tr>
</tbody>
</table>

| F. Do you have an individual health insurance policy? |   |

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BUILDING A GREAT BUSINESS PLAN

SECTION A6.1

i. I am covered on someone else’s policy.
ii. Yes.
iii. No.

G. Do you have life insurance to protect dependents?
   i. I have no dependents.
   ii. Yes, I have a policy that is equal to one or more times my annual salary.
   iii. No, I have dependents and no life insurance

H. What percentage of your income do you put in a tax-deferred retirement plan, including Keogh, SEP-IRA’s, 403(b)s, 401(k)s and others?
   i. A fixed percent per month up to the maximum allowed by law.
   ii. Some but not on a regular basis.
   iii. Nothing.

I. In addition to your retirement savings, what percentage of your income are you saving each month?
   i. More than 10%
   ii. 6% to 10%
   iii. Less than 5%

J. What type of records do you keep for your business and personal expenses?
   i. Good records on an automated system, reconciled monthly.
   ii. Average accountability, reconciled quarterly.
   iii. Poor records, “best guess” annual reconciliation.

K. What is your personal opinion of your ability to support yourself in an independent law practice?
   i. I’ve evaluated the risks and am certain that I can support myself.
   ii. I am concerned by balancing the risks, I believe that this is a good opportunity to give it my best shot.
   iii. I have no idea, but the worst that can happen is I’ll be broke in a few months and will have to get a job

Total number of “i” answers = [ ] low risk factors
Total number of “ii” answers = [ ] medium low risk factors
Total number of “iii” answers = [ ] high risk factors

If you answered “i” most of the time, you are probably in a good financial position to sustain your practice during tough times.
If your answers included a mix of all three factors, consider changing your strategy to minimize your risk factors.

If you have more than two high risk factors, you may not be in a financial position to start your own law practice. Attorneys with a mix of high, medium and low risk factors should consider modifying their high and medium risk factors before opening their own practice.
PART IV
YOUR PERSONAL VISION STATEMENT

Now that you’ve taken some time to get to know yourself, write your personal vision statement using these questions as a guide.

1. What makes me unique?

2. What is my purpose in life?

3. What do I want to do with my life?

4. What are my core values and principles?

And, Write Your Personal Action Plan.

- Where am I?

- Where am I going?

- How will I get there?

- How will I know when I’ve arrived?
## Worksheet #2— Your Basic Practice Concept

Use this Worksheet to outline your practice concept as you see it now.

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Will you serve individuals or businesses?</td>
<td></td>
</tr>
<tr>
<td>What segment of the community will you serve? (People who are injured?</td>
<td></td>
</tr>
<tr>
<td>Start-up companies? Those accused of a crime?)</td>
<td></td>
</tr>
<tr>
<td>What will you do for them? (Litigate? Establish business entities? Solve</td>
<td></td>
</tr>
<tr>
<td>tax problems?)</td>
<td></td>
</tr>
<tr>
<td>What practice areas will you cover?</td>
<td></td>
</tr>
<tr>
<td>What is your overall marketing and sales strategy?</td>
<td></td>
</tr>
<tr>
<td>Which firms are your competitors?</td>
<td></td>
</tr>
<tr>
<td>What are your competitive advantages?</td>
<td></td>
</tr>
<tr>
<td>How will you offer better client service than your competitors do?</td>
<td></td>
</tr>
<tr>
<td>What new practice methods will you use?</td>
<td></td>
</tr>
<tr>
<td>What is your location?</td>
<td></td>
</tr>
<tr>
<td>What are your geographic area’s underserved markets?</td>
<td></td>
</tr>
<tr>
<td>What kind of accessibility will you provide?</td>
<td></td>
</tr>
</tbody>
</table>
**Worksheet #3— Will It Work?**

Use this Worksheet to evaluate your business concept.

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>How economically healthy is your sector of the legal field?</td>
<td></td>
</tr>
<tr>
<td>How sensitive is your area of the legal field to economic fluctuations?</td>
<td></td>
</tr>
<tr>
<td>Is (are) your practice area(s) changing rapidly?</td>
<td></td>
</tr>
<tr>
<td>Are the forecasts for practice growth in your area(s) positive?</td>
<td></td>
</tr>
<tr>
<td>Is your service unique?</td>
<td></td>
</tr>
<tr>
<td>If so, how?</td>
<td></td>
</tr>
<tr>
<td>If not, what makes you special?</td>
<td></td>
</tr>
<tr>
<td>Is your market clearly defined?</td>
<td></td>
</tr>
<tr>
<td>Is it large enough to support your practice?</td>
<td></td>
</tr>
<tr>
<td>Can you afford to reach your market?</td>
<td></td>
</tr>
<tr>
<td>Is your market growing?</td>
<td></td>
</tr>
<tr>
<td>Is the market ready for you? Why?</td>
<td></td>
</tr>
<tr>
<td>Question</td>
<td></td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Do your potential clients have strong ties to your competitors?</td>
<td></td>
</tr>
<tr>
<td>What factors are likely to affect your market?</td>
<td></td>
</tr>
<tr>
<td>How strong is your competition?</td>
<td></td>
</tr>
<tr>
<td>Do a few firms dominate your market?</td>
<td></td>
</tr>
<tr>
<td>Could your competitors with deep pockets drive you out?</td>
<td></td>
</tr>
<tr>
<td>How easy will it be to gain a foothold?</td>
<td></td>
</tr>
<tr>
<td>What barriers will limit your future competition?</td>
<td></td>
</tr>
<tr>
<td>Will personnel be hard to find?</td>
<td></td>
</tr>
<tr>
<td>What financial problems do you anticipate?</td>
<td></td>
</tr>
</tbody>
</table>
### Worksheet #4— Practice Description Form

Use this Worksheet to define your practice.

<table>
<thead>
<tr>
<th>Name:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal Name:</td>
</tr>
<tr>
<td>Domain Name:</td>
</tr>
<tr>
<td>Founding Date:</td>
</tr>
<tr>
<td>Legal Form:</td>
</tr>
<tr>
<td>Sole Proprietorship</td>
</tr>
<tr>
<td>Common Law Partnership</td>
</tr>
<tr>
<td>P.C.</td>
</tr>
<tr>
<td>LLP</td>
</tr>
<tr>
<td>LLC</td>
</tr>
<tr>
<td>State of Establishment:</td>
</tr>
<tr>
<td>Owners, Partners or Members:</td>
</tr>
<tr>
<td>Management/Leadership:</td>
</tr>
<tr>
<td>Principal Attorney, Managing Partner(s) or Manager(s):</td>
</tr>
<tr>
<td>Other Key Management Personnel:</td>
</tr>
<tr>
<td>Initial Number of Employees:</td>
</tr>
<tr>
<td>-------------------------------</td>
</tr>
<tr>
<td>Location:</td>
</tr>
<tr>
<td>Place of Business:</td>
</tr>
<tr>
<td>Mailing Address:</td>
</tr>
<tr>
<td>Geographic Area Served:</td>
</tr>
<tr>
<td>Other:</td>
</tr>
<tr>
<td>Immediate Goals:</td>
</tr>
<tr>
<td>Progress of Current Plans:</td>
</tr>
</tbody>
</table>
**Worksheet #5— Demographics of Your Target Market**

Use this Worksheet to describe the unique characteristics of your target market.

<table>
<thead>
<tr>
<th>Consumer</th>
<th>Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age Range</td>
<td>Industries</td>
</tr>
<tr>
<td>Income Range</td>
<td>Sector</td>
</tr>
<tr>
<td>Sex</td>
<td>Years in Business</td>
</tr>
<tr>
<td>Occupation</td>
<td>Annual Revenues</td>
</tr>
<tr>
<td>Marital Status</td>
<td>Number of Employees</td>
</tr>
<tr>
<td>Family Size</td>
<td>Number of Branches</td>
</tr>
<tr>
<td>Ethnic Group</td>
<td>Company Ownership</td>
</tr>
<tr>
<td>Level of Education</td>
<td>Other</td>
</tr>
<tr>
<td>Assets</td>
<td>Other</td>
</tr>
<tr>
<td>Other</td>
<td>Other</td>
</tr>
</tbody>
</table>
Worksheet #6—Geography

Use this Worksheet to define the density of the geographic area you will serve.

<table>
<thead>
<tr>
<th>Practice Address</th>
</tr>
</thead>
<tbody>
<tr>
<td>Description of Practice Location (Office high-rise, strip, business district, etc.)</td>
</tr>
<tr>
<td>Density of Area (Urban, rural, etc.)</td>
</tr>
<tr>
<td>Area Served (City, Region, etc.)</td>
</tr>
<tr>
<td>Climate Conditions if applicable</td>
</tr>
<tr>
<td>Population of practice location</td>
</tr>
<tr>
<td>Population of target region</td>
</tr>
<tr>
<td>Number of competing law practices in target region</td>
</tr>
</tbody>
</table>
Worksheet #7—Style

Use this Worksheet to define your clients’ style.

<table>
<thead>
<tr>
<th>Consumer</th>
<th>Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age</td>
<td>Type of Business</td>
</tr>
<tr>
<td>Stage of Life</td>
<td>Business State</td>
</tr>
<tr>
<td>Income</td>
<td>Public Image</td>
</tr>
<tr>
<td>Assets</td>
<td>Income</td>
</tr>
<tr>
<td>Leisure Choices</td>
<td>Management Style</td>
</tr>
<tr>
<td>Television Shows Watched</td>
<td>Employee Relations</td>
</tr>
<tr>
<td>Religion</td>
<td>Workforce Type</td>
</tr>
<tr>
<td>Political Affiliations</td>
<td>Community Activities</td>
</tr>
<tr>
<td>Type of Vehicles Owned</td>
<td>Political Affiliations</td>
</tr>
<tr>
<td>Major Concerns</td>
<td>Business Pressures</td>
</tr>
<tr>
<td>Other</td>
<td>Other</td>
</tr>
</tbody>
</table>
Worksheet #8—IAO Variables

Use this Worksheet to identify your clients' interests, attitudes and opinions.

<table>
<thead>
<tr>
<th>Consumer</th>
<th>Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social Class</td>
<td>Position in Industry</td>
</tr>
<tr>
<td>Lifestyle</td>
<td>Major Sources of Influence</td>
</tr>
<tr>
<td>Behavior</td>
<td>Fiscal Strategy</td>
</tr>
<tr>
<td>Opinions</td>
<td>Innovation</td>
</tr>
<tr>
<td>Values</td>
<td>Technology</td>
</tr>
</tbody>
</table>
**Worksheet #9— Buying Patterns**

Use this Worksheet to record your clients’ purchasing patterns. Use one sheet for each type of service.

<table>
<thead>
<tr>
<th>Type of Service (bodily injury claim, estate plan, etc.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reason for first engagement?</td>
</tr>
<tr>
<td>How does client learn of services?</td>
</tr>
<tr>
<td>Length of time to make purchasing decision?</td>
</tr>
<tr>
<td>How does the service benefit the client?</td>
</tr>
<tr>
<td>Is there a need for repeat services?</td>
</tr>
<tr>
<td>Do you provide collateral services? Which ones?</td>
</tr>
<tr>
<td>Cost to client?</td>
</tr>
<tr>
<td>Method of Payment?</td>
</tr>
<tr>
<td>Special Considerations?</td>
</tr>
</tbody>
</table>
**Worksheet #10— Buying Sensitivity**

Use this Worksheet to rate the factors that influence your clients.

<table>
<thead>
<tr>
<th>Factor</th>
<th>High</th>
<th>Medium</th>
<th>Low</th>
<th>Not At All</th>
</tr>
</thead>
<tbody>
<tr>
<td>Location</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Office Appearance</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attorney Notoriety</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attorney Experience</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Size of Practice</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attorney Personality</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reputation of Practice</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Personality</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Response Time</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Client Involvement in Project</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Worksheet #11—Target Market Description

Use this Worksheet to summarize your target market’s characteristics.

<table>
<thead>
<tr>
<th>Market Description:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Market Size:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Market Trends:</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Limitations:</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Opportunities:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
</tbody>
</table>
Worksheet #12 Part A — Variables: Customer Perception

Now compare your practice with your competitors. It is best to evaluate your respective positions in your internal operations and in client preferences. Look at each variable and assign it a number in the “Maximum Points” column (1 being the lowest, and 10 being the highest) that is representative of its importance. For example, if your target market is families who are attempting to obtain MassHealth coverage for long term care, price sensitivity might rate a 10 on the worksheet. Next rate your competitors and then rate yourself.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Maximum Points</th>
<th>Your Practice</th>
<th>Competitor #1</th>
<th>Competitor #2</th>
<th>Competitor #3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Location</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Price</td>
<td></td>
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<tr>
<td>Payment Options</td>
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<tr>
<td>Variety of Services</td>
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<tr>
<td>Attorney/Practice Recognition</td>
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<tr>
<td>Attorney/Practice Experience</td>
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<tr>
<td>Results</td>
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<tr>
<td>Adjunct Services</td>
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<td>Other</td>
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<td>Other</td>
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<td>Other</td>
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<tr>
<td>Total Points</td>
<td></td>
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</tbody>
</table>
### Worksheet #12 Part B — Variables: Operations

<table>
<thead>
<tr>
<th>Variable</th>
<th>Maximum Points</th>
<th>Your Practice</th>
<th>Competitor #1</th>
<th>Competitor #2</th>
<th>Competitor #3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marketing Budget/Resources</td>
<td></td>
<td></td>
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<tr>
<td>Experience/Competence</td>
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<tr>
<td>Operational Efficiency</td>
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<tr>
<td>Practice Area Breadth</td>
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<tr>
<td>Flexibility</td>
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<tr>
<td>Personnel</td>
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<td>Innovation</td>
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<td>Other</td>
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<tr>
<td>Total Points</td>
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</tbody>
</table>
Worksheet #12 Part C — Your Competitive Snapshot

Use this Worksheet to focus the critical advantages of your practice.

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Describe your practice to a stranger in 20 seconds.</td>
<td></td>
</tr>
<tr>
<td>How do other lawyers describe you?</td>
<td></td>
</tr>
<tr>
<td>How do your clients and former clients describe you?</td>
<td></td>
</tr>
<tr>
<td>What do you believe are your special strengths?</td>
<td></td>
</tr>
<tr>
<td>What are your individual weaknesses?</td>
<td></td>
</tr>
<tr>
<td>What are your weaknesses in your practice area?</td>
<td></td>
</tr>
<tr>
<td>Describe your practice's culture.</td>
<td></td>
</tr>
<tr>
<td>Describe your practice's character.</td>
<td></td>
</tr>
<tr>
<td>Describe the best work you have done so far.</td>
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</tr>
<tr>
<td>Describe the worst work you have done so far.</td>
<td></td>
</tr>
<tr>
<td>In what practice area can you become an expert?</td>
<td></td>
</tr>
<tr>
<td>What industry of economic sectors provide the most potential for your prac-</td>
<td></td>
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<tr>
<td>tice's growth?</td>
<td></td>
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<tr>
<td>What are the economic issues that affect your existing or potential clients?</td>
<td></td>
</tr>
</tbody>
</table>
Worksheet #13—Advertising and Sales Plan

Use this Worksheet to determine promotional techniques.

<table>
<thead>
<tr>
<th>Memberships</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name of Association or Organization</td>
</tr>
<tr>
<td>-------------</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Leadership positions in associations and organizations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name of Association or Organization</td>
</tr>
<tr>
<td>-------------------------------------</td>
</tr>
<tr>
<td></td>
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<td></td>
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</tbody>
</table>
### Seminars and Presentations

<table>
<thead>
<tr>
<th>Name of Association or Organization</th>
<th>Type/Topic of Seminar/Presentation</th>
<th>Qualifications</th>
<th>Target Audience</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</tbody>
</table>

### Articles

<table>
<thead>
<tr>
<th>Name of Publication</th>
<th>Contact Info</th>
<th>Name of Article/Lengh</th>
<th>Deadline Date</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

### Advertising

<table>
<thead>
<tr>
<th>Media</th>
<th>Priority</th>
<th>Frequency</th>
<th>Reach</th>
<th>Budget</th>
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</thead>
<tbody>
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</tbody>
</table>
**Sales**

<table>
<thead>
<tr>
<th>Client Development Activities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of Entertainment or Activity</strong></td>
</tr>
<tr>
<td>-------------------------------------</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Client Retention Activities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of Activity</strong></td>
</tr>
<tr>
<td>------------------------</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Mailings</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of Mailing</strong></td>
</tr>
<tr>
<td>---------------------</td>
</tr>
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<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Visits to client locations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Client/Company Name</strong></td>
</tr>
<tr>
<td>--------------------------</td>
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<td></td>
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</tbody>
</table>

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A-139
<table>
<thead>
<tr>
<th>Individual/ Company Name</th>
<th>Contact/Address</th>
<th>Source</th>
<th>Date</th>
<th>Practice Personnel</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</tr>
</tbody>
</table>

**Up-Selling and Cross-Selling**

<table>
<thead>
<tr>
<th>Type of Initial Transaction</th>
<th>Up-Sell Service</th>
<th>Cross-Sell Service</th>
<th>Frequency</th>
<th>Practice Personnel</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</tr>
</tbody>
</table>
**Worksheet #14—Leasing Considerations**

Before you sign a lease there are at least 40 things that you should consider.

<table>
<thead>
<tr>
<th>Location:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you need to be near the courthouse?</td>
</tr>
<tr>
<td>Do you need to be near certain clients?</td>
</tr>
<tr>
<td>Do you need to be near your house?</td>
</tr>
<tr>
<td>Do you need to be near a law library?</td>
</tr>
<tr>
<td>Do you need a prestige location?</td>
</tr>
<tr>
<td>Do you need to minimize overhead by finding a lower-cost location?</td>
</tr>
<tr>
<td>Do you need to be near public transportation?</td>
</tr>
<tr>
<td>Do you need to be near private parking?</td>
</tr>
<tr>
<td>Do you need to be in the suburbs?</td>
</tr>
<tr>
<td>Do you need to be near other lawyers?</td>
</tr>
<tr>
<td>Do you need high visibility and drive-by traffic?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Size:</th>
</tr>
</thead>
<tbody>
<tr>
<td>How many lawyers will you have?</td>
</tr>
<tr>
<td>How much staff will you have?</td>
</tr>
<tr>
<td>How much growth do you anticipate in the next 3-5 years?</td>
</tr>
<tr>
<td>Do you need a conference room?</td>
</tr>
<tr>
<td>How much room do you need for your own office?</td>
</tr>
<tr>
<td>Do you need a reception area?</td>
</tr>
<tr>
<td>Do you need a kitchen?</td>
</tr>
<tr>
<td>------------------------</td>
</tr>
<tr>
<td>Do you need a separate library space?</td>
</tr>
<tr>
<td>Do you need on-site file storage?</td>
</tr>
<tr>
<td>Do you need a copy center or document production area?</td>
</tr>
<tr>
<td>Do you need a private bathroom?</td>
</tr>
<tr>
<td>How many window offices do you need?</td>
</tr>
</tbody>
</table>

**Term:**
- Is this the first time you've rented commercial space in your own name?
- Are you ready for a 3-5 year commitment?
- Would you be more comfortable trying an “office suite” at first?
- Does your growth plan require you to keep the lease term short?
- Have you shopped at least 3 other locations to compare lease terms?
- What will the landlord allow for mid-term reduction or expansion of space?
- Have you considered sub-leasing from another law firm?

**Expansion:**
- Does your target space have at least one more office?
- Is there available adjacent space in your building?
- Is it better to risk being crowded than to take on additional overhead?
- Can you get a lease clause that allows you to move into other space in the building if you need to expand?
### Worksheet #15— Office Space Priorities

Use this worksheet to establish your priorities for your office space.

<table>
<thead>
<tr>
<th>Priorities for Location</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Priorities for Size</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Priorities for Lease Term</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Priorities for Client Access (Public Transportation, Parking, Handicapped Access etc.)</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Other</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
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<table>
<thead>
<tr>
<th>Other</th>
<th>1</th>
<th>2</th>
<th>3</th>
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</tbody>
</table>
Worksheet #16—Office Improvements

Establish priorities for your necessary office improvements on this Worksheet.

<table>
<thead>
<tr>
<th>Interior Structure (Walls, ceiling, floor, etc.)</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electrical</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Plumbing</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>HVAC</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
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<tr>
<td>Other</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
</tbody>
</table>
Worksheet #17— Staffing Requirements

Use this Worksheet to evaluate the staff that you will need and to establish a staffing budget.

### Administrative

<table>
<thead>
<tr>
<th>Job Description (secretary, file clerk, etc.)</th>
<th>Status (full time, part time, outsource)</th>
<th>Projected engagement date</th>
<th>Cost</th>
<th>Pay period (weekly, annual, episodic)</th>
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</thead>
<tbody>
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</tbody>
</table>

### Financial

<table>
<thead>
<tr>
<th>Job Description (bookkeeper, accountant, etc.)</th>
<th>Status (full time, part time, outsource)</th>
<th>Projected engagement date</th>
<th>Cost</th>
<th>Pay period (weekly, annual, episodic)</th>
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</tbody>
</table>
### Legal

<table>
<thead>
<tr>
<th>Job Description (paralegal, clerk, intern, associate, etc.)</th>
<th>Status (full time, part time, outsource)</th>
<th>Projected engagement date</th>
<th>Cost</th>
<th>Pay period (weekly, annual, episodic)</th>
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</tbody>
</table>

### Marketing/IT

<table>
<thead>
<tr>
<th>Job Description (Name, Model number, etc.)</th>
<th>Status (full time, part time, outsource)</th>
<th>Projected engagement date</th>
<th>Cost</th>
<th>Pay period (weekly, annual, episodic)</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>
Worksheet #18—Furniture and Equipment

Use this Worksheet to evaluate the furniture and equipment you will need.

<table>
<thead>
<tr>
<th>Currently Owned Furniture and Equipment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Description (Name, Model #)</td>
</tr>
<tr>
<td>----------------------------------</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Currently Leased Furniture and Equipment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Description (Name, Model #)</td>
</tr>
<tr>
<td>----------------------------------</td>
</tr>
<tr>
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</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>
### Furniture and Equipment to Purchase

<table>
<thead>
<tr>
<th>Description (Name, Model #)</th>
<th>Status (new, used, etc.)</th>
<th>Date Purchased</th>
<th>Cost</th>
<th>Payments</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<tr>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
</tbody>
</table>

### Furniture and Equipment to Lease

<table>
<thead>
<tr>
<th>Description (Name, Model #)</th>
<th>Status (new, used, etc.)</th>
<th>Date Purchased</th>
<th>Cost</th>
<th>Payments</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
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<td></td>
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<td></td>
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<td></td>
<td></td>
</tr>
</tbody>
</table>
Worksheet #19— Suppliers

Use this Worksheet to evaluate the suppliers you will need.

<table>
<thead>
<tr>
<th>Office Products</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vendor Name, Address, Phone and web address</td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Professional Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Description (Title examiner, stenographer, etc.)</td>
</tr>
<tr>
<td>---</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Other</td>
</tr>
<tr>
<td>-------</td>
</tr>
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<td></td>
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<td></td>
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<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>
**Worksheet #20— Financial Control**

Use this Worksheet to establish your financial controls.

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who has the primary responsibility for designing your practice's financial controls?</td>
<td></td>
</tr>
<tr>
<td>Who has the primary responsibility for enforcing your practice's financial controls?</td>
<td></td>
</tr>
<tr>
<td>Who else is involved in the financial control process?</td>
<td></td>
</tr>
<tr>
<td>What financial software will you use?</td>
<td></td>
</tr>
<tr>
<td>What computer security methods will you use?</td>
<td></td>
</tr>
<tr>
<td>Define your fee agreements and fee schedules:</td>
<td></td>
</tr>
<tr>
<td>Hourly</td>
<td>Contingency</td>
</tr>
<tr>
<td>Will you accept credit cards? Which ones? Which credit card processing service will you use?</td>
<td></td>
</tr>
<tr>
<td>Will you charge interest on delinquent accounts?</td>
<td></td>
</tr>
<tr>
<td>What is your procedure for collecting delinquent accounts?</td>
<td></td>
</tr>
<tr>
<td>Who makes decisions on variations in billing procedure?</td>
<td></td>
</tr>
<tr>
<td>Will you use a payroll service? Which one?</td>
<td></td>
</tr>
<tr>
<td>Who is responsible for accounts payable?</td>
<td></td>
</tr>
</tbody>
</table>
**SECTION A6.1 PROFESSIONALISM SUPP. MATERIALS**

<table>
<thead>
<tr>
<th>Question</th>
<th>Options</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who has power of signature on checks?</td>
<td></td>
</tr>
<tr>
<td>What is your policy on paying outstanding bills?</td>
<td>Pay when received</td>
</tr>
<tr>
<td>Who makes decisions on variations in payment procedures?</td>
<td></td>
</tr>
<tr>
<td>Describe your conflict of interest verification system.</td>
<td></td>
</tr>
<tr>
<td>Define your time standards and statute of limitations monitoring systems.</td>
<td></td>
</tr>
<tr>
<td>Where have you established your IOLTA account?</td>
<td></td>
</tr>
<tr>
<td>What are your IOLTA account verification procedures?</td>
<td></td>
</tr>
<tr>
<td>What other clients' funds isolation and security methods will you use?</td>
<td></td>
</tr>
<tr>
<td>How will you protect against theft?</td>
<td></td>
</tr>
<tr>
<td>What reports will you produce to show ongoing financial status?</td>
<td></td>
</tr>
<tr>
<td>How often will you produce those reports?</td>
<td></td>
</tr>
<tr>
<td>Who will review those reports?</td>
<td></td>
</tr>
<tr>
<td>What are your tax preparation and filing procedures?</td>
<td></td>
</tr>
</tbody>
</table>
Worksheet #21— Your Organizational Chart

Use this Worksheet to figure out who reports to whom and why.
Worksheet #22— Personal Vision, Practice Goals

Use this Worksheet to match your personal vision to your practice goals.

<table>
<thead>
<tr>
<th>Write Your Practice’s Mission Statement:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Write Your Personal Vision Statement (Worksheet #1, Part IV):</td>
</tr>
<tr>
<td>What is your top practice goal?</td>
</tr>
<tr>
<td>Niche Specialist</td>
</tr>
<tr>
<td>Leader in the Profession</td>
</tr>
<tr>
<td>Master of Opportunity</td>
</tr>
<tr>
<td>Steady Performer</td>
</tr>
<tr>
<td>Identify Your Strategies</td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>Set Your Priorities for Strategy #1</td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>Set Your Priorities for Strategy #2</td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>Set Your Priorities for Strategy #3</td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>Set Your Priorities for Strategy #4</td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>Set Your Priorities for Strategy #5</td>
</tr>
<tr>
<td>1</td>
</tr>
</tbody>
</table>
**Worksheet #23— What Have I Done?**

Use this Worksheet to summarize your accomplishments.

### Personal Accomplishments

<table>
<thead>
<tr>
<th>Education</th>
<th>Publication</th>
<th>Civic/Political</th>
<th>Charitable</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Professional Accomplishments

<table>
<thead>
<tr>
<th>Positions</th>
<th>Promotions</th>
<th>Awards</th>
<th>Notoriety</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
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</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Practice Accomplishments

Write each goal that you have met and when you met it.

<table>
<thead>
<tr>
<th>Event</th>
<th>Specifics</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawyer Team Identified</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Entity Selected</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lease Signed</td>
<td></td>
<td></td>
</tr>
<tr>
<td>First Client Engaged</td>
<td></td>
<td></td>
</tr>
<tr>
<td>First Case Completed</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

A-155
Worksheet #24—Progress Markers and Risks

Use this Worksheet to assess your progress.

<table>
<thead>
<tr>
<th>Goal</th>
<th>Specifics</th>
<th>Target Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawyer Team Identified</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Entity Selected</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lease Signed</td>
<td></td>
<td></td>
</tr>
<tr>
<td>First Client Engaged</td>
<td></td>
<td></td>
</tr>
<tr>
<td>First Case Completed</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cash Flow</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

What are Your Risks?

<table>
<thead>
<tr>
<th>Risk</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Poor Cash Flow</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Excessive Competition</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Poor Location</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
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<tr>
<td>Other</td>
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<td>Other</td>
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<td>Other</td>
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<td>Other</td>
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<td>Other</td>
<td></td>
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<tr>
<td>Other</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Worksheet #25—Development Plan

Use this Worksheet to define the development of your practice from beginning to end.

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Describe your goals for your practice over the next five years: Consider your estimated collections, number of repeat clients, number of employees, etc.</td>
<td></td>
</tr>
<tr>
<td>Describe the strategies you will use to reach those goals:</td>
<td></td>
</tr>
<tr>
<td>What is your plan for the expenditure of funds?</td>
<td></td>
</tr>
<tr>
<td>What are the major risks your practice faces?</td>
<td></td>
</tr>
<tr>
<td>What is your exit plan?</td>
<td></td>
</tr>
</tbody>
</table>
Worksheet #26—Sample Law Practice Balance Sheet

Use this Worksheet to create your pro forma balance sheet.

<table>
<thead>
<tr>
<th>Assets</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Cash</td>
<td>$</td>
</tr>
<tr>
<td>Accounts receivable</td>
<td>$</td>
</tr>
<tr>
<td>Short-term loans</td>
<td>$</td>
</tr>
<tr>
<td>Prepaid expenses</td>
<td>$</td>
</tr>
<tr>
<td>Long-term loans</td>
<td>$</td>
</tr>
<tr>
<td>Land</td>
<td>$</td>
</tr>
<tr>
<td>Buildings</td>
<td>$</td>
</tr>
<tr>
<td>Improvements</td>
<td>$</td>
</tr>
<tr>
<td>Equipment</td>
<td>$</td>
</tr>
<tr>
<td>Furniture</td>
<td>$</td>
</tr>
<tr>
<td>Vehicles</td>
<td>$</td>
</tr>
<tr>
<td>Other Assets</td>
<td>$</td>
</tr>
<tr>
<td><strong>TOTAL ASSETS</strong></td>
<td>$</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Liabilities</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Accounts payable</td>
<td>$</td>
</tr>
<tr>
<td>Short-term notes payable</td>
<td>$</td>
</tr>
<tr>
<td>Interest payable</td>
<td>$</td>
</tr>
<tr>
<td>Taxes payable</td>
<td>$</td>
</tr>
<tr>
<td>Long-term notes payable</td>
<td>$</td>
</tr>
<tr>
<td><strong>TOTAL LIABILITIES</strong></td>
<td>$</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Capital or Owner’s Equity</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Stock</td>
<td>$</td>
</tr>
<tr>
<td>Retained earnings</td>
<td>$</td>
</tr>
<tr>
<td><strong>TOTAL CAPITAL or OWNER’S EQUITY</strong></td>
<td>$</td>
</tr>
</tbody>
</table>

(Total Assets will always equal Total Liabilities plus Total Capital)
Worksheet #27—Sample Income Statement

Use this Worksheet to create your pro forma income statement.

<table>
<thead>
<tr>
<th>Revenue:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross Collections</td>
<td>$0.00</td>
</tr>
<tr>
<td>Less: Allowances</td>
<td>$0.00</td>
</tr>
<tr>
<td><strong>Net Sales:</strong></td>
<td>$0.00</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Expenses:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Advertising</td>
<td>$0.00</td>
</tr>
<tr>
<td>Amortization</td>
<td>$0.00</td>
</tr>
<tr>
<td>Bad Debts</td>
<td>$0.00</td>
</tr>
<tr>
<td>Bank Charges</td>
<td>$0.00</td>
</tr>
<tr>
<td>Charitable Contributions</td>
<td>$0.00</td>
</tr>
<tr>
<td>Commissions</td>
<td>$0.00</td>
</tr>
<tr>
<td>Contract Labor</td>
<td>$0.00</td>
</tr>
<tr>
<td>Credit Card Fees</td>
<td>$0.00</td>
</tr>
<tr>
<td>Delivery Expenses</td>
<td>$0.00</td>
</tr>
<tr>
<td>Depreciation</td>
<td>$0.00</td>
</tr>
<tr>
<td>Dues and Subscriptions</td>
<td>$0.00</td>
</tr>
<tr>
<td>Insurance</td>
<td>$0.00</td>
</tr>
<tr>
<td>Interest</td>
<td>$0.00</td>
</tr>
<tr>
<td>Maintenance</td>
<td>$0.00</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>$0.00</td>
</tr>
<tr>
<td>Office Expenses</td>
<td>$0.00</td>
</tr>
<tr>
<td>Operating Supplies</td>
<td>$0.00</td>
</tr>
<tr>
<td>Payroll Taxes</td>
<td>$0.00</td>
</tr>
<tr>
<td>Permits and Licenses</td>
<td>$0.00</td>
</tr>
<tr>
<td>Postage</td>
<td>$0.00</td>
</tr>
<tr>
<td>Professional Fees</td>
<td>$0.00</td>
</tr>
<tr>
<td>Property Taxes</td>
<td>$0.00</td>
</tr>
<tr>
<td>Rent</td>
<td>$0.00</td>
</tr>
<tr>
<td>Repairs</td>
<td>$0.00</td>
</tr>
<tr>
<td>Telephone</td>
<td>$0.00</td>
</tr>
<tr>
<td>Category</td>
<td>Amount</td>
</tr>
<tr>
<td>--------------------------</td>
<td>--------</td>
</tr>
<tr>
<td>Travel</td>
<td>$0.00</td>
</tr>
<tr>
<td>Utilities</td>
<td>$0.00</td>
</tr>
<tr>
<td>Vehicle Expenses</td>
<td>$0.00</td>
</tr>
<tr>
<td>Wages</td>
<td>$0.00</td>
</tr>
<tr>
<td><strong>Total Expenses</strong></td>
<td>$0.00</td>
</tr>
<tr>
<td>Net Operating Income</td>
<td>$0.00</td>
</tr>
<tr>
<td>Gain (Loss) on Sale of Assets</td>
<td>$0.00</td>
</tr>
<tr>
<td>Interest Income</td>
<td>$0.00</td>
</tr>
<tr>
<td><strong>Total Other Income</strong></td>
<td>$0.00</td>
</tr>
</tbody>
</table>
Worksheet #28—Cash Flow

Use this Worksheet to plan your cash flow.

<table>
<thead>
<tr>
<th></th>
<th>[Month]</th>
<th>[Month]</th>
<th>[Month]</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beginning Cash Balance</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
</tr>
<tr>
<td>Cash Inflows (Income):</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A ccts. Rec. Collections</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Loan Proceeds</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Current Collections</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other:</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Cash Inflows</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
</tr>
<tr>
<td>Available Cash Balance</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
</tr>
<tr>
<td>Cash Outflows (Expenses):</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Advertising</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bank Service Charges</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Credit Card Fees</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delivery</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Filing Fees</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Health Insurance</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Insurance</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interest</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Office</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Payroll</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Payroll Taxes</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional Fees</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rent or Lease</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Subscriptions &amp; Dues</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Supplies</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Taxes &amp; Licenses</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
## Utilities & Telephone

<table>
<thead>
<tr>
<th>Other:</th>
</tr>
</thead>
<tbody>
<tr>
<td>$0  $0 $0 $0</td>
</tr>
</tbody>
</table>

## Subtotal

$0  $0 $0 $0

## Other Cash Outflows:
Worksheet #29—Capital Needs, Sources and Uses

Use this Worksheet to determine your needs for capital.

<table>
<thead>
<tr>
<th>What are your needs for working capital?</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type</strong></td>
<td><strong>Amount</strong></td>
<td><strong>Date Required</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>What are your needs for growth capital?</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type</strong></td>
<td><strong>Amount</strong></td>
<td><strong>Date Required</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>What are your needs for equity capital?</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type</strong></td>
<td><strong>Amount</strong></td>
<td><strong>Date Required</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Describe your sources of funds:

Owner Investment:

<table>
<thead>
<tr>
<th>Owner Name</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Owner Financing:

<table>
<thead>
<tr>
<th>Name</th>
<th>Amount</th>
<th>Debt Term</th>
<th>Equity?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
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<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Other Private Financing

<table>
<thead>
<tr>
<th>Name</th>
<th>Amount</th>
<th>Terms</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Use of Funds

Capital Expenditures:
- Purchase of Property
- Leasehold Improvements
- Equipment/Furniture
- Other
<table>
<thead>
<tr>
<th>Working Capital:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supplies</td>
</tr>
<tr>
<td>Staff</td>
</tr>
<tr>
<td>Marketing</td>
</tr>
<tr>
<td>Other</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Debt Retirement</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Cash Reserve</td>
</tr>
</tbody>
</table>
Worksheet #30—Assumptions

The figures of the practice's financial forms are based on the following assumptions:

<table>
<thead>
<tr>
<th>Collections:</th>
<th>Year 1</th>
<th>Year 2</th>
<th>Year 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hourly</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Flat Fee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contingent</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

What is the expected increase in rates/fees for each year?

Describe the assumptions for total payroll in the financial forms.

Are there any key attorney or management positions to be added? When?

What is the projected gross profit margin?

Are there any major changes in costs projected that will affect gross profit margin?

What is the timing and cost of key projected expenses?

Facilities?

Major Capital Purchases
<table>
<thead>
<tr>
<th>Major Marketing Expenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other considerations</td>
</tr>
<tr>
<td>Are there any loans projected to be added or retired?</td>
</tr>
<tr>
<td>What interest rates are assumed?</td>
</tr>
<tr>
<td>Describe any other major assumptions used in creating our projections, such as adding partners, etc.</td>
</tr>
</tbody>
</table>
Worksheet #31—Mission Statement Outline

Use this Worksheet to outline your practice’s objectives.

<table>
<thead>
<tr>
<th>Explain your practice’s philosophy about:</th>
</tr>
</thead>
<tbody>
<tr>
<td>The types of legal services that you offer.</td>
</tr>
<tr>
<td>The quality of the legal services that you offer.</td>
</tr>
<tr>
<td>The price of the legal services that you offer.</td>
</tr>
<tr>
<td>Your relationship to your clients.</td>
</tr>
<tr>
<td>Your management style and relationship to your employees.</td>
</tr>
<tr>
<td>Your work environment.</td>
</tr>
<tr>
<td>How your practice relates to the rest of the legal community.</td>
</tr>
<tr>
<td>Your goals for growth.</td>
</tr>
<tr>
<td>Your goals for profitability.</td>
</tr>
<tr>
<td>Other goals such as community involvement, the environment, etc.</td>
</tr>
</tbody>
</table>

What is the essence of my Quest?
Worksheet #32— Narrative Style Executive Summary

Use this Worksheet to write a narrative style executive summary

<table>
<thead>
<tr>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Describe How Your Practice is Organized, Its State of Development, Type of</td>
</tr>
<tr>
<td>Entity, and Mission Statement.</td>
</tr>
<tr>
<td>What is your Practice Concept?</td>
</tr>
<tr>
<td>What is the Market Opportunity?</td>
</tr>
<tr>
<td>What makes your practice Distinctive?</td>
</tr>
<tr>
<td>What is your Competitive Advantage?</td>
</tr>
<tr>
<td>Who are the Principals?</td>
</tr>
<tr>
<td>What are your Goals for Success? How will you reach them, and what is your</td>
</tr>
<tr>
<td>Measure for Success?</td>
</tr>
<tr>
<td>Financials: How Much Do You Need and When Will You Pay It Back?</td>
</tr>
</tbody>
</table>
Worksheet #33—Synopsis Executive Summary

Use this Worksheet to compose your synopsis executive summary.

<table>
<thead>
<tr>
<th>Company Description: Name, type of practice, location, etc.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mission Statement:</td>
</tr>
<tr>
<td>Goals:</td>
</tr>
<tr>
<td>Stage of Development:</td>
</tr>
<tr>
<td>Practice Areas:</td>
</tr>
<tr>
<td>Target Market:</td>
</tr>
<tr>
<td>Competitors:</td>
</tr>
<tr>
<td>Your Competitive Advantages:</td>
</tr>
<tr>
<td>Sales and Advertising Strategy:</td>
</tr>
<tr>
<td>Management:</td>
</tr>
<tr>
<td>Operations:</td>
</tr>
<tr>
<td>Financials:</td>
</tr>
<tr>
<td>Funds Applied For:</td>
</tr>
<tr>
<td>Progress Markers:</td>
</tr>
<tr>
<td>Exit Strategy:</td>
</tr>
</tbody>
</table>
EXECUTIVE SUMMARY

Business Description
The Lopez Law Firm is a new law practice located in Springfield, Massachusetts, specializing in legal services for small and medium sized Hispanic businesses. Primary services will include entity selection, trade secret, trademark and copyright protection, strategic planning, tax representation, benefits representation, tax advice seminars and workshops. Our mission is to provide our clients with business services that help them become more successful and to become a leader in providing legal services to small and medium sized Hispanic businesses.

To keep our overhead costs low, The Lopez Law Firm will be located in the home of John Lopez. The home is equipped with a computer, fax machine and photocopier.

Ownership and Management
The Lopez Law Firm is a solo practice, owned by John Lopez. As the business expands the firm may develop strategic alliances with other law practices. John Lopez is a licensed attorney and a member of the American Bar Association. He has a Bachelor’s Degree from the University of Puerto Rico in Business Administration, a second Bachelor’s degree from the University of Massachusetts, in Legal Studies, a Masters in Business Administration from the Harvard Business School and a Juris Doctor degree from the University of Connecticut. John Lopez was most recently an equity partner at Smith and Smith, Counselors at Law, in Springfield.
The Lopez Law Firm will initially have only one employee, John Lopez. Additional staff support will be obtained on a subcontract basis. Secretarial service will be contracted out as required to TempServ company in Springfield.

Key Initiatives and Objectives

The Lopez Law Firm is currently in the process of obtaining a bank loan for $30,000 to finance the start up of the business. Our key objective during the first 12 months of operation is to develop a profitable legal practice. To do this, a strong client base will be developed through networking with local business leaders and business associations, affiliating with small business loan divisions of the local banks, and holding seminars and workshops. During the first four months of operations eight small business seminars and our small business workshops will be developed.

Marketing Opportunities

Due to high overhead costs, Smith and Smith, Springfield’s largest law firm, recently restructured to focus more on large corporate and government clients. This meant the elimination of their small business division. Large law firms such as Smith and Smith typically target larger businesses and government contracts; thus creating an opportunity for smaller law firms such as The Lopez Law Firm to provide small and medium sized businesses with affordable legal services. Moreover, the number of Hispanic-owned small businesses in Springfield has doubled in the last ten years and the trend is projected to continue.

There are currently no other firms that specialize in this type of legal services located within the region. John Lopez left Smith and Smith to continue to provide small and medium sized businesses with much needed affordable legal services.

Competitive Advantages

The key competitive advantages of The Lopez Law Firm are the small business experience and expertise of John Lopez as well as the relatively low overhead costs compared to competitive law firms. John Lopez is a former resident of Puerto Rico, with extensive legal experience for small and medium sized Hispanic businesses.

Overhead costs are comparatively low because The Lopez Law Firm will be based at the home of John Lopez and labor costs will be low as there are no other full time employees.
Marketing Strategy

Our target markets will be small and medium sized new and existing, Hispanic-owned or operated businesses in the surrounding region. The Lopez Law Firm will market its services by placing an ad in the yellow pages, listing with all local business and industry associations, developing a brochure to be distributed to lending institutions and clients, becoming an active member of a number of business and consulting associations, networking with the local business community, and developing workshops and seminars for small businesses. Our seminars and workshops will be used to promote our other legal services. Attendees will be able to pick up our brochure and ask any questions regarding the services we provide. The brochure will outline The Lopez Law Firm’s services and fee structure. The brochure will also highlight the past experience and level of expertise of John Lopez. The brochures will be distributed at our workshops and seminars, to lending institutions, associations, key business leaders, and to potential clients.

The Lopez Law Firm will not do much advertising except for placing an ad in the local yellow pages and developing a web site to be launched in January, 2006. John Lopez will join local business associations to maintain contacts in the business community as well as to stay well informed about the business issues that are important to local businesses.

Summary of Financial Projections

The revenues of The Lopez Law Firm are projected to increase from $121,770 in 2005 to $181,170 by 2007. Revenues will see strong growth of 22% annually as the practice grows and expands. The Cost of Sales are 55% including total wages (including subcontractors) at 45% and goods and materials at 10%. The Net Income is projected to increase from $12,330 in 2005 to $17,279 in 2007. Since this is an unincorporated solo practice all profits will be taxed at the prevailing personal tax rates.

CONFIDENTIALITY AND RECOGNITION OF RISKS

Confidentiality Clause

The information included in this business plan is strictly confidential and is supplied on the understanding that it will not be disclosed to third parties without the written consent of John Lopez.
Recognition of Risk

The business plan represents our best estimate of the future of The Lopez Law Firm. It should be recognized that not all of major risks can be predicted or avoided and few business plans are free of errors of omission or commission. Therefore, investors should be aware that this business has inherent risks that should be evaluated prior to any investment.

BUSINESS OVERVIEW

Business History

Lopez Law is a law practice that is scheduled to begin operations on January 1, 2005. Lopez Law will be a sole proprietorship, owned by John Lopez. John Lopez left the large law firm of Smith and Smith to specialize in consulting to small and medium sized Hispanic-owned businesses. Large law firms such as Smith and Smith typically target larger businesses and government contracts creating an opportunity for Lopez Law to provide small and medium sized Hispanic-owned businesses with affordable legal services.

Vision and Mission Statement

Our mission is to become a leader in small business legal services by providing our clients with business services that help them become more successful.

Objectives

Our primary objectives over the next year are to:

- Obtain a bank loan of $30,000 to cover the start up costs and initial operating costs for The Lopez Law Firm.
- Generate one new client contract a month by networking with key industry leaders and local lending institutions, conducting seminars and workshops for small and medium sized Hispanic-owned or operated businesses, and joining key business and industry associations.
- Generate a net profit of $12,000 in the first year by developing a strong client base and keeping overhead costs to a minimum.
• Develop and conduct eight business seminars and four business workshops that meet the needs of the local Hispanic business community.

Ownership

Lopez Law is a sole proprietorship, owned by John Lopez. As the business expands, strategic alliances may be formed with other companies.

Location and Facilities

To keep our overhead costs low, The Lopez Law Firm will be located in the home of John Lopez. The home, located at 1875 Wilson Street in Springfield, is equipped with a computer, broadband internet connection, fax machine and photocopier. Secretarial service will be contracted out as required to TempServ Company in Springfield. Where possible, all meetings and presentations will be held at the client's location. If this is not feasible, the company has arranged to rent the boardroom of a local law firm as required. Presentation equipment such as overhead projectors and liquid crystal display (LCD) units will be rented from Holyoke Community College.

Any sub-contractors hired for specific projects will not work in our office but will work from their own offices. This will greatly reduce our overhead costs allowing us to price our services competitively. As The Lopez Law Firm grows, consideration will be given to acquiring office space.

PRODUCTS AND SERVICES

Description of Products and Services

The primary types of services we will provide include entity selection, trade secret, trademark and copyright protection, strategic planning, tax representation, benefits representation, tax advice, litigation, seminars and workshops.

We will offer seminars to small and medium sized Hispanic-owned or operated businesses. The seminars will focus on key legal issues for small and medium sized operators such as employee benefits, intellectual property protection, etc. Attendance will vary but should average 20 to 30 people each.

The workshops will be developed to help small and medium sized businesses identify and avoid key legal pitfalls. This service is currently unavailable in the
area. Workshops will be held in the evenings and on weekends making it easier for busy operators to attend.

**Key Features of the Products and Services**

The Lopez Law Firm will specialize in small and medium sized firms. While other law firms in the region offer small and medium sized businesses legal services, none specialize in this area. With today’s unpredictable political and economic environments, it is increasingly difficult for entrepreneurs to successfully start new businesses and for existing small and medium sized businesses to remain profitable. Our services will differ from our competitors in that The Lopez Law Firm will offer creative, innovative, and effective legal solutions to business problems. Too many law firms try to develop standard models to solve key legal problems. Lopez Law realizes that business problems have a variety of solutions; what may be right for one business would not necessarily meet the needs of another business.

**Production of Products and Services**

Initially subcontractors will be hired as needed to work on specific projects. Subcontractors will be hired based on their area of expertise and experience. Due to office space limitations, subcontractors will work out of their own offices and will be linked directly to our office via e-mail and the Internet. Within the next three years, full time associate and administrative staff will be hired.

While all documents, pleadings, and reports will be produced and edited by John Lopez, the physical reports will be formatted, printed and bound by TempServ, a local secretarial agency in Springfield. Should the company take on any other full time employees, consideration will be given to leasing office space in the Springfield area.

**Future Products and Services**

We will continually expand our services based on industry trends and changing client needs. We will also get feedback from clients and seminar attendees on what is needed for future seminars and workshops.

**Comparative Advantages in Production**

Our comparative advantages in production are our low overhead and labor costs. Lopez Law does not have to pay for under utilized staff or facilities. We also
have an advantage in that we can pick the most qualified sub-contractors for each project. The sub-contractors will be picked based on their expertise. This allows us to draw from a larger labor pool and skill set. Sub-contractors will be hired as needed which means that during down times our firm is not over staffed.

INDUSTRY OVERVIEW

Market Research

To fully understand the market we are targeting we talked to local business leaders, the Small Business Association, the Chamber of Commerce, the local economic development office, and all small business lending departments at the local banks. In addition, we read local newspaper and journal articles, and collected industry statistics.

Size of the Industry

There are 100 business law firms in Hampden County; there are 34 business law firms in the Springfield area alone. While there is some overlap in the types of services provided, most firms have developed their own market niches. Firms tend to become well known and recognized for their skills in a specific area such as employee benefits, tax, litigation, or intellectual property.

Key Product Segments

Legal practice is a very diverse industry. There are hundreds of different services that lawyers provide to all industries and industry sectors.

Key Market Segments

Key market segments vary by legal specialty. The key markets for business legal services are corporations, professional practices, and sole proprietorships. The total size of these markets is unknown because they are continually changing and there are no accurate tracking mechanisms in place to accurately determine how much these market segments spend on legal services annually.
Purchase Process and Buying Criteria

The buying process for legal services varies by type of client and by type of service. Businesses find and choose law firms using several methods.

1. Referral

Businesses find lawyers through their lending institutions, business or industry associations, friends or colleagues, and the yellow pages. Businesses contact these law firms to obtain proposals and price quotes for the required services. A law firm is chosen based on the needs of the client such as price, quality of proposal, as well as the reputation, past experience and level of expertise of the practice.

2. Request for Proposal

Businesses requiring legal services sometimes distribute a “Request for Proposal” to a number of firms for specific projects. These firms submit proposals for the projects they wish to bid on by outlining the scope of the work, the methodology, a work plan and price quote. These proposals are evaluated based on a predetermined set of criteria developed by the client. The proposal evaluation criteria varies by project and by client but usually includes price, quality of proposal, and the reputation, past experience and level of expertise of the firm.

Legal services are usually purchased by start up businesses or by small and medium sized businesses requiring financing, commercializing a new product, or entering new markets. These businesses seek assistance from their lending institutions, industry and business associations, or directly from law firms.

Description of Industry Participants

Law firms are divided into large firms with more than 100 employees, medium sized firms with 20 to 100 employees and small firms with less than 20 employees. The majority (66%) of lawyers in Hampden County are employed at large firms, 6% and medium sized firms and 28% at small firms according to a recent Industry report. Small firms typically have less than 10 employees.

Key Industry Trends

The legal industry is growing for two key reasons. One is that demand for legal services is increasing as companies downsize and contract out work that was historically done in-house. Corporate downsizing has also resulted in many
managers being laid off. It is difficult for many of these people to find similar employment and as a result, many of these managers start their own businesses and will require specialized legal services to improve their chances of success. Therefore corporate downsizing has resulted in an increase both in the supply of, and demand for, legal services. The number of business starts in Springfield has risen 10% annually over the last several years. Approximately 100 new businesses will be started in the area in 2005. This trend is projected to continue for at least another 5 years.

**Industry Outlook**

With the continued economic and political uncertainty in this area, the demand for legal services to small and medium Hispanic-owned businesses has increased. While the number of business starts has increased so have the number of bankruptcies. Approximately seven out of 10 new businesses will fail within the first two years of operation, primarily due to poor entity selection and tax planning.

**MARKETING STRATEGY**

**Target Markets**

Our target markets will be small and medium sized new and existing Hispanic-owned or operated businesses in the surrounding region. We will also submit proposals in response to any Request for Proposals we receive.

**Description of Key Competitors**

There are a total of 34 law firms in Springfield, Massachusetts that provide small business services. Only 14 of these law practices offer services similar to The Lopez Law Firm. None of the 14 offers legal services specifically designed for the Hispanic-owned business, nor do any of the lawyers speak fluent Spanish. The other 20 consulting firms in the region specialize in other areas of law.

There are four large law firms that offer legal services to small and medium sized businesses. However, these large firms cannot cost effectively service this market due to high overhead and labor costs. Small and medium sized businesses usually cannot afford the high hourly fees charged by these firms. Business from this target market does not represent a significant portion of the revenues generated by these four large firms which all specialize in other areas of the law.
Analysis of Competitive Position

The Lopez Law Firm will be the only law practice in the region specializing in providing legal services to small and medium sized Hispanic-owned or operated businesses. The Lopez Law Firm has a competitive advantage in this area due to the excellent legal experience of John Lopez.

However, as a new practice, it may take time to establish a strong client base and develop a reputation as a small business specialist. Attorney Lopez already has an excellent reputation in this area and Smith and Smith, his former employer, will redirect any of this type of business to Attorney Lopez’s new firm.

Pricing Strategy

The Lopez Law Firm services will be priced competitively with other small law firms. Typically the fees charged by small firms are much lower than those charged by the large firms due to lower overhead costs. Our fees will be based on several factors including the time and resources needed to complete a project, overhead costs, and the fees charged by other competitive consulting firms. Our hourly rates average $200.00 per hour compared to $300.00 per hour for the large consulting firms. Our hourly fees will remain the same for all projects. However, total project costs will vary depending on the time needed to complete the project as well as the direct expenses incurred as part of the project.

Promotion Strategy

The Lopez Law Firm will market its services by placing an ad in the yellow pages, listing with all local business and industry associations, developing a brochure to be distributed to lending institutions and clients, becoming an active member of a number of business and consulting associations, networking with the local business community, and developing small business workshops and seminars.

1. Workshops/Seminars. Our seminars and workshops will be used to promote our other legal services. Attendees will be able to pick up our corporate brochure and ask any questions regarding the services we provide.

2. Corporate brochure. We will develop a corporate brochure outlining our services and fee structure. The brochure will also highlight our past experience and level of expertise. The brochures will be distributed at our workshops and seminars, distributed to lending institutions, associations, key business leaders, and to potential clients.
3. Advertising. Lopez Law will not do much advertising except for placing an ad in the local yellow pages. Within the next year, we will develop our own Internet site highlighting our expertise and services.

4. Networking. Lopez Law will join local business associations in order to maintain contacts in the business community as well as to stay well informed about the issues that are important to local businesses.

**Distribution Strategy**

Distribution is not an issue for law firms. Reports and other documents will be couriered, e-mailed, faxed or mailed directly to the appropriate recipient as appropriate.

**MANAGEMENT AND STAFFING**

**Organizational Structure**

Lopez Law is a sole proprietorship that will be run and managed by the owner, John Lopez. All administrative and accounting duties will be contracted out. Any additional staff required will be obtained on a subcontract basis.

**Management Team**

John Lopez is a Massachusetts licensed attorney, and a member of the American Bar Association. He has a Bachelor’s Degree from the University of Puerto Rico in Business Administration, a second Bachelor’s degree from the University of Massachusetts, in Legal Studies, a Masters in Business Administration from the Harvard Business School and a Juris Doctor degree from the University of Connecticut. John Lopez was most recently an equity partner at Smith and Smith, Counselors at Law, in Springfield. John Lopez has been a lawyer for 15 years with Smith and Smith, specializing in small and medium sized businesses.

John Lopez’s resume is attached at the end of this business plan.

**Staffing**

No full time staff will be hired at The Lopez Law Firm for at least three years. Any additional staff required to complete client contracts will be hired on a subcontract basis in order to keep labor costs low.
**Labor Market Issues**

There is no shortage of qualified attorneys in the area who work on a subcontract basis for a number of law firms. However, timing can be a problem in that it may be difficult to find attorneys with a specific type of expertise who have time available when needed.

**RISKS**

**Market Risks**

Increased competition for small business clients and the potential entry of large firms into small business legal representation in Springfield poses some degree of market risk. To develop and maintain a reasonable market share we will give our clients expert and timely legal services at competitive prices. Our long term goal is to expand our operations so that we become the leading small business law firm for Hispanic businesses in the region.

**Other Risks**

There are several other risks that could affect our operations including cyclical cash flow problems and liability issues. Law firms can experience cash flow problems because the industry is project driven. Projects can last for several months and clients can take 30 to 60 days after completion of their projects to pay the invoice. To avoid this situation, our firm will ask for 40% of the project price at the beginning of a project, and will bill clients for all hourly and out-of-pocket expenses every month.

The other major risk facing law firms is professional liability or the risk of being sued by a client. Consultants can be sued both for breach of contract and tort liability. Lopez Law has Professional Liability Insurance as protection in the event of a lawsuit. Lopez Law will also operate in a professional manner, minimizing the risk of a lawsuit.
IMPLEMENTATION PLAN

Implementation Activities and Dates

Within the next several months The Lopez Law Firm will undertake the following activities:

1. John Lopez is in the process of obtaining a bank loan for $10,000 to start up Lopez Law.

2. Documents for seminar and workshops will be developed.

3. A corporate brochure will be developed within the first two weeks to be distributed to potential clients and local business leaders and resources.

FINANCIAL PLAN

Discussion of Projected Net Income

Revenue is projected to increase from $121,770 in 2005 to $181,170 by 2007. Revenues will see strong growth of 22% annually as the business grows and expands. Cost of Sales are $66,480 in Year 1, which projects to a total of 55% of revenues, including wages at 45% and goods and materials at 10%.

Sales and Marketing expenses average 10% of Net Sales. Sales and Marketing expenses include advertising, a corporate brochure, seminar and workshop materials, other expenses such as networking and client lunches. Property and Utilities expenses average 14% of Net Sales including telephone and utilities, and other expenses such as the office furniture and computer lease expenses. Operations, and Banking and Other expenses average 3% to 4% of Net Sales. Operations expenses include supplies, repairs and maintenance, vehicle and travel expenses, and licences and permits. Banking and Other expenses include bank charges, accounting and legal fees, and insurance.

Net Income is projected to increase from $12,330 in 1998 to $17,280 in 2000. Federal and state income taxes are calculated at 22.84% of net income before taxes.

Discussion of Monthly Cash Flow Statement

Without a bank loan, it will take The Lopez Law Firm six months to generate a positive cash flow. The operating loan of $10,000 ensures that The Lopez Law
Firm will not need any additional operating loans during the first twelve months to maintain a positive monthly cash balance.

**Discussion of Projected Annual Cash Flow**

Providing The Lopez Law Firm achieves their revenue projections no additional operating loans will be need in years two and three. This will lead to increases in ending cash balances in both Year 2 and 3.

**Discussion of Pro-Forma Balance Sheet**

With no loans payable in Years 2 and 3 of operations, the cash position and the amount of retained earnings will increase each year. All liabilities will be paid as they are due. Discussion of Business Ratios

Due to The Lopez Law Firm’s billing structure, the average collection period for accounts receivable will be low compared to other law practices. Profit margins are consistent from year to year and are comparable to other practices with less than $500,000 in annual revenue. Debt to net worth is inconsequential as the practice will be debt free after Month 8 of operations.

**Note 1: Revenue Assumptions**

a. Our revenue projections by product and by month for the first year are:

<table>
<thead>
<tr>
<th>Year 1</th>
<th>Clients</th>
<th>Seminars</th>
<th>Workshops</th>
<th>Bad Debt</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Month 1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Month 2</td>
<td>0</td>
<td>1,750</td>
<td>0</td>
<td>-18</td>
<td>1,732</td>
</tr>
<tr>
<td>Month 3</td>
<td>5,000</td>
<td>0</td>
<td>4,500</td>
<td>-95</td>
<td>9,405</td>
</tr>
<tr>
<td>Month 4</td>
<td>5,000</td>
<td>1,750</td>
<td>0</td>
<td>-68</td>
<td>6,682</td>
</tr>
<tr>
<td>Month 5</td>
<td>10,000</td>
<td>0</td>
<td>4,500</td>
<td>-145</td>
<td>14,355</td>
</tr>
<tr>
<td>Month 6</td>
<td>10,000</td>
<td>1,750</td>
<td>0</td>
<td>-118</td>
<td>11,632</td>
</tr>
<tr>
<td>Month 7</td>
<td>15,000</td>
<td>0</td>
<td>4,500</td>
<td>-195</td>
<td>19,305</td>
</tr>
<tr>
<td>Month 8</td>
<td>15,000</td>
<td>1,750</td>
<td>0</td>
<td>-168</td>
<td>16,582</td>
</tr>
<tr>
<td>Month 9</td>
<td>10,000</td>
<td>0</td>
<td>4,500</td>
<td>-145</td>
<td>14,355</td>
</tr>
<tr>
<td>Month 10</td>
<td>10,000</td>
<td>1,750</td>
<td>0</td>
<td>-118</td>
<td>11,632</td>
</tr>
<tr>
<td>Month 11</td>
<td>5,000</td>
<td>0</td>
<td>4,500</td>
<td>-95</td>
<td>9,405</td>
</tr>
<tr>
<td>Month 12</td>
<td>5,000</td>
<td>1,750</td>
<td>0</td>
<td>-68</td>
<td>6,682</td>
</tr>
</tbody>
</table>
b. Our revenue projections by product for Years 2 and 3 are:

<table>
<thead>
<tr>
<th>Year</th>
<th>Clients</th>
<th>Seminars</th>
<th>Bad Debt</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year 2</td>
<td>110,000</td>
<td>15,000</td>
<td>25,000</td>
<td>148,500</td>
</tr>
<tr>
<td>Year 3</td>
<td>135,000</td>
<td>20,000</td>
<td>28,000</td>
<td>181,170</td>
</tr>
</tbody>
</table>

**Note 2: Assumptions Regarding the Collection of Sales Revenue**

a. We assume that the percent of our sales which are collected: in the month they are made; in the month following; in two months; and in three months are:

- **Current Month**: 40%
- **In the Following Month**: 50%
- **In Two Months**: 10%
- **In Three Months**:%
- **Total**: 100%

b. Based on these assumptions we have projected how much we will collect from our sales in each month. The following table also identifies any adjustments we may have made to these figures.

<table>
<thead>
<tr>
<th>Year 1</th>
<th>Projected Collections</th>
<th>Adjustment</th>
<th>Revised Estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Month 1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Month 2</td>
<td>693</td>
<td>693</td>
<td>693</td>
</tr>
<tr>
<td>Month 3</td>
<td>4,628</td>
<td>4,628</td>
<td>4,628</td>
</tr>
<tr>
<td>Month 4</td>
<td>7,549</td>
<td>7,549</td>
<td>7,549</td>
</tr>
<tr>
<td>Month 5</td>
<td>10,024</td>
<td>10,024</td>
<td>10,024</td>
</tr>
<tr>
<td>Month 6</td>
<td>12,499</td>
<td>12,499</td>
<td>12,499</td>
</tr>
<tr>
<td>Month 7</td>
<td>14,974</td>
<td>14,974</td>
<td>14,974</td>
</tr>
<tr>
<td>Month 8</td>
<td>17,449</td>
<td>17,449</td>
<td>17,449</td>
</tr>
<tr>
<td>Month 9</td>
<td>15,964</td>
<td>15,964</td>
<td>15,964</td>
</tr>
<tr>
<td>Month 10</td>
<td>13,489</td>
<td>13,489</td>
<td>13,489</td>
</tr>
<tr>
<td>Month 11</td>
<td>11,014</td>
<td>11,014</td>
<td>11,014</td>
</tr>
</tbody>
</table>
c. Not all of our sales in the first year will be collected during that year. Based on the assumptions shown above our Accounts Receivable at the end of Year 1 will be:

$4,945

d. We assume that our Accounts Receivable at the end of Years 2 and 3 will be:
Year 2 $7,000
Year 3 $8,000

Note 3: Cost of Sales Assumptions

a. Our assumptions regarding the amount that we will pay each month in Year 1 for Cost of Sales items is listed below. These figures show up on our cash flow statements.

<table>
<thead>
<tr>
<th>Year 1</th>
<th>Production Wages</th>
<th>Goods &amp; Materials</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Month 1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Month 2</td>
<td>800</td>
<td>170</td>
<td>970</td>
</tr>
<tr>
<td>Month 3</td>
<td>4,200</td>
<td>940</td>
<td>5,140</td>
</tr>
<tr>
<td>Month 4</td>
<td>3,000</td>
<td>650</td>
<td>3,650</td>
</tr>
<tr>
<td>Month 5</td>
<td>6,400</td>
<td>1,400</td>
<td>7,800</td>
</tr>
<tr>
<td>Month 6</td>
<td>5,200</td>
<td>1,200</td>
<td>6,400</td>
</tr>
<tr>
<td>Month 7</td>
<td>8,600</td>
<td>1,900</td>
<td>10,500</td>
</tr>
<tr>
<td>Month 8</td>
<td>7,400</td>
<td>1,700</td>
<td>9,100</td>
</tr>
<tr>
<td>Month 9</td>
<td>6,300</td>
<td>1,400</td>
<td>7,700</td>
</tr>
<tr>
<td>Month 10</td>
<td>5,200</td>
<td>1,200</td>
<td>6,400</td>
</tr>
<tr>
<td>Month 11</td>
<td>4,200</td>
<td>950</td>
<td>5,150</td>
</tr>
<tr>
<td>Month 12</td>
<td>3,000</td>
<td>670</td>
<td>3,670</td>
</tr>
<tr>
<td>Total</td>
<td>$54,300</td>
<td>$12,180</td>
<td>$66,480</td>
</tr>
</tbody>
</table>
b. Our assumptions regarding the amount that we will pay in Years 2 and 3 for Cost of Sales items are listed below. These figures show up on our annual Cash Flow Statement.

<table>
<thead>
<tr>
<th>Production</th>
<th>Goods &amp; Materials</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wages</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Year 2</td>
<td>66,825</td>
<td>15,000</td>
</tr>
<tr>
<td>Year 3</td>
<td>81,526</td>
<td>19,000</td>
</tr>
</tbody>
</table>

c. (Apart from what we have already paid for) There may be additional Cost of Sales services which we have received but we won’t have paid for yet. We estimate the amount that we will owe (have as an Account Payable) for Cost of Sales items at the end of each year will be:

<table>
<thead>
<tr>
<th>Year</th>
<th>Cost of Sales Payable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beginning Balance</td>
<td>0</td>
</tr>
<tr>
<td>Year 1</td>
<td>0</td>
</tr>
<tr>
<td>Year 2</td>
<td>0</td>
</tr>
<tr>
<td>Year 3</td>
<td>0</td>
</tr>
</tbody>
</table>

d. We have calculated our Cost of Sales expenses, based on these assumptions. These figures (which show up on our Income Statement) are shown in both dollar values and as a percent of our projected revenues.

<table>
<thead>
<tr>
<th>Cost of Sales</th>
<th>$</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year 1</td>
<td>66,480</td>
<td>55%</td>
</tr>
<tr>
<td>Year 2</td>
<td>81,825</td>
<td>55%</td>
</tr>
<tr>
<td>Year 3</td>
<td>100,526</td>
<td>55%</td>
</tr>
</tbody>
</table>
Sample Plan #2

LOPEZ LAW ASSOCIATES P.C.

Business Plan for the Period Starting January 2009

John Lopez, Esquire
Max Lopez, Esquire
1411 Main Street
Springfield, Massachusetts 01111
413-555-1111
Jlopez@lopezlaw.com
Mlopez@lopezlaw.com
Lopezlaw.com

October 17, 2008

Business Plan for the period Starting January 1, 2009

EXECUTIVE SUMMARY

Business Description

Lopez Law Associates PC is a new law practice located in Springfield, Massachusetts, specializing in legal services for members of the Springfield, Massachusetts Hispanic community, and their families, in the areas of motor vehicle tort, products liability, intentional torts, and medical malpractice.

Lopez Law has been established as a Professional Corporation, with attorneys John Lopez and his son, Max Lopez, as the shareholders and sole employees. John Lopez left the large law firm of Smith and Smith to specialize in representing members of the Hispanic community. Large firms such as Smith and Smith do not focus their litigation efforts on this section of the population, which provides a unique opportunity for Lopez Law to provide its neighbors with outstanding legal litigation services.

Ownership and Management

The Lopez Law Associates PC is a Professional Corporation, the shareholders and sole employees are John Lopez and his son, Max Lopez. As the business
expands the firm may develop strategic alliances with other law practices. John Lopez is a licensed attorney and a member of the American Bar Association. He has a Bachelor’s Degree from the University of Puerto Rico in Spanish literature, a second Bachelor’s degree from the University of Massachusetts, in Legal Studies, a Masters in Public Health from the Harvard University and a Juris Doctor degree from the University of Connecticut.

John Lopez was most recently an equity partner at Smith and Smith, Counselors at Law, in Springfield. Max Lopez is a licensed attorney and member of the American Bar Association. He has a Bachelor’s Degree from Middlebury College, and a Juris Doctor degree from Boston College.

Additional staff support will be obtained on a subcontract basis. Secretarial service will be contracted out as required to TempServ company in Springfield.

Key Initiatives and Objectives

The Lopez Law Associates PC is currently in the process of obtaining a bank loan for $30,000 to finance the start up of the business. Our key objective during the first 12 months of operation is to develop a profitable legal practice. To do this, a strong client base will be developed through networking with local medical providers, establishing relationships with community organizations and associations, holding seminars and workshops, and conducting informational radio and cable television broadcasts.

Marketing Opportunities

Due to high overhead costs, Smith and Smith, Springfield’s largest law firm, recently restructured to focus more on large corporate and government clients rather than plaintiffs’ litigation. This meant the elimination of their plaintiff litigation division; thus creating an opportunity for smaller law firms such as The Lopez Law Associates PC to provide plaintiffs’ legal services. Moreover, the number of Hispanic citizens in Springfield has doubled in the last ten years and the trend is projected to continue.

There are currently no other firms that specialize in this type of legal services located within the region. John Lopez left Smith and Smith to continue to provide his community with plaintiffs’ personal injury litigation services.
Competitive Advantages

The key competitive advantages of The Lopez Law Associates PC are the litigation experience and expertise of John Lopez as well as the relatively low overhead costs compared to competitive law firms. John Lopez is a former resident of Puerto Rico, with extensive trial and negotiation experience.

Overhead costs are comparatively low because The Lopez Law Associates PC will be based at the home of John Lopez and labor costs will be low as he and Attorney Max Lopez will be the only full time employees.

Marketing Strategy

Our target markets will be injured individuals and their families in the Hispanic community. Lopez Law will market its services by placing an ad in the Yellow Pages, developing a brochure to be distributed to medical service providers and their patients, becoming active members in a number of community associations, networking with the local community and Bar associations, developing workshops and seminars, and by conducting instructional programs on the local Hispanic radio and cable television stations. Lopez Law Associates PC will develop a web site to be launched in March 2009. John Lopez and Max Lopez will join local business associations to maintain contacts in the business community as well as to stay well informed about the business issues that are important to local businesses.

Summary of Financial Projections

The revenues of The Lopez Law Associates PC are projected to increase from $121,770 in 2005 to $181,170 by 2007. Revenues will see strong growth of 22% annually as the practice grows and expands. The Cost of Sales are 55% including total wages (including subcontractors) at 45% and goods and materials at 10%. The Net Income is projected to increase from $12,330 in 2005 to $17,279 in 2007. Since this is an unincorporated solo practice all profits will be taxed at the prevailing personal tax rates.
CONFIDENTIALITY AND RECOGNITION OF RISKS

Confidentiality Clause

The information included in this business plan is strictly confidential and is supplied on the understanding that it will not be disclosed to third parties without the written consent of John Lopez and Max Lopez.

Recognition of Risk

The business plan represents our best estimate of the future of The Lopez Law Associates P.C. It should be recognized that not all of major risks can be predicted or avoided and few business plans are free of errors of omission or commission. Therefore, investors should be aware that this business has inherent risks that should be evaluated prior to any investment.

BUSINESS OVERVIEW

Business History

Lopez Law Associates P.C. is a law practice that is scheduled to begin operations on January 1, 2009. Lopez Law will be a Professional Corporation with John and his son, Max, serving as the shareholders and sole employees. John Lopez left the large law firm of Smith and Smith to specialize in representing members of the Hispanic community.

Large law firms such as Smith and Smith do not focus their litigation efforts on this section of the Springfield population, which provides a unique opportunity for Lopez Law to provide the Hispanic community with outstanding legal services for its members who have been injured.

Vision and Mission Statement

Our mission is to give outstanding plaintiffs’ litigation legal services to members of the Hispanic community in Springfield.
Objectives

Our primary objectives over the next year are to:

- Obtain a bank loan of $30,000 to cover the start up costs and initial operating costs for The Lopez Law Associates PC.

- Generate ten new client contracts a month by networking with medical professionals and local community organizations, conducting seminars and workshops for individuals, joining key community and legal associations, launching an interactive web site, and conducting informational programs on Hispanic radio and cable television stations.

- Generate a net profit of $12,000 in the first year by developing a strong client base and keeping overhead costs to a minimum.

- Develop and conduct eight seminars and four workshops that meet the needs of the local Hispanic community.

Ownership

Lopez Law is a Professional Corporation, owned by John Lopez and Max Lopez. As the business expands, strategic alliances may be formed with other law firms.

Location and Facilities

To keep our overhead costs low, The Lopez Law Associates PC will be located in the home of John Lopez. The home, located at 1875 Wilson Street in Springfield, has a home office facility with a separate entrance and parking area. The office space has a reception area, two offices, and conference space. It is equipped with computers, broadband connection, fax machine and photocopier. If additional space is required, the practice has arranged to rent the conference room at Smith and Smith. Secretarial service will be contracted out as required to TempServ company in Springfield. Additional equipment such as projectors and liquid crystal display (LCD) units will be rented from Holyoke Community College.

Any sub-contractors hired for specific projects will not work in our office but will work from their own offices. This will greatly reduce our overhead costs allowing us to price our services competitively. As The Lopez Law Associates PC grows, consideration will be given to acquiring office space.
PRODUCTS AND SERVICES

Description of Products and Services
The primary types of services we will provide include pre-suit and trial representation in the areas of motor vehicle tort, products liability, intentional tort, and medical malpractice.

Key Features of the Products and Services
While other law firms in the region offer personal injury litigation, none specialize in representing the Hispanic population of this area.

Production of Products and Services
Initially subcontractors will be hired as needed to work on specific projects. Subcontractors will be hired based on their area of expertise and experience. Due to office space limitations, subcontractors will work out of their own offices and will be linked directly to our office via e-mail and the Internet. Within the next three years, full-time associate and administrative staff will be hired.

While all documents, pleadings, and reports will be produced and edited by John or Max Lopez, the physical documents will be formatted, printed and bound by TempServ, a local secretarial agency in Springfield. Should the company take on any other full-time employees, consideration will be given to leasing office space in the Springfield area.

Future Products and Services
We will continually expand our services based on legal and community trends and changing client needs.

Comparative Advantages in Production
Our comparative advantages in production are our low overhead and labor costs. Lopez Law does not have to pay for under utilized staff or facilities. We also have an advantage in that we can pick the most qualified subcontractors for each project. The subcontractors will be picked based on their expertise. This allows us to draw from a larger labor pool and skill set. Subcontractors will be hired as needed which means that during down times our firm is not overstaffed.
INDUSTRY OVERVIEW

Market Research
To fully understand the market we are targeting we talked to local business leaders, the American Medical Association, the Chamber of Commerce, the local economic development office, and the Massachusetts and Springfield Bar Associations. In addition, we read local newspaper and journal articles, and collected industry statistics.

Size of the Industry
There are 100 business law firms in Hampden County; there are 34 business law firms in the Springfield area alone. While there is some overlap in the types of services provided, most firms have developed their own market niches. Firms tend to become well known and recognized for their skills in a specific area.

Key Product Segments
The practice of plaintiffs’ personal injury litigation is very diverse. There are many different services that lawyers provide to all industries and industry sectors.

Key Market Segments
Key market segments vary by legal specialty. The key markets for plaintiffs’ litigation representation are: motor vehicle accidents, premises liability, intentional torts, products liability, wrongful death, and medical malpractice. The total size of these markets is unknown because they are continually changing and there are no accurate tracking mechanisms in place to determine accurately how much these market segments spend on legal services annually.

Purchase Process and Buying Criteria
The buying process for personal injury legal services tends to be made very quickly under tragic circumstances. Therefore, Lopez Law will focus on building high visibility in the community.
Description of Industry Participants

Law firms are divided into large firms with more than 100 employees, medium sized firms with 20 to 100 employees and small firms with less than 20 employees. The majority (66%) of lawyers in Hampden County are employed at large firms, 6% and medium sized firms and 28% at small firms according to a recent Industry report. Small firms typically have less than 10 employees.

Key Industry Trends

Personal injury litigation has been a steadily growing area of the law for the past forty years. This growth is directly tied to growth in the area's population and in its industrial and construction employment base. The Springfield area has experienced very rapid growth in industrial and construction employment, as well as strong growth in the general population. A rise in the number of automobile accidents per capita is directly tied to the poor condition of the state and federal highways in the area, which have not been targeted for improvement under the incoming administration. The Hispanic population in Springfield has been growing at a rate of 10% annually for the past five years and this trend is projected to continue for the next ten years.

Industry Outlook

Changes in the laws regarding medical malpractice, products liability, and driver liability, which favor recovery for injured parties will result in continued growth in plaintiffs' representation.

MARKETING STRATEGY

Target Markets

Our target markets will be injured individuals and their families in the Hispanic population of the surrounding region.

Description of Key Competitors

There are a total of 34 law firms in Springfield, Massachusetts that provide litigation services. Only 14 of these law practices offer services similar to The Lopez Law Associates PC. None of the 14 offers legal services specifically de-
signed for the Hispanic community, nor do any of the lawyers speak fluent Spanish. The other 20 consulting firms in the region specialize in other areas of law.

There are four large law firms that offer litigation services to plaintiffs. However, these large firms cannot cost effectively service this market due to high overhead and labor costs. Business from this target market does not represent a significant portion of the revenues generated by these four large firms which all specialize in other areas of the law.

**Analysis of Competitive Position**

The Lopez Law Associates PC will be the only law practice in the region specializing in providing legal services to plaintiffs in Springfield’s Hispanic population. The Lopez Law Associates PC has a competitive advantage in this area due to the excellent legal experience of John Lopez.

However, as a new practice, it may take time to establish a strong client base and develop a reputation as a small business specialist. Attorney Lopez already has an excellent reputation in this area and Smith and Smith, his former employer, will redirect any of this type of business to Attorney Lopez’s new firm.

**Pricing Strategy**

Lopez Law Associates PC will price its services on a contingency basis consistent with the standards applied by the Board of Bar Overseers and the Massachusetts Supreme Judicial Court.

**Promotion Strategy**

The Lopez Law Associates PC will market its services by placing an ad in the yellow pages, developing an interactive web site, developing a brochure to be distributed to the area’s medical professionals, becoming an active member of a number of business and community associations, networking with the local community and Bar Associations, and developing workshops and seminars for individuals, as well as presenting informational programs on the region’s Hispanic radio and cable television stations.

**Distribution Strategy**

Distribution is not an issue for law firms. Reports and other documents will be couriered, e-mailed, faxed or mailed directly to the appropriate recipient as appropriate.
MANAGEMENT AND STAFFING

Organizational Structure

Lopez Law is a Professional Corporation that will be run and managed by the shareholders, John Lopez and Max Lopez. All administrative and accounting duties will be contracted out. Any additional staff required will be obtained on a subcontract basis.

Management Team

John Lopez is a Massachusetts licensed attorney, and a member of the American Bar Association. He has a Bachelor’s Degree from the University of Puerto Rico in Spanish literature, a second Bachelor’s degree from the University of Massachusetts, in Legal Studies, a Masters in Public Health from Harvard University and a Juris Doctor degree from the University of Connecticut. John Lopez was most recently an equity partner at Smith and Smith, Counselors at Law, in Springfield. John Lopez has been a lawyer for 15 years with Smith and Smith, specializing in litigation.

Max Lopez is a licensed attorney and a member of the American Bar Association and the Massachusetts Bar Association. He has a Bachelor’s degree from Middlebury College and a Juris Doctor degree from Boston College. After five years of practicing law in Miami, Max decided to return to his hometown to work with his father.

The principals’ resumes are attached at the end of this business plan.

Staffing

No full time staff will be hired at The Lopez Law Associates PC for at least three years. Any additional staff required to complete client cases will be hired on a subcontract basis in order to keep labor costs low.

Labor Market Issues

There is no shortage of qualified attorneys in the area who work on a subcontract basis for a number of law firms. However, timing can be a problem in that it may be difficult to find attorneys with a specific type of expertise who have time available when needed.
RISKS

Market Risks

Increased competition for litigation clients and the potential entry of large firms into plaintiffs’ legal representation in Springfield poses some degree of market risk. To develop and maintain a reasonable market share we will give our clients expert and timely legal services. Our long-term goal is to expand our operations so that we become the leading plaintiff litigation law firm in the region.

Other Risks

There are several other risks that could affect our operations including cyclical cash flow problems and liability issues. Litigation law firms can experience cash flow problems because the industry is award driven. Cases can last for several years and defendants can take 90 to 180 days after final verdict to pay the judgment.

The other major risk facing law firms is professional liability or the risk of being sued by a client. Attorneys can be sued both for breach of contract and tort liability. Lopez Law has Professional Liability Insurance as protection in the event of a lawsuit. Lopez Law will also operate in a professional manner, minimizing the risk of a lawsuit.

IMPLEMENTATION PLAN

Implementation Activities and Dates

Within the next several months The Lopez Law Associates PC will undertake the following activities:

1. John Lopez is in the process of obtaining a bank loan for $10,000 to start up Lopez Law.

2. Documents and presentations for seminars, workshops and radio and television programs will be developed.

3. A brochure will be developed within the first two weeks to be distributed to medical professionals and resources.

4. An interactive web site will be developed and launched.
FINANCIAL PLAN

Discussion of Projected Net Income

Revenue is projected to increase from $121,770 in 2005 to $181,170 by 2007. Revenues will see strong growth of 22% annually as the business grows and expands. Cost of Sales are $66,480 in Year 1, which projects to a total of 55% of revenues, including wages at 45% and goods and materials at 10%.

Sales and Marketing expenses average 10% of Net Sales. Sales and Marketing expenses include advertising, a corporate brochure, seminar and workshop materials, other expenses such as networking and entertainment. Property and Utilities expenses average 14% of Net Sales including telephone and utilities, and other expenses such as the office furniture and computer lease expenses. Operations, and Banking and Other expenses average 3% to 4% of Net Sales. Operations expenses include supplies, repairs and maintenance, vehicle and travel expenses, and licenses and permits. Banking and Other expenses include bank charges, accounting and legal fees, and insurance.

Net Income is projected to increase from $12,330 in 1998 to $17,280 in 2000. Federal and state income taxes are calculated at 22.84% of net income before taxes.

Discussion of Monthly Cash Flow Statement

Without a bank loan, it will take The Lopez Law Associates PC six months to generate a positive cash flow. The operating loan of $10,000 ensures that The Lopez Law Associates PC will not need any additional operating loans during the first twelve months to maintain a positive monthly cash balance.

Discussion of Projected Annual Cash Flow

Providing The Lopez Law Associates PC achieves their revenue projections no additional operating loans will be need in years two and three. This will lead to increases in ending cash balances in both Year 2 and 3.

Discussion of Pro-Forma Balance Sheet

With no loans payable in Years 2 and 3 of operations, the cash position and the amount of retained earnings will increase each year. All liabilities will be paid as they are due.
Discussion of Business Ratios

Due to The Lopez Law Associates PC’s billing structure, the average collection period for accounts receivable will be long compared to other law practices. However, profit margins consistently increase from year to year and are comparable to other practices with less than $500,000 in annual revenue. Debt to net worth is inconsequential as the practice will be debt free after Month 8 of operations.

Note 1: Revenue Assumptions

a. Our revenue projections by product and by month for the first year are:

<table>
<thead>
<tr>
<th>Year 1</th>
<th>Motor Veh</th>
<th>Prod Liab</th>
<th>Med Mal</th>
<th>Bad Debt</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Month 1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Month 2</td>
<td>0</td>
<td>1,750</td>
<td>0</td>
<td>-18</td>
<td>1,732</td>
</tr>
<tr>
<td>Month 3</td>
<td>5,000</td>
<td>0</td>
<td>4,500</td>
<td>-95</td>
<td>9,405</td>
</tr>
<tr>
<td>Month 4</td>
<td>5,000</td>
<td>1,750</td>
<td>0</td>
<td>-68</td>
<td>6,682</td>
</tr>
<tr>
<td>Month 5</td>
<td>10,000</td>
<td>0</td>
<td>4,500</td>
<td>-145</td>
<td>14,355</td>
</tr>
<tr>
<td>Month 6</td>
<td>10,000</td>
<td>1,750</td>
<td>0</td>
<td>-118</td>
<td>11,632</td>
</tr>
<tr>
<td>Month 7</td>
<td>15,000</td>
<td>0</td>
<td>4,500</td>
<td>-195</td>
<td>19,305</td>
</tr>
<tr>
<td>Month 8</td>
<td>15,000</td>
<td>1,750</td>
<td>0</td>
<td>-168</td>
<td>16,582</td>
</tr>
<tr>
<td>Month 9</td>
<td>10,000</td>
<td>0</td>
<td>4,500</td>
<td>-118</td>
<td>11,632</td>
</tr>
<tr>
<td>Month 10</td>
<td>5,000</td>
<td>0</td>
<td>4,500</td>
<td>-95</td>
<td>9,405</td>
</tr>
<tr>
<td>Month 11</td>
<td>5,000</td>
<td>0</td>
<td>4,500</td>
<td>-68</td>
<td>6,682</td>
</tr>
<tr>
<td>Total</td>
<td>$90,000</td>
<td>$10,500</td>
<td>$22,500</td>
<td>-$1,233</td>
<td>$121,767</td>
</tr>
</tbody>
</table>

b. Our revenue projections by product for Years 2 and 3 are:

<table>
<thead>
<tr>
<th></th>
<th>MV</th>
<th>PL</th>
<th>MM</th>
<th>Bad Debt</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year 2</td>
<td>110,000</td>
<td>15,000</td>
<td>25,000</td>
<td>-1,500</td>
<td>148,500</td>
</tr>
<tr>
<td>Year 3</td>
<td>135,000</td>
<td>20,000</td>
<td>28,000</td>
<td>-1,830</td>
<td>181,170</td>
</tr>
</tbody>
</table>
Note 2: Assumptions Regarding the Collection of Sales Revenue

a. We assume that the percent of our sales which are collected: in the month they are made; in the month following; in two months; and in three months are:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Current Month</td>
<td>40%</td>
</tr>
<tr>
<td>In the Following Month</td>
<td>50%</td>
</tr>
<tr>
<td>In Two Months</td>
<td>10%</td>
</tr>
<tr>
<td>In Three Months</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
</tr>
</tbody>
</table>

b. Based on these assumptions we have projected how much we will collect from our sales in each month. The following table also identifies any adjustments we may have made to these figures.

<table>
<thead>
<tr>
<th>Year 1</th>
<th>Projected Collections</th>
<th>Adjustment</th>
<th>Revised Estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Month 1</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Month 2</td>
<td>693</td>
<td>693</td>
<td>693</td>
</tr>
<tr>
<td>Month 3</td>
<td>4,628</td>
<td>4,628</td>
<td>4,628</td>
</tr>
<tr>
<td>Month 4</td>
<td>7,549</td>
<td>7,549</td>
<td>7,549</td>
</tr>
<tr>
<td>Month 5</td>
<td>10,024</td>
<td>10,024</td>
<td>10,024</td>
</tr>
<tr>
<td>Month 6</td>
<td>12,499</td>
<td>12,499</td>
<td>12,499</td>
</tr>
<tr>
<td>Month 7</td>
<td>14,974</td>
<td>14,974</td>
<td>14,974</td>
</tr>
<tr>
<td>Month 8</td>
<td>17,449</td>
<td>17,449</td>
<td>17,449</td>
</tr>
<tr>
<td>Month 9</td>
<td>15,964</td>
<td>15,964</td>
<td>15,964</td>
</tr>
<tr>
<td>Month 10</td>
<td>13,489</td>
<td>13,489</td>
<td>13,489</td>
</tr>
<tr>
<td>Month 11</td>
<td>11,014</td>
<td>11,014</td>
<td>11,014</td>
</tr>
<tr>
<td>Month 12</td>
<td>8,539</td>
<td>8,539</td>
<td>8,539</td>
</tr>
<tr>
<td>Total</td>
<td>$116,822</td>
<td>$0</td>
<td>$116,822</td>
</tr>
</tbody>
</table>

c. Not all of our sales in the first year will be collected during that year. Based on the assumptions shown above our Accounts Receivable at the end of Year 1 will be:

$4,945
d. We assume that our Accounts Receivable at the end of Years 2 and 3 will be:

Year 2 $7,000
Year 3 $8,000

Note 3: Cost of Sales Assumptions

a. Our assumptions regarding the amount that we will pay each month in Year 1 for Cost of Sales items is listed below. These figures show up on our cash flow statements.

<table>
<thead>
<tr>
<th>Year 1</th>
<th>Production Wages</th>
<th>Goods &amp; Materials</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Month 1</td>
<td></td>
<td></td>
<td>0</td>
</tr>
<tr>
<td>Month 2</td>
<td>800</td>
<td>170</td>
<td>970</td>
</tr>
<tr>
<td>Month 3</td>
<td>4,200</td>
<td>940</td>
<td>5,140</td>
</tr>
<tr>
<td>Month 4</td>
<td>3,000</td>
<td>650</td>
<td>3,650</td>
</tr>
<tr>
<td>Month 5</td>
<td>6,400</td>
<td>1,400</td>
<td>7,800</td>
</tr>
<tr>
<td>Month 6</td>
<td>5,200</td>
<td>1,200</td>
<td>6,400</td>
</tr>
<tr>
<td>Month 7</td>
<td>8,600</td>
<td>1,900</td>
<td>10,500</td>
</tr>
<tr>
<td>Month 8</td>
<td>7,400</td>
<td>1,700</td>
<td>9,100</td>
</tr>
<tr>
<td>Month 9</td>
<td>6,300</td>
<td>1,400</td>
<td>7,700</td>
</tr>
<tr>
<td>Month 10</td>
<td>5,200</td>
<td>1,200</td>
<td>6,400</td>
</tr>
<tr>
<td>Month 11</td>
<td>4,200</td>
<td>950</td>
<td>5,150</td>
</tr>
<tr>
<td>Month 12</td>
<td>3,000</td>
<td>670</td>
<td>3,670</td>
</tr>
<tr>
<td>Total</td>
<td>$54,300</td>
<td>$12,180</td>
<td>$66,480</td>
</tr>
</tbody>
</table>

b. Our assumptions regarding the amount that we will pay in Years 2 and 3 for Cost of Sales items are listed below. These figures show up on our annual Cash Flow Statement.

<table>
<thead>
<tr>
<th>Year 1</th>
<th>Production Wages</th>
<th>Goods &amp; Materials</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year 2</td>
<td>66,825</td>
<td>15,000</td>
<td>81,825</td>
</tr>
<tr>
<td>Year 3</td>
<td>81,526</td>
<td>19,000</td>
<td>100,526</td>
</tr>
</tbody>
</table>

c. (Apart from what we have already paid for) There may be additional Cost of Sales services which we have received but we won’t have paid for yet. We esti-
mate the amount that we will owe (have as an Account Payable) for Cost of Sales items at the end of each year will be:

<table>
<thead>
<tr>
<th>Year</th>
<th>Cost of Sales Payable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Beginning Balance</td>
<td>0</td>
</tr>
<tr>
<td>Year 1</td>
<td>0</td>
</tr>
<tr>
<td>Year 2</td>
<td>0</td>
</tr>
<tr>
<td>Year 3</td>
<td>0</td>
</tr>
</tbody>
</table>

d. We have calculated our Cost of Sales expenses, based on these assumptions. These figures (which show up on our Income Statement) are shown in both dollar values and as a percent of our projected revenues.

<table>
<thead>
<tr>
<th>Cost of Sales</th>
<th>$</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year 1</td>
<td>66,480</td>
<td>55%</td>
</tr>
<tr>
<td>Year 2</td>
<td>81,825</td>
<td>55%</td>
</tr>
<tr>
<td>Year 3</td>
<td>100,526</td>
<td>55%</td>
</tr>
</tbody>
</table>
Rules 7.1-7.3 of the Massachusetts Rules of Professional Conduct

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER’S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory including an electronic or computer-accessed directory, newspaper or other periodical, outdoor advertising, radio or television, or through written communication not involving solicitation prohibited in Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization; (3) pay for a law practice in accordance with Rule 1.17; and

(4) pay referral fees permitted by Rule 1.5(e);

(5) share a statutory fee award or court-approved settlement in lieu thereof with a qualified legal assistance organization in accordance with Rule 5.4(a)(4).

(d) Any communication made pursuant to this rule shall include the name of the lawyer, group of lawyers, or firm responsible for its content.

RULE 7.3 SOLICITATION OF PROFESSIONAL EMPLOYMENT

(a) In soliciting professional employment, a lawyer shall not coerce or harass a prospective client and shall not make a false or misleading communication.

(b) A lawyer shall not solicit professional employment if:
(1) the lawyer knows or reasonably should know that the physical, mental, or emotional state of the prospective client is such that there is a substantial potential that the person cannot exercise reasonable judgment in employing a lawyer, provided, however, that this prohibition shall not apply to solicitation not for a fee; or

(2) the prospective client has made known to the lawyer a desire not to be solicited.

(c) Except as provided in paragraph (e), a lawyer shall not solicit professional employment for a fee from a prospective client known to be in need of legal services in a particular matter by written communication, including audio or video cassette or other electronic communication, unless the lawyer retains a copy of such communication for two years.

(d) Except as provided in paragraph (e), a lawyer shall not solicit professional employment for a fee from a prospective client in person or by personal communication by telephone, electronic device, or otherwise.

(e) The following communications shall be exempt from the provisions of paragraphs (c) and (d) above: (1) communications to members of the bar of any state or jurisdiction;

(2) communications to individuals who are

(A) the grandparents of the lawyer or the lawyer’s spouse,

(B) descendants of the grandparents of the lawyer or the lawyer’s spouse, or

(C) the spouse of any of the foregoing persons;

(3) communications to prospective clients with whom the lawyer had a prior attorney-client relationship; and

(4) communications with (i) organizations, including non-profit and government entities, in connection with the activities of such organizations, and (ii) with persons engaged in trade or commerce as defined in G.L. c. 93A, §1(b), in connection with such persons’ trade or commerce.

(f) A lawyer shall not give anything of value to any person or organization to solicit professional employment for the lawyer from a prospective client. However, this rule does not prohibit a lawyer or a partner or associate or any other lawyer affiliated with the lawyer or the lawyer’s firm from requesting referrals from a lawyer referral service operated, sponsored, or approved by a bar association or from cooperating with any other qualified legal assistance organization. Such requests for referrals or cooperation may include a sharing of fee awards as provided in Rule 5.4(a)(4).
Bibliography


Scope Note
This chapter discusses the ethical considerations that apply to legal fees. It covers contingent fees and the division of legal fees with lawyers and with nonlawyers, and offers practical suggestions for establishing fee arrangements.

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* Reprinted from Ethical Lawyering in Massachusetts (MCLE, Inc. 3d ed. 2009 & Supp. 2013). Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
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§ 1 INTRODUCTION

The practice of law is a business that, like other forms of business, is subject to the forces of the marketplace. Goldfarb v. Va. State Bar, 421 U.S. 773, 786–88 (1975). When a lawyer negotiates a fee, however, an inevitable tension arises between the economics of legal practice and the lawyer’s ethical duties. Fee agreements between lawyers and their clients may undergo scrutiny that is not applied to ordinary contracts. For example, courts have traditionally refused to enforce fee agreements deemed “excessive and unreasonable as a matter of law.” McInerney v. Massasoit Greyhound Ass’n, Inc., 359 Mass. 339, 351 (1971); see Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 87 (1st Cir. 1970). More broadly, the Supreme Judicial Court claims the authority to invalidate an otherwise enforceable contract between lawyer and client under its “inherent power to regulate the practices of members of the bar and to provide for the proper administration of justice.” Marino v. Tagaris, 395 Mass. 397, 401 (1985); see also Winthrop Corp. v. Lowenthal, 29 Mass. App. Ct. 180 (1990) (judgment vacated because attorney for prevailing party failed to disclose existence of fee agreement to arbitrator).

This chapter deals with the tension between economics and ethics. It seeks to provide practical guidance for negotiating fee agreements without running afoul of the restrictions imposed on the financial arrangements of the legal profession. The chapter discusses the following Massachusetts Rules of Professional Conduct and the comments that accompany them:
• Rule 1.5(a), which sets forth the basic ethical standards governing all fees;
• Rule 1.5(b), which requires disclosure of the basis for a fee;
• Rules 1.5(c), (d), and (f), which govern contingent fees;
• Rule 1.5(e), which governs division of fees between lawyers;
• Rule 5.4(a), which governs division of fees with nonlawyers;
• Rule 1.8(j), which concerns acquiring a proprietary interest in litigation; and
• Rules 1.8(f) and 5.4(c), which concern payment of fees by persons other than the client.

Where appropriate, the Disciplinary Rules (DRs), which preceded the Massachusetts Rules of Professional Conduct, are discussed. The chapter concludes with practical suggestions for fee agreements.

§ 2 BASIC STANDARD FOR LEGAL FEES

Rule 1.5(a) of the Massachusetts Rules of Professional Conduct provides, “A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses.” The rule thus creates two standards: “unreasonable” for expenses and “clearly excessive” for fees. Mass. R. Prof. C. 1.5 cmt. 1B.

The language of the rule respecting fees follows former DR 2-106(A) rather than ABA Model Rule 1.5(a), which mandates that a fee be “reasonable.” See Mass. R. Prof. C. 1.5 cmt. 1A. The operative terms in Rule 1.5(a) are “illegal” and “clearly excessive.”

§ 2.1 Illegal Fees

The Supreme Judicial Court has not attempted to define comprehensively when a fee agreement is “illegal.” Presumably, a fee is “illegal” if it violates some specific provision of law limiting lawyers’ charges. One such provision is Mass. R. Prof. C. 1.5(d), which prohibits contingent fee agreements in criminal and domestic relations cases. (Contingent fee agreements are discussed in § 4, below.) Another such provision appears in G.L. c. 231, § 60I, which sets ceilings on contingent fees in medical malpractice cases. The Workers’ Compensation Act

Federal law also contains restrictions on fees that may make a fee “illegal” for purposes of Mass. R. Prof. C. 1.5(a). These include the cap on contingent fees in actions under the Federal Tort Claims Act, 28 U.S.C. § 2678, and the requirement that fees relating to Social Security proceedings receive administrative approval. 42 U.S.C. § 406. In In the Matter of Disciplinary Action Against Simmonds, 415 N.W.2d 673, 675 (Minn. 1987), the Minnesota Supreme Court suspended an attorney for charging his client more than the Social Security Administration had approved. Some commentators have also suggested that a fee may be illegal if the lawyer knows that the source of the funds is illegal. C. Wolfram, Modern Legal Ethics, § 9.3.2 at 523 (West 1986) (hereinafter, Wolfram).

§ 2.2 Clearly Excessive Fees

Rule 1.5(a) lists eight factors “to be considered in determining whether a fee is clearly excessive.” The factors are the following:

- the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- the fee customarily charged in the locality for similar legal services;
- the amount involved and the results obtained;
- the time limitations imposed by the client or by the circumstances;
- the nature and length of the professional relationship with the client;
- the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- whether the fee is fixed or contingent.

Comment 3 to Rule 1.5 indicates that the “clearly excessive” standard applies to contingent fees.
The list of factors in Mass. R. Prof. C. 1.5(a) parallels the factors that courts have traditionally considered in determining a reasonable fee under a quantum meruit standard. See, e.g., In re Fordham, 423 Mass. 481, 489-90 (1996); Mulhern v. Roach, 398 Mass. 18, 25-30 (1986); Cummings v. Nat’l Shawmut Bank, 284 Mass. 563, 569 (1933). Although the factors considered are similar, courts have been careful to distinguish between the determination of reasonableness in a typical contract action and the determination of reasonableness under the Massachusetts Rules of Professional Conduct. The Court of Appeals for the First Circuit described the distinction in the following terms:

The first requires the court to arrive at a figure it considers reasonable; the second requires it to arrive at a figure which it considers the outer limit of reasonableness.


The leading Massachusetts case applying these eight factors in a disciplinary context is In the Matter of Fordham, 423 Mass. 481 (1996). In this case, a defendant charged with operating a vehicle under the influence of alcohol retained an experienced trial attorney on an hourly time-charge basis. However, the attorney did not have any prior experience defending OUI cases. Although the attorney achieved an excellent result using a novel theory, the court held that the fee charged was clearly excessive because the lawyer spent far more time than an attorney experienced in the field would have spent, and because the total fee was more than three times the fee customarily charged for such services. In re Fordham, 423 Mass. at 489-91. The court rejected the argument that client consent or acquiescence was a “safe harbor” for an otherwise excessive fee. In re Fordham, 423 Mass. at 492-93.

Both the language of Mass. R. Prof. C. 1.5(a) and the case law indicate that the list of factors is illustrative only, and other factors may sometimes be determinative. One factor that is not specifically mentioned in Mass. R. Prof. C. 1.5(a) but can be critical in practice is whether there is a written agreement covering the fee. In In the Matter of Kerlinsky, 406 Mass. 67, 72-73 (1989), the court held that a fee was “clearly excessive” because it exceeded the amount specified in a written agreement between the lawyer and his client. Cf. Beatty v. NP Corp., 31 Mass. App. Ct. 606, 613 (1991) (in the absence of a prior agreement, an attorney who regularly billed on the basis of time charges could not charge a “premium” fee for an exceptionally good result).

Another factor not explicitly mentioned in Mass. R. Prof. C. 1.5(a) is the sophistication of the client. When the client is experienced in business and the fee
agreement is freely negotiated, the courts are likely to treat the agreement indulgently. Wolfram § 9.3 at 520; cf. Pollock v. Marshall, 391 Mass. 543 (1984); First Nat’l Bank of Boston v. Brink, 372 Mass. at 262. However, when the client is unsophisticated and there is evidence of overreaching on the attorney’s part or misunderstanding on the client’s, the courts may set the agreement aside, Marino v. Tagaris, 395 Mass. 397, 399 (1985), and may also, in appropriate cases, discipline the attorney. See, e.g., Comm. on Legal Ethics v. Tatterson, 352 S.E.2d 107, 113 (W. Va. 1986); Fla. Bar v. Moriber, 314 So.2d 145 (Fla. 1975). The relative sophistication of the client was a factor in In the Matter of Fordham, where the court rejected a claim that the client had entered an hourly fee agreement “with open eyes” on the grounds that the client had no appreciation of the magnitude of the potential fee. In re Fordham, 423 Mass. at 492.

§ 3 COMMUNICATING THE BASIS OF THE FEE

Rule 1.5(b) of the Massachusetts Rules of Professional Conduct provides as follows:

(1) Except as provided in paragraph (b)(2), the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) The requirement of a writing shall not apply to a single-session legal consultation or where the lawyer reasonably expects the total fee to be charged to the client to be less than $500. Where an indigent representation fee is imposed by a court, no fee agreement has been entered into between the lawyer and client, and a writing is not required.

The requirement that the communication be in writing is relatively new in Massachusetts. The writing must address both the basis of the fee and the expenses that will be charged to the client. However, the disclosure about fees need not be exhaustive. Comment 1 to Rule 1.5 explains that “[i]t is sufficient . . . to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee.”
(Note that contingent fee agreements must satisfy more stringent requirements. See § 4.3, Requirement of Written Contingent Fee Agreement, below.)

§ 4 CONTINGENT FEES

In 1964, the Supreme Judicial Court adopted a rule, eventually codified as SJC Rule 3:05, that permitted contingent fees in most civil cases, subject to specific safeguards. 348 Mass. 806 (1965). In 1998, Rule 3:05 was repealed and the substance of its provisions incorporated into Mass. R. Prof. C. 1.5(c), 1.5(d), and 1.5(f).

§ 4.1 Definition of Contingent Fees

Supreme Judicial Court Rule 3:05 began with an elaborate definition of “contingent fee agreement.” This definition does not appear in Mass. R. Prof. C. 1.5(c), which merely provides, “A fee may be contingent on the outcome of the matter. . . .” Presumably, the drafters felt that the concept was familiar after thirty-five years of practice under SJC Rule 3:05 and its predecessors, so a more elaborate definition was unnecessary.

§ 4.2 Prohibited Contingent Fee Agreements

Rule 1.5(c) provides that contingent fees are permissible, except where “prohibited by paragraph (d) or other law.” Rule 1.5(d) expressly prohibits contingent fees in two types of cases: domestic relations matters and the defense of criminal cases.

The prohibitions in Mass. R. Prof. C. 1.5(d) are similar to those in SJC Rule 3:05(3), but the language has been simplified, eliminating at least one ambiguity. Under the former rule, there was some doubt about whether an attorney could charge a contingent fee in postdivorce matters. Compare Guenard v. Burke, 387 Mass. 802, 807 (1982) (prohibiting contingent fee agreements prior to divorce absolute), with MBA Ethics Op. 94–4, 79 Mass. L. Rev. 89 (permitting contingent fee in postdivorce proceedings). Rule 1.5(d)(2) now prohibits fee agreements in any “domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.” Comment 6 to Rule 1.5 states that “[t]his provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders.”

In addition to the prohibitions in Mass. R. Prof. C. 1.5(d), there are statutory limitations on contingent fees that must be observed. In medical malpractice cases, for example, the attorney fee may not exceed the percentages set forth in
G.L. c. 231, § 60I, which are described below. In actions under the Federal Tort Claims Act, the attorney fee may not exceed 25 percent of the recovery. 28 U.S.C. § 2678. Fee agreements that exceed these statutory percentages are prohibited by “other law” within the meaning of Mass. R. Prof. C. 1.5(c) and are “illegal” under Mass. R. Prof. C. 1.5(a).

§ 4.3 Requirement of Written Contingent Fee Agreement

Rule 1.5(c) requires that all contingent fee agreements, except agreements for the collection of commercial accounts and insurance company subrogation claims, be in writing. For an illustration of the exception for insurance company subrogation claims, see Pinto v. Aberthaw Construction Co., 418 Mass. 494, 498–500 (1994), where the court held that an attorney for a workers’ compensation insurer who filed suit to enforce the insurer’s subrogation rights could recover a contingent fee without a written agreement.

(a) Execution and Recordkeeping

Rule 1.5(c) requires that

- the agreement be in duplicate,
- each copy be signed by the attorney and by each client,
- one signed copy be delivered to the client “within a reasonable time after the making of the agreement” and
- the other signed copy (together with proof of delivery to the client) be retained for seven years after completion of the engagement.

Rule 1.5(c) mandates that every contingent fee agreement contain the following provisions:

- the name and address of each client;
- the name and address of the lawyer or lawyers to be retained;
- the nature of the claim, controversy, and other matters with reference to which the services are to be performed;
- the contingency on which compensation is to be paid and whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected for him or her by the lawyer, and if the lawyer is to be paid any fee for the representation that will not be determined on a contingency, the method by which this fee will be determined;
- the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyers out of the amounts collected, and unless the parties otherwise agree in writing, that the lawyer shall be entitled to the greater of (i) the amount of any attorney fees awarded by the court or included in the settlement or (ii) the percentage or other formula applied to the recovery amount not including such attorney fees;
- the method by which litigation and other expenses are to be deducted from the recovery and whether such expenses are to be deducted before or after the contingent fee is calculated;
- the method by which litigation and other expenses are to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated;
- if the lawyer intends to pursue such a claim, the client’s potential liability for expenses and reasonable attorney fees if the attorney-client relationship is terminated before the conclusion of the case for any reason, including a statement of the basis on which such expenses and fees will be claimed, and, if applicable, the method by which such expenses and fees will be calculated; and
- if the lawyer is the successor to a lawyer whose representation has terminated before the conclusion of the case, whether the client or
the successor lawyer is to be responsible for payment of former counsel’s attorney fees and expenses, if any such payment is due.

Rule 1.5(c)(5) was amended in 2001 to deal with the treatment of attorney fees awarded by a court or included in a settlement agreement. See Cambridge Trust Co. v. Hanify & King Prof’l Corp., 430 Mass. 472 (1999).

In 2011, Section (c)(4) was revised to require that, when a lawyer plans to charge a fee that will not be determined on a contingent basis, the method of calculating the fee must be disclosed in the agreement.

In addition, Sections (c)(7) and (c)(8) were added to deal with the issues created when a client in a contingent fee case discharges his or her attorney before the completion of the case and retains a new attorney. In such cases, the discharged attorney may be entitled to recover a fee on a quantum meruit basis if the case is successful, but the client may assume that both lawyers will be paid from the agreed contingency fee and may be unfairly surprised if the discharged attorney’s fee is charged against the client’s share. Malonis v. Harrington, 442 Mass. 692, 700–02 (2004).

To deal with this issue, Section (c)(7) requires that a lawyer who intends to pursue a claim for fees and expenses if the attorney-client relationship is terminated before the end of the case must state in the contingent fee agreement that the client is potentially liable for such charges, and must disclose the basis on which they will be claimed. A lawyer who fails to include the required statement in the contingent fee agreement and who is later discharged waives the right to recover on a quantum meruit basis. Mass. R. Prof. C. 1.5 cmt. 3A.

Section (c)(8) addresses the responsibility of the counsel who replaces the discharged attorney. Successor counsel’s fee agreement must state whether the client or successor counsel will be responsible for paying the discharged attorney’s fees and expenses.

In medical malpractice cases, the maximum percentage fee may not exceed the following limits set in G.L. c. 231, § 60I:

- 40 percent of the first $150,000 recovered;
- 33 percent of the next $150,000;
- 30 percent of the next $200,000; or
- 25 percent of any amount over $500,000.
In actions under the Federal Tort Claims Act, the maximum percentage may not exceed 25 percent of any judgment and 20 percent of any settlement. 28 U.S.C. § 2678.

§ 4.4 Hybrid Fee Arrangements

Rule 1.5(c)(4) addresses hybrid fee arrangements, such as fees based partly on hourly time charges and partly on a percentage of the amount recovered. Such hybrid agreements are permitted, but the fee is contingent at least in part on the outcome of the matter, so the fee agreement must be in writing and satisfy the other criteria of Mass. R. Prof. C. 1.5(c) and 1.5(d). In addition, Rule 1.5(c)(4) now requires that the fee agreement specify how the noncontingent portion of the fee will be determined.

§ 4.5 Collecting Less Than the Maximum Percentages

There is a common misunderstanding that contingent fee agreements always require payment of a fixed percentage of the recovery, regardless of the amount of the recovery or the time and effort required. The comment to Rule 1.5 refutes this misunderstanding. Paragraph 3 of the comment states that “[c] ontentent fees, like any other fees, are subject to the not-clearly-excessive standard of paragraph (a) of this rule.” See also Berman v. Linnane, 424 Mass. 867, 871-72 (1997) (refusing to enforce unreasonable contingent fee agreement); Cameron v. Sullivan, 372 Mass. 128, 132 (1977) (interpreting former SJC Rule 3:05).

§ 4.6 Model Agreements

As originally adopted, Rule 1.5(f) included a model contingent fee agreement that “may be used” to satisfy the requirements of Rule 1.5(c), although other forms of agreement consistent with the rule were permitted.

In In re Discipline of an Attorney, 451 Mass. 131, 141 (2008), the Supreme Judicial Court concluded that lawyers should be required to explain the meaning of any terms that deviated from the model agreement and to obtain the client’s written consent to such deviations.

In response, Rule 1.5(f) has been amended to include two model contingent fee agreements—Forms A and B—and to provide detailed instructions on how these forms are to be used. Forms A and B appear in Exhibit A and B, respectively.

Form A is intended to be the standard form of contingent fee agreement. Under Paragraph 3 of Form A, the lawyer agrees to advance all expenses, and the client is liable for fees and expenses only from amounts the lawyer collects for the
client. If the lawyer is successor counsel, Paragraph 7 of Form A provides that the lawyer will be responsible for payment of former counsel’s fees and expenses. Assuming that Form A accurately reflects the understanding between lawyer and client, a lawyer may use the form without any additional explanation to the client beyond what would normally be required to comply with Rule 1.5.

If a lawyer intends to vary the provisions of Form A, Paragraph 3, concerning the client’s responsibility for fees and expenses, or Paragraph 7, concerning responsibility for a former counsel’s fees and expenses, the lawyer must use Form B. Form B contains alternative provisions in Paragraph 3 and Paragraph 7: the standard provision that appears in Form A and the alternative provision proposed by the lawyer. The lawyer must show both provisions to the client and must obtain the client’s informed consent in writing to the proposed alternative. Rule 1.5(f)(2) provides that a client’s initials next to the selected option satisfies the confirmed-in-writing requirement.

The differences between Forms A and B are explored at greater length in Comment 11 to Rule 1.5.

If the attorney intends to pay a referral fee or otherwise share the fee with another lawyer, both Forms A and B require that the identity of the other lawyer be disclosed in writing to the client and that the client consent to the division of fees. See Forms A and B, ¶ 5. See also § 5.2, Forwarding Fees, below.

Both model agreements require the parties to specify whether the percentage fee will be measured against the gross amount collected or the net amount. If the costs of the litigation will be deducted from the amount collected, specifying the net recovery will yield a smaller fee to the lawyer but will be fairer to the client.

In addition, calculating the fee as a percentage of the gross recovery may yield an unreasonably large fee when the costs of litigation are substantial but the recovery is smaller than anticipated. An example of such a fee is described in 1 Hazard & Hodes, The Law of Lawyering, § 8.13 illus. 8-2 (Aspen 3d ed. 2001). If expenses consume a substantial portion of the recovery, the lawyer should keep in mind that the percentage set in the agreement is a maximum only and that a fee must be reasonable to be enforced against the client. Mass. R. Prof. C. 1.5 cmts. 1A, 3.

The model agreements note that the maximum percentage to be charged “may be on a flat rate basis or in a descending scale in relation to amount collected.” Forms A and B, ¶ 4. The Appeals Court has commented favorably on agreements that employ a descending scale. O’Hara v. Robbins, 13 Mass. App. Ct. 279, 289 n.4 (1982). When the recovery is very large, a descending scale will mitigate the

Rule 1.5(f)(3) states that attorneys may use other forms of contingent fee agreement as long as they comply with Rule 1.5. If, however, such agreements materially differ from or add to the provisions of Forms A and B, the lawyer must obtain the client’s informed consent in writing to the differing or additional terms. As a practical matter, attorneys should consider supplementing the provisions of the model agreements to deal with several recurring problems of interpretation, which are discussed in § 4.8 and § 4.9, below.

§ 4.7 Judicial Review of Contingent Fees

In proceedings to review the reasonableness of a contingent fee, the parties are entitled to a jury trial. Guenard v. Burke, 387 Mass. 802, 808 (1982). In addition, a court should usually review a contingent fee for reasonableness only if an interested party challenges the fee. Gagnon v. Shoblom, 409 Mass. 63, 67 (1991). But see Snow v. Mikenas, 373 Mass. 809, 812 (1977) (court may question fee agreement on its own motion when fee will be deducted from funds distributed by court order).

A critical factor in judging the reasonableness of a contingent fee is the uncertainty of the attorney’s compensation. Permitting the lawyer to take a substantial percentage of the client’s recovery—such as the 33 percent fee often charged in personal injury cases—is usually justified on the grounds that the lawyer runs the risk of taking nothing. The converse should also be true: when there is no uncertainty in the client’s recovery, a contingent fee that amounts to a significant percentage of the recovery should be condemned as unreasonable. Comm. on Legal Ethics v. Tatterson, 352 S.E.2d 107, 113–14 (W. Va. 1986).

Applying this reasoning, the Massachusetts Bar Association (MBA) Committee on Professional Ethics has concluded that charging a contingent fee to assist a client in recovering personal injury protection benefits is unethical if there is no genuine doubt that the client will receive the benefits. MBA Ethics Op. 77–7, 62 Mass. L. Q. 187. Opinions in other states hold that charging a substantial contingent fee when there is no genuine risk of nonrecovery is unethical and may subject the attorney to discipline. Comm. on Legal Ethics v. Tatterson, 352 S.E.2d at 114 (incontestable life insurance claim); In re Kennedy, 472 A.2d 1317, 1322–23 (Del. 1984) (temporary disability payments); see also Horton v. Butler, 387 So.2d 1315 (La. App. 1 Cir. 1980) (undisputed fire insurance claim); see also Redlich v. Lanell, 20 Mass. L. Rptr. 688, 2006 Mass. Super. LEXIS 149 (2006) (refusing to enforce contingent fee agreement because, among other factors, defendant had conceded substantial liability). Comment 3 to Rule 1.5 now coun-
sels that “[w]hen there is doubt whether a contingent fee is consistent with a client’s best interests, the lawyer should inform the client of alternative bases for the fee and explain their implications.”

Under SJC Rule 3:05, the uncertainty of an attorney’s compensation was judged prospectively in light of the circumstances at the time the contingent fee agreement was made. See the standard of review in former SJC Rule 3:05(6). However, whether a fee is contingent is only one of the factors that have traditionally been employed in assessing the reasonableness of a fee. See Mass. R. Prof. C. 1.5(a). Other factors, such as the time and labor involved, Mass. R. Prof. C. 1.5(a)(1), require a retrospective review.

The tension between these two approaches may be illustrated by an example. Suppose that an attorney, reasonably anticipating lengthy and uncertain litigation, enters into a contingent fee agreement calling for a substantial maximum percentage, but then succeeds in negotiating a settlement without having to bring suit. The uncertainty of compensation when the agreement was made warrants a substantial fee. The unexpectedly easy result, on the other hand, suggests that the fee should be reduced.

No Massachusetts case squarely addresses this dilemma. Courts in other jurisdictions, however, have reduced the attorney’s share when the recovery was large and the attorney’s time and effort modest. In Hoffert v. General Motors Corp., 656 F.2d 161 (5th Cir. 1981), for example, the court reduced the attorney fee from 40 percent to 15 percent when the lawsuit settled two months after suit was filed. See also McKenzie Constr., Inc. v. Maynard, 758 F.2d 97 (3d Cir. 1985) (contingent fee may be unreasonable in light of subsequent events).

Massachusetts is likely to reach a similar result in an appropriate case. The Supreme Judicial Court has steadfastly refused to recognize “a complete dichotomy between a fee which is reasonable in the light of hindsight and one which is permissible at the outset.” McInerney v. Massasoit Greyhound Ass’n, Inc., 359 Mass. 339, 353 (1971); accord First Nat’l Bank of Boston v. Brink, 372 Mass. 257, 267 (1977). Moreover, both the Appeals Court and the Supreme Judicial Court have relied on the multifactored standard now incorporated in Mass. R. Prof. C. 1.5(a) in reviewing contingent fees. Opert v. Mellios, 415 Mass. 634, 638 (1993); Johnson v. Blacke, 32 Mass. App. Ct. 399, 403 (1992). Reliance on the factors listed in Mass. R. Prof. C. 1.5(a) suggests that the courts will use hindsight as well as foresight in judging the reasonableness of a contingent fee.
§ 4.8 Interpretation of Contingent Fee Agreements

Massachusetts courts have interpreted the “standard” contingent fee agreement typified by the model agreements in Mass. R. Prof. C. 1.5(f) on a number of occasions. These cases establish the following guidelines:

• Ambiguities in the contingent fee agreement will be construed against the attorney who drafted it. Benalcazar v. Goldsmith, 400 Mass. 111, 114 (1987).

• In the absence of an express provision in the contingent fee agreement, the maximum percentage fee stated in the agreement covers all legal services, both trial and appellate, necessary to bring the case to a successful conclusion. In re Kerlinsky, 406 Mass. 67, 73 (1989).

• In the absence of an express provision in the contingent fee agreement, the maximum percentage fee stated in the agreement includes compensation for negotiating settlement of all liens on the client’s recovery, at least if the liens can be resolved without suit. Doucette v. Kwiat, 392 Mass. 915, 917–18 (1984).

• Benalcazar v. Goldsmith, 400 Mass. at 114 n.10 left undecided whether the percentage that accrues to the attorney under a contingent fee agreement could include a percentage of any fees awarded by the court. In Cambridge Trust Co. v. Hanify & King Professional Corp., 430 Mass. 472 (1999), the Supreme Judicial Court resolved this question. The court held that, in the absence of an express written agreement, an attorney was entitled to recover the greater of the court-awarded fee or the specified percentage of the recovery exclusive of the fee, but not both. Rule 1.5(c)(5) was amended effective January 2, 2001, to reflect the court’s decision. Practitioners should note, however, that the lawyer and client can still agree that the percentage will be applied to both the recovery and the fee award, provided that the agreement is in writing and the total fee is reasonable. Cambridge Trust Co. v. Hanify & King Prof’l Corp., 430 Mass. at 479–80.

• Funds recovered by judgment or settlement belong to the client. Thus, if an attorney deducts more from the recovery than he or she is entitled to under the contingent fee agreement, the attorney violates the requirement now incorporated in Mass. R. Prof. C. 1.15(b) to deliver promptly all funds that the client is entitled to receive. In re Kerlinsky, 406 Mass. at 75. If the court concludes that the attorney withheld funds unreasonably or in bad faith, he or she may be subject to multiple damages and attorney fees under G.L. c. 93A or to interest at five times the lawful rate under G.L. c. 221, § 51. See Doucette v. Kwiat, 392 Mass. at 917–18; Guenard v. Burke, 387 Mass. 802, 809–11 (1982).

§ 4.9 Structured Settlements

In recent years, structured settlements, in which the client receives an initial “up-front” payment at the time of settlement and regular payments thereafter for an agreed period, have become increasingly common. For counsel working under a contingent fee agreement, structured settlements pose two related problems: when the fee should be paid and how to determine the amount collected from which the lawyer’s percentage should be calculated.

From the perspective of the attorney’s financial self-interest, the best answers to these questions are

• the attorney fee should be paid in full on receipt of the “up-front” money; and

• the fee should be based on a percentage of the total payments due under the structured settlement, i.e., a percentage of the up-front payment plus a percentage of the sum of all periodic payments.

But these answers are unfair to the client because, among other reasons, they ignore the time value of money. The present value of future payments is always less than the sum of those payments. The answers may also be unfair to the client if most of the up-front payment ends up in the lawyer’s pocket. The Board of Bar Overseers (BBO) has reprimanded attorneys who calculated their fees in this fashion on the grounds that the fees were “clearly excessive” under the predecessor of Mass. R. Prof. C. 1.5(a). Private Reprimand (PR) 90–34, 6 Mass. Att’y Disc. R. 439 (1990).

The appropriate way to determine such a fee, however, has not yet been firmly established by Massachusetts case law. In PR 90–34, the BBO offered two alternatives:
The correct method of calculating fees in structured settlement cases is either to take one-third (or the applicable percentage) of each payment as received, or to calculate the total contingent fee based on the present value or the value of the annuity purchased by the insurer to fund the settlement. (As to the latter method, however, see Doucette v. Kwiat, 392 Mass. 915 n.1 (1984).)

In Doucette v. Kwiat, the Supreme Judicial Court cited cases from other states that rejected the present value of the settlement as a basis of calculating the attorney fee and held that the attorney must accept the agreed percentage of each payment as it is received by the client. Doucette v. Kwiat, 392 Mass. 915, 915 n.1 (1984). The Supreme Judicial Court’s citation of these cases, although dictum, suggests that calculating the fee on the basis of present value may be hazardous for the unsuspecting attorney, at least if the client has not consented in advance.

In each of the cases cited in Doucette v. Kwiat, however, the court determined the appropriate method of compensation by interpreting the language of the contingent fee agreement, none of which mentioned structured settlements or present value. The court’s focus on the language of the contracts suggests that attorneys may base their fees on the present value of a structured settlement if that method of calculating compensation has been expressly incorporated into the contingent fee agreement. In other words, an attorney may base his or her contingent fee on the present value of the settlement and deduct that amount from the “up-front” payment, but only if the client has expressly consented to that procedure.

However, calculating the present value of a structured settlement may generate its own uncertainties. There is usually a range of possible present values, depending on the discount rates applied to the future payments. To avoid these uncertainties, the fee agreement should base attorney fees on the cost of the settlement to the defendant’s insurer if that amount can be ascertained. The insurer’s cost will consist of the up-front payment, plus the cost of an annuity to fund future payments. See Merendino v. FMC Corp., 438 A.2d 365 (N.J. Super. Ct. Law Div. 1981). In effect, the cost of the annuity represents a marketplace calculation of the value of future payments. By relying on this marketplace determination, the attorney can simplify the calculation of present value and avoid disputes with his or her client.
§ 4.10 Termination of Contingent Fee Agreement

A client has the right to change his or her lawyer at any time “for any cause or no cause at all.” Salem Realty Co. v. Matera, 10 Mass. App. Ct. 571, 575 (1980), aff’d, 384 Mass. 803 (1981). Thus, a lawyer working under a contingent fee agreement may be discharged before the engagement is completed and before the contingency on which the fee depends has occurred. If the attorney is discharged before the case is complete, he or she may be entitled to reasonable compensation on a quantum meruit basis, taking into account the factors discussed in § 2.2, Clearly Excessive Fees, above. Zabin v. Picciotto, 73 Mass. App. Ct. 141, 151 (2008); Salem Realty Co. v. Matera, 10 Mass. App. Ct. at 575–76; see also Rule 1.5 cmt. 3B (discussing the fair value of a discharged lawyer’s services).

The Supreme Judicial Court has left open whether the discharged attorney may recover under the contingent fee agreement if, prior to discharge, he or she has rendered virtually all of the services required to achieve a recovery. Salem Realty Co. v. Matera, 384 Mass. 803 (1981); see also Opert v. Mellios, 415 Mass. 634, 636–38 (1993). As a general rule, however, an attorney may not recover in quantum meruit unless the contingency has occurred. Liss v. Studeny, 450 Mass. 473, 481 (2008).

If an attorney operating under a contingent fee is discharged, he or she must make the client’s file available to the client within a reasonable time. Mass. R. Prof. C. 1.16(e). The attorney may charge the client reasonable copying costs for work product and may also require the client to pay the out-of-pocket costs incurred in obtaining investigatory and discovery documents. The attorney may not, however, hold the client’s file hostage to secure his or her fee. See § 7, Avoiding Acquisition of Interest in Litigation, below.

A discharged attorney may not, however, seek a quantum meruit recovery unless the attorney has expressly reserved that right in the contingent fee agreement. Mass. R. Prof. C. 1.5(c)(7) cmt. 3A. In addition, successor counsel must discuss compensation of the discharged attorney with the client and reach agreement about who will be responsible for former counsel’s fees. Mass. R. Prof. C. 1.5(c)(8) cmt. 3D.

§ 4.11 Accounting for the Contingent Fee

Rule 1.5(c) requires that, at the conclusion of every contingent fee case, the attorney must send the client a closing statement describing the outcome of the case, the amount remitted to the client, and how the remittance was calculated. In addition, since amounts recovered under contingent fee agreements belong to
the client, In re Kerlinsky, 406 Mass. 67 (1989), these amounts are also subject to Mass. R. Prof. C. 1.15(b), which requires a full accounting for client funds.

Under a 2011 amendment to Rule 1.5(c), a lawyer operating under a contingent fee agreement must provide the client with an itemized statement of services rendered and expenses incurred within twenty days after termination of the attorney-client relationship or after receipt of a written request from the client for such information. This requirement permits the client to evaluate what additional fees and expenses might be incurred if he or she decides to discharge the attorney and retain another. Accordingly, an attorney who has not reserved the right to claim a quantum meruit recovery in the contingent fee agreement need not provide an itemized statement.

§ 5 DIVISION OF FEES AMONG LAWYERS

§ 5.1 General Rule

Rule 1.5(e) continues the traditional Massachusetts rule concerning fee sharing, but the requirements of disclosure and client consent were strengthened by the 2011 amendments to the rule.

Lawyers not in the same firm may share a fee for legal services if the following conditions are met:

• the client must be informed, before or at the time the client enters into a fee agreement, that the fee will be divided;

• the client must consent in writing; and

• the total fee of both lawyers must not exceed reasonable compensation for all legal services rendered to the client.

“Reasonable compensation” will be measured as if all the services had been rendered by a single lawyer or law firm. For the factors to be considered in judging the reasonableness of a fee, see Mass. R. Prof. C. 1.5(a), discussed in § 2.2, Clearly Excessive Fees, above. Rule 1.5(e) does not apply to payments to a former partner or associate pursuant to a separation or retirement agreement.

Rule 1.5(e) does not require disclosure of each lawyer’s share of the fee as a condition of client consent. However, a comment to Mass. R. Prof. C. 1.5 states that, if the client asks, the lawyer must disclose the information. Mass. R. Prof. C. 1.5 cmt. 7A. The limited disclosure required by the rule has been criticized by
commentators on the grounds that it does not provide the client with all the information he or she needs to make an intelligent choice. Wolfram § 9.2.4 at 511.

Failure to comply with Rule 1.5(e) may subject both the referring lawyer and the lawyer receiving the referral to discipline. Sagesse v. Kelley, 445 Mass. 434, 443 (2005); see In re Kerlinsky, 406 Mass. 67, 74 (1989) (lawyer censured for failing to obtain client approval for fee-sharing arrangement).

§ 5.2 Forwarding Fees

(a) General Principles

Massachusetts is one of a minority of states that permit the payment of a fee to an attorney who forwards a case but assumes no further responsibility for its conduct. The history of Mass. R. Prof. C. 1.5(e) and its predecessor, DR 2-107(A), makes this clear.

Disciplinary Rule 2-107(A) derived from a similar provision in the ABA Model Code of Professional Responsibility. Subsection (A)(2) of the ABA version required that the division of fees be “in proportion” to the services performed and responsibility assumed by each lawyer. This requirement, which was adopted in most states that followed the ABA Model Code (1969), effectively barred any division of fees with a lawyer who simply referred the case and played no further role.

When the Supreme Judicial Court announced its intention to adopt the ABA Model Code, the MBA objected to subsection (A)(2) on the grounds that it would interfere with the established custom of dividing fees with forwarding counsel. The court agreed and deleted the offending provision from the Disciplinary Rules adopted in 1972.

When the Supreme Judicial Court decided to adopt the ABA Model Rules of Professional Conduct, history repeated itself. ABA Model Rule 1.5(e) contains a variant of DR 2-107(A)(2) as it appeared in the ABA Code: under the model rule, the fee must be divided in proportion to the services performed by each attorney or each attorney must assume joint responsibility for the case. This requirement has been deleted from the Massachusetts version of Rule 1.5(e). Comment 4A to Mass. R. Prof. C. 1.5 underscores the intended result: “Paragraph (e), unlike ABA Model Rule 1.5(e), does not require that the division of fees be in proportion to the services performed by each lawyer . . . .” Mass. R. Prof. C. 1.5 cmt. 7A.

Documenting disclosure and client consent to a forwarding fee is particularly important in contingent fee cases. In such cases, the forwarding counsel often
has no continuing involvement in the legal work, and months or years may pass before damages are collected and the referral fee becomes due. Under Rule 1.5(e), as amended, the agreement to pay a referral fee must be disclosed to the client before or at the time the client enters a fee agreement, and the client must consent in writing.

(b) **Prohibited Fee Divisions**

Rule 1.5(e) assumes that both lawyers who share a fee are acting as attorneys for the client, even if one merely forwards the case to the other. A corollary is that one lawyer may not share another’s fee if he or she could not have received the fee directly. Fees may not be divided with a lawyer who is under a legal or ethical impediment to representing a client. Mass. R. Prof. C. 1.5(e); see also ABA Comm. on Prof’l Ethics, Informal Op. 1088 (1968); SJC Rule 4:01, § 17(3)(7) (the lawyer shall not accept a new retainer after suspension). In Bloomenthal v. Halstrom, Civ. A. No. 95-1773B (Worcester Super. Ct. 1999) (Burnes, J.), the Superior Court ruled that an attorney who makes a referral because he or she is disqualified from handling the matter and must refer it out is not entitled to accept a fee for the referral.

Cases in other states indicate that a suspended or disbarred attorney may share a fee if that attorney performed the services entitling him or her to payment before he or she was disbarred, even if payment is not made until after the effective date of suspension. See Lawyers’ Manual on Professional Conduct (ABA/BNA) 41:713. In Kourouvacilis v. American Federation of State, County & Municipal Employees, 65 Mass. App. Ct. 521 (2006), however, the Appeals Court held that a suspended lawyer was not entitled to share in a fee if the unethical conduct was related to the case in which the lawyer seeks a fee.

Similarly, a lawyer may not accept a referral fee if he or she could not represent the client directly because of a conflict of interest. PR 86-3, 5 Mass. Att’y Disc. R. 423 (1986); MBA Ethics Op. 80–10, 66 Mass. L. Rev. 50 (1981); MBA Ethics Op. 76–26, 61 Mass. L. Q. 239 (1977); N.J. Bar Op. 549 (1984). Finally, an attorney may not pay a referral fee to the executor or administrator of an estate who retains the attorney to carry out the estate’s legal work. MBA Ethics Op. 92–1, 77 Mass. L. Rev. 139 (1992); see also MBA Ethics Op. 76–3, 61 Mass. L. Q. 56 (1976) (attorney who successfully recommended another for appointment as a receiver could not request a referral fee from the receiver).

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§ 6  DIVIDING LEGAL FEES WITH A NONLAWYER

Rule 5.4(a) of the Massachusetts Rules of Professional Conduct continues the traditional prohibition against sharing legal fees with a nonlawyer. Construed literally, this rule might complicate the practice of law by preventing lawyers from paying rent to landlords or salaries to secretaries, since all such payments derive ultimately from attorney fees. In practice, however, the prohibition has not been applied to purchases of goods and services at market prices. Rather, Mass. R. Prof. C. 5.4(a) is aimed at the sharing of specific legal fees or specific portions of legal fees with nonlawyers. Wolfram § 9.2.4 at 510.

The prohibition is subject to the following three exceptions:

- An agreement between a lawyer and his or her firm, partner, or associate may provide for payments to the lawyer’s estate or to designated heirs for a reasonable time after the lawyer’s death. This exception permits the kind of death benefits often found in partnership agreements.

- A lawyer who purchases the practice of a deceased or disabled lawyer may pay the agreed purchase price to the lawyer’s estate or other representative. This provision is new and reflects the permission granted in Mass. R. Prof. C. 1.17 for the sale of a law practice.

- A lawyer may include nonlawyer employees in a compensation or retirement plan, even if the plan is based on a profit-sharing arrangement. This provision is broader than SJC Rule 3:07 and DR 3-102(A)(3), which applied only to retirement plans.

Rule 5.4(a) clearly prohibits the payment of referral fees to nonlawyers. The rule also prevents contingent agreements with nonlawyer consultants and expert witnesses. McPherson v. Sch. Dist. #186, 465 F. Supp. 749, 764 (S.D. Ill. 1978); see also Mass. R. Prof. C. 3.4(g).

Rule 5.4(a) also carries implications for attorneys who are salaried employees of nonlegal businesses, such as banks or real estate brokerage firms. Such businesses sometimes charge their customers for legal services provided by the attorney-employee. Banks, for example, may impose a fee on borrowers for having an attorney conduct the closing on mortgage loans. Under Mass. R. Prof. C. 5.4(a), an attorney-employee may not participate in such an arrangement if the bank charges more than its cost for the attorney’s services. In other words, a business other than a law firm may not make a profit on providing a lawyer’s services to its customers. MBA Ethics Op. 84–1, 69 Mass. L. Rev. 147 (1984); MBA Ethics

§ 7 AVOIDING ACQUISITION OF INTEREST IN LITIGATION

Rule 1.8(j) of the Massachusetts Rules of Professional Conduct prohibits a lawyer from acquiring a proprietary interest in “the cause of action or subject matter of litigation the lawyer is conducting for a client.” This restriction reflects the concern that the lawyer’s personal stake in the outcome of a lawsuit may adversely affect his or her ability to exercise independent professional judgment on the client’s behalf.

Rule 1.8(j) is subject to two important exceptions. First, an attorney may contract with a client for a reasonable contingent fee in a civil case. Mass. R. Prof. C. 1.8(j)(2). A contingent fee agreement must, of course, comply with the requirements of Mass. R. Prof. C. 1.5(c) and (d) (see discussion in § 4, Contingent Fees, above).

Second, an attorney may acquire a lien “granted by law” to secure his or her fee or expenses. Mass. R. Prof. C. 1.8(j)(1). The phrase “granted by law” has customarily been interpreted to refer to liens granted by common law or statute rather than to negotiated security interests. In Massachusetts, the only lien that clearly qualifies under this exception is the charging lien established by G.L. c. 221, § 50, which gives an attorney a lien on a judgment in the client’s favor to secure payment of the fees and expenses incurred in obtaining that judgment. Massachusetts never expressly recognized the common law possessory lien in a client’s papers, books, and other property in the lawyer’s possession. See Torphy v. Reder, 357 Mass. 153, 156 (1970). Whatever lingering doubts may have remained about the possessory lien were dispelled in 1991, when the Supreme Judicial Court adopted the predecessor of Rule 1.16(e). That rule requires return of materials furnished by the client on request, without regard to the status of the attorney fee.

Rule 1.8(j) applies only to litigation. Thus, an attorney may obtain an interest in the subject matter of a business transaction that he or she is conducting for a client, such as a stock issue or real estate development, provided that the attorney complies fully with Rule 1.8(a) concerning business transactions with clients. MBA Ethics Op. 81–11, 67 Mass. L. Rev. 150 (1982); see Mass. R. Prof. C. 1.5 cmt. 4.
Despite its relatively limited scope, attorneys must still take care to comply with Rule 1.8(j) in those cases where contingent fee agreements are prohibited, such as domestic relations matters. Thus, a lawyer hired to represent one of the parties in a divorce should not accept a security interest in the marital home, since the division of the couple's property is likely to be one of the major issues in the divorce. MBA Ethics Op. 91-1, 19 M.L.W. 1847. Negotiating security agreements for fees is discussed further in § 10.6, below.

§ 8 ADVANCING EXPENSES

Rule 1.8(e) of the Massachusetts Rules of Professional Conduct continues the prohibition against providing financial assistance to a client in connection with litigation. Thus, for example, a lawyer cannot advance living expenses to a client while a lawsuit is pending.

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

1. a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

2. a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Mass. R. Prof. C. 1.8(e).

The rule is subject to two exceptions. First, a lawyer may advance court costs and expenses of litigation. Mass. R. Prof. C. 1.8(e)(1). Repayment of these advances may be contingent on the outcome of the lawsuit, thus abolishing the requirement formerly found in SJC Rules 3:05(5)(f) and 3:07, and DR 5-103(B), that the client guarantee repayment of expenses. For a discussion of what constitutes costs of litigation, see MBA Ethics Op. 78-13, 63 Mass. L. Rev. 275 (1978) (lawyer may advance cost of bond in medical malpractice case.)

§ 9  AVOIDING INFLUENCE BY THIRD PARTIES

A lawyer owes a duty of undivided loyalty to his or her client. Rule 1.8(f) applies this principle to cases where the attorney fee is paid by a third party. The rule forbids a lawyer to accept compensation for legal services from someone other than the client unless three conditions are met:

- the client consents after consultation (for the meaning of “consultation,” see Mass. R. Prof. C. 9.1(c));
- there is no interference with the lawyer’s professional judgment or the lawyer-client relationship; and
- the client’s confidences are preserved as required by Mass. R. Prof. C. 1.6.

These requirements are reinforced by Mass. R. Prof. C. 5.4(c), which provides that a lawyer shall not permit a nonclient who pays his or her bill to direct or regulate the lawyer’s exercise of professional judgment on the client’s behalf.

Common situations to which Mass. R. Prof. C. 1.8(f) and 5.4(c) apply include payments by one family member for legal services on behalf of another, payments by a corporation or government agency for representation of an employee, and payments under a prepaid legal services plan. The BBO has publicly reprimanded an attorney who accepted fees from individual clients and from a corporation that created “living trusts” for those individuals without first disclosing the dual fee arrangement to the individuals and obtaining their consent. In re Nardi, 10 Mass. Att’y Disc. R. 204 (1994).

While these rules seem straightforward, their application in particular cases can be difficult, because it may not always be clear who the client is. For example, when parents consult an attorney about a legal problem arising from the conduct of their child, it may not be obvious from circumstances whether the lawyer represents the parents, the child, or the entire family. If this ambiguity is not addressed at the outset, the lawyer may discover—to his or her painful surprise—that the persons consulting him or her have differing opinions about who the client is. The lawyer may then be involved in a serious conflict of interest. To ensure compliance with Mass. R. Prof. C. 1.8(f) and 5.4(c), a careful lawyer should obtain agreement about the identity of the client at the beginning of any engagement where one party needs legal services and another party will be footing the bill.
§ 10  PRACTICAL SUGGESTIONS FOR FEE ARRANGEMENTS

§ 10.1  When to Set the Fee

Rule 1.5(b) of the Massachusetts Rules of Professional Conduct provides that the basis of the fee must be communicated to the client “before or within a reasonable time after commencing the representation.” A clear understanding about fees gives the client some idea of the cost of achieving his or her goals and prevents future misunderstandings. Moreover, contracts entered into at the beginning of an attorney-client relationship are prima facie valid and binding. McInerney v. Massasoit Greyhound Ass’n, 359 Mass. 339, 352 (1971). Contracts entered into after the client has become dependent on the attorney for advice and representation will sometimes be treated with greater suspicion. See Wolfram § 9.2.1 at 503.

§ 10.2  Written Agreements

Under Mass. R. Prof. C. 1.5(c), contingent fee agreements must be in writing. See the discussion in § 4.3, Requirement of Written Contingent Fee Agreement, above. In addition, Rule 1.5(b)(1) indicates that communication of the basis of the fee and the expenses to be charged must be in writing “except when the lawyer will charge a regularly represented client on the same basis or rate.” Practical experience indicates that a high percentage of the fee disputes between lawyers and clients have arisen from oral understandings that were never clearly set forth in writing.

Nevertheless, a written statement setting forth the agreed basis for the attorney fee should be sent to the client as soon as possible in virtually every case. A written statement will document compliance with the requirement that the basis of the fee be communicated to new clients. See Mass. R. Prof. C. 1.5 cmt. 1B. In addition, practical experience indicates that a high percentage of fee disputes between lawyers and clients arise from oral agreements that were never confirmed in writing.

The lawyer should also keep in mind that, in any fee dispute, he or she will have the burden of proving the terms of the fee agreement and of satisfying the court that the fee charged was reasonable. See, e.g., First Nat’l Bank of Boston v. Brink, 372 Mass. 257, 264 (1977); Sears, Roebuck & Co. v. Goldstone & Sudalter, P.C., 128 F.3d 10, 17 (1st Cir. 1997). If there is a dispute about the terms of a fee agreement that was not clearly set forth in writing, judges and juries will often be inclined to accept the client’s version.
Sample forms for fee agreements are available from a number of sources. The forms set forth in Mass. R. Prof. C. 1.5(f) are included on CD as Exhibits A and B. The MBA publishes sample fee agreements for cases conducted on the basis of hourly time charges, domestic relations cases, and criminal cases. These forms are included on CD as Exhibit C. Copies can be obtained by writing to the Massachusetts Bar Association at 20 West St., Boston, MA 02111.

§ 10.3 What the Fee Agreement Should Contain

(a) Basis for Fee

Every fee agreement should specify the basis for calculating the attorney fee. See Mass. R. Prof. C. 1.5(b). Methods for calculating the fee in regular usage include

- contingent fees, which are common in personal injury and eminent domain cases;

- lump-sum fees for designated services, which are sometimes used for discrete tasks such as the preparation of a will; and

- fees based on hourly time charges, which are usually used in commercial transactions.

Contingent fees are prohibited in some types of cases and should be avoided where there is no genuine uncertainty about the recovery. See the discussion in § 4.2, Prohibited Contingent Fee Agreements, above. Apart from these proscriptions, no one method of calculating a fee is ethically superior to another in all cases. The critical factors are that the client consent to the method chosen and that the method yield a fee that is reasonable under the circumstances.

In drafting a fee agreement based on hourly time charges, the attorney should be careful to include provisions for the time charges of all personnel likely to work on the engagement, either by name or by general description, such as “partner,” “associate,” and “paralegal.” An example of such a provision can be found in Exhibit C, Model Fee Agreement—Hourly Fee, included on CD. In Garnick & Scudder, P.C. v. Dolinsky, 45 Mass. App. Ct. 925 (1998), the attorney made provision for his own hourly time charges, but not those of his cocounsel or his paralegal assistant. The court held that he could recover only for his own services.
(b) Court-Ordered Fee Awards

In some types of civil litigation, there are statutes that permit the court to award reasonable attorney fees to the prevailing party. Clients sometimes take the position that the court-ordered fee is all the attorney is entitled to. E.g., Garnick & Scudder, P.C. v. Dolinsky, 45 Mass. App. Ct. 925 (1998) (award of fees in domestic relations case); Smith v. Consalvo, 37 Mass. App. Ct. 192 (1994) (award of fees under 42 U.S.C. § 1988). It is wise to discuss the issue with the client at the beginning of the engagement and, where appropriate, to include a provision concerning the disposition of any court-awarded fees in the fee agreement (see § 4.8, Interpretation of Contingent Fee Agreements, above), because courts generally look first to a written agreement to determine the intent of the parties and mutual obligations. In the absence of a written agreement on this issue, an attorney “shall be entitled to the greater of (i) the amount of any attorney’s fees awarded by the court or included in the settlement or (ii) the percentage or other formula applied to the recovery amount not including such attorney’s fees.” Mass. R. Prof. C. 1.5(c)(5).

(c) Scope of Engagement

Generally, an attorney will be expected to provide all legal services necessary to carry out the engagement. Cf. In re Kerlinsky, 406 Mass. 67, 73 (1989). The subject matter of the engagement and any limitations on the attorney’s services should, therefore, be clearly stated in the fee agreement. See Mass. R. Prof. C. 1.5(b), 1.5(c)(3).

(d) Costs and Disbursements

A fee agreement must also address the client’s responsibility for costs and disbursements such as filing fees and copying charges. See Mass. R. Prof. C. 1.5(b), 1.5(c)(6). What a lawyer considers a disbursement is not always obvious to the client, especially if the client does not use legal services regularly. Moreover, which expenses are charged to the client and which are considered part of overhead and included in the attorney fee can vary from one law firm to another. Accordingly, the fee agreement should spell out which costs will be billed directly to the client.

Absent prior agreement, a lawyer should not charge a client more than actual disbursements for payments to third parties, such as court reporters. Similarly, a lawyer’s charges for services performed in-house, such as photocopying and computer research, should reasonably reflect the lawyer’s actual costs. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93–379 (1993).
(e) Interest

A lawyer may ethically charge a client interest on the unpaid balance of bills for legal services, provided that the client knows in advance that interest will be charged and has reasonable opportunity to pay the bill without interest. MBA Ethics Op. 83–1, 68 Mass. L. Rev. 204 (1983). While it may be ethical to charge interest, it is still essential that the attorney establish a firm contractual basis for such charges. To provide such a basis, and to ensure compliance with the ethical requirements of advance notice and reasonable opportunity for payment, the attorney who intends to charge interest on overdue bills should include the interest rate and the required terms of payment in the fee agreement.

§ 10.4 Credit Cards

The use of credit cards to pay legal bills is now widely accepted. MBA Ethics Op. 77–15, 62 Mass. L. Q. 194 (1977); MBA Ethics Op. 74–1, 59 Mass. L. Q. 86 (1974); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 338 (1974). Ethics opinions on credit card use are summarized in the Lawyers’ Manual on Professional Conduct (ABA/BNA) 41:603–06. The use of credit cards raises several ethical issues that should be addressed before the attorney puts a credit card plan into effect:

- The attorney should not raise his or her fees to pass the cost of the credit card plan on to the client, at least without client consent.

- The attorney must continue to preserve confidential client information, as required by Mass. R. Prof. C. 1.6. Thus, the attorney should either disclose no client confidences to the credit card issuer or should obtain advance client consent to a limited disclosure of specific information necessary to facilitate the credit card transaction.

- Credit cards should not be used to pay fees in cases where the fee payment itself may become an issue during the engagement. Bankruptcy is one such case; domestic relations cases may be another.

- The attorney should not try to use the credit card arrangement with the bank to insulate himself or herself from financial responsibility to the client. Thus, ethics committees in several other states have recommended that the lawyer require the credit card issuer to waive all holder-in-due-course defenses.
Practice Note

Attorneys must be sure to comply with Massachusetts data security law in handling credit card information and other personal information received from clients. See, e.g., G.L. c. 93H; 201 C.M.R. §§ 17.01–.05.

An unsettled question is whether the credit card issuer should have recourse against the lawyer when the client refuses to pay. The “merchant agreement” between a credit card issuer and its customer often provides that the issuer may charge back the amount of any disputed bills against the customer’s account. The MBA Committee on Professional Ethics has suggested that the lawyer’s assignment of a client’s bill to the credit card issuer should be without recourse, so the lawyer does not become “a collection agent” for the issuer. MBA Ethics Op. 74–1, 59 Mass. L. Q. 86 (1974). Ethics committees in other states have argued that assignments without recourse may adversely affect the client’s right to withhold payment for improperly rendered services. Va. Ethics Op. 186–A (1981); Me. Ethics Op. 49 (1977). On balance, it seems preferable that the contract between the attorney and the credit card issuer be with recourse, at least when the client withholds payment because of dissatisfaction with the attorney’s services, since that arrangement leaves the ultimate financial responsibility for the quality of legal services with the lawyer, where it belongs.

A lawyer may permit a client to use a credit card to make an advance payment of fees, sometimes referred to as a “retainer” or “special retainer.” MBA Ethics Op. 78–11, 63 Mass. L. Rev. 231 (1978). See § 10.5, Advance Payments and Retainers, below. However, the attorney must treat the funds received from the bank as the client’s funds, in accordance with Mass. R. Prof. C. 1.15, until the fee has been earned, and the unused balance of the retainer must be returned to the client at the end of the engagement, as required by Mass. R. Prof. C. 1.15(b) and 1.16(d).

§ 10.5  Advance Payments and Retainers

Attorneys sometimes request their clients to make advance payments, which the attorneys then draw against to pay fees as they are earned. Such arrangements are sometimes referred to as “retainers” or “special retainers.” Wolfram § 9.2.2 at 505–06.

(a)  Retainers as Client Funds

Advance payments belong to the client until the attorney has earned them by providing the required services in accordance with the fee agreement. Therefore, lawyers who request advance payments must be careful to comply with Mass. R. Prof. C. 1.15, which governs the handling of client funds. The advance payment

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must be deposited in an interest-bearing client's fund account, as required by Mass. R. Prof. C. 1.15(c) and 1.15(e), and must be fully accounted for, as required by Mass. R. Prof. C. 1.15(a) and (b). Normally, some portion of the advance payment will be held for a significant period of time, often for several months, before it is fully drawn down. Accordingly, the lawyer should not use his or her Interest on Lawyers Trust Accounts (IOLTA) account for such funds. See Mass. R. Prof. C. 1.15(e)(1), (2). If the lawyer withdraws from the representation before completing the engagement, he or she must promptly refund the portion of the advance payment that has not yet been earned. Mass. R. Prof. C. 1.16(d); see also Mass. R. Prof. C. 1.5 cmt. 4.

Some attorneys have tried to charge their clients "nonrefundable" retainers for specific engagements, particularly in divorce and criminal cases. Under this type of fee arrangement, the attorney keeps all or a substantial portion of the retainer if the client decides to discharge the attorney before the engagement is completed. In In the Matter of Cooperman, 633 N.E.2d 1069 (N.Y. 1994), the New York Court of Appeals held that such fee arrangements violated the provisions of the New York disciplinary rules requiring the return of unearned retainers and were also an unwarranted interference with the client's right to discharge his or her counsel. Although there is no reported Massachusetts decision squarely on point, dicta in Smith v. Binder, 20 Mass. App. Ct. 21 (1985), suggests that courts in Massachusetts would reach the same result as the Cooperman court. See also MBA Ethics Op. 95–2, 80 Mass. L. Rev. 90 (1995) (nonrefundable retainers for specific tasks unethical).

(b) General Retainers Distinguished

The advance payment or special retainer has sometimes been distinguished from another type of arrangement, referred to as a "general retainer," pursuant to which the client makes a payment to the lawyer to ensure the lawyer's availability to handle the client's work for some fixed period of time. Such arrangements were once common between corporations and their outside general counsel. More recently, general retainers have sometimes been used in specialized fields, such as mergers and acquisitions, to ensure the availability of some uniquely qualified attorney should the occasion for his or her services arise. Since in theory the lawyer earns the general retainer by making himself or herself available for the specified time, the lawyer need not refund the retainer if his or her services are not called for.

The general retainer can, however, place a significant burden on the client's normally unfettered right to discharge his or her attorney. Compare Salem Realty Co. v. Matera, 10 Mass. App. Ct. 571 (1980), aff'd, 384 Mass. 803 (1981), discussed in § 4.10, Termination of Contingent Fee Agreement, above. Because of
the burden the general retainer places on the client’s right to change counsel, some have argued that such agreements are against public policy and should not be enforced if the client chooses to discharge the attorney. Cf. Provanzano v. Nat’l Auto Credit, Inc., 10 F. Supp. 2d 44, 51 n.13 (D. Mass. 1998). At a minimum, a court will not enforce such an agreement unless the lawyer demonstrates that all aspects of the arrangement were fully explained to and understood by the client. Jacobson v. Sassower, 499 N.Y.S.2d 381 (N.Y. App. Div. 1985).

§ 10.6 Security Agreements

In addition to requesting an advance payment of fees, an attorney may also obtain other forms of security, such as a mortgage or a security agreement in personal property. Such arrangements are enforceable, but only if there is no overreaching or other unfairness on the part of the attorney. Coupounas v. Madden, 401 Mass. 125 (1987); Widett & Widett v. Snyder, 392 Mass. 778 (1984). But see PR 87-13, 5 Mass. Att’y Disc. R. 498 (attorney reprimanded for requiring client to sign note and mortgage that were excessive in amount and tied up most of client’s assets).

A security agreement for fees places the lawyer’s financial interests directly at odds with those of the client. Ethics opinions interpreting the Disciplinary Rules in effect prior to 1998 counseled that a lawyer should exercise “extreme caution” in structuring a security agreement and explaining it to the client. MBA Ethics Op. 81–7, 66 Mass. L. Rev. 207 (1981). Such caution is even more justified today in light of Mass. R. Prof. C. 1.8(a), concerning business transactions between lawyer and client. Rule 1.8(a) is more rigorous than its predecessor, DR 5-101(A). Under the new rule, business transactions with a client are permissible only if

- the terms are fair and reasonable to the client,
- the transaction is fully disclosed to the client in a manner the client can understand,
- the client has a chance to consult independent counsel, and
- the client consents in writing.

Generally, Mass. R. Prof. C. 1.8(a) does not apply to security agreements negotiated as part of the initial fee agreement before the attorney-client relationship has been formed. See In re Discipline of an Attorney, 451 Mass. 131, 138-40 (2008). In practice, however, courts and disciplinary agencies are likely to apply strict scrutiny to any business arrangement between a lawyer and layperson seeking the lawyer’s advice, because the lawyer usually enjoys an advantage in
negotiating the arrangement due to his or her superior legal knowledge and skill. Wolfram § 8.11.3 at 482–83; see also PR 87–13, 5 Mass. Att’y Disc. R. 498 (applying DR 5-101(A) to security agreement negotiated at the outset of the engagement). Therefore, a prudent attorney should comply with Mass. R. Prof. C. 1.8(a) whenever he or she negotiates a security agreement with a client.

If the engagement involves litigation, the attorney must also be careful that the security agreement does not give him or her an interest in the subject matter of the litigation in violation of Mass. R. Prof. C. 1.8(j). For example, an attorney in a divorce case should not ask for a mortgage on the marital home to secure his or her fee, at least until the judgment of divorce has been entered and the disposition of the property has been settled. MBA Ethics Op. 91–1, 19 M.L.W. 1847. Rule 1.8(j) is discussed in greater detail in § 7, above.

§ 10.7 Billing Services

A lawyer who bills the client on a periodic basis may use a third-party billing service to prepare the invoices. However, the attorney remains responsible for ensuring that the client’s confidences and secrets are protected, as required by Mass. R. Prof. C. 1.6. See also Mass. R. Prof. C. 5.3 (regarding responsibility for nonlawyer assistants). The attorney must, therefore, take pains to ensure that only information essential to the preparation of the invoice is disclosed to the billing service. If the information provided to the billing service does include client confidences and secrets, then the lawyer must make sure that the billing service takes adequate precautions to preserve the confidentiality of the information disclosed. MBA Ethics Op. 89–3, 74 Mass. L. Rev. 303 (1989).
EXHIBIT A — Contingent Fee Agreement Form A

To Be Executed in Duplicate

Date: _____, 20__

The Client _____ (Name) _____ (Street & Number) _____ (City or Town) retains the Lawyer _____ (Name) _____ (Street & Number) _____ (City or Town) to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is recovery of damages, whether by settlement, judgment or otherwise.

(3) The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay court costs and expenses of litigation, other than from amounts collected for the client by the lawyer.

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a descending or ascending scale in relation to amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney’s fees awarded by a court or included in a settlement. The lawyer’s compensation shall be such attorney’s fees or the amount determined by the percentage calculation described above, whichever is greater.

(5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.

(6) [IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will receive any payment for the work done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well
as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7) [USE IF LAWYER IS SUCCESSOR COUNSEL] The lawyer is responsible for payment of former counsel’s reasonable attorney’s fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE HAVE EACH READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures          Signatures of client and lawyer
(To client) _____________          (Signature of Client) _____________
(To client) _____________          (Signature of Client) _____________
EXHIBIT B—Contingent Fee Agreement Form B

To Be Executed in Duplicate

Date: ______, 20__

The Client _____ (Name) _____ (Street & Number) _____ (City or Town) retains the Lawyer _____ (Name) _____ (Street & Number) _____ (City or Town) to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is:

(3) Costs and Expenses. The client should initial next to the option selected.

(i) The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay court costs and expenses of litigation, other than from amounts collected for the client by the lawyer; or

(ii) The client is not to be liable to pay compensation or court costs and expenses of litigation otherwise than from amounts collected for the client by the lawyer, except as follows:

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a descending or ascending scale in relation to the amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney’s fees awarded by a court or included in a settlement. The lawyer’s compensation shall be such attorney’s fees or the amount determined by the percentage calculation described above, whichever is greater. [Modify the last two sentences as appropriate if the parties agree on some other basis for calculation.]

(5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.
(6) [IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will be entitled to receive any payment for the work done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7) [USE IF LAWYER IS SUCCESSOR COUNSEL] Payment of any fees owed to former counsel. The client should initial next to the option selected.

(i) The lawyer is responsible for payment of former counsel’s reasonable attorney’s fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses; or

(ii) The client is responsible for payment of former counsel’s reasonable attorney’s fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE HAVE EACH READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures                      Signatures of client and lawyer
(To client) _____________ (Signature of Client) _____________
(To client) _____________ (Signature of Client) _____________
EXHIBIT C—Model Fee Agreements

MODEL FEE AGREEMENT
GENERAL REPRESENTATION—HOURLY FEE

I ____ of _____, the “Client,” hereby agree to retain _____ of _____, the “Attorney”/“Firm” in connection with: ____________________________________
________________________________________________________________
________________________________________________________________
________________________________________________________________

1. The Attorney has received $_____ as a payment on account. Because of this partial payment the Attorney agrees to provide legal services in connection with the above matter and to keep the Client fully informed of all significant developments, and to send copies of relevant documents necessary to achieve that purpose. The payment received shall be applied against both the bills for the legal services performed for the Client and the costs and disbursements as described below.

2. Time charges for the services will be billed at the following hourly rates:

   (a) Partners’ rates $_____ to $_____ per hour.

   (b) Associates’ rates $_____ to $_____ per hour.

   (c) Paralegals’ rates $_____ to $_____ per hour.

3. If at completion or on termination of the legal services, the total of the bills for services performed is less than the amount of the payment on account, the balance will be refunded to the Client.

4. Interim billing may be made in the event the charges exceed the initial payment on account. All interim bills are due and payable on receipt. Failure to pay interim bills promptly will permit the Attorney/Firm, after notice to the Client, to terminate representation of the client as permitted by applicable rules and law.

5. The time charges include but are not limited to court appearances, including waiting time, travel to and from court, telephone conferences, telephone calls to and from the Client (all telephone calls are billed at a minimum of _____/10th(s) of an hour), office conferences, legal research, depositions, review of file materials and documents sent or received, drafting of pleadings, correspondence and memoranda, and preparation for trials, hearings and conferences.
6. The Client agrees to pay for costs incurred and out-of-pocket disbursements made by the Attorney, including, but not limited to, filing fees, witness fees, travel, sheriff’s and constable’s fees, expenses of depositions, investigative expenses, expert witness fees, charges for photocopies and telephone, and other incidental expenses. The Attorney/Firm agrees to obtain the Client’s approval before incurring any single cost or disbursement in excess of $_____, and incurring total costs in excess of $_____.

7. The Attorney and Client state that no results have been guaranteed by the Attorney/Firm to the Client and that this agreement is not based on any such promises or anticipated results.

8. Other terms: ____________________________________________________
________________________________________________________________
________________________________________________________________

CLIENT UNDERSTANDS AND ACKNOWLEDGES THAT NO LEGAL
REPRESENTATION, APPEARANCE, OR PREPARATION WILL BEGIN IN
THIS MATTER UNTIL PAYMENT ON ACCOUNT AS SET FORTH IN
PARAGRAPH ONE IS PAID IN FULL.

We, the Client and the Attorney/Firm, have read this Fee Agreement and agree to its terms and have signed it as our free act and deed on this _____ day of _____, 20__.

__________________________________________  Attorney/Firm

The Client acknowledges receipt of a copy of this agreement.

__________________________________________  Date

THIS IS A LEGALLY BINDING CONTRACT. ASK TO HAVE EACH TERM YOU DO NOT UNDERSTAND FULLY EXPLAINED TO YOU SO THAT YOU UNDERSTAND THE AGREEMENT YOU ARE MAKING.

This agreement has been prepared and endorsed by the Massachusetts Bar Association (June 1988).
OPTIONAL CLAUSES

1. The parties understand that in some cases a court may award legal fees to one party and order the other party to pay the amount awarded. Any award of legal fees is solely in the discretion of the court and cannot be relied on with certainty. In other cases, a settlement agreement may provide that one of the parties will contribute to the other party’s legal expenses, but such contribution is solely one of agreement and likewise cannot be relied on. Client understands that it is very difficult to predict whether either of the above situations will occur. In any case, the Client is responsible to pay the bills of the Attorney/Firm directly.

2. If the Client fails to pay any bill within 60 days of receipt, (simple/compound) interest will be paid at the rate of _____% per (year/month).

3. If the Client and Attorney are unable to resolve their differences on the question of any fee, and or expenses, they hereby agree to make a good faith effort at resolving their disputes. If the dispute cannot be resolved, the Client and Attorney agree to place the matter before the Fee Arbitration Board of the Massachusetts Bar Association, or some other fee dispute resolution body, and agree to be bound by the decision.

CLIENT UNDERSTANDS AND ACKNOWLEDGES THAT THESE OPTIONAL CLAUSES ARE INCORPORATED INTO AND MADE A PART OF THE ATTACHED FEE AGREEMENT.

We, the Client and the Attorney/Firm, have read the above Optional Clauses on this _____ day of _____, 20____, and understand its terms and both have signed it as our free act and deed.

_____________________________  ______________________________
Client                                      Attorney/Firm

The Client acknowledges receipt of a copy of this agreement.

_____________________________  ______________________________
Client                                      Date
I _____ of _____ the “Client,” hereby agree to retain _____ the “Attorney”/ “Firm” in connection with the domestic relations matter as follows: __________

________________________________________________________________
________________________________________________________________
________________________________________________________________

1. The Attorney has received $_____ as a payment on account. Because of this partial payment, the Attorney agrees to provide legal services in connection with the above domestic relations matter and to keep the Client fully informed of all significant developments, and to send copies of relevant documents necessary to achieve that purpose. The payment received shall be applied against both the bills for the legal services performed for the Client, and the costs and disbursements as described below.

2. The legal services performed shall be charged at the rate of $_____ per hour for the Attorney. It is understood and agreed that the Attorney may employ associates _____, and paralegals _____, to assist in the case. If so, their services will be charged at the rate of $_____ per hour for associates, and $_____ per hour for paralegals.

3. The time charges include but are not limited to court appearances, including waiting time, travel to and from court, telephone conferences, telephone calls to and from the Client (all telephone calls are billed at a minimum of _____/10th(s) of an hour), office conferences, legal research, depositions, review of file materials and documents sent or received, drafting of pleadings, correspondence and memoranda, preparation for trials, hearings and conferences.

4. The Client may request a report from the Attorney, or bill, for a current status of the legal fees and costs incurred. Interim billings may be submitted to the Client from time to time if time charges exceed the initial payment on account. All interim billings shall be due and payable on receipt unless otherwise stated. Failure to pay interim billing promptly will permit the Attorney after notice to the Client to terminate the representation of the Client subject to applicable rules of the court.

5. In the event the Client shall discharge the Attorney, or in the event the Attorney determines to terminate the representation of the Client, the Attorney shall be paid for all work performed up to the point of termination of services, and this payment shall include all services which have been completed, as well as
reimbursement of costs expended up to the time of termination of the Attorney/Client relationship.

6. The Client agrees that the final bill submitted by the Attorney for legal fees and costs will be due and payable at the conclusion of this matter, or at the termination of the Attorney/Client relationship.

7. In the event that, either on the completion of the within matter or the termination of the Attorney’s representation of the Client, the total cost of the legal services performed by the Attorney shall be less than the amount paid on account by the Client, the balance shall be refunded to the Client by the Attorney.

8. The parties understand that in some cases a court may award legal fees to one party and order the other party to pay the amount awarded. Any award of legal fees is solely in the discretion of the court and cannot be relied on with certainty. In other cases, if there is a settlement agreed to by both parties thereby avoiding a contested trial, the settlement agreement may provide that one of the parties contribute to the other party’s legal expenses. It is very difficult to predict whether either of the above situations will occur. In the event, however, that the court should award payment of fees by the other party and/or that there is some agreement as to payment of fees by the other party, and that such funds are obtained and received for the benefit of the Client, then the amount of funds so received will be credited against the Attorney’s final bill to the Client. However, in the event any such agreements are reached or awards entered by the court for payment of the Client’s legal fees and/or expenses, but Client’s spouse defaults in all or any portions of said payments, then it shall remain the responsibility of the Client under the terms of this agreement for payment in full of legal fees to the Attorney. Should the Client decide to attempt to recover such monies from the spouse as a result of such default, the Client shall be responsible for any work and expenses incurred by the Attorney in regard to this attempted recovery.

9. The Attorney and Client state that no results have been guaranteed by the Attorney to the Client and that this Agreement is not based on any such promises or anticipated results.

10. The Client agrees to pay for costs incurred and out-of-pocket disbursements made by the Attorney, including, but not limited to, filing fees, witness fees, travel, sheriff’s and constable’s fees, expenses of dispositions, investigative expenses, expert witness fees, charges for photocopies and telephone, and other, incidental expenses. The Attorney/Firm agrees to obtain the Client’s approval before incurring any single cost or disbursement in excess of $______, and incurring total costs in excess of $______.
CLIENT UNDERSTANDS AND ACKNOWLEDGES THAT NO LEGAL REPRESENTATION, APPEARANCE, OR PREPARATION WILL BEGIN IN THIS MATTER UNTIL PAYMENT ON ACCOUNT AS SET FORTH IN PARAGRAPH ONE IS PAID IN FULL.

We, the Client and the Attorney/Firm, have read the above Fee Agreement on this _____ day of _____, 20__, and understand its terms and both have signed it as our free act and deed.

_________________________________________  _____________________________________________
Client                                                                                 Attorney/Firm

The Client acknowledges receipt of a copy of this agreement.

_________________________________________  _____________________________________________
Client                                                                                 Date

THIS IS A LEGALLY BINDING CONTRACT. ASK TO HAVE EACH TERM YOU DO NOT UNDERSTAND FULLY EXPLAINED TO YOU SO THAT YOU UNDERSTAND THE AGREEMENT YOU ARE MAKING.

This agreement has been prepared and endorsed by the Massachusetts Bar Association (June 1988).
OPTIONAL CLAUSES

1. If the Client fails to pay any bill within 60 days of receipt, (simple/compound) interest will be paid at the rate of _____% per (year/month).

2. If the Client and Attorney are unable to resolve their differences on the question of any fee, and/or expenses, they hereby agree to make a good faith effort at resolving their disputes. If the dispute cannot be resolved, the Client and Attorney agree to place the matter before the Fee Arbitration Board of the Massachusetts Bar Association, or some other fee dispute resolution body, and agree to be bound by the decision.

CLIENT UNDERSTANDS AND ACKNOWLEDGES THAT THESE OPTIONAL CLAUSES ARE INCORPORATED INTO AND MADE A PART OF THE ATTACHED FEE AGREEMENT.

We, the Client and the Attorney/Firm, have read the above Optional Clauses on this _____ day of _____, 20__, and understand its terms and both have signed it as our free act and deed.

___________________________________________  ________________________________________
Client                                         Attorney/Firm

The Client acknowledges receipt of a copy of this agreement.

___________________________________________  ________________
Client                                         Date
MODEL FEE AGREEMENT
CRIMINAL DEFENSE—FIXED FEE

I _____ of _____, the “Client,” hereby agree to retain _____ of _____, the “Attorney”/“Firm,” in connection with the defense of the Client on the following criminal charges, or potential criminal charges: (insert specific charges, complaint or indictment numbers, and court(s) involved) ___________________
________________________________________________________________
________________________________________________________________

It is understood that the representation will include handling the following matters, and at the following court levels

_____ Grand Jury    _____ Trial    _____ District Court
_____ Arraignment   _____ Post-Trial _____ Probable Cause Hearing
_____ Bail          _____ Revise and Revocation _____ Superior Court
_____ Motion        _____ Other     _____ U.S. District Court
_____ Pre-Trial     _____ All Appeals
Conference

1. The Client shall pay to the Attorney for all services rendered in regard to the above matter(s), the sum of $_____, payable as follows: _____ (one payment, timetable, etc.).

2. In addition to legal fees, all costs in connection with the representation of this matter shall also be paid by the Client. Examples of these costs and out-of-pocket disbursements which the Attorney may make in connection with this matter are, without limitation, filing fees, witness fees, expert witness fees, travel, sheriff’s fees, deposition expenses, transcript expenses, investigation, copies, telephone calls and other incidental expenses. With regard to such out-of-pocket disbursements, the Attorney agrees to obtain the Client’s prior approval before incurring any single cost or disbursement in excess of $_____, and incurring total costs in excess of $_____.

3. If the Client does not make payments as required under this Agreement, or if the Client has misrepresented or failed to disclose important facts to the Attorney, or if the Client unreasonably fails to follow the Attorney’s advice, then the Attorney is entitled to apply to the court for leave to withdraw from the handling
of the case. If any of these events occur and leave is granted, and if the Attorney elects to withdraw, the Client shall promptly arrange for a substitution of counsel. In addition, there shall be an accounting by the Attorney of legal services rendered and expenses and fees paid at the time of withdrawal. All amounts owing by either party shall be paid to the other party within thirty days.

4. If the relationship is terminated by the Client, or the Attorney withdraws for the reasons stated above, and there are any amounts owing to the Attorney, the Attorney shall have a lien to the extent recognized by law, on all the Client’s documents, property or money in the Attorney’s possession for payment of all amounts due. If it is necessary to file suit for collection of any amounts due from the Client under this Agreement, the Client shall pay the reasonable Attorney fees, together with court costs for this collection.

5. If the Attorney is discharged by the Client prior to the conclusion of this representation, the Attorney is entitled to be then compensated for the fair value of the services rendered to the Client up to the time of discharge, and for his or her reasonable expenses and disbursements.

6. The Attorney may in his or her discretion employ an associate counsel, and/or paralegal, within his or her law firm, at the Attorney’s own expense, to assist in preparing the case and representing the Client.

7. The Attorney and Client state that the Attorney has made no promise or guarantee as to the successful resolution or eventual outcome of the criminal charges or potential criminal charges, and that this agreement is not based on any such promises or anticipated results.

CLIENT UNDERSTANDS AND ACKNOWLEDGES THAT NO LEGAL REPRESENTATION, APPEARANCE, OR PREPARATION WILL BEGIN IN THIS MATTER UNTIL PAYMENT ON ACCOUNT AS SET FORTH IN PARAGRAPH ONE IS PAID IN FULL.

We, the Client and the Attorney/Firm, have read the above Fee Agreement on this _____ day of _____, 20__, and understand its terms and both have signed it as our free act and deed.

Client

Attorney/Firm

The Client acknowledges receipt of a copy of this agreement.

Client

Date
THIS IS A LEGALLY BINDING CONTRACT. ASK TO HAVE EACH TERM YOU DO NOT UNDERSTAND FULLY EXPLAINED TO YOU SO THAT YOU UNDERSTAND THE AGREEMENT YOU ARE MAKING.

This agreement has been prepared and endorsed by the Massachusetts Bar Association (June 1988).
OPTIONAL CLAUSES

1. The parties understand that in some cases a court may award legal fees to one party and order the other party to pay the amount awarded. Any award of legal fees is solely in the discretion of the court and cannot be relied on with certainty. In other cases, a settlement agreement may provide that one of the parties will contribute to the other party’s legal expenses, but such contribution is solely one of agreement and likewise cannot be relied on. Client understands that it is very difficult to predict whether either of the above situations will occur. In any case, the Client is responsible to pay the bills of the Attorney/Firm directly.

2. If the Client fails to pay any bill within 60 days of receipt, (simple/compound) interest will be paid at the rate of _____% per (year/month).

3. If the Client and Attorney are unable to resolve their differences on the question of any fee, and or expenses, they hereby agree to make a good faith effort at resolving their disputes. If the dispute cannot be resolved, the Client and Attorney agree to place the matter before the Fee Arbitration Board of the Massachusetts Bar Association, or some other fee dispute resolution body, and agree to be bound by the decision.

CLIENT UNDERSTANDS AND ACKNOWLEDGES THAT THESE OPTIONAL CLAUSES ARE INCORPORATED INTO AND MADE A PART OF THE ATTACHED FEE AGREEMENT.

We, the Client and the Attorney/Firm, have read the above Optional Clauses on this _____ day of ______, 20____, and understand its terms and both have signed it as our free act and deed.

Client ___________________________  Attorney/Firm ___________________________

The Client acknowledges receipt of a copy of this agreement.

Client ___________________________  Date ___________________________
SECTIO N A7.2

Fees and Feasibility: Amendments to M ass. R . Prof. C. 1.5 on Fees*

Constance V. Vecchione, Esq.
Board of Bar Overseers/Office of the Bar Counsel, Boston

Comprehensive amendments ordered by the Supreme Judicial Court to Mass. R. Prof. C. 1.5 on charging and collecting fees will take effect on March 15, 2011. Some of the revisions mirror amendments made to the corresponding ABA model rule in 2002; some are grammatical or stylistic and do not reflect changes in substance. But other significant amendments, especially those concerning contingent fee agreements, are intended to conform Rule 1.5 to four decisions by the SJC since 2004—Malonis v. Harrington, 442 Mass. 692 (2004), Saggese v. Kelley, 455 Mass. 434 (2005), Liss v. Studeny, 450 Mass. 473 (2008), and Matter of an Attorney, 451 Mass. 131 (2008). These changes are unique to Massachusetts.

Basis or Rate of Fees and Expenses

Consistent with 2002 changes to the ABA model rule, Rule 1.5(a) has now been revised to add a prohibition on entering into an agreement for, charging, or collecting unreasonable expenses. Rule 1.5(b) has been similarly amended to require lawyers to advise clients of the basis or rate of expenses, not just fees, at or near the outset of the representation and to inform clients of any changes in the basis or rate of fees or expenses.

The existing version of Mass. R. Prof. C. 1.5(a) already proscribes illegal or clearly excessive fees; that provision, as well as the familiar list of eight factors to consider in making a determination as to whether a fee is clearly excessive, is unchanged. However, new comment 3 notes that the requirement that fees not be clearly excessive also applies to contingent fees and, very critically, states that

* Source: Board of Bar Overseers/Office of the Bar Counsel. Reprinted with permission.
Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
lawyers should inform clients of alternative bases on which the fee can be charged if there is doubt whether a contingent fee is in the client's best interests.

**Referral Fees**

While Rule 1.5(e) has always required client consent to any division of fees between lawyers not in the same firm, the rule has now been amended to be consistent with the court's decision in *Saggese v. Kelly*, requiring that the consent be in writing and obtained before or at the time that the client enters into the fee agreement. The rule still requires that the total fees charged be reasonable.

**Contingent Fees**

The most extensive changes are to Rule 1.5(c) governing contingent fees and Rule 1.5(f), prescribing authorized forms of contingent fee agreement. The provisions of Mass. R. Prof. C. 1.5(c) have always differed from the ABA model rule, and our Rule 1.5(f) has no ABA counterpart. The revisions to these provisions are unique to Massachusetts.

What has not changed is that contingent fee agreements must still be in writing and signed in duplicate by both lawyer and client within a reasonable time of making the agreement. The agreement must still, as required by sections (c)(1) through (c)(3), include the names and addresses of the clients and lawyers and a statement of the nature of the claim or other matter for which the services are to be performed. Minor stylistic changes have been made to section (c)(5), which is the provision on calculation of contingent fees when fees are also awarded by a court or included in a settlement, and to section (c)(6), pertaining to the method by which fees and expenses are calculated and paid or reimbursed.

Three other sections of Rule 1.5(c), however, have either been substantially revised or are entirely new, as follows:

- Section (c)(4) retains the existing requirement that the fee agreement state the contingency upon which compensation will be paid and the extent to which the client is liable to pay compensation other than from amounts collected by the attorney. However, the section now also mandates that, if the lawyer intends to charge a fee other than the contingent fee, the lawyer must also describe how the non-contingent fee will be calculated.

- Section (c)(7) addresses the client's liability when the attorney-client relationship terminates prior to the end of a contingent fee case. This new section requires that, if a lawyer intends to pursue a claim for fees and expenses in the event that the attorney-client
relationship terminates before the conclusion of the case, the contingent fee agreement must state that the client is potentially liable for such charges. The agreement must also detail the basis on which the fees and expenses will be claimed and, if applicable, the method of calculation. New comments 3A and 3B further expand on these requirements and on the nature of a quantum meruit recovery. Comment 3B, speaking to the issue raised in Liss v. Studeny, expressly states that, unless otherwise agreed in writing, the lawyer ordinarily will not be entitled to receive a fee unless the contingency has occurred.

- Section (c)(8) is directed to successor counsel and codifies the court's decision in Malonis v. Harrington. This new provision requires the fee agreement with successor counsel to state whether the client or the successor lawyer is to be responsible for payment of former counsel's fees and expenses.

The unnumbered paragraph at the end of Rule 1.5(c) has also been significantly revised. Unchanged is the obligation to provide the client with a written statement at the conclusion of any contingent fee case explaining the outcome and showing how the client's remittance was calculated. The revised paragraph, however, imposes additional accounting requirements consistent with the court's decisions in Malonis v. Harrington and Matter of an Attorney.

Specifically, at any time prior to the occurrence of the contingency, if the representation is terminated or if the client so requests, the lawyer must provide a written itemization of services rendered and expenses incurred within twenty days, unless the lawyer informs the client in writing that the lawyer does not intend to make a claim. New comment 3C explains that, if the lawyer is unable to determine the precise amount claimed because the case has not been resolved, the lawyer nonetheless must identify the amount of work performed and the basis employed for calculating the fee due.

Prohibited Contingent Fees

The text of Rule 1.5(d) has not been amended. It continues to prohibit contingent fees in criminal cases and in domestic relations cases contingent upon securing a divorce or upon the amount obtained as alimony, support or property settlement. However, new comment 6, identical to the corresponding ABA model comment, clarifies that contingent fee agreements are not prohibited in connection with collecting post-judgment balances in domestic matters.
The Form Contingent Fee Agreements

In Matter of an Attorney, the court discussed a number of concerns regarding the contingent fee agreement used by the lawyer, ultimately deciding that discipline was not warranted on those issues in the particular circumstances of the case. Going forward, however, the court held that attorneys should specifically explain to clients any terms in a contingent fee agreement that differ materially from those in the model fee agreement set forth in Rule 1.5(f) and obtain the clients' consent in writing to those terms.

To implement this directive, Rule 1.5(f) has now been amended to include two alternative forms of model contingent fee agreement, Form A and Form B.

Rule 1.5(f)(1)-(3) contains directions for the use of the two model agreements, as well as for the use of any other contingent fee agreement. Per section (f)(4), the requirements of sections (f)(1)-(3) do not apply when the client is an organization including a non-profit or governmental entity.

Both Form A and Form B incorporate the changes to Rules 1.5(c) and (d) previously discussed. One very critical revision, identical in both forms, appears in paragraph 6 and prescribes the notice required when the attorney wishes to retain the option of seeking payment if the representation terminates before the conclusion of the case. New comment 3D elaborates on this issue. Paragraph 6 further states that any such payment shall not exceed the lesser of the fair value of the legal services rendered or the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. Thus, if there is no recovery, no fee is owed in quantum meruit.

The differences between the two forms are explained in new comment 11, but in essence:

- Form A is an off-the-shelf version that can be used without any special explanations by the lawyer to the client beyond those otherwise required by Rule 1.5.
- Form A contains a standard provision in paragraph 2 that the contingency is the recovery of damages. Paragraph 2 of Form B, on the other hand, provides a blank space (to be filled in) as to the nature of the contingency. The use of paragraph 2 of Form B, however, does not require any special explanations to the client.
- Paragraph 3 of Form B contains two options for advances and payment of expenses. If the lawyer does not intend to advance expenses and collect payment only from amounts collected for the
client (the first option and also the provision in Form A), the second option requires the lawyer to spell out how expenses are to be paid and collected.

- Paragraph 7 of Form B applies when the lawyer is successor counsel in a contingent fee case and also provides two options. The first option, which again is the provision in Form A, provides that the lawyer will be responsible for paying former counsel’s fees and expenses and for resolving any disputes regarding these matters. The second option imposes the responsibility for these matters on the client.

Attorneys using Form B are required to show both alternatives for paragraph 3 and, if applicable, paragraph 7. The client will thus see the options and can question the alternative selected by the lawyer. The lawyer is required to obtain the client’s informed consent confirmed in writing to each selected option. The client’s initialing the selected option meets the “confirmed in writing” requirement.

Lawyers are permitted to use other forms of contingent fee agreement consistent with Rule 1.5. However, when representing individuals, the attorney must provide explanations to the client of any provisions that are materially different from or add to those in the model forms and then must obtain the client’s informed consent, confirmed in writing, to those provisions.

For purposes of this rule, a contingent fee agreement that omits the first option (i.e., the Form A language) from paragraph 3 or paragraph 7 of Form B is an agreement that materially differs from the model forms. See new comment 12. Per comment 9, a provision in a contingent fee agreement requiring fee disputes to be resolved by arbitration is a provision that materially differs from the model forms such that the lawyer must provide a special explanation to the client and obtain written consent.

The goal of any fee agreement is to ensure that both parties understand their responsibilities. Clients also need to know how and what they are paying for and the consequences of terminating the agreement. These amendments are intended to advance that goal and to reduce misunderstandings between lawyers and clients.
SECTION A 7.3

Self-Audits for Law Offices*

Nancy Byerly Jones, Esq.
NBJ Consulting & Conflict Resolution, Boone, NC

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## CLIENT RELATIONS SELF-AUDIT

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<th>Improvement Strategy</th>
<th>Targeted Completion Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Are you perceptive to potential “problem” clients, and do you wisely decline to take their cases?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Do you set a good example and teach your associates and staff the importance of confidentiality?</td>
<td></td>
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<tr>
<td>3. Do you set a good example and teach your associates and staff the importance of maintaining excellent client relations with all clients at all times?</td>
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<td></td>
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</tr>
<tr>
<td>4. Do you provide your clients with a written engagement agreement that includes the following:</td>
<td></td>
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</tr>
<tr>
<td>(a) Details regarding the scope of your representation?</td>
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<tr>
<td>(b) Details regarding your fee and anticipated expenses?</td>
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<tr>
<td>(c) Reminders that no specific result has been promised?</td>
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<tr>
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<td>Response and Explanatory Remarks</td>
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<tr>
<td>(d) Reminders that, although your nonlawyer assistants play a critical part on your legal team, they cannot and will not ever be giving legal advice?</td>
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<tr>
<td>(e) A statement of your appreciation for their giving you the opportunity to be of service to them?</td>
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<tr>
<td>(f) Who to contact in your firm regarding their questions or concerns?</td>
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<tr>
<td>5. Do you or one of your assistants return your clients' telephone calls within 24 hours?</td>
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<td>6. Do you keep clients regularly informed about the status of their cases?</td>
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<tr>
<td>7. Do you adequately document your files to reflect all conferences (telephone and otherwise) with your clients and any or all third parties?</td>
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<tr>
<td>8. Do clients receive your undivided attention during conferences?</td>
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<tr>
<td>9. Do you meet with clients in private, organized and otherwise presentable areas of your office?</td>
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<tr>
<td>10. Do you frequently follow up and touch base with your clients even when their cases are inactive (i.e., at least every two months)?</td>
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<tr>
<td>11. Do you offer clients a procedure for voicing any concerns, complaints, suggestions and compliments they may have (e.g., client surveys)?</td>
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<tr>
<td>12. Are all firm employees aware of the firm’s policies, procedures and materials about client relations?</td>
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<tr>
<td>13. Is this topic covered in your firm’s policy and procedures manual?</td>
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<tr>
<td>14. Are you using a good case management software system?</td>
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<tr>
<td>15. Knowing what you do about your firm, its people, and the quality of your firm’s work product, would you want to be a client of the firm?</td>
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# CLIENT SELECTION AND ACCEPTANCE

## SELF-AUDIT

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<tbody>
<tr>
<td>1. Do you like the prospective client?</td>
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<td>2. Has the prospective client indicated that he or she has had unsuccessful associations with multiple other lawyers?</td>
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<td>3. Is the prospective client the type who tries to tell you how to practice law?</td>
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<td>4. Is the prospective client unreasonably focused on winning at any costs?</td>
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<tr>
<td>5. Have you checked for any actual or potential conflicts of interest?</td>
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<tr>
<td>6. Do you have sufficient time to add this matter to your caseload?</td>
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<tr>
<td>7. Is the matter within your realm of expertise?</td>
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<tr>
<td>8. If the matter is outside your realm of expertise, are you willing to associate appropriate cocounsel?</td>
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<tr>
<td>9. If cocounsel is associated, have you informed the client of all necessary details, including any required by your state bar rules (e.g., how the fees are to be split, the responsibilities of each lawyer, etc.)?</td>
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<tr>
<td>10. Have you introduced the client to all staff members who will be working on the client’s case?</td>
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<td>11. Have you thoroughly discussed fees and costs with the new client?</td>
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<td>12. Have you clearly explained the difference between fees and expenses and given examples of both?</td>
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<td>13. Have you shown the client your lawyer-client contract and had the client sign it?</td>
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<tr>
<td>14. Did you give the client adequate time to ask you questions about his or her contract with you?</td>
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<td>15. Have you asked for and received an advance fee deposit or retainer?</td>
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<td>16. If you are requiring a nonrefundable retainer, does your client understand this?</td>
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<tr>
<td>17. Is your nonrefundable retainer allowed and, if so, reasonable within the bounds of your state bar rules and regulations?</td>
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<tr>
<td>18. Have you explained your telephone policy and procedures to the client and provided a written policy for the client to take home?</td>
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<tr>
<td>19. Did you take the time to explain other relevant firm systems and policies (e.g., appointments, applicable court procedures)?</td>
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<tr>
<td>20. Did you give the client reasonable time estimates of when particular events and actions will occur in regard to their case?</td>
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<tr>
<td>21. Did you give the client other, external resource references that may be of interest or help to the client in this matter (e.g., community resources, counseling services)?</td>
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<tr>
<td>22. Have you avoided making any guarantees to the prospective client regarding case outcome?</td>
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<tr>
<td>23. Did you ask clients how they heard about your firm?</td>
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<tr>
<td>24. Do you send a thank-you note or appropriate thank-you gift to whoever refers new clients to you?</td>
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<tr>
<td>25. Do you remember to thank new clients, both in person and in writing, for giving you the opportunity to serve them?</td>
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### STAFF PROFESSIONALISM SELF-AUDIT

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<tbody>
<tr>
<td>1. When talking with clients or others not employed by the firm, do I always represent the firm in a professional manner?</td>
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<tr>
<td>2. When interacting with clients, am I a good “manager of first and last impressions” on behalf of the firm?</td>
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<tr>
<td>3. Do I carefully guard client confidentialities at all times?</td>
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<tr>
<td>4. Do I treat each client as I would like to be treated if I were the client?</td>
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<tr>
<td>5. Do I treat each task I perform in my work as representing a self-portrait of myself and my work ethic?</td>
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<tr>
<td>6. When I answer the telephone, do callers get the impression that I am glad they called or that I am frustrated they have interrupted me?</td>
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<tr>
<td>7. Do I project enthusiasm, caring and interest when talking to clients?</td>
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<td>8. Do I refrain from offering clients legal advice even when I know the answer?</td>
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<tr>
<td>9. When passing messages containing legal advice from the lawyer to clients, do I remember to remind clients that the message is from the lawyer and that I am not the lawyer and, therefore, cannot give legal advice?</td>
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<tr>
<td>10. Am I a good team player when my office peers need an extra hand?</td>
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<tr>
<td>11. Do I speak respectfully about the lawyers when they are not present?</td>
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<tr>
<td>12. Do I work at a pace that ensures a quality work product?</td>
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<tr>
<td>13. Do I talk about other staff members behind their backs?</td>
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<tr>
<td>14. Even if I don't personally talk about others, do I willingly listen to others' gossip or do I discourage others from doing so?</td>
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<tr>
<td>15. Do I accent the positives of my job or do I seem to focus primarily on the negatives?</td>
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<tr>
<td>16. Do I remind myself often that it's the clients who pay our salaries?</td>
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<tr>
<td>17. Do I take the necessary time to organize myself and my work so that each day's top priorities are indeed accomplished?</td>
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<tr>
<td>18. Besides satisfactorily meeting the requirements of my job description, can I name at least three additional contributions I have made to the firm over the past few months (e.g., had a positive attitude, suggested a systems improvement, calmed a disgruntled or nervous client)?</td>
<td></td>
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<tr>
<td>19. Am I respectful of other employees' firm responsibilities, their work areas and their diversity of personalities?</td>
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<tr>
<td>20. If I were the client, would I be satisfied having me as the staff person assigned to the case in light of the caliber of my job performance, my professionalism and my attitude?</td>
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## CALENDARING AND DOCKETING SELF-AUDIT

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<tbody>
<tr>
<td>1. Do you ever lose sleep worrying about missed deadlines?</td>
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<tr>
<td>2. Do you feel that your present docket/work control system is efficient, thorough and reliable?</td>
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<tr>
<td>3. Does your docket/work control system include the following:</td>
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<tr>
<td>(a) Statutes of limitation?</td>
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<tr>
<td>(b) All court appearances?</td>
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<td>(c) Client and other appointments?</td>
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<tr>
<td>(d) All administrative hearings and deadlines?</td>
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<td>(e) All real-estate closing deadlines?</td>
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<td>(f) All litigation deadlines?</td>
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<tr>
<td>(g) All self-imposed, discretionary deadlines (i.e., promises made to others, promises made to you and work deadlines you have set for yourself)?</td>
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## Audit Inquiry

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<tr>
<td>(h) At least one docket date for every open file (i.e., if a file is temporarily inactive, do you enter a date at least every six to eight weeks to remind you to touch base with the client as well as a date on which the file is to be reviewed to ensure all necessary filings, etc., have been done)?</td>
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<tr>
<td>4. Does your system have at least one identical backup?</td>
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<tr>
<td>5. Is your backup docket and calendar system kept outside of the office to avoid its loss in a fire, theft or other disaster situation?</td>
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<td>6. Do you calendar a sufficient number of reminders before final deadlines?</td>
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<tr>
<td>7. Do you have a reliable follow-up system in place to confirm the actual completion (or redocketing, if possible and necessary) of all docketed deadlines?</td>
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<tr>
<td>8. Have you appointed an employee to oversee, supervise and ensure the use of your docket/work control system?</td>
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<tr>
<td>9. Is there a system in place for screening incoming mail, faxes, e-mail and interoffice mail for new deadlines before the distribution of the mail?</td>
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<tr>
<td>10. Does your client intake or new matter form include a section for entering deadline dates, both statutory and self-imposed, discretionary ones?</td>
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<tr>
<td>11. When you are out of the office and you make an appointment or other calendar change, do you have a reliable procedure in place to ensure the new information gets entered into your master calendar system?</td>
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<tr>
<td>12. Are employees regularly reminded of the importance of giving conscientious, detailed attention to the proper calendaring and monitoring of all deadlines?</td>
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<tr>
<td>13. Are all employees aware of the firm’s policies, procedures, and materials about docket/work control?</td>
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<tr>
<td>14. Is this topic covered in your firm’s policy and procedures manual?</td>
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<tr>
<td>15. Are employees held appropriately accountable when they fail or refuse to use the calendaring system?</td>
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# CONFIDENTIALITY SELF-AUDIT

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<tbody>
<tr>
<td>1. Do you have all new employees sign a confidentiality form acknowledging that they have discussed confidentiality with you, have read the relevant rules, and will not breach the confidentiality of any client during and after their association with the firm?</td>
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<tr>
<td>2. Do you require all employees to review your jurisdiction’s confidentiality rules and guidelines at least annually, giving each of them an opportunity to ask any questions they may have?</td>
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<tr>
<td>3. Do you remind all departing employees during their exit interviews that they remain bound to hold all client information confidential regardless of their disassociation with the firm?</td>
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<tr>
<td>4. Do you make sure that no client files or other confidential materials are ever left in the reception area?</td>
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<tr>
<td>5. Is your reception area arranged so that visitors cannot overhear confidential conversations that may occur in a nearby conference room, office or break room area?</td>
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### Audit Inquiry

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<tr>
<td>6.</td>
<td>When nonfirm persons are in the reception area, does your receptionist protect the confidentiality of client names and matters and other client information when talking with others in person or on the telephone?</td>
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<tr>
<td>7.</td>
<td>In areas that are entered by nonfirm persons (clients, vendors, cleaning crews, etc.), are precautions taken to guard client confidentialities (e.g., putting away or covering up client files and documents left unattended on desks and locking file cabinets located in common areas of office-sharing situations)?</td>
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<td>8.</td>
<td>When meeting with clients, do you hold meetings in a conference room, office or other area where client files and materials are visible?</td>
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<tr>
<td>9.</td>
<td>Do you or any firm member ever leave clients or other nonfirm persons unattended in an area where confidential files and information may be visible?</td>
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<tr>
<td>10.</td>
<td>When conferring with clients in person, do you avoid taking calls or otherwise talking with other clients to protect client identities and confidentialities?</td>
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<tr>
<td>11. Are your facsimile machines and copiers located away from areas where nonfirm persons may be able to see confidential materials?</td>
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<tr>
<td>12. If you are in an office-sharing arrangement, have you discussed confidentiality with the landlord, other tenants and any employees who may be privy to confidential information (e.g., the receptionist, a word processor)?</td>
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<tr>
<td>13. If you are in an office-sharing arrangement, have you made arrangements to ensure that faxes received are not read by anyone other than you or one of your employees?</td>
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<td>14. If you have a computer maintenance contract, have you made reasonable efforts to ensure that all third parties with access to your computer will protect the confidentiality of any and all client information?</td>
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<td>15. When talking on your car or cordless phone, are you careful not to mention clients' full names or any other confidential information, and do you remind persons on the other end to do the same?</td>
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<tr>
<td>16. Do you use encryption software when sending confidential information via e-mail?</td>
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<tr>
<td>17. Are all firm employees aware of the firm’s policies, procedures and materials about confidentiality?</td>
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<tr>
<td>18. Is this topic covered in your firm’s policy and procedures manual?</td>
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<td>19. Are all employees made aware that any breach of confidential information will be cause for immediate disciplinary action (including possible termination)?</td>
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<tr>
<td>20. Have you reminded employees that they should guard all client confidences as if they were their own?</td>
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<tr>
<td>21. Do you set a good example for others in your office by the way you handle confidential client information?</td>
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</table>
### CONFLICTS OF INTEREST SELF-AUDIT

<table>
<thead>
<tr>
<th>Audit Inquiry</th>
<th>Response and Explanatory Remarks</th>
<th>Improvement Strategy</th>
<th>Targeted Completion Date</th>
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</thead>
<tbody>
<tr>
<td>1. Did you know that conflicts-based malpractice claims and ethics grievances are among the most rapidly increasing problem areas for lawyers and their clients?</td>
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<tr>
<td>2. Do you have a comprehensive conflict-of-interest system for discovering potential conflicts?</td>
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<tr>
<td>3. Do you check for any potential conflicts before receiving confidential disclosures from new clients?</td>
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<tr>
<td>4. Have you offered training sessions and materials to your staff to assist them in understanding, spotting and helping the firm avoid conflict-of-interest situations?</td>
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<tr>
<td>5. Do you request information regarding other names (i.e., maiden, marital, etc.) that potential clients and adverse parties may have used in the past?</td>
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<tr>
<td>6. Do you share new client information with other firm lawyers on at least a weekly basis?</td>
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<tr>
<td>7. Do you share new client information with all staff members on at least a weekly basis?</td>
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<tr>
<td>8. Do you maintain databases or master file indexes of current and former clients?</td>
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<tr>
<td>9. Do you maintain databases or master file indexes of the different matters of law handled by your firm, with cross-references to the involved clients’ names?</td>
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<tr>
<td>10. Do you maintain master file indexes of nonparty but associated and related persons and entities?</td>
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<tr>
<td>11. Do you engage in any of the following practices, all of which are potential conflicts traps: (a) Acting as both legal counsel and an officer or director for the same corporation?</td>
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<tr>
<td>(b) Having a financial interest in a client matter?</td>
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<tr>
<td>(c) Representing adverse parties?</td>
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<tr>
<td>(d) Representing parties attempting to receive monies from one collective financial source?</td>
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<tr>
<td>(e) Engaging in business with a client?</td>
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<td>(f) Accepting stock in lieu of fees?</td>
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<tr>
<td>12. Do you check for any potential conflicts that your legal assistants</td>
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<tr>
<td>(permanent and temporary employees) may have because of their prior work</td>
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<tr>
<td>at other firms or because of their personal or business interests?</td>
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<tr>
<td>13. Are all firm employees aware of the firm’s policies, procedures and</td>
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<tr>
<td>materials about conflicts of interest?</td>
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<tr>
<td>14. Is this topic covered in your firm’s policy and procedures manual?</td>
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</table>
## DOCUMENTATION SELF-AUDIT

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</thead>
<tbody>
<tr>
<td>1. Do all of your client files include copies of engagement letters or employment agreements signed by clients?</td>
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<tr>
<td>2. Do your engagement letters state that if you do not receive the requested signed response from the recipient within 30 days, you will interpret this as the recipient’s agreement and acceptance of the engagement letter?</td>
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<tr>
<td>3. Do you advise clients of when you anticipate destroying their file after the case ends and do you get their signed agreement or disagreement regarding the proposed deadlines for disposal of their file?</td>
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<tr>
<td>4. Do you send nonengagement letters to all persons with whom you have met or consulted but have formed no lawyer-client relationship?</td>
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<tr>
<td>5. Do your nonengagement letters do the following:</td>
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<tr>
<td>(a) Clearly state that no lawyer-client relationship exists?</td>
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<tr>
<td>(b) Warn the recipients to be aware of statutes of limitation?</td>
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<tr>
<td>(c) Recommend that a legal opinion from other counsel should be obtained?</td>
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<tr>
<td>6. Do you send disengagement letters to clients from whose cases you are withdrawing?</td>
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<tr>
<td>7. Do you send file-closing letters to all clients at the termination of their matter?</td>
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<tr>
<td>8. Do your file-closing letters include a clear statement, if applicable, that you are not representing the client in any other matter?</td>
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<tr>
<td>9. Do you confirm in writing a client’s decision to disregard your legal advice?</td>
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<tr>
<td>10. Do you document telephone, office and other conferences with clients, third parties and others?</td>
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<tr>
<td>11. Do you have a peer review or other system in place for checking the substantive accuracy of all outgoing documents (i.e., contracts, motions, opinion letters, briefs, etc.)?</td>
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<tr>
<td>12. Are your paper trails sufficient for review if a dispute later arises regarding who did or did not do what and when?</td>
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<tr>
<td>13. Are all firm employees aware of the firm’s policies, procedures and materials about documentation?</td>
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<tr>
<td>14. Is this topic covered in your firm’s policy and procedures manual?</td>
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<tr>
<td>15. Are employees held accountable for failing to document files properly (e.g., no engagement letter in the file)?</td>
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</table>
### TELEPHONE PROCEDURES SELF-AUDIT

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<tr>
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<tbody>
<tr>
<td>1. Have you thought about the type of impression that callers get when they call your office?</td>
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<tr>
<td>2. Do people calling your office get the impression that their call is unwelcome and interruptive to the person answering the phone?</td>
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<tr>
<td>3. Are people calling your office made to feel that their call is important and welcomed?</td>
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<tr>
<td>4. If the firm is using voice mail, do callers first talk with a receptionist and then have the option of going into voice mail?</td>
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<tr>
<td>5. If the firm is using voice mail, do callers also have the option of connecting directly with a staff member if they so desire?</td>
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<tr>
<td>6. Do you explain to your clients at the onset of your lawyer-client relationship that, because of the busy nature of your practice, you cannot always return calls on the same day they are received?</td>
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<tr>
<td>7. Have you considered asking clients to call during specified hours except in emergency situations?</td>
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<tr>
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<tr>
<td>8. Do you try to return calls within 24 hours or have your assistant return calls to explain when you will be able to talk with the client?</td>
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<tr>
<td>9. Have you asked your clients to include in their messages what the purpose of their call is and to prepare a list of what other matters they need to discuss with you?</td>
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<tr>
<td>10. Do you explain to clients, when applicable, that they will be billed for all telephone conferences with you?</td>
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<tr>
<td>11. Have you defined to your clients what you mean by “emergency types” of situations?</td>
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<tr>
<td>12. Have you taught your assistants the essentials of professional and courteous telephone manners and procedures?</td>
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<tr>
<td>13. Have you prepared and given clients a copy of your telephone policy and thanked them for adhering to it whenever possible?</td>
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<tr>
<td>14. Do you telephone your clients from time to time (at no charge), especially when their cases are in an inactive stage, to touch base with them and to ask if there is anything else you can be doing for them?</td>
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<tr>
<td>15. Have you instructed your assistants never to give out your or any other firm employee’s home phone numbers or addresses without the individual’s prior permission?</td>
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<tr>
<td>16. Do you schedule your day so that a specific period of time is set aside for taking and returning calls?</td>
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<tr>
<td>17. Do you ask your clients periodically if their communications with your firm via the telephone are satisfactory?</td>
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<tr>
<td>18. When you play telephone tag with a client or other person, do you document in the file the dates and times that you attempted to return the call?</td>
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<tr>
<td>19. After several rounds of unsuccessfully trying to return someone’s call to you, do you send them a letter explaining you’ve had no luck in reaching them and asking them to please call your office to schedule an appointment or telephone conference call?</td>
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<tr>
<td>20. Would you like your telephone to self-destruct sometimes?</td>
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<tr>
<td>21. Are all firm employees aware of the firm’s policies, procedures and materials about telephones?</td>
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<tr>
<td>22. Is this topic covered in your firm’s policy and procedures manual?</td>
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SECTION A8.1

Massachusetts IOLTA Guidelines (July 1, 2009)*

Massachusetts IOLTA Committee

The IOLTA Committee (“Committee”) provided for by Mass. R. Prof. C., 1.15(g)(4)(v) (Rule 3:07), adopts the following Guidelines, subject to the approval of the Court, to provide for the operation of the comprehensive IOLTA program set forth in amendments to SJC Rule 3:07 and 4:02 adopted by Orders of the Court dated September 26, 1989, October 1, 1992, April 6, 1993, July 26, 2006 and July 1, 2009.

A. Establishment and Maintenance of IOLTA Accounts

1. Method of establishing IOLTA accounts: A lawyer or law firm shall establish an IOLTA account by completing an Attorney’s Notice of Enrollment, and mailing or delivering the original Notice to the financial institution where the account will be maintained and one copy of the Notice to the IOLTA Committee.

2. Considerations affecting deposit in IOLTA accounts:

   (a) All client funds shall be deposited promptly in an IOLTA account unless they are deposited (1) in an interest bearing account for the benefit of the client; (2) in a conveyancing account as defined in paragraph A(3); or (3) as otherwise required by law.

   (b) All client funds which in the judgment of the lawyer are nominal in amount, or are to be held for a short period of time, shall be deposited in an IOLTA account. In determining whether to deposit funds into an IOLTA account or into an individual client account, a lawyer shall consider the amount of interest likely to be earned during the period the funds are expected to be deposited, as well as the estimated cost of es-

* Source: Massachusetts IOLTA Committee (http://www.maiolta.org/attorneys/index_21_3762736560.pdf). Reprinted with permission. Note that subsequent to the preparation of this material the Supreme Judicial Court published a number of amendments to the Massachusetts Rules of Professional Conduct. The amendments are effective July 1, 2015.
section a8.1  professionalism supp. materials

establishing and administering a separate client fund account, including reasonable imputed overhead costs, and the estimated cost of preparing any tax or other reports required for interest accruing to a client's benefit.

3. conveyancing accounts: A conveyancing account is an account in the name of a lawyer in a lending bank used exclusively for depositing and disbursing funds in connection with that bank's loan transactions. A conveyancing account:

(a) consists solely of funds which will be used in connection with transactions which the institution is financing; and

(b) is used by the lawyer to disburse funds in connection with the institution's loan transactions; and

(c) is used exclusively for the deposit and withdrawal of money related to the institution's loan transactions.

b. characteristics of accounts

lawyers shall establish and maintain IOLTA accounts in eligible financial institutions which have the following characteristics:

1. interest rates: The financial institution pays interest comparable to the highest yield the financial institution offers to its non-IOLTA customers when the IOLTA account meets or exceeds the same minimum balance and other eligibility requirements.

(a) comparability options

a financial institution shall pay on IOLTA accounts the highest yield available among the following product option types (if the product option is available from the financial institution to other non-IOLTA customers) by either using the identified account option as an IOLTA account or paying the equivalent yield on the existing IOLTA account in lieu of actually using the highest yield bank product:

1. a business checking account with an automated investment feature, such as an overnight sweep and investment in repurchase agreements fully collateralized by U.S. government securities as described in Mass. R. Prof. C. 1.15(g)(1).

2. a government (such as for municipal deposits) interest bearing checking account.
3. A checking account paying preferred interest rates, such as money market or indexed rates.

4. An interest bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest.

5. Any other suitable interest bearing deposit account offered by the institution to its non-IOLTA customers.

As an alternative, the financial institution may pay:

6. A "safe harbor" rate equal to 55% net yield of the Federal Funds Target Rate.

* The IOLTA Committee will review and may revise the safe harbor rate from time to time based on changing market conditions.¹

7. A yield specified by the IOLTA Committee, if the Committee so chooses, which is agreed to by the financial institution. Such yield would be in effect for and remain unchanged during a period of no more than twelve months from the inception of the agreement between the financial institution and IOLTA.

(b) Implementation of Comparability

The following considerations will apply to determinations of comparability: Accounts which have limited check writing capability required by law or government regulation may not be considered as comparable to IOLTA in Massachusetts. This, however, is distinguished from checking accounts which pay money market interest rates on account balances without the check writing limitations. Such accounts are included in the Option 3 class identified above. Additionally, rates that are not generally available to other account holders, such as special promotional rates used to attract new customers, are not considered for comparability in Massachusetts.

For the purpose of determining compliance with the above provisions, all participating financial institutions shall report in a form and manner prescribed by the IOLTA Committee the highest yield for each of the accounts they offer within the above listed account types. The IOLTA

¹ Comment: Effective February 1, 2009, the Safe Harbor rate was revised to equal the higher of 55% of the Federal Funds target rate, or 1.00%.
Committee will certify participating financial institutions compliance with these Guidelines on an annual basis.

(c) Definitions

An “eligible financial institution” for IOLTA accounts is a financial institution that meets the requirements of Mass. R. Prof. C. 1.15 (g) (1), and has been certified by the Committee to be in compliance with these guidelines.

A “safe harbor” rate, as identified by the IOLTA Committee, is a rate which if paid by the financial institution on IOLTA accounts shall be deemed as a comparable return, regardless of the highest yield available at the financial institution. Such yield shall be calculated based on 55% net yield of the Federal Funds Target Rate as reported in the Wall Street Journal on the first business day of the calendar month.

“Net yield” is defined as the effective interest rate earned on the IOLTA account after considering any fees assessed by the financial institution against the interest earned. Allowable fees are defined at IOLTA Guidelines, B (3) (a) and (b).

2. Minimum Balance: The financial institution pays interest on all funds in the account. If a lawyer chooses to use for IOLTA purposes an account which requires a minimum balance to pay interest, the lawyer must maintain at least the minimum balance in the account at all times, even if to do so requires the deposit of the lawyer’s own funds.

3. Bank Charges: The financial institution either waives all administrative and service charges on IOLTA accounts, or imposes reasonable fees and charges as follows:

(a) IOLTA Fees: The only fees deducted from IOLTA interest are the reasonable costs of complying with the reporting requirements of the Guidelines.

(b) Normal Service Charges: The financial institution does not assess against the interest earned on an IOLTA account, fees and expenses which are normally imposed on business accounts. Such fees and expenses include but are not limited to check withdrawal and deposit fees, fees for wiring funds, costs of printing checks, charges for insufficient funds or check returns and a monthly service charge. Such fees and expenses are the responsibility of the lawyer or firm maintaining the account.
4. **Interest Remittance**: The financial institution complies with the following interest transmittal and reporting provisions:

(a) The financial institution remits all net interest monthly or quarterly to the IOLTA Committee. The financial institution deducts IOLTA fees from the interest earned on individual IOLTA accounts or aggregates all interest paid and deducts from the total interest earned for each interest remittance period the IOLTA fees imposed on all accounts. IOLTA fees which exceed the interest earned in one remittance period may be carried forward to succeeding remittance periods but may not be billed directly to the Committee, the lawyer or the firm maintaining the account or deducted from the principal in the account.

(b) Each remittance is accompanied by the information required by the Interest Remittance Report for each IOLTA account maintained in the financial institution whether or not any interest was earned on the account. The financial institution reports interest remittance information in any format it chooses so long as the information required is conveyed in a reasonable manner.

(c) Remittances for multiple accounts are submitted through a single check or other payment and are accompanied by a single report containing the required information for each IOLTA account included in the report. The financial institution makes payments of interest (by check or otherwise) in the manner and to the address specified by the Committee.

(d) The financial institution mails or delivers interest remittance reports to the Massachusetts IOLTA Committee, 7 Winthrop Square, 3rd Floor, Boston, MA 02110-1245.

(e) In addition, the financial institution submits a copy of each interest remittance report at the time of remittance to the depositor.

(f) The financial institution either does not prepare W-9 forms and reports of income and IRS Forms 1099, or if the forms are prepared they reflect the Committee, not the lawyer or client, as the recipient and are forwarded to the Committee.

C. **The Committee**

1. **Budgets**: Annually or more often, the Committee shall, in consultation with the charities, adopt a budget for the operation of the Committee which shall be funded by deducting from the amount received by the Committee on behalf of each charity that charity’s proportionate share of the budget.
2. **Staff:** Staffing and general operational support for the Committee shall be provided by staff hired by the Committee for that purpose or by contract with one or more of the charities.

### D. The Charities

1. **Definition:** The charities shall be those organizations which are named by the Court as designated charitable entities from time to time to receive and disburse funds earned on IOLTA accounts.

2. **Additional Charities:** [At the direction of the Court, the Committee recommends the following criteria to the Court for use when considering the application of an organization for designation as a charity.] An organization applying to the Court for designation as a charity (“applicant”), shall demonstrate that it has satisfied the following criteria. An applicant must:

   (a) be organized in Massachusetts as a non-profit corporation or trust, have §501(c)(3) status under the Internal Revenue Code, and include among its purposes providing funds for delivering civil legal services to those who cannot afford them and/or for improving the administration of justice;

   (b) have adopted and demonstrated its ability to administer competently a grants program including grant-making guidelines, proposal criteria, an appropriate grant selection process and the capacity to monitor the quality of the services delivered and the financial systems used by recipients; and,

   (c) agree to adhere to these Guidelines and to cooperate with the Committee and the charities to ensure the smooth operation of the program.

3. **Expenses of Charities:** There shall be two permissible categories of IOLTA-related expenses which a charity may pay with or from IOLTA funds; (a) Committee expenses and (b) compliance and operating expenses.

   (a) Committee expenses shall mean and include only the recipient’s share of the Committee’s expenses, as determined by the Committee from time to time. The Committee’s expenses shall be shared according to the proportion of net IOLTA income received by the Committee on behalf of each charity.

   (b) Compliance and operating expenses shall mean and include only the costs, including overhead, reasonably attributable to accounting for IOLTA funds, processing and evaluating grant requests, monitoring the quality of the services delivered and the financial systems used by
recipients, preparing the reports required by Mass. R. Prof. C. 1.15(g)(6) or by the Committee, and handling and expending IOLTA funds for the charitable purposes of the IOLTA program.

(c) The maximum amount of compliance and operating expenses for which IOLTA funds may be used by any charity during or with respect to any calendar year shall be 5% of the IOLTA funds received by that recipient during that year; provided that, expenses in excess of such 5% limit may be authorized by the Committee with respect to any calendar year upon application and good cause shown by a charity.

4. Record Keeping: Each charity directly or by contract with another entity shall:

(a) Have its records of IOLTA receipts and disbursements audited annually by a Certified Public Accountant and file a copy of the audit report and the charity’s last annual report with the annual report required by Mass R. Prof. C. 1.15(g); and,

(b) Prepare its IOLTA reports based on the charity’s fiscal year; and

(c) Prepare annual financial statements in which all IOLTA funds (including interest, returns and prior year IOLTA receipts) are accounted for separately. This accounting shall report the entity’s IOLTA fund balance at the end of its fiscal year as its “reserve” for that fiscal year.

5. Stabilization Funds: A charity may, in its discretion, reserve IOLTA funds from current distribution to stabilize the amounts available for distribution in future years.

(a) All reserved funds must be invested in, or fully collateralized by, United States Government securities including United States treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof, or, deposited in fully insured bank accounts.

(b) Consistent with the preceding paragraph, reserved funds must be invested at competitive rates providing reasonable investment yield.

(c) Income from investment of reserved funds may be used only for the purposes approved by the Court for IOLTA funds.

(d) No more than 25% of the IOLTA income received by a charity during that charity’s fiscal year may be added to that charity’s reserve, provided however that in no event may the total reserve maintained by the
charity exceed 50% of the average of the current fiscal year’s IOLTA revenue to the entity (including interest) and the prior fiscal year’s IOLTA revenue to the entity (including interest). Each charity has two years to comply with fluctuations that may occur as the average figure changes.

(e) If an entity’s IOLTA reserve exceeds the amount allowed by these guidelines, the IOLTA Committee may withhold the distribution of further IOLTA revenue to the entity by the amount of the excess fund balance;

(f) The IOLTA Committee, in its sole discretion, may waive the provisions of sections (d) or (e) above if it determines that special circumstances warrant a waiver; and

(g) A charity establishing a stabilization fund shall adopt criteria regarding the amounts to be reserved and the uses of the reserve funds including the circumstances under which the reserve may be expended.

E. Disclosure of Confidential Information Prohibited

The IOLTA Committee, the Board of Bar Overseers and the charities collect and retain confidential information on lawyers who have established IOLTA accounts. This information includes the name of the lawyer, the name of the client fund account established by or on behalf of the lawyer, the account number, the name of the bank in which the account is located and the amount of interest earned on each such account. Such confidential information, except as required by law or order of a court of competent jurisdiction, shall not be disclosed by any person who serves on or is employed by the IOLTA Committee, the charities and their governing boards. The governing bodies of the three charities shall adopt personnel policies and other policies and procedures which will effectuate this non-disclosure policy. The Board of Bar Overseers is requested to take such steps as it deems necessary and appropriate to insure the confidentiality of information received under the IOLTA program.

F. Annual Reports

The Committee shall annually, within 90 days following the end of each calendar year, submit to the Court a report containing the information required of the charities by Mass. R. Prof. C. 1.15(g)(6) and based on the information supplied to the Committee by the charities.
G. Interpretive Rulings

The Committee may from time to time issue rulings interpreting and explaining Court Rules Mass. R. Prof. C. 1.15 (3:07) and 4:02 and these Guidelines.

H. Recommendations to the Board of Bar Overseers

Upon the request of a lawyer or the Board of Bar Overseers (Board), the Committee may make such recommendations to the Board as the Committee deems appropriate upon the facts presented including a recommendation that the Board take no action. Recommendations may be requested on any issue concerning the establishment or maintenance of an IOLTA account.
Kicking the Worry Habit*

Will any amount of worrying change the future? Will worrying pay your bills, prevent an accident, make your job more secure, or improve your health?

The truth is, you can spend the rest of your life worrying and you will not have changed a thing. By occupying your thought worrying about the future, you actually immobilize yourself in the present.

Worry means spending a lot of time thinking about negative possibilities. How much time do you spend each day engaged in worrying?

Worry is a problem if:

- Your thinking is causing intense emotional distress and has been interfering with your daily functioning for some time
- In general, it is not quickly or clearly providing solutions.

Worry becomes a problem when persistent worrying takes over your thoughts and emotions. Some stress experts warn that chronic worrying may be the number-one killer in this country. Every time we allow ourselves to experience anxiety (the clinical term for worry), we change our physiology (changes in blood chemistry, blood sugar level, blood pressure, muscle tension). If persistent worrying or anxiety is a part of your lifestyle, these physiological changes are prolonged and undermine your health. Chronic worrying can affect the whole body. The short-term effects of chronic worrying include depression, mental and physical exhaustion, chronic fatigue, insomnia and general achiness. In the long term, the person whose lifestyle includes worrying predisposes him/herself to diseases such as heart disease, diabetes, and certain types of cancer.

The Real Reasons Behind Worry And Anxiety. Worrying is a habit. Habits are developed because you have practiced doing them so often that you start doing

them without being aware of it. Worrying can become a mental habit. How do people get hooked on such a non-productive and self-destructive way of thinking? What are the psychological payoffs?

- By using the “present” to worry, you escape getting involved with whatever it is that is threatening you.

- Worry allows you to escape the creative use of your time. It’s an easy solution for what to do with your time.

- You don’t have to risk failure, rejection or loss. You can use your anxiety as an excuse for your immobility and misery. How could you possibly do anything fun or exciting with all the worrying you have to do?

- Worry is a way to prove how much you care for another person. For example, you can tell yourself what a good parent you are because you worry about your children.

Strategies For Eliminating Worry. Worry is something that we can change if we see it as a bad habit. It’s nothing more than our own thought process. You can train yourself to become a non-worrier, just as you trained yourself to fret.

Below are some strategies for eliminating worry:

1. Take responsibility for making your “present” life work for you. All you really have is your immediate experience. Take the challenge of appreciating and enjoying your life.

2. Have the courage to face whatever you are running away from. Take action here and now.

3. Ask yourself about your obsession to worry... “What's the worst thing that could happen?” Then come to terms with it and get on with your life.

4. Recognize the futility of worrying. People sometimes believe, “If I only worry enough then...” Is there really anything you can change by this investment of your time and energy?

5. Practice “non-worry behavior.” Each time you’re inclined to worry, remind yourself, “No amount of worry will change this situation, so I’m not going to worry at this moment.” Give yourself shorter and shorter periods of time to worry. If you were really conscious of how much time you invested in worrying you would see that you were putting hours into it. And generally, it’s the same tapes swirling around in your head again and again.
The Scarcity of Time: How Much Time Is Enough?*

Frank Sanitate
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I often ask people, “How many more hours a day would do it for you?” I get a variety of answers ranging from one or two hours, to ten to twelve, to, “I need a clone.”

The reality is that we all have exactly the right amount of time right now. Twenty-four hours in a day is perfect! God spent a lot of time working out the details on this. The amount of hours we have in a day is perfect because we are the ones who choose what to do with that time. So what do we do? We over-book ourselves. What would happen if we had a twenty-eight hour day? We would then need thirty-two hours. If we had a thirty-two hour day, we’d need thirty-eight hours. We could just as easily look at it the other way. Let’s pretend there were only supposed to be twenty hours in a day, and God decided to give us a bonus of four extra hours. Look how we’re handling that. We’ve used up that bonus and are clamoring for more. And we’d continue to clamor for more with each bonus we received.

Not having enough time is just like gambling in Las Vegas. You get a thrill out of making dollar bets. But pretty soon it’s not enough, so you up the stakes to two dollars. And soon that’s not enough, so you up the stakes to five dollars, and to ten dollars and so on. People are always amazed at gamblers making bets worth thousands of dollars, and yet it’s no different from a beginner putting a nickel in a slot machine. The high rollers simply up the stakes to the point where they get a thrill out of gambling. We do the same with time. If we gain more time, we simply up the stakes of what we want to accomplish, so that the time again becomes inadequate.

The fact about time is unchangeable: There are 24 hours in a day. However, we can interpret that fact either negatively or positively. “Not having enough time”

is a negative way of interpreting it. Not having enough time really means we want to do more things than we have time to achieve. How might we reinterpret that positively? We can say: “I have more things that I want to do than I have time for. I have a multiplicity, an abundance of desires. I want the fullness of life. Life is staggeringly abundant, and I want it all! I am not narrow in my thinking and desires. My desires far outstrip the time available to achieve them. Mine is a life of abundance.” We need to celebrate the fact that we want to do more than we clearly can achieve. We need to congratulate ourselves and to celebrate how big a game we’re playing!

So the fact that we can’t have everything we want is really good news. It means we’re “big wanters.” But how are we to create satisfaction in our lives when we want more than we can achieve? The answer is: to prioritize, to focus. What that means is, even though we can’t have everything we want, we can have anything we want. For instance, you could become a millionaire if you wanted to. There is no question that this is possible. However, most people who say that they want to become millionaires never achieve that goal. Why? Because they are not single-minded in their purpose. They also want other things besides being a millionaire that may prevent them from becoming a millionaire. For example, to become one you might have to go back to school. You might have to go into a new career, take a second job, give up your family, give up your social life. Any of those may be required to become a millionaire. However, you say, “I want to be a millionaire, and I want to keep my family life, and I want to have leisure time, and I don’t want to move from my current job or current career, etc.” Too bad! There are trade-offs we must make. You can have anything you want, but you can’t have everything you want. Of course, you could buy a lottery ticket. But then that takes you out of the realm of controlling your life and into the realm of hope. Some people live in the realm of hope and don’t even buy the lottery ticket! But if we live in the realm of controlling our life, we come down to trade-offs. We must make choices. So too with time. We have a multiplicity of desires, and we must choose among them. So now we begin to move toward the heart of satisfaction: choice.

In creating satisfaction for ourselves in the use of our time we must realize and acknowledge that we are making choices and that these choices eliminate other options. Every time we say yes to one thing we say no to everything else. We have exactly the right amount of time for the choices we are making now. We’re giving up spending time on other things because of what we’re choosing to spend time on now.

So there is not a scarcity of time. There’s simply the reality that most of us would like to accomplish more in a given day or week or month or year or life than we have time for. Satisfaction comes from the attitude: “I have exactly the right amount of time right now. I choose to do things that are important to me.”
Things of lesser importance may not get done, but the important ones will. I refuse to create life-and-death situations out of those things that don’t get done. In fact, I am proud that there are things that don’t get done because it means that I have a fertile mind and imagination. I am always creating many new possibilities for myself. I clearly know I can’t achieve all of them but I am pleased to have such a large menu to choose from.” In short, there is not a scarcity of time; there is simply an abundance of desires on my part.
In the beginning, there were no lawyers in Colonial Massachusetts. Actually, there were lawyers, but they weren’t permitted to practice law for a fee. In 1641, Nathaniel Ward of Ipswich, a barrister trained at Lincoln’s Inn (London), drafted the “Body of Liberties,” which provided in clause 26:

Every man that findeth himself unfit to plead his owne cause in any Court shall have libertie to imploy any man whom the Court doth not except, to helpe him, Provided he give him noe fee or reward for his paines.

* Source: Legal Chowder: Judging and Lawyering in Massachusetts (MCLE, Inc. 2002).
Colonial Laws of Massachusetts

Ward’s “Body of Liberties” was subsequently adopted by the General Court in Massachusetts. Not content with merely prohibiting the practice of law for a fee, the General Court, again in 1641, under the heading of “Barratrie” made it a crime to do so.

It is ordered, decreed, and by this Court declared, that if any man be proved and judged a common barrater, vexing others unjust, frequent, and endless suites: it shall be in the power of Courts both to reject his cause and to punish him for his Barratrie.


That obstacle, however, was short-lived. In 1648, the General Court removed clause 26 from the Colony’s books, and although the punishment for “Barratrie” remained,1 practicing law in Massachusetts was permitted in spite of the admonition of Mr. Ward and others of similar mind. Once the prohibition against charging fees was removed, the legal profession in Massachusetts began to thrive—gradually at first, with only 1,984 lawyers by 1880, 5,000 by 1920, 14,000 by 1974, 25,000 by 1986 to a high water mark of 41,724 lawyers actively practicing in Massachusetts by the end of the twentieth century.

As the number of Massachusetts lawyers increased, so did their desire and need to associate. Early bar organizations were formed mostly at the local level. First among them was the Suffolk County Bar Association, forerunner of the Boston Bar Association and, according to local lore, the oldest formal bar organization in the country. It was founded in 1770 by twelve prominent Boston lawyers, including John Adams, who served as its first secretary. The Suffolk bar was soon followed by county bar organizations in Essex (1806), Norfolk (1797), Plymouth (1867), Franklin (1812), Worcester (1787), and local groups, for example, Peabody (1824). Concerned with keeping “pettifoggers” or “irregular practitioners” of questionable training and character out of the profession, early organizations quickly asserted control over educational requirements and standards for admission to practice law. There were social purposes, such as dinners and memorial services for deceased members, and periodic efforts to improve the quality and procedures of the courts, but the first 100 years of the organized

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1 Champerty was eliminated as an offense 350 years later in Saladini v. Righellie, 426 Mass. 231, 235 (1997), and barratry and maintenance probably with it.
bar’s existence is perhaps more distinguished by those who served as its leaders than by what bar associations actually accomplished. Names such as Jeremiah Gridley, Lemuel Shaw, Rufus Choate, Benjamin Curtis, and Sidney Bartlett appear prominently in the history of the organized bar.

None of the early associations, in fact, remained in continuous operation. Both the American Revolution and, later, the Civil War, had disruptive effects. Bar organizations also lost much of their influence when the General Court in 1836 assumed control over admission to the profession. Many associations actually dissolved (Franklin in 1835, Suffolk in 1836, and Essex in 1856). By the 1870s, the profession was at one of its periodic low ebbs. It lacked any semblance of standards and was in organizational disarray across the country. Following the example of the Bar Association of the City of New York, organized in 1870 to combat outright corruption in the profession, 100 lawyers from twenty-one states founded the American Bar Association in 1878 in Saratoga Springs, New York. Just two years earlier, the Suffolk bar had reconstituted itself as the Bar Association of the City of Boston (BBA), and by 1878, there were sixteen city and statewide bar associations across the country. With the formation of the Massachusetts Association of Women Lawyers in 1905 (the oldest women’s bar association in the country) and the statewide Massachusetts Bar Association (MBA) in 1909, a new era dawned for the organized bar that was to be of significant and enduring impact.

When the MBA was formed in 1909, it had among its members an African American, and by 1913, a woman. Within several years, the BBA had admitted both an African American and a woman to membership. These steps were among the first toward an open and inclusive bar, in sharp contrast to the nineteenth century when bar association membership was generally by invitation and lawyers were excluded on the basis of class, gender, race, religion, and ethnic background. This practice was in keeping with the prevailing belief that only the “finest” lawyers could represent the interests of the profession. Both the BBA and the MBA had Irish and Jewish presidents by the end of World War II, but it took until the 1980s for both organizations to elect an African American and a woman as president. In the counties, this leap toward equality took even longer. One Massachusetts county bar association had no problem in electing as president three generations of male members from the same family, but its first woman president did not take office until October 2000. From the vantage point of the year 2000, when women constitute approximately 50 percent of those entering the profession, the delay in electing a woman to leadership positions in bar associations may seem chauvinistic. However, viewed historically, women comprised 1 percent of the bar in 1910 and only 3 percent as late as 1960.

During the early twentieth century, local bar associations became strong advocates for the profession in their geographic areas, and in many instances resisted
attempts by the MBA to speak for them on matters such as discipline of local lawyers and appointment of local judges. This resistance diminished somewhat in 1932 when representatives of county bar associations automatically became members of the MBA’s governing board of delegates, but county and local bars continue to exercise considerable influence on local matters. Efforts to “unify” the bar by court rule in the 1940s were unsuccessful, although other states had adopted the concept of unification, which required all lawyers to join one association that would then become the official voice of the profession. In the early 1970s, this issue was again presented to the Massachusetts Supreme Judicial Court by petition of the MBA, which sought to become the sole surviving bar organization of a unified bar.

The BBA strenuously objected, and the matter was resolved in 1974 when the Supreme Judicial Court rejected the MBA’s petition for a unified bar. Unification would obviously have strengthened the influence and control over the profession by the MBA, but as observed by then Supreme Judicial Court Justice Herbert P. Wilkins, the defeat of unification resulted in “vastly stronger, more influential, and effective . . . bar organizations.” “A Justice’s Perspective of the First Twenty Years of the Board of Bar Overseers,” Mass. L. Rev. Dec. 1994, pp. 134, 136.

Although the MBA and BBA, as the two largest bar associations in the Commonwealth, endeavored to include all lawyers within their memberships, specialized groups found it beneficial to organize their own associations to promote their particular interests. Bar associations have organized to promote equality and opportunity for lawyers based on their gender, race, ethnic background, and sexual orientation, for example: the Women’s Bar Association (1978); the Massachusetts Black Lawyers Association (1973); the Massachusetts Association of Hispanic Attorneys (1985); and the Massachusetts Lesbian and Gay Bar Association (1985). Others groups have formed bar associations to promote or oppose legislation affecting their fields of law and otherwise assist their members in their practice, for example, in chronological order: Massachusetts Conveyancers Association (1855), Boston Patent Law Association (1924), Massachusetts Trial Lawyers Association (1955), Massachusetts Chapter of the Federal Bar Association (1968), the Northeast Chapter of the American Corporate Counsel Association (1989), Massachusetts Chapter-National Employment Lawyers Association (1991), and Massachusetts Association of Criminal Defense Association (1992).

There also exist in Massachusetts local chapters of national associations of lawyers involved in specialized fields of practice. Membership in these organizations is either by examination (Massachusetts Chapter, American Academy of Matrimonial Lawyers) or by invitation (American College of Trial Lawyers, American College of Probate Counsel).
Initially, bar associations were formed for practical, self-serving, and social reasons. Over the years, the mission of the organized bar has broadened. It now concerns itself, beyond social intercourse among members of the profession, with the administration of justice, education of the bar and judiciary, access to the courts, reform of the law, and, in more recent years, the advancement of women and minorities in the profession and public interest causes, including the delivery of legal services to the poor. This chapter chronicles some of those contributions.

**Admission Standards**

One of the most notable contributions of bar associations was their attempt and eventual success, after repeated conflicts with the legislature, in raising standards for admission to the Massachusetts bar.

In the latter half of the eighteenth century, candidates needed two to three years of “reading the law” with a seasoned practitioner, as well as the sponsorship and concurrence of members of the bar, to gain admission to practice. John Adams, for example, read law with a prominent Worcester lawyer, James Putnam. Having parted with Putnam on less than happy terms, Adams came to Boston to seek sponsorship for admission to practice in Suffolk County. This proved to be a somewhat difficult undertaking as he was unknown to the Suffolk bar, but he ultimately succeeded with the considerable help of Jeremiah Gridley, Boston’s leading lawyer at that time.

Once bar associations were established, they took control of the admission process and established increasingly formal rules and standards. Fending off an attempt by the legislature in 1785 to open the profession to anyone of good moral character and sufficient skill to be useful, the bar retained exclusive control over entry into the practice of law until 1835. Generally speaking, requirements remained high. The Suffolk bar, for instance, prescribed a college degree with an extra year of study if the candidate had not gone to Harvard, as well as a three-year apprenticeship approved by the Supreme Judicial Court.

In 1835, again in the name of democratizing the profession, the legislature enacted a statute limiting admission prerequisites to three years of study in a law school or a law office or completion of an examination administered by a state judge. From that point on, the judiciary was responsible for testing new applicants. Much depended upon the commitment of the examining judge to the task, and the results were far from uniform. By mid-century, few obstacles existed to entering the profession, although courts haphazardly and occasionally tried to impose some standards. The organized bar’s role in setting standards for admission to the profession was abolished for the time being.
Finally, in 1876, applicants were required to pass a written examination. However, there was no educational requirement, and even after establishment of the Board of Bar Examiners in 1897, anyone wishing to become a lawyer could merely take the bar examination. Raising educational and admission standards was one of the principal goals of the MBA organizers. Both the MBA and BBA fought strenuously for reform, and in 1910, the Supreme Judicial Court added the requirement that a bar applicant must have either a high school diploma or its equivalent. The implementation of this rule was delayed until 1914. Meanwhile, during this delay, the legislature, led by Representative Martin Lomasney of Boston, who perceived these qualifications as exclusionary, enacted a statute that annulled the high school or its equivalency requirement. Although the organized bar continued its efforts to repeal Lomasney’s legislation and reinstate educational requirements for admission to the bar, those efforts failed.

In 1932, the Supreme Judicial Court finally stepped into the void and ruled that the judiciary and not the legislature had the exclusive power to determine qualifications of those seeking admission to the bar. (Opinion of the Justices, 279 Mass. 607). In 1934, the MBA and BBA petitioned the Supreme Judicial Court for the adoption of a rule that the Board of Bar Examiners draft rules for bar admission. These rules, subsequently adopted by the Supreme Judicial Court, required every applicant to have at least a high school education or its equivalent. Over the next decade, bar admission standards became more stringent, requiring first a college and then a law school degree. This second requirement was later refined to require a degree from a law school accredited by the American Bar Association.

It took more than two decades of effort by the organized bar in the twentieth century to establish solid baseline standards for admitting lawyers to practice. That effort was continually resisted, as it had been in the nineteenth century, by the legislature, which viewed the imposition of admission standards as an attempt by an elitist profession to preclude recently arrived immigrants and persons with ethnic and then unacceptable religious backgrounds from becoming lawyers. In the main, however, the organized bar’s desire to establish higher standards of admission was motivated, particularly in this century, by a desire to improve the quality of legal services and not as an exclusionary tool for limiting membership in the profession.

**Discipline**

From its early concern with “pettifagogues,” policing the profession became as important to the organized bar as qualifications for admitting lawyers to practice. Exposing and punishing malfeasance, in fact, was a primary reason for the BBA’s reorganization in the 1870s. For the next 100 years, bar associations,
through their grievance committees, sought to monitor the profession by ridding it of unethical lawyers. Although these committees received complaints and attempted to discipline dishonest lawyers, they had no authority to prosecute and no means to enforce discipline. Except for a few high profile cases in which the BBA was successful in having some notorious figures disbarred, including several politicians in the 1920s and Alger Hiss in the 1950s,2 their efforts were not only ineffective but often tended to subject the associations to charges of ethnic and class prejudice.

Ultimately, grievance committee procedures became more formal and more successful in dealing with the disbarment and discipline of lawyers. However, the grievance process was a closely guarded local prerogative. County bar associations were very vocal in protecting their own turf when it came to bar discipline and opposed any attempt by either the BBA or the MBA to become involved in disciplinary matters outside of Suffolk County. As a result, this system of informal discipline became “regionalized, uneven in its quality, largely unpublicized and subject to the charges of discriminatory or at least indifferent enforcement.” Herbert P. Wilkins, “A Justice’s Perspective of the First Twenty Years of the Board of Bar Overseers,” Mass. L. Rev. Dec. 1994, pp. 134, 137. The logical solution was a uniform statewide system for bar discipline under the control of the judiciary. In 1974, the Supreme Judicial Court created the Board of Bar Overseers, which assumed responsibility for lawyer discipline. Members of the Board of Bar Overseers are appointed by the Supreme Judicial Court (SJC) and usually represent a geographic balance in its membership of eight lawyers and four laypersons. However, the Board of Bar Overseers has retained the concept of county grievance committees by appointing local hearing committees to hear evidence and to make findings of fact and recommendations for bar discipline. At these hearings, the professional staff of the Board of Bar Overseers present evidence and the hearing committees’ findings and recommendations then go to the full Board of Bar Overseers for a decision for private discipline or a recommendation to the SJC for public discipline.

Bar Advocate Programs

One of the most innovative achievements of the county bar associations was the bar advocate program, started in the mid-1970s by the Plymouth County Bar Association and followed closely in time by the Hampden and then Worcester County Bar Associations. The bar advocate program developed because lawyers appointed to represent indigent criminal defendants in the local district courts

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2 Mr. Hiss was later readmitted to the bar by the Supreme Judicial Court. See In the Matter of Hiss, 368 Mass. 447 (1975).
were not being promptly paid for their services by the counties, which were then partially funding the court system. The Plymouth County Bar Association formed a separate corporation that contracted with the Plymouth County Commissioners to administer a program that hired and paid counsel to represent indigent defendants in the district courts. Eventually, every county had a bar advocate program.

The creation of bar advocate programs greatly enhanced the effectiveness of the county bars. They were able to hire full-time staff, who not only ran the bar advocate programs, but on a part-time basis were also able to administer the county bar's educational, lawyer referral, insurance, and social programs.

When the state assumed control of the courts in 1979, the bar advocate programs contracted first with the Administrative Office of the Trial Court and then, in the 1980s, with the Committee for Public Counsel Services (CPCS) to provide counsel in the district courts. In 1990, a confrontation erupted between the county bar advocate programs and the Committee for Public Counsel Services that threatened the continued existence of county control of those programs. Lawyers responsible for running county bar advocate programs were convinced that this public service would be better administered on a local level. CPCS wanted the option to provide this service directly. In 1990, with substantial advocacy from the MBA and over the strenuous objection of CPCS, legislation was enacted requiring the Committee “to enter into contractual agreements with any state, county or local bar association, or voluntary charitable group, corporation, or association, including bar advocate groups, for the purpose of providing such counsel.” G.L. c. 211D, § 6(b). The resolution of this issue in favor of county bar advocate programs was a classic example of the effectiveness of bar associations in molding public policy because members were able to persuade their county legislators to support local control of this program.

The success of the bar advocate program, initiated by the county bars, has been considerable. Indigent defendants, charged with criminal offenses in the district courts, are assigned competent representation. Younger lawyers receive invaluable training from more experienced, local, criminal lawyers. Many successful criminal lawyers today owe their start to the county bar advocate system.

Court Reform

The organized bar has always been active in the area of court reform. Sometimes this took the form of heading off undesirable change. In the late 1800s and early 1900s, for example, the organized bar vigorously opposed all attempts by either the legislature or citizen advocacy groups to force the election of judges. Although most states elect some or all of their judges, Massachusetts, largely
through the continuing efforts of the organized bar, continues the tradition of appointment rather than election.

In 1972, the organized bar, the judiciary, and various citizens groups supported a constitutional amendment requiring mandatory retirement of judges at age seventy. Again in 1972, the MBA and BBA worked closely with then Governor Francis W. Sargent to secure legislation for the creation of an intermediate appellate court (the Massachusetts Appeals Court) to handle the increasing volume of criminal and civil appeals from Massachusetts trial courts. The organized bar also advocated the elimination of special or part-time judges. In 1975, a study of the Massachusetts court system was partially underwritten by a grant from the Massachusetts Bar Foundation (MBF), eventually leading to the appointment of MBA and BBA leaders to the Cox Commission, named for its chairman, Harvard Law Professor Archibald Cox. By 1976, many of the recommendations of that Commission were adopted by the legislature and the governor, including unified administration and state funding of the judicial system, recall of retired Superior and Probate Court judges, and designation of District Court judges for service in the Superior Court.

In the early 1990s, both the BBA and MBA launched an all-out effort to improve the courts. In 1991, the MBA engaged, at its own expense, the consulting firm of Harbridge House, to consider and recommend changes to the administration of the court system and the BBA appointed a State Court Study Commission for that same purpose. In 1993, recommendations of both groups were adopted by the SJC as part of a comprehensive court reform legislation designed to give the judiciary needed management tools, which included pilot unification programs, evaluation procedures for judges, elimination of trial de novo of criminal cases in the District Court, ability of clerks to hear small claims, and clear lines of managerial authority and accountability. Court reform is an ongoing process, and the organized bar continues to be a major voice in suggesting and supporting improvements to our judicial system.

Part of the bar’s continued involvement in the judicial system includes an advisory role in the appointment of judges. In 1960, the MBA Board of Delegates voted for the creation of a Joint Bar Committee that would consist of three members from the MBA, two members from the BBA, and one member each from the county bar associations to advise the governor on judicial appointments. Eventually, the Joint Bar Committee became a reality, and every governor from 1970 to today has submitted his or her nomination for judges to the Joint Bar Committee for final evaluation. There have been instances where the Joint Bar Committee has rejected a governor’s nominee for a particular judgeship and, in those cases, the nomination has been withdrawn. When the constitutional amendment requiring mandatory retirement of judges at age seventy became effective in 1972 and there were suddenly a large number of judicial vacancies, Gover-
nor Sargent agreed with bar leaders to appoint, by executive order, a Judicial Nominating Committee (JNC) that would interview and recommend candidates for judicial vacancies. Every governor since Sargent has used a JNC for the selection of judges, and the organized bar has made a significant contribution in assisting governors in making merit, rather than political, appointments to the bench.

Continuing Education

The organized bar, intent on controlling the quality of those entering the profession, was for so long absorbed with educational standards and requirements for admission to the bar that until the mid-twentieth century, it paid almost no attention to maintaining and updating the skills of those already in practice. By the 1930s, however, several circumstances converged to shift this focus. Significant numbers of young lawyers were entering the profession, and most of them were educated in law schools. Law school education was far more theoretical than the training earlier generations had received through the apprenticeship system. As a result, new admittees often lacked many of the fundamentals necessary to actually practice law. At the same time, older lawyers were increasingly challenged by rapid changes in the law, notably the explosion of New Deal legislation and administrative regulations and the adoption of the Federal Rules of Civil Procedure in 1938. The need for ongoing training and education beyond law school occurred by these factors was apparent, and bar associations, concerned about attracting and keeping members, seized the opportunity to provide an innovative service for continuing legal education (CLE). Not surprisingly, as a direct result of the efforts of the organized bar over time, Massachusetts now has one of the leading independent CLE organizations in the country, in addition to a wealth of first-rate programming sponsored by bar associations themselves.

The movement began slowly. Initial steps included a 1938 lecture series offered by the BBA on the progress of a trial, and a day-long series of courses presented by the MBA at its annual meeting in Swampscott in 1942. The BBA series, attended by more than 500 people, was highly successful, and a publication reprinting the lectures won the ABA’s award for the best legal instruction in the nation that year. The MBA’s program, known as the Massachusetts Lawyers Institute, was likewise popular—so popular, in fact, that it was continued annually for many years.

World War II, however, proved to be a major catalyst for more formalized CLE. World War II also created many opportunities for women to enter the profession. In 1942 alone, twenty-five women joined the BBA, doubling its female membership. Prominent among the women during that era was Eleanor March Moody, the first woman MBA officer. According to some records, almost 40 percent of the lawyers and judges in Massachusetts served in the armed forces during that

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war. On their return, these veterans had a pressing need for updating their knowledge and refreshing their skills. As a result, in the mid-to-late 1940s, both the MBA and the BBA began offering frequent lectures and programs, which turned out to be a great aid to the integration of veterans back into the practice. Although courses were largely devoted to war-related topics, interest was widespread in the bar as a whole, and it was clear by the late 1940s that CLE was an idea whose time had come.

As with most good ideas, others soon wanted to be in on the act. By the early 1950s, law schools started sponsoring CLE programs, as did the New England Law Institute (NELI), an organization founded exclusively for this purpose. NELI soon took over as the primary provider of CLE in Boston, the only location where CLE programs were held at that time since there was no feasible way to offer them in other parts of the state. But, the geographic obstacle was solved in the mid-1950s when the energetic Hampden County Bar Association, with the assistance of a grant from ALI/ABA (a joint committee of the American Bar Association and the American Law Institute formed to promote continuing legal education) organized a course in Springfield on trial practice, thus launching CLE on a statewide basis.

By the late 1950s, bar leaders nationwide had concluded that continuing education for lawyers was best done by bar associations. In 1962, the MBA created a committee on CLE and hired a full-time administrator to design and run its programs. The BBA and some of the county bar associations were also actively involved in CLE, as was NELI. By the late 1960s, the state was awash in competing and duplicative programs. After lengthy discussions, MBA and BBA leaders, concerned that the plethora of courses was compromising overall CLE quality, recommended that the two associations join forces rather than continue to vie with each other to provide this service. By the end of 1968, each organization approved the formation of a separate nonprofit corporation to deliver continuing education on a statewide basis. Thus, Massachusetts Continuing Legal Education (MCLE) was born in 1969 with a grant from each association and a commitment to present all education programs through the new organization. It was further agreed that all profits from CLE activity would belong to MCLE. In 1970, NELI was merged into MCLE, and the merger created the sole major provider of educational programs in Massachusetts.

By 1973–1974, MCLE was offering courses across the state with great success, both in attendance and in revenues, a pattern that persists to this day. MCLE enjoys the continued support of both of its parent associations, which appoint the members of MCLE’s board. Nonetheless, with the passage of time, each association has thought it advantageous to provide CLE programming for its membership in addition to that provided by MCLE—generally shorter and less expensive courses on narrow or highly specialized topics. Much of this pro-
gramming takes place through the section and committee structure of the associations, developed in the 1960s and 1970s to address substantive areas of the law. (In 1974, the MBA won the ABA Award of Merit for the work of its sections and committees.) Despite inevitable tensions in renegotiating the relationship between parent and child, all three organizations, as well as the numerous other bar associations that sponsor CLE in one form or another, coexist cooperatively, recognizing that there is both enormous demand for education and training for lawyers and exciting new ways to provide it.

Serving the Public Interest

During the periods of the eighteenth and nineteenth century, when the bar was organized, it was almost exclusively preoccupied with matters internal to the profession. This is not to say that lawyers were uninvolved in important societal concerns of the day. Members of the Suffolk bar, for example, were actively engaged in the antislavery movement in the mid-nineteenth century and brought several significant cases seeking to free fugitive slaves and eliminate segregation. But issues of social justice and serving the legal needs of the poor did not appear on the bar’s agenda at all.

The formation of the Boston Legal Aid society by a group of the city’s leading lawyers in 1900 highlighted the plight of a growing class of urban poor who faced a multitude of financial and social problems. Though the society’s work with the poor was independent of any bar association, close ties existed as many distinguished bar leaders (such as Moorfield Storey, who served as president of the BBA and the MBA, as well as the ABA) occupied prominent positions with the society.

The concept of legal aid was not viewed with unanimous approval in the twentieth century’s early years. Except to provide assistance to soldiers and sailors returning from World War I, there was little support for, and indeed outright opposition to, the idea that the bar’s calling reached beyond the interests of its own membership (a membership that, in fact, remained highly conservative in its approach to social issues for many years to come). Had it not been for the vision of a few bar leaders, particularly Reginald Heber Smith, the movement may well have fallen victim to prevailing notions that discontent among the poor would provoke social turmoil and, thus, should be addressed with harsher, less compassionate, measures.

Smith, a prominent member of both the MBA and BBA, was a staff member and general counsel to the Boston Legal Aid Society who later joined the firm of Hale and Dorr. In 1918, his report to the Society posited that “[I]f democracy means anything it must include justice as the right of every citizen.” His land-
mark national study, Justice and the Poor, followed in 1919. Funded by the Carnegie Foundation, this study, based in part on Smith's experiences with the Boston Legal Aid Society, undertook to justify legal aid as "an institutional method of ameliorating class injustice." As a result of this publication and his local and national advocacy efforts, Smith became a leading advocate for the responsibility of the bar and the justice system to the poor, for which he is justly viewed as one of the giants of the profession.

Smith's visibility also made the Boston Legal Aid Society a national model. Despite lingering resistance to this seemingly radical step for the profession, by 1927, there were four other legal aid organizations in Massachusetts: in Springfield, New Bedford, Worcester, and at Harvard Law School. At Smith's request, an MBA legal aid committee was formed in 1927. Nine years later, in 1936, the BBA formally endorsed the Boston Legal Aid Society, as well as the Volunteer Defenders Committee, a private program established to provide assistance to criminal defendants.

The Depression and World War II turned the attention of the profession in other directions. There were notable bar leaders with admirable goals during this period, but faced with the pressure of difficult times, their primary focus was keeping their organizations viable. There were some forays by the organized bar into national politics in the late 1930s, notably, opposition to President Roosevelt's proposal to increase the size of the Supreme Court (the court-packing plan) and its participation in the controversy over the confirmation of one of its own, Louis D. Brandeis, to the Supreme Court. With the advent of the McCarthy era, though, the bar's scope began to broaden once again. This time, civil liberties took center stage. In the early postwar years, feverish anticommunist sentiments had driven many bar organizations to form committees for investigating communism within the profession and eradicating party members from its ranks. Gradually, however, concern for the rights of those accused of subversive activities, particularly the right to due process, led to a more tempered approach. In 1951, the MBA went on record in opposition to the loyalty oath proposed by the Massachusetts legislature (although the BBA and the ABA supported it), and in 1952, it launched its Good Citizenship Program (later the Massachusetts Heritage Program) to teach high school students the nature and value of democracy and the rule of law.

In 1953, the BBA called for recognition of the rights of witnesses summoned before the House Un-American Activities Committee, and in 1954, it voted to support representation of persons accused of communist activity. Nothing, however, riveted the attention of the bar, and the nation as a whole, to the dangers of anticommunist hysteria more than the Army-McCarthy hearings in 1953–1954. To the enduring pride of the Massachusetts bar, McCarthy was completely discredited by the efforts of respected Boston attorney Joseph Welch. McCarthy's
vicious attack on Welch’s associate (and later M BA president) Frederick Fisher, and Welch’s response: “Have you no decency, sir?”, remain as both actual and symbolic turning points in this troubled period of our nation’s history.

The bar’s role during the M cC arthy era began a new phase of public activity and outreach. The M BA continued its school education program, putting hundreds of lawyers into classrooms each year. Based in part on the success of this endeavor, the ABA in 1958 created Law Day, and designated May 1 as the day on which it would be observed: a sharp and intended antithesis to the Soviet Union’s “May Day” celebration. Like the M assachusetts Heritage Program, the purpose of Law Day was (and is) to educate the country’s young people about our system of justice. Law Day continues to be observed across the nation, and virtually every bar association in the Commonwealth has law-related educational activities, in schools and otherwise, associated not only with this important occasion, but also at other times throughout the year.

The revival of interest in legal aid was another consequence of M cC arthyism. Having witnessed the problems many citizens faced in obtaining adequate representation during that era, the BBA formed a Lawyers’ Reference Bureau in 1951 to match clients of low and modest means with lawyers willing to provide them with services. Other bar associations followed with lawyer referral programs of their own. In 1956, Alfred Gardner, then BBA president and a former Boston Legal Aid Society president, urged association lawyers to commit to direct representation of indigent clients, including criminal defendants and those connected with unpopular causes. Gardner spearheaded the formation of the Boston Bar Foundation in 1957 to serve as the vehicle for the Association’s charitable work. Although the BBA took only modest steps to provide direct legal services through the new Foundation, the framework for the extensive public service activity that characterizes it today was laid at that time.

The decades of the 1960s and 1970s caused tumultuous changes in society to which the organized bar vigorously responded, often at the urging of younger members. The civil rights movement, the women’s movement, and the Vietnam War, among other forces, propelled the bar into areas of social and political concern that even its most visionary former leaders had never contemplated. The M BA, for example, as the result of investigative efforts by its president Paul Tamburello in 1967, became intensely interested in the plight of the mentally ill, particularly those warehoused at Bridgewater State Hospital. The controversial film, “Titicut Follies,” distributed that same year (but later banned by the Supreme Judicial Court as an infringement of patient rights), focused further attention on the issue. With the M BA’s leadership, complete reform of the state’s laws and procedures regarding mental illness and mental retardation was accomplished, and several years later, the M BA, aided by an ABA grant, established a highly successful program to assist the courts with mental retardation issues.
During these years, the BBA became increasingly involved in urban issues, including housing and desegregation, through its newly formed Urban Affairs Committee and through the local branch of the Lawyers’ Committee for Civil Rights Under Law which became one of the BBA’s projects in 1972. Richard Banks, one of the first African Americans to achieve prominence in the BBA, chaired the BBA’s Housing Committee in the late 1960s and was at the forefront of the BBA’s efforts in the civil rights arena, for which he was awarded the BBA’s Distinguished Service Award in 1988. At the conclusion of the school desegregation case in 1975, the BBA published for the community an explanation of the legal basis and consequences of Judge W. Arthur Garrity’s decision on desegregation of the Boston Public Schools. This publication received national attention and was used extensively by other cities facing court-ordered desegregation. The BBA’s commitment to Boston has grown through the years, and it now sponsors a whole array of activities, including a summer jobs program for inner-city youth, and a law-related education program at the new Federal Courthouse.

During the late 1960s a concerted drive began, on national, state, and local levels, to address the legal needs of the poor. The organized bar was at the center of these efforts, and nowhere was it (or has it been) more successful or effective than in Massachusetts. Often working in cooperation with federally funded legal services offices, by the early 1970s, bar associations throughout the state were forming committees and establishing pro bono programs and panels to provide volunteer assistance to low-income clients. The BBA received the prestigious Harrison Tweed Award from the ABA in 1980 for its many public service initiatives, including the Volunteer Lawyers Project (the largest volunteer panel in the state) and the Legal Advocacy and Resource Center (LARC), a now statewide triage service for low-income clients. These BBA programs, among others, continue to flourish and are among the many examples of bar initiatives across the state that bring national praise and recognition to Massachusetts.

In the late 1970s, and again in the 1980s, state and local bar leaders mobilized to oppose reductions in funding of the federal Legal Services Corporation. Both the MBA and the BBA supported statewide studies of the legal needs of the poor, and advocated for state and private funding for legal services through the establishment of MLAC and Interest on Lawyers Trust Accounts (IOLTA) programs. Many of Massachusetts’s strong voices in support of legal services, including those of a number of MBA, BBA, and ABA presidents, have been nationally influential in the struggle to preserve legal services programs.

Currently, a number of bar organizations, including the MBA, BBA, the Worcester bar, and the women’s bar have their own foundations or endowments through which their public service fund-raising and activity is channeled. Ethnic, gender, and specialty bars have pro bono programs targeted at specific communities or interest groups.
Bar Foundations and IOLTA

In the late 1950s, the BBA created the Boston Bar Foundation (BBF) to operate the BBA’s legal services activities. In 1965, MBA President Livingston Hall, following the lead of the American Bar Association, created the Massachusetts Bar Foundation (MBF) to provide scholarships for law students, research on legal issues, and publish legal works. The MBF raised money through membership to promote its purposes. Lawyers were invited to become members by agreeing to contribute $100 a year for ten years at which time the contributing lawyer would become a MBF life member. Later, this amount was increased to $150 a year for that same period of time. This money was then disbursed by the foundation trustees for the specified, charitable purposes. Many county bar associations formed similar foundations. Initially, the available annual income from these foundations was modest and, consequently, grants made by these foundations were limited.

The role of the foundations changed in 1990, when the Supreme Judicial Court, at the urging of the bar, created by rule the IOLTA program and a committee to administer it. Interest earned on certain funds held in trust by lawyers is paid to the Massachusetts IOLTA Committee to fund legal services to the poor and to improve the administration of justice. To accomplish these purposes, the IOLTA Committee annually disburses the interest amounts received to the Massachusetts Legal Assistance Corporation (67 percent), MBF (26 percent), and the BBF (7 percent). These percentages have remained constant since the Worcester County Bar Association (WCBF) filed a petition with the SJC seeking to be included as a direct recipient of IOLTA funds for distribution to qualifying grantees in Worcester County. The SJC rejected the WCBF’s petition, but the MBF agreed informally to use county grant committees to make initial recommendations for grants within each county. The amount in grants returned to each county approximates the amount of interest received from lawyers’ trusts accounts in that county. In 1999, IOLTA generated nearly $10 million. One of the most fundamental contributions to improve the administration of justice is the MBA’s substantial, annual commitment to the Flashner Institute for judicial education. Similarly, the BBA’s significant annual support for LARC has facilitated the delivery of legal services on a statewide basis. These contributions have been an enormous benefit to the entire Commonwealth.

Not every Massachusetts lawyer supported IOLTA. In 1991, the Washington Legal Foundation, on behalf of several Massachusetts lawyers and citizens, commenced an action against the MBF in federal court (District of Massachusetts) as a means for challenging the use of interest on lawyers’ trust accounts (clients’ funds) for charitable purposes. Then Chief District Court Judge Tauro rejected the challenge (see Washington Legal Found. v. Massachusetts Bar
Ass’n, 795 F.Supp. 50 (D.Mass), which decision was affirmed by the First Circuit Court of Appeals in Washington Legal Found. v. Massachusetts Bar Ass’n, 993 F.2d 962 (1st Cir. 1993). The Washington Legal Foundation and others continue to challenge IOLTA. At the moment, IOLTA remains intact.

**Conclusion**

For most of the 1980s, membership in local, county, and state bar associations was at an all-time high. During this period, two out of every three practicing lawyers in Massachusetts belonged to the MBA. The BBA and county bar associations enjoyed that same percentage of membership. This was a time when county and local lawyers either knew personally, or by sight, most of the other lawyers in their communities as a result of attending or participating in bar association functions and programs. This same familiarity existed statewide, where a lawyer in Northampton could pick up the telephone and talk to a lawyer in Boston he or she had gotten to know through membership in the organized bar. This familiarity bred congeniality since lawyers knew each other and knew that they would see each other again with some regularity, either professionally or through some bar association function and program.

As the profession advances into the twenty-first century, many bar associations, including the BBA and the MBA, have experienced growth both in membership and the level of their activity. However, with an ever-escalating number of lawyers, bar association membership has dramatically declined as it relates to the percentage of lawyers practicing in the Commonwealth. Membership in the MBA has declined from 75 percent of practicing lawyers in the 1980s to 40 percent at the turn of the century. Although the percentage decline in county bar membership has been less dramatic, it has been substantial and all bar associations are now engaging in aggressive programs to increase membership.

There are several reasons for this decline. First, young lawyers are too busy working and believe they don’t have the time to participate in bar association programs and functions. Second, as the number of nonmember lawyers increases, interest of lawyers in bar association membership declines. In the “old days,” when most of the lawyers in a certain locality were members of a bar association, it was expedient for younger lawyers to join that association. As the number of bar association nonmembers increases, the need to join decreases. Third, many lawyers are struggling simply to make a living to support themselves and their families, and for some, bar association membership is perceived to be too expensive, both in money and time. This trend of a decreasing interest in bar membership among practicing lawyers in the Commonwealth will necessarily dilute the ability of bar associations to assist the profession, judiciary, and the public. However, the most detrimental effect of declining bar membership on the
legal profession is the obvious lack of contact among lawyers, which inevitability will lead to increased incivility and, consequently, increased expense to consumers of legal services. There is a well-known truism espoused by lawyers in New York City that when dealing with other lawyers in that city, there is absolutely no need to be civil or cooperative since those lawyers will never see or do business with each other in the future. This unfortunate mindset is slowly creeping into the legal profession of this Commonwealth. The remedy is to increase contact among lawyers and this can best be accomplished through increased bar association membership. The authors sincerely hope that their successors who write this chapter at the beginning of the twenty-second century don’t look back upon bar associations and their substantial contributions to the profession and the public as a phenomenon of a bygone era.
STATE AND REGIONAL BAR ASSOCIATIONS

Massachusetts Bar Association
20 West Street, Boston 02111
(617) 338-0500
1441 Main St., Suite 925, Springfield 01103
(413) 731-5134
www.massbar.org

Boston Bar Association
16 Beacon Street, Boston 02108
(617) 742-0615; Fax: (617) 523-0127
www.bostonbar.org

Attleboro Area Bar Association
c/o Edward J. Casey, President
Casey Law Offices, PC
8 North Main Street, Suite 201, Attleboro 02703
(508) 222-2332
ejcasey@caseylawpc.com
www.attleborobar.org

Barnstable County Bar Association
P.O. Box 718, Barnstable 02630
(508) 362-2121
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Berkshire County Bar Association
c/o Darren M. Lee
Martin, Oliveira & Hamel
75 South Church Street, Suite 550, Pittsfield 01201
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www.berkshirebar.com

Bristol County Bar Association
448 County Street, New Bedford 02740
(508) 990-1303; Fax: (508) 999-0477
info@bristolcountybar.org
www.bristolcountybar.org

Cambridge Arlington Belmont Bar Association
c/o Rebecca L. Dalpe, President
One Canal Park, Suite 2100, Cambridge 02141
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rdalpe@fosteld.com

Dukes County Bar Association
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Essex County Bar Association
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www.essexcountybar.org

Fall River Bar Association
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132 Highland Ave., Fall River 02720
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ddennis132@comcast.net

Franklin County Bar Association
20 Federal Street, Suite 4, Greenfield 01301
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fcbar@franklincountybar.org
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Greater Lowell Bar Association, Inc.
c/o Robert W. Normandin, President
97 Central Street, Suite 401, Lowell 01852
(978) 446-1400
gbalowell@gmail.com
www.greaterlowellbar.org

Greater Lynn Bar Association
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101 North Common Street, Second Floor, Lynn 01902
(781) 599-1010; Fax: (781) 599-4946
www.lynnbar.com

Hampden County Bar Association
Hall of Justice
50 State Street, P.O. Box 559, Springfield 01102
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admin@hcbar.org
www.hcbar.org

Hampshire County Bar Association
15 Gothic Street, Suite 10, Northampton 01060
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Haverhill Bar Association
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Metrowest Bar Association
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Nantucket Bar Association
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Salem Bar Association  
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AFFINITY BAR ASSOCIATIONS

Asian-American Lawyers Association of Massachusetts  
c/o The Boston Bar Association,  
16 Beacon Street, Boston 02108  
aalam.info@gmail.com  
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Boston Patent Law Association  
One Batterymarch Park, Suite 101, Quincy 02169  
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www.bpla.org
Massachusetts Municipal Lawyers Association
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Massachusetts Academy of Trial Attorneys, Inc.
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www.massacademy.com

Massachusetts Association of Criminal Defense Lawyers
32l Walnut Street, Box 473, Newton 02460
(617) 965-2215
macdlweb@gmail.com
www.macdl.com

Massachusetts Association of Hispanic Attorneys, Inc.
c/o The Boston Bar Association, 16 Beacon Street, Boston 02108
(617) 742-0615
mahaboard@gmail.com
www.mahaweb.org

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Massachusetts Association of Women Lawyers
c/o M. Katie Kerr, President
Law Offices of Lisa J. Graff
323 Boston Post Road, Suite 3A, Sudbury 01776
info@mawl.org
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Massachusetts Black Lawyers Association
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www.massblacklawyers.org

Massachusetts Black Women Attorneys
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Massachusetts Defense Lawyers Association
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www.massdla.org

Massachusetts District Attorneys Association
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Massachusetts Employment Lawyers Association
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massjba.org
Massachusetts LGBTQ Bar Association
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Real Estate Bar Association for Massachusetts, Inc.
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admin@reba.net
www.reba.net

South Asian Bar Association, Greater Boston
c/o Boston Bar Association, 16 Beacon Street, Boston 02108
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Women’s Bar Association of Massachusetts
27 School Street, Suite 500, Boston 02108
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membership@womensbar.org
www.womensbar.org

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1050 Connecticut Ave., N.W., Suite 400, Washington, D.C. 20036
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www.americanbar.org

American Academy of Matrimonial Lawyers,
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www.aaml.org

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American Immigration Lawyers Association, New England Chapter
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Federalist Society, Boston Lawyers' Division
c/o Daniel J. Kelly, Chair
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National Academy of Elder Law Attorneys, Massachusetts Chapter
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www.massnaela.com

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STATEWIDE ORGANIZATIONS

Boston Bar Association Lawyer Referral Service
16 Beacon Street, Boston 02108
(617) 742-0625
lrs@bostonbar.org
www.bostonbarlawyer.org
Center for Public Representation, Inc.
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246 Walnut Street, Newton 02460
(617) 965-0776; Fax: (617) 928-0971
info@cpr-ma.org
www.centerforpublicrep.org

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BRISTOL COUNTY

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Middlesex Defense Attorneys, Inc.
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Youth Advocacy Division
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