Massachusetts Law Component Outlines

Version 2 - January 2020

Commonwealth of Massachusetts
Board of Bar Examiners
One Pemberton Square
Suite 5-140
Boston, MA 02108
617-482-4466

Important Notice. The Massachusetts Law Component Outlines (the "Outlines") were developed for reference by petitioners seeking Massachusetts bar admission in preparing for the Massachusetts Law Component Exam required for bar admission. The Outlines are intended to introduce a petitioner for bar admission to key aspects of Massachusetts law and practice by highlighting instances in which Massachusetts law and practice may differ from federal law and practice, or from the law and practice in other states. The Outlines are not intended to serve as an overview of a particular area of law and, although the Outlines are updated periodically, as the law continues to change some statements in these Outlines may not reflect current law. The Outlines are not intended for use as a reference for an accurate, complete, or current statement of Massachusetts law and should not be cited as legal authority. Legal advice should not be furnished based on the content of these Outlines.

Comments or Suggestions. Comments or suggestions regarding the Massachusetts Law Component Outlines may be directed to the Board of Bar Examiners, Attn. Executive Director, at info@bbe.state.ma.us.

Copyright. The Supreme Judicial Court holds the copyright to this original work. The Supreme Judicial Court, through the Board of Bar Examiners, makes the Massachusetts Law Component Outlines available to the public at https://www.mass.gov/doc/mlc-outlines-book/download. Inquiries as to commercial use may be directed to the Board of Bar Examiners, Executive Director, at 617-482-4466.

Copyright © 2020

Massachusetts Law Component
ACKNOWLEDGEMENTS

CONTRIBUTORS

Honorable Peter W. Agnes, Jr.
Massachusetts Appeals Court

Linda G. Bauer, General Counsel
Massachusetts Clients' Security Board

Tina W. Cafaro, Clinical Professor
Western New England School of Law

Jeanne Charn, Lecturer on Law
Harvard Law School

Mary C. Connaughton, Clinical Professor
Boston University School of Law

Michael L. Coyne, Dean & Professor of Law
Massachusetts School of Law

Justin H. Dion, Professor of Legal Skills
Western New England School of Law

Hillary Brave Farber, Professor of Law
University of Massachusetts School of Law

James F. Freeley, III, Lecturer on Law
University of Massachusetts School of Law

Renee Jones, Associate Dean
Boston College Law School

Jeanne M. Kaiser, Professor of Law
Western New England School of Law

Karen Pita Loor, Associate Dean
Boston University School of Law

Marc G. Perlin, Professor of Law
Suffolk University Law School

Anthony S. Sandoe (ret.), Professor of Law
Suffolk University Law School

Jordan M. Singer, Professor of Law
New England Law|Boston

Mark Spiegel, Professor of Law
Boston College Law School

Diane Sullivan, Assistant Dean
Massachusetts School of Law

Paul R. Tremblay, Clinical Professor
Boston College Law School

Dehlia Umunna, Clinical Professor
Harvard Law School

Constance Vecchione, Bar Counsel (ret.)
Massachusetts Office of Bar Counsel

Brian A. Wilson, Lecturer/Clinical Instructor
Boston University School of Law

Jeffrey D. Woolf, Assistant Bar Counsel
Massachusetts Office of Bar Counsel

EDITORS

Geoffrey R. Bok, Chair (Former)
Massachusetts Board of Bar Examiners

Marilyn J. Wellington, Executive Director
Massachusetts Board of Bar Examiners

Special thanks to Jessica Rush of the Massachusetts Board of Bar Examiners for production assistance.

I. ACCESS TO JUSTICE 12
A. Overview 12
B. Related Rules Of Professional Conduct 12
1. Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer 13
2. Rule 3.1: Meritorious Claims; Rule 3.2: Expediting Litigation; Rule 3.3: Candor to Tribunal; and Rule 4.1: Truthfulness in Statements to Others 13
3. Rule 4.3: Dealing with Unrepresented Persons 14
4. Rule 6.1: Voluntary Pro Bono Publico Service 14
5. Rule 6.2 Accepting Appointments 15
6. Rule 6.5: Non-Profit and Court-Annexed Limited Legal Services Programs 16
7. Supreme Judicial Court Rule 3:03: Legal Assistance to the Commonwealth and to Indigent Criminal Defendants and to Indigent Parties in Civil Proceedings 16
C. Procedural Due Process, Fair Hearings and Administrative Procedures 18
1. Federal law 18
2. Massachusetts Law 19
D. Right to Counsel 20
E. Due Process and Mental Health 21
1. Statutory Overview 21
F. Landlord - Tenant 26
1. Evictions 26
G. Non-Profits 39
1. Overview 39
2. Steps for Setting Up a Non-profit Corporation in Massachusetts 45
H. Technology: Opportunities, Responsibilities, And Challenges 48
1. Competence 48
2. Technology: E-mail 49
3. Technology: Online research 49
4. Technology: Discovery and Social Media 49
5. Confidentiality 49

II. ANTI-DISCRIMINATION LAW 51
A. Introduction 51
B. Employment 51
1. Massachusetts Fair Employment Practices Act, Chapter 151B 51
2. Exclusive remedy for discriminatory acts under Mass. G. L. c. 151B, §§5, 9 52
3. Complaint procedure Mass. G. L. c.151B, §5 52
C. Public Accommodations 52
D. Housing 52
E. Sexual Harassment 53
F. Equal Pay 53
G. Judicial Alternatives And Exhaustion Of Administrative Remedies Under Chapter 151b 54
H. Proving Employment Discrimination 54
1. Disparate treatment 54
2. Disparate Impact 55
3. Mixed motive cases 55
4. Retaliation 55
I. Disability Discrimination 56

1. Controlling Law 56
2. Distinctions between Massachusetts and Federal Law 56
3. Reasonable Accommodation 57
4. Essential Functions of the Job 58
5. Pre-employment Inquiries 58
J. Damages 58
1. General 58
2. Back Pay and Front Pay Damages 58
3. Emotional Distress Damages 58
4. Reinstatement 59
5. Prejudgment Interest 59
6. Reasonable Attorneys' Fees 59
7. Punitive Damages 59
8. Civil Penalties 60
K. General 60
1. Supervisor Liability 60
2. Individual Liability 60
3. Seniority Systems 60

III. BUSINESS ORGANIZATIONS 61
A. Corporate Law 61
1. Source of Massachusetts Corporate Law 61
2. Incorporation 61
3. Promoter Liability 62
4. Veil Piercing 62
5. Issuing Stock 63
6. Management and Control 63
7. Dividends 64
8. Fiduciary Duties 65
9. Close Corporations 67
10. Fundamental Transactions 68
11. Shareholder Litigation 71
12. Protections from Liability 72
B. Limited Liability Companies 73
1. LLC Statute 73
2. Formation Documents 73
3. Members and Managers 73
4. Fiduciary Duties 73
5. Dissolution 74
C. Agency & Partnership 74
1. Agency Law 74
2. Partnership Law 77

IV. MASSACHUSETTS COURTS AND CIVIL PROCEDURE 84
A. The Massachusetts Court System 84
1. Supreme Judicial Court 84
2. Massachusetts Appeals Court 85
3. Trial Courts 85
4. Selection and Tenure of Judges 89

B. Pre-Filing Considerations 89
1. Venue 89
2. Personal Jurisdiction/Minimum Contacts 90
3. Statute of Limitations 91
C. Pleadings 92
1. General 92
2. Commencement of Action 92
3. Service of Process 93
4. Form of Pleadings 94
5. Content 95
6. Answers and Defenses 96
7. Affirmative Defenses 97
8. Counterclaims and Cross Claims 97
9. Joinder of Parties and Claims 98
10. Class Actions 100
11. Amendments 101
12. Rule 11: Honesty in Pleadings 101
D. Discovery 102
1. Scope of Discovery; Proportionality 102
2. Discovery Tools 103
3. Electronically Stored Information 104
4. Subpoenas 105
E. Summary Judgment 106
1. Generally 106
2. Timing 106
3. Standards for Granting 106
4. Procedure 106
5. Additional Discovery 107
F. Trial Procedure 107
1. Jury Selection 107
2. Voir Dire 107
3. Continuances 107
4. Court-Specific Procedure 108
G. Appeal 108

V. CONSUMER PROTECTION - MASS. G. L. C. 93A 109
A. Introduction 109
B. Summary of Sections 109
1. §1 Definitions 110
2. §2 Unfair practices; legislative intent; rules and regulations. 110
3. §3 Exempted Transactions. 110
4. §4 Actions by Attorney General; Notice; Venue; Injunctions. 111
5. §5 Assurance of Discontinuance of Unlawful Method or Practice. 111
6. §6 Examination of Books and Records; Attendance of Persons; Notice. 111
7. §7 Failure to Appear or to Comply with Notice. 113
8. §8 Habitual Violation of Injunctions. 113
9. §9 Civil actions and remedies; class action; demand for relief; damages; costs; exhausting administrative remedies. 113
10. §10 Notice to Attorney General; Injunction, Prima Facie Evidence 115

11. §11 Persons Engaged in Business; Actions for Unfair Trade Practices; Class Actions; Damages; Injunction; Costs. 115
C. Statute of Limitations 117
D. No Right To Jury Trial 117
E. Acts Not Covered by Statute 117

VI. CRIMINAL LAW AND PROCEDURE 118
A. Search and Seizure 118
1. Article 14 vs. Fourth Amendment Generally 118
2. Definition of "Seizure" of a Person 118
3. Reasonable Suspicion and Unprovoked Flight 118
4. Search Incident to Arrest 119
5. Strip Searches 120
6. Automatic Standing 120
7. Confidential Informants/Anonymous Tips 121
8. "No Knock" Execution of Search Warrant 122
9. Plain View 122
10. Inventory Searches 123
11. Frisking: Automatic Companion Rule 123
12. Exit Orders at Routine Traffic Stops 124
13. Lost or Destroyed Evidence 125
14. Good Faith Doctrine 126
B. Statements: Fifth and Sixth Amendment Issues 126
1. Article 12 vs. Fifth and Sixth Amendments Generally 126
2. Humane Practice Rule 127
3. Presumption of Taint 127
4. Physical Fruits of Voluntary but Unwarned Statement 129
5. Notifying Suspect Of Attorney's Presence At Station 129
6. Immunity 130
C. Confrontation 131
1. Confrontation: Face-To-Face 131
D. Grand Jury 131
E. Identification 132
1. In-Court Identification Where No Preceding Out-Of-Court Identification 132
2. In-Court Identification Where Suggestive Out-Of-Court Identification 133
F. State Response to Immigration Detainers 134
1. Federal Law 134
2. Massachusetts Law 134
G. Jurisdiction 135
1. Felony vs. Misdemeanor 135
2. Juvenile vs. Adult 135
H. Offenses Against The Person 136
1. Homicide 136
2. Assault and Battery 137
3. Assault 138
4. Kidnapping 138
5. Rape 138
6. Indecent Assault and Battery 139
7. Armed Robbery 139

8. Threats 139
9. Mayhem 139
I. Offenses Against Property 140
1. Breaking and Entering 140
2. Larceny 140
3. Criminal Trespass 140
4. Arson 141
5. Destruction of Property 141
J. Drug Offenses 141
K. Firearms Offenses 142
L. Operating a Motor Vehicle While Under the Influence of Alcohol (OUI) 143
1. Breathalyzer Refusal 143
2. Field Sobriety Test Refusal 144
3. Melanie's Law 144
M. Lesser Included Offenses 145
N. Accomplice Liability 145
O. Conspiracy and Attempt 145
P. Defenses and Justifications 146
1. Self-Defense 146
2. Defense of Others 147
3. First Aggressor Evidence 147
4. Criminal Responsibility and Diminished Capacity 147
5. Necessity 148
6. Duress 148
7. Parental Discipline 148

VII. DOMESTIC RELATIONS 149
A. Jurisdiction of the Probate and Family Court; Terminology 149
B. Applicable Rules, Orders, and Guidelines 149
1. Massachusetts Rules of Domestic Relations Procedure 149
2. Supplemental Rules and Uniform Practices of the Probate and Family Court 150
3. Standing Orders of the Probate and Family Court 150
4. Guidelines 150
C. Premarital Matters: Antenuptial Agreements 150
D. Rights Arising out of Non-Marital Cohabitation 151
1. Common Law Marriage 151
2. Contract and Equitable Remedies 151
E. Marriage: Legal Effects 152
1. Definition of Marriage 152
2. Obligation of Support 152
3. Postnuptial Agreements 152
4. Names upon Marriage 152
5. Marital Privilege 153
6. Tenancy by the Entirety 153
7. Rights upon Death 153
8. Capacity to Marry 153
9. Licensing 153
10. Ceremony 154
11. Recognition of Marriage Entered into in Another Jurisdiction 154

F. Annulment 154
1. Grounds 154
2. Void Marriage 155
3. Voidable Marriage 155
4. Impact of Annulment 156
G. Separate Support 156
H. Divorce 156
1. Requirement that Parties Lived Together in Massachusetts; Durational Period 157
3. Venue 157
4. Long-Arm Jurisdiction 158
5. Financial Statement 158
6. Mandatory Self-Disclosure 158
7. Automatic Restraining Order 158
8. Temporary Orders 159
9. Allowance for Fees 159
10. Discovery 160
11. Divorce Grounds in General 160
12. Fault Grounds 160
13. Defenses to Fault Grounds 160
14. Trial 161
15. No-Fault Grounds 161
16. Irretrievable Breakdown of the Marriage by Agreement of the Parties (Mass. G. L. c. 208, §1A) 162
17. Irretrievable Breakdown of the Marriage without Agreement of the Parties (Mass. G. L. c. 208, §1B) 162
18. Judgment of Divorce 163
19. Appeal 163
20. Recognition of Divorce from Another Jurisdiction 163
I. Property Division 163
1. Types of Property Subject to Equitable Distribution 163
2. Interests not subject to equitable distribution 164
3. Factors 165
4. Alimony 165
5. Amount of Order 165
6. General Term Alimony 166
General Term Alimony is defined as "the periodic payment of support to a recipient spouse who is economically dependent." Mass. G. L. c. 208, §48. 166
7. Rehabilitative Alimony 167
8. Reimbursement Alimony 167
9. Transitional Alimony 168
10. Factors 168
11. Deviation and Modification 168
J. Child Support 168
1. General Rules 169
2. Determination of Child Support 169
3. Modification 170
4. Enforcement 170
5. Termination 171
K. Child Custody 171
1. Jurisdiction 171

2. Standard and Forms of Custody 171
L. Visitation 173
1. Standard 173
M. Modification of Custody 173
N. Procedural Issues regarding Custody 174
O. Separation Agreements 174
P. Paternity Actions 175
1. Jurisdiction and Venue 175
2. Voluntary Acknowledgment of Parentage 175
3. Contested Paternity Actions 176
4. Marital Presumption 176
Q. Domestic Abuse 176
1. Jurisdiction and Venue 176
2. Covered Parties 176
3. Remedies 177
4. Time Limits 177
5. Ex Parte Relief 178
6. Police 178
7. Enforcement 178
R. Care and Protection of Children 179
1. Reports of Child Abuse and Neglect 179
2. Removal of Children 179
3. Reasonable Efforts 180
4. Permanency Planning 180
S. Termination of Parental Rights 181
T. Permanency Options 182
1. Adoption 182
2. Guardianship 182

VIII. ESTATES AND WILLS 183
A. Introduction 183
1. Purpose of Estate Administration 183
B. Probate Proceedings 184
1. General Considerations 184
2. Proceedings 188
C. Estate Administration 197
1. General Duties of the Personal Representative 197
D. Intestate Distribution (Mass. G. L. C. 190b, §§2-101 Thru 2-114) 202
1. Introduction (Determination of Heirs-at-Law-Terminology) 202
2. General: Mass. G. L. c. 190B, §2-101 202
3. Surviving Spouse Mass. G. L. c. 190B, §2-102 202
4. Share of Heirs Other than Surviving Spouse Mass. G. L. c. 190B, §2-103 203
E. Drafting Wills 207
1. General 207
2. Intestacy 207
3. Intestate Share 207
4. Intestate Share of Heirs Other than Surviving Spouse 208
F. Execution of Wills 208
1. Variety of Will Forms 208

2. Facts to which Witnesses Attest and inability of Witness to Testify Testator's Authentication and "Presence" 209
3. Formalities Not Required 210
G. Revocation of Wills 213
1. MUPC Revocation 2-507 213
2. Special Circumstances - Revocation by Divorce 213
3. Pre-Marital Will 213
H. Amendments – Revival and Revalidation 214
1. Codicil 214
2. Revival 214
I. Will Provisions 214
1. Contested Wills and Dis-Inheritance Clause 214
2. Bonds and Sureties 215
3. Funeral Arrangements 215
4. Guardians and Conservators 215
J. Charts I & II 217

IX. EVIDENCE 219
A. Introduction: Massachusetts Guide to Evidence 219
B. Judicial Notice 219
C. Relevancy 220
D. Competence, Privileges, and Disqualifications 220
1. Privilege 221
2. Opinion Testimony by Lay Witnesses 224
3. Opinion Testimony by Expert Witnesses 224
E. Character and Impeachment Issues 225
F. Hearsay Issues 226
G. Common Issues in Civil Cases 227
H. Miscellaneous Important Massachusetts Evidentiary Matters 229

X. MASSACHUSETTS LEGAL ETHICS 231
A. Legal Ethics 231
1. Background 231
2. Disciplinary Enforcement 232
3. Participants in the Disciplinary Process 233
4. Summary of Disciplinary Process 235
5. Bar Counsel Investigations 235
6. Recommendation by Bar Counsel 236
7. Disciplinary Hearings 238
8. Respondent's Answer 238
9. Post-Hearing Proceedings 239
B. Massachusetts Rules of Professional Conduct C. 1.5: Fees 244
1. Overview 244
2. Unique Provisions of the Massachusetts Rule 245
3. Conclusion 250
C. Mass. R. Prof. C. 1.6: Confidentiality of Information 251
1. Overview 251
2. Definition of Information 251

3. Disclosure 251
D. Mass. R. Prof. C. 1.8, 1.9: Conflicts of Interest 253
1. Overview 253
E. Mass. R. Prof. C. 1.10: Imputed Disqualification 254
1. Overview 254
2. Screening in Massachusetts (Mass. R. Prof. C. 1.10(d) and (e)) 255
3. Conclusion 256
F. Mass. R. Prof. C. 1.14: Client with Diminished Capacity 257
1. Overview 257
2. Unique Provisions of Massachusetts Rule 257
3. Conclusion 259
G. Mass. R. Prof. C. 1.15: Safekeeping Property 259
1. Overview 259
2. Definitions 260
3. Operational Requirements for Trust Accounts 264
4. Required Accounts and Records 264
H. Mass. R. Prof. C. 1.15A: Client Files 267
1. Overview 267
2. Client's Entitlement to File 267
3. File Retention 268
4. Electronic Records 269
I. Mass. R. Prof. C. 3.4: Fairness to Opposing Party and Counsel 269
1. Overview 269
2. Mass. R. Prof. C. 3.4(g) 270
3. Mass. R. Prof. C. 3.4(h) 270
4. Mass. R. Prof. C. 3.4(i) 270
5. Unique Provisions of Massachusetts Rule 271
J. Mass. R. Prof. C. 3.5(c): Communication With Jurors 272
1. Overview 272
2. Unique Provisions of Massachusetts Rule 272
3. Comment [3] 273
K. Mass. R. Prof. C. 3.8(d): Special responsibilities of a prosecutor 274
1. Overview 274
2. Comment [3A] 275
3. Conclusion 275
L. Mass R. Prof. C. 6.1: Voluntary *Pro Bono Publico* Service 276
1. Overview 276
M. Mass. R. Prof. C. 8.4: Misconduct 276
1. Overview 276
Consistent with paragraph (g), SJC Rule 4:01, §3 further specifies that the 277
N. Online Resources 278
1. Board of Bar Overseers 278
2. Clients' Security Board (SCB) 278
3. Lawyers Concerned for Lawyers (LCL) 278
4. Law Office Management Assistance Program (LOMAP) 278
5. IOLTA Committee 278
6. Supreme Judicial Court and Appeals Court of Massachusetts 278
7. Massachusetts Bar Association (includes MBA ethics opinions) 278

I. ACCESS TO JUSTICE

A. Overview

Massachusetts is committed to advancing efforts to ensure equal access to legal advice and assistance for low- and moderate-income people. The Supreme Judicial Court has established an Access to Justice Commission, massa2j.org/a2j; and a Standing Committee on Pro Bono Legal Services, mass.gov/courts/court-info/commissions-and-committees/standing-committee-pro-bono-legal-services-gen.html. The Massachusetts Legal Assistance Corporation, the Massachusetts bar, the state legislature, and local charities and foundations raise funds that, each year, more than quadruple the annual funding allocated for Massachusetts by the federal Legal Services Corporation. The Massachusetts bar provides pro bono assistance to thousands of people every year, and many law school clinics help hundreds more. Nevertheless, resources remain insufficient to meet the legal needs of low- and moderate-income people.

The Massachusetts courts and the Board of Bar Overseers have amended procedural and ethical rules to support innovative approaches to increasing access. Knowledge of this ever evolving ethical and procedural framework will enable the newest members of the Massachusetts bar to make service to those in need, and to support the funding and innovation needed to assure access for all, a bedrock commitment of their life in the profession.

B. Related Rules Of Professional Conduct

Supreme Judicial Court (SJC) Rule 3:07 sets out the Rules of Professional Conduct governing the practice of law in the Commonwealth. The Massachusetts Rules are patterned on the American Bar Association's (ABA) Model Rules of Professional Conduct (the "Rules"). Therefore, advisory opinions issued through the ABA Center on Professional Responsibility are relevant and offer guidance when interpreting and applying the Massachusetts Rules of Professional Conduct. americanbar.org/groups/professional_responsibility/publications/ethicsopinions.html

The Rules are structured as axiomatic statements elaborated by commentary. The Rules establish specific requirements and prohibitions, but in many areas do not set bright lines. In recognition of the wide array of contexts and circumstances in which attorneys advise, represent, and speak for their clients, the Rules offer guidance to attorneys when they must exercise discretion consistent with the broad values that inform the bar's ethics. The Rules are available at: mass.gov/courts/case-legal-res/rules-of-court/sjc/sjc307.html

The following Rules implicate or speak directly to access to legal advice and assistance. The Rules offer opportunities to lower costs by contracting for specific assistance that, while less than representation from the beginning to the end of a matter, meet important client needs. Other rules speak broadly to

fairness in dealing with opponents, whether or not represented by counsel. A represented opposing party may too have limited resources and so be unable to afford a resolution on the merits.

1. Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

   Sub-part (c) of this Rule permits attorneys to limit representation to specific tasks, *provided* that the arrangement is "reasonable under the circumstances" and the client gives "informed consent." Informed consent is defined in Rule 1.0(f). The Commentary, in parts 6, 7 and 8 under "Agreements Limiting Scope of Representation," explicitly permits clients and lawyers to agree on representation on some, but not all, aspects of a legal matter. The agreement need not be in writing, but specification of the tasks the lawyer has taken on and the cost or rate to be charged is "generally required" to be in writing and, in any case, is the better practice. Presumably an e-mail or a hard copy would suffice. The commentary gives examples of the reasons a client might want to contract for limited representation. For example, the client might have limited goals, or the client might decide the costs of further representation exceed the gains that representation might secure.

   In professional journals and commentary, Limited Scope Representation is referred to as "Discrete Task Representation" or "Unbundled Legal Services," as well as "Limited Scope." Limited assistance or "unbundled" legal services is closely related to the increase in court-based self-help centers since the mid-1990s. Such centers are now extensive in many state court systems, including the Massachusetts courts. See mass.gov/topics/courts-self-help-center. Limited help from an attorney is more likely to be effective when courts have simplified forms and procedures, and have staff available to support self-represented parties. See Rule 6.5 *infra.*

2. Rule 3.1: Meritorious Claims; Rule 3.2: Expediting Litigation; Rule 3.3: Candor to Tribunal; and Rule 4.1: Truthfulness in Statements to Others

   These Rules address issues of attorney fairness and honesty in legal proceedings, communicating that attorneys should exercise care in pressing procedural and other potentially "offensive" tactical advantages. Fairness and honesty are ideals that cannot be reduced – except at the extremes – to bright line rules. The adversary system generally does not require disclosure of strategies, or disclosure (outside of discovery) of facts helpful to an opponent. The adversary system *does*, however, assume "equality of arms." When an opposing party is pro se or obviously has limited resources, an attorney for a represented party has the discretion to exercise care in pursuing tactical advantages and strategies that are of marginal value, but that impose significant cost or time burdens on an

opposing party. Expectations of professionalism and civility require that attorneys use courtesy and consideration in practice. These values are particularly important when an opposing party is both unrepresented and unfamiliar with legal processes and proceedings.

3. Rule 4.3: Dealing with Unrepresented Persons

When an opposing party is not represented, Rule 4.3 sets a bright line prohibition. The lawyer may not ". . . state or imply that the lawyer is disinterested." Further, when ". . .the lawyer knows, or reasonably should know, that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer *shall* make reasonable efforts to correct the misunderstanding" (emphasis added)." The comment goes further, "In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person."

Aside from clarifying adverse interests, an attorney may not offer any advice to an unrepresented party except to seek legal help. This ethical rule has been in place for decades. Advice to retain counsel is most often hollow, given that unrepresented parties typically lack the means to pay for legal help, and lack the knowledge of and experience with lawyers that would enable them to assess what type or amount of help needed. In Massachusetts, advice to an unrepresented party to get legal help may – and should – include information on court-based self-help services.

Massachusetts courts provide self-help services. An unrepresented party might get help with forms; information via text, online chat, or e-mail. There are staffed self-help service centers in many courts and, in many of the busiest trial courts, a "lawyer-for-the-day" may be available to answer questions and offer limited advice. mass.gov/topics/courts-self-help-center. Lawyers should be familiar with self-help resources, not only as a resource for an unrepresented opposing party, but as an option for a prospective client or advice seeker that the lawyer is unable to assist.

4. Rule 6.1: Voluntary Pro Bono Publico Service

Rule 6.1 creates an ethical responsibility for all lawyers admitted to the bar in Massachusetts to provide, every year, at least 25 hours of legal service to persons of limited means. The duty is aspirational, rather than mandatory, so a lawyer will not be disciplined for failure to meet this aspirational goal. The ABA Model Rule recommends that lawyers provide 50 hours of pro bono service each year. The hours may include assistance to organizations that advocate for increased legal assistance or policies that benefit people of limited means. Massachusetts asks for fewer hours, all devoted to services for low- and moderate-income people. Pro bono services may be provided directly to individuals or to not-for-

profit organizations that provide legal services to low and moderate income people.

Massachusetts permits an annual financial contribution in lieu of service. Section (b) of the Rule specifies an annual contribution of 1% of net professional income – but no less than $250 – as an alternative to direct service.

The Rule's extensive commentary makes clear that the central purpose of pro bono service is to help people who cannot afford the legal assistance they need. Comment [3] sets out the types of clients and services that meet the goal of Rule 6.1. Comment [1] recognizes that pro bono hours may vary from year to year, and that the goal of the Rule is for attorneys to average at least 25 hours per year of pro bono service over the course of a legal career. Lawyers who practice in partnerships or firms can meet the obligation collectively. That is, the requirement is met if the firm's total annual hours average at least 25 hours per attorney in the practice. Part [4] follows the ABA Model Rule by specifying that service is pro bono only when a lawyer undertakes the matter with no expectation of compensation.

Comment [6] makes clear that corporate in-house attorneys should also average 25 pro bono hours a year. The services identified in Comment [3] are sufficiently broad to afford corporate counsel opportunities to meet the pro bono requirement through service but, where direct service is not feasible, through an annual donations consistent with the Rule.

Attorneys are encouraged to contribute more than the annual minimum 25 pro bono hours. Hours above the minimum may include the following:

a) Representing clients of limited means on a reduced fee basis;

b) Completing work taken on a sliding fee basis where the client becomes unable to pay the full fee; and

c) Assisting civic and charitable organizations whose primary purpose is to meet the legal service needs of low- and moderate-income people.

5. Rule 6.2 Accepting Appointments

Rule 6.2 sets a relatively high bar for refusing to accept a court appointment to represent an indigent party. The Rule defines pro bono service to include accepting a "fair share" of "unpopular matters, or indigent or unpopular clients."

In Comment [1], the Rule defines "good cause" for refusing an appointment as follows: lacking competence to handle a case; a conflict

such as a cause or client so repugnant as to impair relations with the client; or an unreasonable or excessive burden, including an excessive financial burden.

6. Rule 6.5: Non-Profit and Court-Annexed Limited Legal Services Programs

On site advice by pro bono "lawyers-of-the-day," and legal aid lawyers staffing advice tables to aid, for example, unrepresented debtors facing garnishment or tenants facing eviction, are now staples in the Massachusetts courts and have proven durable.

Staffing advice centers are an effective way for many lawyers to meet their pro bono obligations. Attorneys can rely on a specific time commitment, and years of experience with "unbundled services" has led to growing support from state court judges and administrators. The emergence of a strong "customer service" ethos in court self-help systems, and a growing interest in empirical assessment informs of which *un*represented parties may be effective *self*-represented parties.

Massachusetts Rule 6.5 encourages attorney participation in court-annexed limited assistance programs by relaxing conflict rules that assume that all parties have attorneys at every stage of a legal matter. The Massachusetts Rule is virtually identical to ABA Model Rule 6.5. It defines a path for ethical and effective participation by relieving participating attorneys of conflict checking obligations that are not feasible in on-site limited assistance efforts. Specifically, Conflict Rule 1.5(b) does not apply to participating attorneys and Rules 1.7, 1.9, and 1.10 do not apply unless the participating attorney knows of a specific conflict.

7. Supreme Judicial Court Rule 3:03: Legal Assistance to the Commonwealth and to Indigent Criminal Defendants and to Indigent Parties in Civil Proceedings

Legal services offices, public defenders (CPCS), government agencies and government counsel offices may cooperate with law school clinical programs or develop law student internship programs. The "student practice rule" offers valuable experience to law students and adds resources to legal services and defender programs, and to government counsel offices. Many students participate for credit in connection with law school clinical programs. Once qualified as required by the Rule (see below) a student may continue to practice until the date of the first bar exam following the student's graduation from law school. If the student passes the bar exam and meets all other admission requirements, he or she may continue for an additional six months or until admitted, whichever comes first.

SJC Rule 3.03 permits practice by law students in an accredited law school in Massachusetts. To be eligible, students:

(a) Must have completed the “next to last year of law school;"

(b) Must have completed or be concurrently enrolled in a course in evidence or trial practice;

(c) Must have a letter of approval from the Dean of their law school; and

(d) Must be under the supervision of an attorney admitted to the Massachusetts bar.

Qualified students, under the general supervision of an agency, program or government attorney, may appear as of right as follows:

- Students may also appear on behalf of the Commonwealth (or a subdivision of the Commonwealth) in any division of the district court, probate and family court, juvenile court or housing court, or the Boston municipal court, or in the Supreme Judicial Court or the Appeals Court. The student must be under the general supervision of a district or agency attorney, agency counsel or city solicitor, town counsel and similar. Students qualified to appear as provided under this Rule may not receive any compensation, though they may receive academic credit through their law school’s clinical program.
- Students may appear on behalf of indigent defendants in any division of the district court, juvenile or housing court, the Boston municipal court and the Supreme Judicial Court and the Appeals Court, under the general supervision of a member of the bar assigned to the Committee for Public Counsel Services (the "CPCS"), or employed by a non-profit legal aid, legal assistance or defense or a law school clinical instruction program.
- Students may appear on behalf of indigent parties in civil proceedings in any district court, probate and family court, juvenile and housing court, or in the Boston municipal court, provided the student is under the general supervision of a member of the bar of the Commonwealth assigned by the CPCS or employed by a non-profit program of legal aid, legal assistance or defense, or a law school clinical program.
- Law students who have completed their first year of law school – “2Ls” – who are certified to practice as required for “3Ls,” and who are enrolled in a law school clinical program, may appear in civil matters. This offers the possibility of two-year internships for the most interested students which will result in higher value

contributions to legal aid, defender, pro bono and government lawyer practice.

Rule 3.03 further provides that "general supervision" does not require the attorney to be present with the student at every appearance or proceeding, so a more experienced student may shoulder many tasks and routine appearances that the supervising attorney would otherwise need to handle.

The Rule offers students opportunities for experience in legal aid, public defender and government agency practice. Participating programs and agencies have opportunities to train interns who might be recruited to their practices. Private attorneys who have active pro bono practices in affiliation with the Volunteer Lawyer's Project or other legal services and public defender programs in the Commonwealth, could recruit student interns to assist on pro bono cases.

C. Procedural Due Process, Fair Hearings and Administrative Procedures

1. Federal law

In a landmark case involving the termination of welfare benefits, Goldberg v. Kelly, 397 U.S. 54 (1970), the Supreme Court first recognized due process rights for statutory entitlements. The Court determined that, for those eligible to receive statutory entitlements, there is a property interest, and the termination of those entitlements involves state action. Such action gives rise to the need for due process protections. This assessment evolved into two questions: (1) whether there is a property or liberty interest protected by the Constitution; and (2) what process is due in the termination of such rights. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Different processes may be required depending on the nature of the rights at issue. e.g. Santosky v. Kramer, 455 U.S. 745 (1982) (Parental rights are fundamental and State may not terminate them without satisfying a burden of proof of at least clear and convincing evidence.)

The Supreme Court refined its approach to procedural due process in Matthews v. Eldridge, 424 U.S. 319 (1976). There, the Court decided that an evidentiary hearing was not required before the termination of social security disability benefits. Matthews v. Eldridge, 424 U.S. 319, 334-335 (1976). The Court set out a balancing test to determine the appropriate process due, setting forth the following three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens from the additional or substitute procedural requirements. *Id.* The Supreme Court in Matthews noted that the government's pre-termination review, which was completed through

documents from the plaintiff and medical professionals, was adequate, and that the plaintiff's due process rights would be protected in a subsequent administrative hearing.

2. Massachusetts Law

Massachusetts courts generally apply the federal framework to decide questions concerning procedural due process. See Doe v. Sex Offender Registry Board, 473 Mass. 297, 311-314 (2015) (applying Matthews v. Eldridge to determine a higher standard of proof in certain Sex Offender Registry Board proceedings). Further, once the Court recognizes that there is a constitutional right to a hearing concerning agency action, the Massachusetts Administrative Procedures Act sets out the requirements for procedural due process protections. See Mass. G. L. c. 30A, §1(1) and §§10, 11, 12, and 14.0.

Under Chapter 30A, state agencies may take action to terminate benefits, or otherwise enforce the law, based on a paper review or on a pre-determination hearing, which may be appealable. Chapter 30A sets out requirements for notice, opportunity to present evidence, and to appeal such decisions, as follows.

a) Section 10 governs notice of the right to request a hearing, to settle, to limit the issues to be heard, the rights of intervenors, and the rights of appeal.

b) Section 11 sets out specific requirements for the adjudicatory hearing, including:

(1) The right to notice of the issues to be heard sufficiently in advance to allow the parties to prepare;

(2) The use of the substantial evidence standard (defined in Mass. G. L. c. 30A, §1 as "such evidence as a reasonable mind might accept as adequate to support a conclusion") and the rules of privilege, noting that rules of evidence need not apply;

(3) The right to call and examine witnesses, to present evidence, to cross-examine witnesses and to submit rebuttal evidence;

(4) The limitation of the decision to the evidence in the record and a record of the proceedings, though the agency may take notice of general technical or scientific facts within their specialized knowledge;

(5) Procedures when all of the decision-makers have not heard or read the evidence; and

(6) Requirements for the decision to list a statement of reasons on every issue of fact or law necessary for the decision and notify parties of the decision, including the rights to review or appeal, and the time limits for such.

c) Section 12 provides rules concerning the issuance of agency subpoenas of documents or witnesses, and enforcement of subpoenas.

d) Section 14 sets out the procedures and standards for judicial review of the administrative record and decision of the agency. The review is generally confined to the administrative record and no other evidence is taken by the court unless a claim of procedural irregularity is made, or other reasons for additional evidence are provided. The grounds for review include that the agency decision is:

(1) in violation of constitutional provisions;

(2) in excess of the statutory authority or jurisdiction of the agency;

(3) based upon an error of law;

(4) made upon unlawful procedure;

(5) unsupported by substantial evidence;

(6) unwarranted by facts found by the court on the record as submitted or as amplified under §14(6) in those instances where the court is constitutionally required to make independent findings of fact; and

(7) arbitrary or capricious, an abuse of discretion or otherwise not in accordance with law.

e) Regulations at 801 CMR 1.01 and 1.02 set out the procedures for Formal and Informal Fair Hearings before state agencies.

D. Right to Counsel

As described above, Massachusetts has recognized a right to counsel in various non-criminal proceedings. Where the rights at issue invoke an important liberty interest (such as civil commitment) or a fundamental right (such as the termination of parental rights), the Court has recognized the right to court-ordered

representation for indigent people at state expense. Massachusetts has not yet identified a right to counsel for representation concerning basic human needs, like housing.

E. Due Process and Mental Health

1. Statutory Overview

In 1986, the Massachusetts statutory scheme concerning the treatment and commitment of persons with mental illness and persons with developmental disabilities was repealed and replaced by two statutes: Mass. G. L. c. 123, "Mental Health," and Mass. G. L. c. 123B "Mental Retardation."

a) Likelihood of Serious Harm

A central focus of this scheme appears in Mass. G. L. 123, §1, in the definition for the existence of a "likelihood of serious harm." As discussed below, where there is a finding of such a likelihood concerning a person, the court may intervene through civil commitment, retention or court-ordered treatment. Likelihood of serious harm" is found in three circumstances:

(1) a substantial risk of physical harm to the person himself as manifested by evidence of, threats of, or attempts at, suicide or serious bodily harm;

(2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or

(3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community. *Id.*

The law concerning substantial risk of harm has two purposes: (1) to protect the person and the public; and (2) to rehabilitate the person with the "least burdensome or oppressive controls over the individual." Commonwealth v. Nassar, 380 Mass. 908, 918-919 (1980). The law also provides for restraint of the person and for involuntary commitment.

b) Three-day Emergency Involuntary Admission under Chapter 123, §12(a)

Pursuant to Mass. G. L. c. 123, §12(a), short-term, emergency restraint or hospitalization is possible. This procedure allows certain authorized professionals (such as authorized physicians/psychiatrists, qualified psychiatric nurses, psychologists, police, etc.) to restrain or authorize restraint and apply for three-day admission to a public or private mental health treatment facility. This provision requires an immediate psychiatric exam performed by a physician with specific statutory authority to admit to the facility. This procedure applies if the original physician, nurse, psychologist or police officer reasonably believes that a failure to hospitalize creates a likelihood of serious harm by reason of mental illness.

Mass. G. L. c. 123, §§7, 8 and 12(b), set out procedures for emergency hearing on an involuntary admission to a mental health facility. Once the person is admitted to a facility, §12(b) allows for appointment of an attorney from the CPCS (i.e., a public defender). The person committed (or their attorney) may request an emergency hearing in the district court and the hearing should be held on the day of the request or the next business day. The person shall be discharged after three days unless the superintendent applies for a commitment under Mass. G. L. c. 123, §§7 and 8, or the person remains on a voluntary basis.

To commit or retain the person beyond the three-day emergency involuntary admission, the superintendent of a facility may petition the district court or the juvenile court for commitment and retention to the facility when: (1) the person is mentally ill; <u>and</u> (2) the discharge of the person would create a likelihood of serious harm by reason of mental illness. There are requirements for notice of a petition and the date of hearing to the person committed or nearest relative or guardian. The hearing is to be commenced within five days of the petition's filing, unless a delay is requested by the person committed or his or her counsel. Under other circumstances (including competence to stand trial, periods of observation, hospitalization of mentally ill prisoners, and other circumstances) a hearing must be commenced within 14 days of the filing of the petition, unless a delay is requested.

See generally, Mass. G. L. c. 123, §§7, 8, 12; Minehan and Kantrowitz, <u>Mental Health Law</u>, 53 Mass. Practice Series, Chapter 7 (2013).

c) Voluntary and Conditional Voluntary Admission

In addition to involuntary admissions, a person may be admitted to a mental health facility on a "voluntary" or a "conditional voluntary" basis. Mass. G. L. c. 123, §§10, 11; 104 CMR 27.09. A voluntary admission requires that the person understand that the admission is for treatment and that the person may seek to leave at any time. A conditional voluntary admission allows for the voluntary admission with the condition that discharge will occur after a psychiatric evaluation. This allows the facility to file a petition for commitment in the event that a discharge would pose a risk of harm to the individual or to another. Mass. G. L. c. 123, §§7, 8. Minehan and Kantrowitz, Mental Health Law, 53 Mass. Practice Series, Chapter 6 (2013).

d) Civil Commitment, Further Retention or Medical Treatment (including antipsychotic medication)

Under this scheme, district, Boston municipal, and juvenile courts may issue orders concerning civil commitment, further retention of a person in commitment, or medical treatment, including treatment antipsychotic medication. Chapter 123, §5 mandates certain rights and duties for these three types of proceedings concerning a person, including:

1) the right to be represented by counsel (and to a court-appointed attorney, and the right to refuse appointment of counsel);

2) the right to present independent testimony;

3) the court may provide an independent medical examination for indigent persons upon request;

4) adequate time to prepare for the hearing, expedited scheduling of the hearing, or delay of the hearing if requested;

5) the requirement that the court furnish notice of the time and place of hearing to the Department of Mental Health, the person, his or her attorney, and his or her nearest relative or guardian; and

6) the holding of a hearing at a facility or hospital.

e) Commitment and Retention

After the hearing, a district, Boston municipal, or juvenile court may order commitment of a person, or renew/extend a commitment order, if the court finds both that: (a) the person is mentally ill; and (b) the discharge of the person would create a likelihood of serious harm. The hearing may be waived by the person. Mass. G. L. c. 123, §8(a). The court must issue its decision within 10 days of the completion of the hearing. There are provisions for extending this deadline. *Id. §8(c)*. Given the potential loss of liberty, the standard of proof for civil commitment is the highest, proof beyond a reasonable doubt. Superintendent of Worcester v. Hagberg, 374 Mass. 271, 275-277 (1978).

f) Antipsychotic Medication

When a patient is the subject of a commitment order or a petition to commit under Mass. G. L. c. 123, §§7, 8,15, 16, or 18, the superintendent of a facility or the medical director of Bridgewater State Hospital may further petition the district, Boston municipal, or juvenile court concerning proposed medical treatment, including extraordinary treatment with antipsychotic medication. The petitioner must request that the court: (a) adjudicate the patient as lacking competence to make informed decisions regarding proposed medical treatment; (b) authorize by adjudication of substituted judgment relative to extraordinary treatment, including treatment with antipsychotic medication; and (c) authorize other necessary medical treatment, as needed, for the mental illness or other medical needs. Mass. G. L. c. 123, §8B(a). A substituted judgment standard allows a judge to determine what the patient would decide if he or she were competent to make the decision, rather than what the doctor or others believe is in the patient's best interests. In re Guardianship of Roe, Third, 383 Mass. 415, 443-452 (1981). The standard of proof for involuntary administration of antipsychotic medication is also proof beyond a reasonable doubt. *Id.*

Under Mass. G. L. c. 123, §8B(c), upon receipt of a petition, the court must notify the person and his nearest relative or guardian and provide the date of the hearing on the petition. Unless the person or his attorney requests a delay, the hearing will start within 14 days of the filing of the petition. Procedures provide for the scheduling of combined hearings where petitions for both commitment or retention and medical treatment are filed at the same time pursuant to Mass. G. L. c. 123, §8B.

g) Treatment Plan after Hearing

After a hearing on a petition regarding medical treatment, including treatment with antipsychotic medication, and before authorizing medical treatment, a court must:

1) make a finding that the person lacks the competence to make informed decisions regarding the proposed treatment; and

2) using the substituted judgment standard, find that the patient would accept such medication and treatment if competent; and

3) approve and authorize a written treatment plan. Mass. G. L. c. 123, §8B(d).

A substituted judgment is based on factors including the patient's expressed preferences on treatment, the patient's religious beliefs, the effect of the treatment decision on the family, the risk of adverse side effects, and the prognosis with and without treatment. Guardianship of Brandon, 424 Mass. 482, 487 (1997); Rogers v. Commissioner of Dept. of Mental Health, 390 Mass. 489, 505-507 (1983).

Under Mass. G. L. c. 123, §8B(f), treatment plans expire with the expiration of the underlying commitment order and can be extended with the underlying commitment order and during the pendency of an order. A party may petition for a modification of the treatment plan. The court may appoint a treatment monitor for the antipsychotic medication treatment plan. If a monitor is not available, the court must monitor the plan to be sure that it is being followed specifically within the bounds of the court order. Rogers v. Commissioner of Dept. of Mental Health, 390 Mass. 489, 504, 513 (1983).

The probate and family court is also authorized to issue orders for medical treatment, including treatment with antipsychotic medication, after a finding of lack of competence. These orders are issued in conjunction with a guardianship, where the guardian is responsible to monitor the treatment plan. Treatment plans ordered by the probate and family court remain in effect for the term ordered by the court, regardless of the status of a commitment order issued by another court.

h) Privileges

Where a patient has been informed that communications to a doctor or other treating person are to be used for the purpose of obtaining treatment, those communications are not privileged. Commonwealth v. Lamb, 365 Mass. 265, 267-268 (1974); In re Adoption of Saul, 60 Mass. App. Court 546, 551 (2004).

F. Landlord - Tenant

1. Evictions

The legal process to recover possession of rental and other real property (known as "summary process") is governed by Mass. G. L. c. 239, et seq. This statutory scheme outlawed self-help in taking possession of rental property and provides the scheme for recovering possession through the court system.

a) Massachusetts Overview

Evictions from residential housing are governed by the tenancy agreement between the parties, statutes and common law. Four types of tenancies are recognized in Massachusetts: (1) tenancy under a written lease; (2) tenancy at will; (3) tenancy at sufferance; and (4) tenancy by regulation. The type of tenancy affects the process by which various types of evictions can occur.

(1) Tenancy under a Written Lease

The landlord and the tenant have executed a written agreement that states the rent and length of the tenancy; the dates of "commencement and termination must be certain." The lease may be for a fixed period or self-extending. Farris v. Hershfield, 325 Mass. 176, 177 (1950), Marchesi v. Brabant, 338 Mass. 790, 791 (1959).

(2) Tenancy at Will (Mass. G. L. c. 183, §3)

The landlord and tenant have agreed to a tenancy term from month-to-month with no agreement for a longer term. The tenant occupies the premises with the landlord's permission. The agreement may be oral or written, stating that the term is from month-to-month. This type of tenancy may arise in a variety of circumstances, including from an expired lease where the landlord accepts rent the next time it is due without reservation of rights, or where a lease is terminated by a Notice to Quit and the landlord allows the tenant to remain after the expiration of the Notice to Quit.

(3) Tenancy at Sufferance

This tenancy arises where the tenant has remained in an apartment after the end of the tenancy without permission from the landlord. This can occur after the lease expires or on the date indicated in a Notice to Quit. The tenant has a duty to pay for use and occupancy or rent, and has rights similar to those of a tenant at will. These include the rights to enforce the sanitary code and to sue the landlord for negligence. See Mass. G. L. c. 186, §3, Brown v. Guerrier, 390 Mass. 631, 633, (1983); King v. G&M Realty, 373 Mass. 658, 663-664, (1977).

(4) Tenancy by Regulation

This type of tenancy is for those who occupy public or subsidized housing or mobile homes. In addition to the rights involved above, they may have additional protections by regulation and statute. Spence v. O'Brien, 15 Mass. App. Ct. 489, 496 (1983), rev. den. 389 Mass. 1102 (1983).

See generally Duke, ed., Mass. Law Reform Institute, Legal Tactics: Tenants' Rights in Massachusetts, 8th Edition, 2017.

b) Terminating the Tenancy: Notice to Quit, Lease Terms, or Illegal Acts

Tenants under a lease may be evicted at the end of the lease term, but landlords may also evict tenants before that time for cause; for lease violations, for the failure to pay rent under Mass. G. L. c. 186, §11, or for illegal activity in the apartment under Mass. G. L. c. 139, §19.

In most cases, the first step in the eviction process is for the landlord to deliver a written Notice to Quit to the tenant.

The Notice to Quit is intended to terminate the tenancy and typically specifies the date upon which the tenancy will terminate. Though such notices usually indicate that the tenant should "quit" and "deliver up" the premises by a certain date, the tenant is not required to move out by that date.

This notice is the necessary predicate to invoke court jurisdiction for many cases under Mass. G. L. c. 239, §1. The landlord must prove that the Notice to Quit was actually delivered to the tenant (or spouse). Ashkenazy v. O'Neill, 267 Mass. 143, 145 (1929). An exception to this requirement is that a Notice to Quit is not required for evictions from criminal activity, such as drug dealing, prostitution, etc. Under such circumstances, the landlord may go

directly to court for an eviction proceeding under Mass. G. L. c. 139, §19, without first serving a Notice to Quit.

There are two types of Notices to Quit, 14-day and 30-day. The choice of which to use depends upon the ground for terminating the tenancy. Examples of possible grounds include non-payment of rent, breach of the lease, or termination of the tenancy for no specific reason.

Fourteen Day Notice for Non-Payment of Rent and Right to Cure: For nonpayment of rent, a 14-day notice is required (Mass. G. L. c. 186, §§11, 12). If the tenant does not have a lease, the notice must include specific language stating that the tenant has a right to cure the non-payment as discussed below. If there is a lease, the 14-day notice need not say this.

In either circumstance, the tenant often has a right to cure by paying the rent owed within certain time frames.

Right to Cure for a Tenancy at Will: For nonpayment of rent in a Tenancy at Will under Mass. G. L. c. 186, §12, the Notice to Quit must contain specific language indicating that the time to pay the rent due with interests and costs is within 10 days of receipt of the notice, unless there was another Notice to Quit for non-payment in the previous 12 months. In the event the landlord accepts the rent after delivering the Notice to Quit, this could create a new Tenancy at Will. However, if the landlord notifies the tenant that the money is for "use and occupancy" and reserves the right to evict, acceptance of the money does not create a new Tenancy at Will. Mastrullo v. Ryan, 328 Mass. 621, 623-624 (1952).

Right to Cure and Tenancy under a Lease: For nonpayment of rent in a tenancy under a lease, the right to cure extends until the date the answer is due. Mass. G. L. c. 186, §11.

Delayed Benefits Checks: Under a written lease or a Tenancy at Will, when the failure to pay rent arises from a late public benefit check, the tenant may take certain steps to pay the amount owed, with interest and costs and, if done, the court will treat the tenancy as not having been terminated and the eviction case will be dismissed. Mass. G. L. c. 186, §11, 12.

c) Other types of Notices to Quit

Notice to Quit for termination of a Written Lease for reasons other than non-payment of rent: The lease should state the grounds and steps to be taken for terminating the tenancy. If the landlord wants to evict before the end of the lease term, most leases require a

Notice to Quit before going to court. The amount of time for this notice may differ between leases, but in most instances the landlord must deliver this notice before going to court. If the termination is at the end of the lease term and there is no renewal, the landlord may go immediately to court to evict without a Notice to Quit. Mass. G. L. c. 239, §1.

Notice to Quit for termination of a Tenancy at Will for reasons besides the failure to pay rent: If the termination is for no reason or for a reason besides the failure to pay rent, the landlord must give either a "30-day" or a "rental period" Notice to Quit. Mass. G. L. c. 186, §12. The tenancy must terminate on the day on which rent is due (or the last day of the month in a tenancy whose term is from month-to-month if the agreement does not state when it is due.) Connors v. Wick, 317 Mass. 628, 631 (1945). It should be delivered a full rental period before the next rent day to provide the full notice. Mass. G. L. c. 186, §12 U-DryvIt Auto Rental v. Shaw, 319 Mass. 684, 686 (1946).

Tenancy at Sufferance: The landlord may go to court to start an eviction process without a Notice to Quit.

Tenancy by Regulation: State and federal government programs provide subsidized housing by which tenants receive reduced rent if they meet low income thresholds. These include public housing through local public housing authorities; Section 8 housing assistance vouchers for low income tenants funded through the U.S. Department of Housing and Urban Development; and Section 8 assistance through the "project based" subsidies and various state-aided voucher programs.

It is important to carefully review Notices to Quit for such programs. Most are governed by federal or state regulations. Depending upon the circumstance, many of these programs require the grounds for termination, specific language to be contained in the Notice, and delivery of the Notice to Quit to the agency or housing authority, as well as the tenant. The failure to comply with these rules may mean that the landlord did not properly terminate the tenancy and can result in the dismissal of the eviction case.

d) Illegal Attempts at Eviction

The law prohibits landlords from evicting tenants under certain circumstances.

(1) Self-help eviction without court permission: A landlord may not take back possession of housing without a court document granting the right to possession (i.e., the landlord may not move belongings out, change locks, shut off utilities or interfere with use of the housing). Mass. G. L. c. 186, §§14, 15F, c. 184, §18 and the Attorney General Regulations at 940 CMR 3.17(5).

(2) Retaliatory eviction after the tenant has exercised a right protected by the law: Examples of these rights include: (1) giving written notice of violations of the state sanitary code to the landlord; (2) reporting an apartment to health inspectors; (3) withholding rent for poor conditions in the apartment under Mass. G. L. c. 239, §8A; (4) taking the landlord to court to enforce rights; and (5) organizing or joining a tenants organization. Mass. G. L. c. 186, §18, c. 239, §2A.

(3) Discriminatory evictions: Eviction based on race, color, religion, national origin, sex, gender identity, sexual orientation, age, ancestry, genetic information, marital status, handicap, or veteran status, rental subsidy or public assistance or has a child and lead paint on the premises under Mass. G. L. c. 151B, §4, ¶¶ 6, 7, 7A, 10, 11.

e) Overview Procedure for Eviction

Massachusetts Trial Court Rule I provides an expedited process for adjudicating evictions, known as the Uniform Summary Process Rules ("USPR"). These rules cover evictions in housing and district court. Where these rules are silent on a particular procedural question, the Massachusetts Rules of Civil Procedure generally apply. USPR 1. The USPR provide expedited court deadlines, which are based on the Monday "Entry Date," (see USPR 2 the date the uniform summary process summons and complaint usually with the Notice to Quit are filed with the court), the answer date (USPR 3 the Monday after the Entry date), the original trial date (USPR 2(c) the second Thursday after the Entry date), and the expedited deadlines to serve and respond to discovery which is also to be served and filed on the answer date (USPR 7). Serving and filing discovery with the answer postpones the trial date for two weeks after the original trial date and this new trial date is known as the rescheduled trial date (USPR 7).

(1) Answers with affirmative defenses and counterclaims (USPR 3 and 5).

Affirmative defenses include:

(a) Improper termination of the tenancy including:

(i) An invalid Notice to Quit based on the lease, statute or regulation;

(ii) The landlord accepts rent after delivering the Notice to Quit without reserving rights;

(iii) The Notice to Quit is based on a failure to pay a rent increase that the tenant has not agreed to pay. Williams v. Sedar, 306 Mass. 134, 137 (1940).

(b) Procedural errors by the landlord in bringing the case to court: Examples include:

(i) The failure to properly serve the summons and complaint;

(ii) Prematurely starting the court case before the Notice to Quit has expired, etc.

(c) Poor Conditions

For most tenants (but not residents of a motel, hotel or lodging house for less than 3 months) who are being evicted for no fault or for non-payment of rent, uninhabitable conditions in the apartment may be a defense to eviction. Uninhabitable conditions may include, among other things, problems with plumbing, heat, electrical outlets, ventilation, locks, etc. This may occur when, for example, the conditions in the apartment violate the State Sanitary Code or the Warranty of Habitability, when the landlord knew about the conditions, the conditions were not caused by the tenant and the conditions can be repaired without vacating the premises. Mass. G. L. c. 239, §8A, 105 CMR 410. After trial of this issue, the court will determine the value of the premises based on the evidence of the poor conditions and may adjust the rent owed. If no rent is owed, the tenant cannot be evicted. If rent is owed and paid within seven days, the tenant cannot be evicted. *Id.*

(d) Rent Withholding

Mass. G. L. c. 239, §8A, allows tenants to follow procedures to notify the landlord of the poor conditions and withhold rent. After trial, the court will determine the value of the premises based on the poor conditions and may adjust the rent owed. If no rent is owed, the tenant cannot be evicted. If rent is owed and paid within seven days of the receiving notice of court's determination of the amount due, the tenant cannot be evicted. *Id.*

(e) Retaliation

A retaliatory motive is presumed by the court if the landlord serves a Notice to Quit, or tries to go to court to evict a tenant, within six months of certain legally protected activities by the tenant such as reporting bad conditions to health inspectors, withholding rent because of bad conditions, going to court to enforce rights against the landlord, or trying to organize a tenants union. Mass. G. L. c. 239, §2A and 186, §18.

(f) Discrimination

Even in fault-based evictions, there is a defense to discriminatory evictions on the basis of race, color, religion, national origin, sex, gender identity, sexual orientation, genetic information, age, ancestry, marital status, handicap, or veteran status, rental subsidy or public assistance or for having a child under age six when there is lead paint on the premises under Mass. G. L. c. 151B, §4, ¶¶6,7, 7A, 10, 11 and various federal laws as, for example, 42 U.S.C., §§1981, 1982; 3604, 29 U.S.C., §794. Some of these statutes may not apply depending on whether they are owner-occupied and/or have fewer than four units.

(g) Other

Other defenses arise in no-fault evictions. For example, where a landlord has violated a material term of the rental agreement or other tenancy-related laws (i.e. the state Sanitary Code, Warranty of Habitability, security deposit law, or the right to quiet enjoyment (Mass. G. L. c. 239, §8A, c. 186, §§14, 15B, Lawrence v. Osuagwu, 57 Mass. App.

Ct. 60, 62-64 (2001)) or the landlord is not able to meet its burden of proving breach of the lease, consented to the breach, waived its rights concerning any breach, or the premises are sold during the eviction action and the landlord has not assigned rights to the eviction.

See generally, Duke, ed., Legal Tactics: Tenants Rights in Massachusetts, supra, (MLRI 2017) Chapter 12.

f) Counterclaims

The tenant may bring counterclaims against a landlord in an eviction action for money damages which, if proven, may result in a payment by the landlord to the tenant. Successful counterclaims are also a defense to eviction if the eviction is either no-fault or based on the failure to pay rent. Mass. G. L. c. 239, §8A. Tenants may also file affirmative cases to enforce the Sanitary Code, or for injunctions against violations of the law by bringing a civil claim in housing, Boston municipal, district court. They are not compulsory under USPR 5. Possible counterclaims include the following:

(1) Breach of Warranty of Habitability

Once a landlord knows, or has reason to know, of conditions, he or she has a duty to keep the housing free of bad conditions during the term of the tenancy under the Warranty of Habitability. BHA v. Hemingway, 363 Mass. 184, 185 (1973). If the conditions existed when the tenant moved into the apartment, the court will assume that the landlord also had knowledge at the time the tenant moved in. Berman and Sons, Inc. v. Jefferson, 379 Mass. 196, n.12 (1979); McKenna v. Begin, 3 Mass. App. Ct. 168, 174 (1975). Remedies include the following.

(a) A right to reduced rent from the time the landlord knew of the conditions in the tenant's apartment. McKenna v. Begin, 3 Mass. App. Ct. 168, 170 (1975).

(b) The court may also calculate money damages to be paid by the landlord to the tenant. The measure of damages is the fair market value of the apartment without the defects, minus the fair rental value of

the apartment with all of the defects. McKenna v. Begin, 5 Mass. App. Ct. 304, 309 (1977).

(c) With serious breaches of the Warranty of Habitability, the tenant may cancel the lease and move, or ask the court to cancel the lease and get a full or partial refund of the rent already paid. BHA v. Hemingway, 363 Mass. 184, 190 (1973).

(2) Breach of Quiet Enjoyment

When a landlord interferes with the use and enjoyment of the apartment, a tenant may bring an action for breach of quiet enjoyment including the following.

(a) Intentional failure to furnish utility or other services.

(b) Direct or indirect interference by the landlord to provide required services.

(c) Transferring responsibility for paying utilities to the tenant without the tenant's consent.

(d) Attempts by the landlord to lock out or move the tenant out without first going to court.

(e) In other ways, the landlord hinders the tenant's use of and quiet enjoyment of the apartment. Mass. G. L. c. 186, §14.

Damages equal the greater of either three months' rent or actual damages. Successful tenants are also entitled to reasonable attorney's fees and costs. *Id.*

(3) Retaliation

Under Mass. G. L. c. 239 and c. 186, a landlord may not threaten to take action against a tenant for certain protected activities. These include: (1) giving written notice to the landlord of violations of the state Sanitary Code; (2) reporting bad conditions in the apartment to health inspectors; (3) withholding of rent due to poor conditions; (4) starting an action against the landlord with a judge or an administrative agency to enforce tenant rights; or (5) organizing or joining a tenant's union. Mass. G. L. c. 239, §§2A, 8A, and c. 186, §18.

There is a rebuttable presumption of retaliation where the landlord delivers a Notice to Quit or starts an action against the tenant within six months of such activities. To overcome the presumption, the landlord has the burden to show, by clear and convincing evidence, that the eviction would have occurred independent of the tenant's protected activity. Damages here are the greater of three months' rent or actual loss, costs and reasonable attorney's fees. *Id.*

(4) Unfair and Deceptive Practices

The Consumer Protection Act, Mass. G. L. c. 93A ("Chapter 93A"), applies to many landlords and tenants and prohibits landlords from threatening, attempting to, or actually using an unfair or deceptive practice against a tenant. Tenants can obtain injunctions or damages. Chapter 93A does not apply to owner occupied two family buildings, and it does not apply to owner occupied three family buildings under certain circumstances. Billings v. Wilson, 397 Mass. 614, 615-616 (1986). Damages may include the greater of $25 for each violation or the actual loss, and remedies for other types of harm, such as for emotional distress damages or compensation for lost work. If the court finds that the landlord should have known that the acts were unfair or deceptive, damages may be doubled or trebled. Mass. G. L. c. 93A, §9(3), (3A). Unfair and deceptive acts may include any act that violate existing laws to "protect health, safety or welfare," which includes the State Sanitary Code. See Attorney General Regulations under c. 93A, §2(c); 940 CMR 3.16(3), 3.17, 105 CMR 410. Such violations may include problems with conditions in an apartment with heat, plumbing, water, electricity, etc. There are requirements for sending a demand letter for money damages, but this is not required in an action where Chapter 93A is raised in a counterclaim or a cross claim. Mass. G. L. c. 93A, §9(3). There are time limits for the landlord to respond in writing and, failing that, the tenant may go to court. If the failure to settle was willful or in bad faith, the tenant may receive double or treble damages, attorney's fees, and costs. Mass. G. L. c. 93A, §9(3) and (4).

(5) Security Deposits and Last Month's Rent Law Violations

Mass. G. L. c. 186, §15B(1)(b) provides that the landlord may request advance payment of first month's rent, last month's rent, and a security deposit equal to the first

month's rent and the cost of a new lock and key. A security deposit is the amount paid to the landlord to reimburse for any damage to the apartment caused by the tenant. A security deposit may also be used for outstanding rent after the tenant leaves. The payment of the last month's rent is to cover the rent due for the last month of the tenancy. For both security deposits and last month's rent, there are various duties to provide the tenant with receipts, year-end statements, and payment of interest earned under this statute. For security deposits, there are additional requirements to give the tenant a statement of conditions in the apartment, to hold funds in a separate bank account, and to provide a list of damages to the apartment and the balance from the deposit to the tenant within 30 days of when the tenant vacates. The tenant may recover triple damages, reasonable attorneys' fees and costs for certain violations of this law. Mass. G. L. c. 186, §15B (6), (7).

(6) Negligence

Where a tenant suffers injury as a result of the landlord's failure to reasonably care for the premises, the tenant may sue for money damages. Crowell v. McCaffrey, 377 Mass. 443, 447-450 (1979).

(7) Infliction of Emotional Distress

A landlord whose negligent, reckless, or intentional acts cause physical or emotional harm to the tenant or to another person may be liable under certain circumstances for infliction of emotional distress. See George v. Jordan Marsh, 359 Mass. 244, 245, n.1 (1971); and Dziokonski v. Babineau, 375 Mass. 555, 561-562 (1978); Simon v. Solomon, 385 Mass. 91, 97-98, 111-113 (1982).

(8) Invasion of Privacy

Landlords may be subject to injunction or money damages for unreasonable, substantial or serious interference with the tenant's physical privacy. This may also be a breach of the tenant's right to quiet enjoyment. Mass. G. L. c. 214, §1B and c. 186, §14.

(9) Paying for Utilities without a Written Agreement

The Sanitary Code provides that the landlord must pay for utilities (heat, hot water, gas, electricity) unless there is a

written agreement specifically stating that the tenant has agreed to cover their expenses. 105 CMR, §§410.190, 410.201 and 410.354. See also Young v. Patukonis, 24 Mass. App. Ct. 907, 908-909 (1987); and Poncz v. Loftin, 34 Mass. App. Ct. 909, 910 (1993); rev. den. 415 Mass. 1102 (1993).

(10) Nuisance

A landlord may be liable to a tenant for any "nuisance," which is a condition caused by the landlord which "injuriously…affects the health or comfort of ordinary people in the vicinity to an unreasonable extent" and resulting in loss. Tortorella v. Traiser & Co., 284 Mass. 497, 498-501 (1933) Proulx v. Basbanes, 354 Mass. 559, 561-562 (1968).

(11) Discrimination under State and Federal Law

Various state and federal fair housing laws prohibit discrimination on the basis of race, color, religion, national origin, sex, gender identity, sexual orientation, genetic information, age, ancestry, marital status, handicap, or veteran status, rental subsidy or public assistance under Mass. G. L. c. 151B, §4, ¶¶6, 7, 7A, 10, 11 and various federal laws as, for example, 42 U.S.C., §§1981, 1982, 3604, 29 U.S.C., §794. Some of these statutes may not apply depending on whether the premises are owner occupied and on the number of units in the building.

(12) The Massachusetts Lead Poisoning Prevention Act

The Massachusetts Lead Poisoning Prevention Act protects children under six years old from lead paint in houses built before 1978. The landlord's duty is to discover and remove, or properly cover, such a hazard. Mass. G. L. c. 111, §§194-199, 105 CMR 460.100. The process of de-leading can cause dangerous conditions. Provisions under the statute allow the tenant to find other housing and relieve the tenant from the duty to pay rent. In the alternative, the landlord may find suitable alternative housing and collect rent. Mass. G. L. c. 111, §197(h). Retaliation for reporting a suspected lead problem is prohibited. Withholding of rent or compensation for violations of the state sanitary code are possible under Mass. G. L. c. 186, §§14, 18, c. 239, §8A. Under Mass. G. L. c. 111, §199(a), the landlord

may be liable for all injuries a lead poisoned child may suffer as a result of living in the landlord's apartment.

g) Fee Shifting Statutes in Housing Law

A number of the counterclaims discussed above arise under statutes which provide for shifting the reasonable attorney's fee and costs from the prevailing tenant to the liable landlord. These include:

(1) Mass. G. L. c. 186, §14 (right to quiet enjoyment);

(2) Mass. G. L. c. 186, §15B (security deposits and last month's rent);

(3) Mass. G. L. c. 186, §18, c. 239, §2A (retaliation for tenant's assertion of rights);

(4) Mass. G. L. c. 186, §20 (when a residential lease provides that the tenant must pay the landlord's attorney's fee to enforce the lease, there is an implied covenant that the landlord shall pay the attorney's fees of the successful claim or defense of a tenant to enforce any obligation of the landlord under that lease);

(5) Mass. G. L. c. 93A, §9(4) (reasonable attorney's fees and costs to be paid to successful petitioner under the Consumer Protection Act):

(a) Mass. G. L. c. 151B, §9 (for actions concerning discrimination, filed in superior, probate or housing court and the successful petitioner may be awarded reasonable attorney's fees and costs);

(b) Mass. G. L. c. 93, §102(d) (the prevailing party in discrimination claim on the basis of sex, race, color, creed or national origin is entitled to reasonable attorney's fees and costs in a claim brought in superior court);

(c) Mass. G. L. c. 93, §103(d) (equal protection against age or handicap discrimination; the petitioner may bring a civil action to enforce rights in superior court; prevailing party may recover injunctive relief and damages along with reasonable attorney's fees and costs.

G. Non-Profits

1. Overview

The Federal tax code, 26 U.S.C. §501(c)(3) (2017), provides a tax exemption for certain organizations that meet the code's requirements. In order to obtain a tax exemption, the organization must show that: (1) it is organized and operates for a tax exempt purpose; (2) there is no private inurement; and (3) it does not engage in substantial political activities. The following summarizes general issues with setting up and managing tax-exempt organizations.

a) The Purpose of the Corporation Must Be Exempt under the Code

A non-profit corporation must meet §501(c)(3)'s requirement concerning an "exempt purpose." It must be: "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals …."

The IRS defines the term "charitable" as it "is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening the burdens of government; lessening neighborhood tensions; eliminating prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency." irs.gov/charities-non-profits/charitable-purposes.

The IRS examines a corporation's articles of organization and its operation in order to determine whether it meets the exempt purpose requirement.

(1) Articles of Organization

The Articles must expressly limit "the purposes of the organization to one or more exempt purposes," must not "expressly empower the organization to engage, other than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purpose," and must "permanently dedicate the organization's assets to 501(c)(3) purposes on dissolution." Elizabeth Ardoin, *Organizational Test—IRC 501(c)(3)*

(2004 EO CPE Text), at irs.gov/pub/irs-tege/eotopicd04.pdf (citing 26 C.F.R. §1.501(c)(3)-1(b)(1)(i), 1.501(a)(3)-1(b)(1)(4)).

(2) Operation of the Organization

"An organization will be regarded as *operated exclusively* for one or more exempt purposes only if it engages primarily in activities that accomplish exempt purposes specified in §501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities does not further an exempt purpose." irs.gov/charities-non-profits/charitable-organizations/operational-test-internal-revenue-code-section-501c3

b) No Inurement to Benefit a Private Shareholder or Individual

Under Section 501(c)(3), no part of the net earnings may inure to the benefit of any private shareholder or individual.

c) Restricted Political Activities by the Organization

To obtain and maintain tax-exempt status under Section 501(c)(3), no substantial part of the activities of the organization may include carrying on propaganda, or otherwise attempting to influence legislation. The organization may not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office, even to an insubstantial degree.

d) Types of §501(c)(3) Organizations

The IRS lists three types of tax-exempt organizations under Section 501(c)(3): (1) publicly supported charitable organizations; (2) private foundations; and (3) other non-profits. This section will discuss public charities and private foundations.

irs.gov/charities-non-profits/types-of-tax-exempt-organizations

In effect, the definition divides Section 501(c)(3) organizations into two classes: private foundations and public charities. Every organization will be classified as a private foundation *unless* it can qualify as a public charity. Most non-profit organizations prefer to be classified as a public charity, because the administrative burdens are fewer compared to private foundations.

(1) Public Charities

Generally, organizations that are classified as public charities are those that:

- Are churches, hospitals, qualified medical research organizations affiliated with hospitals, schools, colleges and universities;
- Have an active program of fundraising and receive contributions from many sources, including the general public, governmental agencies, corporations, private foundations or other public charities;
- Receive income from the conduct of activities in furtherance of the organization's exempt purposes; or
- Actively function in a supporting relationship to one or more existing public charities.

Private foundations, in contrast, typically have a single major source of funding (usually gifts from one family or corporation, rather than funding from many sources) and most have as their primary activity the making of grants to other charitable organizations and to individuals, rather than the direct operation of charitable programs.

irs.gov/charities-non-profits/charitable-organizations/public-charities

Distinctions between private foundations and public charities also include that different tax rules apply to each, fewer donations to private foundations are deductible, and private foundations are subject to an excise tax under certain circumstances. irs.gov/pub/irs-pdf/i1023.pdf

(2) Publicly Supported Charities

There are two tests for a public charity under IRS requirements:

(a) The organization receives a substantial part of its support in the form of contributions from publicly supported organizations, governmental units, and/or the general public.

Example: A human service organization in which revenue is generated through widespread public fundraising campaigns, federated fundraising

drives, or government grants is a publicly supported charity.

(b) The organization receives no more than one-third of its support from gross investment income, and more than one-third of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions.

Example: A membership-fee organization, such as parent-teacher organization, or an arts group with box office revenue is a publicly supported charity.

irs.gov/charities-non-profits/charitable-organizations/publicly-supported-charities.

Even if an organization fits the definition of a public charity, it will be presumed to be a private foundation, with some exceptions, unless it gives timely notice to the IRS that it is not a private foundation. If an organization is required to file the notice, it generally must do so by filing a Form 1023 within 27 months from the end of the month in which it was organized.

(3) Private Foundations

As noted above, every organization that qualifies for tax exemption as an organization described in Section 501(c)(3) is a private foundation, unless it can qualify as a public charity.

There are several restrictions and requirements on private foundations, including the following.

(a) Restrictions on self-dealing between private foundations and their substantial contributors and other disqualified persons.

(b) Requirements that the foundation annually distribute income for charitable purposes.

(c) Limits on their holdings in private businesses.

(d) Provisions that investments must not jeopardize the carrying out of exempt purposes.

(e) Provisions to assure that expenditures further exempt purposes.

Violations of these provisions give rise to taxes and penalties against the private foundation and, in some cases, its managers, its substantial contributors, and certain related persons, including family members.

A private foundation cannot be tax-exempt, nor will contributions to it be deductible as charitable contributions, unless its governing instrument contains special provisions in addition to those that apply to all organizations described in §501(c)(3). See Publication 557, *Tax-Exempt Status for Your Organization*, for examples of these provisions. In most cases, this requirement may be satisfied by reference to state law. The IRS has published a list of states with this type of law. See Revenue Ruling 75-38, 1975-1 C.B. 161. irs.gov/charities-non-profits/charitable-organizations/private-foundations

(4) Self-Dealing and Private Foundations

Under the Code, various taxes are imposed on each act of self-dealing between a private foundation and a disqualified person. 26 U.S.C. §4941.

Self-dealing is generally defined by 26 U.S.C. §4941 §1(d) as: "(1)… any direct or indirect—

(a) Sale or exchange, or leasing, of property between a private foundation and a disqualified person;

(b) Lending of money or other extension of credit between a private foundation and a disqualified person;

(c) Furnishing of goods, services, or facilities between a private foundation and a disqualified person;

(d) Payment of compensation (or payment or reimbursement of expenses) by a private foundation to a disqualified person;

(e) Transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation; and

(f) Agreement by a private foundation to make any payment of money or other property to a government official (as defined in section 4946(c)), other than an agreement to employ such individual

for any period after the termination of his government service if such individual is terminating his government service within a 90-day period."

For the rules relating to private foundation excise taxes, the IRS lists, among others, the following persons to be considered *disqualified persons* with respect to a private foundation:

(a) All substantial contributors to the foundation;

(b) All foundation managers of the foundation.

(c) An owner of more than 20 percent of—

(i) The total combined voting power of a corporation;

(ii) The profits interest of a partnership; or

(d) A member of the family of any of the individuals described in (a), (b), or (c).

irs.gov/charities-non-profits/private-foundations/disqualified-persons.

(5) Excess Benefit Transactions and Tax-Exempt Organizations

26 U.S.C. §4958 imposes taxes on a disqualified individual and the management of a tax-exempt organization involved in an "excess benefit transaction."

The term "excess benefit transaction" is defined as "any transaction in which an economic benefit is provided by an applicable tax-exempt organization directly or indirectly to, or for the use of, any disqualified person, if the value of the economic benefit provided exceeds the value of the consideration (including the performance of services) received for providing such benefit. For purposes of the preceding sentence, an economic benefit shall not be treated as consideration for the performance of services unless such organization clearly indicated its intent to so treat such benefit."

This statute has special rules for supporting organizations.

2. Steps for Setting Up a Non-profit Corporation in Massachusetts

According to the IRS, "state law governs non-profit status which is determined by articles of organization or trust documents. Federal law governs tax-exempt status." irs.gov/charities-non-profits/before-applying-for-tax-exempt-status.

The IRS sets out a sequence of steps for obtaining a federal tax exemption for various organizations, including corporations, trusts and associations. This generally involves gathering the entity's documents, determining state registration requirements and obtaining an Employer Identification Number. irs.gov/charities-non-profits/before-applying-for-tax-exempt-status. The following will summarize the preparatory steps for obtaining tax-exempt status for a non-profit/charitable corporation in Massachusetts:

a) Incorporate under Massachusetts law

See Mass. G. L. c. 156D, §2.02; c. 180, §§1, 4, et seq;

950 CMR 106.03. irs.gov/charities-non-profits/definition-of-a-corporation; sec.state.ma.us/cor/corpweb/cornp/npfrm.htm.

To form a non-profit corporation in Massachusetts, the following are necessary:

(1) Draft Articles of Organization. To establish a charitable corporation in Massachusetts one must file the organization's Articles with the Secretary of the Commonwealth.

The Secretary of the Commonwealth sets out the allowable purposes and powers for a non-profit corporation based on statute. sec.state.ma.us/cor/corpweb/cornp/npinf.htm. Under these statutes, the following procedures are necessary to incorporate.

(a) File Articles of Organization with the Secretary of State after other steps described below (Mass. G. L. c. 156B, §12).

(b) Articles for the organization include its:

(i) name (c. 156B, §11);
(ii) fiscal year (c. 156B, §13);
(iii) Massachusetts address; *Id*.
(iv) initial officers and directors; *Id.*
(v) description of purpose; *Id*.

Corporations may also indicate whether the organization will have members and they may appoint a Board of Advisors, but these are not required.

The Articles must also include the language required by the IRS limiting the organization in ways necessary to achieve Section 501(c)(3) status.

See also, sec.state.ma.us/cor/corpweb/cornp/npinf.htm

(2) Elect a Board of Directors (Mass. G. L. c. 156B, §12).

(3) Elect Officers *Id*. President, treasurer, and clerk are required; others are optional.

(4) Choose a fiscal year (Mass. G. L. c. 156B, §13).

(5) Adopt Bylaws (Mass. G. L. c. 156B, §12).

Generally, see §12 on the meeting to incorporate and the procedures before filing the Articles of Organization with the Secretary of the Commonwealth.

b) Additional Requirements to Obtain a Federal Tax Exemption

(1) Obtain a Federal Taxpayer Identification Number

An Employer Identification Number (EIN) is a federal tax identification number, and is used to identify a business entity. It is the corporate equivalent to a Social Security Number for an individual.

irs.gov/individuals/international-taxpayers/taxpayer-identification-numbers-tin

Tax exempt organizations may apply for an EIN online, or by fax, mail or telephone using form SS-4.

irs.gov/businesses/small-businesses-self-employed/how-to-apply-for-an-ein

(2) Register in Massachusetts for Charitable Solicitation

The Non-Profit Organizations/Public Charities Division (the "Division") of the Massachusetts Attorney General's Office ("AGO") oversees non-profits and public charities in Massachusetts. mass.gov/ago/doing-business-in-

massachusetts/public-charities-or-not-for-profits. See also Mass. G. L., c. 12, c. 68 and 940 CMR 2, 12, 13.

"All public charities doing business in the Commonwealth of Massachusetts must register with the Non-Profits/Public Charities Division and, thereafter, file annual financial reports with the AGO. Upon registration, the AGO will assign the public charity an Attorney General Account Number (AG Number). Any charities that wish to solicit funds must also obtain a 'Certificate for Solicitation' before engaging in fundraising activities."

mass.gov/ago/doing-business-in-massachusetts/public-charities-or-not-for-profits/registering-a-public-charity/

The registration should be filed annually with the Non-Profits/Public Charities Division and should be filed whether or not fundraising is handled by the specific non-profit or charity or by others who contract to fundraise on behalf of the non-profit or charity.

Registration instructions are available on the Attorney General's website. The instructions differ depending on whether the entity is based in Massachusetts or out of state, and whether the registration is done before or after the end of its first fiscal year. See mass.gov/ago/doing-business-in-massachusetts/public-charities-or-not-for-profits/registering-a-public-charity/.

(3) Apply for Recognition of Tax-exempt Status

As discussed above, the IRS sets out the preparatory steps before applying for a federal tax exemption (setting up the organization, obtaining an Employer Identification Number, etc.).

irs.gov/charities-non-profits/before-applying-for-tax-exempt-status

"To obtain federal tax exempt status for a charitable, religious or educational organization under section 501(c)(3), the organization should file Form 1023. It can be treated as tax-exempt from the date the organization is formed, if it applies for recognition of tax exempt status within 27 months of the date of formation."

irs.gov/charities-non-profits/application-for-recognition-of-exemption

(4) Annual Returns and State Taxes

Private foundations and public charities are required to file annual returns with the IRS on the appropriate form in the 990 series. Private foundations are required to file a return on Form 990 PF, whether or not they have taxable income. Public charities (with some exceptions) must file an annual information return on forms from the 990 series. irs.gov/charities-non-profits/private-foundations/private-foundation-annual-return. The deadline for filing the Form 990 is the same deadline for filing the informational return with the AGO, known as a Form PC. That deadline is four and one-half months after the end of the organization's fiscal year.

The tax exempt organization should also check with the Massachusetts Department of Revenue for requirements concerning state taxes. If the organization has 501(c)(3) status, it is tax-exempt in Massachusetts as well. But some activities of the organization might generate income, excise, property, or sales taxes. mass.gov/dor/businesses/help-and-resources/legal-library/administrative-procedures/ap-101-exemptions-from-sales-tax.html

H. Technology: Opportunities, Responsibilities, And Challenges

Technology has the potential to improve access to legal assistance by making it easier to find legal help, reducing costs, improving communication between lawyers and their clients and making information about the law and law services widely available to the public. Technology also brings new and different risks that require attention.

1. Competence

Rule 1.1 of the Massachusetts Rules of Professional Conduct, which is identical to ABA Model Rule 1.1, provides that: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Massachusetts has followed the ABA by amending Comment [8] to include technology as a core dimension of lawyer competence, requiring that lawyers stay up-to-date on the risks and benefits of new uses of technology in law practice. Comment [8] now reads as follows:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant*

technology, engage in continuing study and education (emphasis added).

2. Technology: E-mail

E-mail use is pervasive in law practice and best practices continue to evolve. Basic care includes, at a minimum, the following: maintain a separate account for professional e-mail; routinely check "sent" files and e-mail filters to assure that communications have not been diverted to "draft" or similar files, and that incoming mail has not been diverted to spam files. Ask for confirmation of receipt and send large document files in multiple e-mails and insist on explicit confirmation of receipt.

E-mail is discoverable so advise clients that case relevant exchanges by e-mail may become public.

3. Technology: Online research

Online data bases, regulations and statutes will generally be the most up-to-date source, and almost always involve less search time. Billing for time-consuming book/paper research adds cost and may lead to "unreasonable fee" problems. Failure to check basic facts via a Google or similar search engine may be malpractice. Free, online resources for valuing cars (i.e. Kelly Blue Book, Edmunds) and residential real estate (i.e. Zillow) generally meet due diligence requirements in divorce, bankruptcy and similar matters. It is always advisable to date and print search results and scan to client files.

4. Technology: Discovery and Social Media

Social media is an essential focus of discovery in any legal matter. Lawyers should inquire about client use of social media, review with the client all active social media, monitor client posts, advise clients on risks of continued postings – noting that social media postings are admissible in court - and whether to delete or close accounts. Due diligence generally requires that attorneys identify and monitor the publicly available social media accounts of opposing parties.

5. Confidentiality

Technology involves new risks of inadvertent disclosure of confidential information. Attorneys should have and comply with a comprehensive plan to protect client and work product confidentiality. In large law practices, technology security, user support and user training are provided and managed by expert staff. Solo and small practices, including small not-for-profit firm practices, should consider contracting for expert services. Whether via contract or a comprehensive plan, protection of

confidential information generally should include, for example, the following:

a) Strong passwords that are changed at regular intervals;

b) Up-to-date software;

c) Installation and prompt updating of anti-virus, anti-malware, and anti-spyware software on all devices;

d) Warnings to avoid download of software from the internet other than from trusted sources;

e) Inclusion of all support staff, whether full or part time, on-site or off-site in the cybersecurity plan;

f) Labeling of e-mails “privileged and confidential;”

g) Directions to never e-mail individual clients at their employer's or any other shared e-mail address as these accounts may be monitored;

h) Direction to never transmit confidential information via an unsecured public wifi network;

i) Program your professional mobile phone so that messages do not appear on a home screen; and

j) Ensuring that professional mobile phones have a tracker device and capacity to delete if the phone is lost or stolen.

II. ANTI-DISCRIMINATION LAW

A. Introduction

Massachusetts General Laws, Chapter 151B and various other Massachusetts statutes prohibit illegal discrimination. The Legislature established the Massachusetts Commission Against Discrimination (the "MCAD") as the administrative agency responsible for enforcing these statutes. Mass. G. L. c. 151B, §5. Chapter 151B addresses discrimination in employment, housing, credit, and mortgage lending; Mass. G. L. c. 272, §92A, 98 and 98A, concerns public accommodations; Mass. G. L. c. 151B, §3A, prohibits sexual harassment; Mass. G. L. c. 149, §105D, governs the Parental Leave law; Mass. G. L. c. 151C, is the education civil rights law; and Mass. G. L. c. 111, §199A, is the lead paint law.

B. Employment

1. Massachusetts Fair Employment Practices Act, Chapter 151B

a) Prohibited acts and protected classes

This act prohibits employers from refusing to hire, discharging or discriminating (in terms, conditions or privilege of employment) against an employee on the basis of race, color, religious creed, national origin, sex, sexual orientation, gender identity, age, genetics, ancestry, or status as a veteran or member of the armed forces. Mass. G. L. c. 151B, § 4. Chapter 151B also protects from discrimination qualified handicapped employees and applicants, as well as individuals with work-related injuries. Chapter 151B limits how much an employer can inquire into a person's arrest, conviction and psychiatric hospitalization history. Most recently Chapter 151B § 4 was amended by the Pregnant Workers Fairness Act, to prohibit employers from discriminating against women because of pregnancy or because of conditions related to pregnancy. Id.

Employers covered by Chapter 151B are those with six or more employees, except that the statute includes certain exceptions, such as those employed in domestic service or by nonprofit social, fraternal, or religious organizations. Mass. G. L. c. 151B, §1. However, the Supreme Judicial Court has held that where an employer has fewer than six employees and thus, a person allegedly aggrieved has no claim under c. 151B, the person may sue for employment discrimination under the Massachusetts Equal Rights Act ("MERA"), Mass. G. L. c. 93, §102, the Massachusetts Civil Rights Act ("MCRA"), Mass. G. L. c. 12, §11I; or the Massachusetts sexual harassment statute, Mass. G. L. c. 214, §1C.

Thurdin v. SEI Boston, LLC, 452 Mass. 436, 455 (2008); Guzman v. Lowinger, 422 Mass. 570, 571-573 (1996).

2. Exclusive remedy for discriminatory acts under Mass. G. L. c. 151B, §§5, 9

If Chapter 151B applies, it sets out the exclusive remedy for acts of discrimination. Verdrager v. Mintz Levin, Cohn, Ferris, Glovsky, Popeo and others, 474 Mass. 382, 415 (2016); Martins v. University of Massachusetts Medical School, 25 Mass. App. Ct. 623 (2009) (dismissing MERA claim preempted by Chapter 151B); Thurdin v. SEI Boston, LLC, 452 Mass. 436, 455 (2008) (151B does not apply since employer has fewer than six employees; action permitted for discrimination under MERA).

3. Complaint procedure Mass. G. L. c.151B, §5

A person claiming to be aggrieved (the "Petitioner") under Chapter 151B must file a verified complaint to the MCAD. The MCAD may investigate a complaint against the alleged perpetrator (the "Respondent") if it has reason to believe that there may have been an actionable violation of Chapter 151B. The Respondent must file a position statement and a prompt investigation should be conducted by the MCAD. 804 C.M.R. 1.00 et seq. The MCAD has developed procedures for investigation, conciliation, mediation, discovery, public hearing, dispositions, orders and court enforcement to resolve claims of discrimination. Any person aggrieved by an order of the MCAD may file an appeal under Mass. G. L. c.151B, §6, which is governed by the standards of Mass. G. L. c. 30A, §14(7) as an appeal of a decision of a state administrative agency. After administrative remedies are exhausted (discussed below), a Petitioner may also file a claim in superior, probate or housing court as appropriate under Mass. G. L. c. 151B, §9.

C. Public Accommodations

The Public Accommodations Law, Mass. G. L. c. 272, §§92A, 98 and 98A, prohibits discrimination in places of public accommodation, resort, or amusement on the basis of religious sect, creed, class, race, color, denomination, sex, sexual orientation, gender identity, nationality, deafness or blindness or any physical or mental disability. Section 92A also provides that facilities segregated by sex (such as bathrooms or locker rooms) must provide access by gender identity. Both the Attorney General and the MCAD have been charged with developing rules, regulations and policies to implement the law.

D. Housing

The Federal Fair Housing Act (Title VIII of the Civil Rights Act) prohibits discrimination in the sale or rental of housing based on race, color, religion, sex, familial status, national origin or handicap. 42 U.S.C., §3601 et seq.

Massachusetts also prohibits housing discrimination by realtors, landlords, mortgage lenders and brokers under Mass. G. L. c. 151B, §§4, 3A, 3B, 3C, 6 and 11 and c. 121B, §32. Landlords may not discriminate against families with children under the age of six on the basis that a rental unit may contain lead paint pursuant to Mass. G. L. c. 111, §199A. See generally Mass. G. L. c. 111, §§189A-199B. These state laws prohibit housing discrimination on the basis of the following classes: race, color, religious creed, national origin, ancestry, sex, marital status, veteran status, age, disability, blindness, hearing impairment or use of a guide dog for a person who is blind or hearing impaired, gender identity, sexual orientation, children, public assistance, children involving lead paint, and receipt of public assistance, such as by using Section 8 housing vouchers.

E. Sexual Harassment

Sexual harassment is a form of sexual discrimination which is prohibited in employment, in places of public accommodation, in educational facilities and in housing. Mass. G. L. c. 151B, §§4(1), (16A); Mass. G. L. c. 272, §§92A; Mass. G. L. c. 98A; Mass. G. L. c. 214, §1C; Mass. G. L. c. 151C.

Mass. G. L. c. 151B, §3A, requires that employers have a sexual harassment policy and provide this policy to all employees.

Massachusetts law imposes strict liability on employers for sexual harassment by supervisory personnel. College-Town Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 165-66 (1987). By contrast, federal law imposes vicarious liability on employers for sexual harassment by supervisors, but also provides an affirmative defense if the employer can show it took reasonable steps to prevent or stop harassment and the employee unreasonably failed to take advantage of those steps. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 754-65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 793-804 (1998). Massachusetts law also permits suits against harassers and managers for damages related to discrimination claims. Beaupre v. Cliff Smith and Assoc., 50 Mass. App. Ct. 480, 492 (2000).

F. Equal Pay

The Mass. Equal Pay Act, Mass. G. L. c. 149, §105A (effective in July, 2018) provides for:

1. equal pay for comparable work with some exceptions;

2. prohibition of prospective employers from asking about past wages;

3. prohibition of employer from forbidding employees from discussing wages, or benefits with other employees; and

4. a private right of action including for retaliation for reporting violations.

This law does not require a filing with MCAD and has a three year statute of limitations. Damages include: employer liability for unpaid wages, benefits and compensation and equal amount of liquidated damages, costs and attorneys' fees. Other provisions allow for certain defenses by the employer and action by the Attorney General.

G. Judicial Alternatives And Exhaustion Of Administrative Remedies Under Chapter 151b

In order to seek an adjudication of a claim under Mass. G. L. c. 151B at the MCAD or by a civil court, an aggrieved person must file a complaint of discrimination with MCAD (or Federal EEOC) within 300 days of the alleged acts of discrimination. An exception exists for continuing violations. Cuddyer v. Stop & Shop Co., 434 Mass. 521, 531 (2001).

The aggrieved person has the option to withdraw their claim from the MCAD after 90 days and may then file the discrimination claim in superior, probate or housing court. The aggrieved person may also, before 90 days have passed, get permission from the MCAD to withdraw the claim so that it can be brought in court. Claims that are brought to court must be filed in the court within 3 years of the alleged discrimination. Mass. G. L. c. 151B, §9.

H. Proving Employment Discrimination

There are two theories of proof for discrimination: disparate treatment and disparate impact.

1. Disparate treatment

Disparate treatment involves intentional discrimination and is by far the most common form of discrimination claim.

In the absence of direct evidence of discrimination, in disparate treatment cases courts apply the three stage burden shifting approach or "paradigm" of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973). In the Chapter 151B employment context this generally means:

Stage I. Plaintiff's prima facie case: the plaintiff must show that: 1) plaintiff is a member of a protected class; 2) plaintiff is qualified to perform the job; 3) plaintiff suffered an adverse job action (terminated, not hired, demoted, wages lowered, etc.); 4) others equally or less qualified than the plaintiff outside of the plaintiff's protected class are either hired or continued in employment. Proof of these elements gives rise to the inference of discrimination.

Stage II. The burden then shifts to the defendant to state a legitimate, non-discriminatory reason for the adverse action (burden of production, only, not persuasion).

Stage III. The burden of persuasion shifts to the plaintiff to show that the employer's alleged reason for the action is pretextual. Bulwer v. Mount Auburn Hospital, 473 Mass. 672, 681-683 (2016).

2. Disparate Impact

Disparate impact discrimination involves situations in which a facially neutral policy or practice (e.g., requiring that all employees in a particular job have a college degree, pass a written pre-employment test, or can lift 40 pounds) adversely affect a protected class. See Ricci v. De Stefano, 557 U.S. 557, (2009); Jones v. City of Boston, 752 F. 3d 38 (1st Cir. 2014). The disparate impact burden shifting approach is different.

The plaintiff must show that a facially neutral employment policy or practice has a statistically negative disparate impact on the basis of race, color, religion, sex or national origin. 42 U.S.C. §2000e–2(k)(1)(A)(i). The burden then shifts to the employer to prove that the policy or practice in question is job related and consistent with business necessity. If the employer fails to meet this burden, the plaintiff prevails. Even if the employer meets this burden, the plaintiff may prove discrimination where the plaintiff can show that there is an available alternative with less disparate impact that also meets business necessity and job relatedness. 42 U.S.C. §§2000e–2(k)(1)(A)(ii) and (C).

3. Mixed motive cases

Where there is a mix of legitimate and discriminatory reasons for a particular job action, discrimination can be proven if "race, color, religion, sex or national origin" was a motivating factor in the employment decision. 42 U.S.C. §2000e- 2(m); 42 U.S.C. 2000e- 5-(g)(2)(B); Wynn &Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, 431 Mass. 665, 666-667 (2000); Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 114-115 (2000).

4. Retaliation

Chapter 151B prohibits an employer from retaliating against an employee for reporting or opposing practices prohibited by Chapter 151B. Under Mass. G. L. c. 151B, §4(4A), in order for a plaintiff to prove illegal retaliation, the plaintiff generally must prove the following elements:

1) plaintiff reasonably believed that employer was illegally discriminating;

2) plaintiff acted reasonably in response to this belief;

3) employer's motive to retaliate was a "determinative factor" in the employer's adverse job action. Mass. G. L. c. 151B, §4(4A). Psy-Ed Corp. v. Klein, 459 Mass. 697, 707 (2011).

I. Disability Discrimination

1. Controlling Law

The Massachusetts anti-discrimination law (Mass. G. L. c. 151B, §4) prohibits discrimination based on "handicap" on much the same basis as the American with Disabilities Act ("ADA") prohibits discrimination based on "disability."

The Massachusetts Constitution also contains an amendment barring discrimination in "any program or activity" in the Commonwealth. Amendments Art. 114. There is almost no case law interpreting this constitutional provision.

The definition of the term handicap is:

a) a person with a physical or mental impairment that substantially limits one or more major life activities;

b) a person with a record of such impairment; or

c) a person who is regarded by the person or entity allegedly committing discrimination as having such an impairment.

The federal burden-shifting "paradigm" (detailed in section H.1 above disparate impact cases) applies in handicap discrimination cases in Massachusetts.

2. Distinctions between Massachusetts and Federal Law

In addition to the prohibition against discrimination on the basis of pregnancy or conditions related to pregnancy, discrimination based on disabling conditions related to pregnancy may also constitute handicap discrimination, as well as sex discrimination, under Massachusetts law.

Under a provision in the Massachusetts Workers Compensation Law (Mass. G. L. c. 152, §75B), employees who suffer work-related injuries and can perform the essential functions of the job with or without a reasonable accommodation are entitled to protection against handicap discrimination under Mass. G. L. c. 151B.

3. Reasonable Accommodation

Some disability claims involve the employer's alleged failure to make a reasonable accommodation. MCAD guidelines provide that to make a prima facie case on these grounds, an employee must show:

- the employee is a qualified handicapped individual;
- the employee needs a reasonable accommodation to perform one or more essential functions of the job in question;
- the employer was aware of the handicap and the employee's need for a reasonable accommodation;
- the employer was aware of a means to make a reasonable accommodation, or unreasonably failed to investigate a means to make a reasonable accommodation; and
- the employer failed to make a reasonable accommodation.

Once the employee satisfies the prima facie case, the burden shifts to the employer to show that making an accommodation would cause undue hardship.

The employee is expected to have an interactive dialogue with the employer about the type of accommodation needed. An exception may exist when the employer knows, or reasonably should have known of the employee's need for accommodation. See MCAD Handicap Discrimination Guidelines. For example, an employer reasonably should know that an employee who uses a wheelchair will need reasonable accommodations to access their workplace.

An employer may be required to offer leaves of absence beyond its official leave policy to accommodate an employee with a handicap. However, open-ended leaves are not required. Russell v. Cooley-Dickinson Hosp., 437 Mass. 443 (2002).

Employers in Massachusetts are not required to assign disabled workers to a different job to accommodate their disabilities, unless they have made a practice of providing new positions for injured workers.

An employee is not necessarily estopped from bringing a handicap discrimination claim after applying for federal or private insurance disability benefits. If the employee can show that he or she could perform the essential functions of the job if reasonably accommodated, an application for disability benefits will not bar the claim. Labonte v. Hutchins & Wheeler, 424 Mass. 813 (1997).

4. Essential Functions of the Job

Under Massachusetts law, functions can be considered essential even if they are rarely performed—the question is whether the function is a fundamental part of the job. Thus, for instance, a police officer must have the ability to deal with high stress situations, even if offered the accommodation of a desk job at the police station. Beal v. Board of Selectman of Hingham, 419 Mass. 535 (1999).

5. Pre-employment Inquiries

Massachusetts law about pre-employment inquiries regarding handicaps is similar to that of the ADA. Both prohibit asking questions about disabilities before an offer of employment, but do allow for the conditioning employment on passage of a physical examination. Massachusetts law prohibits inquiries about past psychiatric hospitalizations. Mass. G. L. c. 151B, §4 (16).

J. Damages

1. General

The damages available under Mass. G. L. c. 151B are similar to those available under federal anti-discrimination statutes. They include injunctive relief, back pay, front pay, emotional distress damages and attorneys' fees.

2. Back Pay and Front Pay Damages

Back pay damages are the amount of income that an employee has already lost by the time of the trial due to the adverse action of the employer. Front pay damages are the amount of income that the employee is expected to lose after the time of trial due to the adverse action of the employer. Front pay damages are subject to a number of limitations. They are typically awarded when an employee is close to retirement age and/or has no comparable employment opportunities available. Front pay awards do not receive prejudgment interest and are reduced to present value. The employee has a duty to mitigate their damages as to both front and back pay. Conway v. Electro Switch Corp., 402 Mass. 385, 388 (1988).

3. Emotional Distress Damages

Emotional distress damages must be fair and reasonable, and in proportion to the distress suffered. Stonehill College v. Massachusetts Comm'n Against Discrimination, 454 Mass. 549, 575 (2004).

4. Reinstatement

Reinstatement of employment is available only in actions before the MCAD and not in those brought in court, as Mass. G. L. c. 151B explicitly authorizes only the MCAD to grant reinstatement. Fernandes v. Attleboro Housing Authority, 470 Mass. 117, 127-130 (2014). Federal law, by contrast, permits courts to grant reinstatement.

5. Prejudgment Interest

Prejudgment interest dating from the date the complaint was filed can be awarded by both the MCAD and in civil actions. Both the MCAD and the courts use the Massachusetts statutory interest rate (currently 12%). Mass. G. L. c. 231, 56C.

6. Reasonable Attorneys' Fees

Reasonable attorneys' fees are awarded to all prevailing complainants in MCAD actions. Attorneys' fees are also available in civil actions, but the court may decline to grant them in "special circumstances that would render such an award unjust." Mass. G. L c. 151B, §9.

7. Punitive Damages

Punitive damages are available only in civil court actions because the MCAD does not have statutory authority to grant them.

Punitive damages are available only where the employer's conduct is egregious or taken with reckless disregard to the rights of others. Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 106 (2009). In awarding punitive damages, a court should consider factors such as the duration of the offensive conduct, whether the employer intended to demean the plaintiff, whether the employer knew or recklessly disregarded the risk of causing serious harm, and whether the employer attempted to conceal the conduct. *Id. at 111*.

In contrast to federal law, there is no statutory cap on punitive damages under Massachusetts law. Therefore, courts must be guided by the principles set out by the United States Supreme Court in determining whether a punitive damages award is too high. These principles include the ratio of the damages to the actual harm suffered by the employee, and criminal penalties associated with similar conduct. LaBonte v. Hutchins & Wheeler, 424 Mass. 813, 826 (1997).

Punitive damages are not available in Mass. G. L. c. 151B age discrimination cases because, like under the federal age discrimination statute, Massachusetts law permits only double or triple damages when an employee can prove willful discrimination.

8. Civil Penalties

The MCAD can invoke civil penalties against employers up to $10,000 for a first offense, $25,000 for a second offense within a five year period, and $50,000 for a third offense in a seventeen year period. Mass. G. L. c. 151B, §5. The statute provides no guidance on when such penalties should be assessed, but the MCAD has reserved them for instances of egregious discrimination.

K. General

1. Supervisor Liability

Massachusetts law imposes strict liability on employers for sexual harassment by supervisory personnel. College-Town Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 165-66 (1987). By contrast, federal law imposes vicarious liability on employers for sexual harassment by supervisors, but also provides an affirmative defense if the employer can show it took reasonable steps to prevent or stop harassment and the employee unreasonably failed to take advantage of those steps. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 754-65 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 793-804 (1998).

2. Individual Liability

Massachusetts law permits suits against harassers and managers for damages related to discrimination claims. Beaupre v. Cliff Smith and Assoc., 50 Mass. App. Ct. 480, 492 (2000).

3. Seniority Systems

Unlike federal law, Massachusetts law will consider the discriminatory effect of facially neutral seniority systems when past discrimination has a present effect. Specifically, a seniority system that took into account lost seniority related to an unlawful maternity leave policy was found discriminatory under a continuing violation theory. Lynn Teachers Union, Local 1037 v. Massachusetts Comm'n Against Discrimination, 406 Mass. 515, 518 (1990).

III. BUSINESS ORGANIZATIONS

A. Corporate Law

1. Source of Massachusetts Corporate Law

The Massachusetts corporate statute is the Massachusetts Business Corporation Act, Mass. G. L. c. 156D. 156D was adopted in 2004 to replace the former Massachusetts Business Corporation Law, Mass. G. L. c. 156B. 156D is based on the Revised Model Business Corporation Act (the "Model Act"). However, key provisions of 156D and Massachusetts case law differ from the provisions of the Model Act. Important distinctions between Massachusetts law and the Model Act are emphasized below.

2. Incorporation

a) Articles of Organization

To form a new corporation in Massachusetts the incorporator(s) must file Articles of Organization with the Massachusetts Secretary of State. Articles of Organization are effective when received by the Secretary of State, unless the Secretary of State rejects the articles by written notice within 5 days.

The Articles of Organization must include:

(1) Corporate Name (including the word corporation, incorporation, limited or an abbreviation thereof);

(2) Number of authorized shares and any classes or series of shares;

The articles can authorize the board of directors to establish different classes and series of shares from the total number of authorized shares (bank of shares);

(3) Purpose: A Massachusetts corporation may engage in any lawful business and need not specify a purpose in its articles. If the corporation's purpose includes manufacturing it should indicate so in the articles, as manufacturing corporations are entitled to certain tax advantages. If the corporation limits its purposes in its articles, it runs the risk that unanticipated activities may be deemed *ultra vires*;

(4) Registered Agent: The corporation must provide the name and address of its Registered Agent in the articles. The

registered agent may be an individual, or a domestic or foreign corporation, as long as a foreign corporation is qualified to do business in Massachusetts.

b) Bylaws

The incorporators or directors adopt corporate bylaws when the corporation is formed. Shareholders have the power to amend or repeal bylaws. If permitted by the articles, the bylaws may authorize directors to also make, amend, or repeal bylaws, but shareholders retain the right to amend or repeal any bylaws adopted by the directors.

3. Promoter Liability

Pre-incorporation activity: Like the Model Act, Section 2.04 of 156D provides that a person purporting to act on behalf of a corporation, knowing there was no incorporation, shall be personally liable for all liabilities created while so acting. Massachusetts courts have held that a corporation cannot be bound by a contract that a promoter entered into before formation. Framingham Savings Bank v. Szabo, 671 F.2d 897 (1st Cir. 1980). However, if a newly formed corporation accepts the benefits of a pre-incorporation contract with knowledge of its terms, the corporation can be bound by the contract. Framingham Savings Bank v. Szabo; In re David's Eatery, 82 B.R. 655 (Bankr. D. Mass. 1987).

4. Veil Piercing

As in other states, veil piercing in Massachusetts is determined on a case-by-case basis through common law jurisprudence. Massachusetts courts have imposed liability for corporate acts and obligations on related businesses and individual shareholders in limited circumstances. Courts have stated that the corporate veil is to be pierced only in rare instances. Courts in Massachusetts apply a 12 factor test to determine whether the corporate veil should be pierced to hold shareholders or other controlling entities or individuals liable for the corporation's debts.

The 12 factors are: common ownership; pervasive control; intermingling of business assets; thin capitalization; non-observance of formalities; absence of corporate records; no payment of dividends; insolvency at the time of the litigated transaction; siphoning of funds by the dominant shareholder; non-functioning officers and directors; use of the corporation for transactions by the dominant shareholder; and use of the corporation in promoting fraud. Attorney General v. M.C.K. Inc., 432 Mass. 546 (2000); Scott v. NG US 1, Inc., 450 Mass. 760 (2008).

5. Issuing Stock

Chapter 156D does not require a corporation to designate par value for its shares. Accordingly, there is no minimum consideration required for issuing shares. The adequacy of consideration for shares is to be determined by the board. 156D permits a corporation to specify a par value in its articles, and the articles can require that shares be issued for a minimum type or amount of consideration.

6. Management and Control

a) Shareholders

Annual Meetings: The corporation must hold an annual meeting of shareholders for the election of directors and any other purposes specified in the notice of the meeting.

Special Meetings: Special meetings of the shareholders may be called by the board of directors, or a person authorized in the articles or bylaws, or by the holders of at least 10% of the voting power on an issue (unless the articles permit a lower percentage). For public companies, a 40% threshold of voting power is required for shareholders to call a special meeting.

Actions without a Meeting: Any action required or permitted by shareholders may be taken with the written consent of all of the shareholders or, if permitted by the articles, by the votes of shares sufficient to approve the actions. Unlike under Delaware corporate law, the articles must specify that a shareholder action may be taken by less than unanimous consent.

Court Ordered Meeting: The superior court of the county in which the principal office is located may order a shareholder meeting to be held on the application of any shareholder entitled to participate in the meeting, if an annual meeting is not held within six months from the end of the fiscal year, or 15 months after the last annual meeting.

Remote Participation: Unless otherwise provided in the articles, any annual or special meeting may be held entirely by means of remote communication, as long as reasonable measures are taken to ensure that all shareholders have an opportunity to participate and vote at the meeting. However, public corporations must hold physical meetings of shareholders.

b) Directors

Number of Directors: A corporation must have at least three directors, unless there are fewer than three shareholders, in which case the number of directors must at least equal the number of shareholders.

Staggered or Classified Boards: The articles may provide for a staggered board of directors. Under 156D, public corporations must have a staggered board, in which directors are divided into three classes, with one class sitting for election in a given year. Public corporation shareholders can opt out of the staggered board requirement by a vote of two-thirds of each class of stock.

Removal: Unless otherwise provided in the articles, the shareholders may remove a director, with or without cause, at a meeting called for that purpose. Special provisions apply for removal of directors elected under cumulative voting or by a separate series of class of stock. Unlike the Model Act, 156D allows for the removal of directors for cause by a majority of the board of directors (or a greater number as called for in the articles or bylaws). Unlike the Model Act, 156D does not contain a provision for the judicial removal of a director.

Board Committees: 156D permits a board to delegate its powers to one or more committees. Unlike the Model Act, 156D allows single member committees. However, the following actions may not be delegated to a committee and must instead be taken by the full board: authorizing dividends; approving or proposing actions that must be approved by shareholders under the statute; change to the number of directors; removing directors; filling vacancies on the board; amending articles; adopting amending or repealing bylaws; or authorizing or approving reacquisition of shares. Unlike the Model Act, 156D does not prohibit committees from issuing shares or approving mergers that are not otherwise subject to shareholder approval under the statute.

Officers: Unlike the Model Act, 156D requires a corporation to designate certain statutory officers, including a President, Treasurer, and Secretary. Two or more of these offices may be held by the same person.

7. Dividends

Dividends: A corporation paying a dividend must satisfy a balance sheet test and an equity solvency test. The Equity Insolvency Test prohibits a distribution if, after the fact, the corporation "would not be able to pay its

existing and reasonably foreseeable debts, liabilities and obligations . . . as they come due in the ordinary course of business." Section 6.40(c)(1). The Balance Sheet Test prohibits a distribution if, after the fact, the corporation's total assets would be less than the sum of its total liabilities plus, unless the articles permit otherwise, the amount that would be needed to satisfy any preferential rights of shareholders, if the corporation were to be dissolved at the time of the distribution. Section 6.40(c)(2).

Liability for Improper Distributions: A director may be liable to the corporation for an improper distribution if the director did not fulfill his or her duties under Section 8.30, which sets forth the standard of conduct for directors, as described in Section 8 below. A corporation may not include a provision in its articles that exculpates (eliminates) director liability for improper distributions. A shareholder who receives an improper distribution, knowing it is improper, may be liable to the corporation for the amount that distribution exceeds what could properly be distributed to him or her.

8. Fiduciary Duties

a) Duty of Care

Standard of Conduct: Section 8.30 sets forth the standard of conduct for directors. Section 8.30 requires directors to act: (1) in good faith; (2) with the care that a reasonable person in like position would use in similar circumstances; and (3) in the manner the director reasonably believes to be in the best interest of the corporation. Although this formulation corresponds with the structure of the Model Act's Section 8.30, it differs by including clause two (2) which is not included in the Model Act.

Other constituencies: 156D states that, "in determining what the director reasonably believes to be in the best interests of the corporation, a director may consider the interest of the corporation's employees, suppliers, creditors and customers, the economy of the state, the region, and the nation, community and social considerations and the long-term and short-term interests of the corporation and its shareholders, including the possibility that these interests may best be served by the continued independence of the corporation." Model Act Section 8.30. This provision, which is not included in the Model Act, makes clear that directors may weigh the interests of other constituencies when making corporate decisions, including whether to accept an unsolicited takeover offer.

Safe Harbor from Liability: If a director satisfies the standard of conduct set forth in Section 8.30 he or she is protected from personal liability for his or her actions or inactions.

The Business Judgment Rule: A director's failure to meet the standards established by Section 8.30, does not automatically result in liability. Instead, the director's potential personal liability is determined according to common law doctrine. The Business Judgment Rule establishes a presumption that a board with a majority of disinterested directors, when making a business decision, where disinterested, and after reasonable investigation, acted in good faith and in the best interest of the corporation. Harhen v. Brown, 431 Mass. 838 (2000). To overcome the Business Judgment Rule's presumptions, the plaintiffs must plead facts that refute it.

Good Faith: To enjoy protection from liability under Section 8.30 or the Business Judgment Rule, directors must act in good faith. Massachusetts courts set a high bar for finding a failure to act in good faith. "Bad faith is not simply bad judgment. It is not merely negligence. It imparts a dishonest purpose or moral obliquity. It implies conscious doing of wrong." Spiegel v. Beacon, 297 Mass. 398 (1937). A breach of the duty of good faith occurs when a director is "motivated by subjective bad faith, which is an actual intent to do harm, or where the director has engaged in intentional dereliction of duty or conscious disregard for his or her responsibilities." Blake v. Smith, Mass. Superior Ct. (Hampden 03000038) (2006). This follows the standard established by the Delaware Supreme Court in In re the Walt Disney Derivative Litigation, (906 A. 2d 27, 64, 66 (Del. 2006).

b) Duty of Loyalty

Corporate officers and directors are bound by the duty of loyalty, and are not permitted to use their position of trust and confidence to further their private interests. Massachusetts courts have held that "to meet a fiduciary's duty of loyalty, a director or officer who wishes to take advantage of a corporate opportunity or engage in self-dealing must:

(1) First disclose material details of the venture to the corporation; *and*

(2) Then either,

(a) receive the assent of disinterested directors or shareholders, *or*

(b) otherwise prove that the decision is fair to the corporation."
Demoulas v. Demoulas Super Markets, Inc., 424 Mass. 501 (1997).

Conflict of Interest Transactions: 156D does not follow the Model Act's subchapter F provisions for interested director transactions. Instead, 156D includes an earlier version of the Model Act's provisions that track pre-existing Massachusetts law. Section 8.31 provides a safe harbor for transactions with a corporation in which a director has a material direct or indirect interest. Under Section 8.31, interested director transactions are not voidable, solely due to the conflict, if the material facts regarding conflict are disclosed and the transaction is approved by a majority of disinterested directors or shareholders, or if the transaction is fair. This provision is similar to Section 144 of the Delaware General Corporation Law. Although disinterested approval removes the interested director taint, the transaction can still be voided on other grounds.

Corporate Opportunities: Section 8.31 does not apply to a situation where a director or officer is alleged to have taken a corporate business opportunity, because in that context there is no contract between the director and the corporation.

(a) Definition: A corporate opportunity is defined as "any opportunity to engage in a business activity of which a director or senior executive becomes aware, either in connection with performing the functions of those positions or through the use of corporate information or property, if the resulting opportunity is one that the director or senior executive should reasonably be expected to believe would be of interest to the corporation." *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501 (1997).

(b) Approval: A director or officer who wishes to take advantage of a corporate opportunity must first disclose material details of the venture to the corporation, *and* then either: (1) receive the assent of disinterested directors or shareholders, *or* (2) otherwise prove that the decision is fair to the corporation. *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501 (1997).

9. Close Corporations

Massachusetts courts have long maintained special doctrines to protect the rights of minority shareholders in close corporations. 156D preserves this

tradition. Under Donahue v. Rodd Electrotype, 267 Mass. 578 (1975), and its progeny, shareholders in close corporations owe each other duties of utmost good faith and loyalty.

The Donahue doctrine forbids majority shareholders of a close corporation from taking for themselves any benefits of corporate ownership that they deprive to the minority shareholders. Examples of transactions that may implicate Donahue include the selective redemption of shares; unequal employment opportunities; excessive compensation paid to shareholders; and non-payment of dividends.

10. Fundamental Transactions

a) Amendments to the Articles of Organization

Before the issuance of shares, the promoter may amend the articles. After the issuance of shares, amendments must be adopted by the board and approved by the shareholders. The vote of two thirds of shares entitled to vote on the matter is required to approve amendments to the articles, except that the following amendments require the vote of only a majority of shares:

(1) Increasing or reducing the capital stock or any class or series of stock;

(2) A change in the number of authorized shares or exchange thereof pro rata for a different number of shares of the same class or series; or

(3) A change in the corporate name.

The required vote for amendments to the articles may be reduced in the articles, but not below a majority of shares.

b) Mergers and Share Exchanges

Chapter 156D authorizes mergers and share exchanges. The board of directors must approve a plan of merger or share exchange and submit the plan to shareholders for their approval. The vote of two-thirds of shares entitled to vote is required for approval or a merger of share exchange. This requirement may be altered in the articles of incorporation, but not below a majority of shares.

However, no vote of the shareholders of the surviving corporation is required if the articles do not change, the shareholders of the surviving company retain their shares, and any new shares issued in the merger do not exceed 20% of shares outstanding before the merger.

c) Sale of Assets

Shareholder approval is required for the sale of all, or substantially all, of a corporation's assets, other than in the ordinary course of business. The vote required for approval of a sale of assets is two-thirds of the shares entitled to vote thereon, unless a lesser percentage is authorized in the articles (but not less than a majority of shares entitled to vote).

d) Appraisal Rights

Shareholders who object to a fundamental transaction are entitled to a judicial appraisal and to receive the fair value of their shares in cash.

(1) Mergers

If a shareholder vote is required for a merger, objecting shareholders are entitled appraisal unless:

(a) All shareholders receive cash equal to the amount that would have been due on dissolution; or

(b) Shareholders hold marketable securities in the merging company and will receive only marketable securities and/or cash in the merger (market-out exception); and

(c) There are no insider conflicts of interest.

(2) Share Exchanges

In share exchanges, shareholders (entitled to vote) who object to a share exchange are entitled to appraisal unless:

(a) The shareholders hold marketable securities and will receive marketable securities in the exchange; and

(b) There are no insider conflicts of interest.

(3) Sale of Assets

Shareholders who object to a sale of assets are entitled to a judicial appraisal unless:

(a) The shareholder is entitled to redeem shares at a price no greater than the cash to be received in the transaction; or

(b) The sale is pursuant to a judicial order for sale; or

(c) The sale of assets is conditioned on the dissolution of the corporation and the distribution of assets in cash or marketable securities within one year after sale; and there are no insider conflicts of interest.

(4) Amendments to the Articles

Shareholders are entitled to appraisal rights if the corporation adopts amendments to the articles that adversely affect a shareholder's rights in respect of the shares by creating, altering or abolishing certain rights and preferences accorded to the shares.

e) Dissolutions

A corporation may dissolve by submitting articles of voluntary dissolution to the Secretary of State. The board must submit a proposal for dissolution to the shareholders. The vote required to approve dissolution is two-thirds of the votes entitled to be cast on the matter, unless otherwise provided by the articles (but not less than a majority of all votes entitled to be cast). Non-public corporations can provide for alternative dissolution procedures in the articles.

(1) Distributions on Dissolution

No distributions are permitted on dissolution until the corporation has made adequate provisions for existing and reasonably foreseeable debts, liabilities and obligations, and any liquidation preferences for preferred shares.

Chapter 156D creates safe harbors for distributions made after a three-year period, even if assets are insufficient to pay disputed, unknown, contingent, or unasserted claims, provided the corporation follows notice procedures required by the statute.

(2) Liability for Improper Distributions

A director may be liable to the corporation for an improper distribution on dissolution if the director did not fulfill his or her duties under Section 8.30, setting forth the standard

of conduct for directors. A shareholder who receives an improper distribution, knowing it is improper, may be liable to the corporation for the amount that exceeds what could properly have been distributed to him or her.

11. Shareholder Litigation

a) Direct Actions

Where the harm to a plaintiff-shareholder is direct, such as a freeze out of a minority shareholder by the majority, the court is likely to view the case as a direct action and not require compliance with Mass. G. L. c. 109, §23(a). Horton v. Benjamin, Mx. Sup. Ct., No. 92-06697 (Nov. 26, 1997). Plaintiff must show that a corporate recovery would not provide just relief to the plaintiff.

b) Derivative Actions

A derivative shareholder action may be brought to vindicate a corporate right – to remedy a wrong to the corporation itself. As under Federal Rules of Civil Procedure, the Model Act and Delaware law, shareholders of Massachusetts corporations must follow special procedural requirements in derivative litigation.

(1) Demand Requirement

Massachusetts follows the Universal Demand Requirement. All shareholders must make a written demand upon the corporation to take suitable action before initiating derivative litigation.

(a) Shareholders may not initiate suit until 90 days (or 120 days if the demand is referred to disinterested shareholders) after demand was made, unless irreparable harm would befall the corporation.

(b) Directors may refer the demand to disinterested shareholders, or a committee of independent directors, or apply to the court for the appointment of a panel of independent persons to make a determination on whether to proceed with litigation.

(c) If a shareholder initiates litigation after rejection of demand, the case should be dismissed if the court finds the rejection was made by decision makers (board, or committee of the board), in good faith after conducting a reasonable inquiry, or the disinterested shareholders determined continuing

the litigation was not in the best interest of the corporation.

(2) Director Independence

None of the following factors shall, by itself, cause a director to be considered not independent for the purposes of considering demand:

(a) The director was nominated by a person who is a defendant in the litigation;

(b) The director is named as a defendant in the litigation; or

(c) The director approved of the action being challenged in the litigation, if the director received no personal benefit from the action.

12. Protections from Liability

a) Exculpation

Chapter 156D allows corporations to include a provision in the articles that eliminates the monetary liability of directors for most breaches of fiduciary duty. However, corporations may not exculpate directors for the breach of duty of loyalty, acts or omissions not in good faith, knowing violations of law, or improper distributions. This provision tracks Section 102(b)(7) of the Delaware General Corporation Law.

b) Indemnification

Section 8.51 allows corporations to indemnify directors from liabilities in connection with their service to the company. Indemnification is permissible so long as the director: (1) conducts himself in good faith; (2) reasonably believes his conduct is in the best interests of the corporation (or not opposed to the best interests of the corporation); and (3) in the case of a criminal action, had no reasonable cause to believe his conduct was unlawful. Unlike under the Model Act, permissive indemnification is not limited to third-party actions. Indemnification may cover both the costs of defense and most settlements.

B. Limited Liability Companies

1. LLC Statute

The Massachusetts LLC statute is Chapter 156C of the Massachusetts General Corporation Law. Chapter 156C is modeled on the Delaware LLC statute.

2. Formation Documents

To form an LLC, the organizers must file a Certificate of Organization with the Massachusetts Secretary of State. The members may choose to enter into an operating agreement that governs the affairs and operations of the LLC.

3. Members and Managers

The LLC must have at least one member. Chapter 156C allows members to delegate management authority to one or more managers. Members of the LLC have the flexibility to create the management structure they desire.

The operating agreement may specify the voting rights of members and what actions require the approval of the members. In the absence of specified terms in an operating agreement, decisions are made by members having more than 50% of the member unreturned contributions.

4. Fiduciary Duties

a) Although there is little case law on the issue, Massachusetts courts have ruled that LLC members and managers have fiduciary duties akin to those created under corporate and partnership law. Members of a closely held LLC are bound by duties of utmost good faith and loyalty under the Donahue doctrine. In addition, Massachusetts courts have held that members and managers of an LLP are bound by a covenant of good faith and fair dealing. Fronk v. Fowler, 456 Mass. 319 (2010); Chokel v. Genzyme Corp., 449 Mass. 272 (2007). It is reasonable to expect that Massachusetts courts will extend this good faith obligation to LLCs.

b) Waivers – Fiduciary duties of members and managers may be limited in the operating agreement. Section 8(b) provides that the certificate of organization or operating agreement may eliminate or limit the personal liability of a member or manager for breach of any duty to the limited liability company or to another member of manager. Despite the breadth of this statutory language, it is not clear that fiduciary duties can be eliminated completely.

5. Dissolution

An LLC dissolves at the time specified in the operating agreement, at the occurrence of an event specified in the operating agreement, or on a vote of all of the members. The affairs of the LLC are to be wound up by a manager or its members. Once dissolved, the LLC must file a certificate of cancellation with the Secretary of State.

C. Agency & Partnership

1. Agency Law

Agency law presides at the heart of business dealings. The owner or owners of a business cannot conduct the business without some assistance. Even sole practitioners have moments where they need to figure out whether they should hire an employee or retain an independent contractor.

Partners in partnerships act as the agents for each other and the partnership. In a corporation, the shareholders are not able to act on their own in their capacity as shareholders. They delegate authority and related responsibility to the board of directors. The board of directors delegates that authority to officers. Agency lies at the center of it all. In Massachusetts, the law of agency generally follows the Restatement (Second) of Agency.

a) Formation

(1) Existence Inferred

The existence of an agency relationship may be inferred from a course of conduct that shows the principal "repeatedly acquiesced therein and adopted acts of the same kind." LaBonte v. White Construction, 363 Mass. 41 (1973).

(2) Compensation

On its face, compensation from a principal to an agent does not create an agency relationship.

(3) Ratification

In Massachusetts, if a principal has repeatedly accepted agent's proposals to purchase, this alone does not support a finding of implied authority. Instead, the understanding is that principal's ratification was required to "the validity of the acts." Stone v. Fox Film Corp, 295 Mass. 419 (1936).

(4) Equal Dignities Doctrine

Massachusetts applies the equal dignities doctrine, holding that if a contract must be in writing as required by the statute of frauds, the express authority must also be in writing.

(5) Secret Limiting Instruction

Secret limiting instruction may apply in a determination of actual authority. If an agent has actual authority, the principal may have secretly limited that authority. Frequently, this arises in cases in which the agent engages in conduct that is outside the agent's authority as it had been limited. However, apparent authority may still apply to make a third party whole.

(6) Lingering Authority

Lingering authority happens after the agent's actual authority has been terminated. After the termination of the actual authority, the agent continues to act on the principal's behalf. Third parties may rely for apparent authority on the lingering appearance of authority until the third party receives notice that the agent's authority has been terminated.

(7) Negligent Hiring

Massachusetts allows third party actions against principals for negligent hiring, retention or supervision of an agent if the principal "was aware, or should have been aware" of the agent's lack of fitness for the position and did not take further action. Further action by the principal, depending on the situation, may be an investigation, termination of the agency relationship, or assigning the agent to a different job function. Foster v. The Loft, Inc., 26 Mass. App. Ct. 289 (1988).

(8) Independent Contractors

In Massachusetts, the requirement to establish that someone is an independent contractor involves a three prong test. All three prongs must be satisfied to determine that a relationship is one of independent contractor (not agency).

Per Mass. G. L. c. 149, §148B (a), that test is:

(a) The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(b) The service is performed outside the usual course of the business of the employer; and

(c) The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

b) Obligations of an Agent

(1) Duties

Agency exists in many situations. In some situations in Massachusetts, the agents are held to the duties of the acronym "OLD CAR": obedience, loyalty, disclosure, confidentiality, accountability and reasonable care, and as well as due diligence.

(2) Dual Agency

In Massachusetts, dual agency is allowed with prior disclosure and written consent from both principals.

In real estate, Massachusetts requires completion of a Mandatory Real Estate Licensee-Consumer Relationship Disclosure. It is in this form that, among other things, the agent would disclose the potential dual agency, and the principal would either sign-off or not sign-off on consenting to the dual agency relationship.

In a dual agency situation, the dual agent must act neutrally concerning any conflict of interest. As a result, the dual agent will not be able to fully satisfy the fiduciary duty of loyalty, disclosure, and obedience.

The dual agent can, and must, satisfy the obligation of confidentiality and accounting.

c) Vicarious Liability

(1) Liability for Independent Contractor Torts

The rule in Massachusetts is that there is no vicarious liability for torts by an independent contractor. Massachusetts recognizes two exceptions: (1) if the activities of the independent contractor are ultra-hazardous; and (2) in situations of estoppel, where the principal holds the relationship out as not one of independent contractor but of with the appearance of agency. In the second situation, the principal will be estopped from denying vicarious liability for the activities of the independent contractor.

(2) Liability for Sub-agent Torts

In Massachusetts, the principal is not vicariously liable for torts by a sub-agent unless the same requirements for agency have been met: assent, benefit to the principal, and principal's right to control the sub-agent. In these cases, it is usually difficult to establish the principal's control.

2. Partnership Law

Massachusetts statutory law of partnership is derived from Uniform Partnership Act (1914) (the "UPA"). In Massachusetts it has been recognized that in a general partnership, the one who acts and those who may be held vicariously liable for the consequences of the actor's actions are usually on the same level to each other in the business. Bachand v. Vidal, 328 Mass. 97, 100 (1951). This is in contrast to the typical employment/agency situation of master versus servant, where the master may be responsible for the consequences of the actions of his or her servant-actor. The servant-actor is frequently in a position subordinate to the principal. But, as identified in the Mass. G. L. c. 108(A), Section 9, partners are the agents for the partnership. This is consistent with the UPA.

a) Formation

(1) Intent of the parties

Massachusetts law holds that a partnership may not be "express" but may actually come about through the intent of the parties. Shain Inv. Co. v. Cohen, 15 Mass. App. Ct. 4 (1982).

(2) No filing requirement

While there is no filing requirement in Massachusetts to form a general partnership or sole proprietorship, if the person's name is not in the title of the business they are operating, a certificate must be filed with the clerk in each city or town where the business has an office.

(3) Incoming Partner Liability

Under the UPA, an incoming partner is not directly, personally liable for pre-existing debts of the partnership. Any money paid into the partnership, however, may be used by the partnership to satisfy prior debts. Massachusetts law does not follow this provision of the UPA. Instead, under Mass. G. L. c. 108A, §17, the incoming partner "is liable for the obligations of the partnership arising before his admission as though he had been a partner when such obligation was incurred…". The section further provides that this liability will be satisfied only from partnership property, which is consistent with the UPA.

b) Governance

The law related to fiduciary principals of partners comes from the UPA and common law. Under Massachusetts law, the stockholders in a close corporation are accountable for the same fiduciary standards as those of partners in a partnership (Donahue doctrine). Thus, most of the case law relating to close corporations in Massachusetts is also applicable to Massachusetts partnerships.

(1) Duty of Care

The Massachusetts UPA does not reference the duty of care. The Revised Uniform Partnership Act (the "RUPA"), which references the obligation to not engage in "grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law," has not been adopted by Massachusetts. Similarly, Massachusetts does not have a common law duty of care on the part of partners in partnerships in Massachusetts. "There is no general principal of partnership which renders one partner liable to his copartners for his honest mistakes. So far as losses result to a firm from errors of judgment of one partner not amounting to fraud, bad faith or reckless disregard of his obligations, they must be borne by the partnership. Each

partner owes to the firm the duty of faithful service according to the best of his ability. But, in the absence of special agreement, no partner guarantees his own capacity." Hurter v. Larrabee, 224 Mass. 218, 220-21 (1916) (cited by Shain Investment Co. v. Cohen, 15 Mass. App. Ct. 4, 12 (1982).

(2) Duty of Loyalty

In Massachusetts, the duty of loyalty in partnerships is primarily situated in Mass. G. L. c. 108A, §21, requiring every partner to account to the partnership for any benefit and hold as trustee any profits derived by him or her without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use of its property. From this, partners are proscribed from self-dealing, competing with the partnership, taking partnership business opportunities and misuse of partnership property, without getting the consent of all of the partners.

Under Massachusetts law, a person who is alleged to have violated the duty of loyalty may demonstrate a "legitimate business purpose" for his action. (Starr v. Fordham, 420 Mass. 178, 183-84 (1995)). The same case determined that the Business Judgment Rule does not apply in matters of self-dealing.

(3) Taking a Business Opportunity

Massachusetts requires that each partner in a partnership refrain from taking partnership business opportunities. This is similar to the corporate opportunities doctrine. Lurie v. Pinanski, 215 Mass. 229 (1913), and Wartski v. Bedford, 926 F.2d 11 (1st Cir. 1991).

(4) Self-Dealing

In Massachusetts, if a partner enters into self-dealing, it is the partner's burden to prove that his or her actions were fair and that those actions did not harm the partnership. Meehan v. Shaughnessy, 404 Mass. 419 (1989).

Massachusetts, in *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501 (1997), put forth a standard for the duty of loyalty of corporate fiduciaries engaging in self-dealing or corporate opportunity transactions in a close corporation, which standard probably would apply to a

partnership: "[T]o meet a fiduciary's duty of loyalty, a director or officer who wishes to take advantage of a corporate opportunity or engage in self-dealing must first disclose material details of the venture to the corporation *and* then *either* receive the assent of disinterested directors or shareholders *or* otherwise prove that the decision is fair to the corporation."

(5) Disclosure

Massachusetts requires that partners provide to other partners or legal representatives thereof accurate and full information upon demand of all matters affecting the partnership.

(6) Partnership Agreement

In the partnership agreement, provisions often allow various parties to enter into various transactions, some of which may trigger fiduciary duties. Since all partners sign the partnership agreement, this may be seen as an expression of consent necessitated by Mass. G. L. c.108A, §21. Massachusetts courts may still not be completely open to the concept of partnership agreements limiting fiduciary duties.

A law firm partnership agreement that allowed founding partners to determine partner compensation was determined to be self-dealing and a strict scrutiny test of fairness was applied. Starr v. Fordham, 420 Mass. 178 (1995).

(7) Recovery

If a partner in a general partnership breaches his or her duty of loyalty, the partnership may only bring an action against its own partners for accounting. In an action for an accounting, the partnership may recover the losses the breaching partner caused by the breach, and the profits the breaching partner made by the breach.

c) Vicarious Liability

There are two routes to vicarious liability in a partnership for the unauthorized acts of a partner. Both of these routes would allow impacts to attach to an innocent and uninvolved partner in the general partnership. Neither route requires the innocent partner to have been aware or involved. Kansallis Finance Ltd. vs. Daniel J. Fern, 421 Mass. 659 (1996).

(1) The first route is where there is apparent authority. If apparent authority can be proven, an intent to benefit the partnership is not required.

(2) The second route is where the partner acts within the scope of the partnership to benefit the partnership, at least in part. When apparent authority cannot be established, the determination must be made as to whether the actor acted to benefit the partnership, at least in part.

d) Dissolution

Since the Massachusetts statute follows the UPA, the statute does not define or use the concept of wrongful dissolution.

e) Limited Partnerships

(1) Liability of Limited Partners

The general partners in a limited partnership have the same liability as that of a general partner in a general partnership. Limited partners in a limited partnership are not liable for the partnership obligations. In Massachusetts, to be entitled to this liability protection, limited partners may not participate in the management of the limited partnership business. Mass. G. L. A. 109, §19(a) provides that liability attaches to the limited partner if she "is also a general partner, or, in addition to the exercise of [her] rights and powers as a limited partner, [she] is liable only to persons who transact business with the limited partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner." The statute further identifies what is not considered participation in the control of the business referenced by subsection (a). The list is:

(a) Being a contractor for or an agent or employee of the limited partnership or of a general partner, or being an officer, director or shareholder of a general partner which is a corporation;

(b) Consulting with and advising a general partner with respect to the business of the limited partnership;

(c) Acting as surety for the limited partnership or guaranteeing or assuming one or more specific obligations of the limited partnership;

(d) Taking any action required or permitted by law to bring or pursue a derivative action in the right of the limited partnership;

(e) Requesting or attending a meeting of partners;

(f) Proposing, or approving or disapproving, by voting or otherwise, one or more of the following matters:

(i) The dissolution and closing of the limited partnership;

(ii) The sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership;

(iii) The incurrence of indebtedness by the limited partnership other than in the ordinary course of its business;

(iv) A change in the nature of the business;

(v) The admission or removal of a general partner;

(vi) The admission or removal of a limited partner;

(vii) A transaction involving an actual or potential conflict of interest between a general partner and the limited partnership or the limited partners;

(viii) An amendment to the partnership agreement or certificate of limited partnership; or

(ix) Matters related to the business of the limited partnership not otherwise set forth in this subsection, which the partnership agreement states in writing may be subject to the approval or disapproval of limited partners;

(x) Closing of the affairs of the limited partnership pursuant to the provisions of section forty-six; or

(xi) Exercising any right or power permitted to limited partners under this chapter and not specifically enumerated in this subsection."

In addition, the statute in section (d) provides "[a] limited partner who knowingly permits his name to be used in the name of the limited partnership, except under circumstances permitted by subclause (i) of clause (2) of section two of the statute, is liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner."

(2) Derivative Actions

A limited partner may bring a derivative action to recover if (a) the general partners of the limited partnership refused to bring the action or (b) the likelihood of success is low of in bringing an action. Mass. G. L. c.109, §§56-59.

(3) Entities as Partners

In the case where a general partner is a corporation (or other business entity), some Massachusetts decisions have found that the officers, directors and stockholders of the corporate (or other entity) general partner have fiduciary duties to the other partners in the limited partnership. Or, in some circumstances, courts have found that those individuals are liable for aiding and abetting a breach of fiduciary duties by the general partner that is the business entity. Starr v. Fordham, 420 Mass. 178, 185 (1995), Cacciola v. Nellhaus, 49 Mass. App. Ct. 746, 752-53 (2000), and Ray-Tek Services, Inc. v. Parker, 64 Mass. App. Ct. 165 (2005).

IV. MASSACHUSETTS COURTS AND CIVIL PROCEDURE

A. The Massachusetts Court System

1. Supreme Judicial Court

a) Jurisdiction

The Supreme Judicial Court (the "SJC") is the Commonwealth's highest appellate court. It hears a wide range of civil and criminal appeals from September through May. Individual Justices also sit for Single Justice Sessions throughout the year. Single Justice Sessions cover a variety of proceedings, including motions pertaining to cases on trial or appeal, bail reviews, bar discipline proceedings, petitions for bar admission, and emergency matters.

b) Establishment and Composition

The SJC was established in 1692 and is the oldest known appellate court in continuous existence. It is authorized by, and continues to operate under, the Massachusetts Constitution of 1780. The Court consists of a Chief Justice and six Associate Justices. The Justices typically sit as a group, although Associate Justices also rotate monthly for Single Justice Sessions.

c) Rules and Procedure

The Massachusetts Rules of Appellate Procedure, which substantially follow the Federal Rules of Appellate Procedure, apply to appeals before the SJC and the Massachusetts Appeals Court (see below). The SJC has also established rules for general practice before the Court, see Supreme Judicial Court Rule 1:01-1:24, and rules for Single Justice Sessions, see Supreme Judicial Court Rule 2:01-2:23.

d) Finality

The judgments and decrees of the Supreme Judicial Court are final and conclusive on all parties before it.

e) Administrative Responsibilities

The SJC is responsible for the overall superintendence of the judiciary and the bar. In that capacity, it makes or approves rules for the operations of all the Commonwealth's courts, and oversees several agencies affiliated with the judicial branch, including the Board of Bar Overseers, the Board of Bar Examiners, the Clients'

Security Board, the Mental Health Legal Advisors Committee, and Correctional Legal Services.

2. Massachusetts Appeals Court

a) Jurisdiction

The Appeals Court has general appellate jurisdiction and hears appeals from most trial court departments (see ¶3 below). It also hears appeals from three state agencies: the Appellate Tax Board, the Department of Industrial Accidents, and the Commonwealth Employment Relations Board. Certain types of appeals go directly to the SJC.

b) Establishment and Composition

The Appeals Court was established by statute in 1972 (see Mass. G. L. c. 211A), and has grown to twenty-five justices from its original six. The Appeals Court generally hears about 1,500 appeals annually.

c) Rules and Procedure

Appeals are governed by the Massachusetts Rules of Appellate Procedure.

d) Panels and Single Justice Sessions

Most appeals are heard in three-judge panels. The 25 sitting justices are rotated through panels, along with a number of "recall" justices who have formally retired but continue to sit to help the Court with its caseload. Like the SJC, the Appeals Court holds regular Single Justice sessions to review appeals from certain interlocutory orders, motions for stay of proceedings, and motions for injunctive relief.

3. Trial Courts

There are seven trial court departments in the Commonwealth, which are collectively overseen by the Chief Justice of the Trial Court and the Court Administrator. Each Department also has its own administrative office in Boston and is overseen by its own Departmental Chief Justice. All seven trial court departments are authorized by statute – see Mass. G. L. c. 211B.

The Massachusetts Rules of Civil Procedure apply to most civil actions in the trial courts. In addition, certain trial court departments have additional sets of rules and standing orders that govern certain types of proceedings, as set forth below.

a) Superior Court Department

(1) Jurisdiction

A plaintiff may commence a damage action in the Superior Court in any amount; however, actions in the Superior Court may only proceed where there is no reasonable likelihood that recovery by the plaintiff will be less than or equal to $25,000. Mass. G. L. c. 212, §3. (Effective January 1, 2020 the procedural amount will increase to $50,000, see Supreme Judicial Order Regarding Amount-In-Controversy Requirement under Mass. G. L. c. 218, §19 and Mass. G. L. c. 212, §3.) A defendant may seek to have the matter dismissed where the case is not likely to meet the statutory threshold. Mass. R. Civ. P. 12(b)(10), Reporter's Notes (2008). The Superior Court has jurisdiction as to matters in which equitable relief is sought. The Superior Court also has jurisdiction to review certain administrative matters.

The Court has eighty-two authorized justices and sits in twenty locations in all fourteen counties of the Commonwealth.

(2) Rules and Motions

The Superior Court has its own supplemental set of rules, including Special Provisions for Civil Actions. See Superior Court Rules 19-47.

Civil Motions are governed by Superior Court Rules 9A-9E. All motions shall be served with a separate memorandum stating the reasons, including supporting authorities, why the motion should be granted and may include a request for a hearing. Superior Court Rule 9A(a)(1).

The court need not consider any motion or opposition thereto, grounded on facts, unless the facts are verified by affidavit, are apparent upon the record, or are agreed to in writing, signed by interested parties or their counsel. Superior Court Rule 9A(a)(4).

(3) Business Litigation Sessions

The Business Litigation Sessions of the Superior Court (the "BLS") provide a specialized forum for complex business and commercial disputes. Two full-time sessions are

located within the Suffolk County Superior Court, with two Superior Court Justices assigned permanently to each session. The BLS emphasizes judicial case management, and has developed specialized protocols for discovery and motion practice that are unique to the session. Parties must apply to have a case accepted into the BLS, but a party may seek acceptance into the BLS even if the venue does not lie in Suffolk County.

b) District Court Department

A plaintiff may commence a damage action in the District Court in any amount; however, actions in the District Court may proceed only where there is no reasonable likelihood that recovery by the plaintiff will exceed $25,000. Mass. G. L. c. 218, §19. (Effective January 1, 2020 the procedural amount will increase to $50,000, see Supreme Judicial Order Regarding Amount-In-Controversy Requirement Under Mass. G. L. c. 218, §19 and Mass. G. L. c. 212, §3.) A defendant may seek to have the matter dismissed where the case is not likely to meet the statutory threshold. Mass. R. Civ. P. 12(b)(10), Reporter's Notes (2008). If a defendant makes a timely objection relative to the threshold dollar amount, the judge must dismiss the claim without prejudice. If the defendant does not assert the procedural limit in a timely manner, the District Court judge may, in his or her discretion, retain the case. Rockland Trust Co. v. Langone, 477 Mass. 230, 232 (2017), citing Sperounes v. Farese, 449 Mass. 800, 807 (2007). In actions seeking money damages, the District Court also has the same equitable powers and jurisdiction as the Superior Court (under Chapter 214) and the same authority to issue declaratory judgments (under Chapter 231A). Mass. G. L. c. 218, §19C.

The District Court has jurisdiction over small claims; summary process; mental health, alcohol, and drug abuse commitments; evictions and related matters; abuse prevention proceedings; and some governmental agency actions subject to judicial review. Appeals of certain District Court civil actions, including actions for money damages, summary process cases, and mental health proceedings, are heard in the Appellate Division of the District Court Department, in one of three appellate districts: the Northern District; the Western District; or the Southern District. Further appeal may be taken from the Appellate Division to the Appeals Court.

The District Court has 62 divisions across the Commonwealth, with 158 authorized judges. In addition to the Massachusetts Rules of Civil Procedure, the District Courts utilize the

District/Municipal Courts Supplemental Rules of Civil Procedure. The District Courts also have a set of Special Rules and a set of Standing Orders.

c) Boston Municipal Court (the "BMC")

The Boston Municipal Court's geographical jurisdiction covers most of Suffolk County. Its subject matter jurisdiction is similar to that of the District Court Department. The BMC applies the Massachusetts Rules of Civil Procedure and the District/Municipal Courts Supplemental Rules of Procedure. It also has its own unique set of Standing Orders. The BMC Appellate Division hears appeals of certain actions, including actions for money damages and mental health proceedings.

d) Housing Court Department

The Housing Court's jurisdiction extends to nearly all matters relating to residential housing, such as zoning, general nuisances, and landlord-tenant relations. The Housing Court does not have its own set of court rules, although it does maintain specialized Standing Orders.

e) Juvenile Court Department

The Juvenile Court has general jurisdiction over cases involving delinquency; children in need of services; care and protection petitions; adults contributing to the delinquency of minors; adoption; guardianship; termination of parental rights; and youthful offenders. The Court has eleven divisions. It has established the Juvenile Court Rules for the Care and Protection of Children, as well as a set of Standing Orders.

f) Land Court Department

The Land Court has jurisdiction over the registration of title to real property, and foreclosure and redemption of real estate tax liens. It also shares jurisdiction over matters arising out of decisions by local planning boards and zoning boards of appeal, and over most property matters. It has superintendence authority over the registered land offices in each Registry of Deeds. The Land Court is based in Boston, although it may schedule sessions in other locations in the Commonwealth. In addition to the Massachusetts Rules of Civil Procedure, the Land Court has established its own set of Rules and Standing Orders.

g) Probate and Family Court Department

The Probate and Family Court has jurisdiction over family-related matters such as divorce, paternity, child support, custody, visitation, adoption, termination of parental rights, and abuse prevention. Probate matters include jurisdiction over wills, administrations, guardianships, conservatorships, and name changes. The Probate and Family Court has 14 divisions across the Commonwealth. The Massachusetts Rules of Domestic Relations Procedure govern domestic relations proceedings in the Probate and Family Court. Equity actions are governed by the Massachusetts Rules of Civil Procedure. In addition, the Probate and Family Court has established Supplemental Rules of the Probate and Family Court, Standing Orders, and Uniform Practices.

4. Selection and Tenure of Judges

a) Selection

The Governor is vested with the authority to nominate and appoint all judicial officers "by and with the advice and consent" of an eight-member elected body known as the Executive Council or Governor's Council. Mass. Const., 2d Part, c. II, §1, Art. IX. Although not legally required to do so, every recent Governor has also appointed a nonpartisan judicial nominating commission to assist with the nominating process.

b) Tenure

Judges of the Commonwealth are appointed for "lifetime" terms, with mandatory retirement upon reaching the age of 70. Mass. Const., Art. XCVIII.

B. Pre-Filing Considerations

1. Venue

Transitory actions generally may be filed in the county where one of the parties lives or has a usual place of business. If no party lives in Massachusetts, the action may be filed in any county. Mass. G. L. c. 223, §1. Special venue rules apply for actions involving replevin, title to land, or forged negotiable instruments; and for actions in which the Commonwealth or one of its political subdivisions is a party.

2. Personal Jurisdiction/Minimum Contacts

The courts may exercise jurisdiction over an out-of-state defendant if the assertion of jurisdiction is authorized by Mass. G. L. c. 223A, §3 (the long-arm statute), and the exercise of jurisdiction is consistent with due process. The long-arm statute provides that "[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's:

(a) Transacting any business in this Commonwealth;

(b) Contracting to supply services or things in this Commonwealth;

(c) Causing tortious injury by an act or omission in this Commonwealth;

(d) Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth;

(e) Having an interest in, using or possessing real property in this Commonwealth;

(f) Contracting to insure any person, property or risk located within this Commonwealth at the time of contracting;

(g) Maintaining a domicile in this Commonwealth while a party to a personal or marital relationship out of which arises a claim for divorce, alimony, property settlement, parentage of a child, child support or child custody; or the commission of any act giving rise to such a claim; or

(h) Having been subject to the exercise of personal jurisdiction of a court of the Commonwealth which has resulted in an order of alimony, custody, child support or property settlement, notwithstanding the subsequent departure of one of the original parties from the Commonwealth, if the action involves modification of such order or orders and the moving party resides in the Commonwealth, or if the action involves enforcement of such order notwithstanding the domicile of the moving party."

3. Statute of Limitations

a) Generally

The statute of limitations provides fixed time periods for commencing certain types of claims. The most common limitations periods are found in Mass. G. L. c. 260. They include:

(1) Contract claims – six years. Mass. G. L. c. 260, §2, except contracts under the Uniform Commercial Code (UCC), which are not subject to the six-year statute of limitations.

(2) Personal injury claims – three years. Mass. G. L. c. 260, §2A.

(3) Consumer protection claims – four years. Mass. G. L. c. 260, §5A.

(4) Civil rights actions – three years. Mass. G. L. c. 260, §5B.

b) Commencement

An action is commenced for purposes of the statute of limitations by: (1) mailing to the clerk of the proper court by certified or registered mail a complaint and an entry fee prescribed by law; or (2) filing such complaint and an entry fee with such clerk. Mass. R. Civ. P. 3.

c) Statutes of Repose

A statute of repose prevents the filing of a claim after the statutory period; even if an injury occurs after the conclusion of the statutory period. Some claim types may be subject to both a statute of limitations and a statute of repose. For example, Mass. G. L. c. 260, §2B sets a three-year limitation period for commencing a tort action for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property, other than of a public agency. That same provision sets a repose period providing that "in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner."

C. Pleadings

1. General

Pleading is governed by the Massachusetts Rules of Civil Procedure. However, there are additional sources that must be consulted. In some cases, there may be applicable statutes. The Massachusetts Rules of Domestic Relations Procedure govern domestic relations proceedings in the Probate and Family Court. The Massachusetts Superior Court Rules and Standing Orders may also supplement the Massachusetts Rules of Civil Procedure.

2. Commencement of Action

a) Generally

A civil action is commenced by: (1) the filing of a complaint and the entry fee with the clerk of the proper court; or (2) mailing the complaint and entry fee, by certified or registered mail, to the clerk of the proper court. Mass. R. Civ. P. 3. Where certified mail is not used, the action is not commenced until it is received and filed. In Probate and Family Court complaints may also be called a petition. Supplemental Rules of the Probate and Family Court R. 3.

In cases in Superior Court, a Civil Action Cover Sheet on the form specified by the Clerk of the Court must also be filed. This form is titled a Statement of Damages form in the District and Boston Municipal Courts. Mass. G. L. c. 212 §3A; Massachusetts Superior Court Rule 29; Rule 102A, District/Municipal Courts Supplemental Rules of Civil Procedure. The Cover Sheet and Statement of Damages form includes a statement of damages used to determine whether damages satisfy the statutory dollar amount threshold for the Superior Court, the District Court, or the Boston Municipal Court.

b) Special Rules

Certain claims in Massachusetts require some prior action by the plaintiff before filing an action. For example, under the Massachusetts Tort Claims Act, before beginning an action against a public employer for damages, the plaintiff must present a written claim to the executive officer of the public entity within two years of the date that the cause of action arose. The claim must be finally denied in writing. If the executive officer does not deny the claim in writing within six months, the claim is considered denied. Mass. G. L. c. 258, §4. At least 30 days before filing the action, claims under the Massachusetts Consumer Protection statute (C. 93A) must be preceded by a written demand for relief identifying

the claimant, describing the unfair or deceptive act or practice relied on, and describing the injury suffered. Mass. G. L. c. 93A, §9(3). A plaintiff may not begin an action against a health care provider unless the plaintiff gives the provider 182 days' written notice. Mass. G. L. c. 231, §60L(a).

c) Electronic Filing

A large and growing number of Massachusetts courts allow for electronic filing of documents in civil cases. While e-filing is not mandatory, it is recommended that attorneys use it where available. Further information and registration for the service may be found at efilema.com. E-filing is governed by the Massachusetts Rules of Electronic Filing, Supreme Judicial Court Rule 1:25.

3. Service of Process

a) Within the Commonwealth

Service upon the defendant(s) shall be made within 90 days of the filing of the complaint. If not served within the 90 day period the complaint shall be dismissed unless good cause can be shown. Mass. R. Civ. P. 4(j). The plaintiff is responsible for delivering a copy of the complaint and summons for service to either the sheriff, deputy sheriff or any other person authorized by law or special appointment to make service. Mass. R. Civ. P. 4(a) and (c).

Service within the Commonwealth is made upon an individual by delivering a copy of the summons and complaint to the individual; or by leaving copies at the last and usual abode of the defendant; or by serving an agent authorized by appointment or statute to receive process. Mass. R. Civ. P. 4(d)(1). Service is made on a domestic corporation (public or private), a foreign corporation subject to suit within the Commonwealth, or an unincorporated association subject to suit within the Commonwealth, by delivering a copy of the summons and complaint to an officer, to a managing or general agent, or to the person in charge of the business at the principal place of business within the Commonwealth; or by delivering such copies to any other agent authorized by appointment or by law to receive service of process, provided that any further notice required by law be given. Mass. R. Civ. P. 4(d)(2).

b) Outside the Commonwealth

Service outside the Commonwealth (assuming such service is authorized by statute) may be made by delivering a copy of the summons and of the complaint: (1) in the same manner as service within the Commonwealth; or (2) in the manner prescribed by the

law of the place in which the service is made for its courts of general jurisdiction; or (3) by mail addressed to the person to be served and requiring a signed receipt; or (4) as directed by the appropriate foreign authority in response to a letter rogatory; or (5) as directed by order of the court. Mass. R. Civ. P. 4(e).

(c) Attachment and Trustee Process

Special procedures apply when a party wishes to secure a judgment by attaching the opposing party's property. In most cases, prejudgment attachment requires notice to the debtor. The party seeking to attach property must first file the complaint, along with a motion for approval of the attachment and supporting affidavits with the court. The party seeking the attachment must then serve on the opposing party these same documents, along with a notice of hearing concerning the proposed attachment. Service of these documents must take place at the same time, and in the same manner, as service of the summons and complaint under Rule 4. Mass. R. Civ. P. 4.1(c). After a hearing, the decision whether to grant the motion for the attachment is entirely within the discretion of the court. Attachment may be granted without a hearing only under the narrow circumstances set forth in Mass. R. Civ. P. 4(f).

Trustee process is a similar procedural device for securing property or assets in expectation of an eventual judgment, and the process is quite similar to that of attachment. Mass. R. Civ. P. 4.1(c). The primary difference is that attachment pertains to property in the opposing party's direct possession, while trustee process pertains to property or assets that are in the possession of a third party (such as bank accounts). As with attachment, trustee process typically requires notice and a hearing, including service of process on the defendant in the manner provided by Rule 4.

4. Form of Pleadings

The complaint must have a case caption, including the name of the court; the county; the title of the action; the docket number (may be filled in with the number provided by the clerk after filing); the names of all of the parties; the name of the pleading (for example, a complaint or answer); plaintiff's residence or usual place of business; and, if known, the defendant's residence or usual place of business. If the defendant's residence or usual place of business is not known, the complaint must so state. Allegations in the complaint must be made in consecutively numbered paragraphs and, if practicable, each paragraph should only contain allegations of a single set of circumstances. Mass. R. Civ. P. 10. The complaint must also include a demand for judgment for relief. Relief in the alternative may be demanded. Mass. R. Civ. P. 8(a). Complaints in

a civil action may not contain a monetary amount claimed against any defendant unless the complaint contains both damages that are liquidated or ascertainable by calculation, and a statement under oath by a person having knowledge setting out how the damages were calculated. Mass. G. L. c. 231, §13B. Finally, the complaint must be signed by an attorney admitted to practice in Massachusetts and include the attorney's Board of Bar Overseers (the "BBO") number, address, telephone number and e-mail address. Mass. R. Civ. P. 11(a).

5. Content

Mass. R. Civ. P. 8(a) only requires a short and plain statement of the claim, showing that a pleader is entitled to relief and, as stated above, a demand for relief. However, the SJC has chosen to follow the U.S. Supreme Court's interpretation of Rule 8(a) set forth in Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007). Under that case, although the allegations in the complaint must be accepted as true, including the favorable inferences that can be drawn from the complaint, the factual allegations must also plausibly suggest an entitlement to relief to survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6). Iannacchino v. Ford Motor Co., 451 Mass. 623 (2008). Furthermore, although the SJC has never explicitly stated that it follows the subsequent U.S. Supreme Court case of Ashcroft v. Iqbal, 556 U.S. 662 (2009), the SJC has stated that a complaint must set forth more than labels and conclusions. Burbank Apartments Tennant Association & others v. William M. Kargman & others, 474 Mass. 107 (2016). Unlike Rule 8(a)(1) of the Federal Rules of Civil Procedure, the Massachusetts Rules do not contain the requirement that the claim set out a "short and plain statement of the grounds upon which the court's jurisdiction depends."

Plaintiffs in collection actions against consumers for credit card debt must provide supplementary documentation when filing the complaint. Specifically, the plaintiff must file simultaneously with the complaint: (1) an affidavit describing certain facts about the debt and its documentation; (2) an affidavit regarding the plaintiff's effort to verify the defendant's home address; and (3) a certification that the statute of limitation has not expired. Failure to include these materials with the complaint will preclude the court from issuing a default judgment against the debtor. Mass. R. Civ. P. 8.1 & 55.1.

Under Mass. R. Civ. P. 9 some claims must be pled with specificity. Causes of action based upon fraud, duress, or undue circumstances must plead the circumstances constituting the fraud, duress, or undue circumstances with particularity, although the state of mind can be pled generally. Mass. R. Civ. P. 9(b). In pleading conditions precedent, the plaintiff may allege generally that all conditions precedent have occurred or have been performed. However, when denying that a condition

precedent has occurred or been performed, a party must do so with particularity. Mass. R. Civ. P. 9(c). Under Mass. R. Civ. P. 9(g) items of special damages must be specifically stated.

6. Answers and Defenses

a) Timing

Answers to complaints must be served within 20 days of being served with the summons and complaint. Mass. R. Civ. P. 12(a)(1). However, serving a motion under Rule 12 stops the running of the 20 day period. Mass. R. Civ. P. 12(a)(2). If the court denies the Rule 12 motion or postpones its disposition until the trial, the defendant must serve the responsive pleading within 10 days after notice of the court's action. Mass. R. Civ. P. 12(a)(2)(i). A defendant may also extend the time to answer by either moving for an extension or stipulating to an extension with the plaintiff, subject to court approval. Mass. R. Civ. P. 6(b). Failure to timely answer or obtain an extension risks entry of a default.

b) Rule 12 Defenses

The defenses under Rule 12, as listed in Rule 12(b), and as follows:

(1) Lack of jurisdiction over the subject matter;

(2) Lack of jurisdiction over the person;

(3) Improper venue;

(4) Insufficiency of process;

(5) Insufficiency of service of process;

(6) Failure to state a claim upon which relief can be granted;

(7) Failure to join a party under Rule 19;

(8) Misnomer of a party;

(9) Pendency of a prior action in a court of the Commonwealth;

(10) Improper amount of damages in the Superior Court as set forth in G. L. c. 212, §3 or in the District Court as set forth in G. L. c. 218, §19.

The defenses contained in Rule 12(b)(8)-(10) are unique to Massachusetts. Similar to the Federal Rules, a defendant may raise these defenses by motion or in the answer. Defenses of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, misnomer of a party, pendency of a prior action and improper damages are waived if not raised in a motion filed under 12(b) or, if no such motion is filed, in the answer. The defenses of failure to state a cause of action and failure to join an indispensable party are not waived. Given that lack of subject-matter jurisdiction is central to a court's authority to hear an action at all, it is not waivable and can be raised at any time, in any way, by any party, or by the court on its own. See Jones v. Jones, 297 Mass. 198, 202 (1937).

c) Answers

Answers must respond to each paragraph of the complaint with either an admission, a denial, or a statement that the defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation. If appropriate, the defendant may admit part of an allegation and deny the rest. General denials are disfavored, except in those unusual cases where the pleader can, in good faith, deny every allegation of the complaint. Mass. R. Civ. P. 8(b). Where there is a failure to deny an allegation (or state the pleader lacks sufficient information), the allegation is admitted. Mass. R. Civ. P. 8(d).

7. Affirmative Defenses

Mass. R. Civ. P. 8(c) lists certain defenses, such as accord and satisfaction, arbitration and award, failure of consideration, release, etc., that are considered affirmative defenses that need to be raised by the defendant in the defendant's responsive pleading. Similar to the Federal Rule, Rule 8(c) includes a catchall phrase, "any other matter constituting an avoidance or affirmative defense," that requires the defendant to consult statutes and case law to determine if other potential defenses are affirmative defenses.

8. Counterclaims and Cross Claims

a) Counterclaims

A counterclaim is a claim that a party asserts against an opposing party. Mass. R. Civ. P. 13. Counterclaims, as distinguished from defenses, may result in an award of relief for the defendant, and not just a lack of relief for the plaintiff. Similar to the Federal Rules, Massachusetts divides counterclaims into compulsory

counterclaims and permissive counterclaims. If a counterclaim is compulsory, a defendant must either plead it in the answer or abandon it. A defendant may not assert a claim in a later action if it was not pled as a compulsory counterclaim in an earlier action. A compulsory counterclaim is one that arises out of the same transaction or occurrence as the plaintiff's claim, does not require adding another party over whom the court cannot obtain personal jurisdiction, and is not subject to a law that requires the claim to be brought in a different venue. Mass. R. Civ. P. 13(a). Exceptions to this rule include cases in which the defendant did not have the counterclaim at the time the defendant served its answer, where the counterclaim could not be heard by the Court in which original case was filed, or where the failure to set up the counterclaim is through excusable neglect, oversight, inadvertence, or where justice requires. Mass. R. Civ. P. 13(a) and (f). Another exception to the compulsory counterclaim rule applies where the counterclaim is based upon personal injury or property damage. Mass. R. Civ. P. 13(a). This is particularly applicable in actions that result from automobile accidents where the defendant is represented by an attorney for the insurance company. See Mass. R. Civ. P. 13(a), Reporter's Notes (1973).

A permissive counterclaim is any claim the defendant has against the plaintiff that is not a compulsory counterclaim. Filing a permissive counterclaim is discretionary with the defendant. Mass. R. Civ. P. 13(b).

b) Cross Claims

Cross claims are claims one party has against a co-party, which typically means a party on the same side of the "versus" in the title of the action. Cross claims are allowed only where the cross claim arises out of the transaction or occurrence that is the subject of the plaintiff's complaint, or of a counterclaim, or it is about property that is the subject of the plaintiff's complaint. Mass. R. Civ. P. 13(g). Cross claims may include claims that the co-party is or may be liable for the claims filed against the cross-claimant. Cross claims are permissive.

9. Joinder of Parties and Claims

Rules governing joinder of claims and parties in Massachusetts are similar to the Federal Rules: Rule 18 governs joinder of claims; Rule 20 covers joinder of parties; Rule 19, necessary and indispensable parties; and Rule 14, Third Party claims.

a) Joinder of Claims

Under Rule 18, every claim for any form of relief, whether legal or equitable, may be joined in one complaint, with the only one restriction being that any claim sought to be asserted must lie within the jurisdictional power of the court to adjudicate. Joinder of claims is permissive subject to a later lawsuit being precluded by claim preclusion.

b) Joinder of Parties

Rule 20, which is also permissive, allows joinder of parties (either plaintiffs or defendants), as long as they assert a right to relief jointly, severally, or in the alternative, which arises out of the same transaction, occurrence, or series of transactions or occurrences, and there is a common question of law or fact.

c) Necessary and Indispensable Parties

Under Rule 19, absent parties are divided into necessary and indispensable parties. A party is a necessary party if "(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest, or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise obligations by reason of his claimed interest, or otherwise inconsistent obligations by reason of his claimed interest." Mass. R. Civ. P. 19(a). Necessary parties must be joined if joinder is possible. If a necessary party cannot be joined, then the Court must decide whether the party is "indispensable." In making this determination the Court looks at whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed because the absent person being is considered "indispensable."

Rule 19(b) lists the following factors to guide the Court in making this finding:

(1) The extent to which a judgment rendered in the person's absence might be prejudicial to him or those already parties;

(2) The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;

(3) Whether a judgment rendered in the person's absence will be adequate; and

(4) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

d) Third Party Claims

Mass. R. Civ. P. 14 covers third party claims. A party defending against a civil claim in Massachusetts may believe that if it loses, it can pass some or all of the loss to someone else (for example, an insurer or a joint tortfeasor). Under Mass. R. Civ. P. 14, the defending party may bring a non-party into the existing case. The claim, known as a third-party claim, allows the third-party plaintiff to attempt to hold the third-party defendant liable for any relief awarded against the third-party plaintiff on the underlying claim. A third-party claim must have a basis in applicable substantive law (for example, a contract provision or tort law). Finally, the Court has the power to separate claims and parties to prevent a party from being embarrassed, or to prevent delay or undue expense. Mass. R. Civ. P. 20(b) and 42(b).

10. Class Actions

The Massachusetts class action rule is significantly different from the Federal Rule on class actions. Although Mass. R. Civ. P. 23(a) is the same (setting out four prerequisites for a class action), the rest of the Massachusetts Rule differs significantly. Mass. R. Civ. P. 23(b) is much simpler than its federal counterpart. It does not divide class actions into three types, but simply provides that a class action may be maintained "if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Moreover, unlike Federal Rule 23, the Massachusetts class action rule does not require the giving of notice to members of the class; nor does it provide that members of the class may exclude themselves. Instead, Mass. Rule 23(d) provides that the court may order that notice be given, in such manner as it may direct. The Massachusetts class action rule also provides that if there are leftover undisbursed funds from a class action award, those funds "shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons, consistent with the objectives and purposes of the underlying causes of action on which relief was based, or

to the Massachusetts IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts."

11. Amendments

Mass. R. Civ. P. 15 covers amendments to pleadings. Rule 15(a) allows a party to amend a pleading, prior to entry of an order of dismissal once, as a matter of course if: (1) the pleading is one with respect to which a responsive pleading is permitted (see Mass. R. Civ. P 7(a)) and no responsive pleading has yet been served; or (2) the pleading is one to which no responsive pleading is permitted and the action has not yet been placed on the trial calendar.

In the first case, no time limit is imposed; in the second, the amendment must take place within 20 days after service of the original pleading. Massachusetts Rule 15(a) is the same as Federal Rule 15(a), except that the Massachusetts rule also specifically limits the right of amendment to the situation where there has not been an order of dismissal. This covers situations where the Court has granted a motion to dismiss under Rule 12(b)(6) or Rule 56 (summary judgment). Otherwise a party may amend its pleading only by leave of court or by written consent of the adverse party. Leave of Court shall be freely given "when justice so requires."

Mass. R. Civ. P. 15(c) governs amendments filed after the statute of limitations has run and is more liberal than Federal Rule 15(c) in allowing relation back to the original pleading. The Massachusetts rule only requires that "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment (including an amendment changing a party) relates back to the original pleading." The Federal Rule, by contrast, also requires that within the period provided by law for commencing the action against him, the party to be brought in by amendment: (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits; and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

12. Rule 11: Honesty in Pleadings

Mass. Rule Civ. P. 11 requires that pleadings of represented parties be signed by at least one attorney who is admitted to practice in this Commonwealth. The signature of the attorney to a pleading constitutes a certificate that he or she has read the pleading; that to the best of his or her knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay.

The subjective good faith standard required under Mass. R. Civ. P. 11 is less demanding than the objective good faith standard embodied in Fed. R. Civ. P. 11. The Massachusetts rule does not require the signer of the pleading to certify that **"**the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"; or that "the factual contentions have evidentiary support or, if specifically, so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." The Massachusetts Rule also does not have a separate section dealing with sanctions. It simply states, "for a willful violation of this rule an attorney may be subjected to an appropriate disciplinary action."

D. Discovery

1. Scope of Discovery; Proportionality

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Mass. R. Civ. P. 26(b)(1).

Unlike its Federal analogue, the general scope of discovery set forth in Mass. R. Civ. P. 26(b)(1) does <u>not</u> require an explicit proportionality assessment. Upon a motion for protective order, the court may consider the following factors in determining whether the requested discovery imposes an undue burden or expense: (1) whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive; (2) whether the discovery sought is unreasonably cumulative or duplicative; and (3) whether the likely burden or expense of the proposed discovery outweighs the likely benefit of its receipt, taking into account the parties' relative access to the information, the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues. Mass. R. Civ. P. 26(c).

2. Discovery Tools

a) Depositions

(1) Generally

A party may take a deposition upon oral examination without leave of court except when:

(a) The plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e);

(b) There is no reasonable likelihood that recovery will exceed $5,000 if the plaintiff prevails;

(c) The action is pending in the Superior Court and there has been a trial in a District Court before a transfer;

(d) There has been a hearing before a master; or

(e) The relief sought is the custody of minor children, divorce, affirmance or annulment of marriage, separate support, or any like relief. Mass. R. Civ. P. 30(a).

Any objection to testimony during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. Mass. R. Civ. P. 30(c).

Massachusetts does not place a numerical limit on the number of depositions per party.

(2) Audiovisual Depositions

Audiovisual depositions may be taken as of right and do not require leave of court. Audiovisual depositions must comply with procedures set out in Mass. R. Civ. P. 30A. A simultaneous stenographic record shall be made of an audiovisual deposition unless the parties stipulate or the court orders otherwise.

b) Interrogatories

No party shall serve upon any other party as of right more than thirty interrogatories, including interrogatories subsidiary or

incidental to, or dependent upon, other interrogatories. Mass. R. Civ. P. 33(a)(2).

c) Producing Copies of Documents

A party responding to a request for the production of documents may produce copies or electronic versions of the documents provided that, if requested, the producing party affords all parties a fair opportunity to verify the copies by comparison with the originals. Mass. R. Civ. P. 34(b)(2)(C)(ii).

3. Electronically Stored Information

Massachusetts has a robust set of rules governing the discovery of Electronically Stored Information (ESI), which differ in several significant ways from the Federal Rules of Civil Procedure.

a) Inaccessible ESI

"Inaccessible electronically stored information" is defined as electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. Mass. R. Civ. P. 26(f)(1).

b) ESI Conferences

Parties are not required to confer on ESI matters. However, each party may request a conference with the other parties, as of right, within 90 days after the service of the defendant's first responsive pleading. After the 90 days has elapsed, the parties may also confer by agreement. The purpose of an ESI conference shall be to develop a plan for the discovery of electronically stored information. Mass. R. Civ. P. 26(f)(2).

c) ESI Orders

Upon motion or following a Rule 16 conference, the court may enter an order governing the discovery of ESI in the case. Mass. R. Civ. P. 26(f)(3).

d) Limitations of the Discovery of ESI

(1) Inaccessible ESI

A party may object to the production of ESI on the grounds that it is inaccessible. The party claiming inaccessibility has the burden of showing inaccessibility due to undue burden or cost. Mass. R. Civ. P. 26(f)(4)(A)-(B).

The court may order discovery of inaccessible ESI if the party requesting discovery shows that the likely benefit of its receipt outweighs the likely burden of its production, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues. Mass. R. Civ. P. 26(f)(4)(C).

The court may set conditions for the discovery of inaccessible ESI, including allocation of the expense of discovery. Mass. R. Civ. P. 26(f)(4)(D).

(2) Accessible ESI

The Court may limit the frequency or extent of ESI discovery, even from an accessible source, in the interests of justice. Factors bearing on this decision include the following: (i) whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive; (ii) whether the discovery sought is unreasonably cumulative or duplicative; (iii) whether the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or (iv) whether the likely burden or expense of the proposed discovery outweighs the likely benefit. Mass. R. Civ. P. 26(f)(4)(E).

e) Safe Harbor Provision; Good Faith Requirement

Absent exceptional circumstances, a court may not impose sanctions on a party for failing to produce ESI lost as a result of the routine, good-faith operation of an electronic information system. Mass. R. Civ. P. 37(f). The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve.

4. Subpoenas

A party may serve a subpoena on a non-party purely to obtain documents or ESI. Prior to serving a non-party with a documents-only subpoena, the serving party must serve a copy on all other parties to the case. No additional form of notice to other parties is required. Mass. R. Civ. P. 45(d)(1) and Reporter's Notes to 2015 Amendments.

E. Summary Judgment

1. Generally

Mass. R. Civ. P. 56 governs summary judgment. It is similar to earlier version of the federal rules, but does not incorporate some of the recent federal amendments.

2. Timing

Mass. R. Civ. P. 56(a) allows a claimant to file a Motion for Summary Judgment "at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party." Rule 56(b) allows a party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, to move for summary judgment at any time. The motion must be served at least 10 days before the time set for a hearing. The opposition may serve opposing affidavits "prior to the day of the hearing." Mass. R. Civ. P. 56(b).

3. Standards for Granting

The standard is similar to the federal standard. Summary judgment shall be granted if there is "no genuine issue of any material fact" and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c). The SJC has held that Massachusetts would follow the U.S. Supreme Court case of Celotex Corp. v. Catrett, 477 U.S. 317 (1986), ruling that a party not having the burden of proof at trial can obtain summary judgment by demonstrating that the party having that burden has insufficient evidence to sustain it. See e.g. Kourouvacilis v. General Motors Corp., 410 Mass. 706 (1991). The Court can grant partial summary judgment including making findings that certain facts have been established.

4. Procedure

Mass. R. Civ. P. 56(e) specifies some general guidelines for the procedure to be followed in moving for summary judgment. The parties can file affidavits, but are not required to. If affidavits are filed they must be made on personal knowledge and set forth facts that would be admissible in evidence. In addition, the parties may rely upon the depositions and answers to interrogatories. If the movant supports the motion for summary judgment with sufficient material, the opponent cannot rest upon the allegations or denials in his or her pleading. Superior Court Rule 9A(b)(5) further sets out the procedure for summary judgment motions filed in Superior Court. It requires that the motion shall be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue to be tried, set forth in consecutively numbered

paragraphs, with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents. Failure to include the statement constitutes grounds for denial of the motion. It also sets out special requirements for service of the statement. The opposing party must respond to each paragraph, stating the material facts which are at issue. The opposing party may also assert additional material facts with respect to the claims on which the moving party seeks summary judgment, supporting these with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents. All referenced portions of the documents must accompany the statements.

5. Additional Discovery

Mass. R. Civ. P. 56(f) allows a party opposing a summary judgment motion to seek additional discovery by filing an affidavit that sets forth the reason that the party cannot present facts essential to the opposition. The judge may deny the request or grant a continuance to obtain an additional affidavits or discovery. The trial judge's ruling on such requests is reviewed under an abuse of discretion standard.

F. Trial Procedure

1. Jury Selection

Superior Court juries are typically composed of 12 members. District Court and Boston Municipal Court juries are typically composed of six members. Alternate jurors may also be seated. The agreement of five-sixths of the members is required to render any special or general verdict. Mass. G. L. c. 234A, §68B.

2. Voir Dire

Parties and their attorneys are permitted to question potential jurors directly, either individually or in groups, at the direction of the court and within reasonable limitations imposed by the court. Mass. G. L. c. 234A, §67A. In the Superior Court, where twelve jurors are seated, each party is entitled to exercise four peremptory challenges. Mass. G. L. c. 234A, §67B. In the District Court and Boston Municipal Court, where six jurors are seated, each party is entitled to exercise two peremptory challenges. Mass. G. L. c. 218, §19B(c).

3. Continuances

In the Superior Court, no trial continuance shall be granted without the specific approval of the judge in the session in which the case is pending, or a Regional Administrative Justice if the session judge is not available.

Requests for a continuance must be in the form of a written motion. Superior Court Rule 33.

4. Court-Specific Procedure

Many trial court departments have issued rules and standing orders specific to their courts with respect to trial practice. Attorneys should consult all relevant rules and standing orders for the trial court in which their case is pending.

G. Appeal

1. From Superior Court

In most cases, a notice of appeal in a civil case must be filed within thirty days of the trial court's entry of judgment. Mass. App. R. 4(a).

2. From District Court or Boston Municipal Court

A notice of appeal and filing fee must be filed within ten days of the court's entry of judgment. Dist./Mun. Cts. R.A.D.A. 4(a).

V. CONSUMER PROTECTION - MASS. G. L. c. 93A

A. Introduction

Chapter 93A, the Massachusetts Consumer Protection Act (the "Act"), provides causes of action to the Attorney General (the "AG"), consumers, and persons (including corporations and other legal entities) engaged in trade or commerce for injuries sustained as a result of "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." See Mass. G. L. c. 93A, §2. The remedies available under the Act are in addition to remedies that may be available in tort or contract. The statute, first enacted in 1967, creates new substantive rights.

The Act is one of the most widely used statutes in Massachusetts litigation. Consumers (under §9) and businesses (under §11) may be able to recover multiple damages (double or treble damages), attorneys' fees, and costs for violations of the statute. See Mass. G. L. c. 93A, §§9 and 11.

Although the Act provides that claims should be raised in the courts of the Commonwealth, claims under the Act may be raised in federal court actions if there otherwise is federal jurisdiction (e.g., diversity jurisdiction). The Superior Court, District Court, and Housing Court departments of the Massachusetts Trial Court all have jurisdictions over c. 93A actions. A district court may not grant equitable relief or hear class actions.

Chapter 93A liability has been found with respect to many types of consumer and business relationships in which the plaintiff has been able to show that the defendant business acted in an unfair or deceptive manner, including contractual disputes, debt collection, the sale of goods and services, landlord/tenant disputes, insurance coverage disputes, real estate sales by a business, franchising or distributor disputes, theft or misuse of intellectual property or confidential information, and some types of personal injury or product liability claims.

A Chapter 93A claim must be based on conduct that is more than mere negligence, breach of contract, or a good faith dispute over a legal obligation. For Chapter 93A liability to attach the conduct must be immoral, unethical, oppressive, unscrupulous, or otherwise unfair under the circumstances. See Gossels v. Fleet National Bank, 453 Mass. 366, 375 (2009); Massachusetts Employers Insurance Exchange v. Propac-Mass, Inc., 420 Mass. 39, 42-43 (1995).

B. Summary of Sections

Sections 1 and 2 provide the Act's general scope. Section 3 identifies some activities that are not covered by the Act. Sections 4 through 8 concern actions the AG may bring under the Act. Section 9 concerns actions consumers may bring under the Act. Section 11 concerns claims by businesses against other businesses. Section 10 concerns the role of the AG in actions under §§9 or 11.

1. §1 Definitions.

   a) "Person"- natural persons, corporations, trusts, partnerships, associations whether incorporated or not, and any other legal entity.

   b) "Trade" and "commerce"- the advertising, the offering for sale, rent, lease or distribution of any services and any property (tangible or intangible), real, personal, or mixed, any security (as defined), and any contract of sale of a commodity for future delivery, and any other article, commodity, or thing of value wherever situate, including trade or commerce that affects the people of this Commonwealth directly or indirectly.

   c) "Documentary material"- includes original or copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

   d) "Examination of documentary material"- the inspection, study or copying of any such material, and the taking of testimony under oath or acknowledgment in respect of any such documentary material.

2. §2 Unfair practices; legislative intent; rules and regulations.

   a) Declares unlawful, any unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

   b) In actions brought under §§4, 9, and 11, courts will be guided by interpretations given by the Federal Trade Commission and the Federal Courts to §5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

   c) The Massachusetts AG may make rules and regulations interpreting the provisions of §2(a) of this chapter, provided such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) (the Federal Trade Commission Act), as from time to time amended.

3. §3 Exempted Transactions.

   This chapter does not apply to transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the Commonwealth or the United States.

The burden of proving exemptions from the provision of this chapter is upon the person claiming the exemption.

4. §4 Actions by Attorney General; Notice; Venue; Injunctions.

Whenever the AG has reason to believe any person is using or is about to use any method, act, or practice declared unlawful by §2, and that proceeding would be in the public interest, the AG may bring an action in the Commonwealth's name against such person, and the court may issue a temporary restraining order or preliminary or permanent injunction against the use of such method, act, or practice.

- The court may make such other orders or judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of such unlawful method, act, or practice any moneys or property (real or personal) which may have been acquired. Additionally, the court may require a person to pay to the commonwealth a civil penalty of not more than $5,000 for each violation as well as reasonable costs of investigation and litigation, including reasonable attorneys' fees.

- If the unlawful violation is with regard to any security, or any contract of sale of a commodity for future delivery, the court may issue orders or judgments to restore any person who has suffered loss of any moneys or property, up to three, but not less than two, times the amount if the court finds the use of the act or practice was a willful violation of §2. In addition, the court may require such person to pay to the commonwealth a civil penalty of not more than $5,000 for each violation as well as reasonable costs of investigation and litigation, including reasonable attorney's fees.

5. §5 Assurance of Discontinuance of Unlawful Method or Practice.

Where the AG has authority to institute an action pursuant to §4, the AG may accept an assurance of discontinuance (which must be in writing and filed with the Superior Court of Suffolk County) of any violative method, act, or practice, and such assurance may, inter alia, include a stipulation for voluntary payment of an amount to be held in escrow pending the outcome of an action or as restitution to aggrieved buyers, or both.

The AG may reopen closed matters. A violation of an assurance is prima facie evidence of a violation of §2 in any subsequent action brought by the AG.

6. §6 Examination of Books and Records; Attendance of Persons; Notice.

a) The AG has the authority to conduct an investigation to ascertain whether a person has engaged in or is engaging in an unlawful

method, act, or practice. The AG may: (a) take testimony under oath; (b) examine documents; and (c) require persons with knowledge to be present. Unless otherwise agreed, testimony and examination shall take place in the county where such person resides, or has place of business or, if the parties consent or such person is a non-resident or has no place of business in the Commonwealth, in Suffolk County.

b) Notice for examination, testimony, or attendance must be made at least ten days prior to the date of such taking of testimony or examination.

c) Service of any such notice may be made by:

(1) Delivery to an authorized person to receive process;

(2) Delivery to the principal place of business in the Commonwealth of the person to be served; or

(3) Registered or certified mail.

d) The notice shall state:

(1) Time and place, name, and address of each person, if known. Otherwise, a general description is required sufficient to identify him or the class or group to which he belongs;

(2) The statute and section alleged to have been violated (and the general subject matter of the investigation);

(3) Class(es) of documentary material to be produced;

(4) Return date; and

(5) Members of the AG's staff to whom materials are to be made available for inspection and copying.

e) The notice shall not contain any requirement which would be unreasonable or improper, or which would require the disclosure of privileged information.

f) The AG may not disclose produced material or information to third parties without court order or consent (but the AG may disclose information in court pleadings or other papers filed in court).

g) A court may extend, modify, or set aside a demand or grant a protective order upon motion for good cause (filed prior to date

specified in the notice or within 21 days after the notice is served, whichever period is shorter). This section does not apply to criminal proceedings.

7. §7 Failure to Appear or to Comply with Notice.

   Failure to comply, appear, or with intent to avoid, evade, or prevent compliance triggers a civil penalty of not more than $5,000, as does mutilation, alteration, concealment, etc., of any documentary material in possession, custody, or control of any person subject to such notice.

   The AG may file in the superior court a petition for enforcement. Disobedience of any final order shall be punished as contempt.

8. §8 Habitual Violation of Injunctions.

   Upon petition by the AG for habitual violations of injunctions issued pursuant to section four, the court may order dissolution, suspension, or forfeiture of any franchise of any corporation or the right of an individual or foreign corporation to do business in the Commonwealth.

9. §9 Civil actions and remedies; class action; demand for relief; damages; costs; exhausting administrative remedies.

   (1) Any person (other than a person entitled to bring an action under §11) who has been injured by another person's use or employment of any method, act, or practice declared to be unlawful by §2 or any rule or regulation issued thereunder, or any person whose rights are affected by another person violating the provisions of Mass. G. L. c. 176D, §3(9) (unfair insurance practices), may bring an action in the superior court or the housing court whether by way of original complaint, counterclaim, cross-claim or third party action, for damages and such equitable relief, including an injunction, as the court deems necessary and proper.

   (2) If the court finds in a preliminary hearing that the person entitled to bring such action adequately and fairly represents other persons similarly injured and situated, said person may bring the action on behalf of himself and such others similarly injured and situated.

   - Notice of such action must be given to unnamed petitioners in a practicable manner.

   - The court must approve any dismissal, settlement or compromise of the action, and notice of any such dismissal, settlement, or compromise must be given to all members of the class in such manner as the court directs.

(3) At least 30 days prior to filing in court a claim under §9, a written demand for relief, identifying the claimant and describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be given to any prospective respondent.

- The recipient of such a written demand who, within 30 days of the mailing or delivery of the demand, makes a written tender of settlement, which is rejected may, in any subsequent action, file said tender and an affidavit concerning its rejection, and thereby limit any recovery to the relief tendered if the court finds it was reasonable. In all other cases, if the court finds for the petitioner, recovery shall be in the amount of actual damages or $25, whichever is greater; or up to three, but not less than two, times such amount if the violation was willful or knowing, or the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice was unlawful.

- For this chapter, the amount of actual damages to be multiplied by the court shall be the amount of the judgment on all claims arising out of the same and underlying transactions or occurrence, irrespective of insurance coverage.

- Additionally, the court may award other equitable relief (e.g., injunctive relief).

- The demand requirements do not apply if the claim is asserted by way of counterclaim or cross-claim, or if the prospective respondent does not maintain a place of business or keep assets in the Commonwealth, but such respondent may make a written offer of relief and pay the rejected tender into court as soon as practicable.

- If the court finds any method, act, or practice unlawful with respect to any security, or any contract of sale of a commodity for future delivery, and if court finds for petitioner, recovery is the amount of actual damages.

(3a) A person may assert a claim under this section in a district court, whether by way of original complaint, counterclaim, cross-claim, or third party action, for money damages only.

(4) If the court finds in any action commenced hereunder that there has been a violation of §2, the petitioner shall, in addition to other relief provided, be awarded reasonable attorneys' fees and costs incurred in connection with said action; provided, however, the court shall deny recovery of attorneys' fees and costs which are

incurred after the rejection of a reasonable written offer of settlement made within 30 days of the mailing or delivery of a written demand for relief.

(5) There is no subsection five.

(6) There is no requirement that other proceedings be brought prior to bringing an action under this section (e.g., no requirement to exhaust possible administrative remedies).

(7) Upon a motion by the respondent before the time for answering and after a hearing, the court may permit the respondent to initiate action in which the petitioner shall be named a party before any appropriate regulatory board or officer providing adjudicatory hearings if:

(a) There is a substantial likelihood that favorable final action to the petitioner would require of the respondent conduct or practices that would disrupt or be inconsistent with a regulatory scheme established and administered under law by any state or federal regulatory board or officer; or

(b) That said regulatory board or officer has a substantial interest in reviewing the transactions or actions prior to judicial action under this chapter, and that the board or officer has the power to provide substantially the relief sought by the petitioner and the class, if any.

10. §10 Notice to Attorney General; Injunction, Prima Facie Evidence.

In any action brought under §9 or §11, the clerk shall mail a copy of the bill in equity and any judgment or decree to the AG. A permanent injunction or order of the court made under §4 shall be prima facie evidence in actions brought under §9 or §11 that the respondent used or employed unfair or deceptive acts or practices.

11. §11 Persons Engaged in Business; Actions for Unfair Trade Practices; Class Actions; Damages; Injunction; Costs.

Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property (real or personal) as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by §2 or by any rule or regulation issued under paragraph (c) of §2 may bring an action in the superior court or the housing court for damages and such other equitable relief as the court deems necessary and proper.

Even if such person has not suffered any loss of money or property, an injunction may be proper if the unfair method of competition, act or practice may have the effect of causing such loss of money or property.

Actions may be brought on behalf of such person and others similarly situated if the unfair method of competition or unfair or deceptive act or practice has caused similar injury to other similarly situated persons. The court will make a finding in a preliminary hearing whether the person fairly represents such other persons. Notice to such unnamed petitioners must be given.

No class action may be dismissed, settled or compromised without court approval, and notice of it shall be given to all members of the class of petitioners.

Actions may be brought in a district court for money damages only and may provide for double or treble damages, attorneys' fees and costs with a provision for tendering by the person against whom the claim is asserted of a written offer of settlement for single damages.

- No rights to equitable relief exist in the district court. There is no right to hear class actions in the district court.

If the court finds for petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds the use or employment of the method of competition or the act or practice was a willful or knowing violation of §2.

- Insurance is not considered.
- The court shall award such other equitable relief, including an injunction, as it deems to be necessary and proper.
- Respondent may tender with his answer a written offer of settlement for single damages. If such tender or settlement is rejected by the petitioner, and if the court finds it was reasonable, then the court shall not award more than single damages.
- Violations of §2 include the right of the petitioner to receive reasonable attorneys' fees and costs.
- The court shall be guided in its interpretation of unfair methods of competition by the Massachusetts Antitrust Act.
- No action shall be brought under §11 unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and

substantially within the Commonwealth. The burden of proof is upon the person claiming that such transactions and actions did not occur primarily and substantially within the Commonwealth.

C. Statute of Limitations

The statute of limitations for actions under the Act is four years. See Mass. G. L. c. 260, §5A. However, the Massachusetts Appeals Court has held that, in a personal injury action brought by a tenant against a landlord, the statute of limitations applicable to torts (three years) applies. See Mahoney v. Baldwin, 27 Mass. App. Ct. 778 (1989).

D. No Right To Jury Trial

There is no right to a jury trial under the Act. See Nei v. Burley, 388 Mass. 307 (1983).

E. Acts Not Covered by Statute

Chapter 93A does not apply to purely private transactions between a buyer and seller in a real estate sale. See Lantner v. Carson, 374 Mass. 606 (1978). It also does not apply to an action by an employee against an employer arising out of the employment relationship (e.g., wrongful termination suits). See Manning v. Zuckerman, 388 Mass. 8 (1983). It also does not apply to claims against a charitable organization with respect to actions by that organization in furtherance of its core mission. See Linkage Corporation v. Trustees of Boston University, 425 Mass. 1, 26 (1997). It further does not apply to claims against governmental entities with respect to actions with a predominately public motivation, rather than as a profit making operation. See Peabody N.E., Inc. v. Town of Marshfield, 426 Mass. 436 (1998). Finally, it does not apply to disputes between members of the same business venture or corporation (e.g., disputes between partners in a partnership or shareholders in a closely held business). See Riseman v. Orion Research, Inc., 394 Mass. 311 (1985) and Newton v. Moffie, 13 Mass. App. 462 (1982).

Chapter 93A actions also do not exist when federal or state law preempts or precludes the claim. See, e.g., Fleming v. National Union Ins. Co., 445 Mass. 381 (2005) (holding that the legislature intended employees to seek relief for unfair or deceptive practices in the workers' compensation realm under Mass. G. L. c. 152).

VI. CRIMINAL LAW AND PROCEDURE

A. Search and Seizure

1. Article 14 vs. Fourth Amendment Generally

Like the Fourth Amendment, Article 14 of the Massachusetts Declaration of Rights protects individuals from "unreasonable searches and seizures." The roots of the Fourth Amendment are in Art. 14, which predates the Fourth Amendment by nearly a decade; in fact, their language is virtually identical. Commonwealth v. Upton, 394 Mass. 363, 372 (1985). The Supreme Judicial Court (SJC) has often interpreted Art. 14 to offer more protection to individuals than the Fourth Amendment. Commonwealth v. Cote, 407 Mass. 827, 834-835 (1990).

2. Definition of "Seizure" of a Person

a) Federal Law

Under the Fourth Amendment a person is not "seized" for constitutional purposes until either (1) the police use physical force against her; or (2) the person submits to the officer's commands to stop or other attempts to detain her. California v. Hodari D., 499 U.S. 621 (1991). Therefore, no seizure has occurred at the moment a suspect flees from an officer attempting to effect one.

b) Massachusetts Law

Under Art. 14, however, a person is seized immediately upon a "show of authority" by the police, even if the officer does not use physical force and even if the individual does not submit to that show of authority. Therefore, a mere pursuit may constitute a seizure as soon as it begins, and the officer's suspicion must be reasonable beforehand. Commonwealth v. Stoute, 422 Mass. 782 (1996); Commonwealth v. Thibeau, 384 Mass. 762 (1981). The SJC has noted that "[w]ere the rule otherwise, the police could turn a hunch into a reasonable suspicion by inducing the conduct justifying the suspicion." Thibeau, 384 Mass. at 764.

3. Reasonable Suspicion and Unprovoked Flight

a) Federal Law

Under federal law, unprovoked flight, along with the presence of another factor, such as a high crime neighborhood, is sufficient to constitute reasonable suspicion. Illinois v. Wardlow, 528 U.S. 119 (2000). In Wardlow the Supreme Court held that the unprovoked flight of the defendant from police officers in an area of heavy

narcotics trafficking supported reasonable suspicion to stop the defendant and investigate further. The Court explained that flight, by its very nature is evasive conduct permitting police to investigate further. (Terry v. Ohio, 392 U.S.1 (1968)) It should be noted that the presence of a high crime neighborhood was part of the Court's consideration, leaving open the question whether unprovoked flight alone would warrant a reasonable Terry stop.

b) Massachusetts Law

Unprovoked flight alone is not enough to justify a seizure and should be given little, if any, weight as a factor to be used in the reasonable suspicion determination, according to the SJC in Commonwealth v. Warren, 475 Mass. 530, 539 (2016) ("Where a suspect is under no obligation to respond to a police officer's inquiry, we are of the view that flight to avoid that contact should be given little, if any, weight as a factor probative of reasonable suspicion. Otherwise, our long-standing jurisprudence establishing the boundary between consensual and obligatory police encounters will be seriously undermined."). The Court further explains that the disproportionate minority contact between police and civilians in the City of Boston offers alternative reasons, other than consciousness of guilt, for why a person of color would want to avoid police contact. *Id. at 539.* "[T]he finding that black males in Boston are disproportionately and repeatedly targeted for Field Interrogation and Observation ("FIO") encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus." *Id. at 540.* Massachusetts law considers other factors relevant to reasonable suspicion such as, but not limited to, appearance, conduct, or presence in high crime area. Commonwealth v. Mercado, 422 Mass. 367, 371 (1996) ("Neither evasive behavior, proximity to a crime scene, nor matching a general description is alone sufficient to support . . . reasonable suspicion"); Commonwealth v. Gunter G., 45 Mass. App. Ct. 116 (1998); see also Commonwealth v. Grinkley, 44 Mass. App. Ct. 62 (1997).

4. Search Incident to Arrest

Massachusetts follows the federal law as articulated in Arizona v. Gant, 556 U.S. 332 (2009), specifically with respect to post-arrest searches of cars and containers found therein. Regarding post-arrest searches of

persons and belongings found on persons not in motor vehicles, Art. 14 limits police to search for evidence of a crime or weapons that the police have probable cause to believe the defendant has on his person at the time of arrest. Commonwealth v. Madera, 402 Mass. 156 (1988). This differs from the federal law specifically in that searches incident to lawful arrest under Chimel v. California, 395 U.S. 752 (1969) permit a search of an arrestee and the area within his immediate grabbing distance without any additional suspicion or probable cause for the search.

5. Strip Searches

a) Federal Law

The Supreme Court requires police to have reasonable suspicion that evidence will be found in that specific area of his body to justify a strip search. Bell v. Wolfish, 441 U.S. 520 (1979).

b) Massachusetts Law

Massachusetts requires probable cause for strip searches and visual body cavity searches. A strip search, as the term suggests, is one in which a detainee is ordered to remove the last layer of her clothing. Commonwealth v. Prophete, 443 Mass. 548 (2005). More recent cases have held that searches involving pulling the clothing away from one's body but not removing it, thereby causing an intimate part of the defendant's body to be viewable, constitutes a strip search. In Commonwealth v. Morales, 462 Mass. 334 (2012) the SJC held that the police officer's action of lifting back the defendant's waistband and publically exposing his buttocks while searching for drugs constituted a strip search. Similarly, in Commonwealth v. Amado, 474 Mass. 147 (2016), the Court found that pulling the defendant's waistband away from his body and shining a flashlight inside the clothing constituted a search.

6. Automatic Standing

In this context, "standing" refers to an individual's right to challenge the legality of an action taken by law enforcement. "Automatic standing" refers to an individual's right to make such a challenge without regard to whether that person had an expectation of privacy in the premises or area searched.

a) Federal Law

In United States v. Salvucci, 448 U.S. 83 (1980), the Supreme Court abandoned the automatic standing rule and held that standing to challenge the legality of a search requires the defendant

to establish that she was the victim of an invasion of privacy. The Court declined "to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched." *Id. at 92.*

b) Massachusetts Law

In Commonwealth v. Amendola, 406 Mass. 592, 601 (1990), the SJC held that "the automatic standing rule survives in Massachusetts as a matter of State constitutional law. When a defendant is charged with a crime in which possession of the seized evidence at the time of the contested search is an essential element of guilt, the defendant shall be deemed to have standing to contest the legality of the search and the seizure of that evidence." If possession is not an element of the crime charged, such as distribution of narcotics, then automatic standing does not apply.

7. Confidential Informants/Anonymous Tips

Where a confidential informant or anonymous person provides a tip to the police, in order for that information to establish probable cause for the issuance of a search warrant, the police must present the magistrate with facts that establish: a) the tipster's basis of knowledge; and b) the person's veracity or reliability. In other words, when deciding whether to issue a warrant the magistrate must be able to determine how the informant knows what he knows (was it personal observation, or a mere rumor overheard?) and why he can be trusted.

a) Federal Law

The standard that became known as the U.S. Supreme Court's Aguilar-Spinelli test – named for the cases of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969) – required the government to demonstrate both prongs; that is, that the informant had a sufficient basis of knowledge and was reliable. In Illinois v. Gates, 462 U.S. 213 (1983), however, the Supreme Court abandoned its Aguilar-Spinelli test in favor of the same "totality of the circumstances" analysis courts traditionally apply in determining probable cause. The Gates Court rationalized that anonymous tips – which it noted often serves as a useful tool in solving crime – would rarely meet the Aguilar-Spinelli standard and that under the Fourth Amendment a more flexible approach is appropriate.

b) Massachusetts Law

Massachusetts, however, has declined to adopt the Gates standard and adheres to a version of the Aguilar-Spinelli test, requiring a

showing of both basis of knowledge and veracity. The SJC views the totality of the circumstances analysis as "unacceptably shapeless and permissive," though it also notes that the Aguilar-Spinelli standard is not to be applied "hypertechnically." Commonwealth v. Upton, 394 Mass. 363, 374 (1985). Strong evidence of one prong may make up for deficiencies in the other, and police corroboration of the tip may also strengthen the weight of one or both prongs. *Id.*

8. "No Knock" Execution of Search Warrant

a) Federal Law

To dispense with the requirement of knock and announce during execution of search warrant, police must have reasonable belief or exigent circumstances present at the scene. Richards v. Wisconsin, 520 U.S. 385 (1997).

b) Massachusetts Law

Article 14 requires the police to have probable cause that exigent circumstances exist before dispensing with the requirement that the police knock and announce their presence before entering the premises. Moreover, Massachusetts requires the facts to justify a "no-knock" entry be "uniquely present in the particular circumstances". Commonwealth v. Scalise, 387 Mass. 413 (1982) (holding that the fact that drugs are involved does not justify no knock entry).

Mass. G. L. c. 276, §2 requires that search warrants be executed in the day time hours unless the warrant directs otherwise. Although no special showing is required for nighttime searches, if a search is conducted between 10:00 p.m. and 6:00 a.m., then the warrant must expressly permit a "nighttime search."

9. Plain View

Both the Fourth Amendment and Art. 14 require search warrants to describe with particularity the place to be searched and the items to be seized. Searches and seizures that exceed the scope of a warrant are presumed unreasonable, and therefore unconstitutional. Under the "plain view" doctrine, however, the police may seize an item that is not described in the warrant so long as: (1) the officer is lawfully in the position from which she views it; (2) its incriminating character is immediately apparent; and (3) the police have a lawful right of access to the object.

Unlike the Fourth Amendment, Art. 14 requires that the police come across the item inadvertently; in other words, that before they search the

area they lack probable cause to believe it is there. Commonwealth v. Balicki, 436 Mass. 1, 8-9 (2002). The Supreme Court had once interpreted the Fourth Amendment as requiring inadvertence, see Coolidge v. New Hampshire, 403 U.S. 443 (1971), but later abandoned that theory in Horton v. California, 496 U.S. 128 (1990). The Horton Court noted that the interest in preventing general rummaging through one's belongings is already served by the particularity requirement and the rule that a warrantless search "be circumscribed by the exigencies which justify its initiation." Horton, 496 U.S. at 129.

The SJC has declined to follow Horton, insisting that the inadvertence requirement "lends credibility to" the plain view doctrine. *Balicki*, 436 Mass. at 9.

10. Inventory Searches

a) Federal Law

The Fourth Amendment does not prohibit an inventory search of an impounded vehicle as long as police act pursuant to reasonable police regulations. These regulations do not have to be in writing to constitute standard procedures, but there must be evidence they are established and routine. South Dakota v. Opperman, 428 U.S. 364 (1976).

b) Massachusetts Law

Under Article 14, inventory searches must be pursuant to established police procedures that exist in writing. Commonwealth v. Bishop, 402 Mass. 449 (1988). Moreover, courts look for a level of specificity that authorizes the search. Commonwealth v. Allen, 76 Mass. App. Ct. 21 (2009) (upholding search of unlocked container inside another unlocked container due to presence of detailed inventory policy covering this situation).

11. Frisking: Automatic Companion Rule

a) Federal Law

Federal authority is split regarding the constitutionality of the "automatic companion" rule allowing officers to frisk persons in the immediate vicinity of a suspect arrested for a serious crime. In United States v. Berryhill, 445 F.2d 1189 (9th Cir. 1971), the Court of Appeals for the Ninth Circuit established a bright line rule allowing the frisk of an arrestee's companion. The Supreme Court has not taken a position on the propriety of the Berryhill rule.

b) Massachusetts Law

In Massachusetts, automatically frisking a companion is not allowed. The frisking by a police officer of a person in the company of another who has been lawfully arrested is constitutionally permissible only if the officer can point to specific, articulable facts that warrant a reasonable suspicion that the particular individual might be armed and a potential threat to the safety of the officer or others. Commonwealth vs. Wing Ng, 420 Mass. 236 (1995).

12. Exit Orders at Routine Traffic Stops

a) Federal Law

In a routine traffic stop for a motor vehicle infraction, a police officer may order the driver out of the vehicle – even in the absence of any suspicion of criminal activity – without violating the Fourth Amendment. Pennsylvania v. Mimms, 434 U.S. 106 (1977). Supreme Court has noted that traffic stops carry inherent safety concerns, such as the possibility that the driver is armed, and the hazards posed by traffic passing an officer standing on the driver side of the vehicle. The Court also considers having to step from the vehicle an insignificant intrusion upon the driver's liberty. *For these reasons an automatic "exit order" does not constitute an "unreasonable" seizure under the Fourth Amendment.* Under the same rationale, an officer is justified in ordering a passenger out of a vehicle. Maryland v. Wilson, 519 U.S. 408 (1997).

b) Massachusetts Law

Automatic exit orders in routine traffic stops violate Art. 14, however. In Massachusetts, the police must have a reasonable belief that the safety of the officer or others is in danger in order to justify an exit order of either a driver or a passenger. Commonwealth v. Bostock, 450 Mass. 616 (2008); Commonwealth v. Gonsalves, 429 Mass. 658 (1999). The rationale is that a driver pulled over for a minor infraction enjoys a reasonable expectation that the encounter will be brief and that he will be allowed to continue without being subjected to an intrusion that the police hope will uncover evidence of a crime. Gonsalves, 429 Mass. at 663. The SJC finds persuasive the dissent in Mimms, which offered the following examples of intrusions that can be described as anything but minimal: "[a] woman stopped at night may fear for her own safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully

dressed; an elderly driver who presents no possible threat of violence may regard the police command as nothing more than an arrogant and unnecessary display of authority." *Id.* (quoting Mimms, 434 U.S. at 120-121 (Stevens, J., dissenting)). The SJC has also noted its concern that exit orders – and the traffic stops that precede them – may serve as a pretext for unlawful searches and seizures, particularly of minorities. *Id. at 664.*

The SJC has declined to follow Wilson for the same reasons it rejected Mimms, adding that a passenger usually has nothing to do with the operation or condition of the car that prompted the traffic stop. *Id. at 663.*

The prohibition against automatic exit orders applies only to routine stops, however. Even where no safety concern exists, the police may issue an exit order to detain an individual reasonably suspected of criminal activity, or to prevent the vehicle's escape, so long as the order is proportional to the suspicion that prompted it. Bostock, 450 Mass. at 622.

13. Lost or Destroyed Evidence

Where the police lose or destroy relevant evidence that is potentially useful to the defense, a judge may impose sanctions upon the prosecution, including, in cases of egregious misconduct, dismissal of all charges.

a) Federal Law

To prevail on a claim of prejudice under the Fifth Amendment's Due Process Clause, the defendant must show that the police acted in bad faith in losing or destroying the evidence in question. Arizona v. Youngblood, 488 U.S. 51 (1988). The U.S. Supreme Court's rationale is two-fold: (1) that the Due Process Clause's fundamental fairness doctrine does not require the police to preserve all evidence that might be of some significance to a case; and (2) requiring a showing of bad faith limits their duty to preserve evidence "to reasonable bounds," and confines it to cases in which their actions in losing or destroying the evidence suggests it could be exculpatory. *Id. at 57-58.*

b) Massachusetts Law

In Massachusetts, however, the defendant does not have to prove that the police acted in bad faith or that the loss or destruction was intentional. While bad faith is particularly relevant to the determination of whether sanctions should be imposed, if the evidence is material to the case and the defendant has suffered prejudice from its loss or destruction, mere negligence may suffice.

Commonwealth v. Henderson, 411 Mass. 309 (1991). The SJC has noted that there may be cases in which the defendant cannot prove that the police acted in bad faith, but that the lost or destroyed evidence is so critical to the defense that the trial against him is rendered "fundamentally unfair." *Id. at 311* (quoting Youngblood, 488 U.S. at 61 (Stevens, J., concurring)).

14. Good Faith Doctrine

In 1984, the U.S. Supreme Court adopted the good faith exception to the Exclusionary Rule. United States v. Leon, 468 U.S. 897 (1984).

Massachusetts has not adopted the "good faith exception" for purposes of Art. 14. Rather, Massachusetts courts focus their determination on whether the violations are substantial and prejudicial. Commonwealth v. Hernandez, 456 Mass. 528 (2010). Article 14 has a more stringent test pertaining to inevitable discovery. The analysis has two parts – first the question of inevitability must be resolved, which is similar to the analysis under Nix v. Williams, 467 U.S. 431 (1984). The burden of proof is on the government by a preponderance of the evidence, however, the SJC has stated that discovery of the evidence must be "virtually certain." Second, the court will examine the character of the police misconduct in the instant case. Under this doctrine, evidence may be admissible if the Commonwealth can demonstrate that the evidence was certain to be discovered and that officers did not act in bad faith to accelerate the discovery of the evidence. Commonwealth v. Hernandez, 473 Mass. 379 (2015). Unlike the Fourth Amendment standard where the state of mind of the police officer is irrelevant, Art. 14 makes the bad faith of the officer relevant. "Bad faith" may be evidenced by such activities as conducting an unlawful search for purposes of accelerating discovery of the evidence. Actions on the part of police that manufacture a situation to obtain evidence will be relevant in assessing the severity of the constitutional violation. Commonwealth v. O'Connor, 406 Mass. 112 (1989).

B. Statements: Fifth and Sixth Amendment Issues

1. Article 12 vs. Fifth and Sixth Amendments Generally

Article 12 of the Massachusetts Declaration of Rights contains many of the same guarantees as the Fifth and Sixth Amendments to the U.S. Constitution and, in many respects, offers broader protection. Attorney Gen. v. Colleton, 387 Mass. 790, 796 (1982).

In the context of the privilege against self-incrimination, differences in language demonstrate that Art. 12 offers wider protection than the Fifth Amendment; the latter states that one may not be compelled to "be a witness against himself," while Art. 12 guarantees one may not be

compelled "to accuse, or furnish evidence against himself." Commonwealth v. Mavredakis, 430 Mass. 848, 859 (2000).

2. Humane Practice Rule

a) Federal Law

The government must only prove, by a preponderance of the evidence, that a statement is voluntary before it is admitted at trial. In Lego v. Twomey, 404 U.S. 477 (1972), the Supreme Court held that once the defendant has challenged the voluntariness of a statement, the government must prove by a preponderance of the evidence at a bench hearing that the statement was voluntary before the jury may hear the statement at trial. The Court rejected the defendant's argument that to satisfy due process, the government should be required to prove voluntariness beyond a reasonable doubt. Instead, once the government has demonstrated the voluntariness of the statement by a preponderance of the evidence, the statement may be admitted. It is the purview of the jury to determine its credibility and thus decide what weight, if any, to give to the statement. Notably, the Court stated that the petitioner had not demonstrated that admissibility rulings based on the preponderance standard are unreliable or that imposition of any higher standard under expanded exclusionary rules would be sufficiently productive to outweigh the public interest in having probative evidence available to jurors.

b) Massachusetts Law

The government must prove beyond a reasonable doubt that a statement is voluntary before it may be admitted at trial. In Commonwealth v. Tavares, 385 Mass. 140 (1982), the SJC extended Massachusetts' humane practice rule from confessions to any of defendant's admissions to the police and concluded that the prosecution must demonstrate at a bench hearing the voluntariness of the admission beyond a reasonable doubt before the jury may hear the statement at trial. In addition, if the voluntariness of the statement is at issue during trial, the judge must instruct the jury that if the prosecution does not prove that the statement is voluntary beyond a reasonable doubt, the jury must disregard the statement.

3. Presumption of Taint

a) Federal Law

Unwarned statements do not presumptively taint later warned statements so long as the first was voluntary. In Oregon v. Elstad,

470 U.S. 298, 314 (1985), the Supreme Court held that where a suspect during custodial interrogation gives an uncoerced statement without being advised of her Miranda rights, a subsequent statement is admissible when preceded by proper Miranda warnings. Proper Miranda warnings "cure" the concerns associated with the prior un-Mirandized custodial statement. To reach this conclusion, the Court distinguished a Fourth Amendment violation from a potential Fifth Amendment violation to which Miranda warnings relate. The Court applies "fruit of the poisonous tree" doctrine broadly to Fourth Amendment violations, such that a subsequent statement is presumptively tainted. Further, the goal of suppression of evidence after a Fourth Amendment violation is deterrence of police misconduct. The Court discounted deterrence as a goal of the disciplinary rule in relation to the Fifth Amendment, but instead stated that Fifth Amendment exclusion is concerned with the trustworthiness of the evidence. In addition, the Court explained that the rule that the prosecution cannot use unwarned custodial statements in its case in chief sweeps more broadly than the Fifth Amendment, which only protects against the use of compelled statements. Statements given without Miranda warnings may not actually be compelled but the Court will presume compulsion without warnings. However, the Court refused to extend this presumption of compulsion to the suspect's subsequent statements after being Mirandized.

b) Massachusetts Law

In Commonwealth v. Smith, 412 Mass. 823 (1992), the SJC did not follow Oregon v. Elstad and instead retained the rule of Commonwealth v. Haas, 373 Mass. 545, 553 (1977). Massachusetts courts will presume that the Mirandized statement is tainted if it follows an unwarned statement made while in custody. The prosecution can remedy the taint of the initial illegal custodial interrogation by demonstrating "a break in the stream of events" from the unwarned to the post-Miranda statement. Otherwise, the suspect will assume that the "cat is out of the bag" because the government has already heard her initial non-Mirandized statement. The SJC views the Miranda presumption as deterring police use of warnings strategically – "first questioning the subject without the benefit of warnings, and then, having obtained an incriminating response or having otherwise benefitted from the coercive atmosphere, by giving the Miranda warnings and questioning again in order to obtain an admissible statement." Smith, 412 Mass. at 829. The SJC concluded that this approach was consistent with the Massachusetts humane practice rule and the purposes of Miranda's "bright-line" rule, which seeks to avoid

lopsided credibility contests between defendants and police officers regarding the voluntariness of statements.

4. Physical Fruits of Voluntary but Unwarned Statement

a) Federal Law

Physical evidence ("nontestimonial evidence") of a suspect's unwarned statement is admissible so long as the statement was uncoerced. In United States v. Patane, 542 U.S. 630 (2004), the Supreme Court refused to extend the "fruit of the poisonous tree" doctrine to physical evidence discovered as a result of a statement taken in violation of Miranda. The Court reasoned that the Fifth Amendment's language that "[n]o person shall be compelled in any criminal case to be a witness against himself" means that the self-incrimination clause only protects against use of a defendant's "testimonial evidence" at trial, and not resulting physical evidence. Suppression of the actual statement obtained without Miranda warnings "is a complete and sufficient remedy for perceived . . . violation." *Id. at 631.*

b) Massachusetts Law

Art. 12 forbids use, even if voluntary. In Commonwealth v. Martin, 444 Mass. 213 (2005), the SJC continued to apply the fruit of the poisonous tree doctrine to physical evidence discovered as a result of a statement taken in violation of Miranda. The SJC explained that even though its prior application of the exclusionary rule to evidence obtained in contravention of Miranda was derived from Fifth Amendment jurisprudence, Art. 12 of the Declaration of Rights of the Massachusetts Constitution provides its own protection where federal constitutional protections fall short. Specifically, Art. 12 states that a person cannot be compelled to "furnish evidence against himself." The SJC thus adopted a common law rule establishing that physical evidence "derived from unwarned statements is presumptively excludable from evidence at trial as 'fruit' of the improper failure to provide such warnings." *Id. at 215.* In contrast to the Patane language, the SJC declared that "[s]uppression of the statement alone is an inadequate remedy" to vindicate Art. 12 rights. *Id. at 220.*

5. Notifying Suspect Of Attorney's Presence At Station

a) Federal Law

Police have no duty to inform an interrogation suspect of attorney's presence or efforts to render legal assistance if the

suspect has not requested assistance of attorney. Moran v. Burbine, 475 U.S. 412 (1986).

b) Massachusetts Law

The SJC rejects Moran v. Burbine. Article 12 requires that police have a duty to inform a suspect of an attorney's efforts to render legal assistance. Commonwealth v. Mavredakis, 430 Mass. 848 (2000). The duty to inform is a bright line rule set by the SJC in order to ensure realization of the meaningfulness contained in the Miranda rights. Failure by police to inform a suspect of an attorney's efforts may invalidate an otherwise valid Miranda waiver.

6. Immunity

As in federal and other state jurisdictions, in Massachusetts the government may compel a witness to testify about a criminal matter, even where the witness' truthful testimony would incriminate her, so long as the government obtains immunity for the witness by successfully petitioning the court.

a) Federal Law

A grant of immunity does not violate the Fifth Amendment's privilege against self-incrimination so long as it includes "use" and "derivative use" immunity. In other words, the prosecution may not use the witness' own testimony or any evidence derived from that testimony against her in that or any other subsequent criminal proceeding. Kastigar v. United States, 406 U.S. 441, 453 (1972).

b) Massachusetts Law

In Massachusetts, however, prosecutors may not force a witness to incriminate herself on the witness stand without obtaining full "transactional" immunity, meaning the person cannot be prosecuted further – or at all, if she has not yet been charged – for the crime. Attorney Gen. v. Colleton, 387 Mass. 790, 795-796 (1982). Transactional immunity (also known as "absolute" immunity) is not required under the Fifth Amendment.

C. Confrontation

1. Confrontation: Face-To-Face

a) Federal Law

The Confrontation Clause of the Sixth Amendment guarantees a citizen the right "to be confronted with the witnesses against him" at trial. That right does not include, however, the right to confront witnesses "face-to-face." The Confrontation Clause is satisfied by the "combined effects" of the witness' physical presence before the defendant; her testimony being under oath and subjection to cross-examination by defense counsel; and the opportunity for the jury to observe her demeanor. Maryland v. Craig, 497 U.S. 836, 846 (1990). The right to a physical, face-to-face confrontation may be restricted by the court where "necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id. at 850.*

b) Massachusetts Law

In Massachusetts, however, the language of Art. 12 that guarantees the right "to meet the witnesses against him face-to-face" means just that: the witness and defendant must be able to see each other while the witness is testifying. Commonwealth v. Amirault, 424 Mass. 618, 642 (1997). It is not enough that the defendant be able to see the witness; the courtroom must be arranged so that the witness "must either look upon the accused's face as he testifies or deliberately avert his eyes and look away from him." Commonwealth v. Johnson, 417 Mass. 498, 503 (1994). In describing its rationale for this rule the SJC noted that "[t]he witness who faces the accused and yet does not look him in the eye when he accuses him may thereby cast doubt on the truth of the accusation." Amirault, 424 Mass. at 632. While the circumstances may allow a judge to provide a less formal, less intimidating atmosphere – e.g., where the alleged victim is a child, the judge may limit the number of people in the courtroom – the court may not interfere with the face-to-face requirement. *Id. at 635.*

D. Grand Jury

Article 12 guarantees that one may be not convicted of a felony for which he was not indicted by a grand jury. Commonwealth v. Barbosa, 421 Mass. 547, 549 (1995). In Massachusetts, a grand jury consists of 23 individuals, Mass. R. Crim. P. 5(a), and at least 12 must agree that there is probable cause to believe a person committed a crime in order to return an indictment against him. Mass. R. Crim. P. 5(e).

One does not have the right to testify before a Massachusetts grand jury hearing evidence against him. In the Matter of a Grand Jury Subpoena, 447 Mass. 88, 93 (2006). In fact, one does not have the right to know he is the target of a grand jury investigation prior to an indictment being returned. Any witness testifying before a Massachusetts grand jury has the statutory right to have counsel present, even if the person is not a suspect and even if his testimony would not be self-incriminating. Mass. G. L. c. 277, §14A. That right is not guaranteed by either the U.S. Constitution or the Declaration of Rights, however. Commonwealth v. Griffin, 404 Mass. 372, 374 (1989).

If the grand jurors decline to return an indictment (thereby issuing a "no bill" as opposed to a "true bill"), the Commonwealth may present the case to a new grand jury – even with the same exact evidence – without the approval of the court. Commonwealth v. McCravy, 430 Mass. 758, 762-763 (2000).

E. Identification

1. In-Court Identification Where No Preceding Out-Of-Court Identification

a) Federal Law

The Supreme Court has not specifically dealt with the question of admissibility of an in-court identification where there is no prior out-of-court identification. The majority of lower courts have held that when there is no preceding suggestive out-of-court identification, the in-court identification will be allowed because a juror will be "able to evaluate the reliability of the identification because he or she can observe the witness's demeanor and hear the witness's statements during the identification procedure." Commonwealth v. Crayton, 470 Mass. 228, 239 (2014). A few other courts have held these first-time in-court identifications suggestive. *Id.* However, the Supreme Court has not granted cert. in any of these cases. Regarding generally the admissibility of in-court identifications where no prior state sanctioned suggestive out-of-court identification procedure is involved, the Supreme Court has stated that due process does not require the court to "screen [identification] evidence for reliability before allowing the jury to assess its creditworthiness." Perry v. New Hampshire, 565 U.S. 228, 245 (2012). The Court relied on other "safeguards built into the adversary system that caution juries into placing undue weight on eyewitness testimony of questionable credibility" including cross examination, defense counsel's opening and argument, jury instructions regarding reliability of eyewitness evidence, and the government's burden to prove guilt beyond a reasonable doubt. *Id. at 245-6.*

b) Massachusetts Law

In Commonwealth v. Crayton, 470 Mass. 228 (2014), the SJC held that when there is no preceding out-of-court identification, a first-time in-court identification by an eyewitness will be excluded unless there is good cause for its admission. The SJC viewed a first-time in-court identification as comparable to a show-up identification that is inherently suggestive and likewise only admissible for good cause. The SJC further placed the burden on the prosecution to move in limine to permit an in-court identification. Once the prosecution files its motion in limine, the defendant has the burden to demonstrate by a preponderance of the evidence the unnecessarily suggestive nature of the procedure and the lack of good reason.

2. In-Court Identification Where Suggestive Out-Of-Court Identification

a) Federal Law

In Manson v. Brathwaite, the Supreme Court held that where there is a suggestive and unnecessary out of court identification, that identification can still be admitted at trial where it "possesses certain features of reliability." 432 U.S. 98, 110 (1977). These features include the ability of the identifying witness to observe the suspect and pay attention, how closely the witness's prior description conforms with the defendant, the witness's certainty during the identification procedure, and the time lapse between the incident and the identification procedure. The Court refused to adopt a per se rule of exclusion of suggestive identification and instead stated that due process would be satisfied by totality of the circumstances approach.

b) Massachusetts Law

In Commonwealth v. Johnson, 420 Mass. 458 (1995), the SJC adopted a per se rule of exclusion of suggestive identifications. The SJC concluded that following the more flexible rule of Manson v. Brathwaite would contravene Art. 12 of the Declaration of Rights of the Massachusetts Constitution. At a suppression hearing, the defendant has the burden of proving by a preponderance of the evidence the suggestiveness of the out-of-court identification procedure and, in making this determination, the judge will look to the totality of the circumstances. If the defendant demonstrates suggestiveness by this standard, the prosecution cannot use the out-of-court identification procedure. If the witness has made additional identifications, these may only be admitted if the prosecution shows by clear and convincing

evidence that these other identifications have a basis independent of the suggestive identification. In determining the existence of an independent basis, the "judge considers the following factors: '(1) The extent of the witness' opportunity to observe the defendant at the time of the crime; prior errors, if any, (2) in description, (3) identifying another person or (4) failing to identify the defendant; (5) the receipt of suggestions, and (6) the lapse of time between the crime and the identification.'" *Id. at 464* (quoting Commonwealth v. Botelho, 369 Mass. 860, 869 (1976)).

F. State Response to Immigration Detainers

1. Federal Law

The Supreme Court has not dealt with the legality of detaining someone based on an immigration detainer. Several lower courts have found detention of an individual by state or local authorities based on a civil immigration detainer violates the Fourth Amendment and other constitutional rights. See Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014); see also Morales v. Chadbourne, 793 F.3d 208 (1st Cir. 2015); Moreno v. Napolitano, 213 F.Supp.3d 999 (N.D. Ill. 2016).

2. Massachusetts Law

The SJC held that Massachusetts state and local law enforcement do not have the authority to hold an individual pursuant to an immigration detainer. Lunn v. Commonwealth, 477 Mass. 517 (2017). The SJC stated that it is undisputed that detention based solely on an immigration detainer, after the individual would have regularly been released on her criminal manner, constituted an arrest and thus required probable cause. After determining that there is no federal statute that provided state officers with arrest authority under these circumstances, that detainers are only requests by federal authorities, and that pursuant to the Tenth Amendment the federal government cannot compel states to comply with detainers, the SJC determined that Massachusetts jurisprudence did not provide its police the power to arrest because of a detainer. *Id. at 526.* The SJC specifically rejected the argument that Massachusetts officials have "inherent authority" to arrest because of a detainer, stating that such contention may be foreclosed by Supreme Court precedent and that, in any event, Massachusetts has never recognized a police officer's power to arrest beyond that which is explicitly provided by statute and common law. *Id. at 533.*

G. Jurisdiction

1. Felony vs. Misdemeanor

Superior Court jurisdiction extends to all crimes except certain youthful offender charges. District Court and Boston Municipal Court final subject matter jurisdiction is concurrent with Superior Court over misdemeanors, city ordinances and bylaws, felonies punishable by not more than five years in state prison, as well as certain statutorily specified felonies where punishment exceeds five years. These include, among others, distribution of a Class A controlled substance, assault and battery with a dangerous weapon, and strangulation. Mass. G. L. c. 218, §26. District and municipal court judges have no authority to sentence a person to state prison. A felony is any crime punishable by a state prison term, without regard to duration of the term. A misdemeanor is any crime not punishable by a state prison term, and only subject to a House of Correction term not more than two and a half years. Mass. G. L. c. 274, §1.

2. Juvenile vs. Adult

Juvenile delinquency cases are civil matters, not criminal. The Juvenile Court has exclusive jurisdiction over cases against children between the ages of 7 and 18 who are alleged to have violated any city ordinance or town by-law or to have committed any offense against a law of the Commonwealth. Mass. G. L. c. 119, §52. Juvenile Court jurisdiction extends to people charged with contributing to the delinquency of a minor, Mass. G. L. c. 119, §63; and aiding and abetting/harboring or concealing a child, Mass. G. L. c. 119, §63A.

For delinquency matters in Juvenile Court, the maximum penalty is commitment to the Department of Youth Services. Certain matters, classified as "Youthful Offender" cases, are punishable by any sentence provided by law, including any available adult penalty. Mass. G. L. c. 119, §58. To qualify as a Youthful Offender case, the child must be (1) between the ages of 14 and 18, (2) charged with a felony, and (3) previously committed to the Department of Youth Services, or charged with certain firearms offense, or with a felony that involves the "infliction or threat of serious bodily harm." Mass. G. L. c. 119, §54.

The adult courts have exclusive jurisdiction over youth between the ages of 14 and 18 charged with first or second degree murder. Mass. G. L. c. 119, §74. Although first degree murder is punishable by a mandatory sentence of life without the possibility of parole in Massachusetts, this sentence was eliminated for juveniles convicted of first degree murder. The SJC held that life without the possibility of parole as applied to a juvenile violated the Massachusetts Declaration of Rights' prohibition

against "cruel or unusual punishments." Diatchenko v. Dist. Att'y for the Suffolk Dist., 466 Mass. 655 (2013).

H. Offenses Against The Person

1. Homicide

A person commits first degree murder if the murder is: (1) premeditated and deliberate; (2) committed with extreme atrocity or cruelty; or (3) in the commission or attempted commission of a felony punishable by a life sentence. Mass. G. L. c. 265, §1. The felony murder rule in Massachusetts requires that the killing be directly perpetrated by the defendant or a co-felon. Commonwealth v. Balliro, 349 Mass. 505, 515 (1965). A defendant is not guilty of felony murder if a police officer kills the felony victim or a bystander while pursuing the defendant. *Id.* In Commonwealth v. Brown, the SJC eliminated the felony murder rule as an independent theory of liability for murder, making it an aggravating element of murder. 477 Mass. 805 (2017). After Brown, a person who commits an armed robbery as a joint venturer will be found guilty of murder where a killing was committed in the course of that robbery if she knowingly participated in the killing with the intent either to kill, to cause grievous bodily harm, or to do an act which, in the circumstances known to that person, a reasonable person would have known created a plain and strong likelihood of death.

A person commits second degree murder if the murder is done with malice aforethought. Malice requires that: (1) the defendant intended to cause death or grievous bodily harm to the victim; or (2) the defendant committed an intentional act which, in the circumstances known to the defendant, a reasonable person would have understood created a plain and strong likelihood of death. Commonwealth v. Grey, 399 Mass. 469, 470 n.1 (1987). A person also commits second degree murder if she commits a non-atrocity first degree murder while voluntarily intoxicated. Commonwealth v. Perry, 385 Mass. 639 (1982); Commonwealth v. Gould, 380 Mass. 672 (1980).

Voluntary manslaughter is murder committed under certain mitigating circumstances that reduce it from first or second degree murder to voluntary manslaughter. Such mitigating circumstances are: (1) the heat of passion on reasonable provocation; (2) the heat of passion induced by sudden combat; or (3) excessive force in self-defense or defense of another. Commonwealth v. Glover, 459 Mass. 836, 841 (2011) (quoting Commonwealth v. Acevedo, 446 Mass. 435, 443-44 (2006)). Mere words, alone, are not reasonable provocation, except that sufficient provocation may arise where a defendant learns of a fact from a statement rather than from personal observation. Commonwealth v. Tu Trinh, 458 Mass. 776, 783 (2011) (quoting Commonwealth v. Vick, 454 Mass. 418, 429 (2009));

Commonwealth v. Mercado, 452 Mass. 662, 672 (2008). Such statements may be sufficient if the information conveyed would cause a reasonable person to lose her self-control, and did actually cause the defendant to do so. The killing must occur after the provocation and before there is sufficient time for the emotion to cool. Acevedo, 446 Mass. at 443-44.

Involuntary manslaughter is an unlawful killing unintentionally caused by wanton or reckless conduct. Commonwealth v. Earle, 458 Mass. 341, 347 (2010); Commonwealth v. Walker, 442 Mass. 185, 191-92 (2004). It is also an unlawful killing unintentionally caused by a battery that the defendant knew or should have known created a high degree of likelihood that substantial harm will result to another. Commonwealth v. Sheppard, 404 Mass. 774 (1989).

Vehicular homicide is committed when a defendant causes the death of another by driving recklessly or wantonly. It is not a separate crime, but describes the commission of manslaughter by motor vehicle. Commonwealth v. Jones, 382 Mass. 387 (1981).

Manslaughter while operating under the influence is a separate crime, created by Melanie's Law. See OUI, infra.

2. Assault and Battery

There are two types of assault and battery in Massachusetts - intentional and reckless causing injury. An intentional assault and battery is an intentional touching of another, without right or excuse, that was likely to cause bodily harm, or was offensive and without consent. A reckless assault and battery is reckless conduct that caused bodily injury to the victim. Commonwealth v. Burno, 396 Mass. 622, 625-27 (1986); Commonwealth v. Welch, 16 Mass. App. Ct. 271, 273-77 (1983). The defendant's acts which resulted in the touching must have been intentional, not accidental. Assault and battery is a misdemeanor punishable by incarceration in a county House of Correction, unless committed under certain aggravating circumstances. Mass. G. L. c. 265, §13A.

Although there is no "aggravated battery" in Massachusetts, sentencing enhancements exist for battery that causes serious bodily injury, as well as battery on a pregnant woman, on an elderly or disabled person, on a child under 14 years old causing injury, or on a person who has a restraining order against the defendant of which the defendant has knowledge. These offenses are felonies and punishable by state prison time.

For purposes of these offenses, "serious bodily injury" is injury resulting in a "permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death."

Assault and battery on a healthcare provider, emergency medical technician, and/or public employee, including a police officer, when such person is engaged in the performance of his duties, are misdemeanors punishable by a mandatory minimum term of 90 days in a county house of correction. Mass. G. L. c. 265, §§13A-13N.

3. Assault

There are two kinds of assault in Massachusetts - an immediately threatened battery or an attempted battery. Mass. G. L. c. 265, §13A(a).

To establish a threatened battery, the prosecution must prove that the defendant engaged in objectively menacing conduct with the intent to put the victim in fear of immediate bodily harm. The prosecution need not prove that the victim was actually placed in fear of bodily harm.

To establish an attempted battery, the prosecution must prove that the defendant intended to commit a battery upon the victim, took some overt step toward accomplishing that intent, and came reasonably close to doing so. The prosecution need not prove that the victim was put in fear or even aware of the attempted battery.

4. Kidnapping

A kidnapping occurs when a defendant, without lawful authority:

a) Forcibly or secretly confines or imprisons another person within Massachusetts against his will; or

b) Forcibly carries or sends such person out of Massachusetts against his will. A parent may be guilty of kidnapping for taking a child in violation of a lawful custody order.

Mass. G. L. c. 265, §§26, 26A-26D.

5. Rape

Rape is committed if the defendant engaged in sexual intercourse, either natural or unnatural, with a person, and the sexual intercourse was accomplished by compelling the person to submit by force or threat of bodily injury and against his will. Mass. G. L. c. 265, §22. Aggravated rape occurs if the crime resulted in serious bodily injury. “Unnatural sexual intercourse” includes oral intercourse, anal intercourse, digital penetration, and object penetration.

The prosecution must prove beyond a reasonable doubt that the victim did not consent to intercourse.

Statutory rape applies to the rape of a child under the age of 16. Mass. G. L. c. 265, §23. Consent is not a defense to a statutory rape charge. The offense may be committed with or without knowledge of the victim's age. Commonwealth v. Miller, 385 Mass. 521 (1982).

6. Indecent Assault and Battery

A defendant commits indecent assault and battery if he committed an assault and battery on a victim who was at least 14 years old; the touching was offensive to contemporary standards of decency, including touching parts of the victim's body commonly considered private; and the victim did not consent to the touching.

A defendant commits indecent assault and battery on a child under the age of 14 if he committed an assault and battery on a person not yet 14 years old, and that touching was indecent. A child under the age of 14 is deemed incapable of consent to such conduct. Mass. G. L. c. 265, §§13B, 13H.

7. Armed Robbery

Armed robbery is committed if the defendant, while armed with a dangerous weapon, assaults another and robs, steals, or takes from that person, or the person's immediate control, money or property with the intent to steal it. It is not necessary that the weapon be used in commission of the robbery. Nor is actual force necessary—it is enough if the defendant put the victim in fear by threatening words or gestures. Mass. G. L. c. 265, §17.

8. Threats

Threatening to commit a crime against a person or property is itself a crime. This crime is committed when the defendant expresses an intent to injure a person or the property of another, the defendant intended the threat be conveyed to a particular person, the threatened injury would constitute a crime, and the circumstances could reasonably have caused the person to whom the threat was made to fear that the defendant had the intent and ability to carry it out. Mass. G. L. c. 275, §2.

9. Mayhem

There are two theories of mayhem. According to the first theory, mayhem is committed if the defendant cut out or maimed the tongue, put out or destroyed an eye, cut or tore off an ear, cut, or mutilated the nose or lip, or cut off or disabled a limb of another person. Mass. G. L. c. 265, §14. According to the second theory, mayhem is committed if the defendant assaulted someone with a dangerous weapon, substance or chemical, having the intent to maim or disfigure, and in so doing disfigures, cripples,

or causes serious or permanent injury. In such a case, the prosecution must prove a specific intent to disfigure the victim. Mass. G. L. c. 265, §14.

I. Offenses Against Property

1. Breaking and Entering

Breaking and entering the dwelling of another in the nighttime with the intent to commit a felony therein is a crime, which extends to other structures such as ships, vessels, vehicles, railroad cars, and buildings other than dwellings. Mass. G. L. c. 266, §16. This is the Massachusetts version of common law burglary. Breaking and entering in the daytime is also a crime, Mass. G. L. c. 266, §18, as is breaking and entering with the intent to commit a misdemeanor. Mass. G. L. c. 266, §16A.

2. Larceny

A defendant commits larceny by the wrongful taking of the personal property of another person, with the intent to deprive that person of such property permanently. Mass. G. L. c. 266, §30. The prosecution must prove that the defendant took and carried away property, that the property was owned or possessed by someone other than the defendant, and that the defendant did so with the intent to deprive that person of the property permanently. If the property value is more than $1,200, it is a felony; if less than $1,200, a misdemeanor. Mass. G. L. c. 266, §30(1). The prosecutor need not prove who owned the property, only that the defendant did not.

Larceny from a person, Mass. G. L. c. 266, §20, and larceny from a building, Mass. G. L. c. 266, §25(b), are felony offenses regardless of the value of the stolen items. In order to prove larceny from a person, it must be proved that the defendant took the property from the person of someone who owned or possessed it or from such a person's area of control in his or her presence. For example, an ordinary pickpocketing constitutes a larceny from a person.

Although a defendant may be charged with larceny by stealing and receiving stolen property based on the same goods, she may not be convicted of stealing and receiving the same goods. It is a question for the jury on which charge to convict. Commonwealth v. Dellamano, 393 Mass. 132 (1984).

3. Criminal Trespass

A defendant commits criminal trespass if she enters or remains on the property of another after having been forbidden to do so by the person in lawful control of the premises, either directly or by posted notice. Mass. G. L. c. 266, §120. As to notice, the prosecution is not required to prove

that the defendant actually saw a notice forbidding trespassing; only that there was a reasonably distinct notice forbidding trespass, and that it was posted in a reasonably suitable place so that a reasonably careful trespasser would see it. Securing premises with secure fences or walls and with locked gates or doors is considered to be "directly" forbidding entry to the premises. Commonwealth v. A Juvenile, 6 Mass. App. Ct. 106 (1978).

4. Arson

Arson is committed when a defendant willfully and maliciously sets fire to, burns, or causes to be burned, any man-made structure, regardless of ownership, including her own dwelling house or building. Mass. G. L. c. 266, §1. Attempted arson is placing flammable or explosive materials in or against a building with the intent to willfully and maliciously set fire to the building. Mass. G. L. c. 266, §5A.

5. Destruction of Property

A defendant commits willful and malicious destruction of property when he injures or destroys the property of another willfully and with malice. Mass. G. L. c. 266, §127. This offense is a misdemeanor, unless the value of the property is greater than $250, in which case it is a felony offense. A defendant acts willfully if he intends both the conduct and its harmful consequences. A defendant acts with malice if he acts out of cruelty, hostility or revenge toward another. Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437 (1983).

A defendant commits wanton destruction of property when he injures or destroys the property of another wantonly. A defendant acts wantonly if he intends the conduct but not the harmful consequences, and was reckless or indifferent to the substantial damage that such conduct would probably cause. Commonwealth v. Smith, 17 Mass. App. Ct. 918 (1983). This offense is a misdemeanor, regardless of the value of the property. Mass. G. L. c. 266, §127.

For both offenses, the value of the property is determined by the reasonable cost of repair or replacement of the damaged property. Commonwealth v. Deberry, 441 Mass. 211, 221-22 (2004).

Wanton destruction of property is not a lesser included offense of malicious destruction of property. Commonwealth v. Schuchardt, 408 Mass. 347, 352 (1990).

J. Drug Offenses

In Massachusetts, controlled substances are classified into five schedules (Classes A-E) based on considerations such as likelihood of dependence. Unless such a

substance was obtained with a prescription, it is a crime to knowingly possess it. Mass. G. L. c. 94C, §§31, 32 [Class A], 32A [Class B], 32B [Class C], 32C [Class D], and 32D [Class E], 34.

A defendant commits the separate crime of distribution or possession with intent to manufacture, distribute or dispense a controlled substance when she knowingly or intentionally distributes some perceptible amount of the controlled substance to another person, or possesses some perceptible amount with the intent to distribute it to another person. "Intent to distribute," as opposed to merely possessing a controlled substance for personal use, may be inferred from circumstances such as the quantity of controlled substance, the packaging, records or tools of distribution also in possession of the defendant, and/or evidence of a drug sale in progress.

If a defendant commits a drug offense within 300 feet of a school or preschool, or within 100 feet of a public park or playground, between 5 a.m. and midnight, she is subject to a sentencing enhancement: a mandatory minimum term of two years in a county house of correction, or two and a half years in state prison. It is not necessary that the defendant had knowledge of the school or park boundaries. Mass. G. L. c. 94C, §32J.

In 2016, Massachusetts voters passed a marijuana legalization law. As of December 15, 2016, adults in Massachusetts may possess and use marijuana. It is not a crime to possess, use, purchase, process or manufacture one ounce or less of marijuana. In addition, a person may possess up to 10 ounces of marijuana in her primary residence, as well as marijuana produced by (no more than 12) plants cultivated on the premises.

K. Firearms Offenses

It is a crime in Massachusetts to knowingly possess a firearm without a firearms license. Mass. G. L. c. 269, §10(h). This offense is without regard to whether the firearm is loaded or unloaded. A greater penalty exists for the crime of possessing a firearm without a license outside a person's home or business, also known as "carrying a firearm." Mass. G. L. c .269, §10(a). To be within a residence or place of business, the area must be within the defendant's exclusive control. Commonwealth v. Moore, 54 Mass. App. Ct. 334, 344-45 (2002). Carrying a firearm is punishable by a mandatory minimum term of not less than two and a half years in state prison, or not less than 18 months in a jail or house of correction. Mass. G. L. c. 269, §10(a).

It is also a crime to knowingly possess ammunition without a license. Mass. G. L. c. 269, §10(h).

The Massachusetts Armed Career Criminal Act (MACCA) established sentencing enhancements for individuals convicted of firearms offenses who have been previously convicted of a "violent crime" or a "serious drug offense." Mass. G.

L. c. 269, §10G. A person charged under MACCA faces additional mandatory minimum terms of three years to fifteen years, depending on the number of prior qualifying convictions on his record.

L. Operating a Motor Vehicle While Under the Influence of Alcohol (OUI)

Massachusetts law makes it a crime to operate a motor vehicle while under the influence of alcohol. This offense may be proved in two different ways: (1) by demonstrating that an operator was under the influence of intoxicating liquor: or (2) by demonstrating that the operator's blood alcohol level was .08% or greater. The "under the influence" alternative requires proof of operation "with a diminished capacity to operate safely," Commonwealth v. Connolly, 394 Mass. 169, 173 (1985), but not proof of any specific blood alcohol level, while the "per se" alternative requires proof of operation with a blood alcohol level of .08% or greater but not proof of diminished capacity.

Under the diminished capacity theory, a person is under the influence of alcohol if he has consumed enough alcohol to reduce his ability to operate a motor vehicle safely, by decreasing his alertness, judgment and ability to respond promptly. It means that a person has consumed enough alcohol to reduce his mental clarity, self-control and reflexes, and thereby is left with a reduced ability to drive safely. It is not required to prove that someone actually drove in a dangerous manner or that the operator was "drunk." Connolly, 394 Mass. at 172-173.

Under the per se law, evidence need only prove the defendant was operating a motor vehicle with a blood alcohol level of .08 percent or greater.

1. Breathalyzer Refusal

When an individual is arrested for operating a motor vehicle while under the influence of alcohol, that person is given a test to determine her blood alcohol content. What happens when an individual refuses to take such a test differs depending upon the jurisdiction.

In South Dakota v. Neville, 459 U.S. 553 (1983) and Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court held there is no Fifth Amendment or Fourth Amendment right to refuse to submit to a blood alcohol test. If a suspect refuses to submit to a breath test, that refusal is admissible in court.

In Massachusetts, an individual has no right to refuse a breath test and will suffer administrative penalties from the Registry of Motor Vehicles if she refuses to be tested. However, when an individual refuses to take a blood alcohol test, evidence of that refusal is inadmissible at trial. See Opinion of the Justices to the Senate, 412 Mass. 1201, 1210-1211 (1992) (rescript) (holding that refusal to submit to a breath test constitutes testimonial or communicative evidence that violates the privilege against self-

incrimination embodied in Art. 12 of the Declaration of Rights and is inadmissible).

2. Field Sobriety Test Refusal

Field Sobriety Tests are divided attention tests that require an individual to concentrate on mental and physical tasks at the same time. They are used to evaluate an individual's ability to listen to and follow simple instructions as well as to evaluate an individual's coordination and motor skills.

In Commonwealth v. McGrail, 419 Mass. 774, 778 (1995), the SJC employed the same rational regarding barring testimony that a suspect refused to take a breath test and held inadmissible evidence that a suspect refused to take field sobriety tests.

3. Melanie's Law

Melanie's Law was passed in October of 2005 and is aimed at fighting alcohol impaired driving by enhancing the penalties and administrative sanctions for operating a motor vehicle while under the influence of alcohol. It substantially increased license suspensions for underage drivers and repeat offenders who refused to submit to a blood or breath test and inserted a number of new drunk driving-related statutes. It also created a new offense: Operating Under the Influence of Alcohol While Operating after Suspension For Impaired Driving

> An operator, who was driving under the influence of alcohol while his license was already suspended for OUI, can be charged with two crimes at once: both OUI and OUI with a license suspended for OUI. This additional offense carries a minimum of a one-year mandatory jail sentence.

Operating a Motor Vehicle Under the Influence of Alcohol with a Child 14 Years of Age or Younger in the Vehicle

> An operator can be charged with two crimes at once: OUI and Child Endangerment While OUI.

Manslaughter by Motor Vehicle

> Any operator who commits manslaughter while operating a motor vehicle while under the influence of alcohol or drugs shall be convicted of Manslaughter by Motor Vehicle.

M. Lesser Included Offenses

In Massachusetts, as under Federal law, one crime is a lesser included offense of another if each of its elements is also an element of the other crime. Commonwealth v. Perry, 391 Mass. 808, 813 (1984); Commonwealth v. Parenti, 14 Mass. App. Ct. 696, 704 (1982). If each crime requires proof of an additional fact that the other does not, neither is a lesser included offense of the other. Commonwealth v. Jones, 382 Mass. 387, 393 (1981).

N. Accomplice Liability

There is no distinction among the parties as to criminal liability. An "accomplice" is liable in equal measure as a "principal." An accomplice is anyone who knowingly participated in commission of the crime charged, alone or with others, with the intent required for the offense. Marshall v. Commonwealth, 463 Mass. 529 (2012); Commonwealth v. Zanetti, 454 Mass. 449 (2009). Such liability does not reach unintended crimes, except in a case of felony murder. See Commonwealth v. Tejeda, 473 Mass. 269 (2015) (summarizing the theories of felony murder relied upon in Massachusetts).

A person may be excluded from accomplice liability if she withdraws from or abandons the crime. Withdrawal is only effective if it is (1) communicated or brought to the attention of the other party, and (2) early enough for the other party to have a reasonable opportunity to withdraw. Commonwealth v. Cook, 419 Mass. 192, 202 (1994); Commonwealth v. Fickett, 403 Mass. 194, 201 (1988).

Liability as an accessory after the fact, in Massachusetts, requires only that the defendant (1) know the identity of the principal perpetrator, (2) have knowledge of the substantial facts of the felonious crime that the principal committed and, with that knowledge, (3) aided the principal in avoiding punishment. Commonwealth v. Hoshi H., 72 Mass. App. Ct. 18, 19-21 (2008). Such aid includes harboring, concealing, maintaining, assisting, or giving the principal any other aid. Mass. G. L. c. 274, §7. Accessory after the fact liability does not apply to certain excluded family members of the defendant, including the defendant's spouse, parent, grandparent, sibling, and child. Mass. G. L. c. 274, §4.

O. Conspiracy and Attempt

Conspiracy is committed when parties reach an agreement to do something unlawful or to use unlawful means. Mass. G. L. c. 274, §7. To be liable, the defendant must join the conspiracy knowing of the unlawful plan/means and intending to help carry it out. No overt act or attempt is necessary for liability. Commonwealth v. Benson, 389 Mass. 473 (1983). Conspiracy with another does not subject a person to criminal liability for acts of co-conspirators. For a defendant to be liable for the acts of co-conspirators, the test for accomplice liability must be met. Wharton's Rule holds that an agreement by two people to commit a crime cannot be prosecuted as a conspiracy if the substantive crime

involved requires at least two people to commit. The Wharton Rule does not apply to conspiracy to distribute drugs; it is unsettled whether the rule applies to other conspiracies. Commonwealth v. Cantres, 405 Mass. 238 (1989).

Solicitation to commit a crime is a common law crime in Massachusetts. There must be proof that the defendant solicited, counseled, advised, or otherwise enticed another to commit a crime, and that the defendant intended for the person to actually commit the crime. Commonwealth v. Lenahan, 50 Mass. App. Ct. 180, 186 (2000); Commonwealth v. Wolcott, 77 Mass. App. Ct. 457 (2010).

To be liable for an attempted crime, a defendant must have had a specific intent to commit the crime, and commit an "overt act" that came "reasonably close" to carrying out the crime. Non-completion of the crime is not an element. Commonwealth v. LaBrie, 473 Mass. 754, 763-64 (2016).

P. Defenses and Justifications

1. Self-Defense

Where there is evidence of self-defense, the prosecution must prove, beyond a reasonable doubt, that the defendant did not act in self-defense. Commonwealth v. Fluker, 377 Mass. 123, 127 (1979). Where the defendant used non-deadly force, the prosecution must prove that: (1) the defendant did not reasonably believe she was being attacked or about to be attacked; or (2) the defendant did not do everything reasonable in the circumstances to avoid physical combat before resorting to force; or (3) the defendant used more force than was reasonably necessary in the circumstances. Commonwealth v. Haddock, 46 Mass. App. Ct. 246 (1999). Where the defendant used deadly force, the prosecution must prove that: (1) the defendant did not reasonably believe that she was in immediate danger of great bodily harm or death; or (2) the defendant did not do everything reasonable in the circumstances to avoid physical combat before resorting to force; or (3) the defendant used more force than was reasonably necessary in the circumstances. Commonwealth v. Glacken, 451 Mass. 163 (2008).

In Massachusetts, there is a duty to retreat, except in one's dwelling. Mass. G. L. c. 278, §8A. The "castle rule" provides an affirmative defense to a charge of killing or injuring an intruder as long as: (1) the occupant reasonably believes that the intruder is about to inflict great bodily injury or death on her or on another person lawfully in the dwelling; and (2) the occupant uses only reasonable means to defend herself or the other person lawfully in the dwelling. Commonwealth v. Peloquin, 437 Mass. 204 (2002). The "castle rule" does not eliminate the duty to retreat from a confrontation with someone who is lawfully on the property. *Id.*

2. Defense of Others

Where there is evidence that a defendant used force to help another person, the prosecution must prove beyond a reasonable doubt that:

(1) A reasonable person in the defendant's position would not have believed force was necessary to protect the third party; or

(2) A reasonable person in the defendant's position would not have believed that the third party was justified in using force in his own self-defense. Commonwealth v. Johnson, 412 Mass. 368 (1992).

3. First Aggressor Evidence

Evidence of an alleged victim's prior threats or acts of violence against the defendant is admissible to establish who was the first aggressor, and whether the defendant reasonably feared for his safety. Commonwealth v. Rodriguez, 418 Mass. 1 (1994); Commonwealth v. Edmonds, 365 Mass. 496 (1974). Evidence of an alleged victim's prior acts of violence—even those not known by the defendant—are admissible to establish who was the first aggressor. Commonwealth v. Adjutant, 443 Mass. 649 (2005). Evidence of an alleged victim's reputation for violence is only admissible if it was known to the defendant, to establish whether the defendant reasonably feared for his safety. Commonwealth v. Clemente, 452 Mass. 295 (2008). The prosecution may rebut such evidence (of an alleged victim's prior acts of violence or reputation for violence) with evidence of the alleged victim's reputation for peacefulness. Commonwealth v. Adjutant, 443 Mass. 649 (2005).

4. Criminal Responsibility and Diminished Capacity

Lack of criminal responsibility in Massachusetts is determined using the Model Penal Code test. A defendant lacks criminal responsibility if she has a mental disease or defect and, as a result, she is substantially unable to appreciate the criminality (wrongfulness) of her conduct, or she is substantially unable to conform her conduct to the law's requirements. Commonwealth v. McHoul, 352 Mass. 544, 546-547 (1967) (adopting definition of insanity from Model Penal Code, §4.01[1] [Proposed Official Draft 1962]).

"Diminished capacity" is not a defense in Massachusetts. Commonwealth v. Parker, 420 Mass. 242, 245 n.3 (1995). However, evidence of mental impairment less than lack of criminal responsibility is admissible to show that the defendant could not form the requisite intent or knowledge for the charged offense. Evidence of alcohol or drug consumption is admissible for the same purpose. Such evidence may reduce first degree murder to second degree murder because of the absence of deliberate premeditation, the specific intent to kill, or cruel or atrocious conduct. Commonwealth v.

Perry, 385 Mass. 639 (1982), Commonwealth v. Gould, 380 Mass. 672 (1980).

5. Necessity

Necessity is a defense when circumstances force a person to perform a criminal act. A necessity defense requires evidence that: a) there was a clear and imminent danger, not a debatable or speculative one; b) the defendant had a reasonable expectation that her actions would reduce or eliminate the danger; c) there was no legal alternative which would have reduced or eliminated the danger; and d) the Legislature has not precluded the defense by a clear and deliberate choice concerning the values at issue in the matter. Commonwealth v. Magadini, 474 Mass. 593, 597 (2016).

6. Duress

Duress is a defense when a defendant committed a criminal act under duress from another person, rather than by free will. Duress applies when another person forced the defendant to act, while necessity applies when circumstances forced the defendant to act. When there is evidence of duress, the prosecutor must prove that: a) the defendant did not receive a present and immediate threat which caused him/her to have a well-founded fear of imminent death or serious bodily injury if s/he did not do the criminal act; b) that the defendant had a reasonable opportunity to escape; or c) that the defendant, or a person of reasonable firmness, had a choice and would have been able to do otherwise in the circumstances. Commonwealth v. Robinson, 382 Mass. 189, 198-209 (1981); Commonwealth v. Perl, 50 Mass. App. Ct. 445, 447-48 (2000).

7. Parental Discipline

A parent or guardian charged with using force against a child may raise a parental privilege defense. Such a privilege may negate criminal liability for force used against a minor child if: a) the force used was reasonable; b) the force was reasonably related to the purpose of safeguarding or promoting the welfare of the minor (including prevention or punishment of the minor's misconduct); and c) the force neither caused, nor created a substantial risk of causing, physical harm (beyond fleeting pain or minor, transient marks), gross degradation, or severe mental distress. Commonwealth v. Dorvil, 472 Mass. 1, 12 (2015).

VII. DOMESTIC RELATIONS

A. Jurisdiction of the Probate and Family Court; Terminology

The Probate and Family Court Department of the Massachusetts Trial Court has subject matter jurisdiction over domestic relation actions. These include:

1. Divorce
2. Separate support
3. Annulment
4. Paternity
5. Adoption
6. Abuse prevention
7. Guardianship
8. Conservatorship

The Probate and Family Court has exclusive jurisdiction over actions for divorce, actions to annul a marriage, and actions to affirm a marriage. Mass. G. L. c. 215, §3.

The Probate and Family Court is often referred to as the "Probate Court."

B. Applicable Rules, Orders, and Guidelines

1. Massachusetts Rules of Domestic Relations Procedure

Divorce and divorce-related actions are governed by the Massachusetts Rules of Domestic Relations Procedure. Mass. R. Dom. Rel. P. 1. These rules are similar to, but not identical to, the Massachusetts Rules of Civil Procedure. Examples of important differences between the rules applicable to domestic relations actions and the rules applicable to civil actions under the Massachusetts Rules of Civil Procedure include:

a) Service of process on a defendant may be made by a disinterested person and last and usual service of process is not permitted (Mass. R. Dom. Rel. P. 4).

b) Defaults and judgments by default are not permitted (Mass. R. Dom. Rel. P. 55).

c) Summary judgment is not permitted in actions for divorce, custody, and visitation (Mass. R. Dom. Rel. P. 56).

2. Supplemental Rules and Uniform Practices of the Probate and Family Court

The Supplemental Rules and Uniform Practices of the Probate and Family Court address other important matters applicable to domestic relations actions. These include:

a) Filing of financial statements where financial relief is requested (Rule 401);

b) Mandatory disclosure of specified financial documents, such as tax returns and pay statements;

c) Automatic restraining orders prohibiting specified action by either party, such as sale of property or incurring of debt, changing insurance beneficiaries, or removing a party or children from medical insurance policies;

d) Filing of financial statements by the parties prior to the scheduling of a hearing;

e) Adoption plans.

3. Standing Orders of the Probate and Family Court

Standing Orders of the Probate and Family Court deal with matters such as:

a) Case management and time standards;

b) Attendance by parties at parent education programs where minor children are involved in a divorce action or an action involving minor children of unmarried parents.

4. Guidelines

Guidelines are promulgated by the Trial Court for use in specified proceedings in the trial courts. Examples of guidelines relevant to domestic relations matters include:

a) Child Support Guidelines for use in computing child support orders;

b) Guidelines for Judicial Practice: Abuse Prevention Proceedings for use in domestic abuse actions under Mass. G. L. c. 209A.

C. Premarital Matters: Antenuptial Agreements

Antenuptial, or premarital agreements, are agreements made by parties prior to marriage. Antenuptial agreements may deal with economic matters between them in the event of death of or divorce.

To be enforceable, the agreement must be in writing and must have been freely entered into after full financial disclosure by each of the parties. A court may enforce an antenuptial agreement if it determines that the agreement was fair and reasonable when entered into. In addition, the "second look" doctrine provides that a court may refuse to enforce an antenuptial agreement that may have been fair and reasonable when entered into, but changed circumstances at the time of enforcement may make it inappropriate to recognize the agreement.

Provisions in an antenuptial agreement that deal with child support will not be enforced if they are inconsistent with the Massachusetts Child Support Guidelines (see ¶J of this chapter). Provisions that deal with custody or visitation of children will not be enforced if they are not in the best interests of the child.

D. Rights Arising out of Non-Marital Cohabitation

1. Common Law Marriage

Some states recognize the doctrine of common law marriage, by which parties are deemed to be legally married even though they have not obtained a marriage license and have not had a marriage ceremony. In these states, common law marriage may be recognized where: the parties have lived together as if they were spouses (cohabitation); the parties held themselves out to the public as married; and the parties consummated their relationship.

Massachusetts does <u>not</u> recognize common law marriage. However, the Supreme Judicial Court has recognized a common law marriage where the parties entered into a valid common law marriage in a state recognizing common law marriage and later moved to Massachusetts. This is an application of the traditional conflict of laws doctrine that a marriage validly entered into in another jurisdiction will be recognized as valid in the forum state as long as recognition of the marriage is not inconsistent with the forum state's public policy.

2. Contract and Equitable Remedies

Where two parties cohabit with each other without marriage in Massachusetts, there are no family law rights of support between them, nor will either be entitled to rights under the law of wills and intestacy upon the death of one of the parties. However, a Massachusetts court may recognize rights between them based on contract, quantum meruit, or equitable doctrine.

A contract between two cohabiting parties may be recognized as long as there was sufficient legal consideration for the contract (such as providing homemaking services). Thus, one party may seek damages for

breach of an agreement to support the other or may seek to recover for the fair value of services rendered during a cohabitation relationship.

A party may also seek recovery for the fair value of services rendered to the other based on a quantum meruit theory.

Equitable remedies, such as imposition of a constructive trust on property acquired during the relationship, may also be available where there has been fraud or breach of fiduciary duty. Such a remedy would serve to avoid unjust enrichment of one of the parties to the relationship. Sullivan v. Rooney, 404 Mass. 160 (1989).

E. Marriage: Legal Effects

1. Definition of Marriage

Civil marriage has historically been defined as the voluntary legal union of a man and a woman united for life as husband and wife.

In Goodridge v. Department of Public Health, 440 Mass. 309 (2003), the Supreme Judicial Court, interpreting the Massachusetts Constitution, redefined civil marriage in Massachusetts as "the voluntary union of two persons as spouses, to the exclusion of all others," whether the parties are opposite sex or the same sex. Subsequently, the United States Supreme Court recognized a Fourteenth Amendment right of same-sex parties to marry in Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

2. Obligation of Support

Parties who are married have the obligation to support each other, and may be liable for necessaries furnished to either of them.

3. Postnuptial Agreements

A postnuptial, or postmarital agreement, will generally be enforced under the same circumstances as a premarital agreement. See ¶C above.

4. Names upon Marriage

Upon marriage, parties may retain their own surname or may adopt the surname of the other party, or may use any other name. Massachusetts recognizes the common law right of a party to use any name that he or she desires, as long as it is for a lawful purpose.

In addition, there is a statutory provision allowing a party to obtain a formal change of name by petition filed in the Probate and Family Court.

The statute provides that the change of name "shall be granted unless such change is inconsistent with public interests." Mass. G. L. c. 210, §12.

5. Marital Privilege

By statute, a spouse may not be compelled to testify against the other spouse in a criminal proceeding against the other spouse, except in a proceeding for desertion or non-support or involving child abuse or incest. Mass. G. L. c. 233, §20.

6. Tenancy by the Entirety

If married persons hold real or personal property as tenants by the entirety, the parties have equal rights "to the rents, products, income or profits and to the control, management and possession of property held by them as tenants by the entirety." Mass. G. L. c. 209, §1.

7. Rights upon Death

Upon death of a spouse, a surviving spouse may be appointed personal representative, may be entitled to rights under the laws of intestacy, or may be entitled to a spouse's forced share in the estate notwithstanding a will provision to the contrary.

8. Capacity to Marry

Persons must have legal capacity to marry. Matters dealing with legal capacity are the following:

a) Bigamy. A person who has an existing undissolved marriage may not marry.

b) Consanguinity and Affinity. A person may not marry his or her parent, grandparent, child, sibling, stepparent, uncle or aunt, or nephew or niece.

c) Mental Capacity. The parties must have the requisite mental ability to contract and consent to marry.

d) Age. The parties must be 18 years of age or older, unless they have parental and court approval to marry.

9. Licensing

Persons who intend to marry each other must file a notice of intention to marry with the clerk or registrar of any city or town in Massachusetts, using a form prescribed by the state Registrar of Vital Records and

Statistics. The notice of intention must be filed no less than three days prior to the marriage. Mass. G. L. c. 207, §20.

The three-day period for filing the notice of intention to marry may be waived by a judge of the District Court or Probate and Family Court upon a finding that "it is expedient that the intended marriage be solemnized without delay." Mass. G. L. c. 207, §30.

10. Ceremony

The certificate of intention to marry must be presented to the official who is to solemnize the marriage, and the ceremony must occur within 60 days of the time when the notice of intention to marry was filed. Mass. G. L. c. 207, §28.

A marriage may be solemnized by persons authorized by statute, such as a justice of the peace or a religious official. A marriage solemnized by a person who professes to have the authority to do so even though the person lacks authority is not invalid "if the marriage is in other respects lawful and is consummated with a full belief of either of the persons so married that they have been lawfully married." Mass. G. L. c. 207, §42.

11. Recognition of Marriage Entered into in Another Jurisdiction

Massachusetts will generally recognize a marriage validly entered into in another jurisdiction by parties living in such jurisdiction, as long as the marriage is not deemed to be in violation of Massachusetts public policy. Thus, Massachusetts may deny recognition to a marriage between persons who have a close blood relationship, even though the marriage may have been valid in the country in which it was entered into.

If a resident of Massachusetts is prohibited from entering into a marriage in Massachusetts and travels to another jurisdiction and enters into the marriage there, the marriage is deemed null and void in Massachusetts as if it had been entered into in Massachusetts. Mass. G. L. c. 207, §10.

F. Annulment

An annulment is a judicial determination that a marriage is not valid. The converse of an annulment action is an action to affirm the validity of a marriage.

1. Grounds

The Probate and Family Court may grant an annulment for a ground that makes a marriage void or voidable.

2. Void Marriage

a) Definition

A marriage may be deemed void because it violates a strong state policy regarding marriage. If a marriage is void, either party to the purported marriage may seek an annulment. A void marriage may be collaterally attacked after the death of either of the parties.

b) Grounds.

Grounds that make a marriage void include bigamy, consanguinity, and affinity, matters that are discussed previously regarding capacity to marry. By statute, if a marriage was entered into in Massachusetts notwithstanding these prohibitions, the marriage is deemed void without the need to file for an annulment. Mass. G. L. c. 207, §8. However, a party to a prohibited marriage may seek an annulment from the Probate and Family Court in order to have a judicial record that the marriage is invalid.

c. Saving Statute.

Where a party remarried even though he or she had an existing spouse, the bigamous marriage may ripen into a valid marriage by statute. This may occur if the parties to the subsequent marriage had a legal ceremony, they lived together as spouses, and the subsequent marriage was entered into in good faith with the belief that the former marriage had ended. In this instance, the subsequent marriage will be deemed valid after the impediment to the subsequent marriage is removed, as long as the parties to the subsequent marriage continue to live together as spouses after removal of the impediment. Mass. G. L. c. 207, §6.

3. Voidable Marriage

A voidable marriage is valid until declared invalid by the Probate and Family Court. A voidable marriage is not subject to collateral attack by a third person after the death of one of the parties.

a) Grounds

A marriage may be voidable, and an annulment may be obtained, on grounds such as lack of mental capacity (including lack of ability to consent by reason of alcohol or drugs), being under the required age for marriage, duress, and fraud.

b) Fraud

To be sufficient to grant an annulment, fraud must deal with the essential aspects of marriage (fraud to the essence). For example, marrying with the intent not to cohabit with the other person, and in fact not cohabiting with that person, would constitute fraud to the essence. Reynolds v. Reynolds, 85 Mass. 605 (1862).

c. Defenses

A voidable marriage may be ratified and become a valid marriage by the voluntary act of the aggrieved party continuing to cohabit with the other person after the impediment to the marriage is removed or the fraud or duress has become known. Other equitable-type defenses to an annulment complaint on the basis of a voidable marriage are estoppel, laches, and unclean hands.

4. Impact of Annulment

a) Financial

There can be no alimony or equitable distribution of property upon annulment of a marriage.

b) Children

Where a void or voidable marriage is annulled, the court may make custody and support orders regarding a child as in the case of divorce.

G. Separate Support

An action for separate support (also referred to as a legal separation) is a method for a spouse to obtain court protection and support while the parties remain married. A judgment of separate support does not terminate the marriage, but determines that a party is living apart from his or her spouse for justifiable cause.

Grounds for separate support are failure to provide suitable support without justifiable cause; desertion; or living apart from the other spouse for justifiable cause. Mass. G. L. c. 209, §32.

H. Divorce

A divorce is a judicial determination that ends a marriage. The existence of a valid marriage is a prerequisite to obtaining a divorce.

1. Requirement that Parties Lived Together in Massachusetts; Durational Period

A divorce may not be granted under the following circumstances: a) where the parties never lived together in Massachusetts as spouses, or b) where the cause for divorce occurred in another jurisdiction. The prohibition set forth as b) above does not apply if the parties lived together as spouses in Massachusetts before the cause for divorce occurred, and one of them lived in Massachusetts at the time the cause for divorce occurred. Mass. G. L. c. 208, §4. The provisions of this statute do not apply if the plaintiff satisfies the one-year durational requirement set forth below.

Even if the plaintiff does not satisfy the provisions of Mass. G. L. c. 208, §4, a divorce may be obtained in Massachusetts under the following circumstances, as long as the plaintiff has not moved to Massachusetts for the purpose of obtaining a divorce:

a) If the cause for divorce occurred outside of Massachusetts and the plaintiff has lived in Massachusetts for one year preceding commencement of the action; or

b) If the cause for divorce occurred within Massachusetts and the plaintiff is domiciled in Massachusetts at the time of commencement of the action. Mass. G. L. c. 208, §5.

2. Service of Process; Personal Jurisdiction.

For a valid divorce, due process requires that the defendant be notified of the commencement of the divorce action. Service of process on a defendant within Massachusetts may be accomplished in any of the following methods: (1) by the defendant accepting service by endorsing a notarized acceptance of service on the summons; (2) by personal delivery to the defendant; (3) if the defendant cannot be found, by an order of notice issued by the court; or (4) by publication and certified mail. Mass. R. Dom. Rel. P. 4(d). Personal jurisdiction over the defendant, however, is required to obtain an economic order (alimony, child support, property division); see 4 below regarding long-arm jurisdiction.

3. Venue

The proper venue for commencing a divorce action is in the county in which one of the parties lives. If either party still resides in the county where the parties last lived together, proper venue is in the county where the parties last lived together. Mass. G. L. c. 208, §6.

4. Long-Arm Jurisdiction

Where a defendant is not a resident of Massachusetts at the time of service, the plaintiff may seek to obtain personal jurisdiction to obtain an enforceable order for alimony, child support, or property division under the Massachusetts long-arm statute. Mass. G. L. c. 223A, §3.

A plaintiff may obtain long-arm jurisdiction as to a claim arising from the defendant maintaining a domicile in Massachusetts, while a party to a marital or personal relationship out of which "a claim for divorce, alimony, property settlement, parentage of a child, child support or child custody" arises. Mass. G. L. c. 223A, §3(g).

5. Financial Statement

Financial statements from both parties are required in divorce cases. Rule 401, Supplemental Rules of the Probate and Family Court.

In any action where financial relief is sought, each party must file with the court, and deliver to the other party, a financial statement, signed under the penalties of perjury, within 45 days of the date of service of the summons.

6. Mandatory Self-Disclosure

Each party is required to provide to the other party specified documents within 45 days from the date of service of the summons. Rule 410, Supplemental Rules of the Probate and Family Court.

The documents include copies of the parties' federal and state income tax returns and schedules for the past three years; four most recent pay statements; documentation regarding health insurance; statements for bank accounts for the past three years; statements for securities, stocks, and bonds for the past three years; copies of any loan applications for the past three years; and copies of any financial statements prepared by either party within the past three years.

7. Automatic Restraining Order

An automatic restraining order applies to the plaintiff upon the filing of a complaint and to the defendant upon service of the summons and complaint. The restraining order remains in place for the duration of the case, unless otherwise agreed by the parties or ordered by the court. Rule 411, Supplemental Rules of the Probate and Family Court.

The following are the provisions of the automatic restraining order:

a) Neither party shall sell, transfer, conceal, or dispose of any property

except for reasonable living expenses, in the ordinary course of business or investment, for payment of attorney's fees, by written agreement of the parties, or by court order.

b) Neither party shall incur any debts that may burden the credit of the other party, including using a line of credit secured by the marital home or unreasonably using credit cards or cash advances.

c) Neither party shall change the beneficiary of an insurance policy or retirement plan without the written consent of the other party or by court order.

d) Neither party shall remove any minor children from coverage under an insurance policy and the parties shall keep all insurance policies in effect.

A court may take appropriate action in the event of a violation of the automatic restraining order, including finding a party in contempt of court.

8. Temporary Orders

During the course of the proceeding, a court may enter temporary orders regarding custody, visitation, child support, alimony, and use and possession of property. Mass. G. L. c. 208, §§17 and 19. A court may enter a temporary order prohibiting a spouse from interfering with the personal liberty of the other spouse or an order protecting either party or the children. Mass. G. L. c. 208, §19.

9. Allowance for Fees

A party may ask the court for an order requiring the other party to pay an allowance for legal fees and expenses in order to facilitate the prosecution or defense of a complaint. Rule 406, Supplemental Rules of the Probate and Family Court.

An application for an allowance must contain a statement that the party intends to prosecute or defend the matter in good faith. The party's attorney must certify that the attorney believes the statement to be true.

A court may make an appropriate order for an allowance for fees after reviewing the financial statements of the parts and other relevant information.

10. Discovery

The Massachusetts Rules of Domestic Relations Procedure provide for a variety of methods of discovery: depositions, interrogatories, document production, physical and mental examination, and requests for admission.

11. Divorce Grounds in General

Massachusetts has both fault and no-fault grounds for divorce. Mass. G. L. c. 208, §§1 and 2. Grounds for divorce deal with developments that have occurred since the date of the marriage.

12. Fault Grounds

The following are fault grounds for divorce:

a) Adultery;

b) Impotency;

c) Desertion for one year;

d) Intoxication;

e) Cruel and abusive treatment;

f) Nonsupport; and

g) Criminal sentence of confinement for five years or more.

13. Defenses to Fault Grounds

A defendant may seek to prevent the granting of a fault divorce by raising an affirmative defense in the answer.

The following are defenses to a fault ground for divorce.

a) Condonation

Condonation is the voluntary act of an innocent spouse who has forgiven a marital wrong committed by the other spouse. Condonation is often proven by evidence that the plaintiff resumed marital cohabitation with the defendant after learning of the marital wrong.

b) Collusion

Collusion exists where it is proven that the parties agreed to assert a fault ground for divorce, where no ground existed.

c) Connivance

Connivance is proven by evidence that the plaintiff facilitated in some way the commission of a marital wrong by the defendant.

d) Lack of mental capacity

A divorce may not be granted where the defendant lacked the requisite mental capacity to commit a marital wrong (for example, defendant's mental illness).

e) Recrimination

Recrimination is no longer a defense to a fault divorce ground in Massachusetts. Recrimination involved both parties proving a fault ground for divorce against the other, which would have precluded granting a divorce to either party.

14. Trial

After a hearing on the matter, a court will make a finding whether a ground for divorce was proven.

The court shall also make appropriate orders regarding custody and visitation concerning children, child support, alimony, and property division. Upon a finding that a divorce ground has been proven and entering orders regarding children and financial matters, a judgment nisi of divorce will enter. A judgment nisi of divorce becomes final after 90 days (see below).

15. No-Fault Grounds

A no-fault ground for divorce allows a divorce to be granted even though neither spouse committed a marital wrong, such as adultery or cruelty. Massachusetts recognizes irretrievable breakdown of the marriage as a no-fault ground for divorce. Mass. G. L. c. 208, §1. An irretrievable breakdown of the marriage exists where there is no likelihood of reconciliation by the parties.

There are two types of irretrievable breakdown grounds in Massachusetts, irretrievable breakdown by agreement of both parties, and irretrievable breakdown without agreement of both parties.

16. Irretrievable Breakdown of the Marriage by Agreement of the Parties (Mass. G. L. c. 208, §1A)

A divorce action on the ground of irretrievable breakdown of the marriage may be commenced by the filing of the following documents:

a) A petition signed by both parties (as opposed to a complaint);

b) An affidavit signed by both parties stating that an irretrievable breakdown of the marriage exists; and

c) A notarized separation agreement signed by the parties.

At a hearing, the court will determine whether an irretrievable breakdown of the marriage exists and whether the separation agreement has made proper provisions for custody of any children, child support, alimony, and property division. In determining whether the agreement contains proper provisions regarding alimony and property division, the court is required to apply the factors set forth in Mass. G. L. c. 208, §34 (see ¶I.3 below), except that marital fault of the parties is not to be considered.

If the court finds an irretrievable breakdown of the marriage and approves the separation agreement, a judgment of divorce nisi will enter thirty days later. A judgment nisi of divorce becomes final after 90 days (see ¶17 below).

17. Irretrievable Breakdown of the Marriage without Agreement of the Parties (Mass. G. L. c. 208, §1B)

A divorce action on the ground of irretrievable breakdown of the marriage may be commenced by the filing of a complaint without an affidavit stating that an irretrievable breakdown of the marriage exists and without a separation agreement.

The court will hold a hearing at least six months after filing of the action at which the court must determine whether a continuing irretrievable breakdown of the marriage has existed from the date of filing up to the date of hearing. The court must make orders regarding custody, child support, as well as alimony and property division. In making alimony and property division orders, the court is required to apply the factors set forth in Mass. G. L. c. 208, §34, including marital fault.

If the court finds an irretrievable breakdown of the marriage and makes appropriate orders, a judgment nisi of divorce will enter. A judgment nisi of divorce becomes final after 90 days (see ¶I.3 below).

18. Judgment of Divorce

A judgment of divorce is, in the first instance, entered as a judgment nisi. A judgment nisi of divorce becomes absolute (final) after 90 days unless the court, upon request of one of the parties, otherwise orders. Mass. G. L. c. 208, §21.

The parties remain married to each other during the nisi period. If one of the spouses dies during the nisi period, the divorce will not become final and the parties were spouses at the time of death.

A party is free to remarry after a judgment nisi of divorce has become final. Mass. G. L. c. 208, §24.

19. Appeal

A party may file a notice of appeal to the Appeals Court within 30 days of the entry of the judgment nisi.

20. Recognition of Divorce from Another Jurisdiction

A divorce judgment from another jurisdiction is valid and entitled to recognition in Massachusetts if entered by a court with jurisdiction over the matter and jurisdiction over both parties. Mass. G. L. c. 208, §39.

I. Property Division

Massachusetts is an equitable distribution state with regard to property rights upon divorce. Unlike many equitable distribution states, Massachusetts allows a court, as part of a divorce judgment, to "assign" to either party any property owned by either spouse or by both of them, regardless of whether the property was acquired prior to the marriage or during the marriage. Mass. G. L. c. 208, §34.

Many equitable distribution states, unlike Massachusetts, permit the equitable distribution of marital property only. In such states, marital property is property acquired by either or both spouses during the course of the marriage, except for property that a spouse received by gift from a third person or by inheritance during the marriage. In contrast, in Massachusetts, a court may, but is not required to, equitably divide property that a spouse owned prior to the marriage, or property that a spouse inherited from a third person during the marriage.

1. Types of Property Subject to Equitable Distribution

Both tangible and intangible property interests are subject to equitable distribution. "When the future acquisition of assets is fairly certain, and current valuation possible, the assets may be considered for assignment…." Williams v. Massa, 431 Mass. 619 (2000).

The following types of interests are subject to equitable distribution:

a) Personal property;

b) Real property;

c) Beneficial interests in a trust that are subject to valuation (for example, life estate; vested remainder interest);

d) Goodwill in a business;

e) An attorney's interest in a contingent fee agreement in a pending lawsuit;

f) A vested or nonvested pension benefit or retirement interest, but only if the interest accrued during the marriage (in which case division is made after the judge has approved a "Qualified Domestic Relations Order");

g) Damage for breach of contract; and

h) Personal injury awards insofar as they represent compensation for lost salary, lost earning capacity, or medical expenses.

2. Interests not subject to equitable distribution

The following types of interests are not subject to equitable distribution:

a) Potential future earnings;

b) An academic degree;

c) A license to practice a profession;

d) Any funds attributable to Social Security or Veterans Benefits;

e) A potential inheritance;

f) An expectancy; and

g) Interests not subject to valuation.

Although an interest may not itself be subject to equitable division, a court may consider it in determining how to divide other interests of the parties. For example, although a potential inheritance is not divisible, a court may decide to allocate a larger portion of property to a spouse if it determines that the other spouse is likely to receive an inheritance.

3. Factors

The court may assign property equally, or unequally, between the parties, after considering all relevant factors. These include such matters as length of the marriage, age, health, standard of living, contribution of each of the parties in the acquisition or appreciation of property, and contribution of each of the parties as a homemaker to the family.

A property division order is not subject to modification based on changes in circumstances in the future.

4. Alimony

The purpose of alimony is to provide support to a spouse after the termination of a marriage. Alimony is defined by statute as "the payment of support from a spouse, who has the ability to pay, to a spouse in need of support for a reasonable length of time, under a court order." Mass. G. L. c. 208, §48.

Alimony is gender neutral, and may be awarded to either the plaintiff or defendant in a divorce proceeding.

Massachusetts recognizes the following types of alimony: General Term, Rehabilitative, Reimbursement, and Transitional Alimony. Each is discussed below.

5. Amount of Order

Except for reimbursement alimony (see ¶8 below), or unless there are circumstances that warrant a deviation for other forms of alimony, the amount of an alimony order should not exceed either of the following:

a) The recipient's need; or

b) 30% to 35% of the difference between the gross incomes of the parties at the time of the order. Income is calculated as provided in the Massachusetts Child Support Guidelines (see ¶J below). Mass. G. L. c. 208, §53.

Example. Assume that the gross income of spouse X is $100,000 per year and that of spouse Y is $60,000 per year. An alimony order in favor of spouse Y should not exceed $12,000-$14,000 per year (30-35% of $40,000, which is the difference between the incomes of the parties), assuming that this does not exceed spouse Y's need.

6. General Term Alimony

General Term Alimony is defined as "the periodic payment of support to a recipient spouse who is economically dependent." Mass. G. L. c. 208, §48.

a) Duration

The duration of General Term Alimony is proportional to the length of the marriage. Mass. G. L. c. 208, §49. For example, for a marriage that is five years or less, General Term Alimony will last for not longer than one-half of the number of months of the marriage. For a marriage that is longer than twenty years, General Term Alimony will last for an indefinite period of time.

The court may deviate from the statutory time limits upon a written finding that deviation is in the interests of justice. Mass. G. L. c. 208, §49.

b) Termination by remarriage or death

General Term Alimony will terminate upon the remarriage of the recipient or upon the death of either spouse. Mass. G. L. c. 208, §49.

c) Termination by cohabitation

General Term Alimony must be suspended, reduced, or terminated if the recipient cohabits with a third person. This requires a showing by the payor that the recipient has maintained a common household with a third person for at least three months. Maintaining a common household will occur when the recipient and the third person share a primary residence. Mass. G. L. c. 208, §49.

d) Termination upon retirement of payer

General Term Alimony will terminate when the payer reaches full retirement age. Mass. G. L. c. 208, §49. Full retirement age is defined as "the payer's normal retirement age to be eligible to receive full retirement benefits under the United States Old Age, Survivors, and Disability Insurance program." (Social Security). However, the court may provide otherwise in the original order for good cause shown and upon a written finding setting forth the reason for deviation. Mass. G. L. c. 208, §48.

e) Modification

A court may modify the duration or amount of general term alimony upon a finding of a material change in circumstances.

7. Rehabilitative Alimony

Rehabilitative Alimony is defined as "the periodic payment of support to a recipient spouse who is expected to become economically self-sufficient by a predicted time such as, without limitation, reemployment, completion of job training, or receipt of a sum due from the payer spouse under a judgment." Mass. G. L. c. 208, §48.

a) Duration

The term for Rehabilitative Alimony will be no more than five years. The court may extend the period on a complaint for modification upon a showing of compelling circumstances unless the recipient has remarried. Mass. G. L. c. 208, §50.

b) Termination

Rehabilitative Alimony will terminate upon the occurrence of a specific event, remarriage of the recipient, or upon the death of either party. Mass. G. L. c. 208, §50.

c) Modification

A court may modify the amount of rehabilitative alimony upon a showing of a material change in circumstances within the rehabilitative period. Mass. G. L. c. 208, §50.

8. Reimbursement Alimony

Reimbursement Alimony is defined as "the periodic or one-time payment of support to a recipient spouse after a marriage of not more than 5 years to compensate the recipient spouse for economic or noneconomic contribution to the financial resources of the payor spouse, such as enabling the payor spouse to complete an education or job training." Mass. G. L. c. 208, §48.

a) Termination

Reimbursement Alimony will terminate upon a date certain or upon the death of the recipient. Mass. G. L. c. 208, §51.

b) Modification

There can be no modification of an order for Reimbursement Alimony. Mass. G. L. c. 208, §51.

9. Transitional Alimony

Transitional Alimony is defined as "the periodic or one-time payment of support to a recipient spouse after a marriage of not more than 5 years to transition the recipient spouse to an adjusted lifestyle or location as a result of the divorce." Mass. G. L. c. 208, §48.

a) Termination

Transitional Alimony will terminate upon a specified date that is no longer than three days from the date of the divorce or upon the death of the recipient. Mass. G. L. c. 208, §52.

b) Modification

There can be no modification of an order for Transitional Alimony. Mass. G. L. c. 208, §52.

10. Factors

In determining the type of alimony and the amount and duration of an alimony order, a court must consider specific factors such as length of the marriage, age, health, income, employment, and marital lifestyle. Mass. G. L. c. 208, §53.

11. Deviation and Modification

In setting an order for General Term or Rehabilitative Alimony, the court may deviate from the provisions regarding the amount and the duration of alimony upon a written finding that deviation is necessary (for example, chronic illness or unusual health circumstances of either party). Similarly, a court may modify an existing order for General Term or Rehabilitative Alimony on the same basis. Mass. G. L. c. 208, §53.

In a modification action, a court shall not consider the income and assets of a payor's spouse if the payor has remarried. Income from a second job or from overtime work is presumed to be immaterial in an action to modify alimony if: "(1) a party works more than a single full-time equivalent position; and (2) the second job or overtime began after entry of the initial order." Mass. G. L. c. 208, §54.

Reimbursement and Transitional Alimony orders are not subject to modification.

J. Child Support

Massachusetts law is guided in many respects by federal law governing child support. The basic rules governing child support are set forth in Mass. G. L. c.

208, §37 (separated parents); Mass. G. L. c. 208, §28 (married parents); and Mass. G. L. c. 209C, §9 (unmarried parents); and the case law interpreting those statutes.

1. General Rules

Massachusetts law requires both parents to support their children, whether the parents are married, divorced, separated, or never married.

The Probate and Family Court is empowered to make child support orders for:

a) All minor children;

b) Adult children between the ages of 18 and 21 who are domiciled in the home of a parent and are financially dependent on that parent;

c) Adult children up to the age of 23 if engaged in a full-time educational program.

Child support for adult children is at the discretion of the judge.

Parents may be liable for child support for disabled children over age 18. Such support can be ordered only when a party (often the other parent) becomes the legal guardian of the disabled child.

The court can make temporary orders during the pendency of a case to assure that children receive support until the court makes a final determination.

2. Determination of Child Support

The amount of child support is governed by Child Support Guidelines (the "Guidelines") promulgated by the Massachusetts Trial Court. The Guidelines are updated every four years. The Guidelines apply to both permanent and temporary orders of child support and to both married and never-married parents.

The Guidelines apply when one parent has physical custody of the child(ren), even if the other party has shared legal custody. They do not apply when the parents share physical custody of a child, or if there is more than one child and the children live with different parents. The Guidelines take into account the income of the parents, the number of children who need to be supported, the age of the children, and the costs of providing health insurance. The Guidelines provide for a 25 percent reduction in child support for adult children.

The court can order parents to provide for college expenses. The Guidelines suggest that such orders should be capped at 50 percent of the current cost of attending the University of Massachusetts-Amherst.

The court is permitted to deviate from the Guidelines when certain specific conditions exist or when their application would work an unfairness. The court needs to make written findings showing why such a deviation is appropriate.

A separation agreement of the parties can provide for child support outside of the Guidelines, as long as that agreement is approved by the court as fair and reasonable and makes sufficient provisions for the support of the children.

Separation agreements can also specify the parties' agreement on educational expenses, health insurance, tax deductions, and other matters.

3. Modification

The public policy of Massachusetts requires that children be supported from the resources of their parents. Thus, previous orders of child support can be modified upon a showing of a material change in circumstances. The court should take into account the Child Support Guidelines and changes regarding health insurance when reviewing a request for modification. Because of the strong public policy involved, modification of child support orders is permitted even when parents have entered into agreements regarding child support that have independent legal significance. Mass. G. L. c. 208, §28. However, the intent of the original agreement is entitled to respect when considering modification. McCarthy v. McCarthy, 36 Mass. App. Ct. 490 (1994).

4. Enforcement

Parties can pursue enforcement through traditional judicial remedies, such as contempt and attachment proceedings. In addition, the Massachusetts Department of Revenue (DOR) is empowered to bring actions to enforce child support orders on behalf of payee parents. The DOR also holds subrogation rights with regard to children in the custody of the Department of Children and Families (foster children) or children whose custodial parent receives public assistance.

Massachusetts law permits a number of methods to enforce child support obligations, including income assignment; levying against bank accounts; liens on personal property and real estate; interception of tax returns, pension payments, and other benefits; and suspending professional licenses.

5. Termination

Child support terminates when:

a) Children no longer live with the parent receiving child support;

b) Children reach age 18 and are no longer financially dependent and living with the parent receiving support;

c) Adult children reach age 21 and are not attending a post-secondary institution; or

d) Adult children reach age 23.

K. Child Custody

1. Jurisdiction

The laws governing child custody jurisdiction in Massachusetts are largely based on the federal Parental Kidnapping Protection Act. Mass. G. L. c. 209B (Massachusetts Child Custody Jurisdiction Act). This act is intended to prevent conflicting orders about child custody from different jurisdictions.

Massachusetts has jurisdiction over child custody issues when Massachusetts is the child's "home state." This term is defined as the place where the child has been living with a parent (or person acting as a parent) for the past six consecutive months. Certain exceptions apply if the child is physically present in the state and has no alternative home state.

A Massachusetts court will not modify the order of a court from another state unless that state no longer has jurisdiction or has declined to assert jurisdiction, and the requirements of the Massachusetts jurisdictional statute are satisfied.

2. Standard and Forms of Custody

The best interests of the child are controlling in custody decisions and disputes.

The forms of custody in Massachusetts are similar to those in most other states. The terms are defined in Mass. G. L. c. 208, §31.

Legal custody accords the parent the right to make essential decisions about the child, including decisions involving education, medical treatment, religion, and social and moral matters.

Sole legal custody provides that only one parent has the right to make the aforementioned decisions.

Shared legal custody provides that parents will mutually make the aforementioned decisions.

Physical custody relates to the residence of the child and the party responsible for the child's supervision.

Sole physical custody relates to the primary residence and supervision of the child, subject to reasonable visitation, unless visitation is not in the best interests of the child.

Shared physical custody means that the child has periods of living with each parent so that the child has frequent and continued contact with both parents.

Custody implementation plan. Parties seeking joint legal or physical custody must file a plan with the court outlining the plan for the child and how educational, medical and other decisions will be made, as well as how disputes will be resolved. The court will adopt an acceptable plan as part of the judgment.

When making temporary orders, the court is required to grant shared legal custody to married parents, unless circumstances show that shared custody is not in the best interests of the child. The court must make written findings if it does not grant shared legal custody.

When parents are not married, the mother has sole legal and physical custody absent a court order.

However, there is no presumption that shared physical and legal custody is in the best interests of the child when the court makes permanent orders.

There is a presumption against sole or joint legal and physical custody when a parent has engaged in serious physical abuse or a pattern of physical abuse against a partner or a child. However, the mere existence of a restraining order will not be sufficient to raise the presumption. If domestic abuse exists but is not sufficient to raise the presumption, the court must issue written findings before placing a child in the custody of the abusive parent.

Parents can make provisions for custody of their children in a separation agreement, subject to the approval from the court. Those provisions are incorporated into the judgment.

L. Visitation

1. Standard

When one parent has sole physical custody of a child, the other parent is entitled to reasonable visitation. The guiding concern in visitation is the child's best interests.

A father of a non-marital child is entitled to visitation on the same best interests basis as a married parent, but first must be legally declared the father.

a) Relation to child support

Parental visitation cannot be conditioned upon payment of child support.

b) Supervised visitation

Supervised visitation can be ordered by the court when the safety of the child is in question. Supervision can be provided by family members or other individuals known to the family or in a supervised visitation center.

c) Grandparent visitation

Grandparents can obtain court-ordered visitation in limited circumstances when the court finds that the child's best interests demands such visits. Mass. G. L. c. 119, §39D. However, grandparent visitation may be ordered over the objection of a fit parent only upon a finding that significant harm would result to the child if visitation did not occur. Blixt v. Blixt, 437 Mass. 649 (2002). Grandparents can only file an action for visitation if the parents are divorced, one or both parents have died, or the parents have not married and are living separately. Paternal grandparents can apply for visitation only if paternity of the child has been established.

M. Modification of Custody

Child custody agreements and judgments can be modified when there has been a material and substantial change in circumstances and modification serves the best interests of the child.

a) Relocation

A custodial parent cannot relocate to another state with a minor child absent the consent of the other parent or a court order. The parent

desiring relocation must show cause to obtain such an order. Mass. G. L. c. 208, §30. The parent who has primary physical custody of a child must meet the "real advantage" standard. That standard requires the parent to first show that relocation would afford him or her a real advantage and second that relocation is in the best interests of the child. *See e.g.,* Yannas v. Frondistou-Yannas, 395 Mass. 704 (1985); Rosenwasser v. Rosenwasser, 89 Mass. App. Ct. 577 (2016).

N. Procedural Issues regarding Custody

a) Parent Education

A standing order of the Probate and Family Court requires all divorcing parents of minor children to attend five hours of an approved parent education class. Parents must submit a certificate of completion before a judgment of divorce nisi will be issued.

b) Guardians ad Litem

At its discretion, the court can appoint a guardian ad litem (GAL) to investigate issues surrounding custody and make a recommendation to the court of what is in the children's best interest.

c) Child's Attorney

A child is not entitled to counsel in disputed custody cases. However, where the child's best interests require it, the court may appoint an attorney to represent the interests of the child. The role of an attorney for children is different from that of a GAL. The attorney is required to maintain as much of a normal attorney-client relationship as possible and to advocate the children's stated positions in the litigation.

O. Separation Agreements

A separation, or settlement, agreement is an agreement made between the parties in connection with an impending or ongoing divorce action. By agreement, the parties resolve issues involving alimony, property division, child support, custody, visitation, and related matters.

A separation agreement is presented to the court in connection with a divorce action, and must be approved by the court. In addition to satisfying contract requirements, a separation agreement requires complete financial disclosure between the parties and must be deemed fair and reasonable by the court. In particular, a court will closely scrutinize those portions of the agreement dealing with child support, custody, and visitation. The Massachusetts Child Support Guidelines provide that there is a rebuttable presumption that the guidelines are applicable where the court is considering whether to approve child support provisions set forth in a separation agreement.

Upon approval of the agreement, the court will incorporate the agreement into the court judgment. The agreement may be merged into the judgment, or it may survive as an independent contract.

If merged into the judgment, the agreement will not survive as an independent contract. Under such circumstances, the terms of the agreement will be enforceable as in the case of a court order, typically by a contempt proceeding.

If the parties request, the court may provide that the agreement will survive the judgment as an independent contract. Under such circumstances, the agreement will also be enforceable through a contract action.

P. Paternity Actions

Paternity actions are governed by Mass. G. L. c. 209C.

1. Jurisdiction and Venue

The District Court, the Boston Municipal Court, and the Probate and Family Court have concurrent jurisdiction over paternity actions. However, the District Courts and the Boston Municipal Court have no jurisdiction over custody and visitation rights.

The Juvenile Court has concurrent jurisdiction over paternity actions if brought in connection with a pending Care and Protection action.

Venue is in the district or county where the child and at least one parent lives, or if neither parent lives with the child, where the child lives.

Actions to establish paternity and to obtain orders of supports or for visitation or custody can be brought by the child's mother, the putative father, the child's guardian, the Massachusetts Department of Children and Families if the child is in their custody, and the Massachusetts Department of Revenue if the child is receiving public benefits.

2. Voluntary Acknowledgment of Parentage

The mother and putative father may jointly acknowledge the parentage of the child and file an acknowledgment with the court without the need for an action to establish paternity. Mass. G. L. c. 209C, §11. Once the acknowledgment is filed, paternity is established unless challenged.

The parties may enter into an agreement regarding support, custody, and visitation after the filing of an acknowledgment of paternity. If the agreement is approved by the court, it has the same effect as a judgment. Mass. G. L. c. 209C, §11(b).

3. Contested Paternity Actions

A court may order the mother, the child and the putative father to undergo genetic marker testing in a paternity action. The tests are admissible in evidence without need for a foundation unless a written objection is filed.

If genetic marker tests show a probability of paternity of 97 percent or above, there is a rebuttable presumption that the putative father is the father. The Commonwealth will bear the cost of testing for indigent parties. Mass. G. L. c. 209C, §17.

The Department of Revenue can order a mother, child, and putative father to submit to genetic marker testing without a court order. Mass. G. L. c. 119A, §3A.

4. Marital Presumption

If a child is born during the course of a marriage, or within 300 days of the termination of the marriage, the child is presumed to be the child of the husband. A putative father cannot, therefore, bring a paternity action to establish parentage.

Q. Domestic Abuse

Domestic abuse is largely governed by Mass. G. L. c. 209A. Proceedings under Mass. G. L. c. 209A are civil in nature.

1. Jurisdiction and Venue

Abuse prevention actions can be brought in a district court, the Boston Municipal Court, the probate and family court, or a superior court (with the exception of actions involving a dating relationship, which may not be brought in a superior court). Mass. G. L. c. 209A, §1.

Venue is in the court where the plaintiff's residence is located, or if the plaintiff has left a prior residence due to abuse, where that residence is located. Mass. G. L. c. 209A, §2.

2. Covered Parties

Chapter 209A governs conduct between "family and household members." Mass. G. L. c. 209A, §1.

This definition includes:

a) Married persons;

b) Persons residing in the same household;

c) Persons who are or were related by blood or marriage;

d) Persons who have a child in common regardless of whether they were ever married or cohabited; and

e) Persons who have been in a "substantive dating relationship" or engaged.

To determine whether a party is in a substantive dating relationship, the court will consider the length of the relationship, the frequency of interaction, the type of relationship and if the relationship has been terminated by either party, the length of time since the termination.

3. Remedies

Mass. G. L. c. 209A, §3 empowers a court to grant the following remedies:

a) Ordering the defendant to refrain from abusing the plaintiff;

b) Ordering the defendant to refrain from contacting the plaintiff unless authorized by the court;

c) Ordering the defendant to vacate the household, multiple dwelling and workplace for up to one year, subject to renewal;

d) Awarding the plaintiff temporary custody of a minor child;

e) Ordering the defendant to pay temporary support for the plaintiff or any child in the plaintiff's custody or both (in which case the Child Support Guidelines will apply);

f) Ordering monetary compensation for losses suffered as a direct result of abuse.

A court can order a defendant to refrain from contacting the plaintiff. Mass. G. L. c. 209A, §3A. Contact is broadly interpreted and can include operating a motor vehicle near the plaintiff, calling the plaintiff on the telephone, or ringing the doorbell.

Orders to mediate a domestic violence case are expressly prohibited by Mass. G. L. c. 209A, §3.

4. Time Limits

Relief under Mass. G. L. c. 209A is limited to one year. A party may request an extension when the order is due to expire. Orders for more than

one year or permanent orders are authorized after the original order expires. Mass. G. L. c. 209A, §3.

5. Ex Parte Relief

A temporary abuse prevention order may be issued ex parte, but the defendant is entitled to a full hearing within ten days of the order. Mass. G. L. c. 209A, §4.

To obtain a temporary order, a plaintiff must show a substantial likelihood of immediate danger of abuse. Mass. G. L. c. 209A, §4.

A court shall order the immediate suspension and surrender of a license to carry firearms, along with surrender of any firearms in the possession of the defendant upon issuing a temporary order. Mass. G. L. c. 209A, §3B.

6. Police

Police officers are required to use all reasonable means to prevent abuse whenever they have reason to believe a family or household member is being abused or is in danger of abuse. Mass. G. L. c. 209A, §6. Reasonable means include, but are not limited to, remaining on the scene; assisting the victim in obtaining medical treatment; assisting the victim in getting to a safe place; informing the victim of his or her rights, including access to the emergency judicial system; arresting any person who the officer has probable cause to believe has violated a temporary or permanent restraining order or committed a felony or misdemeanor.

Officers are prohibited from threatening the arrest of all parties to discourage requests for intervention.

The court must inform the victim when an individual arrested for abuse is released on bail.

Copies of abuse prevention orders are served on local law enforcement agencies.

7. Enforcement

Violation of abuse prevention orders is a criminal offense punishable by a fine of not more than $5,000 and/or no more than two and one-half years in the house of correction. Mass. G. L. c. 209A, §7.

The court can also order treatment in a batterers' treatment program when the defendant has no prior record of any crime of violence and when the court believes the defendant is susceptible to treatment. If the defendant receives a suspended sentence and fails to attend the ordered treatment program, the court must re-impose the original sentence. Mass. G. L. c.

209A, §7. Participation in a batterers' treatment program may also be a condition of probation.

The court can order the defendant to pay all damages incurred by the plaintiff, including costs of emergency shelter, loss of wages, medical expenses, and reasonable attorneys' fees. Mass. G. L. c. 209A, §7.

R. Care and Protection of Children

Cases involving the care and protection of children are governed by Mass. G. L. c. 119. In addition, constitutional limitations on interference in family life are reflected in Massachusetts law. The law also takes into account standards and rules provided by the federal government through the Adoption and Safe Families Act (ASFA).

The Department of Children and Families (DCF) is the agency charged with providing protective services to children in Massachusetts. Mass. G. L. c. 119, §1. DCF is charged with supporting families and using removal as a last resort. *Id.*

1. Reports of Child Abuse and Neglect

DCF becomes involved with families upon receiving a report to its child abuse hotline. Mass. G. L. c. 119, §51A. Reports can be anonymous. However, certain parties, including medical personnel, police, teachers, coaches, and other parties with regular contact with children, are mandated reporters. These parties must report their suspicions when they reasonably believe a child is suffering from abuse or neglect. Mass. G. L. c. 119, §21.

After receiving a report of abuse or neglect, DCF will either screen out the report or commence an investigation. Mass. G. L. c. 119, §51B. An investigation generally involves sending an investigator to the child's home and speaking with the child's parents and other household members, the child, and other parties with information about the child's situation.

At the end of the investigation, DCF will either support or not support a finding of child abuse or neglect.

If DCF supports a finding of child abuse or neglect, it has a number of options. It can open a case and simply monitor the family and/or link the family with services. It can also seek removal of the child from the home.

2. Removal of Children

DCF can perform an emergency removal of a child when there is "reasonable cause" to believe the child's health and safety are in immediate danger. Mass. G. L. c. 119, §24. Following an emergency

removal, DCF seeks temporary custody of the child from the Juvenile Court on an ex parte basis. *Id.*

Parents are entitled to a hearing on custody within 72 hours of the child's removal. *Id.* They have a right to counsel at the hearing and at all proceedings involving DCF thereafter.

If DCF is awarded custody, it will place the child in a foster home. DCF regulations provide a preference for kinship placements when possible. At times the foster home is a pre-adoptive placement; at other times the placement is intended to be temporary.

3. Reasonable Efforts

DCF has a duty to make reasonable efforts to reunify parents with a child both before and after the child's removal. Mass. G. L. c. 119, §29C. A Juvenile Court judge must certify that such efforts have been made. *Id.*

Reasonable efforts are excused under certain conditions including if the child is abandoned; if there has been termination of parental rights of a sibling; and serious crimes involving physical and sexual abuse.

DCF regulations require it to develop service plans to families unless reasonable efforts are excused. The service plans provide tasks for all parties, particularly parents and DCF. Parent-child visitation is almost always an element of a service plan.

The Juvenile Court must approve a change in goal.

4. Permanency Planning

The court must hold a permanency hearing within twelve months of a child being placed in foster care under ASFA and Mass. G. L. c. 119, §29B.

At the first permanency hearing, the court must certify whether DCF has made reasonable efforts to return the child home. Mass. G. L. c. 119, §29B.

If the child is not going to be returned home at that time, DCF must make reasonable efforts to develop a permanency plan for the child. Mass. G. L. c. 119, §29B.

The court must review the permanency plan each year as long as the child is in DCF custody. The goal for the child can be changed at the permanency hearing. The court must certify that DCF has made reasonable efforts to implement the permanency plan at all reviews. Mass. G. L. c. 119, §29B.

Permanency options include reunification, adoption, guardianship, permanent placement with a relative, or "another permanent planned living arrangement." Mass. G. L. c. 119, §29B.

S. Termination of Parental Rights

Termination of parental rights (TPR) actions are governed by Mass. G. L. c. 210, §3.

Under federal guidelines, DCF is required to seek TPR if a child has been in foster care for fifteen of the last twenty two months. ASFA.

TPR completely and permanently severs the parent-child relationship. Parents no longer have any right to custody or decision making about their child following TPR.

TPR also frees a child to be adopted by other persons. Often the child is adopted by his or her pre-adoptive foster parents.

The standard of proof for TPR is clear and convincing evidence. This high level of proof is required because of the constitutional rights of parents and children to preserve their family relationship. Santosky v. Kramer, 455 U.S. 745 (1982).

Where DCF seeks TPR, parents are entitled to a full hearing. Both parents and children are entitled to counsel. Mass. G. L. c. 119, §29; Mass. G. L. c. 210, §3(b). The rules of evidence apply and parents and children have a right to cross-examine all witnesses.

The Juvenile Court must issue detailed and specific findings if it determines that parental rights should be terminated. Adoption of Nancy, 443 Mass. 512, 514 (2005).

The findings must establish, by clear and convincing evidence parental unfitness and that TPR is in the best interests of the child. Adoption of Carlos, 413 Mass. 339 (1992).

Under Mass. G. L. c. 210, §3, the court considers fourteen non-exclusive factors to determine parental fitness. In this analysis, proof of a mental illness or disability, substance abuse, poverty, homelessness and incarceration, or similar conditions alone is insufficient to prove parental unfitness. Instead DCF must establish these conditions interfere with parents' functioning to the point where they cannot provide "minimally acceptable care." Mass. G. L. c. 210, §3.

Post-termination visitation must be ordered by the court if the best interests of the child so requires. The primary considerations in whether to order post-termination contact are the existing bond between parent and child and whether continued contact will help the child transition to a new home. Adoption of Rico, 453 Mass. 749 (2009).

The court must make an order for post-termination sibling visitation if such visitation is reasonable and practical and in the best interests of the children. Mass. G. L. c. 119, §26B(b).

Any party can appeal a decision on TPR. Children and parents are entitled to counsel upon appeal. Mass. G. L. c. 210, §3.

T. Permanency Options

1. Adoption

Adoption results in a new permanent family for the child that replaces the birth parents. A child's name might be changed, as might the birth certificate.

Adoptions are designed to be irrevocable. Mass. G. L. c. 210, §§1-11A. Children over age 12 can object to their own adoption. Mass. G. L. c. 210, §2. Non-married persons can adopt children. Mass. G. L. c. 210, §1.

Same-sex couples have been able to adopt children in Massachusetts since 1993. Adoption of Tammy, 416 Mass. 205 (1993).

2. Guardianship

A child remains in the custody of a guardian, and the guardian is empowered to make all legal decisions about the child. Mass. G. L. c. 190B, §5-209. Guardianship ends when a child reaches age 18, or before if vacated by the court. Any person, including a child over age 14, may petition to remove the guardianship. Mass. G. L. c. 190B, §5-212.

A parent has the right to court review and redetermination every six months during the course of a guardianship. Care and Protection of Thomasina, 75 Mass. App. Ct. 563, 569 (2009).

VIII. **ESTATES AND WILLS**

A. Introduction

1. Purpose of Estate Administration

The objective of Estate Administration is to pass title to the decedent's property to those who are entitled to receive it. The first informal step in Estate Administration is to classify all of the property in which the decedent had an interest into two categories:

a) Property that passes to someone at death by virtue of his or her form of ownership; and

b) Property that does not.

In general, property interests pass by operation of law, contract, trust, and power of appointment.

No other property interests of the decedent pass in these ways. What these property interests have in common is that, in general, they are individually titled to the decedent. This is the distinction between 'Non-Probate Assets' and 'Probate Assets.'

Probate Assets are the subject of estate administration. Here, if the decedent had a will, the property interests pass pursuant to the terms of the will. Where the decedent did not have a will, the property interests pass pursuant to the intestate statute. Mass. G. L. c. 190B, §2-101.

Before the decedent's assets pass by will or intestate statute, the decedent's liabilities must be satisfied, as creditors are paid first, before beneficial interests. Those beneficial interests are determined - Will or Intestate Statute. Accordingly, a liquidation will take place to pay debts, taxes and expenses of estate administration, and then to pay the balance to the beneficiaries.

The person who performs the liquidation, payment, and distribution process is known as the decedent's Personal Representative (the "PR"). The first formal step in estate administration is to appoint the PR and to admit the decedent's will, if there is one, so that there is someone who has been given the authority to administer the estate assets and there is a will that has been given judicial effect, if there is one, to direct their distribution. That is known as the Appointment and Admission process, sometimes also known as Probate.

The Appointment and Admission is made by the Probate and Family Court, the court that has jurisdiction over estates, in the decedent's county of domicile.

There are three Probate Proceedings under the Massachusetts Uniform Probate Code (the "MUPC"): (1) Informal Proceedings; (2) Formal Proceedings; and (3) Supervised Administrations. A principal difference among the three is the degree of involvement of the court in the proceeding.

a) Informal Proceedings: In an Informal Proceeding, most of the actions are performed by MUPC Magistrates and there is little court action. A MUPC Magistrate is an official of the court designated to perform certain authorized actions.

b) Formal Proceedings: In a Formal Proceeding there can be significant court action, where hearings are required or requested because the proceeding is litigation. However, the court's involvement ends with the appointment of the PR and the allowance of the will, if any, unless the interested parties requests that the court become involved thereafter for a particular reason.

c) Supervised Administrations: In a Supervised Administration there is substantial court action because it too is litigation. A Supervised Administration is a single, in rem proceeding, designed to secure complete administration of a decedent's estate under the continuing authority of the court, which extends until the entry of an order approving distribution of the estate, and discharging the PR, or other order terminating the proceeding.

As among the three, the more extensive the court involvement, the greater the time required for, and expenses of, administration. In selecting the proceeding, the Petitioner decides the extent of court involvement.

Special Purpose Proceedings: There are two special purpose proceedings under the MUPC:

a) A Special Administration which provides for authority to manage assets that require immediate attention; and

b) A Voluntary Administration which provides for extra-judicial authority to administer certain small estates.

B. Probate Proceedings

1. General Considerations

a) Time Limits for Filing Actions

(1) General Rule: In general, an informal probate or appointment proceeding, or a formal testacy or appointment proceeding, must be commenced within three years of the

decedent's death. This time limit does not apply to the following proceedings, which may be filed at any time:

- Voluntary Administration;
- actions to construe a Probated Will;
- determination of heirs;
- actions by foreign fiduciaries; and
- appointment of a Successor PR.

(2) Effect of the Time Limitation: After three years have passed from the decedent's death, and unless an exception applies:

- no one may seek the appointment of a PR;
- no testacy proceeding may be commenced;
- if a will was not offered for probate, there is a presumption of intestacy, which is final; and
- if a will was informally probated and no formal proceeding to contest the informal probate was commenced within the three years, the informally probated will is final.

(3) Exceptions: There are 5 exceptions to the general time limit applying to original proceedings which include:

(a) doubt about death;

(b) missing person;

(c) 12 months;

(d) late and limited; and

(e) power of appointment exceptions.

These are set forth in technical detail in The MUPC Estate Administration Procedural Guide – Second Edition (hereinafter "Procedural Guide") at section 1.2.3. (See also Appendix A— Practice Resources.) In addition, there is a Fraud Exception and a Subsequent Petitions Exception.

b) Priority of Appointment

Priority of Appointment is a way of determining the ranking of person(s) who may be appointed PR in an informal or formal proceeding. This is commonly referred to as "the priority ladder." Whether the proceedings are informal or formal, the statutory priority runs as follows.

(1) The person with priority as determined by a probated will.

(2) The surviving spouse of the decedent who is also a devisee in the will.

(3) Other devisees in the will.

(4) The surviving spouse of the decedent.

(5) Other heirs-at-law of the decedent.

(6) A public administrator.

There are provisions for persons with priority to renounce appointment and to nominate a PR. The Procedural Guide provides many examples at section 1.5.8.

An objection to an appointment can only be made in a formal proceeding. There are four grounds for disqualification from serving as PR, enumerated in the Procedural Guide at section 1.5.4.

c) Venue

Venue is the county in which the case is to be filed. Venue for the first informal or formal testacy or appointment proceeding after a decedent's death is:

(1) in the county where the decedent was domiciled at the time of death; or

(2) if the decedent was not domiciled in Massachusetts, in any county where property of the decedent was located at the time of death.

There are provisions for subsequent proceedings, multiple proceedings and transfer.

d) Bonds

(1) General: A Bond shall be required if a petitioner is seeking the appointment of a PR or Successor PR (SPR). No Bond

is required if a petitioner is seeking only to probate an original will or apply as a voluntary PR. Prior to receiving Letters of Appointment, a PR must file a bond with the court.

(2) Sureties: Sureties on the bond are required unless:

(a) the will directs that there be no bond or waives the requirement of sureties;

(b) all of the heirs-at-law (if intestate) or all of the devisees (if testate) file a written waiver of sureties;

(c) the PR is a bank or trust company qualified to do trust business or exercise trust powers in Massachusetts; or

(d) the court concludes that sureties are not in the best interests of the estate.

The penal sum on a bond with sureties must be listed. The penal sum must equal the amount of the personal property in the estate. Each personal surety must certify that he or she is a resident of Massachusetts and that he or she possess sufficient unencumbered assets in Massachusetts in excess of the penal sum.

By executing the bond, the PR submits to the jurisdiction of the court on all matters involving the estate.

(3) Demand for Sureties: If a PR has filed a bond without sureties, a written demand that a PR provide a bond with sureties may be filed by: (1) a person having an interest in the estate worth more than $5,000; or (2) a creditor with a claim against the estate in excess of $5,000. The demand may be filed in a formal or informal proceeding either before or after the appointment of the PR. There are provisions for court procedure depending on when the demand is filed set forth in the Procedural Guide in section 1.8.

A PR may file a Petition to Modify the Bond with the court, requesting that the court modify the amount of the bond, release the current sureties, permit the substitution of another bond with or without sureties. A citation will be issued on the petition and notice must be given.

e) Guardians *Ad Litem* (GAL) and Actual/Parental/Virtual Representation

A GAL must be appointed for a spouse, heir-at-law, or devisee who is an Incapacitated Person (IP), a Protected Person (PP), or a minor, unless any of the following apply:

(1) The spouse, heir-at-law, or devisee is represented by a conservator;

(2) The spouse, heir-at-law or devisee is represented by a guardian who is not the petitioner; or

(3) The court in a formal proceeding has approved a motion to waive the appointment based on parental or virtual representation or for any other reason. Actual, Parental and Virtual Representation are defined by the Procedural Guide in section 1.10.2.

2. Proceedings

a) Informal Proceedings

In general, an Informal Proceeding is an administrative proceeding allowed by a MUPC magistrate or a judge to probate a will or appoint a PR. If the decedent died with a will (testate), an Informal Proceeding may be filed to probate the will with or without a request for the appointment of a PR. A proceeding may also be filed for the informal appointment of a PR after the formal or informal probate of a will. If the decedent died without a will (intestate), a proceeding for informal appointment of a PR may be filed.

The Informal Proceeding will be used by practitioners in most estates because it is a streamlined procedure. There are, however, several specific circumstances where an Informal Proceeding is unavailable. These are enumerated in the Procedural Guide, Chapter 3.

b) Filing Requirements for Informal Probate and/or Appointment of a PR

The Petitioner must submit a "complete packet" of several required court approved forms, available from the registry or the Massachusetts Uniform Probate Code (MUPC Hub) located on the Probate and Family Court website. The composition of the packet is dependent on whether the decedent died testate or intestate. There are also additional, so-called "May Need" forms that depend

on the facts of the case. The Procedural Guide provides a checklist at 3-3.

The complete informal testate packet of required documents consists of the following forms. All forms can be found at Massachusetts Probate and Family Court MPC Forms.

(1) Petition for Informal Probate of Will/Appointment of PR (MPC Form 150).

(2) Persons Interested Surviving Spouse, children Heirs-at-Law (MPC Form162); Devisees (MPC Form 163).

(3) Original Will.

(4) Certified Copy of Death Certificate.

(5) Notice of Informal Probate & Return of Service (MPC Form 550).

(6) Order of Informal Probate of will and/or Appointment of PR (MPC Form 750).

(7) Bond (MPC Form 801) only if seeking appointment of PR.

(8) Military Affidavit (MPC Form 470) (not required if all interested persons assent).

Additional forms that may be required include the following.

(1) Assent and Waiver of Notice/Renunciation/Nomination/Waiver of Sureties (MPC Form 455).

(2) Affidavit as to Cause of Death (MPC Form 475).

(3) Domicile (MPC Form 485).

(4) Proof of Guardianship.

The complete informal intestate packet of required documents and may be required documents are the same except for the will and devisees (MPC Form 163). Once the complete packet is filed at a Probate and Family Court registry, a docket number will be assigned, which should be used on all subsequent filings. The registry will docket all of the foregoing forms except the proposed Order of Informal Probate/Appointment (MPC Form 750).

c) Required Elements of the Informal Petition (MPC Form 150) [Instructions for the completion of this form are provided in Form MPC Form 962]

The Informal Petition must contain:

(1) information about the Decedent, including name, address, age and domicile; and

(2) information about the Petitioner, including name, address and interest in the estate that gives the Petitioner the right to petition to be appointed PR.

The Petitioner must certify in the Petition that the Petition is being filed within the time period permitted by law. (See time limits for filing Actions ¶B1 above.)

A magistrate must find that the Petition has been timely filed.

The Petitioner must certify in the Petition that Venue in the proceeding is proper because the Decedent was either domiciled in the county or left property located in the county. (See Venue ¶B1c) above.)

The Petitioner is required to certify in the Petition that he or she provided written notice to the Division of Medical Assistance at least seven (7) days prior to petitioning by sending to the Division a copy of the signed Petition and death certificate, via certified mail.

The Petitioner is required to certify that the Decedent's surviving spouse, children, heirs-at-law and devisees, if any, so far as known or ascertainable with reasonable diligence, are as stated in MPC Form 162 (Surviving Spouse, Children, Heirs-at-Law) and, if the Decedent died with a will, MPC Form 163 (Devisees), which forms are incorporated into the Petition itself.

d) Testacy Status

The form requires that the Petitioner indicate whether or not the decedent died intestate or testate. If the Decedent died intestate, the Petitioner must further certify that he or she is unaware of any unrevoked testamentary instrument relating to property in Massachusetts. If the Decedent died testate, the Petitioner must identify the Decedent's will by the date that it was executed, together with any codicils and the dates that they were executed, and the location of the will and codicils if they do not accompany the Petition. The Petitioner must personally "verify" the Petition

by certifying that, to the best of her or his knowledge, he or she believes that the will was validly executed, and that, after the exercise of reasonable diligence, the Petitioner is unaware of any instrument revoking the will and believes that the will is the Decedent's last will, signing the Petition. The statute gives the magistrate two methods by which to review the execution requirements: (1) an attestation clause; and (2) the will appears to be valid.

e) Appointment of PR (if requested)

To acquire the powers and undertake the duties of a PR, a person must be appointed by order of the court or magistrate, qualify, and be issued Letters. The Petitioner requests that the following qualified person be appointed as PR:

(1) self only;

(2) self and others;

(3) the identity of others;

(4) that all nominees have priority either by statute or by renunciation; and

(5) the identity of persons with a higher or equal right to appointment.

The Petitioner certifies that no PR has been appointed and no appointment proceeding is pending in Massachusetts or elsewhere.

The Petitioner certifies that either a bond with sureties in a stated penal sum has been filed, or a bond without sureties has been filed and is permissible for a stated reason. (See Bonds ¶B1d) above)

The Petitioner requests that the court/magistrate admit the will to informal probate and/or appoint the nominee with priority for appointment as PR of the estate in an unsupervised administration to serve either with or without sureties on the bond and that Letters be issued.

f) Required Elements of Persons Interested in the Estate (MPC Form 162) - Surviving Spouse, Children, Heirs-at-Law

This form must be used to identify a Decedent’s surviving spouse, heirs-at-law, and children. Instructions are provided to assist the Petitioner in completing these forms. (See MPC Form 958.)

The form requires that the Petitioner:

(1) provide the name and address of each child of the Decedent;

(2) whether or not the child was a child of the surviving spouse;

(3) whether the child was a minor; and

(4) whether the surviving spouse has children who are not the children of the marriage to the Decedent.

Additional information is required regarding predeceased children. Similar information is required concerning the Decedent's parents, siblings and heirs-at-law. The form further requires that the Petitioner identify any heir-at-law who is under a legal disability, including their age(s) and the identity of their guardian or conservator, if any, and any heir-at-law who is deceased and the identity of their PR, if any.

g) Required Elements of Persons Interested in the Estate (MPC Form 163) - Devisees

This form must be used to identify the Decedent's devisees who are persons, entities, charitable organizations or trusts designated in the will to receive the Decedent's real or personal property. Instructions are provided to assist the Petitioner in completing this form. (See MPC Form 959.)

The form requires that the Petitioner identify the Decedent's will and the date that it was executed together with any codicils and the dates that they were executed.

The form requires that the Petitioner identify all devisees who were living at the time of the Decedent's death, their relationship to the decedent and if they are a minor, and also all devisees who predeceased the Decedent, their date of death, their relationship to the Decedent, the identity of a contingent beneficiary provided for in the will or in the anti-lapse statute, their relationship to the Decedent, and if they are a minor.

The form further requires that the Petitioner identify any devisee who is under a legal disability, their age and the identity of their guardian or conservator, if any, and any devisee who is deceased and the identity of their PR. If any devisee is a charity, notice must be given to the charity and to the Massachusetts Attorney General (the "AG").

h) Additional Required Forms, not previously addressed

(1) Military Affidavit (MPC Form 470)

Unless the Petition is assented to by all interested parties, this form must be filed, stating whether or not an heir-at-law, devisee, or other interested party is in the military service. If an heir-at-law, devisee or other interested party is in the military service, his or her written assent must be filed. Otherwise, an Informal Proceeding is not available. (See MPC Form 455 and MPC Form 941 Instructions.)

(2) Magistrate's Order (MPC Form 750)

Petitioner must submit a "proposed" Order of Informal Probate of Will and/or Appointment of PR, sometimes called the Informal Order, that grants the relief requested in the Petition. The Petitioner is required to complete all applicable sections of the form that reflect the facts of the case in preparation for the magistrate's signature. The magistrate may issue the order seven days after the Decedent's death if the Petitioner is seeking the allowance of the Decedent's will, or seven days after the Decedent's death if the Petitioner is seeking appointment as PR, provided the Petitioner qualifies by filing a bond.

(3) Renunciation/Nomination (MPC Form 455)

(See Priority of Appointment ¶B1b) above.)

(4) Affidavits General

An Affidavit is a written declaration or statement of facts made voluntarily. The Affiant certifies under penalties of perjury that the statements are true to the best of their knowledge and belief.

Any of the following affidavits may be required:

a) Suspicious Death Affidavit (MPC Form 475)

If the manner of death is homicide, the petitioner must file this affidavit stating whether or not the decedent's death is the result of a felonious and intentional killing of the decedent by the PR or any person entitled to share in the decedent's estate.

b) Affidavit of Domicile (MPC Form 485)

If the address of the decedent is incorrectly listed on the Death Certificate, an MPC Form 485 must be filed stating facts from the Affiant's personal knowledge.

c) Affidavit of Conservator

If the conservator of an Incapacitated Person (IP), Protected Person (PP), or a minor has an interest in the estate, as an heir-at-law or devisee, the conservator must file an affidavit stating specific facts that would warrant a finding that no conflict of interest exists.

d) Proof of Guardianship/Conservatorship

In an Informal Proceeding, a spouse, heir-at-law, or devisee who is an IP, PP, or a minor must be represented by a conservator or guardian who cannot be the Petitioner. That fact must be proven by a docket number in the court of appointment or a certified copy of Letters or other proof of appointment from another court.

i) Notice Requirements for an Informal Proceeding

(1) General

No citation issues in an Informal Proceeding. Rather, an Informal Proceeding requires two types of notice: (a) Notice prior to filing the Petition; (b) Notice after Informal Probate and Return of Service (MPC Form 550).

(2) Notice prior to filing the Petition

At least seven (7) days prior to filing the Petition, the Petitioner must give written notice of the Petitioner's intent to file for Informal Probate and/or appointment of a PR (See MPC Form 550). The Petitioner is required to complete MPC Form 550 in accordance with the facts of the petition. This puts all interested persons on notice as to the pendency of the Informal Proceeding and notifies them of certain rights they have to information concerning the administration of the estate from the PR and the right to institute a Formal Proceeding. The court is not responsible for issuing notice in an informal proceeding.

Persons entitled to notice include:

(a) heirs-at-law;

(b) all devisees, including charities and trustees of trusts;

(c) any person having a higher or equal right to appointment not waived;

(d) any PR of the decedent whose appointment has not been terminated;

(e) The AG, if there is no spouse or heir-at-law of the decedent or if any devisee is a charity;

(f) a conservator or guardian appointed to represent a spouse, heir-at-law or devisee who is an IP, PP or a minor and the person represented regardless of age.

Any person entitled to notice may assent and waive notice on MPC Form 455, Assent and Waiver of Notice. Instructions for completing this form are available. (See MPC Form 941) Assents are not required in an Informal Proceeding, except Military Affidavits, but they are highly recommended. Notice of the informal proceeding must be given to the PR of any person entitled to notice who dies after the Decedent. (The Procedural Guide has many helpful Practice Alerts on notice)

(3) Proof of Service

The Petitioner must submit a return of service stating the names of the persons served, how served and the date of service. If the person entitled to notice assented and waived their right to notice, the Petitioner must provide this information, along with the written assent and waiver of notice (MPC Form 550, Return of Service).

(4) Publication notice after the allowance of the Petition

The Petitioner is required to complete an MPC Form 550, Notice of Informal Probate and Return of Service, and to provide notice to all interested persons who have not waived their right to notice. The court does not issue a pre-filing or post publication notice in an Informal Proceeding.

(5) Publication Notice after Informal Probate or Appointment, Informal Probate Publication Notice (MPC 551)

Within 30 days after allowance of the Informal Probate and/or appointment, the Petitioner must publish a notice once in one of the newspapers designated by the registrar. The Petitioner selects the newspaper from the list based on the city or town of the decedent's last domicile or where the proceeding is pending. A sample form is available. (See MPC 551 Instructions)

(6) Proof of service

While there is no requirement to file proof of publication with the court, it is recommended.

j) Amending a Pleading in an Informal Proceeding

General: After a Petition is filed with the court, and before it is acted on by a magistrate, the Petitioner may amend the Petition or MPC Forms 162 and 163, without permission of the court, to correct any errors. The Petitioner must file a new Petition (MPC Form 150) and new forms MPC Form 162 and MPC Form 163. Additional required forms may need to be revised as well. (See checklist Procedural Guide.) A motion to amend is not required. Notice of the amended forms must be provided to persons interested, but the notice is not governed by the seven-day time requirement.

k) Magistrate Approval

General: The Magistrate shall review the informal packet for substantive errors. The Magistrate may approve the Petition if all statutory requirements are met. There are a number of specific circumstances for which the Magistrate shall and may deny the petition and they are set forth in the Procedural Guide at section 3-16.

l) Letters of Authority for Personal Representative (MPC Form 751)

General: Letters of Authority are evidence of the PR's appointment and proof of authority to act on behalf of the estate and issue only if the PR is appointed and a bond is approved.

C. Estate Administration

1. General Duties of the Personal Representative

Once appointed, the Informal, Formal or Supervised PR begins the process of administering the estate. Accordingly, the PR has numerous duties. (See Procedural Guide at 3-715 (a))

a) Duty to Collect Assets

The first duty of the PR will be to collect all the assets that will be "under administration." The PR will collect the probate assets and reduce them to possession and control in anticipation of the payment of the debts and taxes of the decedent, and the expenses of the estate, and the distribution of the balance of the estate to the beneficiaries, however their beneficial interest is determined—will or intestate statute. The PR will maintain actions as necessary to recover estate assets and protect them.

b) Duty to Prepare an Inventory

As part of the duty to collect the probate assets, the PR must prepare an Inventory within three months of appointment. The Inventory must list all personal property, wherever located, and all real property located in Massachusetts and owned by the decedent at the time of death. The Inventory must state the property's fair market values as of date of death, together with the type and amount of any encumbrance on the listed property.

The PR is required to:

(1) mail a copy of the Inventory to all interested persons whose addresses are reasonably available; or

(2) file the original or a copy of (MPC Form 854) Inventory or (MPC Form 854(a)) Inventory (without schedules) with the court.

Failure to serve all interested persons with a copy of an Inventory or to timely file an Inventory with the court is grounds for the removal of the PR.

The purpose of the Inventory is to put all interested persons on notice as to assets of the estate and their value. Interested persons include beneficiaries, creditors, and sureties. The Inventory establishes the extent of the PR's responsibility and liability, as well as the sureties liability.

c) Duty to Preserve and Protect

As part of the PR's duty to collect the probate assets, bring them under control, and inventory them, the PR has a duty to preserve and protect them for the benefit of whomever will receive them, creditors, and beneficiaries, including maintaining insurance as necessary. The PR has the right to expend such sums and incur such liabilities as are necessary to preserve and protect the assets. The PR has the power to retain agents such as attorneys, accountants, and investment advisers to assist with the estate's administration.

For example, as to marketable securities, the PR should review the composition of the portfolio and take measures to reduce the risk of loss on the investments. The Decedent could have had a speculative portfolio and an investment expertise to match. However, the PR has no duty to retain speculative investments of the decedent. The PR does have a duty to use prudent judgment on behalf of the beneficiaries and creditors, and a duty to preserve and protect means the orderly liquidation of speculative investments. An investment advisor would be a reasonably incurred expense of administration. The standard of conduct to which the PR is held in Massachusetts is the so called Prudent Investor Rule.

d) Duty to Pay Debts of the Decedent, including Taxes and Expenses of Administration

Once estate assets are secured and inventoried, the PR will next consider the payment of debts and expenses—the liabilities. (See Generally MCLE Probate Manuel Chapter 7.) If estate assets are sufficient to pay liabilities, assets will be liquidated as necessary. But if assets are not sufficient, the estate is said to be insolvent. As a consequence, some creditors may not be paid.

Insolvent estates are not administered pursuant to the Federal Bankruptcy Code. Rather, they are administered pursuant to local law. Local law typically establishes an order of creditor priority. Here, there is some jurisdictional variation. The Massachusetts statutory order is as follows:

(1) costs and expenses of administration;

(2) reasonable funeral expenses;

(3) debts and taxes with preference under federal law;

(4) reasonable and necessary medical and hospital expenses of last illness;

(5) debts and taxes with preference under other laws of Massachusetts;

(6) debts due to the Division of Medical Assistance; public assistance recovery; and

(7) all other claims. (See Procedural Guide 3-805.)

Assuming assets are sufficient, what assets are available to satisfy creditor's claims? Again, there are jurisdictional differences. In Massachusetts, the general rule is probate assets only. Non-probate assets are generally not available because they are not "under administration."

However, there are two important Massachusetts case law exceptions:

(1) State Street Bank & Trust Co. v. Reiser, 7 Mass. App. 633, 389 N.E.2d 768 (1979); and

(2) State Street Trust Co. v. Kissel, 302 Mass. 328, 19 N.E.2d 25 (1939).

The Reiser case subjected the decedent's inter-vivos trust assets to creditor claims because the decedent/settlor retained a power of revocation. The Kissel case subjected the decedent/beneficiary's beneficial interest to his creditor's claims because the beneficiary was granted a General Power of Appointment.

The Probate Manuel cites other exceptions. As among the decedent's probate assets, there are also jurisdiction variations in the order of asset liquidation where the decedent died testate. Unless the will provides otherwise, the Massachusetts statutory order is as follows:

(1) Residuary assets;

(2) Personal property and real property not specifically devised;

(3) Real and personal property specifically devised.

(See Procedural Guide 3-902) If real property has to be liquidated, the PR has a duty to sell the real property.

e) Duty to Pay Taxes

There are jurisdictional differences regarding state and local taxes for which the PR is responsible. Massachusetts has an income tax on the estate's taxable income. This is called a Fiduciary Income Tax. The PR is responsible for preparing and filing an income tax return (Form 2) for each year that the estate is open and producing taxable income, and is responsible for paying the tax reported thereon.

Massachusetts also has an Estate Tax on estate assets. This is a so-called "transfer tax," which is an asset based tax, as opposed to an income tax. The PR is responsible for preparing and filing the Massachusetts Estate Tax Return (Form M-706) and is responsible for paying the tax reported thereon.

Massachusetts cities and towns have real property taxes. Accordingly, if real property is "under administration," for any reason, the PR is responsible for paying the assessed local property taxes.

f) Statutes of Limitation on the Payment of Debts of the Decedent

There are jurisdictional differences regarding when the PR may or may not pay creditor claims. The Massachusetts general rule is that a PR may not pay a creditor claim after one year from the decedent's death. The creditor's claim is barred unless the statutory period is extended for any reason. This statute overrides any other Statute of Limitations (SOL) that may be running before the decedent died, such as a contract statute of limitation.

In addition, the Massachusetts general rule is that the PR may not pay a creditor claim before six months from the decedent's death, without running the risk that a creditor could file a claim before six months that could render the estate insolvent. The PR would be personally liable if he/she could not pay creditors in accordance with the statutory priority cited above. (See MCLE Probate Manuel, Chapter 7 for additional technical exceptions.)

g) Duty to Pay Beneficiaries their Beneficial Interests

Once creditors are paid or provided for, the PR has a duty to pay the remaining estate assets to the beneficiaries, however, their beneficial interest is determined, by will or intestate statute.

Where the decedent died testate, this may be routine. The PR applies the terms of the will to the decedent's named devisees and designated property and makes the distributions. However, where

there have been changes in the composition of the named beneficiaries and/or in the composition of the designated property since the decedent's death it may not be routine.

Where the decedent did not provide for such changes in the will there are jurisdictional differences in the default rules. Where the decedent died intestate, there is little jurisdictional difference in the distribution with the exception on Advancement. (See Intestate Distribution these materials)

h) Duty to Render Accounts

A PR appointed with a MUPC bond is not required to file an account with the court, unless otherwise required by law or court order. An interim or final account may be filed voluntarily with the court by the PR, with or without a petition for allowance.

If an account is filed with the court, it must be on one of the court promulgated forms. (See MPC Form 853, Account (with schedules), or MPC Form 853(a), Account (without schedules)). The Court Account form details the activities of the fiduciary by use of schedules A, B and C. The Account Form lists the estate's income, gains from sales and property received, payments, distributions, losses and the balance, if any, remaining at the end of the accounting period.

An interim Account is not an annual account and may cover any discrete period of time which may be less than or more than one year. An interim Account may be allowed by the court only if requested by the filing of a (MPC Form 857) Petition for Allowance of Account at any time prior to the allowance of a final account by Decree and Order of Complete Settlement.

When a Petition for Allowance of Account is filed, a citation shall issue from the registry for service on all interested persons who have not assented or waived notice. The allowance of an interim Account does not close the estate, but only determines the items as stated in the account.

If there is no court order requiring a PR to file an Inventory or Account with the court, any person interested in the estate may file the Petition to Render Inventory/Account (MPC Form 856), requesting that the PR render an Inventory, and if more than one year has passed since the date of appointment, an Account.

After filing the Petition, the court shall issue a citation to be served in-hand on the PR, unless otherwise ordered. If no objection is

filed by the PR by the return day, the court shall issue to the PR (MPC Form 754) Order to Render by mail.

D. Intestate Distribution (Mass. G. L. C. 190b, §§2-101 Thru 2-114)

1. Introduction (Determination of Heirs-at-Law-Terminology)

There are two kinds of relationships to a decedent, consanguinity and affinity. Consanguinity relationships are those persons who are related to the decedent by blood, sometimes also called kindred. Affinity relationships are those persons who are related to the decedent "by law," i.e. marriage. The spouse is only affinity relationship in intestate statutes.

There are two types of kindred relationships, Lineals and Collaterals. Lineals are all those kindred who are related to the decedent in the direct ascending and descending lineal line. Ascending line: parents, grandparents, great grandparents, and great-great grandparents. Descending line: children, grandchildren, great grandchildren. Within the descending lineal line are two relationships: children and issue. The term child is a single generational term. The term issue is a multi- generational term. (See Chart II at the end of this section.) The term issue is often used synonymously with "descendants."

All those relationships to the decedent outside the lineal line are collateral kindred. They are related to the decedent through an ancestor in the lineal line. For example, brothers and sisters, nieces and nephews, and grandnieces and grandnephews, are all related to the decedent through the parents, aunts and uncles, and first cousins, are all related to the decedent through the grandparents.

The Intestate statute refers to "degrees of kindred." The degree of kindred is a measure of nearness in blood to the decedent. The lower the degree, the closer a relation is to the decedent. (See Chart II at the end of this chapter and Mass. G. L. c. 190B, §2-103.)

2. General: Mass. G. L. c. 190B, §2-101

This section provides that any part of a decedent's estate that is not effectively disposed of by will passes by intestate succession to the decedent's heirs-at-law. This section envisions a will that is partially effective, which is known as partial intestacy. For example, the will's residuary clause may not be effective.

3. Surviving Spouse Mass. G. L. c. 190B, §2-102

General: The surviving spouse's share is determined first, before the share of the other heirs-at-law.

Size of the share: The size of the share is flexible and depends on the facts of survivorship, namely who else survives together with the spouse. The statute establishes four factual situations and every estate will fall into one of them.

The facts of survivorship are:

a) Where: (1) the decedent is survived by the spouse and children, or descendants of any predeceased child, and all surviving children are also children of the surviving spouse, and the surviving spouse has no surviving children who are not children of the decedent; or (2) no descendant or parent of the decedent survives: the surviving spouse receives the entire estate.

b) Where the decedent is survived by the spouse and no children, but is survived by a parent, the Surviving Spouse receives the first $200,000 plus ¾ of the balance of the estate.

c) Where the decedent is survived by the spouse and children, or descendants of any predeceased child, and all surviving children of the decedent are also children of the surviving spouse and the surviving spouse also has surviving children who are not children of the decedent, the surviving spouse receives the first $100,000 plus ½ of the balance of the estate.

d) Where the decedent is survived by the spouse and children, or descendants of any predeceased child, and one or more of the decedents children or descendants of predeceased children are not descendants of the surviving spouse, the surviving spouse receives the first $100,000 plus ½ of the balance of the estates.

4. Share of Heirs Other than Surviving Spouse Mass. G. L. c. 190B, §2-103

a) General

This section provides that any part of the intestate estate not passing to the decedent's surviving spouse under §2-102, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated who survive the decedent:

(1) to the decedent's descendants per capita at each generation;

(2) if there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;

(3) and if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them per capita at each generation; and

(4) and if there is no surviving descendant, parent, or descendant of a parent, then equally to the decedent's next of kin in equal degree; but if there are 2 or more descendants of deceased ancestors in equal degree claiming through different ancestors, those claiming through the nearest ancestor shall be preferred to those claiming through an ancestor more remote.

Degrees of kindred shall be computed according to the rules of civil law. (See Chart II at the end of this chapter.)

b) Size of the shares and examples of computation:

(1) Where the estate passes to the decedent's descendants per capita at each generation, §2-106(b) describes the method of per capita at each generation, as follows:

If, under §2-103(1), a decedent's intestate estate, or a part thereof, passes "per capita at each generation" to the decedent's descendants, the estate or part thereof is divided into as many equal shares as there are:

(a) surviving descendants in the generation nearest to the decedent that contains one or more surviving descendants; and

(b) deceased descendants in the same generation who left surviving descendants, if any.

Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants in the nearest generation and their surviving descendants had predeceased the decedent.

Example (See Chart I at the end of this chapter.): Suppose PDQ dies intestate and unmarried survived by A's two children, B1's four children, C1's two children, and C2 and C3. PDQ's estate would be divided into six shares, one each for the surviving four grandchildren A1, A2, C2 and C3 and one each for the deceased grandchildren who left issue surviving B1 and C1. The living grandchildren would receive their 1/6 shares; and the two remaining shares

would be combined and distributed to B1 and B2's children per capita. If the distribution had been per stirpes, C1's children would have received a 1/12 share and B1's children would have received a 1/24. The Massachusetts statute no longer provides for per stirpes distributions.

c) Where the estate passes to the decedent's parents, they share equally if both survive, or to the surviving parent.

d) Where the estate passes to the descendants of the decedent's parents or either of them per capita at each generation. Section 2-106 (c) describes the method of per capita at each generation the same as did in §206 (b). So, the foregoing example would similarly apply to the parent's descendants.

e) Where the estate passes to the decedent's next of kin in equal degree, it becomes necessary to compute degrees of kindred according to the rules of civil law. (See Chart II at the end of this chapter.)
Under the rules of civil law, lineal ancestors are counted up from the parents two, three. Collateral kindred are computed by counting up from the decedent to the common ancestor and then counting down the collateral line to the person. For example, an aunt or uncle would be computed by counting up to the grandparent one, two, and then down to the aunt/uncle three. They would be the "next of kin" and they would share the estate equally.

Where there are multiple relations with the same degree, those who claim through the nearest ancestor are preferred. For example: suppose the nearest living relatives are a great-aunt, a great-uncle and two first cousins, all of the fourth degree. The two first cousins would inherit because they claim through the grandparents, a closer ancestor than the great-grandparents. (See Chart II at the end of this chapter.)

f) No Taker, Mass. G. L. c. 190B, §2-105
This section provides that if there are no takers under the foregoing provisions, the estate escheats to the Commonwealth of Massachusetts or to the Soldier's Homes.

g) Kindred of the Half Blood, Mass. G. L. c. 190B, §2-107
This section provides that relatives of the half-blood inherit the same share they would inherit if they were of the whole blood.

h) Afterborn Heirs, Mass. G. L. c. 190B, §2-108
This section provides that an individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth. This is the posthumous child rule which modifies the normal rule that heirs-at-law are determined and their interests vest upon the death of the Intestate Decedent.

i) Advancements, Mass. G. L. c. 190B, §2-109
This section provides that if an individual dies intestate, property the decedent gave during the decedent's lifetime to an individual who, at the decedent's death, is an heir, is treated as an advancement against the heir's intestate share only if:

(a) the decedent declared in a contemporaneous writing, or the heir acknowledged in writing, that the gift is an advancement; or

(b) the decedent's contemporaneous writing or the heir's written acknowledgement otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate.

Value of the advance: The value of the advance shall be as expressed in the writings; otherwise it shall be the value when the property was given. The property which is advanced shall be considered as part of the intestate's estate in the division and distribution of such estate, and shall be taken by the heir who received it toward the heir's share of the estate; but, if the value exceeds the heir's share, the heir shall not be required to restore the excess value to the estate.

j) Death of an Heir before the Intestate:
If a child, or other lineal descendant of the intestate who has received an advancement, dies before the intestate leaving descendants who receive a share of the intestate's estate, the value will be deducted from their shares as if the advance were made directly to them.

k) Debts to Decedent, Mass. G. L. c. 190B, §2-110
This section provides that a debt owed to the decedent is not charged against the intestate share of any individual except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's descendants.

l) Dower and Curtesy Abolished, Mass. G. L. c. 190B, §2-112
This section abolishes the estates of Dower and Curtesy in Massachusetts.

m) Parent and Child Relationship, Mass. G. L. c. 190N, §2-114
This section provides that for purposes of intestate succession by, through, or from a person, an individual is the child of his natural parents, regardless of their marital status. This section also provides that an adopted individual is the child of his adopting parent or parents and not of his natural parents, but adoption of a child by the spouse of either natural parent has no effect on the right of the child or a descendant of the child to inherit from or through either natural parent.

E. Drafting Wills

1. General

The Massachusetts Uniform Probate Code (the "MUPC"), effective 2012, differs from the Uniform Probate Code (the “UPC”) in that it was adopted in part, and rejected in part.

- MUPC Devise includes the disposition of real or personal property, and a devisee is a person designated in a will to receive a devise.
- There is no longer a distinction between bequeathing personal property and devising real property, as devise encompasses all testamentary dispositions.
- Personal Representative: Executor and Executrix are no longer needed, as “Personal Representative” includes executor, administrator, successor personal representative and special administrators.

2. Intestacy

A failure to dispose of all of a person’s estate by will or trust results in the distribution pursuant to the rules of intestacy.

3. Intestate Share

The surviving spouse takes the entire intestate estate if:

a) the decedent had no surviving descendant or parent; or

b) if all of the decedent’s surviving descendants (if any) are also the only surviving descendants of the spouse.

If there is no surviving descendant but a parent survives the decedent, the spouse takes the first $200,000 and three-fourths of any balance on the intestate estate.

If a descendant survives the decedent or spouse who is not common to the decedent and spouse, the spouse takes the first $100,000 and one half of any balance on the intestate estate.

4. Intestate Share of Heirs Other than Surviving Spouse

If not passing to the surviving spouse, the estate passes in the following order:

a) to the decedent's descendants per capita at each generation;

b) if no surviving descendent, to the decedent's surviving parents equally;

c) if no surviving descendants or parents, to the descendants of the decedent's parents per capita at each generation;

d) if no surviving descendant, parent, or descendant of a parent, then equally to the decedent's next of kin in equal degree.

The MUPC adopts the "per capita at each generation" system of representation.

F. Execution of Wills

1. Variety of Will Forms

a) Holographic: Holographic wills are not permitted in Massachusetts.

b) Nuncupative: A soldier in actual military service or a mariner at sea may dispose of his personal property by a nuncupative will.

c) Attested: Mass. G. L. c. 190B, §2-502.

(1) Except as provided in subsection (b) and in sections 2-506 and 2-513, a will shall be:

(a) in writing;

(b) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and

(c) signed by at least two individuals, each of whom witnessed either the signing of the will as described in

paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will.

(2) Intent that the document constitutes the testator's will can be established by extrinsic evidence.

2. Facts to which Witnesses Attest and inability of Witness to Testify Testator's Authentication and "Presence"

a) Testator's Authentication and Presence

A will must be signed by either the testator or in the testator's name by someone else in the testator's conscious presence, at the testator's direction. The signature can be any mark intended to be the testator's signature that was willingly made by the testator or someone at their direction and in their presence. A signing is sufficient if it was done in the testator's conscious presence, i.e., within the range of the testator's senses such as hearing; the signing need not have occurred within the testator's line of sight.

b) Testator's Capacity

A person must be 18 years old or older to make a will and without undue influence. To demonstrate undue influence, the will contestant must show that an:

- unnatural disposition has been made;
- by a person susceptible to undue influence to the advantage of someone;
- with an opportunity to exercise undue influence; and
- who in fact has used that opportunity to procure the contested disposition through improper means.

In Massachusetts mere suspicion, surmise, or conjecture are not enough to warrant a finding of undue influence. There must be a solid foundation of established facts upon which to rest an inference of its existence.

c) Signature by Witnesses and Sequence of Signing

A will must be signed by the testator and two other witnesses who signed within a reasonable time after witnessing the signing of the will (or the testator's acknowledgement of that signature or acknowledgement of the will). A will in which the witnesses sign before the testator is void.

d) Beneficiary as Witness

A beneficiary under a will is permitted to be a witness, as long as two other disinterested witnesses (including the spouse of the beneficiary) also sign as witnesses. If two other disinterested witnesses did not sign as witnesses to the will, the interested witness may still take if they establish the will was signed by the testator voluntarily and was free from fraud and undue influence.

e) Notary Public

Not required.

f) Choice of Law as to Execution

A written will is valid if executed in compliance with §2-502 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.

g) Mass. G. L. c. 190B, §2-513: Separate Writing Identifying Devise of Certain Types of Tangible Property

A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. To be admissible under this section, as evidence of the intended disposition, the writing shall be signed by the testator and shall describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect on the dispositions made by the will.

3. Formalities Not Required

Self-Proved Wills: Self-Proved wills are valid in Massachusetts and allow a court to accept a will without the testimony of the witnesses. A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will’s due execution. There is no requirement that a will be self-proved in order to be valid.

A will may be simultaneously executed, attested, and made self- proved, by acknowledgment thereof by the testator and affidavits of the witnesses,

each made before an officer authorized to administer oaths under the laws of the state in which execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:

> I,_____, the testator, sign my name to this instrument this _____ day of _____ and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.
>
> _____
>
> Testator
>
> We, _____, _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as [his] [her] will and that [he] [she] signs it willingly (or willingly directs another to sign for [him] [her]), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.
>
> _____
>
> Witness One
>
> _____
>
> Witness Two
>
> The State of _____
>
> County of _____
>
> Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by, _____, and _____, witness, this day of _____.
>
> (Seal)
>
> (Signed)_____

(Official capacity of officer)

Attestation Clause and Conversion of Attested Will to Self-Proved Will: An attested will may be made self-proved at any time after its execution by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgment occurs and evidenced by the officer's certificate, under the official seal, attached or annexed to the will in substantially the following form:

The State of _____

County of _____

We,_____, _____, and _____, the testator and the witnesses, and respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that [he] [she] had signed willingly (or willingly directed another to sign for [him] [her]), and that [he] [she] executed it as [his] [her] free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of [his] [her] knowledge the testator was at that time 18 years of age or older, of sound mind, and under no constraint or undue influence.

_____

Testator

_____

Witness

_____

Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by, _____, and _____, witness, this day of _____

(Seal)

(Signed)_____

(Official capacity of officer)

A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will's due execution.

G. Revocation of Wills

1. MUPC Revocation 2-507

There are two ways to revoke (or partially revoke) a will: (a) executing a subsequent will that expressly revokes (or impliedly revokes because its terms are inconsistent with) the terms of a prior will; or (b) the testator (or someone in their presence and at their direction) perform a revelatory act that touches the words of the will with the intent to revoke (such as tearing, destroying, burning, cancelling, obliterating, etc.).

Like the requirement for the execution of a will, presence requires testator's conscious presence, i.e., within the range of the testator's senses such as hearing; the signing need not have occurred within the testator's line of sight.

A revocation of a will also revokes all codicils associated with that will. If a subsequent will does not completely dispose of the testator’s estate, the subsequent will is treated as a codicil.

If the original will is missing, and an authenticated copy of the will is not available, the court presumes the testator destroyed the will with the intent to revoke it.

2. Special Circumstances - Revocation by Divorce

A final decree of a divorce (not the nisi order) or annulment revokes a disposition by will or inter vivos trust to the prior spouse, including retirement plan and life insurance beneficiary designations. A joint tenancy with a right of survivorship held by a married couple is severed into a tenancy in common upon divorce. If the divorced parties later remarry, the previously revoked will is revived.

3. Pre-Marital Will

Unlike divorce, marriage is generally not deemed a change in circumstances that revokes a pre-marital will. After marriage, the spouse is instead entitled to receive the share of the estate that the spouse would have received had the testator had died intestate, but only as to that portion of the estate that is not devised to a child of a testator who was born before the marriage and who is not a child of the surviving spouse. An exception

exists where the will was made in contemplation of marriage, or the spouse was otherwise provided for by transfers outside of the will.

H. Amendments – Revival and Revalidation

1. Codicil

The function of a codicil is to make minor changes to an existing will, such as additions, deletions, or alterations. As the codicil republishes the will, it must be executed with the same formalities and witness requirements as a will. If a subsequent will does not completely dispose of the testator's estate, the subsequent will is treated as a codicil.

2. Revival

A will that has been revoked can be revived if there is evidence from the circumstances of the revocation or from the testator's contemporary or subsequent declarations that the testator intended the first will to take effect again. If such an intention is proved to have existed at the time of canceling of the second will, revocation would have the effect of reviving the former will. If the testator by revelatory act revokes a second will for the purpose of reviving a former will, evidence will be necessary to establish the testator's intent to revive the former will to affect a revival of the former will, making the application of dependent relative revocation as to the second will unnecessary. From a practical standpoint, complete re-execution of the will is certainly the preferred practice in order to prevent the estate from being forced to deal with issues of testator post-mortem intent.

I. Will Provisions

1. Contested Wills and Dis-Inheritance Clause

A will contest clause (also known as a penalty clause or in terrorem clause) is a provision in a will purporting to penalize a beneficiary for contesting the will or instituting other proceedings relating to the estate, and is enforceable. The penalty for contesting can also extend to descendants of the contesting beneficiary. From a practical standpoint, the drafter of the will contest clause may want to allow beneficiaries to petition the court to resolve ambiguous language in the will without triggering the penalty, if being pursued in good faith.

With two exceptions, a person not named in a will does not take under the will. The exceptions are for:

a) an omitted living spouse who they married after the execution of the will; and

b) an omitted biological or adopted child born after the execution of the will. Either exception will trigger the omitted spouse and/or child from receiving a share of the estate.

2. Bonds and Sureties

To keep the administrator from giving surety on a bond: either (a) the testator must state in the will that they wished the executor be excused from the same; (b) all interested persons consented; or (c) the court otherwise concluded that it is not in the best interest of the estate. If a surety is required, the will can establish the proposed amount (subject to the court's approval), otherwise the court will establish the amount.

3. Funeral Arrangements

The PR, under the will, can carry out the written instructions regarding the funeral, even prior to appointment. If written instructions do not exist, the spouse (or next of kin if no spouse) has the authority to make funeral arrangements.

4. Guardians and Conservators

The MUPC makes a clear distinction between guardians and conservators in that a guardian has custody over the person of the ward only; whereas only a conservator may have possession of the property of the ward. Accordingly, a testator must appoint both a guardian and conservator for minor children.

If there is no surviving parent, the parent of a minor may name a guardian of a minor in their will which automatically becomes effective upon the filing of an acceptance. If the minor is fourteen or older, they may object to the appointment.

The parent of an unmarried incapacitated person (or spouse of a married incapacitated person) may nominate a guardian by will or other writing signed by the parent (or spouse) and attested by two witnesses. The court will give priority to the person nominated to be guardian.

The ward of a conservator is a "protected person." Before being appointed conservator, a person must petition the court. After notice and a hearing, the court must find the appointment is appropriate based on the following priority:

a) a person nominated in a durable power of attorney;

b) a conservator appointed in another jurisdiction;

c) an individual (or corporation) nominated by a protected person who is at least 14 years old and has sufficient mental capacity;

d) an agent appointed by the protected person under a durable power of attorney;

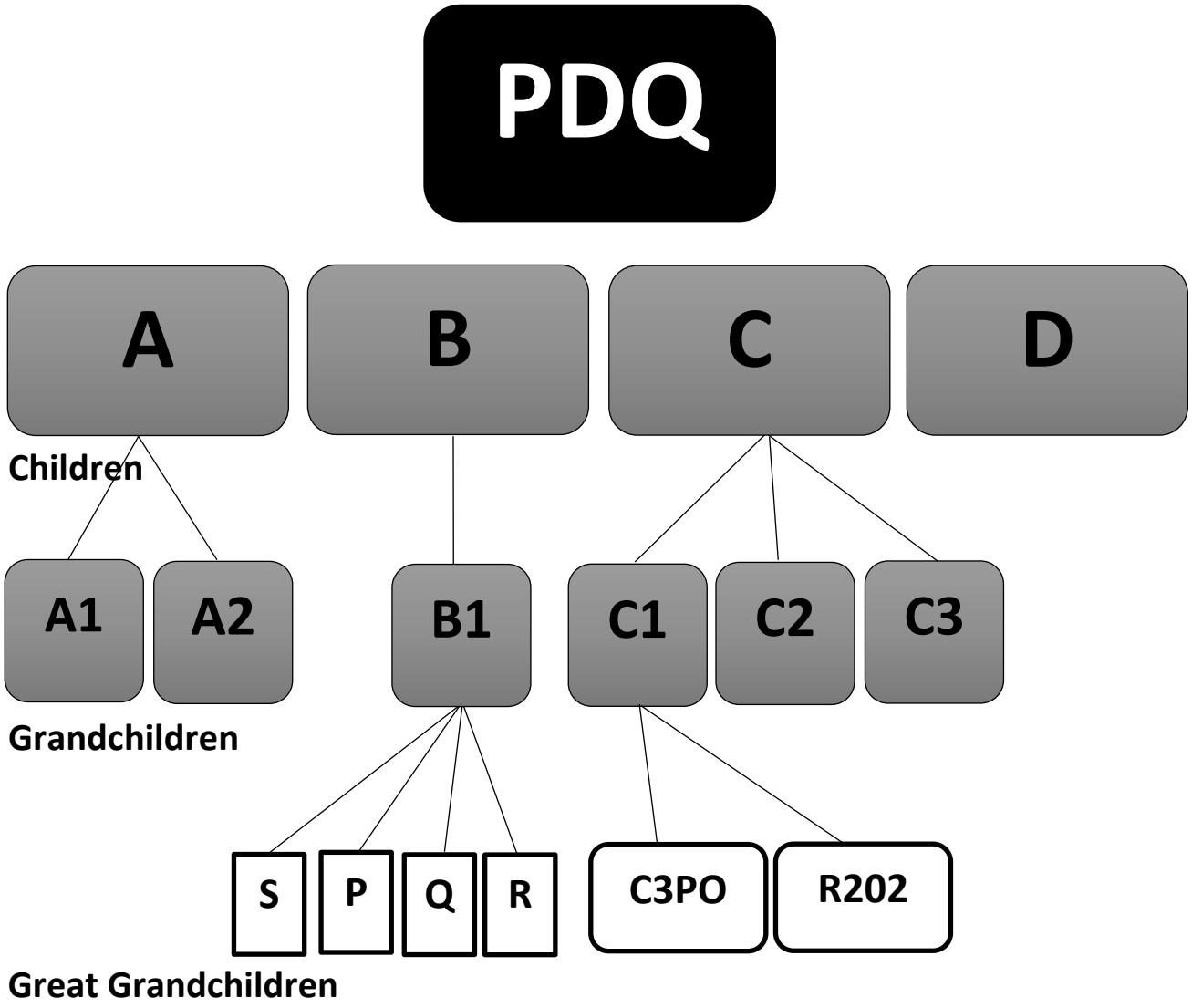
e) a parent of the protected person; and

f) a person deemed appropriate by the court.

J. Charts I & II

Chart I: Family Chart

(PDQ dies intestate and unmarried)



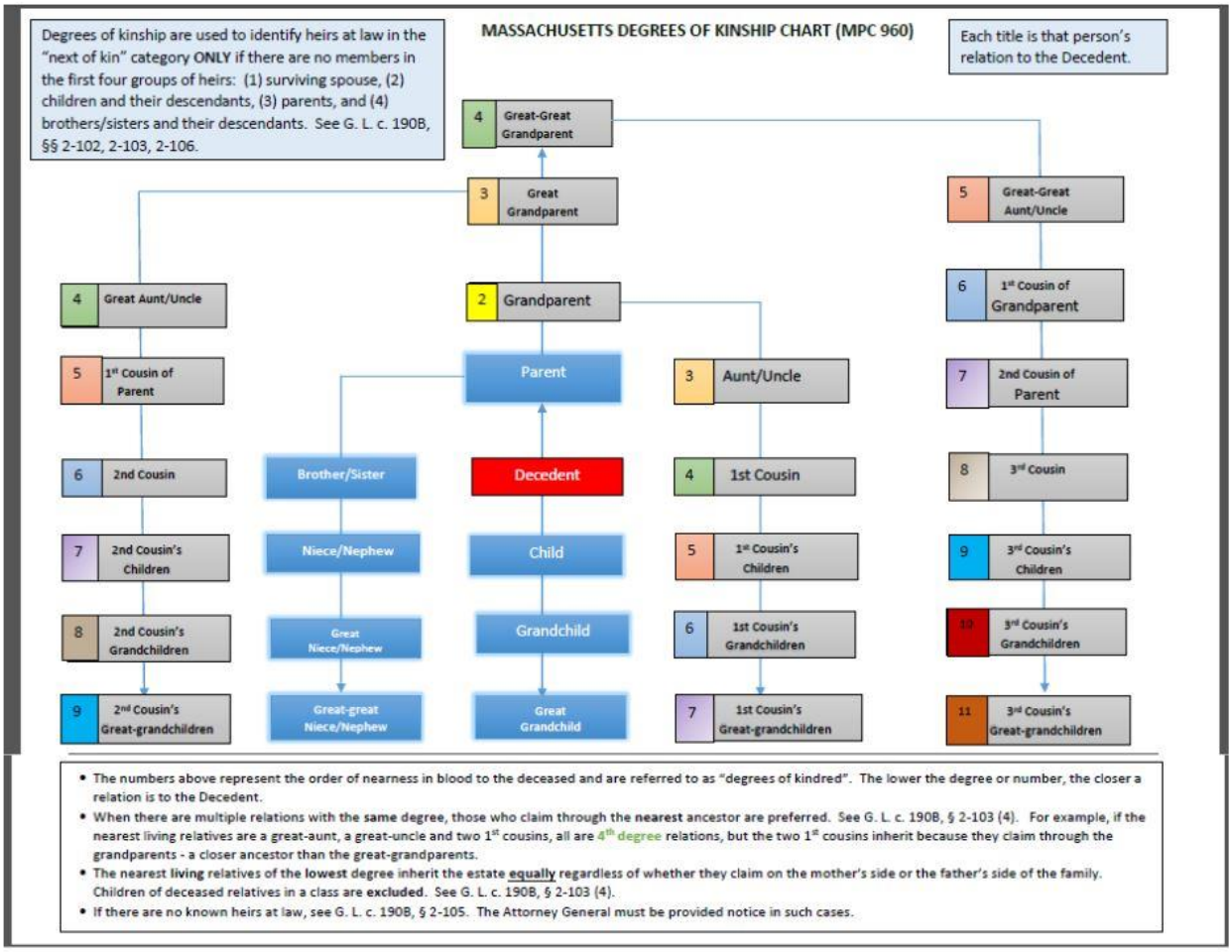
Children: A, B, C, D

Grandchildren: A1, A2, B1, C1, C2, C3

Great Grandchildren: S, P, Q, R, C3PO, R202

Chart II

MUPC ESTATE ADMINISTRATION PROCEDURAL GUIDE – SECOND EDITION



IX. EVIDENCE

A. Introduction: Massachusetts Guide to Evidence

Unlike the federal system, Massachusetts does not have rules of evidence. The law of evidence in Massachusetts is found in statutes enacted by the legislature and the common law.

Since 2008, Massachusetts law pertaining to evidence has been collected in the annually updated *Massachusetts Guide to Evidence* (Guide). The Supreme Judicial Court recommends its use, and the Guide is regularly cited by appellate and trial court judges and relied upon by practitioners. The Guide is online at mass.gov/courts/case-legal-res/guidelines/mass-guide-to-evidence

Each section of the Guide is extensively annotated with citations to pertinent cases, statutes, and rules as well as references to provisions of the state and federal constitutions that bear on the law of evidence. The Guide does not predict the development of the common law in Massachusetts. The Guide follows the arrangement of the law contained in the Federal Rules of Evidence (FRE) and is thus comprised of eleven articles, with each article containing a series of sections. Whenever possible, the Guide expresses the principle of Massachusetts evidence law by using the language of the corresponding FRE. In some instances, a principle of Massachusetts evidence law that appears in the Guide has no counterpart in the FRE.

This brief summary of the law of evidence in Massachusetts highlights some of the key principles and, where relevant, identifies major variations between Massachusetts evidence law and the FRE. Substantively, the admissibility or exclusion of evidence under the FRE or under Massachusetts law often arrives at the same result even if that result is achieved through different means, e.g., the FRE treats a party's own statement offered against that party as admissible non-hearsay while the Massachusetts rule admits the statement as an admission and an exception to the hearsay rule. The admission or exclusion of evidence often turns on an analysis of five key areas: relevance, competence, foundation, hearsay, and the exclusion of otherwise relevant evidence based on prejudice, confusion, surprise, or its cumulative nature.

B. Judicial Notice

The court may judicially notice a fact that is not subject to reasonable dispute because it is generally known within the trial court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Guide §201(b). In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive. Guide §201(e). A court is not permitted to take judicial notice of municipal

ordinances, town bylaws, special acts of the Legislature, or regulations not published in the Code of Massachusetts Regulations. Guide §202(c).

C. Relevancy

Relevancy and its limits is the subject of Article IV of the Guide. In Massachusetts, relevant evidence simply has to have a rational tendency to help prove or disprove an issue in the case. The offered evidence need only make the proposition more probable if the evidence is received than it would be without it.

While the FRE defines the relevant scope of cross-examination as bias, credibility and the subject matter of the direct examination, the relevant scope of cross-examination in Massachusetts is unlimited, provided the inquiry is relevant to the matter under consideration. Guide §611.

In Massachusetts, otherwise relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulatively evidence. Guide §403. Guide §404 prohibits evidence of a person's character or a character trait to suggest that the person acted in conformity with that character or trait on the occasion in question, but states the exceptions relevant under Massachusetts law. In a criminal case, a defendant may offer evidence known to the defendant prior to the incident in question of the victim's reputation for violence, of specific instances of the victim's violent conduct, or of statements made by the victim that caused reasonable apprehension of violence on the part of the defendant. Guide §404(a)(2)(C). In the case where the identity of the first aggressor or the first to use deadly force is in dispute, a defendant may offer evidence of specific incidents of violence allegedly initiated by the victim, or by a third party acting in concert with or to assist the victim, whether known or unknown to the defendant, and the prosecution may rebut the same with specific incidents of violence by the defendants.

Under the "Rape-Shield Law," evidence offered to prove that a victim engaged in other sexual behavior or offered to prove a victim's sexual reputation is generally inadmissible in civil and criminal proceedings involving alleged sexual misconduct. Guide §412(a). However, evidence of specific instances of a victim's recent sexual behavior is admissible if offered to prove that someone other than the defendant was the source of any physical feature, characteristic, or condition of the victim. Guide §412(b)(2).

D. Competence, Privileges, and Disqualifications

Like the FRE, Massachusetts law finds witnesses are competent if they can perceive, understand, remember, and communicate the information in question. The witness must also understand the difference between telling the truth and a falsehood, while recognizing the obligation to tell the truth and the likely punishment for failing to do so. A person who is competent to testify may still

refuse to testify, be disqualified from testifying, or prevent others from testifying based on privilege. Article V of the Guide covers Privileges and Disqualifications, while Article VI addresses Witness Competency and Impeachment.

1. Privilege

Sections 501 - 528 of Article V lists a variety of privileges recognized under Massachusetts law. Some of the most important ones are:

- Attorney-Client Privilege (Guide §502): The burden of proving that the attorney-client privilege applies to a communication rests on the party asserting the privilege. This burden extends not only to a showing of the existence of the attorney-client relationship but also to the other elements involved in the determination of the existence of the privilege. The party asserting privilege must show that that the communications were made during the course of the client's search for legal advice from the attorney in his or her capacity as such, that the communications were made in confidence, and that the client has not waived the privilege as to these communications. Massachusetts recognizes the crime/fraud exception to the Attorney-Client Privilege so that under Massachusetts law no privilege applies if the services of the attorney were sought or obtained to commit or to plan to commit what the client knew or reasonably should have known was a crime or fraud. The attorney-client privilege survives the death of the client.

- Psychotherapist-Patient Privilege (Guide §503): Massachusetts does not recognize the Doctor-Patient privilege, but it does recognize the Psychotherapist-Patient privilege. The definition of a psychotherapist includes a licensed medical doctor who devotes a substantial portion of his or her time to the practice of psychiatry, a licensed psychologist, or a nurse authorized to practice as a psychiatric nurse mental health clinical specialist. In general, a patient shall have the privilege of refusing to disclose, and of preventing a witness from disclosing, communications to a psychotherapist. The privilege does not apply under a number of stated exceptions, including reports to the Department of Children and Families of reasonable cause to believe that a child under the age of eighteen has suffered serious physical or emotional injury resulting from sexual abuse pursuant to Mass. G. L. c. 119, §51A, threats of imminently dangerous activity, and court-ordered psychiatric exams. The privilege also does not apply to a disclosure in any proceeding, except one involving child custody, adoption, or adoption consent, in which the patient introduces the patient's mental or emotional condition as an element of a claim or

defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected.

- Spousal Privilege and Disqualification (Guide §504): The spousal privilege provides that a spouse shall not be compelled to testify in any criminal proceeding brought against the other spouse. A spouse may choose to testify against the other spouse. This privilege shall not apply in civil proceedings, or in any prosecution for nonsupport, desertion, neglect of parental duty, or child abuse, including incest. The spouse who asserts the privilege must be married at the time the privilege is asserted. The spousal disqualification provides that a spouse shall not testify in any proceeding, civil or criminal, as to private, verbal conversations with a spouse that occurred during their marriage. Because this is a disqualification, the testimony is barred even if both spouses wish the communication to be revealed. There are, however, a number of exceptions including, but not limited to, where the communications relate to a contract between them, in proceedings to establish paternity, criminal proceedings in which a spouse has been charged with a crime against the other spouse, and child abuse proceedings.

- Domestic Violence Counselor - Sexual Assault Counselor, Social Worker-Persons Consulting Privilege, and Allied Mental Health or Human Services Professional Privilege (Guide §§505-508). See Guide for details.

- Religious Privilege (Guide §510): An individual has the right to prevent a member of the clergy from disclosing confidential communications between them that occurred while seeking religious or spiritual advice.

- Tax Return Privileges (Guide §§519-520): Massachusetts State Tax returns are privileged, and a taxpayer cannot be compelled to produce them in discovery. In Massachusetts, Federal Tax returns are subject to a qualified privilege. The taxpayer is entitled to a presumption that the returns are privileged and are not subject to discovery. However, a taxpayer who is a party to litigation can be compelled to produce Federal tax returns upon a showing of substantial need by the party seeking to compel production. In addition, no person engaged in the business of preparing tax returns can disclose any information obtained in the conduct of such business without the consent of the client or a court order.

- Privilege against self-incrimination (Guide, §511): Every witness has a right, in any proceeding, civil or criminal, to refuse to answer a question unless it is perfectly clear, from a careful consideration of all the circumstances, that the testimony cannot possibly have a tendency to incriminate the witness. This includes the privilege to refuse to provide real or physical evidence in the absence of a court order. Thus, a person may, for example, refuse to provide physical evidence during a police investigation without a warrant or court order. A person may also refuse to take field sobriety or breath tests if they are suspected of a drunk driving. In Massachusetts, unlike most other jurisdictions, a person's refusal to take a breathalyzer test is inadmissible; the Supreme Judicial Court has held that admission would violate Article 12 of the Massachusetts Declaration of Rights.

Massachusetts has a greater required immunity than is required by federal law to overcome an exercise of the 5th Amendment. Article 12 of the Massachusetts Declaration of Rights requires a witness to receive a grant of transactional immunity and not merely use or derivative use immunity to overcome a claim of privilege against self-incrimination. Transactional immunity provides immunity from prosecution to the witness for any offense to which his or her testimony relates. The Federal Constitution only requires that the witness be granted use immunity to overcome the privilege against self-incrimination.

- Medical Peer Review Privilege (Guide §5.3): The medical peer review privilege was established to promote rigorous and candid evaluation of the professional performance of a health care provider by the provider's peers. It provides legal safeguards against the disclosure of the identity of the medical personnel who participated in these reviews as well as the disclosure of peer review committee reports and records but not the information merely presented to the peer review committee in connection with its proceedings.

- Interpreter-Client privilege and Sign-Language-Interpreter Privilege (Guide §521 and §522)

Massachusetts does not recognize the Reporter-Source Privilege or the Accountant-Client Privilege. However, Massachusetts does provide common law protections for cases in which a reporter resists an effort to uncover his or her sources. Guide Article V, Introductory Note.

A privilege holder or his or her legally appointed guardian, administrator, executor, or heirs can waive a privilege. Guide §523(a). Subject to certain exceptions, a privilege is waived if the privilege holder voluntarily discloses or consents to disclosure of any significant part of the privileged

matter or introduces privileged communications as an element of a claim or defense, such as when privileged material is used during the examination of a witness at trial. Guide §523(b).

2. Opinion Testimony by Lay Witnesses

In Massachusetts, lay witnesses are generally not competent to offer an opinion, but if they have sufficient personal knowledge obtained from underlying observations, a lay witness may offer opinion regarding a number of topics that fall within the realm of common experience. Article VII, §701 These topics include:

- Speed of a car;
- Sobriety;
- Signature or handwriting;
- Speech (the identity of a speaker); and
- Value of property if the witness is sufficiently familiar with that property.

Massachusetts generally reserves the question of sanity for expert testimony. In Massachusetts, unlike the FRE, a lay witness cannot testify to an individual's sanity apart from a testator's capacity to execute a will.

3. Opinion Testimony by Expert Witnesses

Sections 702-706 address testimony by expert witnesses. Massachusetts law permits a judge to exercise a gatekeeper function and to allow expert witness testimony as reliable under alternative theories, including general acceptance in the relevant scientific community or the standard under the FRE. (See Guide §702.) Massachusetts law requires that, in cases involving expert witness testimony that is intended to establish a match between physical evidence and the defendant or between two items of physical evidence (e.g., a bullet and a particular firearm), the prosecutor must follow special rules and the witness may not express absolute certitude about his or her opinion. Guide §702. An expert witness may base his or her opinion on facts or data not in evidence, provided that the facts or data are independently admissible in evidence and are a permissible basis for an expert to consider in formulating an opinion. Guide §703. An expert witness may not, under the guise of stating the reasons for the opinion, testify to matters of hearsay in the course of the direct examination unless such matters are admissible under some statutory or other recognized exception to the hearsay rule. Guide §703.

E. Character and Impeachment Issues

In Massachusetts, a witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness. However, evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked. Unlike the FRE, character for truthfulness cannot be proven by evidence of personal opinions or isolated acts. Guide §608(a).

Specific instances of misconduct that do not result in a conviction cannot be used to impeach a witness in Massachusetts. Guide §608(b).

In Massachusetts, the specific instances of a victim's character or a defendant's character are admissible on the issue of who was the first aggressor, but in cases of self-defense, it must be shown that the Defendant was aware of the victim's aggressive behavior at the time the alleged crime was committed. The Defendant may introduce evidence of current and past physical or sexual abuse, and expert testimony concerning common patterns in abusive relationships, if claiming self-defense, duress, or accidental injury. Guide §404.

Prior false allegations of rape and love triangle evidence are admissible to show that the victim had a motive to lie about claimed consensual intercourse. Guide §608.

A judge must exercise discretion before deciding whether to admit prior convictions for impeachment. A relevant factor is whether the prior conviction involves a crime implicating truthfulness.

When impeaching a witness with record of a prior criminal conviction, the conviction of another more recent crime allows the earlier conviction to be used for impeachment, even if it was more than ten years old. The use of prior convictions for impeachment purposes rests with the trial judge's discretion, and in order to use the prior conviction the witness must have been represented by counsel. Guide §609.

A party may not impeach its own witness with the witness' prior inconsistent statements without first providing the witness the opportunity to explain or deny the statement. A party who calls a witness also may not impeach that witness by evidence of bad character, including reputation for untruthfulness, or prior convictions. Guide §607.

A prior consistent statement by a witness is generally inadmissible. However, if the court makes a preliminary finding that there is a claim that the witness's in-court testimony is the result of recent contrivance or a bias, and the prior consistent statement was made before the witness had a motive to fabricate or the occurrence of the event indicating a bias, the evidence may be admitted for the limited purpose of rebutting the claim of recent contrivance or bias. Guide §613(b).

F. Hearsay Issues

Massachusetts law defines hearsay as any out-of-court statement offered to prove the truth of the matter asserted therein. Guide §801. Article VIII addresses hearsay. Under Massachusetts law, a statement that is offered against an opposing party and was made by the party is not considered hearsay. Guide §801(d)(2)(A).

Unlike the FRE, in Massachusetts, a party's own statement (an admission), agent's statements, and co-conspirator's statements made in the course of and in furtherance of a conspiracy are all considered hearsay. Such statements are, however, admissible as exceptions to the hearsay rule if certain conditions are met. Likewise, prior inconsistent statements of a testifying witness that were made under oath at a grand jury proceeding are admissible if the statement was voluntary and can be corroborated. Guide §801. There are other important variations from the FRE with respect to hearsay statements in Massachusetts.

In Massachusetts, there are a number of hearsay variations from the FRE that apply when the declarant is available as a witness.

- Massachusetts has no present sense impression exception to the hearsay rule. Guide §803(1).
- Statements made for the purpose of medical diagnosis or treatment describing medical history, pain, symptoms, condition, or cause, but not the identity of the person responsible or legal significance of such symptoms or injury, are admissible. Guide §803(4)
- If the proper foundation is laid for past recollection recorded, the proponent may be allowed to admit the document or recording. Guide §803(5).
- There is no lack of Business Record exception to the hearsay rule. Guide §803(6).
- Hospital bills, records, and reports are admissible by statute with the requisite advance notice. Guide §803(6).
- The Family Pedigree exception is more limited than under the FRE. Guide §803(13).
- The Ancient Document exception requires that the material be 30 years old, not 20 years old as under the FRE. Guide §803(16).
- The Learned Treatise exception allows for parts of treatise to be used during cross or re-direct but not as part of the Plaintiff's case in chief. Guide §803(18).

- In the discretion of the court, statements from medical textbooks are admissible to prove malpractice if the author is an expert. Guide §803(18).

In Massachusetts, there are a number of hearsay variations from the FRE that apply when the declarant is unavailable as a witness.

- The Dying Declaration exception applies only to homicide cases; therefore, the declarant must actually die. Guide §804(b) (2)

- The Declaration Against Interest exception when offered to exculpate a criminal defendant is only admissible if there are corroborating circumstances that clearly indicate its trustworthiness. Guide §804(b) (3)

- While Massachusetts does not have a conventional Dead Man's Statute, its statutes are generous concerning the admissibility of a decedent's statement that would have otherwise been inadmissible hearsay for claims asserted against the decedent if the decedent's statements are shown to have been made in good faith with the decedent's first-hand knowledge. Guide §804(b)(5).

- Hearsay statements of a child under 10 are liberally treated in cases involving sexual contact if advance notice is given and the statements are corroborated. However, our courts give great respect to the accused's right to face-to-face confrontation guaranteed under the Massachusetts Declaration of Rights and the 6th Amendment. Also, the defendant's prior acts of child molestation may be admitted if they provide evidence of motive, opportunity, intent, common plan, scheme, or design (mimic rule). Guide §804(b) (8) and §804(b) (9).

Also, while there is no Present Sense exception to the Hearsay rule, there is a first complaint doctrine providing the admissibility of the sexual assault victim's initial report of sexual violence Guide §413.

G. Common Issues in Civil Cases

- In Massachusetts, evidence of the routine practice of a business organization or of one acting in a business capacity, if established through sufficient proof, may be admitted to prove that on a particular occasion the organization or individual acted in accordance with the routine practice. Guide §406.

- Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim: furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim or any other claim, and conduct or a statement made during compromise negotiations about the claim.

However, the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or other state of mind, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Guide §408.

- Statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to such person or to the family of such person shall not be admissible as evidence of an admission of liability in a civil action, thus making it permissible to say you are sorry without the statement becoming admissible. Guide §409(a).

- Any expression of benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of concern made by a health care provider, a facility, or an employee or agent of a health care provider or facility to the patient, a relative of the patient, or a representative of the patient, and that relates to an unanticipated outcome, shall not be admissible as evidence in a medical malpractice action, unless the maker of the statement, or a defense expert witness, when questioned under oath during the litigation about facts and opinions regarding any mistakes or errors that occurred, makes a contradictory or inconsistent statement as to material facts or opinions, in which case the statements and opinions made about the mistake or error shall be admissible for all purposes. Guide §409(c).

- When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. However, the court may admit this evidence for another purpose, such as impeachment or, if disputed, to prove ownership, control, or the feasibility of precautionary measures. Guide §407.

- The Uniform Photographic Copies of Business and Public Records Act allows photocopies of the records of certain public entities and businesses to be admitted into evidence overcoming both Best Evidence and any hearsay objections.

- Otherwise, to prove the terms of writing, where such terms are material, the Massachusetts' Best Evidence Rule is a strict one requiring the original to be produced or its loss satisfactorily explained. If original documents are available but are very lengthy or complicated, then Massachusetts law allows a summary of those documents to be admissible in evidence. Guide Article X.

H. Miscellaneous Important Massachusetts Evidentiary Matters

Article XI of the Guide, entitled Miscellaneous, goes far beyond its counterpart in the FRE by addressing important miscellaneous evidence or evidence-related topics including evidence relating to spoliation or destruction of evidence, special issues relating to criminal proceedings, and care and protection and termination of parental rights cases.

Spoliation: Massachusetts treats the spoliation or destruction of evidence in civil and criminal cases harshly. In civil cases, trial judges have broad discretion to fashion remedies for the intentional and even negligent spoliation of evidence by a party, often including instructions to the jury regarding the ability of jurors to draw an adverse inference from the loss of the evidence. Sanctions are appropriate where a reasonable person would appreciate the significance of preserving the evidence. Where an item of physical evidence has been lost, destroyed, or materially altered by an expert, an opposing party may be entitled to an order precluding the expert from testifying about the item before its disappearance or alteration and from expressing an opinion based on its earlier condition. Guide §1102.

In criminal cases where a defendant claims loss or destruction of evidence by the government, to make a constitutional due process claim, the defendant must first meet a burden of establishing a reasonable probability that access to the material would have produced evidence favorable to the defense. If the defendant meets that burden, the court then conducts a balancing test, taking into account government culpability, the materiality of the evidence, and the extent of prejudice in order to determine a remedy. A defendant has additional remedies where the Commonwealth has acted in bad faith or recklessly. Guide §1102.

Third-Party Culprit: A criminal defendant may offer evidence tending to prove that a third party committed the crime if the evidence has substantial probative value. Guide §1105. What would otherwise be inadmissible as hearsay may be admissible as third-party culprit evidence if:

- The evidence is relevant;
- The evidence will not tend to prejudice or confuse the jury; and
- There are other substantial corroborating factors indicating the commission of a crime by a third party.

Misconduct by Law Enforcement: Massachusetts treats misconduct by law enforcement in the gathering of evidence harshly. A criminal defendant may offer evidence that the police were given information they failed to investigate adequately, that police failed to conduct certain tests, or that police procedures were not followed to suggest that the police investigation of the crime was

inadequate and, thus, that the prosecution's evidence is unreliable or insufficient to prove guilt beyond a reasonable doubt. Guide §1107.

Evidence of out-of-court statements made to the police regarding a defense of inadequate investigation is not admissible to prove the truth of such statements unless admissible on an exception to the hearsay rule, but only received to prove what information the police had been given. When a defendant makes such a defense, the prosecution may rebut it by offering evidence, including hearsay, which explains why the police focused their investigation on the defendant.

Eyewitness Identification: Massachusetts has developed detailed rules for the use of eyewitness identification testimony that are far stricter than federal law. Massachusetts has determined that there are five principles pertaining to eyewitness identifications that are "so generally accepted" that they must be included in a jury instruction. Those principles are:

1. Human memory does not function like a video recording but is a complex process that consists of the stages of acquisition, retention, and retrieval;

2. An eyewitness's expressed level of certainty, by itself, may not indicate the accuracy of his or her identification;

3. High stress can reduce an eyewitness's ability to make an accurate identification;

4. A witness's recollection of the memory and the identification can be influenced by unrelated information that is received both before or after making that identification; and

5. A prior viewing of a suspect at an identification procedure may reduce the reliability of a subsequent identification procedure with the same suspect.

Guide §1112.

Care and Protection and Termination of Parental Rights: Massachusetts has detailed statutes relating to the rules of evidence in care and protection proceedings and the termination of parental rights cases. Many of the statutory provisions liberally provide for the admission into evidence of what would otherwise be subject to a hearsay or privilege challenge, including investigative reports, records of various public and private service providers, school records, police reports, treatment records, and court ordered evaluations and reports. Even multi-level hearsay may be received as evidence through these documents as long as the declarants are identifiable and there is a fair opportunity to rebut and attack that evidence. Guide §1115.

X. MASSACHUSETTS LEGAL ETHICS

A. Legal Ethics

1. Background

Lawyers admitted to practice or engaging in practice in Massachusetts are subject to the Supreme Judicial Court's disciplinary authority. See SJC Rule 4:01, §1(1). In 1971, the Supreme Judicial Court adopted the American Bar Association's (the "ABA's") Model Code of Professional Responsibility and Canons of Judicial Ethics, with some modifications based on prior Massachusetts practice. See SJC Rule 3:22, 359 Mass. 796 (1971). In 1997, Massachusetts joined most other states in adopting a version of the ABA's revised rules, the Model Rules of Professional Conduct (ABA Model Rules). The Massachusetts Rules of Professional Conduct and Comments (Mass. R. Prof. C. or Massachusetts rules) first became effective on January 1, 1998. See SJC Rule 3:07, 426 Mass. 1301, 1302-1434 (1998). The Massachusetts rules have been modified in significant ways since 1998. The current version of the Massachusetts rules can be found at massbbo.org/Rules.

The Massachusetts rules set forth ethical standards for the practice of law in Massachusetts and constitute a set of rules that all Massachusetts lawyers must follow. The Massachusetts rules govern lawyers' conduct in both their business and personal affairs. SJC Rule 4:01, § 3(1). For example, a lawyer is subject to discipline if he or she commits fraud in applying for a personal mortgage or is convicted of a crime involving conduct outside the practice of law. See, e.g., Matter of Barkin, 1 Mass. Att'y Disc. R. 18 (1977) (lawyer suspended for six months for failure to file income taxes). Massachusetts lawyers may also be disciplined for their conduct that occurs in other jurisdictions. For example, if a lawyer licensed only in Massachusetts engages in the unauthorized practice of law in another jurisdiction, the lawyer may be disciplined in Massachusetts. See, e.g., Matter of Ramos, 29 Mass. Att'y Disc. R. 554 (2013) (six-month suspension for unauthorized practice in Ohio). Massachusetts lawyers may also be disciplined for their conduct as fiduciaries, such as trustees, personal representatives of estates, or attorneys-in-fact pursuant to powers of attorney. See, e.g., Matter of Tracia, 31 Mass. Att'y Disc. R. 640 (2015) (lawyer disbarred for his extended scheme to steal money from his father, for whom he was serving as a fiduciary pursuant to a power of attorney).

The Massachusetts rules contain some significant differences from the ABA Model Rules. These differences are explored in the sections that follow.

In 1974, the Supreme Judicial Court issued rules concerning bar discipline and clients' security protection. See SJC Rule 4:01, 365 Mass. 696-714

(1974). The Court established the Board of Bar Overseers (the "BBO" or "the Board") to "consider and investigate the conduct of any lawyer within the court's jurisdiction" and to conduct disciplinary hearings concerning charges of lawyer misconduct. SJC Rule 4:01, §5(3). The Court also established the Office of Bar Counsel (the "OBC") to investigate complaints of professional misconduct by lawyers, and to pursue formal disciplinary charges before the BBO.

Massachusetts is a voluntary bar state, where membership in bar associations is not required. The Court chose not to require lawyers to join a statewide bar association responsible for attorney discipline. Instead, the Court created the BBO as an independent administrative tribunal tasked with bar licensing and disciplinary functions. See Massachusetts Bar Discipline: History, Practice, and Procedure, Board of Bar Overseers of the Supreme Judicial Court, pps. 1-5 (2018).

Lawyer registration fees are used to fund the bar discipline system and the Clients' Security Board (CSB). Registration fees also fund Lawyers Concerned for Lawyers (LCL) and LCL's Law Office Management Assistance Program (LOMAP), which are independent and unaffiliated with the BBO. No taxes are spent to support the bar discipline system. Through the CSB, payments to victims of lawyer theft are made solely from registration fees paid by lawyers. The disciplinary enforcement system in Massachusetts is described briefly below.

Guidance about the bar disciplinary system, the Massachusetts Rules of Professional Conduct, and other rules concerning bar discipline can be found on the Board of Bar Overseers website at massbbo.org.

The BBO website also contains articles on ethics; answers to frequently asked questions; disciplinary decisions dating back to 1999; and other resources. Massachusetts lawyers can also call an ethical helpline at the Office of Bar Counsel to speak with an assistant bar counsel for informal ethical advice.

2. Disciplinary Enforcement

The legal profession is largely self-regulating. Lawyers are responsible for observing the rules of professional conduct and for working to secure their observance by other lawyers. Ultimate authority over the legal profession is vested largely in the courts. See SJC Rule 3:07, Preamble to Mass. Rules of Professional Conduct, ¶9.

The Supreme Judicial Court has established a disciplinary system to investigate professional conduct complaints regarding Massachusetts licensed lawyers. The participants, process and types of disciplinary sanctions or resolutions are briefly described below. For more detailed information, see Massachusetts Bar Discipline: History, Practice, and

Procedure, supra. Also see SJC Rule 4:01, the Supreme Judicial Court's procedural rules on bar discipline, and the Rules of the Board of Bar Overseers, both available on the BBO website at massbbo.org/Rules.

3. Participants in the Disciplinary Process

a) Board of Bar Overseers

The Board of Bar Overseers was established by the Supreme Judicial Court in 1974. SJC Rule 4:01, § 5. The Board is an independent administrative tribunal that administers and oversees the disciplinary process, and holds responsibility for the registration of attorneys in Massachusetts. The Board is independent from the Office of Bar Counsel.
The Court appoints twelve volunteer members to serve on the Board for four-year staggered terms. Eight of the Board members are lawyers. The other four Board members are non-lawyers. The Board meets once a month. The Board, through its hearing committees and panels, hears and decides disciplinary charges and petitions for reinstatement to the bar. The Board also hears appeals from hearing committee decisions by the OBC and lawyers. The Board makes recommendations to the SJC to suspend or disbar attorneys, and to accept or reject petitions for reinstatement of previously suspended or disbarred attorneys. The Board has authority to impose public reprimands and admonitions (private discipline) and can decide to dismiss petitions for discipline filed by the OBC.

b) Hearing Committees

The Board appoints volunteer lawyers and laypersons to serve as hearing committee members or hearing officers. There are typically two lawyers and one non-lawyer appointed to each hearing committee. Occasionally the Board will appoint a lawyer to serve alone as a special hearing officer. Hearing committees and hearing officers conduct evidentiary hearings in formal disciplinary proceedings brought by the OBC against Massachusetts lawyers.

c) Office of the General Counsel

The Office of the General Counsel (the "OGC") acts as legal counsel to the Board and provides legal advice and guidance to the volunteer hearing committees. The OGC consists of four attorneys and two administrative staff members. The General Counsel does not offer legal advice to respondent lawyers. However, if a lawyer cannot afford to retain counsel and does not have a professional liability insurance policy that covers the defense of disciplinary

complaints, the General Counsel will seek to assist the lawyer in retaining counsel either at a reduced or at no cost. See BBO Rules, § 3.4(d).

d) Office of Bar Counsel

The Office of Bar Counsel (the "OBC") was established by SJC Rule 4:01, § 7, and functions independently of the BBO. The Bar Counsel is an independent prosecutor appointed by the Board with the approval of the SJC, who serves at the pleasure of the Court. SJC Rule 4:01, § 5(3)(b). Bar Counsel investigates complaints of professional misconduct by lawyers and prosecutes formal charges before hearing committees, special hearing officers, the Board, and the SJC. Assistant Bar Counsel are appointed by Bar Counsel with the concurrence of the Board to assist in the investigation and prosecution of ethical complaints, and also serves at the pleasure of the Court. Id. The OBC also employs a certified fraud examiner and other investigators. The OBC provides education and guidance to members of the bar by writing articles, posting information on the BBO website, speaking at continuing legal education programs, and operating an ethics telephone helpline for lawyers. The OBC also presents at programs for legal consumers and engages in other outreach efforts to the public about hiring a lawyer and managing the attorney/client relationship.

e) The Attorney and Consumer Assistance Program

The Attorney and Consumer Assistance Program (the "ACAP") is the intake unit of the OBE. ACAP resolves routine concerns or minor disciplinary issues without opening a disciplinary file and promptly refers matters that raise issues of more serious misconduct for investigation by Bar Counsel. Frequent complaints from clients to ACAP concern lack of diligence and failure to return client calls. ACAP attorneys and investigators resolve many consumer inquiries by providing information; discussing reasonable expectations and timetables in legal cases; suggesting alternative ways of dealing with the dispute; or making referrals to lawyer referral services, fee dispute resolution services, and legal services organizations. At the consumer's request, ACAP may also contact the lawyer to attempt to resolve issues such as the return of client files, refunds of unearned retainers, obtaining information on the status of ongoing matters, or similar matters. Where a lawyer returns the call from ACAP promptly, inquiries are often resolved without the initiation of a formal investigation.

f) Clients' Security Board

The Clients' Security Board (the "CSB") manages and distributes monies from the Clients' Security Fund to members of the public whose funds have been stolen by a Massachusetts lawyer acting as a lawyer or fiduciary. The CSB is authorized to reimburse a client only when the lawyer about whom a claim is filed has resigned, been disbarred or suspended by the SJC, or has died. The CSB is comprised of seven volunteer members appointed by the SJC. A portion of the annual registration fees paid by each lawyer registered to practice in Massachusetts is contributed to the Clients' Security Fund. The CSB has its own staff, consisting of two lawyers and one administrative staff member. The CSB is an agency independent of the BBO. The CSB maintains its own website and conducts its based on its own rules. Claim forms and information are available on the CSB website. See masscsb.org.

4. Summary of Disciplinary Process

Attorney and Consumer Assistance Program (the "ACAP"): Most telephone inquiries and written complaints are initially reviewed by ACAP. If a telephone inquiry cannot be resolved or if the misconduct alleged during the call is serious, ACAP sends a complaint form and asks the caller to file a written request for investigation with the OBC. Information about filing a complaint is available on the BBO website at massbbo.org/Complaints.

5. Bar Counsel Investigations

Bar Counsel is authorized to investigate all matters involving alleged misconduct by a lawyer coming to Bar Counsel's attention from any source. Where Bar Counsel determines that a matter is frivolous, falls outside of the jurisdiction of the BBO, or involves conduct that does not warrant further action, Bar Counsel has the discretion to decide not to investigate the matter. SJC Rule 4:01, §7(1).

Upon determining that a matter should be investigated, Bar Counsel notifies the lawyer, in writing, of the written complaint. The lawyer is required to respond to the complaint in writing and to cooperate in Bar Counsel's investigation. Failure to do so may constitute a separate act of misconduct and may result in the lawyer's immediate administrative suspension. SJC Rule 4:01, §3(2).

Bar Counsel may also request the issuance of investigatory subpoenas by the Board (SJC Rule 4:01, §22), in order to obtain production of evidence or testimony of witnesses.

With limited exceptions, Bar Counsel's investigations are confidential until the filing of a petition for discipline, although Bar Counsel is permitted to disclose information to the extent needed to conduct its investigation. SJC Rule 4:01, §20.

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. Lawyers may not, as a condition of settlement, compromise, or restitution, require a 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.

Complainants are immune from civil liability based on the complaints made to Bar Counsel. SJC Rule 4:01, §9(1). However, the complainant's immunity from suit only applies to communications to the Board or the Bar Counsel and does not apply to public disclosure of information contained in or relating to the complaint. *Id.* Similarly, complainants and witnesses who give sworn testimony or otherwise communicate with the Board or the Bar Counsel during any investigation or proceeding under Rule 4:01 are immune from civil liability based on their testimony or communications. The immunity from suit only applies to testimony or communications made to the Board or Bar Counsel. Immunity does 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).

6. Recommendation by Bar Counsel

After the investigation of a matter, Bar Counsel will recommend a disposition, which may include the following:

a) Closing

Bar Counsel may close a complaint because no violation of the rules of professional conduct has occurred, because the violation does not warrant discipline, or because no violation can be proved. Bar Counsel may also close a matter with a warning, or with stipulated conditions such as that the lawyer attend a continuing legal education class, return the file or fee, or participate in fee arbitration.

b) Diversion

For minor disciplinary violations, Bar Counsel may recommend diversion of the lawyer to an educational, remedial, or rehabilitative program. Common diversions are to continuing legal education courses and trust account training programs. Lawyers may also be diverted to Lawyers Concerned for Lawyers (LCL) or

the Law Office Management Assistance Program (LOMAP). For diversion to be offered as a resolution, the lawyer and Bar Counsel must enter into a formal diversion agreement, to be approved or modified by the BBO. At the successful conclusion of the diversion, the file will be closed.

c) Admonition

Bar Counsel may also recommend to the Board that an admonition be imposed for relatively minor disciplinary violations. The identity of the lawyer receiving an admonition is not made public. Admonition requests must be reviewed and approved by a member of the Board (Reviewing Board Member). If a lawyer seeks to contest the admonition, the lawyer must file a timely objection with the BBO and request a hearing. The matter is then assigned to a special hearing officer and proceeds to an expedited hearing. SJC Rule 4:01, §§8(2), 8(4). These proceedings are confidential.

d) Formal Proceedings

Bar Counsel may file a petition for discipline with the Board with a recommendation that formal proceedings be initiated. The petition for discipline must set forth the specific charges of alleged misconduct and the rules that Bar Counsel alleges were violated. A Reviewing Board Member may approve, reject, or modify the recommended action. If the Reviewing Board Member concludes that, if proved, the alleged misconduct would warrant public discipline, Bar Counsel will file and serve the petition for discipline. SJC Rule 4:01, §§ 8(1), 8(3).

e) Public Discipline Imposed by Agreement

If Bar Counsel and the lawyer agree that there has been a violation warranting public discipline and agree on a sanction, a petition for discipline, an answer, and a stipulation of the parties are submitted directly to the full Board. SJC Rule 4:01, § 8(1). If the Board accepts a joint recommendation for public reprimand, the Board will issue the reprimand. If the Board accepts a joint recommendation for suspension, resignation, or disbarment, an Information, consisting of the administrative record, will be filed with the Supreme Judicial Court for the County of Suffolk. SJC Rule 4:01, § 8(3)(c). The matter will then be assigned to a Single Justice for imposition of the appropriate sanction, if any.

f) Resignations under Disciplinary Investigation

At any time during a disciplinary investigation, a lawyer may resign from the bar by submitting an affidavit of resignation. SJC Rule 4:01, §15; BBO Rules, §4.1.

In order to resign while under investigation, the lawyer must affirm that the resignation is voluntary and not the subject of coercion or duress, and that the lawyer is waiving the right to a disciplinary hearing. The lawyer must acknowledge the pending investigation, and specifically describe the allegations of misconduct made by Bar Counsel. The lawyer must also affirm that the factual allegations made by Bar Counsel are true, or that the material allegations can be proven by a preponderance of the evidence, and that the lawyer violated the rules charged by Bar Counsel.

Generally, the lawyer and Bar Counsel negotiate the terms of the affidavit and file the affidavit jointly. The Board will vote whether to recommend approval of the resignation and the matter will be forwarded to the Court for entry of a judgment. In most instances, the Court will accept the resignation and disbar the lawyer. Where the underlying conduct would not have warranted a sanction of disbarment, the resignation will be accepted as a disciplinary sanction. In either event, a lawyer is prohibited from seeking reinstatement until three months prior to the expiration of at least eight years from the allowance of a resignation. SJC Rule 4:01, §15.

7. Disciplinary Hearings

If a matter is not otherwise disposed of and a Reviewing Board Member concludes that, if proved, the misconduct alleged in Bar Counsel's petition would warrant public discipline, Bar Counsel will serve a petition for discipline and the matter will move to disciplinary hearing. SJC Rule 4:01, §§ 8(1)(c), 8(3). The record of proceedings before the BBO is public upon the service of a petition for discipline, with a few exceptions articulated in the rules. SJC Rule 4:01, §20; BBO Rules, §3.22.

8. Respondent's Answer

After Bar Counsel files a petition for discipline, the lawyer (respondent) is required to file a timely answer that admits or denies, specifically and in reasonable detail, each material allegation of the petition, and states clearly and concisely the facts and matters of law relied upon. The respondent is also required to include in the answer any facts in mitigation and a request for a hearing on mitigation. Failure to file a timely and complaint answer may result in the lawyer being defaulted. SJC Rule 4:01, §8(3)(a); BBO Rules, §3.15.

a) Public Hearings

After the respondent files an answer, the Board will assign the matter to a hearing committee or special hearing officer. The disciplinary hearing is open to the public, subject to any protective orders issued by the Board or the Court. BBO Rules, §3.22(c).

b) Standard of Proof

At the hearing, both Bar Counsel and the respondent are given the opportunity to present evidence and testimony. Bar Counsel bears the burden of proving the allegations of the petition for discipline. BBO Rules, §3.28. The respondent bears the burden of presenting and proving facts in mitigation. Matter of Patch, 466 Mass. 1016, 1018 (2013); Matter of Gustafson, 6 Mass. Att'y Disc. R. 140, 141 (1989). In Massachusetts, the standard of proof in attorney disciplinary matters is a preponderance of the evidence, not the higher standard of clear and convincing evidence used in many other jurisdictions. Matter of Mayberry, 295 Mass. 155, 167 (1936); Matter of Ruby, 328 Mass. 542, 547 (1952). See Massachusetts Bar Discipline: History, Practice, and Procedure, *supra,* at p. 2, note 10.

c) Evidentiary Issues

The admissibility of evidence at disciplinary hearings is governed by the rules of evidence observed in adjudicatory administrative proceedings pursuant to Mass. G. L. c. 30A (Administrative Procedures Act). BBO Rule, §3.39. As set forth in Mass. 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."

d) Issue Preclusion

The usual rules of issue preclusion or collateral estoppel are applied to bar disciplinary proceedings. Bar Counsel v. Board of Bar Overseers, 420 Mass. 6 (1995).

9. Post-Hearing Proceedings

Following the hearing, the hearing committees file hearing reports with the Board, setting forth their findings of fact and rulings of law and, where relevant, recommendations for discipline.

a) Appeals to the Board

The parties may appeal from the hearing report and request oral argument before the Board. The Board will review the hearing report even if neither party appeals. The Board has the authority to revise findings of fact and conclusions of law that it determines to be erroneous. The Board may also adopt or modify the recommendation of the hearing committee. However, the hearing committee, hearing panel, or special hearing officer is the "sole judge of the credibility of the testimony presented at the hearing." SJC Rule 4:01, §8(5). The Board may decide to dismiss the petition, or to impose an admonition, at which point the record will be sealed. The Board may also impose a public reprimand. If the Board recommends a suspension, disciplinary resignation, or disbarment, or if either party appeals, the matter will proceed to a Single Justice of the Supreme Judicial Court.

b) Single Justice

The Single Justice has authority to impose, modify, or reject the proposed discipline, to remand the matter to the BBO, or to report it to the SJC full bench. The Single Justice may schedule a hearing where Bar Counsel and the respondent appear for oral argument. The subsidiary facts found by the Board and reported to the SJC must be upheld if supported by substantial evidence. SJC Rule 4:01, §8(6).

c) Full Court

Bar Counsel, the respondent, or the Board may appeal the decision of the Single Justice. Appeals are subject to expedited procedures set forth in SJC Rule 2:23. The SJC generally decides the appeal on the papers, without oral argument. However, the Court may invite the parties to file full briefs and await oral argument before the full bench.

d) Suspensions

The Court may suspend a lawyer's license during disciplinary proceedings, after disciplinary proceedings, or for reasons independent of the disciplinary process.

(1) Temporary Suspensions:
Bar Counsel may seek an order of immediate temporary suspension if a lawyer poses "a threat of substantial harm to clients or prospective clients," or if a lawyer's whereabouts are unknown. SJC Rule 4:01, §12A. The Court will give notice to the lawyer and will schedule a hearing to determine whether to suspend the lawyer

for the protection of the public. Bar Counsel is then expected to file a petition for discipline pursuant to SJC Rule 4:01, §8(3) within a reasonable time. See Matter of Ellis, 425 Mass. 332, 339 (1997).

(2) Administrative Suspensions:
The Court may administratively suspend a lawyer's license without hearing under certain circumstances.

Massachusetts lawyers are required to file annual registration statements with the BBO, including the lawyer's current home and office addresses, and a business email address. Other registration information required by the Court includes designation of IOLTA accounts and disclosure as to whether the lawyer carries professional liability insurance. Lawyers are required to file supplemental statements of any change in the information submitted within fourteen days of such change (including change of address and business email). SJC Rule 4:02, §(1). Lawyers are also required to pay annual registration fees pursuant to SJC Rule 4:03. If a lawyer fails to pay the annual registration fee, or fails to timely register or file a supplemental registration statement of any change in the information previously submitted on a registration statement, the Board may file a petition with the Court for the lawyer's administrative suspension without a hearing pursuant to SJC Rule 4:02, §(3), and SJC Rule 4:03, §(2).

If a lawyer fails, without good cause, to comply with a subpoena validly issued by the BBO, to respond to requests for information made by the Bar Counsel or the Board in the course of processing a complaint, or to file an answer to a petition for discipline, the lawyer will be administratively suspended without a hearing upon Bar Counsel's filing with the Court a petition for administrative suspension, in accordance with the procedures set forth in SJC Rule 4:01, §3(2).

If a lawyer fails to complete the Practicing with Professionalism course required by SJC Rule 3:16 within the time limits set forth by that Rule, the BBO may file a petition for the lawyer's administrative suspension without a hearing. SJC Rule 3:16, §4.

(3) Term Suspensions and Indefinite Suspensions:
Following formal disciplinary proceedings, the Court may suspend a lawyer's license for a specified term of months or years, or indefinitely. A lawyer who is indefinitely suspended may not seek reinstatement until three months prior to five years from the effective date of the suspension. SJC Rule 4:01, §18(2)(b). The Court may also enter an order staying the suspension for a specific term, or partially staying the suspension, subject to various

probationary conditions. See, e.g., Matter of Kydd, 25 Mass. Att'y Disc. R. 341 (2009) (three-month suspension, stayed for one year, subject to conditions).

(4) Reinstatement from Disciplinary Suspensions:
The length of the suspension affects the reinstatement process.

(5) Short-Term Suspensions:
A lawyer who is suspended for six months or less may seek reinstatement at the end of the term of suspension by filing an affidavit with the Court and Bar Counsel affirming that the lawyer has complied with the order of suspension, paid all costs imposed in the disciplinary process, and reimbursed the Clients' Security Board for any funds it paid out on the lawyer's behalf. The lawyer will be automatically reinstated unless Bar Counsel files an objection within ten days, at which point the Court will hold a hearing to address the objection. SJC Rule 4:01, §§18(1)(a), (c).

(6) Suspensions for More Than Six Months and Not More Than One Year:
A lawyer suspended for more than six months must file the affidavit described in paragraph (5) above, and must sit for and pass the Multi-State Professional Responsibility Exam (MPRE) to be eligible for reinstatement. SJC Rule 4:01, §18(1)(b).

(7) Suspensions for More Than One Year:
A lawyer suspended for more than one year, disbarred, or who has resigned pursuant to SJC Rule 4:01, §15, must pass the MPRE, complete a detailed reinstatement questionnaire, and petition for reinstatement. SJC Rule 4:01, §§18(2), (4), (5).

e) Reciprocal Discipline

Where a Massachusetts lawyer has been disciplined in another jurisdiction where they are also licensed to practice law, Massachusetts generally imposes reciprocal discipline.

Massachusetts lawyers are required to report to the BBO and to Bar Counsel any public or private discipline received from another disciplinary authority, or from a state or federal court or administrative body or tribunal, within ten days from the issuance of the order imposing the sanction. SJC Rule 4:01, §16(6). Failure to report discipline from another jurisdiction may prevent the lawyer from having the Massachusetts sanction run retroactive to the original sanction date in the other jurisdiction. See, e.g., Matter of Sheridan, 449 Mass. 1005, 1008 (2007) (lawyer's suspension not retroactive to date of New Hampshire suspension order

because lawyer failed to report New Hampshire discipline to the Board and Bar Counsel).

A Massachusetts lawyer is also required to notify the BBO and Bar Counsel if the lawyer is denied admission to the bar of another jurisdiction, including any state or federal court or administrative body or tribunal, for reasons other than failure to pass the bar examination, within ten days from the issuance of the decision to deny admission. SJC Rule 4:01, §16(7).

Bar Counsel will notify the Board and the SJC upon receipt of a public reprimand order, or its equivalent, that discipline has been imposed on a Massachusetts lawyer in another jurisdiction. The order is then filed with the Court and made public to the same extent as a public reprimand issued by the Board or the Court. SJC Rule 4:01, §16(4).

Upon receipt of a certified copy of a suspension order or a resignation or disbarment order from another jurisdiction, Bar Counsel will file a Petition for Reciprocal Discipline with the SJC. The SJC will issue a notice directing the respondent lawyer to inform the Court within thirty days of any claim or argument why the Court should not impose identical discipline in Massachusetts. SJC Rule 4:01, §16(1). After hearing, the Court "may enter such order as the facts brought to its attention may justify." SJC Rule 4:01, §16(3).

A judgment of suspension or disbarment from another jurisdiction will be conclusive evidence of the misconduct unless 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." SJC Rule 4:01, §16(3).

The Court will generally impose identical discipline to that imposed by the other jurisdiction "unless (a) imposition of the same discipline would result in grave injustice; (b) the misconduct established does not justify the same discipline in this Commonwealth; or (c) the misconduct established is not adequately sanctioned by the same discipline in this Commonwealth." SJC Rule 4:01, §16(3).

f) Criminal Convictions

A lawyer who is convicted of a crime must report the conviction to Bar Counsel within ten days. SJC Rule 4:01, §12(8). For purposes of this Rule, the term "conviction" includes any guilty verdict or finding of guilt, any admission to or finding of sufficient facts, and

any plea of guilty or *nolo contendere* that was accepted by the court, whether or not a sentence has been imposed. SJC Rule 4:01, §12(1). The Rule applies to convictions for felonies and misdemeanors, and to convictions occurring in other state or federal jurisdictions.

If a lawyer is convicted of a "serious crime," as defined in the rule, the Court may enter an order of immediate temporary suspension after a show cause hearing, regardless of any pending appeal. The Court will then refer the matter to the Board to take appropriate action, which may include investigation by the Bar Counsel or commencement of formal disciplinary proceedings. SJC Rule 4:01, §12(4).

A "serious crime" under the Rule includes any felony, and any lesser crime where a necessary element of the 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).

The Court may refer matters involving convictions of a lawyer for crimes that are not "serious crimes" to the Board to take appropriate action, which may include investigation by Bar Counsel or the institution of a formal disciplinary proceeding. SJC Rule 4:01, §12(5).

A conviction for any crime is conclusive evidence of the commission of the crime in any disciplinary proceeding against the lawyer based on the conviction. SJC Rule 4:01, §12(2).

B. Massachusetts Rules of Professional Conduct C. 1.5: Fees

The Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.) are based generally on the ABA Model Rules. The Massachusetts rules, however, contain some significant differences that are outlined below.

1. Overview

Mass. R. Prof. C. 1.5 and ABA Model Rule 1.5 both govern the fees that lawyers may charge their clients. While the ABA Model Rule requires fees to be reasonable, the Massachusetts rule rather prohibits "illegal or clearly excessive fees." Disciplinary case law in Massachusetts establishes that a fee may be clearly excessive for a variety of reasons, including where a lawyer bills for an unreasonable number of hours (Matter of Fordham, 423 Mass. 481 (1996)), bills legal rates for non-legal services (Matter of Moran, 479 Mass. 1016 (2018)), or collects a contingent fee on

a non-contingent recovery (Matter of Landry, 31 Mass. Att'y Disc. R. 374 (2015)). Comment [1A] to Mass. R. Prof. C. 1.5 explains that although fees must be clearly excessive or illegal to violate the rule, only "reasonable" fees may be enforced against the client.

Like the ABA Model Rule, the Massachusetts rule requires that fee arrangements be communicated by the lawyer to the client, regulates the division of fees between lawyers, and prohibits contingent fees on certain matters. On the other hand, in contrast to the ABA rule, the Massachusetts rule:

- Requires, with limited exceptions, that lawyers communicate the basis or rate of the fee and expenses, and scope of the representation, to the client *in writing;*
- Permits lawyers to divide fees with the written consent of the client *whether or not* the split is proportional to the services performed;
- Sets forth very specific requirements for contingent fee agreements and presents fee agreements that may be used to satisfy those specific requirements.

2. Unique Provisions of the Massachusetts Rule

a) Requirement of a Writing

Mass. R. Prof. C. 1.5(b) provides that: "(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."

Unlike ABA Model Rule 1.5(b), which states that a written communication concerning the legal fee is preferable, the Massachusetts rule requires a writing for the vast majority of representations. It *requires* that the lawyer inform the client in writing of the scope of the representation, the rate or basis of the fee, and the expenses for which the client will be responsible before or within a reasonable time of commencing the representation. A written fee agreement signed by lawyer and client is almost always a preferable way of memorializing the

terms of the representation, but this subsection does not go that far. Comment [2] to the rule notes that "[f]urnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the scope of the representation and the basis or rate of the fee is set forth" and that "[o]rdinarily, the lawyer should send the written fee statement to the client before any substantial services are rendered."

The exceptions to the writing requirement, set forth in 1.5(b)(2), are very limited. Those are a single session consultation, a representation for which the total fee is less than $500 and an indigent representation fee imposed by the court.

b) Fee Division Between Lawyers

Mass. R. Prof. C. 1.5(e) governs the division of a single billing of fees between lawyers who are not affiliated in a law firm:

"A division of a fee [in Massachusetts] 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."

A division of fees facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist." Comment [7]. In other instances, non-affiliated lawyers may divide fees because they are working on a matter collaboratively.

While the ABA Model Rule requires that the lawyers split the fee in proportion to the services performed, the Massachusetts rule does not require any proportionality, thereby allowing a lawyer to collect a referral fee whether or not that lawyer actively participates in the matter. A referring lawyer, however, "should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter." Comment [7].

Both the Massachusetts Rule and the ABA Model Rule require that the client be informed that the fees will be divided and consent in writing to a division, but in contrast to the ABA Model Rule, the Massachusetts rule does not require that the client be informed of or consent to the actual share each lawyer will receive. Comment [7A]. However, if the client requests information about the

division of fees, the share of each lawyer must be disclosed. *Id*. If the client does not give written assent to the fee split, all lawyers who receive a portion of the fee will have engaged in a violation of Rule 1.5(e).

Under both the Massachusetts and the ABA Model Rules, the total fee collected by the lawyers in any matter must be reasonable. See Massachusetts Comment [1A] and Matter of Kerlinsky, 406 Mass. 67 (1989) (lawyer violated former version of Rule 1.5(e) by withholding an additional 15% of tort recovery to pay for services of an out-of-state attorney where the client did not receive full disclosure and did not give his prior consent to the arrangement). Comment [3] to the Massachusetts rule notes that contingent fees "are subject to the not-clearly-excessive standard of paragraph (a) of this Rule" and that "[a]pplicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee."

Rule 1.5(e) "does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm." Comment [8].

c) Substance of Contingent Fee Agreements

Mass. R. Prof. C. 1.5(c) and (f) concern the required terms of contingent fee agreements. As is true of the ABA Model Rules, a contingent fee agreement must be in writing, must be signed by the client and must explain the method and calculations by which the fee will be determined. But, as explained below, the Massachusetts rule has provisions not found in the ABA Model Rules, including very precise requirements for the terms of contingent fee agreements.

First, the Massachusetts rule creates an exception to the requirement of a written fee agreement for contingent fee arrangements involving the collection of commercial accounts and insurance subrogation claims.

Second, the rule has a specific provision regarding the maintenance and delivery of the fee agreement. It requires that the fee agreement be signed in duplicate, with one copy given to the client, and that the lawyer retain a copy of the signed fee agreement for six years following the conclusion of the matter along with proof that another copy was delivered or mailed to the client.

Third, Mass. R. Prof. C. 1.5(c) is explicit about terms and provisions that the agreement must include, two of which, paragraphs (7) and (8) below, are intended to address fee conflicts that may develop when an attorney/client relationship in a contingent fee case ends prior to the resolution of the matter and another lawyer assumes the representation. Some of the Massachusetts requirements set forth below also appear in the ABA Model Rules, but the Massachusetts requirements are generally more exacting:

- 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 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;
- 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 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 other formula to the recovery amount not including such attorney's fees;
- 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;
- 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
- 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.

As Comment [3A] notes, in further explaining subparts (7) and (8), a "lawyer must inform the client at the time representation is undertaken if there is a possibility that a legal fee or other payments will be owed" under circumstances other than the occurrence of the contingency. A lawyer may not pursue a *quantum meruit* recovery or payment for expenses advanced if such a provision does not appear in the contingent fee agreement. Comment 9 adds that when fee disputes do arise, "the lawyer should conscientiously consider submitting to mediation or an established fee arbitration service."

d) Contingent Fee Agreement Sample Forms

Massachusetts Rule 1.5(f) provides two fee agreements (Form A and Form B) that may be utilized to satisfy the requirements of Rule 1.5(c). If the lawyer includes terms in a contingent fee agreement that materially differ from, or add to, those in the model fee agreements, the lawyer is required when representing individuals (but not entities) to explain those terms specifically to the client and obtain the client's informed consent, confirmed in writing, to the terms. Mass. R. Prof. C. 1.5(f)(3).

The differences between Form A and Form B are explained in Comment [11] and are summarized as follows:

- 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 B contains certain alternative provisions that must be explained to the client and to which the client must give informed consent confirmed in writing. Confirmation in writing, where required, may be satisfied by the client's initialing the option elected.
- Form A, paragraph 2, contains a standard provision 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 A provides that the lawyer will advance expenses and that the client is not liable for repayment other than from amounts collected. Paragraph 3 of Form B contains two options for advances and payment of expenses. The first option applies if the lawyer agrees to advance expenses and the client is not liable for those expenses other than by reimbursement from amounts collected for the client. (Note that Mass. R. Prof. C. 1.8(e)(1) permits repayment by the client

of court costs and expenses of litigation to be contingent on the outcome of the matter.) The second option applies if the client is liable for any expense other than from amounts collected for the client and requires the lawyer to explain these options to the client and specify those expenses and how they will be paid. The client must assent in writing and may do so by initialing the option selected.

- Paragraph 7 of Forms A and B apply when the lawyer is successor counsel in a contingent fee case. 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. Form B includes this paragraph but also provides a second option imposing the responsibility for these matters on the client. The lawyer using Form B must explain these options to the client and have the client initial, or otherwise confirm in writing, the option selected by the lawyer.

e) Required Time and Expense Information

Finally, Mass. R. Prof. C. 1.5(c) includes, in an unnumbered paragraph following paragraph (c)(8), a requirement not found in the ABA Model Rules, which pertains particularly, although not exclusively, to contingent fee agreements that are terminated before the matter is concluded. Like subparagraphs (7) and (8), above, this provision is intended to facilitate the resolution of any fee disputes between original and successor counsel when the contingency occurs. Thus, at any time prior to the occurrence of the contingency, either upon the termination of the attorney-client relationship or receipt of a written request from the client in an ongoing relationship, the attorney must provide the client with a written itemized statement of services rendered and expenses incurred. A lawyer need not provide the statement if the lawyer informs the client in writing that she will not seek entitlement to a fee or expenses if the relationship is terminated before the conclusion of the fee matter.

3. Conclusion

Mass. R. Prof. C. 1.5 may look a bit daunting to a new practitioner, but it is designed to protect both clients and lawyers from the issues that often arise when fee agreements are not in writing and the parties have different memories of the arrangement. Rule 1.5(c) likewise protects all the parties from situations in which the competing fee claims of original and successor counsel in contingent fee matters are not clear from the outset. A lawyer who wants to keep things as simple as possible in a contingency case may just use the "off-the-shelf" Form A; those desiring a more nuanced approach may use Form B or create their own contingent fee

agreement but must review Rule 1.5(f) very carefully in order to give the necessary explanations to their clients.

C. Mass. R. Prof. C. 1.6: Confidentiality of Information

1. Overview

In the course of representing a client, an attorney obtains or otherwise receives information relating to the representation of the client that is to be held by the attorney in confidence. Mass. R. Prof. C. 1.6 defines what information is confidential and the circumstances as to when and how an attorney can disclose such information. The Massachusetts rule is similar fundamentally to the ABA Model Rule 1.6. However, Massachusetts elaborates on the ABA Model Rule in several important aspects.

Generally, both the ABA Model Rule and Massachusetts rule prohibit an attorney from revealing the information obtained relating to the representation of the client unless the client gives informed consent, or the disclosure is impliedly authorized in order to carry out the representation. Where the Massachusetts rule begins to deviate is in modifying the scope of what qualifies as protected information and the circumstances under which an attorney may be permitted to disclose the information absent a client's informed consent or implied consent.

2. Definition of Information

The ABA Model Rule prohibits disclosure of "*information*" relating to the representation, where the Massachusetts rule prohibits disclosure of "*confidential information*." Comment [3A] to the Massachusetts rule defines the "confidential" modifier to limit information "gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the lawyer has agreed to keep confidential." It does not include "(i) a lawyer's legal knowledge or legal research, or (ii) information that is generally known in the local community or in the trade, field[,] or profession to which the information relates.

The Comment further clarifies that "generally known" includes information that is widely known and offers the example that information contained in a public document that is given widespread publicity qualifies as generally known, but is not if not given widespread publicity.

3. Disclosure

Paragraph (b) presents exceptions to the prohibition on revealing confidential information. The ABA Model Rule and the Massachusetts rule each have seven exceptions, but they vary in several important details.

First and foremost, the Massachusetts rule uses the opportunity to reference other rules of professional conduct, notably Rules 3.3, 4.1(b), 8.1, and 8.3, all of which have provisions relating to the disclosure of confidential information. Specifically, although the exceptions to confidentiality set forth in Rule 1.6(b) are generally permissive, i.e., an attorney has discretion to reveal such information under certain conditions to the extent that the attorney believes the disclosure is necessary to accomplish one of the purposes specified, disclosure becomes mandatory if required by one of the other rules referenced. Absent such a mandate, an attorney's decision not to disclose as permitted under Paragraph (b) does not violate the rule.

The essential interests behind the seven exceptions are to prevent or mitigate harm, to address or establish a legal claim, to secure legal advice, to avoid ethical conflicts, and to comply with a rule, law, or court order.

Subsection (b)(1) of the ABA Model Rule permits disclosure "to prevent reasonably certain death or substantial bodily harm." The Massachusetts rule expands that protection to include preventing "wrongful execution or incarceration of another." The expanded section recognizes the overriding values of life and physical integrity.

Subject to narrow limitations, subsection (b)(2) of the ABA Model Rule permits disclosure "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." The Massachusetts rule removes some of the limitations and expands the protectable interests; specifically, the crime or fraud can be by anyone and need not be related to using the attorney's services. Massachusetts further expands the protectable interests to include substantial injury to "other significant interests of another," in addition to financial or property interests. Interests that are not property or financial may, for example, include parental rights, voting rights, or various first amendment rights.

Subsection (b)(3) of both the Model and Massachusetts rules permits disclosure to prevent, mitigate or rectify substantial injury to certain interests of another. As in subsection (b)(2), Massachusetts subsection (b)(3) expands the protectable interests to include substantial injury to "other significant interests of another," in addition to financial or property interests. Under both the Massachusetts and ABA Model Rules, disclosures are limited to those situations where the substantial harm is the result of the client's actions and was furthered by the attorney's services.

The last significant distinction in Massachusetts Rule 1.6(b) is in subsection (b)(7). Where the ABA Model Rule permits disclosure "to detect and resolve conflicts of interest arising from the lawyer's change of employment," the Massachusetts Rule clarifies that such disclosure may

occur earlier in the employment process, adjusting the language to "potential change of employment." This distinction may be helpful when an attorney is considering joining a new firm, merging two or more firms, or acquiring the law practice of another attorney. In each case, the information disclosed may only be to the extent necessary to detect and resolve conflicts of interest, only once substantial communications concerning the employment have occurred, and only if it would not compromise the attorney-client privilege or otherwise prejudice the client.

Finally, Massachusetts Rule 1.6 adds subsection (d), which is not contained in the ABA Model Rule. Subsection (d) establishes that any attorney participating in a lawyer assistance program, as defined by the rule, shall treat the people assisted as clients for purposes of Massachusetts Rule 1.6.

D. Mass. R. Prof. C. 1.8, 1.9: Conflicts of Interest

1. Overview

Mass. R. Prof. C. 1.8, entitled "Conflict of Interest: Current Clients: Specific Rules," and Mass. R. Prof. C. 1.9, entitled "Duties to Former Clients," follow the ABA Model Rules except in one significant respect.

Specifically, the Supreme Judicial Court has retained from a prior version of the ABA Model Rules the prohibitions in Rule 1.8(b) and Rule 1.9(c)(1) against using confidential information relating to client representation for the benefit of a third party or for the lawyer's own benefit. The corresponding ABA Model Rules have deleted these restrictions.

The Massachusetts version of Rule 1.8(b), with emphasis added to show how the rule differs from the ABA Model Rules, therefore provides:

> "(b) A lawyer shall not use confidential information relating to representation of a client to the disadvantage of the client or for the lawyer's advantage or the advantage of a third person, unless the client gives informed consent, except as permitted or required by these Rules."

Similarly, the Massachusetts version of Rule 1.9(c)(1), showing the language that differs from the ABA Model Rules, provides:

> "(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use confidential information relating to the representation to the disadvantage of the former client, or for the lawyer's advantage, or the

> advantage of a third person, expect as Rule 1.6, Rule 3.3, or Rule 4.1 would permit or require with respect to a client; ... ."

As a Comment to Rule 1.8(b) clarifies, whether the lawyer is using confidential information relating to the representation to the disadvantage of the client or for the lawyer's advantage or the advantage of a third person such as another client or a business associate of the lawyer, the use violates the lawyer's duty of loyalty to the client. Rule 1.8, Comment [5]. Under Mass. R. Prof. C. 1.8(b) and 1.9(c)(1), a lawyer is prohibited from using confidential information for the benefit of the lawyer or some third party even if it causes no harm at all to the client or former client, without first getting the client's informed consent confirmed in writing.

E. Mass. R. Prof. C. 1.10: Imputed Disqualification

1. Overview

Imputed or vicarious disqualification is the term used to describe a situation in which an entire law firm (private law firm, corporate/organizational legal department, legal services organization) is disqualified from a representation because one lawyer in the firm is personally disqualified based on a conflict of interest. The problem of imputed disqualification is addressed in Mass. R. Prof. C. 1.10. The principal concepts of the Massachusetts rule are the same as those in ABA Model Rule 1.10. There is, however, a sharp difference in how an exception to the rule is implemented, and it is that difference that is the focus of this summary.

Both the ABA Model and the Massachusetts versions of Rule 1.10 have as their central premise that a law firm is one lawyer for purposes of the rules governing loyalty to a client and, thus, for purposes of determining conflict of interest. See Comment [6] to Mass. R. Prof. C. 1.10 (Comment [2] to the ABA Model Rule). A firm is prohibited from representing a client when any member of the firm would be prohibited from doing so under Mass. R. Prof. C. 1.7 or 1.9, the general conflict of interest rules for conflicts with current and former clients. Mass. R. Prof. C. 1.10(a). The Massachusetts rule further clarifies that lawyers employed by the Public Counsel Division of the Committee for Public Counsel Services (CPCS), and lawyers assigned to represent clients by the Private Counsel Division of CPCS, are not considered to be associated. It also contains a helpful expansion in Comments [1] - [4] of the definition of a "firm."

Both the ABA Model Rule and the Massachusetts rule allow an exception to the general disqualification rule if the prohibition is based on a personal interest of the disqualified lawyer that does not affect the representation of the client by other firm members. Mass. R. Prof. C. 1.10(a). An obvious illustration would be that a whole firm should not be prohibited from representing a client when an individual firm lawyer would be prohibited

from representation because of lack of competence in a particular field of law. Another example might be that one lawyer has strong political or personal beliefs that might make it impossible for that lawyer to represent the client, but it would not affect other lawyers in the firm.

Both the Massachusetts rule and the ABA Model Rule also allow an attorney's former firm to represent a client with interests adverse to those of a client who had been represented by the departed attorney, as long as the matters are not the same or substantially related and no remaining firm lawyer has material confidential information. Mass. R. Prof. C. 1.10(b).

Finally, both the Massachusetts rule and the ABA Model Rule also allow an exception to the general disqualification rule in certain circumstances arising from a personally disqualified lawyer's association with a prior firm, if that lawyer is screened from participation in the representation. Here, however, is where the significant difference between the two rules occurs. Although the two rules differ somewhat in particulars as to how a screen is implemented, the critical difference between them is as to the circumstances under which a screen is permitted, with Massachusetts taking a narrower approach. The Massachusetts rule on screening is discussed below.

2. Screening in Massachusetts (Mass. R. Prof. C. 1.10(d) and (e))

The screening process usually comes into play when a law firm makes a lateral hire and the new lawyer had been, or the new lawyer's former firm is or had been, on the opposite side of an ongoing matter from the new firm. The problem can also arise in other situations; for example, the new firm may be retained by the adverse party only after the lateral hire has joined the new firm.

a) Prerequisites

Pursuant to Mass. R. Prof. C. 1.10(d), a firm cannot undertake or continue to represent a client in a matter that is the same or substantially related to a matter in which the lawyer who joins the firm (the "personally disqualified lawyer"), or that lawyer's former firm, previously represented (or the former firm continues to represent) a client whose interests are materially adverse to a client of the new firm, unless:

- The personally disqualified lawyer has no material information protected by Rule 1.6 or 1.9 (paragraph (d)(1)); or
- The personally disqualified lawyer did not have involvement or information sufficient to provide a substantial benefit to the new firm's client <u>and</u> is screened from participation and receives no part of the fee from the case (paragraph (d)(2)).

Paragraph (d)(1) is the critical place where the Massachusetts rule diverges from the ABA Model Rule. The ABA Model Rule permits screening regardless of the level of involvement by the personally disqualified lawyer at that lawyer's former firm, while the Massachusetts rule does not permit screening if the disqualified lawyer has material information. The disqualification of the new firm can, however, be waived if the former client gives informed consent confirmed in writing. Mass. R. Prof. C. 1.10(c).

b) Screening Process

For purposes of Mass. R. Prof. C. 1.10 (as well as for Mass. R. Prof. C. 1.11 and 1.12 on conflicts for former or current government employees and former judges or other third-party neutrals), a personally disqualified lawyer is deemed per Mass. R. Prof. C. 1.10(e) to have been screened if:

- All material information in the disqualified lawyer's possession is isolated from the new firm;
- The disqualified lawyer is isolated from contact with the new firm's client and any witnesses;
- The disqualified lawyer and the new firm are precluded from discussing the matter with each other;
- The former client of the disqualified lawyer receives a detailed notice describing, among other required content, the screening procedures; and
- The disqualified lawyer and the new firm reasonably believe that the screening will be effective in preventing material information from being disclosed to the new firm and its client.

3. Conclusion

Screening is not a permissible option if the lateral hire was involved in the prior representation to a degree sufficient to provide a substantial benefit to the new firm's client or has confidential information sufficient to do the same. Absent consent from the former client, the firm in this circumstance is disqualified. Mass. R. Prof. C. 1.10, Comment [8].

Even if the prerequisites for screening theoretically can otherwise be met, screening is not an option for the firm if it is not reasonable to believe that it will be effective. Realistically, screening is primarily a possibility for large firms. It is likely not feasible for small firms, where it probably would not be reasonable to believe that a screen can be effective. Mass. R. Prof. C. 1.10, Comment [10].

If the lateral hire has no confidential or protected information about the matter from the former firm, the new firm is not disqualified and no screening procedures are required. Lateral hires must, however, search

their recollections and files before making this determination. Mass. R. Prof. C. 1.10, Comment [9]. See also Mass. R. Prof. C. 1.6(b)(7) permitting a limited exception to confidentiality requirements for purposes of detecting conflicts of interest arising from a lawyer's change of employment.

F. Mass. R. Prof. C. 1.14: Client with Diminished Capacity

1. Overview

Massachusetts made substantial changes to the conceptual approach of Rule 1.14 to clients with diminished capacity as a result of the difficult case of Care and Protection of Georgette, 439 Mass. 28 (2003). The primary problem in the underlying case was that counsel for two minor children did not want to advocate for their expressed custodial preference because the lawyer believed it was not in their best interests to live with their physically and psychologically abusive parent. The overall thrust of the changes in the comments to the rule was to tell lawyers that they could use "substituted judgment" in advocating for the client with diminished capacity; *i.e.*, inform the court what the client would do if the client could make an adequately considered decision about the issue, as one of multiple options when advocating for a client with diminished capacity. See Comment [7].

There were minor changes to the text of Rule 1.14(a) and (c). However, Rule 1.14(b) added authority for a lawyer to act if the lawyer reasonably believes that the client's diminished capacity "prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation." The lawyer's authority to act is limited to a situation where the lawyer reasonably believes there is a "risk of substantial physical, financial or other harm unless action is taken" and the client cannot adequately act in the client's own interest.

2. Unique Provisions of Massachusetts Rule

Massachusetts made substantial changes in certain comments to Rule 1.14:

> Comment [3] to both the ABA Model Rule and the Massachusetts rule recognizes that the client with diminished capacity may wish to have family members or other persons participate in discussions with the lawyer. Under Comment [3] of the ABA Model Rule, a lawyer is warned to keep the client's interests foremost, and except when taking protective action authorized by Rule 1.14(b), the lawyer "must look to the client, and not family members, to make decisions on the client's behalf." This language is deleted from Comment [3] to Massachusetts rule. Instead, the Massachusetts comment permits the lawyer to consult with family members "even though they may be personally interested in the situation."

However, Comment [3] to the Massachusetts rule adds a warning that "[b]efore the lawyer discloses confidential information of the client, the lawyer should consider whether it is likely that the person or entity to be consulted will act adversely to the client's interests." Comment [3] then acknowledges that decisions under Rule 1.14(b) about whether and to what extent to consult or to disclose confidential information are "matters of professional judgment on the lawyer's part."

Comment [4] to both ABA Model Rule 1.14 and the Massachusetts rule recognizes that if a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. However, Comment [4] to the Massachusetts rule deletes the sentence in the ABA Model Rule comment authorizing a lawyer to look to the parents as natural guardians in certain cases involving minors. Therefore, although parents may be consulted under Massachusetts Rule 1.14(b) and Comment [3], subject to the limitations of those sections, they are not accorded the same authority under Comment [4] as appointed legal representatives for minor clients. They are no longer the first source for the lawyer to consider when trying to ascertain the best interests of the client with diminished capacity. The Massachusetts comment adds references to Rules 1.6 (disclosure of confidential information); 3.3 (candor to a tribunal); and 4.1 (truthfulness in statements to third persons).

Comment [6] adds that the lawyer should consider "whether a client has diminished capacity that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation."

Comment [7] to the Massachusetts rule replaces the ABA Model Rules comment and gives the lawyer four options if "a client is unable to make an adequately considered decision regarding an issue, and if achieving the client's expressed preferences would place the client at risk of a substantial harm." This is in response to the situation that arose in Care and Protection of Georgette, *supra*.

The options are:

- advocate the client's expressed preferences regarding the issue;
- advocate the client's expressed preferences and request the appointment of a guardian ad litem or investigator to make an independent recommendation to the court;
- do not advocate the expressed preference, and request the appointment of a guardian ad litem or next friend to direct counsel in the representation; or

- exercise "substituted judgment"; i.e., determine what the client's preferences would be if he or she were able to make an adequately considered decision regarding the issue and represent the client in accordance with that determination. If exercising substituted judgment, the lawyer will ordinarily inform the tribunal of the client's expressed preferences.

3. Conclusion

The primary difference with the ABA Model Rules Comment [7] is that Massachusetts gives clear options to the lawyer who disagrees with the client's "expressed preference" because of the "risk of substantial harm" to the client in doing so. Unlike the ABA comment, Massachusetts Comment [7] allows the lawyer to exercise substituted judgment and advocate that position, or to request a guardian ad litem who, after evaluation, will direct the lawyer.

G. Mass. R. Prof. C. 1.15: Safekeeping Property

1. Overview

Mass. R. Prof. C. 1.15, entitled "Safekeeping Property," sets forth the standards and guidelines under which Massachusetts attorneys are required to manage client and third-party property, including in particular client and other fiduciary funds held in trust accounts. The one type of property excepted from this rule is client files, which are the subject of a separate rule, Rule 1.15A.

The focus of this section is the strict record-keeping requirements for trust funds described in Rule 1.15. It is important to note in this respect that the Massachusetts version of Rule 1.15 is very different from the ABA Model Rule. Both rules have the same overarching mandate that fiduciary funds must be maintained separate from the lawyer's own funds, *i.e.*, no commingling of trust funds with personal funds is permitted. Both also include the further directive that the intended recipients of such funds are entitled to prompt delivery of the money and a full accounting.

The Massachusetts rule, however, contains very detailed instructions as to specific required operational requirements and record keeping that the ABA Model Rule does not. These additional mandates are intended to ensure that lawyers can document the amount currently held for each client or matter and that the account is regularly reconciled. Failure to maintain compliant records, often leading to negligent misuse of funds, is one of the most common ways that Massachusetts attorneys can find themselves facing serious disciplinary problems.

2. Definitions

a) Trust Property

Trust property includes both tangible personal property—jewelry, for example—and funds. Trust property is defined by Rule 1.15(a) to mean "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." The record-keeping requirements of the rule are therefore not limited to funds of just clients.

Trust funds are not fungible. Client funds and other trust monies can only be used for the matter for which the attorney is holding the funds.

b) Trust Funds

Among the monies that are to be treated as trust funds, the obvious examples are settlement funds or payments of judgments from claims or lawsuits, mortgage proceeds, and deposits on sales of real estate, as well as other traditional receipts. Also included, however, are funds held by the lawyer in a fiduciary capacity, such as personal representative, executor, guardian or conservator, or escrow agent.

In addition, and very importantly, legal fees and expenses that have been paid in advance must be held in a trust account and withdrawn only as fees are earned or as expenses are incurred. Mass. R. Prof. C. 1.15(b)(3). Thus, retainers—advance fees paid by clients to be earned in the future on an hourly or other basis—are required to be deposited to a trust account, as are advances for costs such as filing fees, medical records, and depositions. There is an exception for flat fees, described in the next paragraph.

c) Funds other than Trust Funds

Funds that are not trust funds are not permitted to be held in a trust account. Most obviously, personal funds of an attorney cannot be maintained in a trust account. This prohibition includes fees paid in arrears, that is, fees paid for services that have already been rendered at the time of payment. These fee payments must be deposited to a business or personal account.

Similarly, 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." Mass. R. Prof. C. 1.15(b)(2)(ii). Thus, a check for the settlement of a personal injury case from which the attorney is due a contingent fee must be deposited to a trust account. Once the client has received an accounting and been paid, the attorney's fees and expenses must also be withdrawn in full.

The same strictures apply to retainers. Once the client has been billed in accordance with the requirements of Rule 1.15(d), the funds must be withdrawn from the trust account.

d) Flat Fees

Flat fees occupy a gray area as to whether or not they are trust funds. Comment [2A] to Rule 1.15 defines a flat fee as "a fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal services, whether relatively simple and of short duration, or complex and protracted." The Massachusetts rule, unlike the rules in some other jurisdictions, does not require a flat fee to be deposited to a trust account, but if it is, it is subject to all provisions of the rule, including paragraphs (b)(2), (d)(2), and (f).

Attorneys often prefer to charge flat fees in certain types of practice such as criminal defense and immigration. Note, however, that there is no such thing as a nonrefundable fee and that any portion of a flat fee that is not earned must be refunded as required by Mass. R. Prof. C. 1.16(d), regardless of whether the fee was initially deposited to a trust account or a business or personal account.

e) Nondelegable Duty

Compliance with Mass. R. Prof. C. 1.15 is a nondelegable duty. An attorney or firm may choose to assign the task of maintaining trust account records to a secretary, office manager, bookkeeper or accountant. However, the lawyer still must establish, be familiar with, supervise and ensure that the operation of the trust account complies with the requirements of the rule. The lawyer is not absolved of responsibility for the proper handling of the account by the fact of hiring a bookkeeper or other person to keep the records. In addition, when a firm dissolves, the partners are required to make reasonable efforts to ensure that trust account records are maintained as required by Rule 1.15. Mass. R. Prof. C. 1.15(f)(4).

Note, too, that a lawyer who receives trust funds is required to maintain at least one other account (business or personal) for funds

received and disbursed other than as a fiduciary. Mass. R. Prof. C. 1.15(f)(2).

f) Notice, Delivery, and Accounting

Upon receipt of trust funds or other trust property in which a client or third party has an interest, a lawyer is required to promptly notify such person and to deliver the funds or other property to which the person is entitled. Mass. R. Prof. C. 1.15(c).

Pursuant to Rule 1.15(d), a lawyer is required to provide clients and third parties for whom the lawyer holds trust property with a full written accounting regarding such property in two circumstances:

- Upon final distribution of the trust property or upon request at any time. See also Mass. R. Prof. C. 1.5(c), the rule on fees, imposing similar requirements at the conclusion of a contingent fee case but further requiring a lawyer to provide a written itemized statement of services rendered and expenses incurred even when the contingency has not occurred but either the attorney/client relationship has terminated or the client has made a written request for such an accounting.
- On or before a date when funds are withdrawn from a trust account to pay fees, the lawyer must send the client an itemized bill or other accounting showing services rendered, the amount and date of the withdrawal, and the balance of the client's funds in the trust account following the withdrawal. Note in particular that Comment [6A] to Rule 1.15 requires lawyers representing themselves as fiduciaries to create a bill or other accounting prior to or contemporaneous with paying themselves.

g) Types of Trust Accounts

With one very narrow exception discussed briefly below, all trust funds must be held in one of two types of interest-bearing accounts, an individual account or a pooled IOLTA account. Mass. R. Prof. C. 1.15(e)(6). Trust funds can only be maintained in financial institutions that have filed an agreement with the Board of Bar Overseers to report any checks drawn on the account that are dishonored because of insufficient funds. Mass. R. Prof. C. 1.15(h)(1).

(1) IOLTA accounts

The term IOLTA is an acronym for "Interest On Lawyers' Trust Accounts." An IOLTA account is a pooled account for holding the funds of multiple unrelated clients. The interest earned on an

IOLTA account is withdrawn automatically from the account and paid by the financial institution directly to the IOLTA Committee, appointed by the Supreme Judicial Court. The IOLTA Committee in turn distributes the funds received to the Massachusetts Legal Assistance Corporation (MLAC) and other designated charitable entities for delivery of civil legal services to those who cannot afford them and for the improvement of the administration of justice; See Mass. R. Prof. C. 1.15(g) (5). IOLTA accounts may be established only in financial institutions certified as eligible by the IOLTA Committee. Most major banks are approved, but, for a complete list, see the link at maiolta.org.

Trust funds must be deposited to an IOLTA account if, in the judgment of the lawyer, the money will either be held for a short period of time or is nominal in amount. For example, funds from settlements and judgments, or from real estate closings, are generally held short-term and thus are deposited by lawyers to an IOLTA account until disbursed.

(2) Individual trust accounts

These are single-purpose trust accounts with interest payable as directed by the client or third person for whom the funds are held. In general, trust funds should be deposited to an individual trust account if the money will be held for a period of time sufficient to earn an amount of interest for the recipient that outweighs the administrative cost to the lawyer of establishing a separate account. There are, however, certain types of trust funds that, because of the ongoing nature of the attorney's undertaking over months or years, must always be deposited to an individual trust account, regardless of the amount of interest that will be earned. Such funds are not held "for a short period of time" and cannot be deposited to an IOLTA account. Examples include accounts for the estate of a decedent or a trust for which the attorney is trustee.

(3) Conveyancing Accounts

There is one narrow exception in Rule 1.15(e)(5) for the establishment of a pooled trust account that is not interest-bearing. These accounts may be opened by a lawyer representing a lending bank in real estate transactions. The account must be opened at the lending bank and used exclusively for depositing and disbursing funds for that bank's transactions. Although it is not required, this type of account is also permitted to be an IOLTA account earning interest for the IOLTA Committee and most lending banks do not object if it is set up as such.

3. Operational Requirements for Trust Accounts

In addition to describing the different types of permissible trust accounts, Rule 1.15(e) also sets forth requirements for establishing and maintaining these accounts.

An IOLTA account held by a lawyer whose office is in Massachusetts must be maintained in Massachusetts; again, the financial institution must be certified as eligible by the IOLTA Committee. Individual trust accounts may be maintained outside Massachusetts with the consent of the client or third party for whom the funds are held.

The lawyer must submit written notice to the financial institution for each trust account opened, confirming that the account holds trust funds as defined by Mass. R. Prof. C. 1.15 and specifying the bank name, account number, and type of trust account, *i.e.*, individual or IOLTA. The notice must be signed by both the bank and the lawyer and the lawyer must retain a fully executed copy. Forms for opening an IOLTA account (called an Attorney's Notice of Enrollment) may be found on the IOLTA Committee website or obtained by contacting the IOLTA Committee.

The title of each trust account must indicate the fiduciary nature of the account by including words such as "trust account," "IOLTA account," "client funds account," "escrow account," "estate account," or other terms to the same effect. This title should also appear on the printed checks.

If a withdrawal from a trust account is made by check, the check must be pre-numbered and not a counter check. Withdrawals by wire or electronic funds transfer are also permitted. No withdrawal can be made by ATM or in cash and no withdrawal can be made by a check payable to "cash," "bearer," or any other method that does not identify the recipient. The reason for these requirements is that there needs to be a trail, paper or electronic, that shows who was paid the funds and where the money went.

Every withdrawal from a trust account to pay an attorney's fees must be payable to the lawyer or law firm. A lawyer cannot remit funds in the trust account owed to the lawyer as fees directly from the trust account to the lawyer's own creditors. To do so would be commingling, in violation of Rule 1.15(a). Thus, a lawyer wishing to make a payment for his or her home mortgage or a child's school tuition must first transfer funds to the lawyer's personal account and then pay the lender or the school from the personal account.

4. Required Accounts and Records

The record-keeping requirements for attorney trust accounts are set forth in Mass. R. Prof. C. 1.15(f). These records must be retained for six years after the termination of the representation and distribution of the property.

The requirements are very straightforward as long as certain basic information is routinely and consistently entered into the check register of either an IOLTA or individual trust account. In essence, attorneys are required to keep a detailed check register for both IOLTA and individual trust accounts, as well as an individual ledger for each client or matter for which funds are held in an IOLTA account, and then to reconcile these items to each other and to the bank statements.

When compliant records are kept, attorneys will know at a glance what the current balance is for any given client or case and how that balance was calculated. Most attorneys use any of numerous software programs that are available for this purpose, although manually kept records may be sufficient for an account with very limited activity. Trust account records that are kept electronically, however, are required to be backed up to an appropriate storage device and must be maintained in a form that can be printed to a hard copy. Mass. R. Prof. C. 1.15(f)(1)(G).

The following are the record-keeping requirements set forth in paragraph (f):

a) Account Documentation

The attorney must maintain a record of the name and address of the financial institution, account number and title, opening and closing dates, and type of trust account (IOLTA or individual). In addition, the attorney is required to retain:

- bank statements provided by the bank;
- other transaction records sent by the bank such as canceled checks and records of electronic transactions; and
- records of deposits separately listing each deposited item and the name of the client or matter for whom the deposit is made. Thus, a deposit ticket for a deposit of $500 that consists of three separate checks must say $100 (Mary), $150 (John), and $250 (George).

b) Check Register

The attorney must maintain a register recording in chronological order:

- the date and amount of every deposit;
- the date, check or transaction number, amount and payee of every disbursement, whether by check, wire, electronic funds transfer or other means;
- the date and amount of every other credit or debit, such as IOLTA interest paid and then withdrawn, wire fees, and new check charges;

- the identity of the client or matter for whom funds were deposited or disbursed; and
- the current balance in the account.

It is particularly critical to make sure that the client or matter is always identified for every deposit or withdrawal. Negligent failure to do so is a mistake that has been made by many attorneys facing disciplinary issues for noncompliant record keeping. Among other reasons that client identity is so critical is that it is this information that computer software programs use to create client ledgers. Especially when using a software program, lawyers also need to make sure to denominate the client or matter consistently, that is, do not write "George Smith" one time and "Smith, George" the next time; the computer may view these entries as separate cases. Identifying clients or matters with a case number is a possible solution.

c) Individual Ledgers

The lawyer must also create an individual ledger for every client matter, or other matter for which the lawyer holds trust funds, showing each receipt and disbursement and the current balance. The balance can never be negative; if it is, a mistake has been made that must be corrected. In effect, the ledger is an accounting for a case as of the date of the last entry. The rule requires a ledger for each matter, not merely each client. For example, if the lawyer handles multiple real estate closings for a lender client, or numerous collection cases for a creditor client, a separate ledger is required for each closing or collection case.

d) Bank Fees and Charges Ledger

Pursuant to Mass. R. Prof. C. 1.15(b)(2)(i), a lawyer may retain his or her own funds reasonably sufficient to pay bank charges in the trust account. The lawyer, if depositing his or her own funds for that limited purpose, must maintain a ledger listing each deposit and expenditure of the lawyer's funds in the account, as well as a running balance.

e) Reconciliation Reports

A reconciliation report is required to be prepared periodically for every trust account (individual or IOLTA) no less frequently than every 60 days. In general, and unless the account is rarely used, it is best to reconcile the account every month, when the monthly bank statement is received. For very active accounts with large balances, such as some accounts used for real estate closings, it may even make sense to reconcile the account more frequently.

Reconciliation reports must show the following balances and confirm that they match:

- Check register balance as of the date of the report;
- Adjusted bank statement balance, determined by adding checks and other deposits that have not yet been credited to the bank statement balance and subtracting outstanding checks and other debits that have not yet cleared; and
- For IOLTA or conveyancing accounts (but not individual trust accounts), the combined total of the balances in all individual ledgers including the bank charges ledger.
- Thus, if the attorney's IOLTA account ledgers show that the attorney holds $100 for Mary, $200 for Fred, and $300 for George, plus $50 in the bank charges ledger, the combined total of the ledgers ($650) needs to match the check register balance on the reporting date and also match the bank statement balance when adjusted for deposits not yet credited and disbursements not yet cleared. This undertaking is often referred to as a three-way reconciliation.

H. Mass. R. Prof. C. 1.15A: Client Files

1. Overview

Administrative issues relating to client files are a concern to all attorneys, whether in large firms, small firms, or solo practices. What does the "file" consist of, and which documents or papers have to be retained? For how long? Is the client entitled to a copy of the file? Even if legal fees and expenses are unpaid?

Mass. R. Prof. C. 1.15A, effective September 1, 2018, answers these questions. It is a rule that has no equivalent in the ABA Model Rules, although some other states have also adopted rules on these points. Although nothing in the rule mandates that a lawyer destroy a file if permitted to do so (See Comment [9]), the implementation by a lawyer or law firm of a policy on file retention and destruction, on an ongoing basis and upfront, will assist lawyers when they change firms, retire, or face any other career transition. It will also help families and estates when lawyers die. And it will be a boon to all lawyers and law firms with storage issues.

2. Client's Entitlement to File

Paragraph (a) of Rule 1.15A defines the "client file." Paragraph (b) then states that, upon request, the file must be made available to a client or former client within a reasonable time, conditioned on the client's paying out-of-pocket or copying costs for certain designated materials unless retention would unfairly prejudice the client. In addition, unless the lawyer and the client have entered into a contingent fee agreement, the

lawyer is only required to turn over copies of the lawyer's work product for which the client has paid. Mass. R. Prof. C. 1.15A(a) and (b).

As defined in the rule, the term "client file" includes items such as papers supplied to the lawyer by the client; correspondence (whether physical or electronic); pleadings; investigatory or discovery documents; intrinsically valuable documents such as wills, trusts, deeds and securities; and copies of the lawyer's work product. Work product is further defined as "documents and tangible things, prepared in the course of the representation … ." Because the person making the request is the lawyer's own client or former client rather than an opposing party, the definition is different from, and the obligation to turn over work product is broader than, that found in Rule 26(b)(3) of the Massachusetts Rules of Civil Procedure and case law.

Comments [1] through [5] explain further the items that fall within, and outside, the definition of client file, including that:

- The lawyer need not provide multiple copies or drafts of the same document, unless the matter is unfinished and the client and successor counsel require the drafts to complete the representation
- The lawyer's personal notes are not part of the file unless the notes are the only record of an event, such as a witness interview or a negotiation.
- Internal administrative documents, such as conflicts checks, billing and time records, and matters of administration, fall outside the definition of a client file. While these items may be subject to discovery, they ordinarily do not need to be supplied to the client or successor counsel who requests the file.

3. File Retention

If the conditions imposed by this rule are satisfied, the lawyer may destroy files in a manner consistent with the lawyer's obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9 and other applicable law. No notice to the client is mandated before the file is discarded, but Comment [1] to Rule 1.15A expressly encourages lawyers to address disposition of client files in the written engagement letter required by Rule 1.5(b)(1) and, in instances where particular arrangements for disposition or transfer have not been made, in the lawyer's final communication to the client at the conclusion of a matter.

Paragraphs (c) through (f) of Rule 1.15A describe the default standards for the periods of time that files for different types of legal matters must be retained:

In general, and unless the file has been transferred to successor counsel or the client, a lawyer in a civil case must retain a client's file for six years after the matter has been completed or the engagement has been terminated. Mass. R. Prof. C. 1.15A(c). If the client has not requested the file within that time, or within six years after a minor client reaches the age of majority, the file may be destroyed without further notice.

Different rules apply in criminal and delinquency cases. Where a client has been sentenced to death or life imprisonment, the file must be retained for the client's life. In other criminal cases, the lawyer must retain the file for ten years after the latest of the completion of the representation, the conclusion of all direct appeals, or the running of an incarcerated client's maximum period of incarceration. Mass. R. Prof. C. 1.15(f).

There are, of course, exceptions for both civil and criminal matters requiring that documents or the file be retained beyond the otherwise applicable time period:

- The most obvious exception is for intrinsically valuable documents, such as wills, that must either be returned to the client or kept until they no longer possess intrinsic value. Mass. R. Prof. C. 1.15A(d).
- Other exceptions include circumstances where there is a pending or anticipated lawsuit or other claim relating to the client matter; a criminal or other investigation related to the client matter; or a disciplinary investigation or proceeding related to the client matter. Mass. R. Prof. C. 1.15A(e).

4. Electronic Records

Comment [4] to Rule 1.15A clarifies that, in the ordinary course, files can be scanned or otherwise retained in electronic form. If a file has been scanned, the hard copy can be discarded at any time. The only exception is for situations where applicable law requires a particular document to be physically preserved for its legal effectiveness. The lawyer must, however, make reasonable efforts to store such electronic files in a form that can be read with available technology for any period during which the file must be retained.

I. Mass. R. Prof. C. 3.4: Fairness to Opposing Party and Counsel

1. Overview

Both the Massachusetts and ABA versions of Rule 3.4 contain a variety of provisions relating to fair competition in the adversary system, including such matters as prohibitions against destruction or concealment of evidence, improperly influencing witnesses, and obstructive discovery tactics. See Comment [1]. Massachusetts, however, has paragraphs

3.4(g), (h) and (i), which do not exist in the ABA Model Rules. These additional paragraphs are treated separately below.

2. Mass. R. Prof. C. 3.4(g)

Section (g) states that a lawyer may not "pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case," except a lawyer "may advance, guarantee, or acquiesce in the payment of:

- expenses reasonably incurred by a witness in preparing, attending or testifying;
- reasonable compensation to a witness for loss of time in preparing, attending or testifying; and
- a reasonable fee for the professional services of an expert witness."

The ABA Model Rules are silent on whether the lawyer can pay a witness for preparation time, and some states have decided the lawyer may therefore not do so.

Exceptions aside, Rule 3.4(g) thus expands and clarifies the provision in Rule 3.4(b) against offering an inducement that is prohibited by law. As Massachusetts Comment [5] says, compensation cannot be based on the content of the fact witness's testimony. However, compensation for lost time and expenses "reasonably incurred in preparing for or attending the proceeding" is permissible. Comment [5]. A lawyer may pay a fact witness for preparing for testimony, such as reviewing documents or meeting with the client or the lawyer. Compensation is not limited to time spent testifying (or waiting to testify) and travel time.

3. Mass. R. Prof. C. 3.4(h)

Section (h) states that a lawyer may not "present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a private civil matter." This provision was carried over and expanded by Massachusetts from the predecessor Model Code (DR7-105(A)) but was dropped by the ABA when it replaced the ABA Model Code with the ABA Model Rules. Rule 3.4(h) therefore goes beyond the requirement in Rule 4.4(a) prohibiting use of means with no substantial purpose other than to delay, embarrass, or burden a third party.

4. Mass. R. Prof. C. 3.4(i)

Section (i) states that, "in appearing in a professional capacity before a tribunal," a lawyer shall not "engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person. This paragraph does not preclude legitimate advocacy when race, sex, religion,

national origin, disability, age, or sexual orientation, or another similar factor is an issue in the proceeding."

The ABA Model Rule does not include this paragraph, but it should be compared to the ABA's recently adopted ABA Model Rule 8.4(g), which provides that a lawyer shall not:

> "(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules."

5. Unique Provisions of Massachusetts Rule

There are several key differences between Mass. Rule 3.4(i) and ABA Model Rule 8.4(g).

Mass. Rule 3.4(i) is limited to "in appearing in a professional capacity before a tribunal." ABA Model Rule 8.4(g) is not so limited, but instead refers more broadly to any "conduct related to the practice of law," whether or not in front of a court or other tribunal. Comment [4] to ABA Model Rule 8.4(g) explains the breadth of the ABA Model Rule:

> "[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations."

Second, ABA Model Rule 8.4(g) includes prohibitions against discriminatory conduct related to "gender identity, marital status or socioeconomic status," which are not present in Mass. Rule 3.4(i).

Third, ABA Model Rule 8.4(g) prohibits conduct "that the lawyer knows or reasonably should know is harassment or discrimination" on the basis of one of the prohibited categories. Mass. Rule 3.4(i) instead says that the lawyer "shall not" engage in the prohibited conduct, suggesting it is more like strict liability.

Fourth, Mass. Rule 3.4(i) expressly permits "legitimate advocacy when" a discriminatory "factor is an issue in the litigation." ABA Model Rule

8.4(g) similarly allows "legitimate advice or advocacy consistent with these Rules," so the boundaries are less clear under the ABA Model Rule than under the Massachusetts rule.

Comment [5] to ABA Model Rule 8.4(g) also clarifies what is not discriminatory conduct, that might pertain to the Massachusetts rule:

> "[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) [of ABA Model Rule 8.4] by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law."

In Massachusetts, however, facially race-based (or other discriminatory) peremptory challenges are improper. i.e., Commonwealth v. Soares, 377 Mass. 461, *cert. denied* 444 U.S. 881 (1979); Commonwealth v. Reid, 384 Mass. 247 (1981) (gender-based challenges; burden properly shifted to the party exercising the challenges to justify them).

J. Mass. R. Prof. C. 3.5(c): Communication With Jurors

1. Overview

In 2017, the SJC approved amendments to Mass. R. Prof. C. 3.5(c) on communications with jurors after discharge of the jury that conforms the rule and its comments to the notice requirements and other directives set forth in the Court's decision in Commonwealth v. Moore, 474 Mass. 541 (2016). As a result, Massachusetts revised the text of the rule, revised Comment [3] and added Comments [3A] and [3B].

2. Unique Provisions of Massachusetts Rule

The differences between the ABA Model Rule and Mass. Rule 3.5(c) can be clearly seen from the underlined versions below, which highlights the language added by Massachusetts:

"A lawyer shall not:

…

(c) communicate with a juror or prospective juror after discharge of the jury if:

> the communication is prohibited by law or court order;
>
> the juror has made known to the lawyer, either directly or through communications with the judge or otherwise, a desire not to communicate with the lawyer;

the communication involves misrepresentation, coercion, duress or harassment; or

the communication is initiated by the lawyer without the notice required by law[.]"

3. Comment [3]

As a result, Massachusetts revised Comment [3] to this rule and added comments [3A] and [3B]. The revision to Comment [3] is as follows, and makes clear that the lawyer may inquire into "extraneous influences" on jury deliberations but not into the deliberative process itself:

Comment [3]: A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. Subject to the notice requirements discussed below, the lawyer may do so unless the communication is prohibited by law or a court order. For example, in most cases common-law principles bar inquiry into the contents of jury deliberations and the thought processes of jurors, but not into extraneous influences. The lawyer must respect the desire of the juror not to talk with the lawyer. Where a juror makes known to the judge a desire not to communicate with the lawyer, and the judge so informs the lawyer, the lawyer may not initiate contact with that juror, directly or indirectly. The lawyer may not engage in improper conduct during the communication.

In addition, while the ABA says the lawyer "must respect the desire of the juror not to talk with the lawyer," Massachusetts frames it in much stronger terms, suggesting that the lawyer cannot try to change the juror's mind about not talking with the lawyer. Massachusetts comment [3A] sets forth the procedure to be followed if the lawyer wants to contact a juror. The ABA Model Rule and its comments, on the other hand, do not outline the procedure at all. The procedure to be followed in Massachusetts is as follows:

"[3A] If the lawyer wishes to initiate the communication with a juror or prospective juror after discharge of the jury, the lawyer must send notice of the lawyer's intent to initiate such contact to counsel for the opposing party or parties (or directly to the opposing party or parties, if not represented by counsel) five business days before contacting any juror. The notice must include a description of the proposed manner of contact and the substance of any proposed inquiry to the jurors, and, where applicable, a copy of any letter or other form of written communication the lawyer intends to send. The preferred method of initiating contact with a juror is by written letter, and the letter must include a statement that the juror may decline any contact with the lawyer or terminate contact once initiated. If the lawyer seeks to initiate contact through an oral conversation (whether in person, by telephone, or otherwise), the lawyer is nonetheless required to provide opposing counsel or opposing parties with

prior notice of the substance of the intended communication five business days before the contact is initiated. See Commonwealth v. Moore, 474 Mass. 541, 551-52 (2016)."

Unlike the ABA Model Rule and its comments, Massachusetts also says what a lawyer should do if the juror initiates contact with the lawyer:

"[3B] If the juror initiates the communication with the lawyer and seeks to communicate about permissible subjects, such as the existence of extraneous influences on the jury deliberation process or the lawyer's performance during the trial, the lawyer is permitted to communicate with that juror after discharge of the jury ... ."

The take-away points concerning the differences between the ABA and Massachusetts are as follows:

The Massachusetts revision to Comment [3] makes explicit that the lawyer may inquire into any "extraneous influences" on the jury but not "into the contents of jury deliberations and the thought processes of jurors."

a) Comment [3A] describes the process for lawyer-initiated communication:

- The lawyer sends notice five days in advance to opposing counsel or unrepresented opposing parties.
- The notice has to include the proposed manner of contact and the subject of any proposed inquiry.
- If proposing a written communication with the juror (which is preferred under the rule), then the lawyer provides a copy of the proposed letter.
- If oral communication is proposed, the lawyer must still provide five days' notice with the subject of any proposed inquiry.

b) Comment [3B] discusses juror-initiated communication:

- It has to be about permissible subjects, "such as the existence of extraneous influences on the jury deliberation process or the lawyer's performance during the trial." However, no notice to opposing counsel or parties is required.

K. Mass. R. Prof. C. 3.8(d): Special responsibilities of a prosecutor

1. Overview

Mass. Rule 3.8(d) concerning prosecutorial misconduct is identical to the ABA Model Rule and pertains to "evidence or information" that "tends to negate the guilt of the accused or mitigates the offense."

Rule 3.8(d) provides that a prosecutor shall "(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in

connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."

As explicated in ABA Formal Opinion 09-454, these duties go far beyond Brady v. Maryland, 373 U.S. 83 (1963). The differences between Brady and Rule 3.8(d) are as follows:

Requirements of *Brady V. Maryland*	**Requirements of Rule 3.8(d)**
Disclosure to be made upon request	Request is not required
Contingent timing; under *U.S. v. Ruiz*, 536 U.S. 622 (2002), disclosure does not have to be made before a guilty plea	Timely disclosure required
Defendant can waive the right to receive *Brady* materials	Prosecutor's obligations under Rule 3.8(d) cannot be waived
Disclosure of "evidence"; must be "material"	Disclosure required of evidence, and of information that may be inadmissible; no "materiality" required
Not limited to what the prosecutor knows	Applies only to what the prosecutor knows

2. Comment [3A]

"[3A] The obligations imposed on a prosecutor by the rules of professional conduct are not coextensive with the obligations imposed by substantive law. Disclosure is required when the information tends to negate guilt or mitigates the offense without regard to the anticipated impact of the information. The obligations imposed under paragraph (d) exist independently of any request for the information. However, regardless of an individual's right to disclosure of exculpatory or mitigating information in criminal proceedings, a prosecutor violates paragraph (d) only if the information required to be disclosed is known to the prosecutor as tending to be exculpatory or mitigating."

3. Conclusion

The take-away is that the obligations under Rule 3.8(d) are greater than under Brady and exist even without a request for disclosure.

Note that the obligations under Mass. R. Crim. Proc. 14 and the 2004 Reporters' Notes address the disclosure requirements in detail. As these exceed the requirements of Rule 3.8(d), it unlikely that a Massachusetts state court prosecutor will run afoul of Rule 3.8(d) by complying with Mass. R. Crim. Proc. 14.

L. Mass R. Prof. C. 6.1: Voluntary *Pro Bono Publico* Service

1. Overview

Mass. R. Prof. C. 6.1, entitled "Voluntary *Pro Bono Publico* Service," sets out an aspirational standard for each lawyer admitted to practice in Massachusetts to provide each year at least twenty-five (25) hours of *pro bono publico* legal services for the benefit of persons of limited means. The Massachusetts aspirational standard is less than that of ABA Model Rule 6.1, which recommends that lawyers provide at least fifty (50) hours of *pro bono* legal services each year. As the Massachusetts comments note, the lower number of hours specified in the Massachusetts rule is because the Massachusetts rule focuses only on legal activity that benefits those unable to afford access to the system of justice. Mass. R. Prof. C. 6.1, Comment [1].

Mass. R. Prof. C. 6.1(a) suggests that the lawyer should provide all or most of the 25 hours of services without compensation or expectation of compensation to persons of limited means or to charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means. The Rule suggests that lawyers may use any remaining hours to deliver legal services at substantially reduced compensation to persons of limited means, or to participate in activities for improving the law, the legal system, or the legal profession that are primarily intended to benefit persons of limited means.

Mass. Rule 6.1 recognizes that in some years a lawyer may provide greater or fewer than 25 hours of *pro bono* services to persons of limited means. However, over the course of a lawyer's career, the lawyer should average 25 hours each year of such services. Mass. R. Prof. C. 6.1, Comment [1].

Massachusetts permits a lawyer to make a financial contribution to organizations that provide or support legal services to persons of limited means, as an alternative to providing actual legal services. The suggested annual contribution is from $250 to 1% of the lawyer's annual taxable, professional income. Mass. R. Prof. C. 6.1(b).

M. Mass. R. Prof. C. 8.4: Misconduct

1. Overview

Mass. R. Prof. C. 8.4, entitled "Misconduct," contains two provisions not found in the corresponding ABA Model Rule. Those provisions, found at Mass. R. Prof. C. 8.4(g) and 8.4(h), state as follows:

"It is professional misconduct for a lawyer to:

(g) fail without good cause to cooperate with the Bar Counsel or the Board of Bar Overseers as provided in SJC Rule 4:01, §3; or

(h) engage in any other conduct that adversely reflects on his or her fitness to practice law."

Consistent with paragraph (g), SJC Rule 4:01, §3 further specifies that the following acts or omissions, if committed without good cause, constitute misconduct and shall be grounds for appropriate discipline:

- Failure to comply with a subpoena issued by the BBO pursuant to SJC Rule 4:01, §22;
- Failure to respond to requests for information by the Bar Counsel or the Board made in the course of processing a complaint made to the Bar Counsel;
- Failure to comply with procedures of the Board for the processing of a petition for discipline or the imposition of a public reprimand or admonition; or
- Failure to comply with a condition of probation or diversion to an alternative educational, remedial, or rehabilitative program.

See SJC Rule 4:01, §3(1). In addition, a lawyer's failure to file an answer to a petition for discipline as required by SJC Rule 4:01, §8(3), or to appear at a hearing before a hearing committee, special hearing officer or panel of the Board, also are examples misconduct set forth in SJC Rule 4:01, §3(2).

Massachusetts also retained the catch-all provision at Rule 8.4(h), as a separate basis for discipline. On numerous instances, the Court has found that lawyers have engaged in conduct that violated Rule 8.4(h) as well as other rules. See, e.g., Matter of Curry, 450 Mass. 503, 527 (2008) (citing cases where DR 1-102(A)(6), the predecessor version to Rule 8.4(h), had been applied to a variety of categories of misconduct, any of which also reflect adversely on the attorney's fitness to practice). Rule 8.4(h) also prohibits conduct that adversely reflects on a lawyer's fitness to practice law, even if the conduct does not violate the other subsections of Mass. R. Prof. C. 8.4. See Mass. R. Prof. C. 8.4, Comment [7].

N. Online Resources

1. Board of Bar Overseers
   massbbo.org/

   a) Rules
      massbbo.org/Rules

   b) Disciplinary Decisions
      massbbo.org/Decisions

   c) Articles on Ethics
      massbbo.org/Ethics

   d) Frequently Asked Questions
      massbbo.org/FAQ

   e) BBO Treatise
      massbbo.org/BBOTreatise

2. Clients' Security Board (SCB)
   masscsb.org/

3. Lawyers Concerned for Lawyers (LCL)
   lclma.org/

4. Law Office Management Assistance Program (LOMAP)
   masslomap.org/

5. IOLTA Committee
   maiolta.org/

6. Supreme Judicial Court and Appeals Court of Massachusetts
   ma-appellatecourts.org/search.php
   mass.gov/appellate-opinion-portal

7. Massachusetts Bar Association (includes MBA ethics opinions)
   massbar.org