Researching Ethical Issues

Paul R. Tremblay, Boston College Law School
Chapter 23

RESEARCHING ETHICAL ISSUES

PROF. PAUL R. TREMBLAY, ESQ.
Boston College Law School, Newton

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Scope Note
This chapter is intended to assist the reader in finding and utilizing sources for ethics law and authority in Massachusetts. The sources of rules include attorney discipline reports, criminal practice standards, and the Massachusetts Rules of Professional Conduct.

§ 23.1 THE MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT

A lawyer researching any ethical question in Massachusetts will employ as the primary source authority the Massachusetts Rules of Professional Conduct, which can be found at SJC Rule 3:07. The rules track in substance, but are not identical to, the American Bar Association’s (ABA’s) Model Rules of Professional Conduct (Model Rules). The ABA promulgated the Model Rules in 1983, and by 2009 every jurisdiction except California has adopted some version of the Model Rules. The Massachusetts Rules of Professional Conduct may be found online at http://www.state.ma.us/ocebbo/rpcnet.htm. For comparison, the ABA Model Rules may be found online at http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

Nearly every rule adopted by the Supreme Judicial Court differs in some small or large respect from the corresponding ABA rule, but most of the Massachusetts rules are in substance equivalent to the ABA counterpart. A select few of the Massachusetts rules, however, are notably different from the ABA’s offering. Among the most important of the Massachusetts variations are the following:

- **Mass. R. Prof. C. 1.5 (Fees):** Massachusetts permits lawyers to pay referral fees without assuming proportional responsibility for the matter, contrary to the ABA version of Mass. R. Prof. C. 1.5.
• **Mass. R. Prof. C. 1.6 (Confidentiality):** Massachusetts is more protective of client information than the ABA by limiting revelations intended to protect against death or substantial bodily harm to crimes or frauds; less protective by limiting the scope of Rule 1.6 to “confidential information”; and less protective by permitting revelation of client information to prevent wrongful executions.

• **Mass. R. Prof. C. 1.14 (Disabled Client):** In 2008, the Supreme Judicial Court rewrote Rule 1.14 to address the responsibilities of lawyers who represent disabled or minor clients who risk suffering serious harm by their choices. The Massachusetts Comments are more useful and nuanced than the Model Rule’s Comments.

• **Mass. R. Prof. C. 3.3 (Perjury):** Massachusetts has crafted an exception to the Model Rule’s obligation that a lawyer reveal perjury when the perjury is that of a criminal defendant.

**Practice Note**
The Massachusetts rules include, after each rule and its comments, a “Corresponding ABA Model Rule” notation listing the differences from the ABA’s version of that rule. In some instances (for example, at Mass. R. Prof. C. 4.2), the notation reads “Identical to the ABA Model Rule” where the rule’s language is identical but the comment’s language is different from the ABA version. Because the comments can matter a great deal, do not rely too readily on the comparison offered by the rules’ drafters.

§ 23.1.1 **Understanding and Interpreting the Massachusetts Rules**

The Supreme Judicial Court adopted a version of the ABA’s Model Rules in 1998, much later than most states. The advantage of the Supreme Judicial Court’s adoption of a version of the Model Rules is the uniformity across jurisdictions and the wealth of interpretive data developing in the many states working with the Model Rules. The disadvantage of the introduction of the rules is the resulting uncertainty about the common law and ethics opinions issued within Massachusetts under the prior system, which was based on the ABA’s Code of Professional Responsibility.

The most reliable source of guidance, of course, is the text of the rules and comments themselves. If the rule’s language differs from some prior Supreme Judicial Court opinion or bar association ethics opinions, then obviously the
Supreme Judicial Court intends its rule and comment language to overrule anything contrary that existed in Massachusetts prior to 1998.

There exists, however, extensive commentary on the ABA’s Model Rules, and that guidance will have direct relevance to Massachusetts lawyers to the extent that the Massachusetts rule is equivalent to the ABA’s version. The most prominent sources of interpretive authority on the Model Rules are given in the following Practice Note.

**Practice Note**

When researching ethics questions based on commentary about the ABA’s Model Rules or another state’s rules, be certain that the text in question is the same as the text in the Massachusetts rule. Most states, when adopting a version of the Model Rules, included some local options that differed from the ABA’s version.

- **Ethics Opinions, American Bar Association, Committee on Ethics and Professional Responsibility:** The ABA’s Ethics Committee issues opinions regularly on contested questions about the scope of the Model Rules. Because the ABA adopted the Model Rules over two decades ago, the committee has an impressive array of opinions on a variety of topics. The committee issues both Formal Opinions and Informal Opinions, the respective status intended to reflect the committee’s estimate of their relative importance and interest to lawyers. The opinions are published, and can be found on LexisNexis (Library: ABA; Files: FOPIN (Formal Opinions), INFOP (Informal Opinions)) and Westlaw (Database ABA-ETHOP or LS-ABAEO) and on the Internet (selected opinions, headnotes, and purchase arrangements) at the ABA’s Web site: http://www.abanet.org/cpr/pubs/ethicopinions.html.

- **American Bar Association, Center for Professional Responsibility, Annotated Model Rules of Professional Conduct (6th ed. 2007):** This elaborate book explains each rule with commentary, ethics opinions, court interpretation, and other interpretive guidance.

- **Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering (3d ed., supplemented through 2008):** This book, coauthored by Geoffrey Hazard, the Reporter for the Kutak Commission, which developed the first Model Rules in 1980, is simply the best authority on the meaning of the rules. The two-volume, loose-leaf book includes a separate chapter for each rule, and offers clear and helpful assessments of the meaning of the rules’
the rules’ and comments’ language. Each chapter also includes several examples to demonstrate the interpretations offered by the authors.

- **ABA/BNA Lawyers’ Manual on Professional Conduct**: This loose-leaf reporter is one of the best sources available in researching ethical issues. The reporter is organized according to a topical index following the structure of the Model Rules. Each section contains summaries of ABA and state bar association opinions interpreting a particular rule. In addition to the basic manual, which serves as a form of updated treatise on different substantive areas, this service includes a binder on ethics opinions from all states (containing abstracts only, not full texts) and a “Current Developments” binder, which is indexed and contains almost all new court decisions and ethics committee opinions on lawyer conduct, liability and ethics. The *ABA/BNA Lawyers’ Manual* can be found in most law libraries, and has a Web site at http://www.abanet.org/cpr/pubs/manual.html. (The electronic version of the manual requires a paid subscription, or payment for selected items.)

- **Other States’ Ethics Opinions**: The ABA is hardly the final authority on how a rule should be interpreted. Each state has at least one bar association or similar authority issuing ethics opinions, and those opinions can be relied on by a practitioner seeking to understand how a rule ought to be interpreted. The problem is finding the opinions. More and more states are including the text of ethics opinions on-line, but that process remains somewhat unreliable. The best summary of state ethics opinions can be found in the *ABA/BNA Lawyers’ Manual*, described above. Also helpful is a resource on the Internet known as Legalethics.com, found at http://www.legalethics.com/legal.htm.

- **Massachusetts Bar Association (MBA) and Boston Bar Association (BBA) Ethics Opinions**: The ethics committee of the MBA and, to a lesser extent, that of the BBA issue ethics opinions of interest to Massachusetts lawyers. For a fuller description of how these ethics committees operate, see § 23.6.1 and § 23.6.2, below.

- **Case Law**: While the rules are intended as the basis of discipline only, and not as a source of authority for civil disputes such as malpractice claims, they are inevitably interpreted by courts within civil cases. Therefore, even though one might start with ethics opinions and the like, looking to Massachusetts court doctrine will often be rewarding.
§ 23.2 RESearching and understanding attorney discipline in Massachusetts

Supreme Judicial Court Rule 4:01 contains the rules governing bar discipline, including sections covering jurisdiction, grounds for discipline, the respective roles of the Board of Bar Overseers (BBO) and Bar Counsel, and the procedures governing imposition of discipline.

The reports of public disciplinary action, plus summaries of private reprimands, are published in the *Massachusetts Attorney Discipline Reports*. These reports contain all of the published opinions of the Supreme Judicial Court from 1974 through the present. Decisions of the court issued prior to the creation of the BBO in 1974 are found in the *Massachusetts Reports*. The reports are indexed by the Canons of Ethics and Disciplinary Rules, as well as by the name of the respondent attorney.

In addition to the *Massachusetts Attorney Discipline Reports*, the results of disciplinary proceedings are published weekly in *Massachusetts Lawyers Weekly*.

The Bar Counsel’s office and the Board of Bar Overseers share a Web site, found at http://www.mass.gov/obcbbo.

§ 23.3 Criminal practice standards in Massachusetts (former SJC rule 3:08)

In addition to SJC Rule 3:07’s standards governing professional ethics and SJC Rule 4:01’s standards on discipline generally, the Supreme Judicial Court had promulgated, in SJC Rule 3:08, a series of disciplinary rules regulating the conduct of attorneys in criminal proceedings. Supreme Judicial Court Rule 3:08 contained Standards Relating to Prosecution Function (PF 1 through PF 15) and Standards Relating to Defense Function (DF 1 through DF 15). These rules were for the most part eliminated or subsumed within the Massachusetts Rules of Professional Conduct as of January 1, 1999. In one instance, Rule 3:08 PF 7(6) was restated within Rule 3:07 (Mass. R. Prof. C. 3.8).
§ 23.4  GOVERNANCE OF FEDERAL COURT PRACTICE IN MASSACHUSETTS

Lawyers appearing before the U.S. District Court for the District of Massachusetts are governed by those canons and rules adopted by the Supreme Judicial Court of Massachusetts, embodied in Rules 3:05, 3:07 and 3:08 of said court, as they may be amended from time to time by said court, except as otherwise provided by specific rule of this court after consideration of comments by representatives of bar associations within the Commonwealth.


§ 23.5  IMPORTANCE OF “OTHER” SUBSTANTIVE LAW

Lawyers faced with questions involving professional ethics tend to begin their research and thinking with reference to the applicable rules and their interpretation, as the above discussion has confirmed. That practice, though, ought not imply that the Supreme Judicial Court rules are the only authority applicable to and binding on Massachusetts lawyers when the question is the appropriateness or legality of lawyer conduct. Unless some explicit exception exists, lawyers are governed by all general substantive law, including regulatory authority, applicable to the rest of the populace. Lawyers sometimes believe that their special code of ethics relieves them of obligations toward third parties or toward governmental agencies that would otherwise apply were they not lawyers. Attorneys adopt this stance at their peril. See, e.g., United States v. Cintolo, 818 F.2d 980, 995–96 (1st Cir. 1987). Many feel, indeed, that the difficulties encountered in the infamous Kaye Scholer matter (in which a prominent New York law firm paid $541 million in settlement to the federal Office of Thrift Supervision (OTS) after OTS challenged the firm’s actions on behalf of Lincoln Savings & Loan) were largely the result of Kaye Scholer’s assuming that the federal reporting obligations would not apply to it as counsel. While that precise legal question has not yet been resolved, in light of the firm’s settlement with OTS, the assumption that
lawyers are immune from such substantive obligations remains an uncertain and perhaps risky one.

The law of malpractice and professional liability plays a critical role in the operation of any law practice. For a comprehensive, five-volume treatise on this topic, see Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice (2005 ed.).

One of the most important legislative developments for corporate lawyers in recent years has been the passage of the Sarbanes-Oxley Act. In 2002, Congress enacted the Sarbanes-Oxley Act of 2002 (Pub. L. No. 107-204; 15 U.S.C. § 7245). Section 307 of the act instructs the Securities and Exchange Commission (SEC) to adopt a new federal rule requiring all attorneys appearing and practicing before the SEC to report evidence of material violations of the securities laws and other misconduct “up the ladder” to the company’s senior management, and if necessary, to its board of directors. In 2003, the SEC issued its final rules on those obligations, at 17 C.F.R. pt. 205. Section 307 of the act also contains language authorizing the SEC to adopt other “minimum standards of professional conduct” for attorneys appearing and practicing before the agency.


Practice Note
When evaluating whether certain conduct is problematic from a professional responsibility standpoint, be sure to ask whether the conduct would be problematic if performed by a layperson. For instance, while some lack of disclosure seems permitted lawyers in negotiations (see Mass. R. Prof. C. 4.1), consider whether that same lack of disclosure might amount to a form of fraud if performed by a merchant. See also Mass. R. Prof. C. 1.13, Organization as Client.

§ 23.5.1 American Law Institute’s Restatement of the Law Third, The Law Governing Lawyers

The above commentary regarding the importance of “other law” invites inquiry about the precise scope of the “law of lawyering.” In 1985, the American Law Institute (ALI) began a multiyear project to develop a Restatement of the Law Governing Lawyers, along the lines of other ALI Restatements of the Law, such as those for torts, contracts, agency and restitution. In 2000, the ALI completed that project with a two-volume treatise entitled Restatement of the Law Third, The Law Governing Lawyers. The Restatement’s purpose is to reflect the state of
doctrine as it exists, rather than to propose doctrine. The official version of this long-awaited restatement serves as an authoritative resource on questions of professional responsibility. (A one-volume paperback edition is also available. For either edition, contact the American Law Institute at http://www.ali.org.)

§ 23.6 SOURCES OF CONSULTATION

§ 23.6.1 MBA Committee on Professional Ethics

One helpful resource for an attorney faced with interpreting an ethical matter that may arise in everyday practice is the Massachusetts Bar Association’s (MBA’s) Committee on Professional Ethics. The purpose of the Ethics Committee is to give advisory opinions on ethical and professional conduct to members of the MBA. Although the committee is without governmental status, and its opinions are not binding, its interpretations of the Supreme Judicial Court rules on professional conduct can be valuable.

To obtain an opinion of the Ethics Committee, a member of the MBA must submit a signed written request for an opinion. The request is usually in the form of a letter setting out the facts of the inquiry and the advice requested. The request must be for the purpose of guiding a bar member on his or her own future conduct and may not be for the purpose of determining whether a fellow bar member has violated the disciplinary rules or for the purpose of determining whether the inquirer has violated the rules in the past. The committee will not give opinions on hypothetical questions, questions of law or questions of unauthorized practice of law, and it will not give an opinion on any matter that is currently pending before the Board of Bar Overseers or before any tribunal of the Commonwealth. Additionally, the committee may decline to give an opinion on any matter on which it does not choose to render an opinion.

The MBA Ethics Committee’s response to a request for advice is usually a private letter to the inquirer. Because the letter is the result of review and comment by the entire committee, an inquirer will not receive a response to a written request for advice for several weeks. The committee, therefore, has a procedure for rendering emergency advice by telephone in a situation that does not allow sufficient time for a written request and response. The emergency advice procedure does not allow for the precise communication of a letter request or for the input of the whole committee, and it is, therefore, a procedure that is used only rarely.

On occasion, a member of the bar will request advice on an area of the law that the committee considers to be of general interest to the bar as a whole. Such
areas will include, for example, the circumstances under which an attorney may represent a bank and a borrower in closing mortgage loans. MBA Ethics Op. 90-3. In such cases the committee will draft an opinion to be published, which is submitted to the Massachusetts Bar Association Board of Delegates for approval prior to publication. If approved, the opinions are published in *Massachusetts Lawyers Weekly* and in the *Massachusetts Law Review*, as well as on the MBA Web site at http://www.massbar.org. They are also separately published in a volume of opinions of the MBA Committee on Professional Ethics. This volume is indexed according to the Massachusetts rules (or the predecessor code) and contains summaries of the opinions interpreting the particular rule. Summaries of the opinions of the Ethics Committee are also found in the *ABA/BNA Lawyers’ Manual on Professional Conduct*, described in § 25.1.1, above.

§ 23.6.2  BBA Ethics Committee

The Boston Bar Association (BBA), like the MBA, maintains an ethics committee, whose purpose is to give advisory opinions to its members with respect to the interpretation of rules promulgated by the Supreme Judicial Court relating to ethical and professional conduct of lawyers. Primarily, the BBA Ethics Committee’s opinions are formal, published responses to inquiries received in writing, and concerning matters of broad interest to BBA’s members. The full texts of BBA Ethics Committee Opinions are published in the *Boston Bar Journal* and can be found on the BBA Web site at http://www.bostonbar.org/sc/ethics/opinions.htm. Summaries are published in *Massachusetts Lawyers Weekly* and in the *ABA/BNA Lawyers’ Manual on Professional Conduct* (see § 23.1.1, above). The BBA Ethics Committee also is authorized to provide advice on an informal basis in urgent matters. Members with pressing ethical concerns may telephone the BBA to gain access to a member of the BBA Ethics Committee. The committee member is authorized to give telephonic advice to the inquiring party; the scope and substance of that advice will be reviewed by the full committee at its next meeting for purposes of future reference.

§ 23.6.3  Office of the Bar Counsel

It is not commonly known that the Office of the Bar Counsel will accept telephone inquiries from lawyers seeking opinions on ethical questions. An assistant bar counsel is on call during regular office hours to handle such requests.

As with all other sources of ethical opinion other than the courts, bar counsel “opinions” are not binding, nor will you receive an opinion about a pending complaint or matter. To contact the Office of the Bar Counsel for purposes of advice, telephone 617-728-8750 on Mondays, Wednesdays, and Fridays between 2:00 p.m. and 4:00 p.m.
§ 23.6.4 Legal Ethics on the Internet

Legal ethics research is now available over the Internet. Besides the Web site addresses listed in the sections above, some Web sites focus primarily on legal ethics across the country. Some important ones include the following:

- **The American Legal Ethics Library**: Cornell Law School’s Legal Information Institute offers a digital library on judicial and legal ethics. It may be found at http://www.law.cornell.edu/ethics/.

- **David Hricik’s Legal Ethics Site**: This site contains links to many state ethics opinions and state rules. It may be visited at http://www.hricik.com.

- **EthicSEARCH**: The ABA’s Center for Professional Responsibility offers a service called “EthicSEARCH,” which answers questions about legal ethics. It may be found on the Internet at http://www.abanet.org/cpr/ethicsearch/home.html.

- **Freivogel on Conflicts**: Calling itself “[a] practical online guide to conflicts of interest for lawyers with sophisticated business and litigation practices,” this Web site has an extensive reference network on conflicts questions. It may be visited at http://www.freivogelonconflicts.com.

- **Legalethics.com**: Both legal and nonlegal ethics codes can be found on the Web site “Legalethics.com.” Browsers may visit the Legal Ethics Resources section at http://www.legalethics.com/legal.htm or the Non-Legal Ethics Resources section at http://www.legalethics.com/nonlegal.htm.

- **Internet Lawyering**: E-lawyering.com (http://www.e-lawyering.com) is a Web site offering lawyers, for a price, many services needed for effective lawyering, including risk-management advice and services to avoid conflicts and unauthorized practice in jurisdictions where the lawyers do not have a license to practice law. For a blog about Internet lawyering, go to http://www.elawyeringredux.com.

- **A Legal Ethics Blog**: An active legal ethics blog hosted by several law professors and lawyers specializing in legal ethics may be found at http://www.legalethicsforum.com.
§ 23.7 PROFESSIONAL ORGANIZATIONS

The Association of Professional Responsibility Lawyers (APRL) consists of members who are actively involved in the practice of law in the area of lawyer conduct and alleged misconduct. The APRL is an available resource for lawyers seeking direction or answers to sophisticated inquiries. For further information, see http://www.aprl.net. J. Charles Mokriski, of Boston’s Day Pitney LLP, is a recent Past President of APRL.

Several other professional organizations or public agencies have developed and published their own standards of professional responsibility. Lawyers seeking specialized guidance might wish to consult the following:

- **Alternative Dispute Resolution:**
  - John Feerick et al., *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. Disp. Resol. 95 (1995);


§ 23.7 ETHICAL LAWYERING IN MASSACHUSETTS

• Paralegals:


• Securities Practice: Securities and Exchange Commission, 17 C.F.R. § 201.100 et seq.

• Tax Practice: Duties and Restrictions Relating to Practice Before the Internal Revenue Service, 31 C.F.R. §§ 10.20–38.

§ 23.8 ADDITIONAL ABA STANDARDS

In addition to the ABA Model Rules, the ABA promulgates model guidelines for more specific areas of practice, including the following:


• ABA Model Rules for Lawyer Disciplinary Enforcement (2007);


• ABA Standards for Criminal Justice, available at http://www.abanet.org/crimjust/standards/;

• ABA Standards for Imposing Lawyer Sanctions (2005), available at http://www.abanet.org/cpr/regulation/standards_sanctions.pdf; and

• ABA Creed and Pledge of Professionalism (1988).

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