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Procedure, Remedies

FOURTH EDITION
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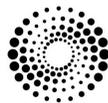
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Chapters 1 to 16



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PREFACE TO THE 2015 EDITION

This is the Fourth Edition of Massachusetts Practice, *Collection Law, Debtor/Creditor Practice, Procedure, Remedies*.

The fifteen years since the publication of the Third Edition have witnessed a seemingly relentless expansion of the number and scope of the laws regulating the legal procedures by which a creditor may seek to secure and obtain a judgment against a debtor, and then enforce that judgment. That is, to obtain payment.

The ever-increasing size of the book's annual Supplements--which have kept readers up to date with these changes—is testament to this expansion. The changes in the law, both state and federal, include everything from individual statutes to entire statutory systems; from federal regulations to court rules; from required forms to changes in terminology. They create new dangers of ethical violations, tort liability, including professional liability, double and triple damages, and procedural sanctions. They have added new time requirements, notice obligations, burdens of proof, threats of fees and costs, procedural complexities and jurisdictional limitations.

The cumulative result of these changes is that the legal environment for the practicing attorney has grown increasingly demanding, complicated, challenging and, in some ways, dangerous.

The purpose of the Fourth Edition, as with the previous three, is to provide an accurate, accessible and comprehensive guide through this maze, to lighten the burden on the practicing attorney and to offer insights and suggestions for simplifying procedures and avoiding procedural traps.

For the authors, the challenge of preparing the Fourth Edition has been two-fold: to integrate all of the information accumulated in the annual Supplements into a single readable text, and to revise and expand that text to improve the analysis and accessibility of that information. The authors have endeavored to achieve that goal. We hope the lawyers who use this book agree.

Among the changes in the Fourth Edition is the inclusion, where appropriate, of references to civil claims generally. That is, much of the case law and many of the statutes, rules and procedural requirements discussed in the book are not limited to the “collection of debts,” but rather apply to money damage suits

in general, including both tort and contract actions.

For example, none of the procedures for securing a defendant's property at the outset of a suit—attachment, trustee process, reach and apply, *lis pendens*—is limited to collection cases. Similarly, the methods of imposing liability—by suing an estate, by piercing a corporate veil, by voiding a fraudulent transfer—may apply to tort and contract damage actions as well as to suits for collecting an existing debt. This fact is reinforced where appropriate in the Fourth Edition.

Other new features of the Fourth Edition include a topic-by-topic treatment, with nation-wide case law references, of the activities that pose specific dangers to the collection lawyer under the federal Fair Debt Collection Practices Act. In addition, an expanded analysis of the use of Rule 69 of the Massachusetts Rules of Civil Procedure for post-judgment enforcement is provided. The chapter on reach and apply as an under-used but powerful means of enforcing judgments has also been expanded and improved.

The relationship between Massachusetts procedures for debt collection and judgment enforcement, on the one hand, and bankruptcy proceedings, on the other hand is covered on in the Fourth Edition. Also, the implications of the revised Massachusetts Uniform Probate Code for collection and judgment enforcement proceedings are explained.

This edition also addresses major changes in the law regarding income and property that is exempt from attachment, trustee process and execution, including changes in the homestead exemption.

Starting with the first edition in 1984, and continuing with the subsequent editions in 1992 and 2000, it has been the our firm belief that a book devoted to “collection law,” including the securing and enforcement of civil judgments, as well as strategies for attorneys defending this type of litigation, was needed in Massachusetts. Over the years, the response by the bar has vindicated that belief. We are hopeful that this new Fourth Edition continues to meet that need.

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August, 2015

§ 1:7 Ethical considerations regarding identification of the party sued

Attorneys must be cautious when identifying the target of a lawsuit, in order to be sure that the proper party is named.¹

§ 1:8 Ethical considerations when an attorney receives multiple accounts against the same debtor

If different creditors forward accounts against the same debtor to one attorney, ethical issues may arise that may not, at first, be obvious.

In the event a debtor has attachable assets, for example, the attorney must decide whether there is a conflict of interest in accepting both cases, inasmuch as each creditor will expect the attorney to attempt to obtain a first lien and priority over other creditors. Application of payments by one debtor to claims of two

[Section 1:7]

¹See Matter of Monaco, Public Reprimand No. 2006-12, Board of Bar Overseers, Office of the Bar Counsel, Disciplinary Decisions, available on the Internet at www.mass.gov/obcbbo. In this disciplinary matter arising out of the issuance of a *capias* in a supplementary process action against a corporation, an attorney was disciplined for failing to obtain updated information that was available from the records of the Secretary of the Commonwealth. Because of this, the attorney was unaware of a change of address of the corporation and a change in corporate officers. “Without notice to or without authority from the court,” the attorney wrote the name and address of the prior president on a reissued *capias*, despite the fact that the prior president had resigned several years earlier and had been replaced. When the prior president appeared in court, counsel advised that the debt had to be paid and convinced the individual to sign a payment agreement, despite the prior president having no authority to act on behalf of the corporation and without the attorney telling the president to seek advice of independent counsel.

The attorney’s “failure to ascertain the proper party . . . to be brought into court on the *capias* and

failure to obtain updated, accurate information” was held to have violated Mass.R.Prof.C. 1.1 (lack of competence) and 1.3 (failure to act with reasonable diligence and promptness). The altering of the *capias* and advice to the individual violated Mass.R. Prof.C. 1.1(4.3)(b) (rendering advice, other than advice to secure counsel, to unrepresented persons whose interests are or have reasonable possibility of being in conflict with client’s interest), and 8.4(d) (engaging in conduct prejudicial to administration of justice).

Attorney levied and sold real property belonging to unrelated third parties and not owned by the debtor. Attorney failed to investigate the identity of the property owners by failing to perform a competent, accurate, and diligent title search for the debtor’s property. Despite agreeing to take steps to correct the mistake, he failed to take adequate steps until a complaint was filed with the Office of Bar Counsel, thereby violating Mass. R. Prof. C. 1.1 and 1.3. Attorney also failed to timely file supporting schedules for his client’s Chapter 13 bankruptcy petition, resulting in its dismissal. See Admonition No. 10-08 (Board of Bar Overseers, Office of the Bar Counsel, Disciplinary Decisions, available on the Internet at www.mass.gov/obcbbo).

or more creditors represented by the same counsel also could create ethical concerns.

Other ethical issues may arise when two creditors seek to utilize the same counsel or counsel who share the same office to collect different claims due from the same debtor.

In the alternative, one creditor may seek to utilize the same counsel to collect two different claims against the same debtor.

Even utilization of different counsel may cause ethical issues which may prevent acceptance of a particular matter. Because the Rules of Professional Conduct are comprehensive, it is important for attorneys to carefully review the same before embarking into the area of collections.¹

§ 1:9 References to civil rules

Attorneys should be aware that the Massachusetts Rules of Civil Procedure apply in both the Superior Court and the District Court, but different provisions within the rules themselves may apply in one court or the other.¹

In addition, attorneys must make reference to the separate sets of internal rules that may govern in particular courts. For example, Superior Court Rule 9A, governing motion practice in the Superior Court (see Appendix F), does not apply in District Court and Boston Municipal Court civil proceedings.

Caution and time are required in order to complete a careful examination of the distinctions in the various rules of these courts. Where relevant, the differences in these rules are discussed in this book.

Where required procedures are governed by other sets of rules, such other rules are identified.

§ 1:10 Restrictions on use of personal identifying data

The Supreme Judicial Court has adopted guidelines restricting

[Section 1:8]

¹See *Matter of Discipline of Two Attorneys*, 421 Mass. 619, 660 N.E.2d 1093 (1996) (two attorneys representing different creditors had collection plan which placed first client at greater risk because vendor of property who was judgment debtor of second client might have gained knowledge of proposed attachment of portion of proceeds of real estate sale by first creditor or otherwise may have inter-

fered with the pending sale); SJC Rule 3:07, Rule 1.7, Massachusetts Rules of Professional Conduct.

[Section 1:9]

¹An example is Mass. R. Civ. P. 52, governing findings and rulings in jury-waived cases. In the Superior Court, Mass. R. Civ. P. 52(a) and (b) apply, while in the District Court and Boston Municipal Court, Mass. R. Civ. P. 52(c) and (d) apply.

the use of certain personal identifying data in court documents.¹

The purpose of the guidelines is “to prevent the unnecessary inclusion of certain personal data identifying data elements in publicly-accessible documents filed with or issued by the courts, in order to minimize the opportunity to use such documents for identity theft or other improper purposes.”²

Attorneys who prepare documents that are filed in court should not include a complete version of the following items and should ensure that the documents contain at most:

1. In the case of a social security number, taxpayer identification number, credit card or other financial account number, driver’s license number, state-issued identification card number, or passport number, only the last four digits; and

2. In the case where a person’s mother’s maiden name is identified as such, only the first initial of the maiden name.³

Compliance with the guidelines will likely change existing practices where attorneys include financial account numbers in certain documents, such as motions seeking court approval of trustee attachment. See § 5:78. However, the guidelines themselves include no consequences or sanctions for noncompliance.

Similar concerns about protection of personal information kept by the trial courts and appellate courts has led to an Order of the Supreme Judicial Court in 2010 designed to avoid wrongful disclosure of Social Security numbers, driver’s license numbers, and financial account numbers.⁴

[Section 1:10]

¹Interim Guidelines for the Protection of Personal Identifying Data in Publicly Accessible Court Documents. See <http://www.mass.gov/courts/programs/pilot-programs/interim-pid-guidelines.pdf>

The full text of the guidelines is set forth in Appendix C.

²Interim Guidelines for the Protection of Personal Identifying Data in Publicly Accessible Court Documents,

sec. (a).

³Interim Guidelines for the Protection of Personal Identifying Data in Publicly Accessible Court Documents, sec. (b).

⁴Supreme Judicial Court Order Re: Protection of Personal Information, January 7, 2010, implementing G.L. c. 93H. The full text of the Order is available at <http://www.mass.gov/courts/docs/sjc/docs/sjc-order-protection-of-personal-info.pdf>.

II. PRELIMINARY CASE-HANDLING AND OFFICE-ORGANIZING PROCEDURES

§ 1:11 Fee arrangements

Before starting any collection effort, the attorney should enter into a clear, written fee agreement with the client.¹ See Supreme

[Section 1:11]

¹R.G. v. Hall, 37 Mass. App. Ct. 410, 640 N.E.2d 492 (1994) (despite such a fee agreement, an attorney should be aware that a restraining order could impede a client's ability to pay legal fees). See also, *Indian Motorcycle Associates III Ltd. Partnership v. Massachusetts Housing Finance Agency*, 66 F.3d 1246, 27 Bankr. Ct. Dec. (CRR) 1230, Bankr. L. Rep. (CCH) P 76672 (1st Cir. 1995) (regarding disgorgement of attorney's \$35,000 retainer arising after client filed Chapter 11 bankruptcy).

Admonition No. 13-14 (violation of Mass. R. Prof. C. 1.5(c) where attorney failed to enter into a written contingency fee agreement with clients for whom debt collection work was performed and failed to provide, at conclusion of case, a writing to the client that adequately explained the outcome and showed how the client's remittance was calculated) (Board of Bar Overseers, Office of the Bar Counsel, Disciplinary Decisions available online at www.mass.gov/obcbbo).

In re Small, S.J.C. BD-2013-069 (attorney violated Mass. R. Prof. C. 1.5(c) by failing to prepare written contingent fee agreement signed by himself and the client) (Board of Bar Overseers, Office of the Bar Counsel, Disciplinary Decisions available online at www.mass.gov/obcbbo).

There are restrictions on whether a retainer can be made non-refundable. See Massachusetts Bar Association Committee on Professional Ethics, Opinion 95-2, prohibiting non-refundable retainers under certain conditions, citing *Matter of Cooperman*, 83 N.Y.2d 465, 611 N.Y.S.2d 465, 633 N.E.2d 1069 (1994) (non-refundable special retainers are un-

ethical and unconscionable). See also *Smith v. Binder*, 20 Mass. App. Ct. 21, 477 N.E.2d 606 (1985); Massachusetts Bar Association Committee on Professional Ethics, Opinion 78-11 (1978). But see *Philbrook v. Moxey*, 191 Mass. 33, 77 N.E. 520 (1906) (where payment was in return for attorney's agreement to be bound to the client to the exclusion of others, the fee was therefore "earned" when paid).

See *Craft v. Kane*, 51 Mass. App. Ct. 648, 747 N.E.2d 748 (2001) (contractual or quantum meruit basis for recovering fees is a prerequisite to establishing an attorney's lien under G.L. c. 221, § 50).

An attorney's fee agreement generally does not survive the client's death. The general rule is that the death of the client terminates the attorney's authority to act on behalf of the client. *Barnes v. Barnes*, 291 Mass. 383, 385, 196 N.E. 917, 918 (1935). There may be exceptions (1) where the client executed a contingent fee agreement (*In re Agee's Estate*, 69 Utah 130, 252 P. 891, 50 A.L.R. 641 (1927)); or (2) where an administrator or executor gives the attorney authority to act on matters commenced during the lifetime of the deceased client (*In re Maratto's Will*, 145 N.Y.S.2d 621, 622-623 (Sur. Ct. 1955)).

See *In re Goldstone*, 445 Mass. 551, 839 N.E.2d 825 (2005), upholding disbarment of attorney for violating many of the then Canons of Ethics and Disciplinary Rules, including S.J.C. Rule 3:07, Canon 7, DR-7-101(A)(2), for intentional failure to carry out his contract of employment.

See Board of Bar Overseers Admonition No. 09-17, Board of Bar Overseers, Office of the Bar Counsel (violation of Mass. R. Prof. C. 1.5(c) where contingent fee agreement for