

# Table of Contents

## CHAPTER 1. ROLE OF THE ATTORNEY

- § 1:2 Attorney-client relationship
- § 1:2.50 What decisions does my client get to make? *[New]*
- § 1:3 Attorney conduct, generally
- § 1:4 Attorney conduct—Disbarment
- § 1:5 Attorney conduct—Suspension
- § 1:6 Attorney conduct—Public censure
- § 1:7 Attorney conduct—Monetary penalty
- § 1:8 The role of the attorney in criminal cases—Right to counsel
- § 1:9 The role of the attorney in criminal cases—When right to counsel attaches
- § 1:11 The role of the attorney in criminal cases—Right to competent counsel
- § 1:13 The role of the attorney in criminal cases—Right to separate counsel
- § 1:14 The role of the attorney in criminal cases—Compensation of appointed counsel
- § 1:15 The role of the attorney in criminal cases—Discharge of appointed counsel
- § 1:16 The role of the attorney in criminal cases—Waiver of right to counsel
- § 1:17 The role of the attorney in criminal cases—Pro se representation
- § 1:22 Withdrawal of counsel—Civil actions
- § 1:23 Withdrawal of counsel—Criminal actions
- § 1:25 Conflict of interest—Criminal actions
- § 1:26 Contempt of court

## CHAPTER 2. THE TRIAL SYSTEM AND THE JUDGE

- § 2:3 Massachusetts court system and general trial conduct—The courts
- § 2:4 Massachusetts court system and general trial conduct—Exclusion of the public
- § 2:5 Massachusetts court system and general trial conduct—Impoundment of pleadings and papers
- § 2:6 Massachusetts court system and general trial conduct—Media coverage and publicity before and during trials
- § 2:7 Massachusetts court system and general trial conduct—Law applicable to cases arising outside of Massachusetts
- § 2:9 Massachusetts court system and general trial conduct—Recording devices
- § 2:10 Massachusetts court system and general trial conduct—Transcripts in criminal cases

- § 2:13 Judicial duty to preserve order
- § 2:15 General conduct of the judge—Demeanor
- § 2:16 General conduct of the judge—Avoiding bias
- § 2:17 General conduct of the judge—Judge and counsel
- § 2:18 General conduct of the judge—Questioning witnesses, defendants
- § 2:20 General conduct of the judge—Judicial misconduct
- § 2:23 Judge’s control of examination of witnesses
- § 2:25 Judicial questioning of witnesses
- § 2:26 Judicial ruling on admissibility of evidence
- § 2:28 Impartial medical experts
- § 2:29 Control of proceedings by pretrial order in civil cases
- § 2:32 Virtual hearings *[New]*

### **CHAPTER 3. MOTIONS DURING TRIAL**

- § 3:2 Motion to amend
- § 3:3 Motion to continue, civil
- § 3:5 Motion to continue, civil—Want of material evidence
- § 3:6 Motion to continue, criminal
- § 3:7 Motions to dismiss on pleadings, civil
- § 3:8 Motions to dismiss on pleadings, civil—Lack of jurisdiction
- § 3:9 Motions to dismiss on pleadings, civil—Failure to state a claim
- § 3:10 Motions to dismiss on pleadings, civil—Motion for judgment on the pleadings under 12c
- § 3:15 Motion to dismiss, criminal
- § 3:16 Motion for summary judgment
- § 3:17 Motion for default and removal of default judgment
- § 3:18 Motion to sever, criminal

### **CHAPTER 3A. MOTIONS TO DISMISS** *[New]*

- § 3A:1 Motions to dismiss—Criminal matters *[New]*
- § 3A:2 Motions to Dismiss for Lack of Probable Cause *[New]*

### **CHAPTER 4. CRIMINAL TRIALS**

- § 4:1 In general
- § 4:1.50 Covid-19: Impact on The Trial Court and The Response by Counsel *[New]*
- § 4:4 Criminal proceedings in Massachusetts—Guilty plea
- § 4:5 Criminal proceedings in Massachusetts—Competence to stand trial
- § 4:6 Initial appearance and arraignment
- § 4:6.50 Pretrial diversion statute *[New]*
- § 4:6.70 Dangerousness *[New]*
- § 4:8 Constitutional mandate of presence of defendant and counsel during criminal proceedings
- § 4:9 Probable cause hearing
- § 4:11 Delinquency proceedings against juveniles
- § 4:11.50 Youthful offender and motion. to dismiss *[New]*
- § 4:14 Conduct of parties and security in the courtroom

## TABLE OF CONTENTS

- § 4:15 Prosecution's failure to disclose exculpatory evidence
- § 4:16 Restitution in Criminal Cases *[New]*

## CHAPTER 5. CONTEMPT OF COURT

- § 5:1 Power of court to punish for contempt
- § 5:2 Civil and criminal contempt
- § 5:3 Proceedings for civil contempt
- § 5:7 Contemptuous acts—Attempts to improperly influence the judge or jury

## CHAPTER 6. SELECTION OF THE JURY

- § 6:1 Right to jury trial
- § 6:2 Right to fair and impartial jury
- § 6:3 Jury demand and waiver in civil action
- § 6:4 Jury waiver in criminal cases
- § 6:6 Selection of persons for jury service
- § 6:8 Confidential juror questionnaire
- § 6:12 Challenge to jury pool
- § 6:13 Irregularities in selection and summoning of jury
- § 6:14 Selection of jury—Generally
- § 6:14.50 Attorney assisted voir dire and panel voir dire (Superior Court) *[Retitled]*
- § 6:14.60 Attorney assisted voir dire and panel voir dire (District Court) *[New]*
- § 6:14.70 Attorney assisted voir dire and panel voir dire (Boston Municipal Court) *[New]*
- § 6:15 Challenge to array for prejudice
- § 6:16 Discrimination in the jury venire because of sex, race, religion
- § 6:17 Grounds for challenge for cause
- § 6:18 Judicial discretion in exclusion of jurors
- § 6:20 Time for making objections to jurors
- § 6:21 Conduct of voir dire examination
- § 6:25 Conduct of voir dire examination—Ability to render an impartial verdict
- § 6:26 Conduct of voir dire examination—Pretrial publicity
- § 6:27 Conduct of voir dire examination—Racial prejudice
- § 6:28 Conduct of voir dire examination—Sexual offenses
- § 6:29 Conduct of voir dire examination—Other highly emotional issues
- § 6:31 Peremptory challenges—Civil
- § 6:32 Peremptory challenges—Criminal
- § 6:33 Peremptory challenges—Race
- § 6:34 Peremptory challenges—Age
- § 6:35 Peremptory challenges—Ethnicity
- § 6:36 Peremptory challenges—Gender
- § 6:38 Alternate jurors
- § 6:39 Discharge of juror

## CHAPTER 7. OPENING STATEMENTS

- § 7:2 Content of opening statement

- § 7:3 Effect of opening statement
- § 7:4 Directed verdict on opening statement

## **CHAPTER 8. ORDER OF PROOF**

- § 8:1 Order of producing testimony
- § 8:2 Evidence in rebuttal
- § 8:3 Admission of evidence after party has rested
- § 8:5 Conditional admission of evidence

## **CHAPTER 9. BURDEN OF PROOF**

- § 9:2 Prima facie case
- § 9:3 Degree of persuasion in civil cases—Fair preponderance of evidence
- § 9:8 Allocation of burden of proof in civil cases
- § 9:9 When defendant bears burden of proof
- § 9:13 Allocation of burden of proof in criminal cases
- § 9:14 Interference with the lawful duties of a police officer *[New]*

## **CHAPTER 10. PROOF OF FACTS**

- § 10:1 Situations where proof is excused before trial
- § 10:2 Control of proceedings by stipulation
- § 10:4 Use of stipulations to excuse proof of facts

## **CHAPTER 11. WITNESSES**

- § 11:4 Habeas corpus ad testificandum
- § 11:5 Subpoena duces tecum
- § 11:7.50 Right to conduct *ex parte* interviews *[New]*
- § 11:8 Right of criminal defendant to confront witnesses
- § 11:9 Compensation of witnesses—Generally
- § 11:14 Exclusion, separation or sequestration of witnesses

## **CHAPTER 12. THE COMPETENCY OF A WITNESS TO TESTIFY**

- § 12:1 In general
- § 12:2 Time for objecting to competency
- § 12:5 Child
- § 12:6 Insane person
- § 12:7 Spouse—Disqualification as to private conversations
- § 12:9 Spouse—Presence of third party
- § 12:10 Spouse—Limits of disqualification
- § 12:10.50 Spouse—Testimony of parent and minor child *[New]*
- § 12:13 Attorney

## **CHAPTER 13. IMPEACHMENT OF WITNESSES**

- § 13:1 Impeachment of witnesses; generally
- § 13:5 Prior inconsistent acts or statements

## TABLE OF CONTENTS

- § 13:8 Prior inconsistent acts or statements—Former proceeding or deposition
- § 13:10 Bias or personal interest of witness
- § 13:12 Evidence of conduct
- § 13:14 Reputation in group of habitual associates
- § 13:15 Proof of prior conviction and manner of proving conviction
- § 13:17 Rehabilitating witness
- § 13:19 Pretrial silence *[New]*

## CHAPTER 14. EXAMINATION OF WITNESSES

- § 14:2 Direct examination—Leading questions
- § 14:3 Direct examination—Refreshing witness’s memory
- § 14:7 Cross-examination—Scope
- § 14:10 Cross-examination—Denial of right to cross
- § 14:11 Redirect examination—Scope
- § 14:14 Questioning of witnesses by jurors

## CHAPTER 15. PRIVILEGE

- § 15:1 Privilege; generally
- § 15:2 Spousal privilege
- § 15:3 Child-parent privilege/disqualification
- § 15:4 Privilege against self-incrimination—In general
- § 15:5 Privilege against self-incrimination—Invoking privilege against self-incrimination by witness
- § 15:6 Privilege against self-incrimination—Testimonial privilege of defendant in criminal proceedings
- § 15:10 Privilege against self-incrimination—When privilege against self-incrimination is lost
- § 15:11 Attorney-client privilege—In general
- § 15:12 Attorney-client privilege—Existence of attorney-client relationship
- § 15:13 Attorney-client privilege—Confidential nature of the communication between attorney and client
- § 15:14 Attorney-client privilege—Waiver and termination of attorney-client privilege
- § 15:15 Confidential communications between patient and physician or psychotherapist
- § 15:16 Privileged communications to journalists
- § 15:17 Privileged communications to clergyman
- § 15:20 Privileged communications to sexual assault counsellors
- § 15:25 Public records
- § 15:27 Medical peer review *[New]*
- § 15:28 Absolute litigation privilege *[New]*
- § 15:29 Absolute judicial deliberative privilege *[New]*

## CHAPTER 16. JUDICIAL NOTICE

- § 16:1 In general
- § 16:4 Domestic laws
- § 16:5 Federal and foreign law

- § 16:7 Court records and facts known through other trials
- § 16:11 Matters of common observation
- § 16:13 Medical and scientific facts

## **CHAPTER 17. PRESUMPTIONS**

- § 17:1 Nature of presumptions
- § 17:2 Conclusive presumptions
- § 17:3 Disappearing presumptions
- § 17:4 Continuing presumptions
- § 17:5 Prima facie evidence
- § 17:6 Presumptions and burden of proof
- § 17:7 Inference
- § 17:8 Res ipsa loquitur
- § 17:9 Continuance of condition
- § 17:12 Regularity of conduct—Corporate conduct
- § 17:13 Regularity of conduct—Public officials and proceedings
- § 17:15 Other courts
- § 17:17 Presumptions arising from failure to produce witness or evidence
- § 17:18 Foreign law
- § 17:19 Delivery of letters
- § 17:21 Marriage and legitimacy
- § 17:27 Other presumptions in criminal trials

## **CHAPTER 18. ADMISSIBILITY OF EVIDENCE IN GENERAL**

- § 18:1 Requirement of relevance
- § 18:2 Negative evidence
- § 18:3 Circumstantial evidence—Generally
- § 18:5 Circumstantial evidence—Remoteness
- § 18:6 Prejudicial evidence

## **CHAPTER 19. REAL AND DEMONSTRATIVE EVIDENCE**

- § 19:2 Criteria for admission
- § 19:8 Photographs—Of persons
- § 19:10 Photographs—Of premises
- § 19:12 Motion pictures, video-tapes, tape recordings, etc
- § 19:13 Maps, drawings, diagrams and displays
- § 19:15 Demonstrations and tests

## **CHAPTER 20. VIEWS**

- § 20:2 Views granted according to discretion of judge
- § 20:3 Conduct of view
- § 20:4 Presence of defendant at view in criminal trials
- § 20:5 Evidentiary value of views

## **CHAPTER 21. DOCUMENTARY EVIDENCE**

- § 21:4 Authentication—Public records

## TABLE OF CONTENTS

- § 21:5.50 Authentication—Out of state records *[New]*
- § 21:6 Authentication—Massachusetts law
- § 21:8 Authentication—Court papers and records
- § 21:10 Authentication—Business records/deposit of business records with clerk
- § 21:11 Authentication—Hospital records
- § 21:13 Authentication—Learned treatises

## CHAPTER 22. BEST EVIDENCE RULE

- § 22:1 In general
- § 22:2 Situations calling for the best evidence
- § 22:3 Situations where best evidence is not required
- § 22:7 Proof of loss of primary evidence
- § 22:12 Copies as primary or secondary evidence
- § 22:14 Establishing content of documents by oral evidence

## CHAPTER 23. PAROL EVIDENCE

- § 23:1 In general
- § 23:7 Construing written agreements
- § 23:9 Showing invalidity or inapplicability of written instrument

## CHAPTER 24. OPINION EVIDENCE

- § 24:1 Requirement that witness testify as to facts
- § 24:4 Opinions concerning ultimate issue
- § 24:7 Other limitations on opinion evidence
- § 24:8 Non-expert opinion—In general
- § 24:10 Non-expert opinion—Speed
- § 24:12 Non-expert opinion—Value of services
- § 24:13 Non-expert opinion—Value of personal or real property
- § 24:14 Non-expert opinion—Intoxication
- § 24:15 Matters as to which expert witness may or must testify
- § 24:17 Qualifications required of expert witnesses
- § 24:19 Expert testimony—Matter of business
- § 24:20 Expert testimony—How incident occurred
- § 24:21 Expert testimony—Value of services
- § 24:24 Expert testimony—Fingerprints and footprints
- § 24:25 Expert testimony—Ballistics
- § 24:25.50 Expert testimony—GPS technology *[New]*
- § 24:26 Expert testimony—Other experiments, demonstrations and tests
- § 24:27 Expert testimony—Statutes
- § 24:27.50 Expert Testimony—Negative profiling *[New]*
- § 24:28 Hypothetical question—Content
- § 24:30 Cross-examination of expert witness

## CHAPTER 25. HEARSAY EVIDENCE AND EXCEPTIONS

- § 25:1 In general
- § 25:3 Right to confrontation

- § 25:4 Verbal acts—Inapplicability of hearsay rule
- § 25:10 Other non-hearsay situations
- § 25:13 Spontaneous declarations
- § 25:15 Statements made to physicians
- § 25:16 Dying declarations
- § 25:18 Declarations against interest
- § 25:22 Dead witness rule
- § 25:23 Unavailable witness rule
- § 25:23.50 Unavailable witness rule—Forfeiture by wrongdoing [*New*]
- § 25:24 Depositions
- § 25:25 Prior inconsistent statement under oath
- § 25:27 Business records
- § 25:28 Official records, generally
- § 25:30 Police records
- § 25:31 Registry of motor vehicles
- § 25:33 Hospital records
- § 25:37 Learned treatises
- § 25:42 Adoptive admission exception
- § 25:45 Hearsay and computer generated or computer stored records [*New*]

## CHAPTER 26. ADMISSIONS

- § 26:1 In general
- § 26:9 Party's own testimony or evidence as an admission
- § 26:18 Flight or escape
- § 26:20 Silence, adoptive admissions—Of party as an admission, criminal trials
- § 26:21 Failure to reply to written statements
- § 26:23 Payments to plaintiff
- § 26:25 Evidence of liability insurance
- § 26:30 Admission by—Co-conspirators

## CHAPTER 27. CONFESSIONS

- § 27:2 Requirements of a confession, generally
- § 27:3 Protection of constitutional rights in obtaining a confession
- § 27:4 Public safety exception to *Miranda* rule on confessions
- § 27:5 Voluntariness of confession
- § 27:6 Confessions inadmissible because of taint
- § 27:7 Humane practice applied to confessions
- § 27:8.50 Photographic identification of an inanimate object [*New*]

## CHAPTER 28. EXCLUSION OR ADMISSION OF ILLEGALLY OBTAINED EVIDENCE

- § 28:1 In general
- § 28:2 Exclusion or admission of illegal pre-trial identification
- § 28:3 Exclusion or admission of illegal pre-trial identification—Right to counsel
- § 28:4 Exclusion or admission of illegal pre-trial identification—Suggestive pre-trial identification

## TABLE OF CONTENTS

§ 28:6	Exclusion or admission of illegal pre-trial identification—Suggestive pre-trial identification—Voice identification
§ 28:7	Exclusion or admission of illegal pre-trial identification—Suggestive pre-trial identification—Photographic array
§ 28:8	Exclusion or admission of illegal pre-trial identification—Suggestive pre-trial identification—Show-up
§ 28:8.50	Exclusion or admission where no out-of-court identification took place <i>[New]</i>
§ 28:8.70	Identification of an object <i>[New]</i>
§ 28:9	Exclusion and admissibility of evidence obtained from illegal searches and seizures—Prohibition against illegal searches and seizures
§ 28:10	Exclusion and admissibility of evidence obtained from illegal searches and seizures—Scope of rule against unreasonable searches and seizures—Generally
§ 28:11	Exclusion and admissibility of evidence obtained from illegal searches and seizures—Scope of rule against unreasonable searches and seizures—Reasonable expectation of privacy
§ 28:12	Exclusion and admissibility of evidence obtained from illegal searches and seizures—Scope of rule against unreasonable searches and seizures—Seizure
§ 28:13	Exclusion and admissibility of evidence obtained from illegal searches and seizures—Scope of rule against unreasonable searches and seizures—Stop and frisk
§ 28:14	Exclusion and admissibility of evidence obtained from illegal searches and seizures—Scope of rule against unreasonable searches and seizures—Checkpoint stops
§ 28:15	Exclusion and admissibility of evidence obtained from illegal searches and seizures—Motion to suppress evidence illegally seized
§ 28:16	Exclusion and admissibility of evidence obtained from illegal searches and seizures—Standing necessary to invoke privilege against an unlawful search and seizure
§ 28:16.50	Exclusion and admissibility of evidence obtained from illegal searches and seizures—Equal protection challenges <i>[New]</i>
§ 28:18	Warrantless searches in general
§ 28:19	Warrantless searches in general—Automobile exception
§ 28:20	Warrantless searches in general—Plain view
§ 28:20.50	Warrantless searches in general—Automatic license plate readers <i>[New]</i>
§ 28:23	Warrantless searches in general—Exigency
§ 28:25	Warrantless searches in general—Private individual
§ 28:27	Warrantless searches in general—Search incident to arrest
§ 28:28	Warrantless searches in general—Consent
§ 28:29	Warrantless searches in general—Knock and announce
§ 28:30	Warrantless searches in general—Incident to forfeiture
§ 28:31	Search of automobile without a warrant
§ 28:32	Search and seizure with warrant
§ 28:33	Establishing probable cause through affidavit in support of application for search warrant
§ 28:35.50	Search by probation officer <i>[New]</i>

- § 28:36 Evidence obtained by interception of oral or wire communications
- § 28:37 Evidence obtained by interception of oral or wire communications—Interception of communications under warrant

## **CHAPTER 29. ADMISSIBILITY OF OTHER TYPES OF EVIDENCE**

- § 29:1 Past conduct
- § 29:2 Habit
- § 29:3 Similar circumstances
- § 29:4 Previous accidents
- § 29:6 Scientific and standardized tests
- § 29:7 Polygraph tests
- § 29:16 Character and reputation—Method of proving reputation
- § 29:17 Character and reputation—Reputation in criminal cases
- § 29:18 Character and reputation—Character of victim of assault or homicide
- § 29:20 Character and reputation—Proof of character in civil cases
- § 29:21 Other crimes
- § 29:25 Telephone conversations
- § 29:28 Plea agreement
- § 29:29 Fresh complaints in sexual assault cases
- § 29:31 State of police knowledge *[New]*

## **CHAPTER 30. OBJECTIONS TO EVIDENCE**

- § 30:3 Timeliness of objection
- § 30:4 Stating the grounds for objection
- § 30:12 Objections and motions in limine *[New]*

## **CHAPTER 31. MISTRIAL**

- § 31:2 Grounds for declaring mistrial
- § 31:4 Mistrial in criminal cases and double jeopardy

## **CHAPTER 32. DIRECTED VERDICT**

- § 32:1 Power of court to direct verdict
- § 32:2 Duty of court to direct verdict
- § 32:3 Testing propriety of a directed verdict
- § 32:6 Motion for directed verdict
- § 32:7 Directing verdict after presentation of evidence
- § 32:8 Motion for judgment notwithstanding verdict

## **CHAPTER 33. DAMAGES**

- § 33:1 In general
- § 33:2.50 Preliminary injunction *[New]*
- § 33:3 Apportionment of damages under comparative negligence
- § 33:4 Nominal damages
- § 33:5 Foreseeability of damages
- § 33:6 Mitigate damages—Duty to mitigate damages

## TABLE OF CONTENTS

- § 33:8 Mitigation of damages for wrongful discharge
- § 33:9 Treatment of other payments received by plaintiff
- § 33:10 Future effects of an injury
- § 33:12 Exemplary or punitive damages
- § 33:13 General and special damages

## CHAPTER 34. CLOSING ARGUMENTS

- § 34:3 Content of closing argument
- § 34:4 Comments on failure to produce witnesses or evidence and other improper arguments
- § 34:5 Comments on matters not in evidence
- § 34:6 Closing arguments by prosecutors
- § 34:7 Objections to argument

## CHAPTER 35. JURY INSTRUCTIONS

- § 35:1 General requirements for jury instructions
- § 35:1.50 General requirements for jury instructions—Eyewitness identification *[New]*
- § 35:7 Instructions on issues
- § 35:8 Slanted, argumentative and misleading instructions
- § 35:9 Instructions to deadlocked jury
- § 35:10 Objections to instructions
- § 35:12 Minimizing implicit biases *[New]*
- § 35:13 Minimizing Implicit Biases—Model Jury Instructions *[New]*

## CHAPTER 36. CONDUCT OF JURY

- § 36:1 In general
- § 36:2 Communications with jurors
- § 36:3 Jurors reading newspaper accounts of trial
- § 36:4 Separation of jury during trial
- § 36:6 Control of jury during deliberations
- § 36:8 Rules governing arrival at verdict
- § 36:9 Improper conduct
- § 36:10 Contact with jurors after discharge

## CHAPTER 37. VERDICT

- § 37:1 In general
- § 37:2 Objections to verdicts
- § 37:4 Revising or amending verdicts
- § 37:5 Power of court to have jury reconsider defective verdict
- § 37:6 Construction of general verdicts

## CHAPTER 38. JUDGMENT

- § 38:1 Entry of judgment
- § 38:2 Effect of entry of judgment
- § 38:5 Inclusion of interest in judgment—Prejudgment interest
- § 38:6 Inclusion of interest in judgment—Postjudgment interest
- § 38:7 Allowance of court costs
- § 38:8 Allocation of counsel fees and expenses in civil cases

TRIAL HANDBOOK FOR MASSACHUSETTS LAWYERS

- § 38:10 Amendment of judgment or new trial under Rule 59 in civil actions
- § 38:11 New trial under Rule 30 in criminal actions
- § 38:12 Relief from clerical mistakes in civil judgments
- § 38:13 Relief from judgment in civil cases under Rule 60(b)

**Table of Laws and Rules**

**Table of Cases**

**Index**