Chapter 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.

§ 3.1 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.

§ 3.1.1 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.

§ 3.1.2 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.

§ 3.1.3 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.

§ 3.1.4 Lawyer as Witness
You may be called as a witness in a pending client matter.

§ 3.2 PRIOR REPRESENTATION OF ADVERSE PARTY

§ 3.2.1 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 relating to representation of the client to the disadvantage of the client or for the lawyer’s advantage or the advantage 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 interests 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 action 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.


The “substantially related” test became the generally accepted standard for disqualification 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 address 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 previous 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 interests 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 cur-
rently 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.
of actual use of confidential information is unnecessary if the substantial rela-
tionship test is met; under that test, the court will assume an attorney will use
confidences obtained from the former client in the subsequent representation.”

tum). Detailed factual findings are required to support disqualification on the
basis that two representations are “substantially related.” Slade v. Ormsby, 69
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 atto-
ney 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.


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.
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 represented plaintiff’s parent company on substantially related matter); Towne Development of Chandler, Inc. v. Superior Court, 842 P.2d 1377, 1381 (Ariz. Ct. App. 1992) (notes that A.L.I Restatement of the Law of Lawyering, § 204(2) (Tent. Draft No. 4, 1991) approves screening with conditions, Towne Development of Chandler, Inc. v. Superior Court, 842 P.2d at 1382 n.9); and Lansing-Delaware Water Department v. Oak Lane Park, Inc., 808 P.2d 1369, 1377 (Kan. 1991) (court notes that in drafting Model Rules, the ABA considered and rejected a provision that would not impute disqualification to private law firms hiring private attorneys if screening occurred). The A.L.I Restatement of the Law Governing Lawyers § 124 (2000) permits screening in very limited circumstances.

**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 EOA 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, 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 . . . dissolved when . . . [she] moved on.” O’Donnell v. Robert Half Int’l, Inc., 724 F. Supp. 2d 217, 223 (D. Mass. 2010).

§ 3.3 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.’” In re Driscoll, 447 Mass. 678, 686 (2006) (quoting Comment [4] to Mass. R. Prof. C. 1.7). In Commonwealth v. Downey, 65 Mass. App. Ct. 547, 553–56 (2006), criminal defendants were granted a new trial after it was discovered that their trial counsel had worn concealed microphones pursuant to a recording agreement with a film company without obtaining their clients’ consent.

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 seasonable 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).
§ 3.3 ETHICAL LAWYERING IN MASSACHUSETTS

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 alleging 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.

§ 3.4 INDEPENDENT PROFESSIONAL JUDGMENT

Former DR 5-101(A) is now dealt with in Mass. R. Prof. C. 1.7. See discussion in § 3.3, 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 by the client 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.

§ 3.5 OTHER MATTERS

§ 3.5.1 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 full disclosure and consent of the client in DR 5-104(A) was identical to that contained in DR 5-101(A). See MBA Ethics Ops. 79-2, 81-7, 82-4 (discussed in § 3.4, Independent Professional Judgment, above), in which the committee referred to both DR 5-101(A) and DR 5-104(A). See also MBA Ethics Op. 81-11 (purchase by lawyer of warrants issued by corporate client to pay costs of a public offering as to which lawyer is advising the client); Owens v. Murendi, 448 Mass. 66, 74 (2006) (attorney had duty to advise client that attorney had conflict and could not represent client and that client "should seek the advice of other counsel"); In re Lupo, 447 Mass. 345, 352 (2005) (duty to fully disclose); Fanaras Enters., Inc. v. Doane, 423 Mass. 121, 124–26 (1996) (general discussion of DR 5-104(2)); McLaughlin v. Amirsaleh, 65 Mass. App. Ct. 873, 880–85 (2006) (mortgage held and recorded on property of client unenforceable because of violation of DR 5-103 and Mass. R. Prof. C. 1.8(jj)); Duggan v. Gonsalves, 65 Mass. App. Ct. 250, 256–58 (2005) (attorney improperly represented clients in foreclosure proceeding and then purchased property himself).

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).

§ 3.5.2 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).

§ 3.6 LAWYER AS WITNESS

§ 3.6.1 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 § 3.7, 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. Jamikowski, 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).

§ 3.6.2 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

[t]he 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.
§ 3.6 ETHICAL LAWYERING IN MASSACHUSETTS

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).

§ 3.7 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 case-by-case analysis that “allows a client to challenge a disqualification order only if the grounds for disqualification can be reviewed independently of any consideration of the merits of the case.” Maddocks v. Ricker, 403 Mass. 592, 599 (1988) (discussing Borman). Subsequent to Borman, the U.S. Supreme Court disclaimed use of a case-by-case analysis and held that “orders disqualifying counsel in civil cases are not collateral orders subject to appeal as ‘final judgments’” under 28 U.S.C. § 1291. Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 440 (1985).

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. Jamitkowski, 29 Mass. App. Ct. 107, 109 n.3 (1990).