CHAPTER 8

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# *The Right to Counsel*

*Written by Eric Blumenson (1st edition)*
*and Randy Gioia, Michael Schneider & Roger Geller (this revision)*

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## § 8.1 THE CONSTITUTIONAL PARAMETERS GENERALLY

### § 8.1A. WHEN THE RIGHT TO COUNSEL ATTACHES

Both the Massachusetts Constitution and the United States Constitution guarantee all defendants the right to counsel[1] and to equal protection of the laws.[2] This

[1] U.S. Const. amends. 6, 14; Mass. Const. Declaration of Rights art. 12. In Massachusetts, the right to counsel is statutorily embodied in G.L. c. 263, § 5.

[2] U.S. Const. amend. 14; Mass. Const. Declaration of Rights art. 1. *See also* Powell v. Alabama, 287 U.S. 45 (1932) (holding deprivation of counsel to be violoation of Fourteenth Amendment Due Process Clause). The right to counsel is also embodied in international human rights instruments to which the United States is a party, including, most significantly, the International Covenant on Civil and Political Rights, Art. 14, sec. 3, adopted Dec. 19, 1966, 999 U.N.T.S. 171; entered into force Mar. 23, 1976; ratified by the United States on Sept. 8, 1992 (providing that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal

right is a fundamental constitutional right[3] and its erroneous denial can never be treated as harmless error.[4]

If the defendant can afford to retain counsel, she must be permitted counsel of choice[5] and must be given "reasonable time and opportunity to secure" such counsel.[6] If she cannot afford counsel, a lawyer must be appointed in all cases where incarceration *may* result,[7] including juvenile delinquency cases,[8] or cases that may

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assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;" and also " [t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;..."). In ratifying the ICCPR, the U.S. attached an understanding that the right to counsel did not "entitle a defendant to counsel of his own choice when he [was] either indigent or financially able to retain counsel in some other form." Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 1, 18-19 (102d Sess. 1992), reprinted in 31 I.L.M . 645 (1992).

[3] Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 234 (2004) ("There is no question that the right to counsel is a fundamental constitutional right ...").

[4] Commonwealth v. Means, 454 Mass. 81, 88-89, 907 N.E.2d 646, 656 (2009) ("Because the right to the assistance of counsel is essential to individual liberty and security, and to a fair trial, its erroneous denial can never be treated as harmless error"), citing Chapman v. California, 386 U.S. 18, 23 & n. 8 (1967).

[5] U.S. v. Gonzalez–Lopez, U.S. , 126 S.Ct. 2557, 2561–2566 (2006); United States v. Flanagan, 465 U.S. 259, 268–69 (1984); Crooker v. California, 357 U.S. 433, 439 (1958); Glasser v. United States, 315 U.S. 60, 70 (1942); Powell v. Alabama, 287 U.S. 45 (1932); Wheat v. United States, 486 U.S. 153, 159, 108 (1988). *See also* Panzardi-Alvarez v. United States, 879 F.2d 975 (1st Cir. 1989) (decision denying pro hac vice admission necessarily implicates Sixth Amendment right to counsel of choice). A defendant's right to counsel of choice is not necessarily violated however, simply because a court has frozen the defendant's assets. United States v. Monsanto, 491 U.S. 600, 605–614 (1989).

[6] Powell v. Alabama, 287 U.S. 45 (1932), cited in United States v. Gonzalez-Lopez, 548 U.S. 140,150 (2006).

The right to counsel of choice is a right to legal, not lay, counsel. Commonwealth v. Wolf, 34 Mass. App. Ct. 949, 950 (1993)(no right to appointment of ordained minister as counsel in Operation Rescue trespass case). *See* more extensive discussion *infra* § 8.5B (court's removal of counsel of choice). If the prosecutor and court are notified by the defendant's arraignment counsel that new counsel must be appointed for the defendant, the prosecutor must put the defendant's case on a list for appointment of counsel by the court. *See* Commonwealth v. Lasher, 428 Mass. 202, 203–204 & n.1 (1998).

The deprivation of the right to the defendant's counsel of choice is "structural error" and is thus not subject to harmless-error review, since it "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." United States v. Gonzalez-Lopez, 548 U.S. 140,150 (2006).

[7] The Massachusetts rule requires counsel be appointed if the crime is punishable by imprisonment or commitment to the Department of Youth Services. Mass. R. Crim. P. 8. This right is enforced in Massachusetts by S.J.C. Rule 3:10 ("Assignment of Counsel") and G.L. c. 211D. Rule 8, which formerly regulated appointment of counsel, was amended in 1986 to incorporate the rule and statute by reference. *See also* G.L. c. 263, § 5 (providing general statutory right to counsel).

No appointment of counsel is required in a misdemeanor case if the court announces that it will not impose imprisonment. G.L. c. 211D, § 2A. The Supreme Court has held that

result in executing a previous suspended sentence.[9] The defendant must be formally advised of these rights by the judge personally.[10] No appointment of counsel is required in a misdemeanor case if the court announces that it will not impose imprisonment,[11] but an uncounseled conviction should be challenged when used as a "prior offense" to trigger enhanced punishment,[12] and probably cannot support either a

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counsel is required only in a case where incarceration is *actually* imposed. Scott v. Illinois, 440 U.S. 367, 371 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972). In Alabama v. Shelton, 535 U.S. 654, 658-662 (2002), the Supreme Court extended this principle to prevent the activation of a suspended sentence that could "end up in the actual deprivation of a person's liberty," if the defendant was not represented by counsel on the underlying offense. The Court explained that the incarceration is being imposed on the underlying offense and not on the defendant's violation of the terms of her probation. *See also* Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in any felony trial). Therefore, any constitutional challenge to the denial of counsel should cite the Mass. Const. Declaration of Rights art. 12 (right to counsel) and arts. 11 and 12 (due process).

[8] In delinquency cases, where commitment may result, the assistance of counsel is also constitutionally required. In re Gault, 387 U.S. 1 (1967) (adjudicatory hearing); Marsden v. Commonwealth, 352 Mass. 564 (1967); Kent v. United States, 383 U.S. 541 (1966) (transfer hearing).

[9] *See* Macdonnel v. Commonwealth, 353 Mass. 277, 281 (1967) (statutory interpretation based on former S.J.C. Rule 3:10).

[10] In Massachusetts, S.J.C. Rule 3:10, § 1, requires that a defendant he told of his right to have CPCS provide counsel at no cost if he is indigent, or at reduced costs if he is marginally indigent. Because the rules require that the warning be given by a judge, statements by a probation officer are not sufficient. Baldassari v. Commonwealth, 352 Mass. 616 (1967); Mulcahy v. Commonwealth, 352 Mass. 613 (1967). *See also* Kitchens v. Smith, 401 U.S. 847, 848 (1971) ("right to counsel does not depend on a request").

[11] *See supra* note 7.

[12] This is a complex and evolving area of law. The U.S. Supreme Court has held that it does not violate the Sixth and Fourteenth Amendments for a sentencing court to consider a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense, so long as the previous uncounseled misdemeanor conviction was valid under Scott v. Illinois, 440 U.S. 367 (1979), because no sentence of imprisonment was imposed. Nichols v. United States, 114 S. Ct. 1921 (1994), *overruling, in part*, Baldasar v. Illinois, 446 U.S. 222 (1980). *See also* Custis v. United States, 114 S. Ct. 1732 (1994) (with the sole exception of convictions obtained in violation of the right to counsel, a defendant in a federal sentencing proceeding has no right to collaterally attack the validity of previous state convictions that are used to enhance his sentence under the ACCA (Armed Career Criminal Act of 1984)).

In United States v. Isaacs, 14 F.3d 106 (1st Cir. 1994), the First Circuit Court of Appeals had held that the constitution generally requires sentencing courts to permit defendants to make a collateral challenge to prior convictions if the alleged constitutional error is so grave as to make the prior conviction "presumptively void," i.e., if a constitutional violation such as absence of counsel can be found on the face of the prior conviction, without further factual investigation, or where an offender challenges the validity of a prior conviction on "structural" grounds. *See also* United States v. Paleo, 871 F. Supp. 60 (D. Mass. 1994), *aff'd*, 47 F.3d 1156 (1st Cir. 1995) (refusing to enhance sentence under ACCA where one prior conviction appeared to have taken place without counsel and another involved uncounseled appearance at resentencing under former trial de novo system). *But see* United States v. Munoz, 36 F.3d 1229, 1237 (1st Cir. 1994) (approving the general approach of *Custis*, not *Isaacs*: "although *Custis* considered collateral attack under the Armed Career Criminal Act rather than the sentencing guidelines themselves, the constitutional question is the same in each context"); United States v. Cordero, 42 F.3d 697 (1st Cir. 1994) (holding that *Custis* significantly restricted the utility of

conditional suspended sentence or imprisonment if probation is violated.[13] Moreover, where a defendant takes the stand, an uncounseled conviction cannot be used to revive a stale counseled conviction (i.e, an old misdemeanor conviction that is older than 5 years, or a felony conviction that is older than 10 years) for purposes of impeaching the defendant by a prior conviction.[14]

The Supreme Court and the S.J.C. have held that if the right to counsel has "attached" and the defendant was actually or constructively denied representation by counsel at a "critical stage" of the proceedings, the conviction must be reversed even without a showing of prejudice.[15] The Supreme Court has made clear, however, that the Sixth Amendment right to counsel does not attach until the "initiation of adversary criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information or arraignment."[16] Thus, there is no Sixth Amendment right to counsel at arrest or booking.[17]

The Supreme Court has found that unless a suspect invokes his right to counsel, it is not a Sixth Amendment or Miranda violation for the police to interfere with counsel's efforts to communicate with the suspect prior to arraignment.[18] The S.J.C., however, has made clear that under Article 12 of the Massachusetts Declaration of Rights, police interference with an attorney's effort to contact his client violates the state constitution.[19]

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*Isaacs*); United States v. Burke, 67 F.3d 1 (1st Cir. 1995) (absent specific language allowing collateral attack, none is permitted in a sentencing proceeding except as respects the appointment of counsel).

The current validity of Massachusetts cases such as Commonwealth v. Proctor, 403 Mass. 146, 147 (1988) (error to use uncounseled conviction at SDP hearing) is therefore not completely clear. However, the Mass. Const. Declaration of Rights could be found to offer greater protection than the U.S. Constitution.

[13] *See also infra* § 41.3F (uncounseled conviction as basis for probation revocation). Also, under Massachusetts law, a defendant has the right to the assistance of counsel in any probation revocation hearing. Commonwealth v. Faulkner, 418 Mass. 352, 359–360 (1994).

[14] Commonwealth v. Saunders, 50 Mass. App. Ct. 865 (2001).

[15] United States v. Cronic, 466 U.S. 648, 659 (1984).

[16] Kirby v. Illinois, 406 U.S. 682, 689 (1972), quoted in Commonwealth v. Smallwood, 379 Mass. 878, 884 (1980). The attachment of a defendant's Sixth Amendment right to counsel on one offense, however, does not result in the attachment of right to counsel as to other offenses with which the defendant has not yet been charged. McNeil v. Wisconsin, 501 U.S. 171 (1991).

[17] Commonwealth v. Mahoney, 400 Mass. 524, 528–29 (1987); Commonwealth v. Mandeville, 386 Mass. 393, 401 (1982). *See also* Commonwealth v. Beland, 436 Mass. 273 (2002) (defendant has no 6th Amendment or Article 12 right to counsel prior to arraignment, and court-appointed attorney has no duty to phone police station to try to stop interrogation of defendant); Commonwealth v. Patterson, 432 Mass. 767 (2000) (defense counsel's violation of ethical duty towards defendant does not deprive defendant of constitutional guarantee until right to counsel attaches).

[18] Moran v. Burbine, 475 U.S. 412, 424-32 (1986)(where the suspect does not specifically invoke his right to counsel, police failure to inform him that an attorney retained by his family was attempting to reach him did not violate the suspect's Sixth Amendment right to counsel nor did it undermine the validity of his Miranda waiver).

[19] *See* Commonwealth v. Mavredakis, 430 Mass. 848, 849 (2000) (the "duty to inform a suspect of an attorney's efforts to render assistance is necessary to actualize" or give real

But whether or not the Sixth Amendment right to counsel (which is designed to protect the defendant against the government's "expert adversar[ies]," the Supreme Court has recognized that there is an independent Fifth Amendment due-process right to counsel, recognized by Miranda, that is designed to protect the defendant against coercive police interrogation.[20] Whether or not a defendant's Sixth Amendment right to counsel has attached, the defendant may thus have a Fifth Amendment right to counsel, but only if she clearly invokes her right to counsel in the face of police interrogation.[21]

After the Sixth Amendment right to counsel has attached through the initiation of formal charges, the deprivation of counsel will only require reversal if the deprivation occurred at a "critical stage" in the proceedings, which the Supreme Court has defined as any portion of the proceedings that could prejudice the defendant's trial.[22] . In applying this definition, the courts have found:

1. *Lineups/photo arrays.* Lineups following formal charge are critical stages in the proceedings,[23] while postindictment photographic displays are not.[24]

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meaning to the suspect's Miranda rights). *See also* Commonwealth v. McNulty, 458 Mass. 305 (2010) .

[20] McNeil v. Wisconsin, 501 U.S. 171 (1991).

[21] There appears to be a growing split over the level of clarity needed for a defendant to invoke his Fifth Amendment *Miranda* rights (i.e., his right to counsel and to remain silent). In Davis v. United States, 512 U.S. 452, 461 (1994), the Supreme Court held that after a defendant has been administered his Miranda rights and has waived them, "law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney," such "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." In Berghuis v. Thompkins, 130 S. Ct. 2250, 2263 (2010), the Supreme Court extended the *Davis* postwaiver rule of clarity to the prewaiver situation, holding that the invocation of a defendant's Miranda right to remain silent must also be invoked "unambiguously". In Commonwealth v. Clarke, 461 Mass. 336 (2012), however, the Supreme Judicial Court held that under Article 12, a defendant's prewaiver invocation of his Miranda rights does not, unlike the Fifth Amendment, require a defendant to invoke his rights with "utmost clarity," since he has not yet been given and has not yet waived his Miranda rights and since the police can always ask questions clarifying the defendant's intention. In Clarke, the S.J.C. found that the defendant who shook his head in response to officer's post-Miranda question, "So you don't want to speak?," adequately expressed his desire to be remain silent for Article 12 purposes. *See also* Commonwealth v. Hoyt, 461 Mass. 143 (2011) (defendant's prewaiver statement that he wanted an attorney present, but could not afford one, was an unambiguous invocation of his right to counsel and his subsequent statement that he would speak with the police was not a knowing and voluntary waiver of his right to counsel; all subsequent statements must be suppressed since it cannot be said beyond a reasonable doubt that that the defendant initiated subsequent communications with the police); Commonwealth v. Morganti, 455 Mass. 388, 397-98 (2009) (defendant's postwaiver statement "I might need a lawyer and want to talk with him before talking to you" did not unambiguously invoke right to counsel). *See also* Davis v. United States, 114 S. Ct. 2350 (1994); Commonwealth v. DiMuro, 28 Mass. App. Ct. 223 (1990) (under the Fifth Amendment, the police should clarify whether a defendant who makes an ambiguous assertion actually wants counsel). *See infra* ch. 19.

[22] Coleman v. Alabama, 399 U.S. 1 (1970).

[23] Commonwealth v. Mendes, 361 Mass. 507 (1972); Kirby v. Illinois, 406 U.S. 682 (1972); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218, 226–27 (1967),

[24] United States v. Ash, 413 U.S. 300 (1971); Commonwealth v. Jackson, 419 Mass. 716 (1995) (the use of a photo array instead of a lineup does not violate a defendant's right to counsel).]

2. *Psychiatric examinations.* A [a defendant's???] decision to undergo a psychiatric examination is a critical stage in the proceedings,[25] but the defendant has no right to counsel at the Blaisdell interview (where a psychiatrist examines the defendant for criminal responsibility), unless the judge orders otherwise.[26] The decision whether to permit counsel to be present during the psychiatric examination is, however, a matter within the sound discretion of the judge.[27]

3. *Custodial interrogations and interrogations by the police, court officers, social service workers, and jailhouse informants acting as government agents.* While a defendant has no Sixth Amendment right to have counsel present at interrogations conducted prior to the initiation of adversary proceedings,[28] the defendant may nonetheless have a Fifth Amendment right to counsel's presence at custodial interrogations if he has clearly asserted that right,[29] and under Article 12, the police may not interfere with counsel's efforts to communicate with his client.[30] Once a defendant's Sixth Amendment right to counsel has attached, unless a defendant has requested the appointment of counsel or has clearly asserted his Fifth Amendment right to counsel, any statements obtained from him during the course of custodial interrogation in the absence of counsel will only be suppressed if the defendant has clearly and affirmatively requested the appointment of counsel at the arraignment or preliminary hearing or has clearly invoked his right to counsel.[31]

Of course, once his Sixth Amendment right to counsel has attached a defendant has a right to have counsel present at all subsequent police interrogations. This rule has

[25] *See* Estelle v. Smith, 451 U.S. 454 (1981),

[26] *See* Commonwealth v. Trapp, 423 Mass. 356, 358 (1996)(no right to counsel to be physically present during interview, although "videotaping might be a sound idea."); Blaisdell v. Commonwealth, 372 Mass. 753 (1977).

[27] *See also* Commonwealth v. Baldwin, 426 Mass. 105, 110–13 (1997) (it is within the judge's discretion to require an electronic recording of the Blaisdell interview or to permit counsel to be present at the interview and even if the examination of defendant by a psychiatrist retained by the Commonwealth is not recorded, the judge may exclude all or portion of the expert's testimony if found unreliable).

[28] Massiah v. United States, 377 U.S. 201 (1964); Commonwealth v. Harmon, 410 Mass. 425, 428 (1991). *See also* Commonwealth v. Ortiz, 422 Mass. 64, 66 n. 1 (1996) (even where a complaint charging murder and arrest warrant have issued, there is no Sixth Amendment or article 12 right to counsel during police questioning prior to arraignment).

[29] Edwards v. Arizona, 451 U.S. 477 (1981); Commonwealth v. Brant, 380 Mass. 876 , cert. denied, 449 U.S. 1004 (1980).

[30] Commonwealth v. Mavredakis, 430 Mass. 848, 849 (2000). *See also* Commonwealth v. McNulty, 458 Mass. 305 (2010) (police violated defendant's Article 12 right to counsel by not informing him of his attorney's efforts to contact him while the police were interrogating him).

[31] Montejo v. Louisiana, 556 U.S. 778 (2009) (holding that neither defendant's request for counsel at arraignment nor court's appointment of counsel give rise to presumption of invalidity of subsequent waiver by defendant to police-initiated interrogation). *Cf.* Commonwealth v. Tlasek, 77 Mass. App. Ct. 298 (2010) (court declined to consider whether Article 12 requires more than the *Montejo* rule where the defendant failed to specifically raise the issue). In Howes v. Fields, __ S. Ct. __, 2012 WL 538280 (2012) , the Supreme Court held that for Fifth Amendment purposes, the interrogation of a prisoner in a prison environment about crimes unrelated to their current incarceration is not necessarily "custodial," and that the police therefore do not necessarily need to read the prisoner his Miranda rights before questioning him.

been extended to cover the Commonwealth's use of jailhouse informants acting as government agents to "deliberately elicit" incriminating testimony.[32] To prevail on a motion to suppress on these grounds, a defendant must show that the informant was genuinely a government agent and that he was more than a mere passive listener told to keep his ears open for some unspecified evidence of a crime.[33]

4. *Arraignments.* The defendant is entitled to the assistance of counsel at an arraignment,[34] since events at the arraignment may limit or prejudice the defendant's potential defenses.[35] But the failure to appoint an attorney at arraignment may be still be found to be harmless error if lack of prejudice is shown beyond a reasonable doubt.[36]

4. *Probable-cause hearing*.[37]

5. *Change-of-plea hearing.*[38]

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[32] Massiah v United States, 377 U.S. 201 (1964) (government agents outfitted an informant's automobile with radio transmitting equipment and instructed the informant to engage the defendant in conversation relating to the crimes); United States v. Henry, 447 U.S. 264 (1980) (where the police place a paid informant in defendant's cell block and give him specific instructions, the defendant's incriminating statements must be suppressed because law enforcement authorities had deliberated created the situation likely to induce the defendant to make those statements without the advice of counsel); Commonwealth v. Reynolds, 429 Mass. 388, 393 (1999).

[33] *Compare* Commonwealth v. Murphy, 448 Mass. 452 (2007) (holding that an "an articulated agreement" with an informant that contains a "specific benefit" creates an agency relationship, whether or not a specific defendant is "targeted," at least under the S.J.C.'s more expansive reading of Article 12); Commonwealth v. Reynolds, 429 Mass. 388, 393 (1999) (holding that the mere promise to an informant of receiving unspecified benefits of cooperation agreement is sufficient to make informant a government agent), with Kuhlman v. Wilson, 477 U.S. 436 (1986) (holding that defendant's incriminating statements were not "deliberately elicited" by informant who did nothing to stimulate the conversations with defendant, even though informant was intentionally placed in "close proximity" to defendant); United States v. LaBare, 191 F.3d 60 (1st Cir. 1999) (there was no Sixth Amendment violation where informant was merely told by government to listen passively for information about criminal activity from all inmates). *See also* Commonwealth v. Hilton, 443 Mass. 597, 614–615 & n. 8 (2005) (holding that questioning by a court officer was "the equivalent of direct police investigation" and thus constituted a violation of the defendant's Sixth Amendment right to counsel); Commonwealth v. Howard, 446 Mass. 563, 563–564, 567-69 (2006) (holding that a social worker investigating for the Department of Social Services was a government agent when she questioned the defendant and forwarded his responses to a district attorney's office).

[34] Brewer v. Williams, 430 U.S. 387, 398 (1977). *See also* Powell v. Alabama, 287 U.S. 45, 57 (1932) (entitled to counsel during pretrial period beginning with arraignment); Mass. R. Crim. P. 7(a) (counsel to be appointed before arraignment).

[35] Hamilton v. Alabama, 368 U.S. 52, 53 (1961) (critical stage if events at arraignment may limit or prejudice the subsequent defense).

[36] Delle Chiaie v. Commonwealth, 367 Mass. 527, 531–32 (1975); Chin Kee v. Commonwealth, 354 Mass. 156, 163–64 (1968) (absence of counsel at arraignment). *See also* Taylor v. United States, 59 F.3d 154 (1st Cir. 1995) (no presumption exists that lack of counsel at arraignment prejudices all subsequent stages of proceeding where only significant event at arraignment was plea of not guilty).

[37] Hadfield v. Commonwealth, 387 Mass. 252, 256 (1982); Adams v. Illinois, 405 U.S. 278 (1972); Commonwealth v. Britt, 362 Mass. 325 (1972); Coleman v. Alabama, 399 U.S. 1 (1970).

[38] Commonwealth v. Bolduc, 375 Mass. 530, 539–40 (1978); Boyd v. Dutton, 405 U.S. 1, 2–3 (1972); McMann v. Richardson, 397 U.S. 759, 771 (1970) (advice re plea must be

6. *Trials*.[39]

7. *Hearings on the waiver or forfeiture of counsel.* Given the potential severity of the sanction, the defendant is entitled to counsel at any hearing on the waiver or forfeiture of counsel.[40]

8. *Sentencing hearings.* The defendant has the right to counsel at sentencing hearings because counsel's participation at this stage is essential to assist the defendant "in marshaling the facts, introducing evidence of mitigating circumstances," and otherwise assisting the defendant.[41]

9. *Probation or parole revocation hearings.* The Sixth Amendment does not apply to probation and parole revocation hearings because the proceedings are not considered criminal proceedings since the defendant has already been sentenced.[42] The Fourteenth Amendment due process clause, however, does require a case-by-case analysis to determine whether a defendant is entitled to counsel and this hinges on whether the defendant has colorable claim that there was no violation or it was justified or mitigated.[43] The S.J.C. has taken a "more expansive view" and has held that "whenever imprisonment palpably may result from a violation of probation, 'simple justice' requires that, absent waiver, a probationer is entitled to assistance of counsel."[44]

9. *Withdrawal of appeals*..[45]

10. *Appeals*. While the defendant does not have a Sixth Amendment right to counsel on appeal,[46] she does a Fifth Amendment right to counsel but only where she is entitled to a "first appeal as of right."[47] This means that counsel is not constitutionally required on "discretionary appeals."[48]

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competent); Williams v. Commonwealth, 350 Mass. 732, 734 (1966); White v. Maryland, 373 U.S. 59, 60 (1963); Moore v. Michigan, 352 U.S. 907 (1956); cf. Mass. R. Crim. P. 12(b)(2) (right to counsel for plea discussions).

[39] Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

[40] Commonwealth v. Means, 454 Mass. 81, 98–100 (2009).

[41] Baldassari v. Commonwealth, 352 Mass. 616 (1967). *See also* Commonwealth v. Brennick, 14 Mass. App. Ct. 952 (1982); Osborne v. Commonwealth, 378 Mass. 104, 113 (1979); Gardner v. Florida, 430 U.S. 349 (1977; Mempa v. Rhay, 389 U.S. 128, 135 (1967); Townsend v. Burke, 334 U.S. 736 (1948); United States v. Mateo, 950 F.2d 44 (1st Cir. 1991) (sentencing without counsel after express request violated Sixth Amendment); Commonwealth v. Lykus, 406 Mass. 135, 145 (1989).

[42] Commonwealth v. Patton, 458 Mass. 119, 124-25 (2010), citing Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973); Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

[43] Commonwealth v. Patton, 458 Mass. 119, 124-25 (2010), citing Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973); Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

[44] Commonwealth v. Patton, 458 Mass. 119, 125 (2010), quoting Williams v. Commonwealth, 350 Mass. 732, 737 (1966)); Commonwealth v. Faulkner, 418 Mass. 352, 359–360 (1994). *See also* District Court Rules for Probation Violation Proceedings, Rule 5(a) ("The probationer shall be entitled to the assistance of counsel, including the appointment of counsel for probationers determined by the court to be indigent.").

[45] Cardran v. Commonwealth, 356 Mass. 351, 353–54 (1969).

[46] *See also* Martinez v. Court of Appeals of California, 120 S. Ct. 684 (2000)..

[47] Evitts v. Lucey, 469 U.S. 387, 391–405 (1985); Anders v. California, 386 U.S. 738 (1967); Douglas v. California, 372 U.S. 353 (1963); Commonwealth v. Cardenuto, 406 Mass. 450 (1990); Commonwealth v. Conciecao, 388 Mass. 255 (1983); Commonwealth v. Moffett,

11. *Motions to revise and revoke and sentence appeals.* While a defendant's sentence appeal to the Appellate Division is a critical stage of the proceeding at which the defendant has the right to counsel,[49] the S.J.C. has reiterated that it has never held that indigent defendants are "automatically" entitled to the assistance of counsel on motions to revise and revoke.[50]

12. *New trial motions, habeas corpus proceedings, and appeals of new trial motions.* There is no Sixth Amendment right to counsel in postconviction proceedings,[51] including in federal habeas corpus proceedings.[52] But Massachusetts rules of criminal procedure do allow the appointment of counsel for new trial motion, at least where there is a finding of necessity,[53] and the S.J.C . has described the appointment of counsel as "much the better practice."[54]

12. *Juvenile delinquency hearings.* The Supreme Court has held that juvenile defendants are entitled to all trials or hearings where an adjudication of delinquency may result in the defendant's commitment or incarceration.[55] The defendant also has a

383 Mass. 201 (1981); Cardran v. Commonwealth, 356 Mass. 351 (1969). *See also* Martinez v. Court of Appeals of California, 120 S. Ct. 684 (2000) (defendants do not have a constitutional right of self-representation on appeal because the Sixth Amendment does not apply to appellate proceedings and because, under Fifth Amendment due-process analysis, one's interest in self-representation is outweighed by countervailing government interests).

[48] Ross v. Moffitt, 417 U.S. 600 (1974).

[49] Petition of Croteau, 353 Mass. 736 (1968).

[50] Jordan v. Superior Court, 426 Mass. 1019 (1998).

[51] Pennsylvania v. Finley, 481 U.S. 551 (1987). *See also* Murray v. Giarratano, 492 U.S. 1 (1989) (indigent capital defendants have no additional right to postconviction counsel); United States v. Tajeddini, 945 F.2d 458 (1st Cir. 1991) (no right to counsel on federal new trial motion). Cf. Commonwealth v. Conceicao, 388 Mass. 255 (1983) (there is no Article 12 right to counsel in post-conviction proceedings, except perhaps where a "fundamental unfairness" would result); Commonwealth v. Davis, 410 Mass. 680, 684 (1991).

[52] The Sixth Amendment right does not extend to habeas corpus, even in capital cases, but statutory provisions provide for appointment in certain limited cases. *See infra* § 44.5D.

[53] *See* Mass. R. Crim. P. 30(c)(5); G.L. c. 211D, § 5. When a judge sends CPCS a "notice of assignment of counsel" form in a postconviction case, a CPCS "post-conviction panel" will itself review the case to determine whether counsel is necessary, and such appointments are not infrequently made. *See* Memorandum of CPCS Chief Counsel, Jan. 23, 1992.

[54] *See* Commonwealth v. Conciecao, 388 Mass. 255 (1983) (whether new trial motion requires appointed counsel is case by case determination of whether "meaningful access" requires it); Ross v. Moffitt, 417 U.S. 600, 609–16 (1974) (no right to counsel for discretionary review); Commonwealth v. Deeran, 397 Mass. 136, 140 n.4 (no right to counsel on new trial motion in trial court); Commonwealth v. Davis, 410 Mass. 680, 684 n.7 (1991); Commonwealth v. Gagnon, 37 Mass. App. Ct. 626, 634–35 (1994), further appellate review granted on other grounds, 419 Mass. 1009 (1995) (no error in refusal to appoint counsel on Rule 30 motion where there were "no factual issues" and the arguments "were not legally complex"). Although not constitutionally a "critical stage," Massachusetts case law provides a right to counsel at all postverdict judicial interviews with jurors regarding extraneous influences. Commonwealth v. Mahoney, 406 Mass. 843, 856 (1990). If the facts indicate that the interview was unwarranted, excluding defense counsel is not reversible error. *Id.*

[55] In re Gault, 387 U.S. 1 (1967).

right to counsel at any court hearing that may result her transfer to adult court. 11. Juvenile transfer hearings.[56]

13. Sexually Dangerous Persons and Sex Offender Registry Board Classification Hearings.[57]

Even if the defendant has no right to have counsel appointed, if the court does appoint counsel who provides ineffective assistance, the defendant's Sixth Amendment right has been abridged.[58]

The Sixth Amendment right to counsel, however, is "offense specific."[59] Once a person has been formally charged, the right to counsel attaches, but incriminating statements pertaining to other crimes, as to which the right has not yet attached, may be admissible at a trial of those offenses.[60] In determining whether a defendant, by invoking his Sixth Amendment right as to one offense, has effectively invoked it as to other offenses, the Supreme Court has made clear that it is not enough that the two offenses are "factually related" or "inextricably intertwined" as a matter of fact. Rather the two offenses must be greater or lesser included offenses under the double-jeopardy *Blockburger* rule.[61]

## § 8.1B. STATE CONSTITUTION PROVIDES BROADER PROTECTION

Any right to counsel claim should rely on the Massachusetts Constitution Declaration of Rights as well as the federal constitution, because article 12 has been held to provide broader protection than the sixth amendment.[62] For example, the Supreme Judicial Court has varied from the federal rule in holding that no showing of prejudice is necessary when an actual conflict of interest is demonstrated,[63] and has indicated that the level of prejudice necessary to establish other kinds of ineffective

[56] Marsden v. Commonwealth, 352 Mass. 564, 567 n.5 (1967); Kent v. United States, 383 U.S. 541 (1966).

[57] Commonwealth v. Ferreira, 67 Mass.App.Ct. 109, 114–115 (2006) (holding that G.L. c. 123A, sec. 10, provides a statutory right to counsel at SDP hearings and stating in dictum that state and federal due process require as much); Poe v. Sex Offender Registry Bd., 456 Mass. 801, 811–814 (2010)(holding that a defendant's statutory right to counsel at classification hearings before the Sex Offender Registry Board includes the right to the effective assistance of counsel).

[58] Breese v. Commonwealth, 415 Mass. 249, 251–52 n.4 (1993).

[59] McNeil v. Wisconsin, 501 U.S. 171, 175 (1991).

[60] Maine v. Moulton, 474 U.S. 159, 180 n.16 (1985). *But see* Texas v. Cobb, 532 U.S. 162 (2001) (the right to counsel may cover other uncharged lesser-included or greater-inclusive offenses stemming from the same incident).

[61] *See* Texas v. Cobb, 532 U.S. 162 (2001), effectively abrogating Commonwealth v. Rainwater, 425 Mass. 540, 556 (1997), cert. denied, 522 U.S. 1095 (1998) .

[62] Commonwealth v. Murphy, 448 Mass. 452 (2007); Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 230–231 (2004); Commonwealth v. Mavredakis, 430 Mass. 848, 849 (2000); Breese v. Commonwealth, 415 Mass. 249, 252 (1993); Commonwealth v. Lykus, 406 Mass. 135, 138 (1989); Commonwealth v. Richard, 398 Mass. 392, 393 (1986) (citing Commonwealth v. Hodge, 386 Mass. 165, 169–70 (1982); Commonwealth v. Hurley, 391 Mass. 76, 81 (1983).

[63] Commonwealth v. Richard, 398 Mass. 392, 393–94 (1986); Commonwealth v. Hodge, 386 Mass. 165, 168–70 (1982).

assistance claims may be less than the federal standard.[64] In at least some cases, the Supreme Judicial Court utilized the federal standard because counsel asserted no claim under article 12.[65]

## § 8.1C. INEFFECTIVE ASSISTANCE OF COUNSEL

### 1. The standard of review

The Sixth Amendment right to counsel encompasses a right to the *effective* assistance of *competent* counsel.[66] In *Strickland v. Washington* [67] the Supreme Court established a two-pronged test for proving ineffective assistance of counsel, requiring both "unreasonable representation under prevailing professional norms" and prejudice. As to the first prong, *Strickland* established a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[68] As to the second prong, *Strickland* held that the defendant must demonstrate a "reasonable probability" of a different result "sufficient to undermine confidence in the outcome" — that is, more than a mere possibility that the result would have been different but not proof by a preponderance of the evidence.[69] *Strickland's* failure to apply the normal rule of prejudice — that once a constitutional error is found, the government must prove it harmless beyond a reasonable doubt [70] — constitutes a devaluation of the right to effective assistance of counsel.[71] However, in certain egregious delineated cases

[64] Commonwealth v. Richard, 398 Mass. 392, 394 n.2 (1986).

[65] Commonwealth v. Florentino, 396 Mass. 689, 689–90 & n.1 (1986). *See also* Commonwealth v. Perez, 411 Mass. 249, 256 (1991) (*Miranda* issue); Commonwealth v. Molino, 411 Mass. 149, 152 (1991) (citing Commonwealth v. Oakes, 407 Mass. 92, 98 (1990) (court generally will not consider state constitutional grounds if not argued separately from federal claim)).

[66] Kimmelman v. Morrison, 477 U.S. 365, 377 (1986); Strickland v. Washington, 466 U.S. 688 (1984); Cuyler v. Sullivan, 446 U.S. 335, 344–45 (1980) (right to *effective* assistance applies both to appointed and retained counsel); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); Reese v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60 (1942); Breese v. Commonwealth, 415 Mass. 249, 251–52 n.4 (1993) (when counsel is appointed, ineffective assistance of counsel claim is viable regardless of whether defendant had a right to counsel to begin with).

[67] 466 U.S. 668, 691–92 (1984).

[68] Strickland v. Washington, 466 U.S. 668, 689 (1984).

[69] Strickland v. Washington, 466 U.S. 668, 693–94 (1984). *See* United States v. Cronic, 466 U.S. 648, 657–62 (1984), and Kimmelman v. Morrison, 477 U.S. 365, 381 n.6 (1986), for a discussion of when a showing of prejudice is required in assessing Sixth Amendment claims. The Supreme Court has also ruled that *Strickland*'s prejudice test is not satisfied if trial counsel failed to make a federal constitutional claim which court decisions at the time recognized, but which has since been overruled, even if it would have changed the outcome. The outcome must be unfair or unreliable as measured by the law as it exists at the time of review. Lockhart v. Fretwell, 113 S. Ct. 838 (1993).

[70] *See* Pope v. Illinois, 481 U.S. 497 (1987); Chapman v. California, 386 U.S. 18 (1967).

[71] For an argument that the traditional harmless error standard should apply to ineffective assistance claims, *see* Hoffman, *Promises to Keep: The Right to Effective Assistance of Counsel: Anderson v. Butler*, 74 MASS. L. REV. 28, 33 (1989).

prejudice will be presumed,[72] and the Supreme Judicial Court has raised the possibility that article 12 of the Massachusetts Constitution may invalidate a conviction with a lesser showing of prejudice than is required under *Strickland.*[73]

In *Commonwealth v. Saferian*, the S.J.C. established a similar two-pronged standard: (1) was there serious incompetency, inefficiency, or inattention, falling "measurably below the conduct of an ordinary fallible lawyer,"[74] and (2) did this conduct "likely deprive the defendant of an otherwise available, substantial ground of defense?[75] With respect to the first prong, the standard is highly deferential and presumes that counsel's performance fell within adequate limits.

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[72] In addition to an actual conflict of interest (*see infra* § 8.6), other circumstances that are presumed to be prejudicial include (1) complete denial of counsel, such as by lack of appointment or by interference; (2) complete failure by counsel to subject the case to meaningful adversarial testing; or (3) prevention or interference with the attorney-client relationship that would be likely to render even fully competent counsel unable to provide effective assistance, such as appointment just before trial. *See* Kimmelman v. Morrison, 477 U.S. 365, 381 n.6 (1986); United States v. Cronic, 466 U.S. 648, 658–59 (1984); United States v. Mateo, 950 F.2d 44 (1st Cir. 1991) (harmless error analysis does not apply to sentencing in absence of counsel after explicit request); Commonwealth v. Thibeault, 28 Mass. App. Ct. 787, 789 (1990) (presumed prejudice from representation by someone *posing* as an attorney). Satterwhite v. Texas, 486 U.S. 249, 256–58 (1988), articulated a general rule that if the Sixth Amendment violation pervaded the entire proceeding, it can never be considered harmless.

[73] Commonwealth v. Richard, 398 Mass. 392, 394 n.2 (1986). The case further notes that no showing of prejudice is required when the ineffective assistance was based on counsel's conflict of interest. *Richard*, *supra*, 398 Mass. at 393–94. *But see* Commonwealth v. Tucceri, 412 Mass. 401, 413 (1992); Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977) (regarding nonconflict ineffective assistance claims, court will not overturn a conviction unless defendant shows that better work might have accomplished something material for defense). *See also* Commonwealth v. Cardenuto, 406 Mass. 450, 454 n.8 (1990) (leaving open whether Massachusetts *Saferian* test of effective assistance is stricter than federal test). *See* Commonwealth v. Urena, 417 Mass. 692, 696 (1994) (art. 12 of the Mass. Const. Declaration of Rights guarantees at least as much by way of "effective assistance" as does the Sixth Amendment). *But see* Scarpa v. Dubois, 38 F.3d 1, 7–8 (1st Cir. 1994), *cert. denied*, 513 U.S. 1129 (1995) (doubting whether any actual difference exists between Massachusetts and federal "ineffective assistance" standards).

[74] *See also* Commonwealth v. Garcia, 379 Mass. 422, 434 (1980) (describing Saferian's first prong as a test "tended toward a standard of competence similar to that for legal malpractice"). To prevail on a malpractice claim, however, the S.J.C. now requires not only attorney negligence causing an adverse result, but also that the criminal defendant have been innocent. Glenn v. Aiken, 409 Mass. 699, 704–08 (1991).

[75] Commonwealth v. Saferian, 366 Mass. 89, 96 (1974) . *See also* Commonwealth v. Stroyny, 435 Mass. 635 (2002) (defendant raising ineffective assistance claim has burden of showing defense counsel's error likely influenced verdict); Commonwealth v. Alphas, 430 Mass. 8,14 (1999); Commonwealth v. Peters, 429 Mass. 22, 31–33 (1999); Breese v. Commonwealth, 415 Mass. 249, 252 (1993); Commonwealth v. Burke, 414 Mass. 252, 256 (1993); Commonwealth v. Gillette, 33 Mass. App. Ct. 427, 429–33 (1992); Commonwealth v. Benoit, 410 Mass. 506, 519 (1991); Commonwealth v. White, 409 Mass. 266, 272 (1991); Commonwealth v. Blake, 409 Mass. 146, 162 (1991); Commonwealth v. Pena, 31 Mass. App. Ct. 201, 204 (1991); Commonwealth v. Osorno, 30 Mass. App. Ct. 327, 329, 333 (1991); Commonwealth v. Lanoue, 409 Mass. 1, 4 (1990); Commonwealth v. Colon, 408 Mass. 419, 432 (1990); Commonwealth v. Mattos, 404 Mass. 672, 677 (1989); Commonwealth v. Moran, 388 Mass. 655, 660 (1983); Commonwealth v. Street, 388 Mass. 281, 285 (1983); Commonwealth v. Levia, 385 Mass. 345, 353 (1982); Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

With respect to the second prong, the S.J.C. in *Commonwealth v. Satterfield*, gave the prejudice requirement a slightly different, and perhaps more defendant-friendly, formulation, by stating that prejudice will be found if it can be concluded that "better work might have accomplished something material for the defense."[76] In cases where the ineffective assistance claim is based on counsel's failure to preserve an issue for appeal, the S.J.C. has stated that *Commonwealth v. Freeman's* substantial risk of a miscarriage of justice standard is the "default standard of review" and that the defendant need not raise the issue independently as an ineffective assistance of counsel claim.[77] One advantage of this is that the defendant need not first litigate the claim as part of a new trial motion before raising the claim on direct appeal. Notwithstanding the Massachusetts' courts understanding of the issue, however, the federal courts have a different view. If a defendant wants to make sure that his federal ineffective assistance claim is not deemed unexhausted or procedurally defaulted for federal habeas corpus purposes, the defendant should explicitly raise the issue as a Fourteenth Amendment ineffective assistance claim.[78]

In those cases where the courts characterize counsel's mistake as a "tactical" or "strategic" decision, a defendant must meet an even more demanding standard – the defendant must show that counsel's decision was "manifestly unreasonable," a difficult standard to satisfy.[79] Not infrequently, the courts -- and trial counsel in addressing their

[76] 373 Mass. 109, 115 (1977). For still other formulations, *see* Commonwealth v. Street, 388 Mass. 281 (1983) (trial counsel's failure left defendant "denuded of a defense"); Commonwealth v. Westmoreland, 388 Mass. 269, 274 (1983) (trial counsel abandoned only available defense).

[77] Commonwealth v. Randolph, 438 Mass. 290, 297-298 (2002) (the substantial risk of a miscarriage of justice standard is the "default standard of review" for all unpreserved errors – whether waived at trial, on direct appeal, or in a prior new trial motion). *See also* Commonwealth v. Sholley, 432 Mass. 721 (2000) (standard of review is same for claim of ineffective assistance as for substantial risk of miscarriage of justice). In Randolph, the S.J.C. also declared that its recent opinions had "equat[ed] the ineffective assistance of counsel standard to the substantial risk of a miscarriage of justice standard in cases where waiver stems from an omission by defense counsel," and that ineffectiveness will accordingly be "presumed if the attorney's omission created a substantial risk, and disregarded if it did not." Id. at 295, citing Commonwealth v. Azar, 435 Mass. 675, 687 (2002), and Commonwealth v. Peters, 429 Mass. 22, 31 n.12 (1999).

[78] *See* Lynch v. Ficco, 438 F.3d 35, 46 (1st Cir. 2006) (observing that the defendant had properly raised and exhausted his federal ineffective assistance claim before the S.J.C. and finding that the Saferian-Strickland standard, in fact, differs from the Freeman substantial risk of a miscarriage of justice standard).

[79] *See, e.g.,* Commonwealth v. Alvarez, 433 Mass. 93 (2000) (strategic choices by defense counsel not ineffective assistance unless manifestly unreasonable); Commonwealth v. Hill, 432 Mass. 704 (2000); Commonwealth v. O'Neil, 51 Mass. App. Ct. 170 (2001) (failure to use at trial document specifying Commonwealth's reward to its witness for testimony against defendant); Commonwealth v. Martin, 427 Mass. 816, 822 (1998) (failure to pursue issue of alleged victim's cause of death); Commonwealth v. Scheffer, 43 Mass. App. Ct. 398 (1997) (failure to seek voir dire of complainant to determine whether previous allegations of sexual abuse against others were sufficiently similar to her allegations against defendant to make evidence of earlier incidents admissible to explain complainant's knowledge); Commonwealth v. Day, 42 Mass. App. Ct. 242 (1997) (strategy of introducing unsanitized police "wanted" flyer of defendant in order to show that identifications of the defendant were tainted); Commonwealth v. Aviles, 40 Mass. App. Ct. 440 (1995) (failure to call chiropractor, civil attorney, insurance agent, or eyewitnesses to support testimony that defendant was physically impaired); Commonwealth v. Barrett, 418 Mass. 788, 792–93 (1994) (ineffective assistance

own conduct -- will characterize their mistake a "tactical choice" within the range of competent conduct.[80] One strategy for dealing with this is to scour the record for contradictory conduct that demonstrates either that no such choice was made or that it was made in ignorance without the necessary information.[81] As one court has said, "There is nothing strategic or tactical about ignorance."[82]

*Capital cases:* A standard more favorable to the defendant is applied to review of capital cases. Under G.L. c. 278, § 33E, discussed *infra* § 45.8, a defendant convicted of first-degree murder is entitled to a special form of appeal. This statute looks at the entire trial process to determine whether there is a substantial likelihood

found on ground that counsel failed to seek dismissal of 12 charges that had occurred sufficiently long before indictment to have been barred by the statute of limitations; this was so even if counsel had knowingly waived this defense as a matter of strategy); Commonwealth v. Street, 388 Mass. 281, 285 (1983); Commonwealth v. Moran, 388 Mass. 655, 660–61 (1983) (citing Commonwealth v. Adams, 374 Mass. 722, 727 (1978)).

[80] *See, e.g.,* Lema v. United States, 987 F.2d 48 (1st Cir. 1993); Commonwealth v. Serino, 436 Mass. 408 (2002) (tactical decision to forego voir dire hearing on voluntariness of defendant's confession); Commonwealth v. Vao Suk, 435 Mass. 743 (2002) (tactical decision to stress defendant's insanity over misidentification);; Commonwealth v. Burgess, 434 Mass. 307 (2001) (whether to call defendant as witness at motion to suppress hearing is tactical decision); Commonwealth v. Britto, 433 Mass. 596 (2001) (whether to impeach Commonwealth's witness on a particular ground is tactical decision for defense counsel, though complete failure to impeach witness on any available ground might amount to ineffective assistance of counsel); Commonwealth v. Fisher, 433 Mass. 340 (2001); Britto, *supra* (whether to call a particular witness is strategic decision for defense counsel); Commonwealth v. Willard, 53 Mass. App. Ct. 650 (2002) (failure to request mistaken identification instruction not necessarily ineffective assistance); Commonwealth v. Savage, 51 Mass. App. Ct. 500 (2001) (defendant's decision not to testify on advice of counsel is "tactical choice"); Commonwealth v. Hunt, 50 Mass. App. Ct. 565 (2000) (reasonable tactics for defense counsel not to object to defendant's statement to police officers, so as to put defendant's defense before jury without defendant testifying); Commonwealth v. Ortiz, 50 Mass. App. Ct. 304 (2000) (failure to use peremptory challenge to remove a police officer as juror may be sound tactical decision); Commonwealth v. Hurley, 32 Mass. App. Ct. 620, 621–23 (1992); Commonwealth v. Colon, 408 Mass. 419, 433 (1990); Commonwealth v. Williams, 30 Mass. App. Ct. 543 (1991); Chappee v. Vose, 843 F.2d 25, 34 (1st Cir. 1988); Commonwealth v. Sellon, 380 Mass. 220, 228 (1980). Mistaken tactics or judgments will not be grounds for reversal if within the range of competence. Commonwealth v. Daigle, 379 Mass. 541, 544 (1980) (court will not second guess reasonable tactics of trial counsel); Commonwealth v. Bernier, 359 Mass. 13, 20 (1971). *See also* Commonwealth v. Parker, 420 Mass. 242 (1995) (even under more favorable review standard of G.L. c. 278, § 33E, counsel's failure to present defense of intoxication to negate evidence of premeditation held not ineffective). Regarding tactical decisions, the S.J.C. will review with "some deference to avoid characterizing as unreasonable a defense that was merely unsuccessful." Commonwealth v. White, 409 Mass. 266, 272–73 (1991) (citing Commonwealth v. Rondeau, 378 Mass. 408, 413 (1979)).

[81] *See, e.g.,* Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988), in which the court refuted the claim that failure to deliver promised psychiatric testimony was a tactical choice by stating that if such a choice was made, it was inexcusable to allude to the evidence in the opening statement.

[82] Pineda v. Craven, 424 F.2d 369, 372 (9th Cir. 1970).

that a miscarriage of justice has occurred.[83] Thus when applying this to claims of ineffective assistance of counsel, the focus is not solely on the adequacy of trial defense counsel's performance (the *Strickland* standard), but rather concentrates on, "whether there was an error in the course of the trial (by defense counsel, the prosecutor, or the judge) and, if there was, whether that error was likely to have influenced the jury's conclusion."[84]

### 2. Procedure for asserting ineffective assistance

Where the defendant has made a "substantial showing," the trial court should conduct an evidentiary hearing to determine whether counsel was incompetent, unprepared, or harbored conflicting interests.[85] Even if the defendant does not raise the issue, the court has a general obligation to insure that the defendant is competently represented,[86] and must conduct specific colloquies in the case of joint representation of codefendants or other likely conflicts, as detailed *infra* at § 8.6.

Defendants who want to assert a claim of ineffective assistance *following* conviction usually need to expand the record by filing a motion for a new trial, at which evidence may be taken. Indeed, while the courts have stated that ineffective assistance claims can, in principle, be raised and addressed on direct appeal "when the factual basis of the claim appears indisputably on the trial record,"[87] the courts have repeatedly stated that "absent exceptional circumstances," ineffective assistance of counsel claims should be raised in the first instance in a new-trial motion before the trial court.[88]

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[83] G.L. c. 278, § 33E. *See* Commonwealth v. Vinnie, 428 Mass. 161, 164 (1998); Commonwealth v. Wright, 411 Mass. 678, 682 (1992); Commonwealth v. Lennon, 399 Mass. 443, 448–449 n.6 (1987).

[84] Commonwealth v. Burke, 414 Mass. 252, 256–57, 264 (1993); Commonwealth v. Wright, 411 Mass. 678, 682 (1992); Commonwealth v. Martino, 412 Mass. 267, 288 (1992); Commonwealth v. MacKenzie, 413 Mass. 498, 518 (1992).

[85] Commonwealth v. Caban, 48 Mass. App. Ct. 179, 183 (1999) (motion judge abused her discretion in not ordering evidentiary hearing where trial counsel had failed to consult with key alibi witness before trial and where witness failed to bring in key document because counsel had belatedly summonsed him in; need for evidentiary hearing to determine whether defendant's failure to respond to counsel's inquiries played a role); Habarek v. Commonwealth, 421 Mass. 1005 (1995) (defendant represented on appeal by trial counsel was held entitled to an evidentiary hearing on his claim of ineffective assistance); Commonwealth v. Flowers, 5 Mass. App. Ct. 557, 565–66 (1977).

[86] McMann v. Richardson, 397 U.S. 759, 771 (1970) (court should maintain proper standard of performance by counsel); ABA Standards Relating to the Administration of Criminal Justice: Special Functions of the Trial Judge (1980), Standard 6-1.1; Standards of Judicial Practice: Arraignment Standard 5:04 (District Court Administrative Office, Aug. 1977) (court should insure appointed attorney is competent).

[87] Commonwealth v. Adamides, 37 Mass. App. Ct. 339, 344 (1994); Commonwealth v. McCormick, 48 Mass. App.Ct. 106, 107 (1999).

[88] *See* Commonwealth v. Brookins, 416 Mass. 97 (1993); Commonwealth v. Cosme, 398 Mass. 1008, 1009 (1986); Commonwealth v. Pires, 389 Mass. 657, 663 (1983) (claims of ineffectiveness raised for first time on appeal "not properly before us"). .*See also* Commonwealth v. Allen, 430 Mass. 252, 257 (1999); Commonwealth v. Carney, 31 Mass. App. Ct. 250 (1991); Commonwealth v. O'Neil, 51 Mass. App Ct. 170 (2001); Commonwealth v. Delarosa, 50 Mass. App. Ct. 623 (2000); Commonwealth v. Frisino, 21 Mass. App. Ct. 551, 556 (1986). It has long been clear that where the same attorney represented a defendant at trial and on direct appeal, a claim of ineffective assistance of counsel is not waived when raised for the

Following appeal on the conviction or on the denial of a motion for a new trial, the defendant may pursue an ineffective assistance claim by bringing a habeas action in federal district court, although counsel must make sure that the claim has been fully exhausted by fairly presenting the issue to the S.J.C. either on appeal or via an application for leave for further appellate review.[89]

Before raising an ineffective assistance of counsel claim, the defendant must understand that bringing the claim may free the former counsel to reveal client confidences.[90] Moreover, the court's "presumption" of competent representation and the requirement of demonstrated prejudice are difficult hurdles, especially since the more inadequate the investigation and representation, the more likely the case will appear "hopeless" and thus incapable of having been prejudiced by counsel's failures. A defendant will also have to overcome the reviewing court's interests in finality, protecting the former attorney from humiliation, and discouraging postconviction

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first time in the defendant's post-appeal motion for a new trial because trial counsel cannot be expected to have raised an ineffective claim targeting himself. Commonwealth v. Azar, 435 Mass. 675 (2002). There may, however, be circumstances where a defendant was represented on appeal by new counsel, not affiliated with trial counsel, failure to raise ineffectiveness claim on direct appeal is waiver of claim. Commonwealth v. Chase, 433 Mass. 292 (2001). If a defendant has previously waived an ineffectiveness claim, a judge, in the exercise of discretion to avoid a miscarriage of justice, may grant relief from the waiver on defendant's motion for a new trial. Commonwealth v. Wheeler, 52 Mass. App. Ct. 631 (2001). But in 2006 in Commonwealth v. Zinser, 446 Mass. 807 (2006) the S.J.C. held that because a new-trial motion is the preferred route for raising ineffective claims in the first instance, a defendant's failure on direct appeal to raise a claim of ineffective assistance based on counsel's alleged failure to investigate did not waive issue for new-trial-motion purposes and that claim should be considered by the motion court, at least where the trial record was not sufficient to have properly assessed the claim on direct appeal. Commonwealth v. Zinser, 446 Mass. 807 (2006). The Massachusetts rule, post-Zinser, tracks the federal approach. *See* Massaro v. United States, 538 U.S. 500, 502-04 (2003) (defendant's failure to have raised an ineffective assistance claim on direct appeal was not a procedural default barring habeas review under §2255, even if issue could have been resolved on direct appeal, on ground that all such claims should first be raised in the trial court where relevant facts can be developed).

When a defendant files a new-trial motion, the trial court will almost invariably expect that either the defendant or the Commonwealth will submit an affidavit of trial counsel explaining her view of the matter. Postconviction counsel should interview trial counsel and consider submitting her affidavit if it would be supportive of the defendant's new-trial motion. If the defendant raises an ineffectiveness claim supported only by a defendant's affidavit, the Commonwealth should present defendant's trial counsel's counter-affidavit to provide a basis for inquiry and findings by the judge. Commonwealth v. Harding, 53 Mass. App. Ct. 378 (2001). A defendant may raise a claim of ineffective assistance by *appellate* counsel through a motion for a new trial under M.R.Cr.P. 30. Bates v. Commonwealth, 434 Mass. 1019 (2001).

[89] *See* Lynch v. Ficco, 438 F.3d 35, 46 (1st Cir. 2006) (observing that the defendant had properly raised and exhausted his federal ineffective assistance claim before the S.J.C. and finding that the *Saferian-Strickland* standard differs from the Freeman substantial risk of a miscarriage of justice standard). *See also* Kimmelman v. Morrison, 477 U.S. 365 (1986) (restriction on Fourth Amendment habeas claims does not apply to Sixth Amendment claim).

[90] Mass. R. Prof. C. 1.6(b)(2) ("to respond to allegations in any proceeding concerning the lawyer's representation of the client") S.J.C. Rule 3:07, DR 4-101(C)(4). However, confidences may be revealed by former counsel only to the extent they are "relevant, material, or necessary to defend against the charge." Commonwealth v. Woodberry, 26 Mass. App. Ct. 636, 637 (1988).

claims generally. Statistics demonstrate that defendants presenting an ineffective assistance claim face a rough road.[91]

### 3. Conduct that constitutes ineffective assistance

The United States Supreme Court has not adopted detailed competency standards against which to measure the Sixth Amendment right, and in *Strickland* it explicitly eschewed doing so.[92] Whether a particular failure rises to the level of ineffective assistance must be decided on a case-by-case basis. Defense attorneys may be guided by the rules and standards that have been promulgated by the Supreme Judicial Court,[93] the American Bar Association,[94] and the Massachusetts Committee for Public Counsel Services.[95] The issue of "ineffective assistance" is highly fact-specific and turns essentially on the strength of the Commonwealth's evidence against the defendant. Poor performance in the conduct of a defense will be insulated against a finding of "ineffective assistance" if the evidence against the defendant is very strong.[96] Conversely, a single, "serious," oversight by counsel in a case where the Commonwealth's evidence is thin may require reversal on the ground of "ineffective assistance," even if counsel's performance has otherwise been excellent.[97]

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[91] *See, e.g.*, Anderson v. Butler, 858 F.2d 16, 21 (1st Cir. 1988) (Breyer, J., dissenting) (in 1986 and 1987, 157 ineffective assistance cases were heard in federal court, of which only 20 were successful); Commonwealth v. Filippidakis, 29 Mass. App. Ct. 679, 688 (1991) (heavy burden of proof on defendant).

[92] Strickland v. Washington, 466 U.S. 668, 688–89 (1984). The alternative approach was adopted by the Fourth Circuit in Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968), which enunciated the following standards: an attorney must (1) confer with the client as early as possible and as often as necessary; (2) advise the client of the charges against him and his rights; (3) ascertain and develop all appropriate defenses; (4) conduct all necessary investigations; (5) allow time for reflection and preparation.

[93] S.J.C. Rule 3:07 (canons of ethics and disciplinary rules, generally adopted from the ABA Code of Professional Responsibility); Rule 3:08 (prosecution and defense standards). These rules are reproduced in this volume as Appendix C.

[94] The ABA has promulgated three sets of standards of attorney conduct: (1) Standards Relating to the Administration of Criminal Justice (1972), including Chapter 4, The Defense Function, some of which were adopted as S.J.C. Rule 3:08; (2) The Model Code of Professional Responsibility (1970), much of which was adopted as former S.J.C. Rule 3:07; and (3) The Model Rules of Professional Responsibility, adopted in 1983 by the ABA but subsequently by only a minority of states.

Additionally, the ABA Committee on Professional Ethics publishes "formal" and "informal" opinions interpreting the Code of Professional Responsibility's application to particular situations.

[95] CPCS, Performance Guidelines Governing Representation of Indigents in Criminal Cases (1987).

[96] *See* Scarpa v. Dubois, 38 F.3d 1, 7, 10, 15–16 (1st Cir. 1994), *cert. denied*, 513 U.S. 1129 (1995) (defense counsel's self-professed ineffectiveness consisted of pursuing a "half-baked theory" of defense which "evidenced a blatant misunderstanding" of the pertinent law, but resulted in no "actual prejudice" required for finding of ineffective assistance; habeas corpus denied); Commonwealth v. Juzba, 46 Mass. App. Ct. 319, 321–323 (1999) (defense counsel's lack of knowledge of relevant statute did not meet standard of ordinary fallible lawyer, but did not result in deprivation to defendant of available substantial defense).

[97] *See* Commonwealth v. O'Neil, 51 Mass. App. Ct. 170 (2001) (single serious mistake by defense counsel at trial may amount to ineffective assistance of counsel despite over-all good

Virtually any phase of trial and pretrial representation may warrant an ineffective assistance finding,[98] including:

1. *Failure to investigate, interview witnesses, or prepare adequately for trial.* Defense counsel has duty to make either (a) a reasonable investigation of the case or (b) a reasonable decision not to undertake investigation.[99] While failure to investigate or adequately prepare a case violates the attorney's ethical responsibility under the rules governing professional responsibility,[100] a failure under the ethical rules will not necessarily meet the *Saferian-Strickland* standard. The mere fact that a client has confessed or admitted to key exculpatory facts does not excuse counsel's failure to investigate and prepare a case for trial.[101] Even if the case appears to be headed for a guilty plea, counsel nonetheless has a duty to conduct a reasonable investigation.[102] The S.J.C. has thus reversed for counsel's failure to investigate and pursue the only realistic defense.[103] When it has occurred, inadequate investigation may be the most

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quality of defense); Commonwealth v. Frisino, 21 Mass. App. Ct. 551, 556 (1986); Commonwealth v. Rossi, 19 Mass. App. Ct. 257, 258–260 (1985) (eliciting defendant's prior convictions on direct examination of defendant to blunt the force of anticipated impeachment, where convictions were barred by statute from use for impeachment, required reversal on ground of "ineffective assistance," notwithstanding defense counsel's display of "high degree of professional competence"). *See also* United States. v. Cronic, 466 U.S. 648, 657 n. 20 (1984) ("the type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole— specific errors and omissions may be the focus of a claim of ineffective assistance as well").

[98] With the exception of a conflict of interest situation and those situations listed *supra* in sec. 8.1C(1), the defendant must point to particular conduct rather than those factors that might make ineffective assistance more likely, because it is presumed a lawyer is competent. United States v. Cronic, 466 U.S. 648, 658, 662 (1984). *See* Commonwealth v. Harris, 11 Mass. App. Ct. 165, 177 n.11 (1981) (finding dubious defendant's assumption that inexperienced attorney is necessarily less competent).

[99] Wiggins v. Smith, 539 U.S. 510 (2003); Commonwealth v. Duran, 435 Mass. 97 (2001); *See also* United States v. Tucker, 716 F.2d. 576, 581, 583 (9th Cir. 1983) ("[p]retrial investigation and preparation are the keys to effective representation of counsel"); Commonwealth v. Aviles, 31 Mass. App. Ct. 244 (1991) (counsel's failure to investigate defendant's medical incapacity to commit crime because he was on crutches and to argue alibi might have been ineffective assistance).

[100] Mass. R. Prof. C. 1.1 (competence); 1.3 (diligence); *see also* former S.J.C. Rule 3:07, DR 6-101(2); S.J.C. Rule 3:08, DF 4. *See also* Wagenmann v. Adams, 829 F.2d 196 (1st Cir. 1987) (malpractice suit won for not contesting Bridgewater observational commitment).

[101] Mass. R. Prof. C. 3.1; ABA Standards Relating to the Administration of Criminal Justice, Standard 4-4.1 (2d ed. 1980). However, counsel is entitled to rely on his client's description of the events underlying a criminal charge. Strickland v. Washington, 466 U.S. 668, 691 (1984); Commonwealth v. White, 409 Mass. 266, 274 (1991).

[102] Commonwealth v. Caban, 48 Mass. App. Ct. 179, 182 n.2 (1999) (counsel must fully investigate case even if plea agreement is contemplated); ABA, Standards Relating to the Administration of Criminal Justice, Standard 4-6.1(b) (Supp. 1986). *See also id.*, Standard 4-4.1 (duty to promptly investigate). *But see* Burger v. Kemp, 483 U.S. 776 (1987) ("strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation").

[103] Commonwealth v. Fletcher, 435 Mass 558 (2002) (failure to investigate defendant's mental state is ineffective assistance of counsel if facts known or accessible to counsel raise

promising and easily proved of ineffective assistance claims.[104]

reasonable doubt as to defendant's mental condition); Commonwealth v. Milton, 49 Mass. App. Ct. 552 (2000) (reversed, because counsel's failure to request psychiatric evaluation of defendant, given his history of psychiatric difficulties, was ineffective assistance that may have deprived defendant of insanity defense); Commonwealth v. Alvarez, 433 Mass 93 (2000) (ineffective assistance of counsel for defense counsel to fail to provide defendant's expert psychiatric witness with defendant's medical records); Commonwealth v. Roberio, 428 Mass. 278, 280–282 (1998) (failure to investigate insanity defense); Commonwealth v. Haggerty, 400 Mass. 437, 441 (1987). *But see* Commonwealth v. Haley, 413 Mass. 770, 777 (1992) (failure to subpoena log book not ineffective assistance because it would not have seriously impeached adverse evidence); Commonwealth v. Gould, 413 Mass. 707, 711 (1992) (failure to investigate a mental state defense can constitute ineffective assistance but not here where there were no facts supporting this claim); Commonwealth v. Smith, 29 Mass. App. Ct. 449, 455 (1990) (failure to seek alibi ineffective assistance only if counsel has significant information about alibi and fails to diligently pursue it); Commonwealth v. Haas, 398 Mass. 806, 811 (1986) (failure to interview and prepare expert witness not ineffective assistance if counsel familiar with witness's testimony); Commonwealth v. Blake, 409 Mass. 146, 162 (1991) (defense counsel not obliged to pursue all theoretical defenses if little basis in evidence); Commonwealth v. Messere, 14 Mass. App. Ct. 1 (1982) (although any counsel who fails to interview a material witness leaves himself open to claim of ineffective assistance, failure here was not ineffective because result of defendant's lies to counsel); Commonwealth v. Cepulonis, 9 Mass. App. Ct. 302 (1980) (failure to investigate alibi was harmless error); Osborne v. Commonwealth, 378 Mass. 104, 111 (1979) (failure to investigate insanity defense not ineffective unless facts accessible to counsel raise reasonable doubt regarding mental condition); Commonwealth v. Saferian, 366 Mass. 89 (1974) (court did not find the total lack of investigation and preparation fatal because defendant had two days to consult with counsel during the motion to suppress and no prejudice was shown); Commonwealth v. Oliveira, 431 Mass. 609, 614–616 (2000) (failure to seek review of rape complainant's treatment records meeting "likely to be relevant" standard applicable at time of trial; issue of ineffectiveness dependent on content of records, which must be examined by motion judge on remand). *See also* United States v. Porter, 924 F.2d 395 (1st Cir. 1991) (failure to investigate must result in loss of "viable defense"); Commonwealth v. Licata, 412 Mass. 654, 661–62 (1992) (denial of motion for new trial remanded to an evidentiary hearing to determine whether counsel deprived defendant in rape case of only defense he had: consent of victim); Commonwealth v. Aviles, 31 Mass. App. Ct. 244, 249 (1991) (remanded for evidentiary hearing on whether conduct, including failure to call alibi witnesses, constituted ineffective assistance); Eldridge v. Atkins, 665 F.2d 228, 236 (8th Cir. 1981) (ineffective assistance presumed when counsel failed to interview important eyewitnesses); and other federal cases finding ineffective assistance from failure to interview witnesses, *cited in* Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 665 nn.221, 222.

[104] *See, e.g.,* Commonwealth v. Phinney, 446 Mass. 155 (2006) (counsel's failure to review police reports relating to third-party culprit deprived the defendant of the substantial, alternative defense that the police failed to investigate another legitimate suspect); Commonwealth v. Farley, 432 Mass. 153 (2000) (ineffective assistance of counsel to fail to interview other suspect); Commonwealth v. Caban, 48 Mass. App. Ct. 179, 181–182 (1999) (failure to interview key witness who could confirm defendant's alibi testimony); Commonwealth v. Conley, 43 Mass. App. Ct. 385 (1997) (counsel's failure to file a motion to inspect the alleged victim's knife for blood case required that the case be remanded where it was manifestly unreasonable for counsel not to have filed such a motion, especially in the face of the defendant's request). *But see* Commonwealth v. Beauchamp, 49 Mass. App. Ct. 591 (2000) (defendant's claim of defense counsel's failure to prepare adequate defense fails if no showing that counsel's failure resulted in forfeiture of substantial defense).

2. *Failure to move for funds for a forensic expert or to consult such an expert.* Part of defense counsel's duty to investigate includes a duty to determine whether forensic testing or consultation with or presentation of a forensic expert is necessary to present a defense. Courts have thus, in some cases, reversed convictions where trial counsel failed to conduct an adequate forensic investigation or present necessary forensic evidence.[105]

[105] *See* Commonwealth v. Roberio, 428 Mass. 278 (1998) (trial counsel's failure to "have at least undertaken an investigation [of] the viability of presenting expert psychiatric testimony" regarding the defendant's "attention deficit disorder [ADHD], traumatic brain injuries and a learning disability" may have constituted ineffective assistance of counsel); Commonwealth v. Martin, 427 Mass. 816 (1998) (counsel's failure to challenge the Commonwealth's evidence that LSD was the cause of the victim's death was ineffective assistance requiring reversal where counsel mistakenl relied only on preliminary testing); Commonwealth v. Conley, 43 Mass. App. Ct. 385, 391-396 (1997) (trial "counsel's failure to file [a] motion for forensic investigation of [a] knife [recovered from the crime scene] was 'manifestly unreasonable,'" and required that the case be remanded for an evidentiary hearing for the defendant to test the knife); Commonwealth v. Haggerty, 400 Mass. 437 (1987) (counsel's failure to consult with an expert to determine whether the victim died from a heart attack, rather than from an assault, required reversal); Commonwealth v. Doucette, 391 Mass. 443, 458-9 (1984) (counsel's "[f]ailure to investigate an insanity defense [falls] below the level of competence demanded of attorneys, if facts known to, or accessible to, trial counsel raised a reasonable doubt as to the defendant's mental condition"); - Even a "strategic decision[ ]" by counsel not to investigate may be deemed ineffective where counsel lacks sufficient information to make an informed and reasonable decision). *But see* Commonwealth v. Walker, 433 Mass. 213 (2005) (counsel's performance was not seriously incompetent where counsel had "no information" from the defendant, family members, or prison personnel that there was a potential "mental health defense"; where the defendant presented himself as responsible father who had simply acted in self-defense; where the judge characterized counsel's performance as superb; and where a mental-health defense was "weak" and "likely would have had an adverse impact on the claim of self-defense"); Commonwealth v. Fletcher, 435Mass. 558 (2002) (rejecting claim that trial counsel should have produced expert psychiatrist as to insanity and diminished capacity where there was abundant evidence that trial counsel had "thoroughly investigated the defendant's mental condition"; had consulted with a board certified psychiatrist who examined the defendant and concluded that he was "a "malingerer and a liar"; had also consulted with a psychologist who also examined the defendant six times and concluded that he was unable to support a lack of criminal responsibility defense; that the decision not to call such experts was fully discussed with the defendant and that "the defendant agreed with that strategic choice"); Commonwealth v. Rosado, 434 Mass. 197 (2001) (counsel's failure to present expert testimony on the defendant's history of intoxication and aggression was not ineffective where expert testimony would have undermined the defendant's credibility and where there was overwhelming evidence of a prolonged joint venture tying the defendant to the killing); Commonwealth v. Frank, 433 Mass. 185 (2001) (counsel's failure to present medical testimony about intoxication to support claim of diminished capacity as to murder was a "reasonable tactical decision" where trial counsel testified that in his experience experts often harmed case; the key issue is whether counsel's choice was "an informed and reasonable decision"); Commonwealth v. Cormier, 427 Mass. 446, 451 (1998) (trial counsel's decision not to present expert testimony on the defendant's mental capacity due to intoxication was a "reasonable" [tactical] decision, where counsel had consulted with several experts and properly determined that they would not have been helpful to the defense); Commonwealth v. Hardy, 426 Mass. 725, 730-731 (1998) (failure to introduce expert on mental impairment not ineffective); Commonwealth v. Bousquet, 407 Mass. 854, 863-864 (1990) (failure to call expert on effects of hashish not ineffective).

3. *Lying to the client*. While the ethical rules hold defense counsel to a higher standard than *Saferian* and *Strickland* require, the courts have occasionally, if infrequently, reversed a conviction where counsel has made a material misrepresentation to his client that had an adverse impact on his representation or on the defendant's choices.[106]

4. *Failure to give accurate legal advice***.** Counsel's failure to give accurate legal advice may rise to the level of ineffective assistance of counsel, if the advice given is based on an inadequate investigation of the case[107] or a misunderstanding of the law,[108] and if the defendant takes the advice and is thereby prejudiced.

5. *Failure to meet with or adequately interview the client*. Although counsel is expected to meet with and interview his client in preparation for either a trial or a guilty plea, the courts have only rarely found that insufficient time spent by counsel interviewing his client constitutes a basis for ineffective assistance of counsel.[109]

6. *Improper disclosure of client confidences*. Where trial counsel permits the unauthorized disclosure of client confidences, the courts in some circumstances have held that this may create an unconstitutional conflict of interest in violation of the defendant's Sixth Amendment and article 12 rights to the effective assistance of counsel.[110]

7. *Failure to adequately advise client before during plea negotiations*. It is now clear that "a defendant's decision whether to plead guilty or proceed to a trial is

[106] Commonwealth v. DiPietro, 35 Mass. App. Ct. 638 (1993) (defendant entitled to have guilty plea vacated if evidentiary hearing demonstrated both that he pleaded guilty because his attorney falsely told him that a motion to suppress had been filed and denied and that counsel was ineffective in failing to file such a motion because it should have been allowed); Commonwealth v. Chetwynde, 31 Mass. App. Ct. 8 (1991) (counsel's material misrepresentation to defendant that a suppression motion had been heard & denied was ineffective assistance & violation of disciplinary rules; the crucial issue is whether the defendant was so misled by counsel's alleged false representations that he prematurely waived his right to a jury trial).

[107] Commonwealth v. Moreau, 30 Mass. App. Ct. 677 (1991) (advising a client to sign a confession at arraignment along with failing to inform defendant of agreed sentencing recommendation).

[108] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1478-87 (2010) (bad immigration advice may warrant vacation of a guilty plea); Commonwealth v. Freeman, 29 Mass. App. Ct. 635 (1990) (advising defendant not to testify on legally erroneous basis that juvenile delinquencies were admissible to impeach violated defendant's right to testify and might have constituted ineffective assistance).

[109] *See* Mitchell v. Mason, 325 F.3d 732 (6th Cir. 2003) (habeas writ issued where counsel met with the defendant for a total of under six minutes during three separate encounters in lockup during the seven months before trial).

[110] *See* Commonwealth v. Downey, 65 Mass. App. Ct. 547 (2006) (trial counsel's agreement with PBS Frontline to wear microphones during amurder trial without the consent of the defendants resulted in the improper disclosure of client confidence and created an actual conflict of interest as attorneys had "'extra' allegiances to the broadcasting company" that violated their duty of undivided loyalty to their clients).

a critical stage in a criminal proceeding" and that the defendant is constitutionally entitled to the effective assistance of counsel during plea negotiations.[111] This includes the right to the effective assistance in connection with the defendant's decision to reject as well as accept a plea offer, whether or not the defendant ultimately decides to go to trial.[112]

A variety of acts, omissions, and other errors by counsel during plea negotiations have been held to constitute inadequate performance under *Strickland*, including: counsel's failure to explain the material elements of the offense;[113] counsel's failure to accurately explain the defendant's sentencing exposure after a plea and after trial;[114] and counsel's failure to communicate a prosecutor's formal plea offer.[115]

To establish prejudice resulting from counsel's failure to adequately advise the defendant during plea negotiations, the courts have required the defendant to meet the *Strickland* standard -- that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[116] Where a defendant had accepted a

[111] Commonwealth v. Mahar, 442 Mass. 11, 14 (2004), citing inter alia, Hill v. Lockhart, 474 U.S. 52, 56 (1985), McMann v. Richardson, 397 U.S. 759, 771 (1970). *See also* Commonwealth v. Soffen, 377 Mass. 433, 436 (1979).

[112] Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) (observing that American system of criminal justice has become "for the most part a system of pleas," that plea negotiations are a critical stage in the criminal process and that defendants have a Sixth Amendment right to effective assistance of competent counsel during plea negotiations; Missouri v. Frye, 132 S Ct. 1399 (2010). *See also* Commonwealth v. Mahar, 442 Mass. 11, 14-15 (2004); Osborne v. Commonwealth, 378 Mass. 104, 108–113 (1979).

[113] *See* Commonwealth v. McGuirk, 376 Mass. 338, 344 (1978) (observing that if defendant was not informed that malice aforethought is element of second-degree murder, it would have been error for judge to have accepted the guilty plea and to deny motion for new trial); Paters v. United States, 159 F.3d 1043, 1044, 1048–1049 (7th Cir.1998) (remanding for evidentiary hearing as to prejudice where counsel erroneously advised that defendant could only be found guilty for drugs in his physical possession and that he had "nothing to lose" by proceeding to trial); Tse v. United States, 290 F.3d 462, 463, 466 (1st Cir.2002) (remanding for evidentiary hearing to determine whether the attorney erroneously advised the defendant that the government could not prosecute certain charges); State v. Lentowski, 212 Wis.2d 849, 854, 857, 569 N.W.2d 758 (1997) (counsel's failure to advise the defendant about defenses available in sexual assault case). *See also* Henderson v. Morgan, 426 U.S. 637, 645-46 (1976) (defendant must receive "real notice of the true nature" of the charge to which he pleads guilty by means of either judge's recitation of the elements at the plea colloquy, defendant's admission to facts constituting the elements, or a representation that counsel has properly explained the elements to defendant); Commonwealth v. Correa, 43 Mass. App. Ct. 714 (1997) (vacating guilty plea in the absence of evidence that neither the judge in the plea colloquy nor defense counsel advised defendant as to elements of the offense to which he pleaded guilty).

[114] *See* Commonwealth v. Mahar, 442 Mass. 11, 14 (2004), citing United States v. Rashad, 331 F.3d 908, 911–912 (D.C.Cir. 2003); Magana v. Hofbauer, 263 F.3d 542, 551–552 (6th Cir.2001); Cullen v. United States, 194 F.3d 401, 402–403 (2d Cir.1999); Boria v. Keane, 99 F.3d 492, 494 (2d Cir.1996), cert. denied, 521 U.S. 1118 (1997); United States v. Day, 969 F.2d 39, 44 (3d Cir.1992).

[115] Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012). *See also* Pham v. United States, 317 F.3d 178, 181-83 (2d Cir.2003); Lyles v. State, 178 Ind. App. 398, 402, 382 N.E.2d 991 (1978); State v. Simmons, 65 N.C.App. 294, 301, 309 S.E.2d 493 (1983).

[116] Hill v. Lockhart, 474 U.S. 52, 59 (1985).

guilty plea based on counsel erroneous advice and seeks to vacate that plea, the defendant must establish prejudice by proving that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.[117] Not only must the defendant assert that this is the case, but he must also "convince the court either (1) that he had an available, substantial ground of defense that he would have pursued if he had been correctly advised; or (2) that there is a reasonable probability that a different plea offer could have been negotiated or (3) that the defendant placed great emphasis on the advice given in deciding whether to plead guilty.[118]

Where counsel fails to communicate a plea offer or where counsel's provision of erroneous legal advice caused a defendant to reject a beneficial plea offer, the defendant must establish prejudice by showing that there was a reasonable probability that: (1) he would have accepted the plea offer; (2) the prosecutor would not have rescinded the offer; (3) the court would have accepted the plea agreement; and (4) the resulting disposition would have been "more favorable" to the defendant.[119]

Until recently, the courts of this Commonwealth had held that the defendant's right to the effective assistance of counsel did not include a right to accurate advice about the "contingent or collateral consequences" of a guilty plea.[120] But in *Padilla v. Kentucky,* the Supreme Court, noting that it had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance'" required under Strickland, held that counsel's failure to advise the defendant that his guilty plea might result in deportation was sufficiently prejudicial to require vacation of the guilty plea.[121] Observing that deportation is a "particularly severe 'penalty," and that deportation or removal proceedings, though "civil in nature," are "nevertheless intimately related to the criminal process," the Court held that the Sixth Amendment right to counsel includes the right to accurate advice about whether the plea might result in deportation. Under *Padilla*, counsel may not dodge her obligation by playing it safe and not

[117] Commonwealth v. Clarke, 460 Mass. 30, 47-48 (2011); Commonwealth v. Martinez, 81 Mass. App. Ct. 595, 599 (2012); Hill v. Lockhart, 474 U.S. 52, 59 (1985). *See also* Premo v. Moore, 131 S.Ct. 733, 743-44 (2011).

[118] Commonwealth v. Clarke, 460 Mass. 30, 47-48 (2011), citing Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010) & Hill v. Lockhart, 474 U.S. 52, 60 (1985).

[119] Lafler v. Cooper, 132 S. Ct. 1376, 1388### (2012); Missouri v. Frye, 132 S Ct. 1399, 1402-03 (2010).

[120] *See*, e.g., Commonwealth v. Shindell, 63 Mass. App. Ct. 503 (2005) (the sex-offender-registration consequences of a guilty plea); Commonwealth v. Morrow, 363 Mass. 601, 605-606 (1973) (parole eligibility); Hill v. Lockhart, 474 U.S. 52 (1985) (parole eligibility). *See also* Commonwealth v. Friaire, 55 Mass. App. Ct. 916 (2002) and Commonwealth v. Monteiro, 56 Mass. App. Ct. 913 (2002), both of which upheld rulings declining to vacate guilty pleas based on counsel's failures to give accurate advice about the immigration consequences of their clients' guilty pleas. As noted below, *Monteiro* and *Fraire* were overruled by the Supreme Court's holding in Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

[121] 130 S. Ct. 1473, 1478-87 (2010). *See also* Commonwealth v. Clarke, 460 Mass. 30 (2011) (holding that Padilla applies retroactively on collateral review of guilty pleas obtained after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, which became effective on April 1, 1997).

advising a client about the immigration consequences of his plea, at least where the law is "succinct and straightforward." Where, on the other hand, the law is not clear, counsel need only advise her noncitizen client that his guilty plea "may carry a risk of adverse immigration consequences."[122] In *Commonwealth v. Clarke*,[123] the SJC subsequently held that the *Padilla* holding applies retroactively on collateral review to any guilty pleas that were obtained after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996,[124] which became effective on April 1, 1997. It remains to be seen whether the courts will invoke *Padilla's* questioning of the direct/collateral distinction to impose on counsel the obligation of giving accurate advice on matters heretofore deemed collateral.

8. *Failure to file a motion to suppress or motion in limine to exclude damaging evidence.* For a defendant to prevail on an ineffective assistance claim based on counsel's failure to file a motion to suppress, the defendant must demonstrate a likelihood that the motion would have been successful.[125]

9. *Failure to object to closure of courtroom during jury selection or other critical phases of the trial.* Although the question has yet to be definitively resolved in this Commonwealth, counsel's failure to object to the closure of the courtroom during a critical stage of the proceedings without discussing the issue with the defendant and obtaining his personal waiver of the right to a public trial may constitute ineffective assistance of counsel.[126]

10. *Failure to give an adequate opening statement or to object to the prosecutor's improper opening arguments.* For example, where counsel makes an opening argument that promises to introduce evidence that, in fact, is never delivered, that may amount to ineffective assistance of counsel.[127] Under some

[122] 130 S. Ct. at 1483.

[123] 460 Mass. 30 (2011).

[124] Pub. L. No. 104-208, 110 Stat. 3009-546.

[125] Commonwealth v. Pena, 31 Mass. App. Ct. 201, 204 (1991) (failure to file motion to suppress was ineffective assistance); Kimmelman v. Morrison, 477 U.S. 365, 385 (1986) (habeas granted because trial counsel's failure to file suppression motion was ineffective assistance); Commonwealth v. Gillette, 33 Mass. App. Ct. 427 (1992) (counsel's failure to file motion in limine to exclude inadmissible evidence of defendant's predisposition to rape was ineffective assistance). *But see* Commonwealth v. Segovia, 53 Mass. App. Ct. 184 (2001) (defendant claiming ineffective assistance from failure of counsel to file motion to suppress must show reasonable probability that the verdict would have been different without excludable evidence); Commonwealth v. Conceicao, 388 Mass. 255, 264 (1983) (not ineffective assistance if unfiled suppression motion had only minimal chance of success); Commonwealth v. Lee, 32 Mass. App. Ct. 85, 87–91 (1992) (motion would have been unavailing so no prejudice); Commonwealth v. Lykus, 406 Mass. 135 (1989) (new trial motion based on counsel's failure to file suppression motion properly denied because itwouldn't have been successful).

[126] *See* Commonwealth v. Lavoie, 80 Mass. App. Ct. 546, 553-54 (2011), further review granted, 461 Mass. 1101 (2011).

[127] Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988) (First Circuit found ineffective assistance resulted from unfulfilled promise in opening statement that two doctors would testify in support of a provocation defense). *Compare* Commonwealth v. Duran, 435 Mass. 97 (2001) (failure of defense counsel to keep promise in opening statement to produce particular evidence

circumstances, making such a promise can be so damaging that it may be treated as "prejudicial as a matter of law."[128]

11. *Failure to adequately cross-examine a prosecution witness*. Although it is rare, the courts have occasionally found trial counsel's cross-examination to be so inept as to warrant reversal.[129]

12. *Failure to call key witnesses or develop key evidence at trial.* While "the tactical decisions of trial counsel, especially those regarding whether to call a witness that counsel has interviewed, are the type of professional judgments that warrant significant deference and should not ordinarily be the subject of second-guessing," the courts have recognized that "that rule is not absolute."[130] The courts have thus on occasion held that failing to secure the attendance of or to call key witnesses,[131] to make an offer of proof,[132] or to develop evidence at trial, may constitute ineffective assistance requiring reversal.[133]

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is ineffective assistance of counsel only if omission creates substantial likelihood of miscarriage of justice); Commonwealth v. Carney, 34 Mass. App. Ct. 922 (1993).

[128] Anderson v. Butler, 858 F.2d 16, 17, 19 (1st Cir. 1988).

[129] *See* Commonwealth v. Farley, 432 Mass. 153 (2000) (counsel's "pointless and rambling" cross-examination one of several factors contributing to finding of ineffective assistance of counsel); Commonwealth v. Peters, 429 Mass. 22, 32-33 (1999) (counsel's "inept" cross-examination, which resulted in the introduction of improper fresh complaint evidence, was one of several factors, constituting "deficient" performance that prejudiced the defense). *But see* Matthews v. Rakiey, 54 F.3d 908, 916-18 (1st Cir. 1995) (choices in emphasis during cross-examination are "prototypical examples of unchallengeable strategy").

[130] Commonwealth v. Lane, 462 Mass. 591, 598 (2012).

[131] Commonwealth v. Lane, 462 Mass. 591 (2012) (counsel's decision in assault and battery case not to call credible and disinterested witness, whose description of shooter differed substantially from prosecution's key eyewitness and whom counsel had promised to call in his opening statement, was manifestly unreasonable and constituted ineffective assistance, notwithstanding counsel's minor concerns about witness's credibility ); Commonwealth v. Hill, 432 Mass. 70 (2000) (counsel's failure to call potentially critical, disinterested eyewitness in absence of credible explanation was "manifestly unreasonable," notwithstanding risk of aggressive cross-examination); Commonwealth v. Brookins, 33 Mass. App. Ct. 626 (1992), rev'd, 414 Mass. 1103 (1993) (counsel's failure to move for continuance or capias to secure exculpatory testimony of disinterested alibi witness who had been under summons was ineffective assistance); Coss v. Lackawanna County District Attorney, 204 F.3d.453, 462 (3d Cir. 2000) (habeas petitioner met burden of demonstrating Strickland prejudice based on counsel's failure to subpoena key witnesses, where there was reasonable probability that petitioner would have testified consistently with these witnesses or would not have testified at all, even though petitioner's trial testimony conflicted in certain material details with such witnesses' accounts). *But see* Lema v. United States, 987 F.2d 48, 53 (1st Cir. 1993) (noting that the decision of whether to call a witness is almost always strategic, requiring a balancing of the benefits and risks, where the prosecution's case is "less than compelling," the "risk of 'rocking the boat'" may warrant foregoing of even favorable defense testimony).

[132] Commonwealth v. Frank, 433 Mass. 185 (2001) (failure to make offer of proof when portion of defendant's testimony is excluded may constitute ineffective assistance of counsel).

[133] Commonwealth v. Farley, 432 Mass. 153 (2000) (ineffective assistance of counsel to fail to develop defense through evidence, cross-examination, or summation); Commonwealth v. Caban, 48 Mass. App. Ct. 179, 183 (1999) (motion judge abused her discretion in not

13. *Failure to object to or move to strike inadmissible and damaging evidence***.**[134] The courts have also held that counsel's improper direct examination that opens the door to damaging impeachment material may constitute ineffective assistance.[135]

14. *Failure to give an adequate closing argument***.** The courts have found ineffective assistance where counsel's closing argument misstated the key evidence in a way that undermined the defense,[136] or where the closing argument effectively abandoned or denuded the defense by communicating disbelief in the defendant's case.[137]

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ordering evidentiary hearing where trial counsel failed to consult with key alibi witness before trial and where witness failed to bring in key document because counsel had belatedly summonsed him in; need for evidentiary hearing to determine whether defendant's failure to respond to counsel's inquiries played a role). *See also* Commonwealth v. Rondeau, 378 Mass. 408 (1979) (where counsel has critical exculpatory evidence that only he, as a percipient witness, can provide, counsel's failure to withdraw and give such testimony has been held ineffective assistance of counsel).

[134] Commonwealth v. Lester, 70 Mass. App. Ct. 55, 66 (2007) (counsel's failure to object to the admission of one defendant's statement that raised totem-pole hearsay problems constituted ineffective assistance where the evidence as to which of two defendant brothers made 34 threatening phone calls was weak); Commonwealth v. Peters, 429 Mass. 22, 31–32 (1999) (failure to object to inadmissible hearsay testimony by rape complainant as to her own alleged "fresh complaint"); Commonwealth v. Whyte, 43 Mass. App. Ct. 920 (1997) (failure to object to hearsay that was evidence of constructive possession); Commonwealth v. Egardo, 426 Mass. 48, 50–54 (1997) (failure to object to prosecutor's use of defendant's post-arrest silence deprived defendant of duress defense and "struck at the heart of the defendant's only defense"); Commonwealth v. Scullin, 44 Mass. App. Ct. 9 (1997) (new trial granted where, following judge's deferral of ruling on Commonwealth's motion to introduce "fresh complaint" evidence, defense counsel referred to evidence in opening, did not object to testimony, did not request limiting instruction, and did not object to prosecutor's closing); Commonwealth v. Sugrue, 34 Mass. App. Ct. 172, 173 (1993) (failure to object to inadmissible fresh complaint evidence was ineffective and prejudicial); Commonwealth v. Gillette, 33 Mass. App. Ct. 427, 430 (1992) (reversal for failure to move in limine to exclude defendant's seven-year-old statement showing predisposition to sexual assault); Commonwealth v. Frisino, 21 Mass. App. Ct. 551 (1986) (damaging hearsay); Commonwealth v. Rossi, 19 Mass. App. Ct. 257 (1985) (prior convictions); Commonwealth v. Cook, 380 Mass. 314, 321–25 (1980) (failure to object, seek voir dire, or request instruction regarding codefendant taking stand and asserting Fifth Amendment privilege). *Compare* Commonwealth v. Hurley, 32 Mass. App. Ct. 620, 621–23 (1992) (failure to seek limiting instructions on past convictions was a reasonable tactical decision); Commonwealth v. Jordan, 49 Mass. App. Ct. 802 (2000) (no ineffective assistance of counsel if failure to object did not create a substantial risk of a miscarriage of justice).

In Commonwealth v. Wright, 411 Mass. 678, 682 (1992), the court declined to focus on the ineffective assistance issue, holding that the standard to be applied to unpreserved errors—was there a "substantial likelihood of miscarriage of justice"—was more favorable to the defendant than the ineffectiveness standard. The "substantial likelihood" standard derives from G.L. c. 278, § 33E (capital cases). As explained in Commonwealth v. Lennon, 399 Mass. 443, 448–449 n.6 (1987), it is akin to, but somewhat less stringent than, the "substantial risk" standard of Commonwealth v. Freeman, 352 Mass. 556, 563–64 (1967).

[135] Commonwealth v. Grissett, 66 Mass. App. Ct. 454, 459-60 (2006).

[136] Commonwealth v. McIntosh, 78 Mass. App. Ct. 37, 42-43 (2010).

[137] Commonwealth v. Farley, 432 Mass. 153 (2000) (counsel's failure to "marshal" the

15. *Failure to object to prosecutor's misstatements, vouching, improper comments on the defendant's constitutional rights, prejudicial and inflammatory appeals to emotion or other improper statements during closing argument***.**

16. *Failure to request appropriate jury instructions*[138] *or object to erroneous jury instructions.*[139]

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evidence on summation, coupled with an overall failure to develop the defense at other stages of the case, "denuded" the defendant of a defense where there was evidence that another person other than the defendant had killed the victim); Commonwealth v. Triplett, 398 Mass. 561, 569, 500 N.E.2d 262 (1986) ( "[c]ounsel's statements in his closing were tantamount to an admission of his client's guilt, ... and left the client denuded of a defense"); Commonwealth v. Westmoreland, 388 Mass. 269 (1983) (reversed based on abandonment of insanity defense); Commonwealth v. Street, 388 Mass. 281 (1983) (abandoning client's sole defense in closing argument); Commonwealth v. Swan, 38 Mass. App. Ct. 539 (1995) (ineffective assistance of counsel to abandon defense of improper actions by repair shop in larceny prosecution); Commonwealth v. Aviles, 31 Mass. App. Ct. 244 (1991) (remanded for finding whether abandonment of alibi defense was deliberate tactical choice); Commonwealth v. Triplett, 398 Mass. 561, 567-569 (1986) (comments by defense counsel implied disbelief of defendant's testimony); Commonwealth v. Sarvela, 16 Mass. App. Ct. 934 (1983) (ineffective assistance where defense counsel abandoned a viable defense by undermining defendant's credibility in closing argument by contradicting defendant's testimony); Herring v. New York, 422 U.S. 853, 862 (1975) ("[n]o apsect of [our adversary system] could be more important that the opportunity finally to marshal the evidence for each side before submission of the case to judgment").

[138] Commonwealth v. Livingston, 70 Mass. App. Ct. 745, 750 (2007) (counsel's failure to request a necessity instruction constituted ineffective assistance where the defense of necessity was fairly raised by the evidence); Commonwealth v. Gelpi, 416 Mass. 729, 731 (1994) (counsel's failure to request instructions on defendant's theory of defense and to judge's omission of reference to intent required for armed robbery was ineffective assistance where there was evidence that the defendant lacked the intent to steal). *See also* Commonwealth v. Simmarano, 50 Mass. App. Ct. 312 (2000) (where defense counsel presses point hard at trial and in final argument, it may be ineffective assistance of counsel not to request instruction on point by judge). Failure to request jury instructions on all theoretical defenses just slightly supported by the record does not necessarily render counsel's assistance ineffective. Commonwealth v. Blake, 409 Mass. 146, 162 (1991) (citing Commonwealth v. Stevens, 379 Mass. 772, 774 (1980)). *See also* Commonwealth v. Donlan, 436 Mass. 329 (2002) (where evidence at trial does not warrant a lesser included instruction, counsel was not ineffective in failing to request instruction or to discuss it with defendant).

[139] Commonwealth v. Kane, 19 Mass. App. Ct. 129, 142 (1984), further appellate review denied, 394 Mass. 1101 (1985) (failure to object to harmful, erroneous jury instructions). *See also* Glenn v. Aiken, 409 Mass. 699, 700 (1991) (malpractice action against defense counsel who failed to object to erroneous jury instruction); Commonwealth v. Davis, 52 Mass. App. Ct. 75 (2001) (defense counsel's failure to object to patently erroneous response by judge to deliberating jury's question is ineffective assistance of counsel); Commonwealth v. Gilliard, 36 Mass. App. Ct. 183, 191–92 (1994) (attorney representing a defendant convicted of second-degree murder neither requested a lesser-included instruction on simple assault and battery nor raised the "lesser-included" issue on appeal; appeals court ordered new counsel appointed and any new trial motion based on ineffective assistance heard in the superior court), Commonwealth v. Gilliard, 46 Mass. App. Ct. 348, 351-352 (1999) (failure to request lesser-included instruction constituted ineffective assistance); Commonwealth v. Leitzsey, 421 Mass. 694, 701–702 (1996) (counsel's failure to request a jury instruction on the failure of the police to perform certain tests held not to be ineffective assistance); Commonwealth v. Gelpi, 416 Mass. 729, 730 (1994) (the failure of defense counsel to request a jury instruction concerning the

17. *Failure to present a coherent theory of defense*. Although courts rarely second-guess counsel's overall performance, in rare cases the courts have found counsel's failure to articulate and present an understandable theory of defense may constitute ineffective assistance of counsel.[140]

18. *Inadequate representation at sentencing.* Since sentencing is a critical stage of the proceedings,[141] counsel's inadequate representation at sentencing can constitute ineffective assistance of counsel requiring at least a resentencing.[142] If ineffective assistance is shown, the defendant need not demonstrate an adverse result on the sentence because such a burden rarely could be met.[143]

19. *Failure to notify the defendant of his right of appeal*. Defense counsel has a duty to consult with the defendant about an appeal where there is reason to think that (1) a rational defendant would want to appeal because a non-frivolous ground for appeal exists; or (2) this particular defendant reasonably

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defense of "honest and reasonable mistake of fact" in an armed robbery prosecution held to constitute ineffective assistance of counsel).

[140] *See* Commonwealth v. Farley, 432 Mass. 153 (2000) (counsel's failure to "develop [a] defense through evidence, cross-examination, or in summation…denuded" the defendant of a defense; failure to test forensic evidence; failure to interview other suspect; trial counsel's cross on other points was "pointless and rambling"; failure to really "marshal" the evidence on summation; "lack of preparation"). *But see* Commonwealth v. Myers, 51 Mass. App. Ct. 627, 632 (2001) (no error). *See also* Commonwealth v. Street, 388 Mass. 281, 286-87 (1983) (abandoning client's sole defense in closing argument); Commonwealth v. Westmoreland, 388 Mass. 269, 271-74 (1983) (same).

[141] Gardner v. Florida, 430 U.S. 349 (1977); Mempa v. Rhay, 389 U.S. 128, 135 (1967) (counsel guaranteed at this stage to assist "in marshaling the facts, introducing evidence of mitigating circumstances," and otherwise assisting the defendant); Townsend v. Burke, 334 U.S. 736 (1948); United States v. Mateo, 950 F.2d 44 (1st Cir. 1991); Commonwealth v. Cameron, 31 Mass. App. Ct. 928 (1991); Osborne v. Commonwealth, 378 Mass. 104, 113 (1979); Baldassari v. Commonwealth, 352 Mass. 616 (1967).

[142] -Commonwealth v. Montanez, 410 Mass. 290 (1991) (counsel's barebones sentencing pitch with minimal mention of defendant's background plus failure to request that sentences run concurrently was ineffective assistance); Osborne v. Commonwealth, 378 Mass. 104 (1979) (inadequate representation at sentencing by a substitute, ill-prepared attorney who conjured up pity for the victim and who failed to mention key pieces of mitigating evidence constituted ineffective assistance); Commonwealth v. Cameron, 31 Mass. App. Ct. 928 (1991) (counsel's failure to make any argument for defendant at sentencing was ineffective assistance); Commonwealth v. Moreau, 30 Mass. App. Ct. 677 (1991), cert. denied, 112 S.Ct. 915 (1992) (counsel's decision to jointly recommend sentence that exceeded the guidelines, coupled with his failure to offer mitigating evidence until after joint recommendation was submitted, and possible failure to inform defendant of terms of joint recommendation may have been ineffective assistance). *See also* Commonwealth v. Brennick, 14 Mass. App. Ct. 952, 953 (1982)(rescript) (presence of public defender who was not the defendant's appointed counsel at resentencing violated the defendant's right to counsel).

[143] Osborne v. Commonwealth, 378 Mass. 104, 114 (1979). *Compare* Commonwealth v. Fanelli, 412 Mass. 497, 503 (1992) (claim of ineffective assistance at sentencing rejected, where defendant did not inform attorney of mitigating factors and where defendant was provided ample opportunity to present to judge any mitigating factors).

demonstrated to counsel that he was interested in appealing.[144] If counsel has failed to prosecute an appeal, the defendant can file a motion for new trial raising an ineffective assistance claim that counsel failed to prepare and file his appeal.[145]

20. *Failure of appellate or post-conviction counsel to raise key issues*. While appellate counsel is not required to "identify every plausible argument," but should "winnow[ ] out weaker arguments," the courts have found that counsel's failure to raise an issue that is apparent in the record on appeal may constitute ineffective assistance warranting reversal if the failure to raise the issue created a substantial risk of a miscarriage of justice.[146]

21. *An actual conflict of interest.* As discussed further below, *infra* at § 8.6, under Article 12 of the Massachusetts Declaration of Rights, where counsel has either an "actual" or a "genuine" conflict of interest (situations where counsel's professional judgment is impaired by his own interests or by the interests of other clients), counsel's representation is *per se* ineffective assistance and the defendant need show no prejudice or adverse effect on attorney performance to invalidate a conviction.[147]

22. *Representation by a nonlawyer*. A defendant who unknowingly has been represented by someone posing as an attorney will have his conviction set aside without any showing of prejudice and despite the quality of representation.[148]

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[144] Roe v. Flores-Oregon, 528 U.S. 470 (2000) . CPCS Performance Guideline 8.4 now states that after a trial, whenever a client wants to appeal a conviction, trial counsel must file a notice of appeal and order all necessary tapes before moving to withdraw and moving for the assignment of certified appellate counsel. *See also* Pires v. Commonwealth, 373 Mass. 829 (1977) (failure to notify defendant of right to appeal may not require permitting filing of appeal if appeal would be frivolous). *See also* Super. Ct. R. 65 (counsel responsible for perfecting appeal); Commonwealth v. White, 429 Mass. 258, 265 (1999) (same); Commonwealth v. Woody, 429 Mass. 95, 96–97 n.2 (1999) (if appellate counsel's failure to complete record prejudices defendant's appeal, defendant may move for new trial based on ineffective assistance of counsel);

[145] Rasheed v. Appeals Court, 434 Mass. 1012 (when defendant's appeal dismissed by Appeals Court for lack of prosecution of appeal, defendant may bring motion for new trial grounded on ineffective assistance of counsel); Commonwealth v. Frank, 425 Mass. 182 (1997) (failure to file brief).

[146] Commonwealth v. Lao, 450 Mass. 215, 222 (2007) (appellate counsel's failure to raise Crawford issues created a substantial risk of a miscarriage of justice since Crawford was decided at time case was pending on appeal); Commonwealth v. Azar, 435 Mass. 675, 686 (2002); Commonwealth v. Sowell, 34 Mass. App. Ct. 229 (1993); Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986) (the applicable standard is whether whether appellate counsel "failed to raise a significant and obvious issue ... which ... may have resulted in a reversal of the conviction, or an order for a new trial"). *See also* Commonwealth v. Cardenuto, 406 Mass. 450, 453-454 (1990) (trial counsel's failure on appeal to argue his own ineffectiveness at trial for failure to move for a required finding was ineffective assistance on appeal and at trial).

[147] Commonwealth v. Hodge, 386 Mass. 165, 169–70 (1982); Commonwealth v. Miller, 435 Mass. 274 (2001); Commonwealth v. Davis, 376 Mass. 777, 780–81 (1978); Glasser v. United States, 315 U.S. 60, 76 (1942).

[148] Commonwealth v. Thomas, 399 Mass. 165, 168 (1987) (*per se* rule may apply where advocate had never been admitted to the bar or was layman "masquerading as a lawyer"

But where an attorney of "established training and competence" fails to register with the Board of Bar Overseers or is otherwise "legally incapacitated from undertaking particular representation," the defendant must show that he has been actually prejudiced.[149]

23. *Commonwealth-induced or court-induced ineffective assistance.* The courts have recognized that the actions of government agents and the courts may also be the cause of ineffective assistance of counsel. This can include a wide range of conduct including incommunicado interrogation;[150] obstruction of attorney-client communications ;[151] conducting lineups without counsel;[152] issuing attorney subpoenas or ordering fee forfeitures;[153] planting government informants in the defense camp or other breaches of the attorney-client privilege;[154] improperly removing or substituting counsel; refusing to give counsel adequate time to prepare for trial;[155] placing improper restrictions on the function of trial counsel;[156] or denying indigent funding.[157] Counsel's

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or where lawyer's conduct raised serious questions concerning his "moral character" or his "capacity and competence"). *Accord* Harrison v. United States, 387 F.2d 203, 212–13 (D.C. Cir. 1967), *rev'd on other grounds*, 392 U.S. 219 (1968); United States v. Hoffman, 733 F.2d 596, 599–600 (9th Cir.), *cert. denied*, 469 U.S. 1039 (1984); People v. Felder, 47 N.Y.2d 287, 291 (1979). Absent a showing of actual prejudice to the defendant, this rule does not apply where the defendant is represented by a licensed attorney who has been disqualified for administrative reasons, or is practicing in a jurisdiction in which she is not licensed to practice. Commonwealth v. Thibeault, 28 Mass. App. Ct. 787, 789–90 (1990) (lawyer's suspension for conviction of receiving stolen property did not require automatic reversal; listing cases of serious unethical behavior that did not result in per se reversals). *See also* Commonwealth v. McGuire, 421 Mass. 236, 241 (1995) (no *per se* rule of ineffectiveness where defendant's attorney's license to practice had been suspended effective three days after representation at plea and sentencing).

[149] Commonwealth v. Melo, 67 Mass. App. Ct. 71, 74-78 (2006). *See* Commonwealth v. Thibeault, 28 Mass. App. Ct. 787, 789–90 (1990) (lawyer's suspension for conviction of receiving stolen property did not require automatic reversal; listing cases of serious unethical behavior that did not result in *per se* reversals). *See also* Commonwealth v. McGuire, 421 Mass. 236, 241 (1995) (no *per se* rule of ineffectiveness where defendant's attorney's license to practice had been suspended effective three days after representation at plea and sentencing).

[150] *See infra* § 19.4.

[151] Geders v. United States, 425 U.S. 80 (1976). *Cf.* Commonwealth v. Curry, 388 Mass. 776, 781–84 (1983); Commonwealth v. Cote, 386 Mass. 354, 359–60 & n.9 (1982).

[152] *See infra* § 18.4.

[153] *See supra* § 5.7D (attorney subpoenas). Fee forfeitures, or a pretrial seizure of assets which deny the defendant counsel of choice, are beyond the scope of this book. On the issue, *see* G.L. c. 94C, § 47 (property forfeiture law); Mitchell, *The New Massachusetts Drug Asset Forfeiture Law*, MASS. L. REV. 165 (Winter 1990); United States v. Monsanto, 491 U.S. 600 (1989) and Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) (rejecting right to counsel argument against forfeiture).

[154] *See* Commonwealth v. King, 400 Mass. 283 (1987) (improper police surveillance of attorney-client conferences did not prejudice hopeless case).

[155] Commonwealth v. Cavanaugh, 371 Mass. 46, 51 (1976). *See* full discussion *infra* at § 27.1B(5).

[156] The Sixth Amendment and Article 12 are violated when counsel's adversary defense is restricted, such as by prohibiting or limiting summation -- Herring v. New York, 422 U.S.

blunder in violating a discovery order may induce the court to make a prejudicially erroneous ruling precluding the presentation of critical defense evidence.

The restrictive *Strickland* requirement of "reasonable probability of prejudice" does not apply when government interference prevents counsel from rendering effective assistance.[158] Under some circumstances, counsel should move for dismissal where government misconduct that interferes with the attorney-client relationship is particularly egregious. Although dismissal is an extreme sanction rarely granted, dismissal was ordered without consideration of prejudice when two federal officers sought to persuade a defendant to become an informer and disparaged defense counsel.[159]

### 4. Indigent defense

853, 857 (1975); Commonwealth v. Miranda, 22 Mass. App. Ct. 10, 12–13 (1986); Commonwealth v. Cutty, 47 Mass. App. Ct. 671, 675–676 (1999) -- or burdens on the defendant's right to present his own testimony through direct examination. Brooks v. Tennessee, 406 U.S. 605 (1972); Ferguson v. Georgia, 365 U.S. 570 (1961). The Sixth Amendment bars interference with the ability of counsel to make independent decisions about how to conduct the defense. Strickland v. Washington, 466 U.S. 668, 686 (1984).

[157] *See infra* § 8.4B. *See also* Commonwealth v. Sena, 429 Mass. 590, 594–596 (1999) (judge should have sanctioned defense counsel personally for discovery violation rather than exclude important defense evidence).

[158] Strickland v. Washington, 466 U.S. 668, 692 (1984). *Accord* Kimmelman v. Morrison, 477 U.S. 365, 381 n.6 (1986); United States v. Diozzi, 807 F.2d 10 (1st Cir. 1986); United States v. Cronic, 466 U.S. 648, 659 & n.25 (1984).

[159] The S.J.C. found such conduct a "deliberate and intentional attack" on the attorney-client relationship that required dismissal rather than reversal. Commonwealth v. Manning, 373 Mass. 438 (1977). The court raised but did not decide the issue of whether there should be a per se rule mandating dismissal in all cases of deliberate manipulation of criminal defendants. *Manning, supra,* 373 Mass. at 444–45. *See also* Commonwealth v. Fontaine, 402 Mass. 491 (1988) (audio visual monitoring of cell block during attorney-client conference warrants dismissal because of prejudice, but no per se dismissal). The *Manning* Court also noted that plea bargaining with the defendant behind counsel's back has been held to violate the Sixth Amendment. *Manning, supra,* 373 Mass. at 443 n.6. (These issues emerged in the federal arena following the infamous "Thornburgh Memo" of June 8, 1989, stating that federal law enforcement personnel have an investigatory right to contact represented parties without going through counsel despite contrary state rules of professional conduct.)

The S.J.C. has since divided on whether dismissal is ever appropriate as a prophylactic measure in the total absence of prejudice. *See* Commonwealth v. King, 400 Mass. 283 (1987) (court explicitly refused to decide the question); Commonwealth v. Cinelli, 389 Mass. 197 (1983) (although detectives improperly and coercively talked with defendent they knew was represented by counsel, dismissal was not warranted because no prejudice). *See also* Commonwealth v. Mencoboni, 28 Mass. App. Ct. 504, 507 (1990) (in absence of prejudice or improper motive by police who prevented private attorney–defendant consultation before decision whether to take breathalyzer test, dismissal not warranted). *Compare* United States v. Morrison, 449 U.S. 361, 364–65 (1981) (federal constitutional interpretation barring dismissal for right to counsel violation in absence of prejudice).

The standard of competent representation required of appointed counsel is identical to that required of retained counsel,[160] but national studies have found that in many states levels of legislative funding for public defense are insufficient to provide necessary time and resources for investigation and preparation.[161] Inadequate funding leads to low rates of compensation for the private attorneys who accept indigent assignments and heavy caseloads for the salaried full-time public defender.[162] When an attorney cannot provide competent and diligent representation because of an excessive caseload or inadequate pay, the attorney's ethical obligation requires her to seek court permission to withdraw from the representation.[163]

National standards have been proposed that state that an attorney should be expected to competently handle *no more* than 150 felony cases, or 300 misdemeanor cases, per year.[164] Although appellate courts will generally review an ineffective assistance claim by examining the individual case for errors,[165] at the trial and pretrial stage such standards may, if violated, provide support for continuances or indigent funding which are necessary to provide the Sixth Amendment right.[166]

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[160] ABA Standards Relating to the Adminstration of Criminal Justice, Standard 4-1.2 (3d ed. 1993). *Accord* Polk County v. Dodson, 454 U.S. 312, 318 n.6 (1981); Vermont v. Brillon, 556 U.S. 81, 92 (2010)(in the context of speedy trial, the principle that delay caused by counsel is attributable to the defendant is the same whether counsel is assigned or privately retained.); Commonwealth v. Bernier, 359 Mass. 13 (1971) Lavallee v Justices in Hampden Superior Ct., 442 Mass 228, 235(2004)("The right to counsel means the right to effective assistance of counsel").

[161] *See* The Spangenberg Group, *Rates of Compensation for Court-Appointed Counsel in Non-Capital Felonies at Trial: A State-by-State Overview* (July 2002)); American Bar Association, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (December 2004); The Constitution Project, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (2009)

[162] *See* discussion in Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 532–39 (1988); Lefstein, *In Search of Gideon's Promise: Lessons from England and the Search for Federal Help*, 55 Hastings L.J. 835 (2004).

[163] ABA formal opinion 06-441; Cooper v. Regional Administrative Judge, 447 Mass. 513, 521 (2006) (the legal remedy for an attorney who suffers an undue financial burden because of the low rates of compensation is to seek release from the appointment from the appointing court).

[164] NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, GUIDELINES FOR NEGOTIATING AND AWARDING INDIGENT LEGAL DEFENSE CONTRACTS, Guideline III-6: Allowable Caseloads (1984). This guideline was adopted by the ABA House of Delegates. ANNUAL SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, REPORTS OF SECTION 17 (1985). *But see* BUREAU OF JUSTICE STATISTICS: A NATIONAL ASSESSMENT OF PUBLIC DEFENDER OFFICE CASELOADS (2010)(found that the median number of felony cases handled by state public defenders was 75. The BOJ study found that public defenders in Massachusetts handled 65 felony cases per year, but the definition of felony in Massachusetts excludes many crimes that are considered felonies in most other states, and until recently, most public defenders in Massachusetts handled only serious or bind-over felonies))

[165] *See* United States v. Cronic, 466 U.S. 648, 658, 662 (1984) (except in egregious situations, defendant must demonstrate specific errors of counsel rather than circumstances hampering effective representation).

[166] Counsel seeking funding or additional time should additionally remind the court of its responsibility to enable counsel to do his job competently. McMann v. Richardson, 397 U.S.

In Massachusetts, pursuant to statute,[167] the Committee for Public Counsel Services has promulgated performance standards that assigned counsel must follow as a condition of appointment. CPCS standards now exist in the areas of criminal defense, appellate representation, civil mental health commitments, guardianship cases, substituted judgment cases, authorization to treat proceedings, sexually dangerous persons proceedings, minors seeking judicial consent for abortion proceedings, and child welfare cases[168]. The Committee has also promulgated qualification standards governing who may be appointed counsel, and caseload limits for bar advocates and other appointed counsel.[169] Pursuant to G.L. c.211D §10, the Committee for Public Counsel Services must "monitor and evaluate compliance with the standards and performance of counsel within its division". Consequently the Committee has established rules regarding complaints made "regarding inadequate attorney representation, attorney misconduct, or an attorney's noncompliance with Committee performance standards, guidelines, policies, and other requirements".[170]

## § 8.2 WAIVER OF COUNSEL

There are three ways that a defendant may forego, or be found to surrender, her right to counsel: (1) explicit waiver; (2) waiver by conduct or abandonment; and (3) forfeiture.[171]

### § 8.2A. REQUIREMENTS FOR EXPLICIT WAIVER

The defendant has a constitutional right to represent himself,[172] even where the defendant has no legal knowledge,[173] will clearly hurt his chances [174] or cannot

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759, 771 (1970) (court should maintain proper standard of performance by counsel) Counsel should also remind the court of the "paramount importance of vigorous advocacy". Commonwealth v. Rahim, 441 Mass. 273, 283 ( ;Lavallee v. Justices of Hampden County, 442 Mass. 228, 232 (2004)(lack of adequate funding for indigent defense violated petitioner's right to counsel under article 12 of the Massachusetts Declaration of Rights) ABA Standards Relating to the Administration of Criminal Justice: Special Functions of the Trial Judge, Standard 6-1.1 (3rd Ed. 2000);

An agreement by D.C. lawyers to cease taking appointments in order to force higher compensation was found to be a price-fixing conspiracy in violation of the Sherman Act in Federal Trade Commission v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990). *See also* Burge: "Lawyers for Poor Feel Slap from US" Boston Globe, October 17, 2003.

[167] G.L. c. 211D, §§ 9, 10.

[168] The performance standards can be found by following links on the Committee's web page at www.publiccounsel.net.

[169] Caseload limits are regulated, in part, by statute. In 2011, G.L. c. 211D § was amended to limit the number of hours that private attorneys are permitted to bill the Commonwealth within the fiscal year.

[170] The complaint procedure can be found at:

http://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2010/Ch.4 Civil.pdf

[171] Commonwealth v. Means, 454 Mass. 81, 89 (2009).

[172] Commonwealth v. Lee, 394 Mass. 209, 216 (1985); Commonwealth v. Moran, 388 Mass. 655 (1983); Commonwealth v. Jackson, 376 Mass. 790, 794 (1978), *habeas denied sub*

articulate any reasons for invoking the right.[175] Violation of this right is reversible error per se.[176]

However, the following have been found prerequisites to the exercise of the right to proceed pro se:

1. The assertion of the right, and waiver of the right to counsel, must be *unequivocal*.[177]

2. The right must be *asserted before trial*. If asserted after impanelment of the jury, the right is subject to the court's discretion.[178] However, before trial begins a dilatory motive is "probably not now a sufficient basis on its own for denying" an otherwise proper motion to defend pro se.[179]

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*nom.* Jackson v. Amaral, 729 F.2d 41 (1st Cir. 1984); Commonwealth v. Cavanaugh, 371 Mass. 46, 53 (1976); Faretta v. California, 422 U.S. 806 (1975); Commonwealth v. Mott, 2 Mass. App. Ct. 47, 50 (1974) (based on Mass. Const.); United States v. Benefield, 942 F.2d 60 (1st Cir. 1991); Commonwealth v. Burbank, 27 Mass. App. Ct. 97, 108 (1989).

The right to self-representation is established in the United States Constitution by the Sixth Amendment rights to defend and to counsel and the Fourteenth Amendment due process clause; and in Massachusetts by art. 12 of the Declaration of Rights of the Mass. Const., guaranteeing the right to defend in person or by counsel. Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 265 (1979).

[173] Technical legal knowledge is irrelevant. Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 265 (1979); Faretta v. California, 422 U.S. 806, 836 (1975); Maynard v. Meachum, 545 F.2d 273, 279 (1st Cir. 1976). *See also* United States v. Betancourt-Arretuche, 933 F.2d 89 (1st Cir. 1991) (neither lack of training beyond high school nor inability to speak English bar pro se representation).

[174] Commonwealth v. Stovall, 22 Mass. App. Ct. 737, 739 (1986); Faretta v. Commonwealth, 422 U.S. 806, 834 (1975); Commonwealth v. Mott, 2 Mass. App. Ct. 47, 52 (1974).

[175] Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 268 (1979).

[176] McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984); United States v. Betancourt-Arretuche, 933 F.2d 89 (1st Cir. 1991); Commonwealth v. Conefrey, 410 Mass. 1, 10 (1991); Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 268 (1979); Commonwealth v. Mott, 2 Mass. App. Ct. 47, 52 (1974). *See also* Oses v. Massachusetts, 961 F.2d 985 (1st Cir. 1992) (habeas granted, in part on exclusion of pro se defendant from bench conferences and other infringements on right to self-representation).

[177] Commonwealth v. Conefrey, 410 Mass. 1, 10 (1991); Commonwealth v. Tuitt, 393 Mass. 801, 807 (1985); McKaskle v. Wiggins, 465 U.S. 168, 184 (1984); Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 265–66, 266 n.4 (1979); Commonwealth v. Miller, 6 Mass. App. Ct. 959, 960 (1978) (rescript); Commonwealth v. Cavanaugh, 371 Mass. 46, 53 (1976); Faretta v. California, 422 U.S. 806, 835 (1975); Commonwealth v. Mott, 2 Mass. App. Ct. 47, 51 (1974); Commonwealth v. Scott, 360 Mass. 695, 699 (1971). *See also* ABA, Standards Relating to Providing Defense Services, Standard 7.2 (Approved Draft 1968) (failure to request counsel and desire to plead guilty do not constitute waiver).

[178] United States v. Betancourt-Arretuche, 933 F.2d 89 (1st Cir. 1991); Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 265–66 & 266 n.3 (1979); Commonwealth v. Miller, 6 Mass. App. Ct. 959, 960 (1978) (dilatory effect is proper grounds for denial after impanelment); Commonwealth v. Mott, 2 Mass. App. Ct. 47, 51 (1974).

[179] Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 267 n.8 (1979).

3. A defendant's *disruptions* may permit denial of the right to represent himself.[180]

4. The defendant must *knowingly and intelligently waive the right to counsel*.[181] The record should show that he "knows what he is doing and his choice is made with eyes open."[182] A valid waiver requires that the defendant:

a. be informed of his right to counsel by a judge personally;[183]

b. make a "free and meaningful" choice,[184] and to this end the courts have been advised to inquire into the defendant's motivation;[185]

c. be mentally competent to make the choice. The U.S. Supreme Court has ruled that the standard of competency to waive counsel is the same standard as that which governs competency to stand trial or to plead guilty.[186] Previous Massachusetts cases have required a more rigorous standard for waiving counsel,[187] but required an inquiry only if there is an indication of mental disorder;[188]

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[180] Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 267 (1979) (disruption *might* constitute constructive waiver of right to proceed pro se). *See also* Faretta v. California, 422 U.S. 806, 834–35 n.46 (1975).

[181] United States v. Benefield, 942 F.2d 60 (1st Cir. 1991); Edwards v. Arizona, 451 U.S. 477, 482 (1981); Maynard v. Meachum, 545 F.2d 273, 277 (1st Cir. 1976); Faretta v. California, 422 U.S. 806, 835 (1975) (citing Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938)); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); Boyd v. Dutton, 405 U.S. 1, 2–3 (1972) (waiver not lightly presumed and trial judge must "indulge every reasonable presumption against waiver").

[182] Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 268 (1979); Commonwealth v. Cavanaugh, 371 Mass. 46, 53 (1976); Faretta v. Commonwealth, 422 U.S. 806, 835 (1975).

[183] In Massachusetts, S.J.C. Rule 3:10, § 1, requires that a defendant be told of his right to have CPCS provide counsel at no cost (or reduced cost) if he is indigent (or marginally indigent). Because the rules require that the warning be given by a judge, statements by a probation officer are not sufficient. Baldassari v. Commonwealth, 352 Mass. 616 (1967); Mulcahy v. Commonwealth, 352 Mass. 613 (1967). *See also* Kitchens v. Smith, 401 U.S. 847, 848 (1971) ("right to counsel does not depend on a request").

[184] Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976). *See also* Commonwealth v. Cavanaugh, 371 Mass. 46, 53–54 (1976) (alleged waiver resulted from Hobson's choice between unprepared counsel and proceeding pro se); Commonwealth v. Stovall, 22 Mass. App. Ct. 737, 739 (1986) (waiver in order to avoid prolonged pretrial detention constituted a free choice); Moore v. Michigan, 355 U.S. 155, 164 (1957).

[185] In Cooper v. Oklahoma, 116 S. Ct. 1373 (1996), the Supreme Court held that Oklahoma's procedural rule that allows the state to try a defendant who is more likely than not incompetent violates due process. One of the important considerations in the Court's analysis was the inability of such a defendant to communicate with counsel. *See also* Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 265 (1979); Commonwealth v. Mott, 2 Mass. App. Ct. 47, 52 (1974).

[186] Godinez v. Moran, 113 S. Ct. 2680 (1993) (competency to stand trial, to plead guilty, or to waive right to counsel depends on whether defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him").

[187] Commonwealth v. Barnes, 399 Mass. 385, 389 n.3 (1987); Commonwealth v. Wertheimer, 19 Mass. App. Ct. 930, 931–32 (1984).

[188] Commonwealth v. Barnes, 399 Mass. 385, 389 (1987).

d. understand the dangers and disadvantages of self-representation, and the magnitude of the undertaking;[189]

e. have a general appreciation of the seriousness of the charge and the penalty;[190]

f. understand that he will be required to comply with all the technical rules of trial [191] and that standby counsel is available to assist.[192]

5. Although an explicit *inquiry* may not be required to find waiver if the full record demonstrates a valid waiver,[193] waiver may not be inferred from a silent record [194] and an inquiry has at times been asserted as a requirement.[195]

6. Written waiver and certificate: S.J.C. Rule 3:10, § 3, states that the defendant shall sign a prescribed form waiving counsel, to be certified by the judge.[196] Whether the defendant signs the waiver is evidence of the defendant's intent but is not conclusive.[197] Even where a defendant has signed a waiver form, that alone may not be

[189] Commonwealth v. Burbank, 27 Mass. App. Ct. 97, 108 (1989); Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 265 (1979); Commonwealth v. Jackson, 376 Mass. 790, 795 (1978), *habeas denied sub nom.* Jackson v. Amaral, 729 F.2d 41 (1st Cir. 1984); Commonwealth v. Cavanaugh, 371 Mass. 46, 53 (1976); Maynard v. Meachum, 545 F.2d 273, 279 (1st Cir. 1976); Faretta v. California, 422 U.S. 806, 835 (1975); Commonwealth v. Mott, 2 Mass. App. Ct. 47, 52 (1974).

[190] Commonwealth v. Lee, 394 Mass. 209, 216–17 (1985); Commonwealth v. Jackson, 376 Mass. 790, 795 (1978); Maynard v. Meachum, 545 F.2d 273, 279 (1st Cir. 1976); Commonwealth v. Burbank, 27 Mass. App. Ct. 97, 108 (1989). A court's mere failure to inform the defendant of the maximum and minimum sentence facing him does not render unconstitutional an otherwise valid waiver. Commonwealth v. Barnes, 399 Mass. 385, 391 (1987).

[191] Maynard v. Meachum, 545 F.2d 273, 279 (1st Cir. 1976); Commonwealth v. Lee, 394 Mass. 209, 216–17 (1985).

[192] Commonwealth v. Jackson, 376 Mass. 790, 795 (1978); Commonwealth v. Barnes, 399 Mass. 385, 391 (1987).

[193] Commonwealth v. Lee, 394 Mass. 209, 218–19 (1985); Maynard v. Meachum, 545 F.2d 273, 278–79 (1st Cir. 1976); *see also* Commonwealth v. Fillippini, 2 Mass. App. Ct. 179 (1974), *habeas denied sub nom.* Fillippini v. Ristaino, 585 F.2d 1163, 1165–67 (1st Cir. 1978) (court examined history of defendant and total record to support waiver, rejecting any requirement of a particular formulaic inquiry); Commonwealth v. Barnes, 399 Mass. 385 (1987) (same).

[194] Commonwealth v. Wertheimer, 19 Mass. App. Ct. 930, 931–32 (1984); Fillippini v. Ristaino, 585 F.2d 1163, 1166 (1st Cir. 1978); Williams v. Commonwealth, 350 Mass. 732, 734 (1966); Carnley v. Cochran, 369 U.S. 506, 516 (1962).

[195] Commonwealth v. Mott, 2 Mass. App. Ct. 47, 51–52 (1974); Commonwealth v. Cavanaugh, 371 Mass. 46, 54 (1976); Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 265 (1979).

[196] *See also* S.J.C Rule 3:10, § 3 (containing form); Commonwealth v. Rittenberg, 366 Mass. 446, 448 n.3 (1974) (in future written waiver should be obtained even if defendant is an attorney).

[197] Commonwealth v. Appleby, 389 Mass. 359, 368 (1983); Commonwealth v. Moran, 17 Mass. App. Ct. 200, 207 (1983); Commonwealth v. Cavanaugh, 371 Mass. 46, 54 & 54 n.5 (1976); Crowell v. Commonwealth, 349 Mass. 776 (1965). *See also* Commonwealth v. Tuitt, 393 Mass. 801, 808 n.4 (1985); Commonwealth v. Beneficial Fin. Co., 360 Mass. 188, 368

sufficient to constitute a knowing and voluntary waiver if the judge has not given the defendant an on-the-record colloquy about proceeding pro se and has not certified that such a colloquy was given.[198] If the defendant elects to act pro se but refuses to sign the waiver, the court must certify the waiver and the refusal in writing.

In general, the requirements of a timely, unequivocal, voluntary, and intelligent waiver are strict. If a valid waiver of counsel was not demonstrated on the record, a new trial is required;[199] and in the first tier of the district court, counsel defending against a probation surrender should check the tape of the underlying proceeding if counsel was allegedly waived at that time because waivers in that court are often legally insufficient. However, as noted immediately below, failure to retain counsel by one who can afford to, or rejection of appointed counsel, may be deemed a "constructive waiver" of the right to counsel.

## § 8.2B. WAIVER BY CONDUCT: ABANDONMENT OR FAILURE TO RETAIN OR UTILIZE COUNSEL

A defendant may waive counsel by conduct. This typically occurs when a judge denies a defendant's motion to terminate counsel's representation, gives the defendant the choice of going forward either with counsel or pro se, and the defendant, after an "express warning" about the risks of self-representation, engages in some sort of "misconduct" that can be interpreted as an implied waiver of his right to counsel.[200]

If a defendant able to afford counsel does not retain one within a reasonable time, the defendant may be deemed to have waived the right to counsel and the case may be ordered to trial.[201] Dilatory, last-minute efforts to obtain or change counsel are within the discretion of the court to deny.[202] But denial of a justifiable request for a

(1971); Standards of Judicial Practice: Arraignment, Standard 5:00 (District Court Administrative Office, Aug. 1977) (valid waiver not affected by refusal to sign).

[198] Conmmonwealth v. Mullen, 72 Mass. App. Ct. 136 (2008); Commonwealth v. Cote, 74 Mass. App. Ct. 709 (2009).

[199] Brewer v. Williams, 430 U.S. 387 (1977); Williams v. Commonwealth, 350 Mass. 732 (1966). *Cf.* Commonwealth v. Hurst, 39 Mass. App. Ct. 603, 604 (1996) (dismissal with prejudice not warranted where prosecutor engaged in plea negotiations with uncounseled defendants who did not file written waiver of counsel forms absent finding that the defendants were prejudiced as a result of the discussions or that they had not meant to waive counsel).

[200] *See* Commonwealth v. Means, 454 Mass. 81, 92(2009).

[201] S.J.C. Rule 3:10, § 4. *See also* Means, *supra*, 454 Mass. at 91 n. 17, citing S.J.C. Rule 3:10(5) (where nonindigent defendant failed to retain counsel after being given "reasonable time" to do so and has not petitioned court for appointment of counsel for financial reasons, court may find that waiver of counsel byconduct). When the defendant claims indigency, but the court believes otherwise, it must file a written finding to that effect. *See also* Commonwealth v. Jackson, 376 Mass. 790, 796 (1978), *habeas denied sub nom.* Jackson v. Amaral, 729 F.2d 41 (1st Cir. 1984) (indigent pro se defendant may not delay trial by demanding counsel on day of trial); Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976); Commonwealth v. Delorey, 369 Mass. 323, 330 (1975); Commonwealth v. Bettencourt, 361 Mass. 515, 517–18 (1972).

[202] *See* Commonwealth v. Babb, 416 Mass. 732, 735 (1994) (holding that defendant abandoned right to counsel where he moved to terminate counsel without good cause, was warned by judge of the difficulties of self-representation, but then assaulted counsel, which

continuance to obtain reasonably prepared counsel violates the defendant's Sixth Amendment right.[203] Similarly, if a defendant improperly rejects a competent and prepared appointed attorney, this may be deemed a voluntary waiver of the right to counsel.[204]

Before determining that a defendant has waived his right to counsel by conduct, the trial judge must first advise the defendant of the risks of self-representation and then give him the choice of continuing with counsel or representing himself.[205] However, the Supreme Judicial Court has held that no such constructive waiver may be found if the defendant, while refusing to proceed with presently appointed counsel, explicitly refuses to waive her right to counsel [206] or can show by a preponderance of the evidence that she did not have a fair understanding of what the "waiver" entailed.[207]

## §8.2C. FORFEITURE BY CONDUCT OR WRONGDOING

A defendant may forfeit his constitutional right to counsel where she engages in acts of physical or threatened violence or other highly disruptive behavior, even though she continues to insist that she wants representation by counsel and even though she has not been properly warned about the dangers of self-representation.[208] But before a judge can conclude that the defendant has forfeited her right to representation by counsel and deprives her of representation at trial, the judge must first hold an evidentiary hearing at which the defendant has "a full and fair opportunity to offer evidence as to the totality of the circumstances that may bear on the question whether the sanction of forfeiture is both warranted and appropriate."[209] In deciding whether

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conduct the judge found calculated "to forestall his trial and disrupt the prosecution by forcing a last minute change of his court-appointed counsel").

[203] Commonwealth v. Cavanaugh, 371 Mass. 46, 51 (1976). This subject is addressed in detail *infra* at § 27.1B(5) (continuance required by right to counsel).

[204] Commonwealth v. Wolf, 34 Mass. App. Ct. 949, 951 (1993) (defendant's rejection of legal counsel and request for ordained minister to represent him seen as waiver of legal counsel); Commonwealth v. Lee, 394 Mass. 209, 216 (1985); Commonwealth v. Appleby, 389 Mass. 359, 366–67 (1983); Commonwealth v. Jackson, 370 Mass. 855, 856 (1976); Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976).

[205] Commonwealth v. Clemens, 77 Mass. App. Ct. 232, 238 (2010) (holding that the judge erred in finding a waiver by conduct because the judge had failed to advise the defendant of the risks of self-representation and give him the choice of continuing with counsel or representing himself). *See also* Commonwealth v. Pamplona, 58 Mass. App. Ct. 239, 240-242 (2003) (holding that the defendant had impliedly waived counsel after the judge gave him an express warning and the defendant nonetheless insisted that counsel not represent him "under any circumstances")

[206] Commonwealth v. Tuitt, 393 Mass. 801, 808 & n.4 (1985). *See also* Commonwealth v. Carsetti, 53 Mass. App. Ct. 558, 562 (2002) ("when a defendant alleges that counsel is unprepared, judge should perform some colloquy to ascertain whether this is dilatory tactic or whether counsel is truly unprepared"); Commonwealth v. Cavanaugh, 371 Mass. 46, 54–56 (1976); ABA, Standards Relating to Providing Defense Services, Standard 7.2 (Approved Draft 1968) (failure to request counsel and desire to plead guilty do not constitute waiver).

[207] Commonwealth v. Higgins, 23 Mass. App. Ct. 552, 556 (1987).

[208] Commonwealth v. Means, 454 Mass. 81, 92 (2009).

[209] Means, *supra* 454 Mass. at 92-98 (reversing defendant's conviction because judge's ruling that defendant, who was mentally unstable, had forfeited right to appointed counsel by

forfeiture is appropriate, the judge should remember that forfeiture: (1) is rarely applied where the defendant has had only one counsel; (2) is rarely applied to deny representation during trial; (3) is rarely applied to conduct other than threats or acts of violence against defense counsel or others; and (4) is a "last resort" to be applied only to "the most grave and deliberated misconduct."[210] In addition, forfeiture is inapplicable where the defendant has been determined incompetent to waive counsel and proceed pro se.[211]

## § 8.2D. ASSISTANCE AVAILABLE TO A PRO SE DEFENDANT

A pro se defendant must observe all the "ground rules" of professional representation and is not entitled to special consideration on appeal.[212] However, the judge has a continuing responsibility to ensure a fair trial,[213] and courts have provided the following forms of special assistance to a pro se defendant for this purpose:

1. *Notice of trial rights:* The court must inform the defendant of his rights to cross-examine, to present testimony by himself or other witnesses subject to cross-

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having sent a threatening letter to counsel was not based on an adequate inquiry); Commonwealth v. Clemens, 77 Mass. App. Ct. 232, 238 (2010) (reversing defendant's conviction where judge required defendant to proceed to trial "without any inquiry as to the cause for the request to remove defense counsel" and without advising defendant of risks of self-representation and giving defendant choice of continuing with counsel or representing himself).

[210] Means, *supra*, 454 Mass. at 95.

[211] Means, *supra*, 454 Mass. at 95.

[212] Commonwealth v. Aldrich, 23 Mass. App. Ct. 157, 167 (1986); Commonwealth v. Miller, 4 Mass. App. Ct. 379, 382 (1976). *Cf.* Commonwealth v. Mitchell, 15 Mass. App. Ct. 943, 944 (1983) (defendant is solely responsible for decision to act pro se and for its consequences).

The pro se defendant is not entitled to be called "counsel" or "co-counsel" because he is not a member of the Bar. Commonwealth v. Brown, 378 Mass. 165, 174–76 (1979). But failure to accord a pro se defendant the tools of representation violates the Sixth Amendment. Oses v. Massachusetts, 961 F.2d 985 (1st Cir. 1992) (defendant excluded from lobby conferences, manicled, and other violations).

[213] Commonwealth v. Sapoznik, 28 Mass. App. Ct. 236, 241 & n.4 (1990). *Cf.* McMann v. Richardson, 397 U.S. 759, 771 (1970) (court should maintain proper standard of performance by counsel); ABA, Standards Relating to the Administration of Criminal Justice: Special Functions of the Trial Judge, Standard 6-1.1 (1980); District Court Standards of Judicial Practice: Arraignment, Standard 5:04 (District Court Administrative Office, Aug. 1977) (court should ensure appointed attorney is competent).

The related right of prison inmates to have access to a prison library and legal assistance program was limited by the Supreme Court in Lewis v. Casey, 64 U.S.L.W. 4587 (1996) (to establish a violation of Bounds v. Smith, 430 U.S. 817 (1977), the "actual injury" that an inmate must demonstrate is that the alleged shortcomings in the prison library or legal assistance program have hindered, or are presently hindering, his efforts to pursue a nonfrivolous legal claim; statements in *Bounds* suggesting that prison authorities must also enable the prisoner to discover grievances, and to litigate effectively once in court, are now disclaimed).

examination, and to decline to testify without penalty or inference.[214] It may be advisable to additionally explain to the defendant such matters as the right to make an opening statement, the role of the closing argument, different approaches to presenting the defense, and the procedure for challenging jury instructions.[215]

2. *Jury instructions:* The court *may* precharge and/or charge the jury not to penalize the defendant for his self-representation and conduct.[216]

3. *Sua sponte exclusion of hearsay:* The court should consider excluding hearsay and sanitizing records on its own motion.[217]

4. *Trial advice:* The court may advise the defendant of various approaches to presenting a defense, and grant a recess to a defendant who needs time to prepare cross-examination.[218]

5. *Standby counsel:* The court may appoint standby counsel for a pro se defendant,[219] even over his objection.[220] The role of standby counsel is to advise the defendant when asked.[221] While he may also call the attention of the court to favorable matters and help the defendant to overcome procedural obstacles,[222] he may not deprive the defendant of an opportunity to "present his case in his own way."[223] Nor may

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[214] Dist. Ct. Dep't Suppl. R. Crim. P. 4. Cross-examination of witnesses is a fundamental component of the right of self-representation, and requiring standby counsel to cross-examine instead of defendant was found reversible error in Commonwealth v. Conefrey, 410 Mass. 1 (1991).

[215] Commonwealth v. Moran, 17 Mass. App. Ct. 200, 210 n.7 (1983).

[216] Commonwealth v. Moran, 17 Mass. App. Ct. 200, 210 & n.7 (1983).

[217] Commonwealth v. Moran, 17 Mass. App. Ct. 200, 210 & n.7 (1983); *see also* Commonwealth v. Sapoznik, 28 Mass. App. Ct. 236, 241 & n.4 (1990) (judge should have intervened to prevent prosecutorial unfairness, just as he might with a represented defendant); Commonwealth v. Stovall, 22 Mass. App. Ct. 737, 739–43 (1986).

[218] Commonwealth v. Moran, 17 Mass. App. Ct. 200, 210 n.7 (1983).

[219] S.J.C. Rule 3:10, §§ 3, 6. *See also* Molino v. DuBois, 848 F. Supp. 11 (D. Mass. 1994) (petition for habeas corpus denied, holding there is no constitutional right to standby counsel, to a minimum level of competence in standby counsel, or to "hybrid" representation).

[220] McKaskle v. Wiggins, 465 U.S. 168, 176–77, 184 (1984); Jackson v. Commonwealth, 370 Mass. 855, 856 (1976) (rescript); Faretta v. California, 422 U.S. 806, 835 n.46 (1975).

[221] Faretta v. California, 422 U.S. 806, 835 n.46 (1975); Commonwealth v. Stovall, 22 Mass. App. Ct. 737, 743 (1986). However, the S.J.C. has stated that it would be appropriate to permit standby counsel to offer unsolicited advice to the defendant if the defendant so desires. Commonwealth v. Molino, 411 Mass. 149, 155 (1991). *But see* Commonwealth v. Johnson, 424 Mass. 338 (1997) (conviction affirmed where defendant who had elected to proceed pro se with standby counsel was persuaded by the court to be represented by standby counsel, but standby counsel told the court he was not prepared to try the case, a continuance was denied, and the judge determined the case would proceed with counsel acting in the standby role only).

[222] McKaskle v. Wiggins, 465 U.S. 168, 183 (1984); ABA, Standards for Criminal Justice, Standard 6-3.7 (2d ed. 1980).

[223] McKaskle v. Wiggins, 465 U.S. 168, 177 (1984). This means at least that if the defendant objects, standby counsel may not interfere with the defendant's tactical choices, questioning of witnesses, right to speak, or right to appear to the jury as his own counsel. 465 U.S. at 178, 181. Included among the tactical choices that defendant must be free to make are all those decisions that would normally be left to the discretion of counsel. 465 U.S. at 179 n.10. *See also* Commonwealth v. Conefrey, 410 Mass. 1, 13 (1991) (reversible error for judge to

standby counsel interfere with the defendant's constitutional right to have the jury perceive that he is in control of his own defense.[224] Because the court has discretion to deny a pro se defendant standby counsel, it also has discretion to limit the role of standby counsel.[225]

The court may but is not required to permit hybrid representation, whereby standby counsel and the defendant divide the conduct of the defense,[226] but this still requires a full waiver of the right to counsel.[227]

## § 8.3 PROCEDURE FOR APPOINTMENT OF COUNSEL

### § 8.3A. INQUIRY AND DETERMINATION OF INDIGENCY

An accused person facing jail time, if indigent, is entitled to counsel at every stage of the proceeding[228] Indigency determinations are governed by statute and rule.[229] Supreme Judicial Court Rule 3:10, establishes the criteria of indigency,[230] and is satisfied if the defendant (1) receives certain forms of governmental assistance, (2) is committed to a mental health facility or other similar facilities or is incarcerated and has no available funds, (3) has an annual income after taxes of 125 percent or less of the current poverty threshold.[231] A defendant may be indigent but able to contribute a portion of the fee if (1) he has an annual income, after taxes, of more than one hundred twenty-five percent and less than two hundred fifty percent of the current poverty threshold or (2) is charged with a felony within the jurisdiction of the Superior Court and whose available funds are insufficient to pay the anticipated cost of counsel for the defense of the felony but are sufficient to pay a portion of the cost.[232] Available funds" are defined to include the defendant's liquid assets and disposable net monthly income,

require, over pro se defendant's objection, that standby counsel, not defendant, cross-examine witness).

[224] McKaskle v. Wiggins, 465 U.S. 168, 278–79 (1984).

[225] Commonwealth v. Molino, 411 Mass. 149, 154 (1991).

[226] McKaskle v. Wiggins, 465 U.S. 168, 183 (1984). Once a defendant accepts hybrid representation, "subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced." 465 U.S. at 183. *See also* Commonwealth v. Molino, 411 Mass. 149, 152–53 (1991); United States v. Nivica, 887 F.2d 1110 (1st Cir. 1989) (court is not required to appoint standby counsel, nor must it permit standby counsel to question defendant when he takes stand).

[227] Maynard v. Meachum, 545 F.2d 273 (1st Cir. 1976). *See also* Commonwealth v. Brown, 378 Mass. 165, 174 & n.9 (1979).

[228] Gideon v. Wainwright, 372 U.S. 335 (1963).

[229] G. L. c. 211D and S.J.C. Rule 3:10 *See* Mass. R. Crim. P. 8 ("If a defendant [is] charged with a crime for which [he may be entitled to appointed counsel and] initially appears in any court without counsel the judge shall follow the procedures established in G. L. c. 211D and in [rule] 3:10").

[230] This rule incorporates but expands the definition of indigency contained in G.L. c. 261, § 27A. G.L. 211D, § 2, places the responsibility for promulgating future definitions of indigency on CPCS.

[231] The poverty threshold referred to is in G.L. c. 261, § 27A(b).

[232] S.J.C. Rule 3:10, § 1(f)

including the defendant's spouse (or person substantially in the same relationship) and each of the defendant's parents, provided that any such person lives in the same residence with the defendant and contributes substantially to the basic living expenses of the household.[233] The judge may hold a hearing and the defendant bears the burden of proving his indigency by a preponderance of the evidence.[234]

The chief probation officer of each court, is responsible for collecting the data for the indigency determination and offering a written opinion to the judge as to the ability of the accused to pay for counsel. [235]Prior to arraignment, a probation officer interviews the accused, and collects information relevant to the indigency determination.[236] The probation officer then submits his report via a prescribed form to the judge, who may also interrogate the defendant as to his financial ability to retain counsel.[237] Obviously, these interviews must include no discussion as to the merits of the case itself, which are irrelevant,[238] and any information provided by the party is inadmissible in the case.[239]

The court must make a written finding and order of indigency [240] . The original order is subject to income verification by the chief probation officer and indigency reassessments at six month intervals.[241] Even if the court finds the defendant is indigent and unable to contribute to the cost of counsel, the court is permitted to assess a $150 statutory counsel fee, payable in cash or by community service.[242]

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[233] S.J.C. Rule 3:10, § 1(f); If the person is over the age of 16 and claimed as a dependent by a parent, the parents assets will be considered as part of the available funds; Commonwealth v. Mortimer, 2012 Mass. LEXIS 659 (Mass. July 13, 2012)(defendant's IRA should ordinarily be considered a liquid asset, available to the defendant and may be included in the assessment of his ability to pay for counsel); Commonwealth v. Fico, 2012 Mass. LEXIS 658 (Mass. July 13, 2012)(trial judge held evidentiary hearing to determine the defendant's available assets and properly considered income from defendant's mother and girlfriend in assessing his ability to pay for counsel); *See also*, Commonwealth v. Porter, *infra* (income from spouse).

[234] Commonwealth v. Porter, 2012 Mass. LEXIS 656 (Mass. July 13, 2012).

[235] G.L. 211D §2A, 5

[236] S.J.C. Rule 3:10, § 6; G.L. 211D, § 6.

[237] S.J.C. Rule 3:10, § 4. The required form appears in § 4(a).

[238] Mass. R. Crim. P. 7(a)(1) requires the probation department to "make a report to the court of the pertinent information reasonably necessary to determination of the issues of bail and indigency." S.J.C. Rule 3:10, § 4(a), prescribes a form containing the relevant questions.

[239] S.J.C. Rule 3:10, § 9. However, under the rule the information may be used in a prosecution for perjury or contempt committed while providing it.

[240] S.J.C. Rule 3:10, § 4 (written indigency findings required); § 5 (written notice of assignment required); and § 4 (indigency determination form).

[241] G.L. c. 211D §2A

[242] G.L. c. 211D, § 2A(e). If the court determines that the person cannot pay the fee within 180 days, the court may waive the fee or order the accused to perform community service at a rate of $10.00 per hour. According to §2A(h), the clerk of court is required, within 60 days of appointment of counsel, to report to the department of revenue, the department of transitional assistance and the registry of motor vehicles the amount of any legal counsel fee owed by the person for whom counsel has been appointed. In turn, the department of revenue is required to intercept tax refunds and the registry of motor vehicles is required to hold the driver's license and motor vehicle registration of persons who owe the legal counsel fee. Nevertheless, an indigent client who faces risk of incarceration cannot be denied counsel for failure to pay this fee, even if able to do so. Cameron v. Justices of Taunton, S.J.C. for Suffolk

## § 8.3B. SELECTION AND APPOINTMENT OF COUNSEL

### 1. The Statutory Scheme

If the defendant meets the indigency criteria described above, the court will appoint counsel for him. Unlike his prosperous counterpart, an indigent defendant has no right to counsel of his choice [243] but does have a right to counsel "with whom reasonable communication is possible, who is competent, completely loyal and . . . prepared to defend him."[244] When a defendant's public defender was absent and the court assigned an unprepared public defender to substitute for him in a sentencing hearing, the right to counsel was violated.[245]

By statute, all court appointments are to the statewide agency, Committee for Public Counsel Services, which is then required to assign either the Public Defender Division, or the Private Counsel Division to represent the defendant.[246] However, procedures vary from court to court, and in practice most courts directly appoint cases to attorneys through the county bar advocate programs that have been authorized by the Private Counsel Division to assign private attorneys, or law school clinical programs,

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County, No. 92-203 (June 5, 1992). CPCS has advised that if a judge seeks to strike an appointment on grounds that the defendant has not paid the fee, CPCS will provide support and assistance in pursuing a ch. 211, § 3 petition to the S.J.C. single justice session. CPCS Training Bulletin, Vol. 2, No. 1, at 1 (March 1992). Moreover, according to G.L. c.278, §14, an accused is not required to pay the fee if s/he is acquitted, or discharged because the case ends in a "no bill" by the grand jury or a dismissal for want of prosecution..

[243] Commonwealth v. Appleby, 389 Mass. 359, 366, *cert. denied*, 464 U.S. 941 (1983); Commonwealth v. Moran, 388 Mass. 655, 659 (1983); Costarelli v. Municipal Court, 367 Mass. 35, 42–45 (1975); Commonwealth v. Drolet, 337 Mass. 396, 400–01 (1958). *See also* Commonwealth v. Garcia, 379 Mass. 422, 434–36 n.6 (1980) (no per se constitutional right to attorney who speaks defendant's language if interpreter is available); Commonwealth v. Smith, 1 Mass. App. Ct. 545, 547–49 (1973) (no right to attorney of same race). United States v. Van Anh, 523 F.3d 43, (2008)(no constitutional right to attorney who agrees about advisability of plea); *But see* Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STANFORD L. REV. 73, 99 (1974).

[244] Commonwealth v. Lee, 394 Mass. 209, 216 (1985) (citing Commonwealth v. Moran, 17 Mass. App. Ct. 200, 204 (1983)). *See also* Commonwealth v. Brennick, 14 Mass. App. Ct. 952, 953 (1982) (rescript) (presence of an attorney from Public Defender Division other than defendant's appointed counsel did not satisfy right to counsel); Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976); CPCS also requires that attorneys who accept assignments through CPCS carry malpractice insurance, maintain an office easily accessible to the court and the client, maintain a means for regularly accepting collect calls from clients, maintain a working e-mail account and adhere to performance standards. *See* Committee for Public Counsel Services, ASSIGNED COUNSEL MANUAL POLICIES AND PROCEDURES, SECTION II, June, 2011, available from CPCS website at www.publiccounsel.net.

[245] Commonwealth v. Brennick, 14 Mass. App. Ct. 952, 953 (1982) (rescript).

[246] G.L. c. 211D, §§ 5, 6; Mass R. Crim. P. 7(a). *See also* S.J.C. Rule 3:10, § 5 (requiring appointments to CPCS "unless exceptional circumstances," supported by written findings, necessitate another procedure); Super. Ct. R. 53(2) (murder cases); Dist. Ct. Dep't Suppl. R. Crim. P. 8.

as well as to Public Defender Division.[247] In either event, G.L. c. 211, § 6, requires the following division of appointments:

1. *CPCS Public Defender Division receives all indigent cases except* (a) codefendants of a client; (b) any defendant having a conflict of interest with a client; (c) in such other proceedings as the Chief Counsel shall determine to be necessary.

2. In practice, misdemeanor and concurrent felonies are assigned to attorneys from the county bar advocate programs or the Public Defender Division or law school students in clinical programs on a rotating basis. Bind-over felonies are assigned to the Public Defender Division unless there is a conflict of interest.[248] County Bar Advocate Programs maintain a list of qualified trial counsel who are scheduled for superior and district court case assignments on a rotating basis, and provide training and mentor programs for these attorneys.

3. *Indigent murder defendants* may be assigned by the CPCS Chief Counsel to either the Public Counsel Division or to private counsel on the CPCS murder list.[249] A district court defendant may also petition the superior court for assignment of counsel.[250]

4. *Standards governing appointments of counsel:* G.L. c. 211D, § 9, requires the CPCS to promulgate standards governing appointments, including continuous ("vertical") representation by the attorney through pretrial and trial; specified caseload limits; a training program; and access to investigative, social, expert, and clerical services, and to more experienced counsel where necessary. CPCS has and continues to promulgate both standards governing appointments and performance standards, which are available from the CPCS website.[251]

### 2. Obtaining Court Appointments

[247] Generally, the county bar advocate programs and the local office of the Public Defender Division assign lawyers to take "duty days" at the individual district courts and the presiding arraignment session judge makes appointments on a rotating basis.

[248] *See* Mass. R. Crim. P. 3:03. A supervised senior law student may be appointed to represent an indigent defendant in district, housing, or juvenile courts; or in the Supreme Judicial Court or Appeals Court; or in superior court for bail reviews, sentence reviews, or new trial motions. The client must agree to the student representation by signing an authorization form that is then signed by the supervising attorney. An entry of appearance, signed by the student and by his supervisor, must also be prepared. Order Implementing S.J.C. Rule 3:03, ¶ 2 (June 26, 1980).

[249] G.L. c. 211D, § 8; G.L. c. 276, § 37A.

[250] G.L. c. 276, § 37A. While the law seems somewhat anomalous after adoption of G.L. c. 211D, it might be used to provide a remedy for a defendant whose claim of indigency is rejected by a district court, or who is dissatisfied with appointed counsel.

[251] http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_index.html. CPCS standards now exist in the areas of criminal defense, appellate representation, juvenile delinquency cases, mental health cases, abortions for minors, guardianship cases, sexually dangerous persons proceedings, and child welfare cases. The Committee has also promulgated qualification standards governing who may be appointed counsel and caseload limits for bar advocates and other appointed counsel. These are compiled in Chapter IV of the CPCS Assigned Counsel Manual (Revised Nov. 2011) which can be found on the CPCS website.at www.publiccounsel.net.

Indigent clients will be appointed to private counsel from panels of attorneys certified by CPCS or, by a county bar advocate program. Separate lists now exist for appointment in the following types of cases: district court, probable-cause felony and superior court, murder, appeals, mental health, minor seeking abortion, sexually dangerous persons proceedings, sex offender registry proceedings, state intervention and parental rights termination, children and family law trials and appeals, and juvenile delinquency cases, youthful offender cases and DYS revocation proceedings.

Attorneys who wish to accept appointments in the district court on misdemeanor and concurrent felony cases, must complete a two-step process. The first step is applying for and gaining admission to a county bar advocate program[252]. The second step is completing a training program[253]. Attorneys who complete the training requirements are certified to represent indigent adult defendants who are charged with misdemeanors and felonies within the final jurisdiction of the District Court. Additional certifications are required for superior court jurisdiction felonies, juvenile delinquency cases, and various civil proceedings.

To be certified to accept appointments in superior court or murder cases, the attorney must submit an application and a letter to the Chief Counsel demonstrating that she meets the criteria. The prerequisites for certification are detailed in the margin,[254] but the Chief Counsel retains discretion to approve or deny any application based on additional factors.

*Entry of appearance.* Assigned counsel must enter an appearance within forty-eight hours of notice of assignment.[255] A clinical student's appearance requires a supervisor's signature and must be accompanied by client authorization.[256] For entry of appearance generally, *see supra* § 7.4; for withdrawal of representation, *see infra* § 8.5C.

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[252] A directory of the county bar advocate programs may be found at www.publiccounsel.net/Office_Locations/bar_advocate_offices.html

[253] The training requirement is satisfied by attending a five-day seminar presented by Massachusetts Continuing Legal Education, Zealous Advocacy in the District Court.

[254] *Superior Court Jurisdiction Cases:* The application must show that the attorney has demonstrated familiarity with practice and procedure in the Massachusetts criminal courts and (1) meets the minimum requirements for certification for murder cases or (2) has tried at least six criminal jury trials to verdict in the last five years as lead counsel or (3) has other significant experience, including substantial criminal jury trial experience which demonstrates qualification.

*Murder list:* The application must show the attorney (1) is an experienced and active trial practitioner with at least five years criminal trial experience; (2) is familiar with Massachusetts criminal practice and procedure; (3) was lead counsel in at least 10 jury trials of serious and complex cases, at least five of which were life felony indictments ; (4) is experienced in using expert witnesses, including psychiatric and forensic evidence (identifying specific cases) and (5) attendance at specialized training programs..

*Appeals:* Attorneys must agree to comply with the CPCS Appellate Performance Standards and attend a training program. The letter must summarize appellate and trial experience, and include a resume and two writing samples.

*Juvenile delinquency list:* Attorneys must attend specialized training programs and comply with CPCS performance guidelines governing indigents in criminal and juvenile cases. This does not qualify counsel to represent juveniles in superior court cases, CHINS, care and protection matters, and guardianship cases.

[255] S.J.C. Rule 3:10, § 10.

[256] S.J.C. Rule 3:03;

*Appeals.* Counsel has an obligation to advise the client of the right to appeal and, if the client decides to appeal, counsel should file a notice of appeal and request withdrawal and the appointment of successor counsel for the appeal. Counsel has an obligation to cooperate with successor counsel.[257]

## § 8.3C. ETHICAL CONSTRAINTS ON ACCEPTING PARTICULAR CASES

Cases that an attorney may not ethically accept include, inter alia: cases posing a conflict of interest between clients,[258] including appointment to codefendants which Massachusetts Rules of Professional Conduct 1.7 generally, but not entirely, prohibits;[259] cases in which the lawyer's judgment may be affected by financial, business, property, or personal interests;[260] and cases in which the lawyer is likely to be a witness.[261]

The ethical requirements of professional conduct are generally found in the Massachusetts Rules of Professional Conduct. Additionally, defense attorneys may refer to (1) the Board of Bar Overseers, which issues formal opinions and provides informal telephone advice;[262] (2) Ethics Opinions published by both the Massachusetts Bar Association Committee on Professional Ethics (available on-line at www.massbar.org/publications/ethics-opinions) and the ABA Committee on Professional Ethics; (3) standards promulgated by the American Bar Association;[263] (4) performance standards promulgated by the Massachusetts Committee for Public Counsel Services;[264] and (5) a variety of treatises [265] and reporting services [266] cited in the margin.

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[257] Assigned Counsel Manual, Chapter IV, section VIII.

[258] *See* full discussion *infra* at § 8.6.

[259] The comment to Mass. R. Prof. C. 1.7. states that "[i]n criminal cases, the potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one codefendant, or more than one person under investigation by law enforcement authorities for the same transactions, including any investigation by a grand jury, [but], [o]n the other hand, common representation of persons having similar interests is proper if the lawyer reasonably believes the risk of adverse effect is minimal and all persons have given their informed consent to the multiple representation ."

[260] Mass R. Prof. C. 1.7 (conflicts), 1.8 (prohibited transactions), 1.9 (former client);

[261] Mass. R. Prof. C. 3.7;. This Rule includes limited exceptions to this prohibition, which are listed in the rule.

[262] The Opinions are published by LexisNexis as the MASSACHUSETTS ATTORNEY DISCIPLINARY REPORTS and may be purchased at www.lwxisnexis.com/store. Informal advice can be obtained from assistant bar counsel by calling (617) 728-8750 between 2:00 and 4:00 P.M. on Mondays, Wednesdays and Fridays.

[263] The ABA has promulgated three sets of standards of attorney conduct: (1) STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (http://www.americanbar.org/groups/criminal_justice/policy/standards.html ); (2) THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1970), much of which was adopted as former S.J.C. Rule 3:07; and (3) THE MODEL RULES OF PROFESSIONAL RESPONSIBILITY, adopted in 1983 by the ABA but subsequently by only a minority of states.

[264] CPCS, PERFORMANCE STANDARDS AND COMPLAINT PROCEDURES in Chapter IV, Assigned Counsel Manual.

[265] ABA, PROFESSIONAL DISCIPLINE FOR LAWYERS AND JUDGES (1985); FREEDMAN, UNDERSTANDING LAWYERS ETHICS,(4th ed. 2010); ROTUNDA, LEGAL

## § 8.4 COMPENSATION, FUNDING, AND OTHER SUPPORT

What follows is an overview of financial and other support services for appointed counsel. Appointed counsel should consult the CPCS *Assigned Counsel Manual* (Revised Nov. 2011), available on-line at www.publiccounsel.net.

For retained counsel, the generally less bureaucratic free market reigns, but the defense attorney should be cognizant of Disciplinary Rules that bar the use of contingent[267] or "clearly excessive"[268] fees in criminal cases. Additionally, under rule 15(d) of the Rules of Criminal Procedure, either retained counsel as well as appointed counsel is entitled to have her fees and costs paid by the Commonwealth for representing the defendant on an interlocutory appeal taken by the Commonwealth, even if the Commonwealth's appeal is meritorious.[269] The defendant must file his application for fees and costs with the Appeals Court within thirty days of the issuance of the rescript.[270] The defendant is entitled to an award of reasonable attorney's fees and costs even where the Commonwealth files a nol pros before the appeal is complete.[271]

### § 8.4A. COMPENSATION FOR COUNSEL'S SERVICES

The Committee for Public Counsel Services has promulgated policies and procedures governing billing and compensation for private counsel assigned to represent indigent defendants.[272] In order to receive payment for services rendered,

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ETHICS IN A NUTSHELL (3rd ed. 2007); BOLAN & LAWRENCE (EDs.), ETHICAL LAWYERING IN MASSACHUSETTS (2010; the full text is available on-line); BURKOFF, CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY (2nd 2007); RHODE & HAZARD, PROFESSIONAL RESPONSIBILITY AND REGULATION (2nd ed. 2007); TUONI, MASSACHUSETTS PROFESSIONAL RESPONSIBILITY (2nd ed 2003);. *See also* http://www.law.cornell.edu/ethics.

[266] ABA, THE DISCIPLINARY LAW AND PROCEDURE RESEARCH SYSTEM; ABA, SUPPLEMENTS TO DIGEST OF BAR ASSOCIATION ETHICS OPINIONS; ABA/BNA, LAWYER'S MANUAL ON PROFESSIONAL CONDUCT; and the periodic reports of the MBA and ABA committees on ethics, identified in the accompanying text.

[267] Fees contingent on an acquittal or favorable disposition are prohibited by Mass. R. Prof. C. 1.5.

[268] Mass. R. Prof. C. 1.5.

[269] *See* Commonwealth v. Lopez, 430 Mass. 244, 245–246 (1999). The defendant is entitled to reasonable attorney's fees and costs even where the Commonwealth files a nol pros before the appeal is complete. Commonwealth v. Rosario, 458 Mass. 1003 (2010). However, fees and costs under rule 15(d) cannot be awarded to attorneys to whom appointed counsel unilaterally "subcontract[s]" the defendant's representation on the Commonwealth's interlocutory appeal. Commonwealth v. Sparks, 431 Mass. 299, 302 (2000)

[270] Commonwealth v. Ennis, 441 Mass. 718, 720 (Mass. 2004)

[271] Commonwealth v. Rosario, 458 Mass.1003 (2010)

[272] Chapter V of the CPCS Assigned Counsel Manual (Revised November 2011). The manual is available for download at:
www.publiccounsel.net/private_counsel_manual/private_counsel_manual_index.html

assigned attorneys must have a state Vendor Customer number and Taxpayer Identification Number (TIN) on file with the State Comptroller's Office.[273] After counsel is registered with the Comptroller's Office, counsel must submit bills electronically, through the CPCS–instituted E_Bill system[274] CPCS encourages attorneys to submit E-Bills on an interim monthly basis[275]

Assigned counsel may receive compensation for services performed only in connection with the assigned case, and only from the Commonwealth[276]. Assigned counsel are required to keep detailed time records of actual hours worked. Counsel must be able to support their bills with adequate documentation and are subject to review and audit.[277]

Counsel will also be reimbursed for documented and reasonable expenses, including travel expenses,[278] associate [279] and paralegal [280] expenses, telephone and copying bills, and other expenses.[281] Attorneys should use the indigent court costs fund pursuant to the procedure described immediately below for nontravel expenses.

Attorneys must submit the bills electronically to CPCS "within sixty days of the conclusion of the attorney's representation" in order to receive full payment. Bills submitted later than ninety days will not be paid unless the Chief Counsel finds that "the delay was due to extraordinary circumstances beyond the control of the attorney".[282]

Attorneys are compensated at hourly rates, dependent on the nature of the case. Attorneys assigned to murder cases are paid $100.00 per hour. Attorneys assigned to superior court cases are paid $60.00 per hour, and attorneys assigned to district court cases are paid $50.00 per hour[283]. CPCS has established an annual cap on billable hours, not to exceed 1,650 hours.[284] Attorneys are prohibited from accepting new assignments after the attorney has billed 1,350 hours during any fiscal year.[285] Attorneys may participate in no more than two county bar advocate programs. The

[273] The procedure for obtaining the required numbers is described in Chapter V, Section 8 of the CPCS Assigned Counsel Manual.

[274] The E-Bill system can be accessed at www.cpcsebill.com.

[275] Chapter V, section 18, Assigned Counsel Manual

[276] Chapter V, section 1, Assigned Counsel Manual.

[277] Chapter V, sections 9, 24, Assigned Counsel Manual.

[278] Travel expenses are restricted by CPCS policy and CPCS implemented additional travel restrictions in response to cost control measures requested by the Patrick Administration in Fiscal Year 2012. Chapter V, section 28, Assigned Counsel Manual.

[279] The use of associates is limited. Associates must work under the supervision of the assigned counsel, may not conduct court hearings or witness examinations in place of the assigned attorney. CPCS will reimburse the attorney for the services of an associate at a maximum rate of $40.00 per hour. Chapter V, section 25, Assigned Counsel Manual.

[280] Compensation for paralegals is at a rate of up to $18 per hour. CPCS has instiuted minimum requirements for a person to qualify as a paralegal, Chapter V , section 25. Assigned Counsel Manual.

[281] *See* Assigned Counsel Manuel (Revised, November 2011).

[282] 211D s. 12.

[283] 211D s. 11(a).

[284] 211D s. 11(b)

[285] 211D s. 11(c); Chapter V, section 17, Assigned Counsel Manual

attorney's office must be within geographical proximity to the courts in which the attorney accepts assignments[286].

## § 8.4B. FUNDING FOR DEFENSE EXPENSES

Apart from expenses for counsel services, there are many other trial costs that the defendant may not be able to afford, such as the services of an investigator, expert, psychiatrist,[287] or stenographer. But as the Supreme Court has held, "There can be no justice where the type of trial that a person has depends on the financial means of such person."[288] In Massachusetts, the defendant has a statutory right to obtain court-ordered funding for trial or appeal [289] or, in some cases, for post conviction access to forensic and scientific testing[290] to the degree "reasonably necessary to assure the applicant as effective a . . . defense . . . as he would have if he were financially able to pay."[291] This is true even if counsel is retained but the defendant is without further adequate funds.[292]

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[286] Chapter V, section 20, Assigned Counsel Manual

[287] When an indigent defendant's sanity is at issue, she has a constitutional right to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." Ake v. Oklahoma, 470 U.S. 68, 83 (1985). *Cf.* Commonwealth v. Gould, 413 Mass. 707, 712, n.7 (1992) (posttrial request for funding for psychiatric evaluation denied when defendant failed to make a showing of basis of his claim);Commonwealth v. Carreiro, 2005 Mass. App. Div. 41(2005)(requests for funds for service of subpoena may not be denied because such expenses are "normal fees and expenses") Most process servers now serve subpoenas and bill CPCS directly so no motion for funds is needed. .

[288] William v. Illinois, 399 U.S. 235, 241 (1970) (indigent cannot be jailed for nonpayment beyond maximum incarceration provided as punishment for the crime) (quoting Griffin v. Illinois, 351 U.S. 12 (1956) (transcript must be provided for appeal because equal protection requires that defendant have basic tools of an adequate defense on appeal)).

[289] G.L. ch. 261, § 27(C)(4) is only available for trial or appeal but not for an actual or possible motion for new trial, even though this might leave the defendant unable to discover the evidence supporting the motion. Commonwealth v. Davis, 410 Mass. 680 (1991) (test using new scientific techniques sought).

[290] G.L. c.278A was enacted in 2012 and provides for post conviction access to forensic and scientific testing for defendants who have been convicted and are incarcerated or on parole or probation and who assert factual innocence of the crime for which they have been convicted.

[291] G.L. c. 261, § 27C(4). *See also* Commonwealth v. Baker, 440 Mass. 519 (2003)(denial of funds for expert witness was reversible error where it left the defendant with no expert to counter the Commonwealth's theory of prosecution); Commonwealth v. Lockley, 381 Mass. 156 (1980) (denial of funds for polygraph); Comonwealth v. King, 2005 Mass. App. Div. 29 (2005)(Denial of funds to counter Commonwealth's expert that drugs were consistent with distribution was abuse of discretion); Commonwealth v. Luciano, 79 Mass. App, Ct. 54, 58 (2011)(defendant was entitled to a hearing before his motion for a free transcript following mistrial was denied and denial was unreasonable in light of the speed in which transcript of trial could be prepared); Commonwealth v. Brown, 57 Mass.App.Ct. 852, 860 (2003)(trial counsel's failure to obtain transcript of suppression hearing before trial was a "regrettable lapse" and an "undeniable shortcoming").

[292] *See cases cited in,* Kumer, "Reconsidering Ake v. Oklahoma: What Ancillary Defense Services Must States Provde to Indigent Defendants Represented by Private or Pro

A motion for such funds should additionally assert the several constitutional provisions that require such funding.[293] An affidavit of indigency must also be filed.[294]

A hearing on the motion is required.[295] The Supreme Judicial Court has listed factors that the judge should consider in a motion for funds, including cost and the uses and value of the item sought at trial.[296] Where such information would give the

Bono Counsel?", 18 Temp. Pol. & Civ. Rights L. Rev. 783, 784 (2009)( "A clear majority of courts have held that indigent defendants have a statutory or constitutional right to funds for ancillary defense services when represented by private or pro bono counsel").

[293] The provisions in the U.S. Constitution that support the motion are the equal protection and due process clauses of the Fourteenth Amendment, and the right to counsel, compulsory process and confrontation clauses of the Sixth Amendment, incorporated by the Fourteenth Amendment. Additionally, the motion should cite Mass. Const. Declaration of Rights articles 1 (equal protection) and 12 (due process, the rights to confront witnesses and present a defense, and the right to counsel). In Commonwealth v. Lockley, 381 Mass. 156, 164 (1980), the court declined to reach the constitutional issue because § 27C provided a statutory basis for relief.

[294] G.L. c. 261, § 27B; Commonwealth v. Pope, 392 Mass. 493, 501 (1984). If the court has assigned counsel, this should constitute a finding of indigency, rendering an affidavit unnecessary.

[295] G.L. c. 261, § 27C(4); Commonwealth v. Lockley, 381 Mass. 156, 161 (1980) (new trial because no sufficient hearing held); Commonwealth v. Luciano, 79 Mass. App, Ct. 54, 58 (2011)(defendant was entitled to a hearing before his motion for a free transcript following mistrial was denied)

[296] Commonwealth v. McDonald, 21 Mass. App. Ct. 368, 376–77 (1986) (defendant did not demonstrate how flying in court-appointed examining psychiatrist would help defense); Commonwealth v. Souza, 397 Mass. 236 (1986) (defendant did not show particularized need for transcript of bench trial); Commonwealth v. Kenney, 437 Mass. 141 (2002)(Defense counsel's failure to file an affidavit in support of defendant's motions for funds resulted in denial of funds for expert), *But see* Commonwealth v. Luciano, 79 Mass. App. Ct.54 (2011)(defendant should have cited the short continuance time needed to obtain a copy of the transcript of the mistrial); Commonwealth v. Zimmerman, 441Mass. 146 (2004)(judge did not conduct a sufficient hearing on defendant's request for an expert on eyewitness identifications issues; judge must consider the desirability or necessity of the expert in connection with the defendant's defense). Commonwealth v. Lockley, 381 Mass. 156, 161 (1980). In *Lockley*, 381 Mass at 160–61, the court stated that the criterion is not that the item would alter the outcome, nor that it "might conceivably contribute some assistance" or be acquired by a defendant with unlimited resources, but that the funds are reasonably necessary to prevent a disadvantage in comparison with one who could afford the preparation which the case reasonably requires. *Accord* Souza, *supra*, 397 Mass. at 240–41.

One factor that may make an expenditure more necessary is if the defendant will not testify because of impeachment by a prior record. *Lockley*, *supra*, 381 Mass. at 163; Commonwealth v. Bolduc, 10 Mass. App. Ct. 634, 638 (1980).

For additional information, *see* Monahan and Clark, "Funds for Defense Expertise: What National Benchmarks Require", NACDL Champion, May 1997; Documents and Experts," Crim. Prac. Man. (BNA) No. 35, 21:401–31 (Nov. 1989) (discussion of statutory and constitutional bases for right to funds, including sample motions); *CPCS Training Bulletin* vol. 1 no. 4 (Dec. 1991), at 4–5 (detailed advice on how to obtain needed funds for expert services). Karp, "Use of the Massachusetts Court Costs Act", in Hoffman, Child Welfare Practice in Massachusetts, 2009, Massachusetts Continuing Legal Education, Inc.(Counsel must consult 'CPCS Expert Qualifications and Rates for Investigators, Social Service Providers, and Expert Witnesses' in order to determine an appropriate hourly rate, *see* Assigned Counsel Manual, Chapter VI.

prosecution unwarranted discovery, counsel should move to submit an affidavit in camera to explain the need.[297] In any event, the prosecution, unless asked by the court, has "no proper role to play" in a motion seeking funds for the defense.[298]

If defense funds are denied by the trial court, notice of the right to appeal must be given,[299] written findings will be entered,[300] and the defendant has seven days within which to file a notice of appeal with the clerk..[301] The proceedings may be stayed during this appeal.[302] The court has advised that it may in a future case rule that interlocutory appellate review under § 27D is the exclusive avenue of appeal from a denial of costs.[303] To date, however, it has not done so clearly.[304] In some circumstances, appointed counsel who fails to obtain necessary court-ordered funds may obtain them by applying to the Chief Counsel of the Committee for Public Counsel Services.

Travel and minor expenses may be submitted as part of the final bill, as detailed in the immediately preceding subsection.

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[297] *See* Commonwealth v. Dotson, 402 Mass. 185, 187 (1988) ("the prosecution has no proper role to play in a defendant's motion for defense funds unless the judge requests the prosecution's participation"); Commonwealth v. Haggerty, 400 Mass. 437, 441 (1987) (judge has power to exclude evidence derived from prosecutorial misconduct in obtaining contact information for expert, who was consulted, but not used, by the defendant).counsel could obtain protective order to prevent prosecutor from discovering identity of experts through fund request).

[298] Commonwealth v. Dotson, 402 Mass. 185, 187 (1988).

[299] G.L. c. 261, § 27D; Commonwealth v. Lockley, 381 Mass. 156 (1980); Commonwealth v. Zimmerman, 441 Mass. 146 (2004)(defendant's failure to file a timely notice of appeal from a denial of his motion for funds was forgiven because trial court failed to advise defendant of his right to an interlocutory appeal)

[300] The trial judge must make written findings within three days after the filing of a notice of appeal (G.L. c. 261, §§ 27C(4), 27D), but should make such findings whether or not there is an appeal. Commonwealth v. Bolduc, 10 Mass. App. Ct. 634, 636 n.9 (1980), *aff'd*, 383 Mass. 744 (1981) (new trial because no proper consideration or findings on need for expert).

[301] The appeal from a district court order is to the appellate division; from a superior court trial, it is to a single justice of the Appeals Court, from the juvenile court department to the superior court sitting in the nearest county or in Suffolk county. There is no further interlocutory appeal. G.L. c. 261, § 27D; Commonwealth v. Pope, 392 Mass. 493, 502 (1984).

[302] G.L. c. 261, § 27D. This section was amended on July 20, 1992 (St. 1992, c. 133, § 563). The amendment discarded what had been a right to a "speedy hearing" on this appeal, to simply a right to a "speedy decision" on the appeal. Counsel is advised when filing such an appeal to move for an oral hearing, denial of which might violate due process and equal protection under Ake v. Oklahoma, 470 U.S. 68 (1985).

[303] Commonwealth v. Souza, 397 Mass. 236, 240 n.5 (1986); Commonwealth v. Bolduc, 10 Mass. App. Ct. 634, 637 n.10 (1980) (citing Little v. Rosenthal, 376 Mass. 573 (1978)). *See also* Commonwealth v. McDonald, 21 Mass. App. Ct. 368, 376 (1986); Commonwealth v. Lockley, 381 Mass. 156, 159 (1980) (§ 27D provides a "professedly exclusive procedure" for appealing denial of fees and costs, but review here because judge did not advise defendant of right to interlocutory appeal).

[304] *See, e.g.*, Commonwealth v. Martinez, 420 Mass. 622, 627 n.5 (1995).

## § 8.5 WITHDRAWAL OR CHANGE OF COUNSEL

### § 8.5A. DEFENDANT'S RIGHT TO CHANGE COUNSEL

The court may deny last-minute shifts in representation that threaten to delay the proceedings,[305] including late requests by a pro se defendant who wishes to utilize counsel [306] or by a represented defendant to defend pro se.[307] However, the defendant must have been afforded a "reasonable opportunity" to obtain counsel,[308] and a last-minute continuance to change counsel may still be constitutionally required if events before or during trial reveal that counsel is lacking in skill, preparation, undivided

[305] Tuitt v. Fair, 822 F.2d. 166, 171–72 (1st Cir. 1987), *cert. denied*, 484 U.S. 945; Commonwealth v. Babb, 416 Mass. 732 (1994) (defendant held to have abandoned right to counsel); Commonwealth v. Quinones, 414 Mass. 423, 436 (1993); Commonwealth v. Haas, 398 Mass. 806, 814–15 (1986); Commonwealth v. Dunne, 394 Mass. 10, 14–15 (1985); Commonwealth v. Moran, 388 Mass. 655, 659 (1983); Commonwealth v. Jackson, 376 Mass. 790, 795–97 (1978), *denial of habeas aff'd sub nom.* Jackson v. Amaral, 729 F.2d 41 (1st Cir. 1984); Commonwealth v. Flowers, 5 Mass. App. Ct. 557, 565–566 (1977); Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976); Commonwealth v. Scott, 360 Mass. 695, 699–701 (1971).

The defendant's freedom to change counsel "is restricted on the commencement of trial." Commonwealth v. Chavis, 415 Mass. 703, 710–12 (1993) (denial of motion to discharge counsel on trial day prior to empanelment of jury was within discretion of judge as judge gave defendant opportunity to explain basis for request and defense attorney was prepared); Commonwealth v. Dunne, 394 Mass. 10, 13–16 (1985) (day jury empanelment was to commence). *See also* United States v. Richardson, 894 F.2d 492 (1st Cir. 1990) (not error to deny shift from public to private counsel on morning of trial); United States v. Panzardi Alvarez, 816 F.2d 813 (1st Cir. 1987) (balancing of listed factors); Commonwealth v. Carsetti, 53 Mass. App. Ct. 558 (2002) (defendant's refusal without good cause to proceed with able appointed counsel is voluntary waiver of counsel requiring defendant to proceed pro se); Commonwealth v. Dutra, 15 Mass. App. 542, *rev. denied*, 389 Mass. 1103 (1983) (on day of trial, defendant not entitled to continuance to replace appointed counsel with private counsel yet to be retained); Commonwealth v. Diatchenko, 387 Mass. 718 (1982) (during jury empanelment); United States v. Poulack, 556 F.2d 83, 86 (1st Cir. 1977) (court must blend appreciation of difficulties of trial administration with concern for constitutional protections; defendant's right to choose own counsel cannot be insisted on in a manner that obstructs reasonable court procedure); Commonwealth v. Bettencourt, 361 Mass. 515 (1972) (no continuance for obtaining counsel required where defendant had one month until trial date and did nothing); Lamoureux v. Commonwealth, 353 Mass. 556, 560 (1968) (second day of trial).

[306] Commonwealth v. Higgins, 23 Mass. App. Ct. 552, 556 (1987); Commonwealth v. Jackson, 376 Mass. 790, 795–97 (1978) (request on morning of trial).

[307] If the defendant seeks to proceed pro se after impanelment of the jury, the right is subject to the court's discretion. Commonwealth v. Chapman, 8 Mass. App. Ct. 260, 265–66 & n.3 (1979); Commonwealth v. Miller, 6 Mass. App. Ct. 959, 960 (1978) (rescript); Commonwealth v. Mott, 2 Mass. App. Ct. 47, 51 (1974); United States v. Betancourt-Arretuche, 933 F.2d 89 (1st Cir. 1991).

However, before trial begins a dilatory motive is "probably not now a sufficient basis on its own for denying" an otherwise proper motion to defend pro se. *Chapman*, *supra*, 8 Mass App. Ct. at 267 n.8.

[308] Mass. R. Crim. P. 8(d); Commonwealth v. Perry, 6 Mass. App. Ct. 531, 539 (1978); Commonwealth v. Bettencourt, 361 Mass. 515, 517 (1972). The court is not obligated to grant indefinite postponements while the defendant continues to seek private counsel. Fillippini v. Ristaino, 585 F.2d 1163 (1st Cir. 1978).

loyalty, ability to communicate with the defendant, or other necessary components of the right to effective assistance.[309]

If the defendant is indigent, she is not entitled to counsel of choice,[310] and the court may therefore refuse a request for substitute counsel absent good cause.[311] Good cause for substitution may be found where counsel has failed to prepare a defense, has a conflict of interest, or has experienced such a breakdown in communication with the defendant that a fair trial is threatened,[312] but a defendant is not entitled to change counsel solely because there is no "meaningful" relationship with counsel.[313] Pursuant to the Sixth Amendment, the court must allow the defendant to present her reasons for change of counsel.[314]

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[309] Commonwealth v. Carsetti, 53 Mass. App. Ct. 558 (2002) (defendant may not be forced to trial with counsel who is incompetent or unprepared; judge should inquire into asserted unpreparedness); Commonwealth v. Ortiz, 50 Mass. App Ct. 304 (2000) (discharge of defense counsel on day scheduled for trial warranted by conflict of interest, incompetence, or irreconcilable breakdown in communications with defendant). A defendant has the burden of showing good cause for removal of appointed counsel, including conflict of interest, incompetence, or irreconcilable breakdown of communication, the ultimate question being the likelihood of denial of effective assistance of counsel. Commonwealth v. Britto, 433 Mass. 596 (2001). Defense counsel's failure to meet "unreasonable" demands by defendant does not constitute "irreconcilable breakdown." *Id*.

*See also* discussion of factors and accompanying citations in Commonwealth v. Dunne, 394 Mass. 10, 15 (1985); Commonwealth v. Chavis, 415 Mass. 703, 710–12 (1993); Commonwealth v. Flowers, 5 Mass. App. Ct. 557, 565–66 (1977) (hearing may be required on defendant's claim of ineffective assistance if no reason to suspect defendant's good faith). An irreconciliable breakdown in communication may entitle the defendant to a new attorney. Commonwealth v. Moran, 17 Mass. App. Ct. 200 (1983); Commonwealth v. Fogarty, 25 Mass. App. Ct. 693, 699 (1988) (court may properly deny last minute motion unless communication problem may lead to "an apparently unjust verdict, prevents an adequate defense, or threatens the defendant's right to a fair trial"). However, the Sixth Amendment right does not require that counsel and the defendant enjoy a "meaningful relationship," (Morris v. Slappy, 461 U.S. 1, 11 (1983)), and loss of confidence by the defendant in counsel is not, in itself, sufficient to require substitution of counsel. United States v. Porter, 924 F.2d 395 (1st Cir. 1991) (citing Tuitt v. Fair, 822 F.2d 166, 173 (1st Cir. 1987)).

[310] Commonwealth v. Appleby, 389 Mass. 359, 366, *cert. denied*, 464 U.S. 941 (1983); Commonwealth v. Moran, 388 Mass. 655, 659 (1983); Costarelli v. Municipal Court, 367 Mass. 35, 42–45 (1975); Commonwealth v. Drolet, 337 Mass. 396, 400–01 (1958).

[311] Commonwealth v. Moran, 17 Mass. App. Ct. 200, 204–05 (1983); Commonwealth v. Scott, 360 Mass. 695, 698–701 (1971). When a defendant requests appointment of new counsel, the judge must allow the defendant to state his reasons for wanting to discharge present counsel. Commonwealth v. Jordan, 49 Mass. App. Ct. 802 (2000).

[312] Commonwealth v. Moran, 17 Mass. App. Ct. 200, 204 (1983); Commonwealth v Meachum, 545 F.2d 273, 278 (1st Cir. 1976).

[313] Commonwealth v. Tuitt, 393 Mass. 801, 806–07 (1985); Morris v. Slappy, 461 U.S. 1, 13–14 (1983). *But see* Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970). *See also* authorities cited *supra* in note 218.

[314] Commonwealth v. Lee, 394 Mass. 209, 217 (1985); Commonwealth v. Tuitt, 393 Mass. 801, 804 (1985); Commonwealth v. Moran, 388 Mass. 655, 659–60 (1983), and cases cited therein; Lamoureux v. Commonwealth, 353 Mass. 556, 560 (1968). *But see* Commonwealth v. Flowers, 5 Mass. App. Ct. 557, 565 (1977) (better practice to inquire into reasons for seeking change of counsel, but not constitutionally required unless seemingly substantial complaint); Commonwealth v. Smith, 1 Mass. App. Ct. 545, 548 (1973) (failure to inquire not required in this case because reason asserted at trial).

## § 8.5B. COURT'S REMOVAL OR SUBSTITUTION OF COUNSEL

For a defendant with means to retain counsel, the Sixth Amendment protects the right to counsel of choice.[315] Although an indigent does not have a right to counsel of choice, once an attorney is appointed the defendant is entitled to continuous representation.[316] The Supreme Judicial Court has found a violation of the right to counsel in the court's substitution of one public defender for another who was absent at a sentencing hearing in the district court jury session.[317] Additionally, removal or substitution may render the assistance of subsequent counsel constitutionally defective,

[315] Powell v. Alabama, 287 U.S. 45 (1932), cited in United States v. Gonzalez-Lopez, 548 U.S. 140,150 (2006).). *See also* United States v. Flanagan, 465 U.S. 259, 268–69 (1984); United States v. Seale, 461 F.2d 345, 360 (7th Cir. 1972); Releford v. United States, 288 F.2d 298, 302 (9th Cir. 1961) (improper to require representation by substitute counsel when defendant's retained counsel hospitalized), *But see* Commonwealth v. Johnson, 54 Mass. App. Ct. 224, 235 (2004)(not a violation of the defendant's tight to counsel of choice when trial judge denied defendant's request for continuance when defendant sought to substitute counsel five days prior to the commencement of trial) Reynolds v. Cochran, 365 U.S. 525 (1961); Crooker v. California, 357 U.S. 433, 439 (1958); Chandler v. Fretag, 348 U.S. 3, 9 (1954); Glasser v. United States, 315 U.S. 60, 70 (1942). In Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981), the court described the right to choose one's own counsel as "an essential component of the Sixth Amendment because, were a defendant not provided an opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut." *But see* Panzardi-Alvarez v. United States, 879 F.2d 975 (1st Cir. 1989) (although decision denying pro hac vice admission necessarily implicates Sixth Amendment right to counsel of choice, it is justified if ethical and orderly administration of justice would be affected); United States v. Diozzi, 807 F.2d 10 (1st Cir. 1986); United States v. Poulack, 556 F.2d 83, 86 (1st Cir. 1977) (right to choose counsel cannot be insisted on in a way that obstructs reasonable and orderly court procedure).

The right to counsel of choice includes the right to retain counsel who has a conflict of interest. *See* discussion *infra* at § 8.6D. A defendant does not, however, have the right to be represented by a person not admitted to the bar. *See* Commonwealth v. Wolf, 34 Mass. App. Ct. 949 (1993).

[316] Continuous representation by appointed counsel is statutorily mandated. G.L. c. 211D, § 9(a). Commonwealth v. Jordan, 49 Mass. App. Ct. 802 (2000) (defendant has right to continued representation by particular defender after attorney-client relationship is formed but judge did not abuse discretion by allowing "conflict-ridden" attorney to withdraw); Moore v. United States, 432 F.2d 730 (3d Cir. 1970).).

[317] Commonwealth v. Brennick, 14 Mass. App. Ct. 952, 953 (1982) (rescript). *See also* ABA, Standards Relating to the Administration of Criminal Justice, Standard 5-6.2 (3d ed. 1990) (appointed counsel should continue representation throughout the trial court proceedings); McKinnon v. State, 526 P.2d 18 (Alaska 1974) (reversal because substituting new appointed counsel violated right to counsel); Smith v. Superior Court, 68 Cal 2d. 547, 561 (1968) (reinstating counsel because removal of appointed counsel for alleged incompetence beyond statutory and inherent powers of the trial court). *But see* Morris v. Slappy, 461 U.S. 1 (1983) (upholding court's refusal to grant a continuance when public defender entered hospital and substitute attorney appointed six days before trial).

because she is inadequately prepared [318] or unable to communicate with her aggrieved client.[319]

Finally, it has been noted that the threat of summary removal constitutes a "grave dilution of the constitutional right to counsel" because it can "intimidate the trial bar and discourage tenacious trial representation."[320]

## § 8.5C. WITHDRAWAL BY COUNSEL

### 1. Procedure for Withdrawal

In general, an appearance locks counsel into representation through trial and appeal [321] unless withdrawal is permitted by the court.[322] However, Rule 7(c) permits a provisional appearance at superior court arraignment, allowing the attorney to withdraw without permission within fourteen days provided the successor attorney simultaneously files his appearance; and a district court rule allows the appointment of one attorney to represent all defendants at an arraignment session without binding him to future representation.[323]

Apart from these special cases, withdrawal will require leave of the court.[324] The district courts have been advised that withdrawal should be permitted only on written motion and on good cause, and should generally not be permitted on the day of

[318] This right is addressed *infra* at § 27.1B(5).

[319] McKinnon v. State, 526 P.2d 18, 23 (Alaska 1974). In finding a right to defend pro se, the Supreme Court used language equally applicable here: "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction." Faretta v. California, 422 U.S. 806, 820 (1975).

[320] McKinnon v. State, 526 P.2d 18, 23 (Alaska 1974). In a related area, the Massachusetts courts have sounded "a cautionary note about judicial disqualification of counsel" who might be called as a witness for his client, notwithstanding disciplinary rules detailed *infra* in § 8.5C(2). Byrnes v. Jamitkowski, 29 Mass. App. Ct. 107, 109–10 (1990) (interpreting Borman v. Borman, 378 Mass. 775 (1979)). *See also* Smaland Beach Ass'n v. Genova, 461 Mass. 214,(2012).

[321] Mass. R. Crim. P. 7(c) states that a superior court appearance represents that counsel will represent the defendant for trial or plea, and Mass. R. App. P. 3(e) binds trial counsel to prosecute the appeal unless he files a motion to withdraw along with the notice of appeal, and the trial court permits it (which is routine). This course of action is also the policy of CPCS. *See also* Super. Ct. R. 65 (obligation to prosecute appeal until withdrawal permitted). No rule similarly describes the future obligation of retained counsel appearing at arraignment in district court, but Dist. Ct. Dep't Suppl. R. Crim. P. 8(4) binds appointed attorneys to represent the defendant throughout all district court proceedings. *See also* G.L. c. 278, § 20 (district court first-tier appearance transmitted to jury session) and S.J.C. Rule 3:10, § 10(b) (withdrawal of assigned counsel).

[322] Mass. R. Crim. P. 7(c)(2).

[323] Dist. Ct. Dep't Suppl. R. Crim. P. 8(8).

[324] Mass. R. Crim. P. 7(c)(2).

trial.[325] A hearing must be afforded at which counsel may explain the reasons for seeking withdrawal.[326]

For appointed counsel, the Committee for Public Counsel Services has its own rules, which require an attorney appointed to a district court probable-cause hearing to continue representation in the superior court if bind-over occurs.

In seeking withdrawal, the attorney is required to avoid client prejudice by providing due notice to the client, time for employment of other counsel, and all papers and property to which the client is entitled.[327] All unearned fees must be returned.[328]

### 2. Grounds for Withdrawal

Massachusetts Code of Professional Conduct Rule 1.16 requires a lawyer to decline to represent or, where representation has commenced, to withdraw if:

1. the representation will result in violation of the rules of professional conduct or other law;

2. the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

3. the lawyer is discharged.

The rule makes clear, however, that if permission for withdrawal is required by the rules of tribunal, a lawyer may not withdraw without permission.[329]

Rule 1.16 permits withdrawal "if withdrawal can be accomplished without material adverse effect on the interests of the client," or if:

1. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

2. the client has used the lawyer's services to perpetuate a crime or fraud;

3. a client insists on pursuing an objective that the lawyer considers repugnant or imprudent;

4. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

5. the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

6. other good cause for withdrawal exists.

In any case, a lawyer whose representation terminates "shall take steps to the extent reasonably practicable to protect a client's interests."[330]

This rule is substantially different from former S.J.C. Rule 3:07, DR2-110(B).[331] Still, the following recurrent circumstances should be noted:

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[325] Standards of Judicial Practice: Arraignment, Standard 5:05 (Aug. 1977). *See also* Commonwealth v. Simon, 391 Mass. 1010 (1984) (refusal to permit withdrawal of counsel on day of trial upheld because dilatory tactic).

[326] Tuitt v. Fair, 822 F.2d 166 (1st Cir. 1987), *cert. denied*, 484 U.S. 945 (1987); Commonwealth v. Moran, 388 Mass. 655, 659 (1983).

[327] Mass. R. Prof. C. 1.16(d), (e); *see also* former S.J.C. Rule 3:07, DR 2-110(A)(2).

[328] Mass. R. Prof. C. 1.16(d), (e); *see also* former S.J.C. Rule 3:07, DR 2-110(A)(2).

[329] Mass. R. Prof. C. 1.16(c).

[330] Mass. R. Prof. C. 1.16(d).

[331] Former S.J.C. Rule 3:07, DR 2-110(B), *required* withdrawal if (1) continued representation will violate a disciplinary rule; (2) the attorney's mental or physical condition

1. *Withdrawal because of conflict of interest:* If counsel discovers his representation of a defendant involves a conflict of interest, ethically he must seek to withdraw. If the court finds a conflict, it must permit withdrawal.[332] The better procedure is to decline representation of codefendants from the start. *See infra* § 8.6.

2. *Withdrawal where lawyer will be a witness:* Where counsel ought to be a witness on his own client's behalf, withdrawal is often required and must be allowed except in narrowly defined circumstances.[333] Withdrawal may not be required if another party may call counsel as a witness unless it appears that his testimony might prejudice his client.[334] When the opposing party seeks counsel's testimony, a stipulation may be a way to avoid withdrawal.[335]

3. *Withdrawal because of client perjury or other client fraud on the court:* Withdrawal may be appropriate when counsel learns that the client intends, or is in the process of, committing a fraud on the court — as, for example, when the client would commit perjury or has lied regarding her indigency. This subject is addressed *infra* at § 8.7.

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"renders it unreasonably difficult" to give effective representation; OR (3) counsel is discharged by the client.

Former DR 2-110(C) *permitted* withdrawal *only* where (1) the client insists on presenting a bad-faith claim; pursuing an illegal course of conduct; having the lawyer pursue an illegal, unethical, or inadvisable course of conduct; or where the client renders the attorney unable to give effective representation or fails to honor the fee agreement; (2) continued representation is likely to result in a disciplinary rule violation; (3) counsel is unable to work with co-counsel; (4) counsel's condition makes it "difficult" to give effective representation; (5) the client assents to withdrawal; or (6) counsel believes the tribunal will find other good cause for withdrawal.

[332] Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60, 62, *rehearing denied*, 315 U.S. 827 (1942).

[333] Mass R. Prof. C. 3.7(a), as did former S.J.C. Rule 3:07, DR 5-102(A) and 2-110(B)(2), requires withdrawal unless the testimony will be uncontested, relate solely to the value of the legal services rendered, or where withdrawal would create a hardship to the client due to the distinctive value of the lawyer in the particular case. *See also infra* note 249; Super. Ct. R. 12 (attorney witness may not conduct trial without special leave of court); Commonwealth v. Patterson, 432 Mass. 767 (2000) (when defense counsel is obviously only witness who can refute Commonwealth's inculpatory evidence, counsel must move to withdraw and testify as defendant's witness; counsel's continued representation of defendant involves actual conflict of interest); Commonwealth v. Johnson, 412 Mass. 318, 326 (1992) (quoting from Commonwealth v. White, 367 Mass. 280, 284 (1975)) (if there is no third party present at a pretrial interview with prosecutor, then prosecutor has no basis for introducing witness's prior inconsistent statements, unless he obtains leave to withdraw from the case in order to present such inconsistencies); Commonwealth v. Rondeau, 378 Mass. 408, 414–17 (1979) (reversed because failure of attorney to withdraw when he was possible alibi witness was unethical and created conflict of interest). But the Massachusetts courts have cautioned that disqualification should not be court ordered "in every case in which counsel could give testimony on behalf of his client on other than formal or uncontested matters. We must look to whether the attorney is likely to 'withhold crucial testimony from his client because he prefers to continue as counsel,'. . . to determine if this 'continued participation as counsel taints the legal system or the trial of the cause before it.' " Byrnes v. Jamitkowski, 29 Mass. App. Ct. 107, 109 (1990) (citing Borman v. Borman, 378 Mass. 775 (1979)).

[334] Mass. R. Prof. C. 3.7(a); *see also* former S.J.C. Rule 3:07, DR 5-102(B).

[335] Commonwealth v. Shraiar, 397 Mass. 16 (1986) (attorney's stipulation to uncontested facts does not require withdrawal).

4. *Withdrawal from appeal:* Trial counsel who wishes to withdraw from the appeal must file a motion to withdraw in the trial court on the same day as the notice of appeal. The motion must be heard within seven days. Counsel continues to represent the defendant on appeal until the trial court permits withdrawal and substitute counsel files an appearance.[336]

5. *Withdrawal from a frivolous appeal:* Rules of Professional Conduct forbid a lawyer from bringing or defending a proceeding or asserting or controverting an issue unless there is a nonfrivolous basis to do so.[337] A defense lawyer, however, may "so defend the proceeding as to require that every element of the case be established."[338] For appointed [339] counsel, withdrawal requires court leave, and to ground a withdrawal motion on the frivolousness of the appeal raises the alternative ethical, and Sixth Amendment,[340] issue of an attorney arguing against her client.

To resolve this conflict, Massachusetts has decided that an appointed counsel may not withdraw solely on the ground that the appeal lacks merit.[341] However, recognizing the ethical problems involved in advancing a meritless claim, the Supreme Judicial Court in *Commonwealth v. Moffett* [342] has enunciated guidelines for appointed counsel handling an appeal she believes is frivolous. These guidelines are detailed *infra* at § 45.2F.

## § 8.6 CONFLICT OF INTEREST

### § 8.6A. OVERVIEW / STANDARD OF REVIEW

[336] Mass. R. App. P. 3(e). Ambiguous language leaves uncertain whether this rule applies solely to appointed counsel or also to retained counsel. However, Super. Ct. R. 65 requires a motion to withdraw in either case. For appointed trial counsel who is not CPCS-certified for appellate matters or does not wish to represent the client on appeal, the following action must be taken within 30 days of sentencing: (a) file a notice of appeal; (b) file a motion to withdraw; and (c) send copies of the above to CPCS Private Counsel Division. (Public defenders should follow internal CPCS requirements after filing a notice of appeal.)

[337] Mass. R. Prof. C. 3.1; *see also* former S.J.C. Rule 3:07, DR 7-102(A)(2); Polk County v. Dodson, 454 U.S. 312, 323–34 (1981).

[338] Mass. R. Prof. C. 3.1.

[339] Because the rules require a motion to withdraw from retained counsel as well, similar problems could theoretically arise from explaining in a withdrawal motion that the appeal was frivolous. Commonwealth v. Moffett, 383 Mass. 201 (1981), did not address the issue of retained counsel, probably because in practice retained counsel does not have the same burden of persuading a judge to permit withdrawal and there is no need for such an explanation.

[340] Indigent defendants are entitled to have the assistance of counsel on appeal. Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12, 18 (1956).

[341] Commonwealth v. Moffett, 383 Mass. 201 (1981). This is more restrictive than the former federal rule, which permitted a motion to withdraw but only if accompanied by a brief referring to anything in the record which might arguably support the appeal. Anders v. California, 386 U.S. 738 (1967). *See also* McCoy v. Court of Appeals of Wisconsin, Dist. 1, 486 U.S. 429 (1988). The *Anders* rule was abandoned in Smith v. Robbins, 120 S. Ct. 746, 753 (2000), where the Supreme Court held that "the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appointed counsel."

[342] 383 Mass. 201, 208–09 (1981).

A defendant is entitled to counsel free of any conflict of interest and unrestrained by commitments to others.[343] Nevertheless, even if there is an actual or genuine conflict of interest, a defendant can consent to the continued representation of conflicted counsel, if, after a colloquy, a judge finds that the defendant's waiver is voluntarily, knowingly, and intelligently made.[344] Unless there is a waiver, representation by counsel with conflicting interests violates both the Rules of Professional Conduct [345] and the constitutional right to effective counsel.[346]

Appellate courts have focused on the following four issues to determine whether a challenge based on counsel's conflict of interest is successful:

1. *Was there an actual conflict?* If so, no prejudice need be shown.[347] The defendant carries the burden of proof [348] and may rely on the record or introduce evidence extrinsic to the court proceedings by means of a new trial motion.[349]

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[343] Commonwealth v. Shraiar, 397 Mass. 16, 20 (1986); Commonwealth v. Burbank, 27 Mass. App. Ct. 97, 103 (1989); Commonwealth v. Michel, 381 Mass. 447, 453 (1980); Commonwealth v. Mosher, 455 Mass. 811, 819 (2010).

[344] Commonwealth v. Agbanyo, 69 Mass. App. Ct. 841, 845 (2007).

[345] Mass. R. Prof. C. 1.7; Commonwealth v. Michel, 381 Mass. 447, 456 (1980) (listing counsel's disciplinary violations).

[346] Commonwealth v. Hodge, 386 Mass. 165, 169–70 (1982); Commonwealth v. Davis, 376 Mass. 777, 780 (1978); For a discussion of the right to effective assistance generally, *see supra* § 8.1C.

[347] Commonwealth v. Hodge, 386 Mass. 165, 168–70 (1982), established a more stringent rule under art. 12 of the Mass. Const. Declaration of Rights than the Supreme Court had applied, finding that if the conflict is "genuine," or actual, no prejudice or adverse effect on attorney performance need be shown to invalidate a conviction. A "genuine" conflict of interest arises when defense counsel's professional judgment is impaired by his own interests or by the interests of other clients. Commonwealth v. Miller, 435 Mass. 274 (2001); The defendant has the burden of proving genuine conflict of interest of defense counsel, requiring reversal without any showing of prejudice under Article 12. *Id.* A genuine conflict of interest is one in which prejudice is "inherent in the situation," such that no impartial observer could reasonably conclude that the attorney is able to serve the defendant with undivided loyalty. Commonwealth v. Mosher, 455 Mass. 811, 819-20 (2010) If defense counsel's conflict is only "potential," defendant must demonstrate actual prejudice. *Id*. *See also* Commonwealth v. Allison, 434 Mass. 670 (2001). So also if the conflict is "tenuous." Commonwealth v. Patterson, 432 Mass. 767 (2000); Commonwealth v. Soffen, 377 Mass. 433, 435–440 (1979). *Accord* Commonwealth v. Filippidakis, 29 Mass. App. Ct. 679, 682–84 (1991); Commonwealth v. Epsom, 399 Mass. 254, 261 (1987); Commonwealth v. Richard, 398 Mass. 392, 393–94 (1986); Commonwealth v. Goldman, 395 Mass. 495, 503 n.10 (1985); Commonwealth v. Howell, 394 Mass. 654, 656–57 (1985); Commonwealth v. Wooldridge, 19 Mass. App. Ct. 162, 168 (1985); Commonwealth v. Hurley, 391 Mass. 76, 81 (1984); Commonwealth v. Michel, 381 Mass. 447, 453 (1980); Commonwealth v. Bolduc, 375 Mass. 530, 540–41 (1978); Commonwealth v. Smith, 362 Mass. 782, 784 (1973). *Compare* federal rule in Satterwhite v. Texas, 486 U.S. 249, 256–58 (1988) (citing Holloway v. Arkansas, 435 U.S. 475 (1978) (if joint representation of conflicting interests pervades proceeding, prejudice presumed)); Cuyler v. Sullivan, 446 U.S. 335, 348–49 (1980) (if defendant did not object to joint representation at trial, must demonstrate on appeal that actual conflict adversely affected representation).

[348] Commonwealth v. Walter, 396 Mass. 549, 554 (1986); Commonwealth v. Soffen, 377 Mass. 433, 437 (1979); Commonwealth v. Adams, 374 Mass. 722, 731 (1978); Commonwealth v. Bolduc, 375 Mass. 530, 541 (1978); Commonwealth v. Davis, 376 Mass. 777, 781 (1978); Commonwealth v. Burbank, 27 Mass. App. Ct. 97, 103 (1989); Commonwealth v. Milley, 67 Mass. App. Ct. 685 (2006)(defendant failed to sustain his burden

2. *Was there a potential conflict?* If so, a conviction may be overturned if the potential conflict materially prejudiced the defendant.[350]

3. *Was there a colloquy?* Even if no actual or prejudicial conflict occurred, the trial court was required to conduct a colloquy when confronted with joint representation of codefendants. If it failed to do so, the prosecution has the burden of demonstrating the improbability of prejudice or the conviction will be set aside.[351]

4. *Was there a valid waiver?* If a conflict existed and the record is silent as to waiver, it cannot be supplemented by a posttrial evidentiary hearing and the conviction must be set aside.[352] If a waiver appears on the record as described *infra* at § 8.6D, the court will accord substantial deference to the trial judge's findings, "with the reservation, however, that an appellate court indulges every reasonable presumption against waiver of a fundamental right."[353] The burden of proving a valid waiver is on the Commonwealth.[354]

## § 8.6B. DEFINITION AND EXAMPLES OF CONFLICTS

### 1. Conflict Defined

to show an actual conflict or prejudice resulting from a potential conflict despite allegation that attorney had financial interest in being assigned cases and hiring private investigator who was involved in a scheme to defraud the state).

[349] Commonwealth v. Soffen, 377 Mass. 433, 437 (1979); Commonwealth v. Frisino, 21 Mass. App. Ct. 551, 556 (1986); Commonwealth v. Davis, 376 Mass. 777, 781 (1978).

[350] Commonwealth v. Dahl, 430 Mass. 813, 816–818 (2000); Commonwealth v. Shraiar, 397 Mass. 16, 24 (1986); Commonwealth v. Davis, 376 Mass. 777, 782–83 (1978); Commonwealth v. Walter, 396 Mass. 549, 559 (1986), and cases cited therein. *See also* Commonwealth v. Bonefont, 35 Mass. App. Ct. 54 (1993) (potential conflict where defense counsel represented robbery victim's parents in guardianship proceeding concerning victim's brother, but no reversal, as no prejudice shown); Commonwealth v. Filippidakis, 29 Mass. App. Ct. 679, 682–83 (1991).

[351] Commonwealth v. Davis, 376 Mass. 777, 786 & n.10 (1978); Commonwealth v. Agbanyo, 69 Mass. App. Ct. 841, 845 (2007)(judge's colloquy with defendant was inadequate because it failed to cover important points,; "the judge neglected to inquire into the defendant's understanding of the potential conflict; to advise the defendant that he had a constitutional right to an attorney free of divided loyalties, to invite the defendant to raise or discuss any concerns that he might have, to inform the defendant that he could consult with another attorney before deciding what to do, or to offer a continuance to permit the defendant to investigate his options or obtain new counsel."; Commonwealth v. Martinez, 425 Mass 382, 393 (1997)(colloquy was inadequate)

[352] Commonwealth v. Wooldridge, 19 Mass. App. Ct. 162, 170 (1985) (citing Commonwealth v. Foster, 368 Mass. 100, 108 n.7 (1975) (guilty plea)); Commonwealth v. Fernandes, 390 Mass. 714, 721 (1984).).

[353] Commonwealth v. Wooldridge, 19 Mass. App. Ct. 162, 167 (1985) (citing Commonwealth v. Gill, 393 Mass. 204, 214 (1984), and cases cited therein). Commonwealth v. Perkins, 450 Mass. 834 (2008)(defendant voluntarily, knowingly and intelligently consented to his counsel's actual conflict of interest, and so he was not denied the effective assistance of counsel).

[354] Barker v. Wingo, 407 U.S. 514, 529 (1972); Glasser v. United States, 315 U.S. 60, 70 (1942).

A defendant is entitled to "the untrammeled and unimpaired assistance of counsel free of any conflict of interest and unrestrained by commitments to others,"[355] Where, "no impartial observer could reasonable conclude that the attorney is able to serve the defendant with undivided loyalty.[356] An attorney has an actual conflict of interest if his independent professional judgment is impaired, either by his own interests or by the interests of another client.[357] Even where no actual conflict exists, a potential conflict may prejudice the defendant and if so is grounds for reversal.[358]

In addition to the constitutional violation, it is a disciplinary infraction for counsel to represent multiple clients when their interests conflict or would impair his independent professional judgment, unless each defendant can be provided adequate representation and each has consented to joint representation after full disclosure.[359]

If an attorney would be required not to represent a client because of a conflict of interest, his *law firm or associates* may be required to decline representation as well.[360] Counsel must actively investigate whether conflicting interests exist among his

[355] Commonwealth v. Patterson, 432 Mass. 767 (2000); Commonwealth v. Davis, 376 Mass. 777, 780–81 (1978) (quoting Glasser v. United States, 315 U.S. 60, 76 (1942)). *See also* Commonwealth v. Allison, 434 Mass. 670 (2001), (mere sharing of office space by attorneys does not ordinarily trigger conflict of interest rules, but actual conflict may arise between office-sharing attorneys representing defendant and co-defendant when they hold themselves out to public as a firm or conduct themselves as a firm); *id*. (joint defense meetings between counsel for defendant and co-defendant are not inherently conflicted); Commonwealth v. Shraiar, 397 Mass. 16, 20 (1986); Commonwealth v. Croken, 432 Mass. 266 (2000) (even when defense counsel concluded that he could vigorously represent defendant despite his intimate relationship with an a.d.a. employed by the prosecuting office, he should obtain informed consent from the defendant before continuing to represent him). Commonwealth v. Stote, 456 Mass. 213 (2010). CPCS has issued a memorandum, recommending that attorneys should obtain executed waivers from defendants in cases where the attorney has a close relationship with a person who is a member of law enforcement, the district attorney's office or the sheriff's department in the county where the attorney practices. *See* the memo from Carol Beck, CPCS Private Counsel Division Director of Criminal Trial Support, dated January 30, 2012 for a more detailed account of the instances when an executed waiver is recommended.

A conflict exists when an attorney's regard for his duty to one client would lead to disregard of another. Commonwealth v. Goldman, 395 Mass. 495, 503 (1985). *Accord* ABA Standards of Criminal Justice, Standard 4-3.5(b) (2d ed. 1980).

[356] Commonwealth v. Mosher, 455 Mass, 811, 819-820 (2010).

[357] Commonwealth v. Shraiar, 397 Mass. 16, 20 (1986). *See also* Commonwealth v. Burbank, 27 Mass. App. Ct. 97, 103 (1989); Guaraldi v. Cunningham, 819 F.2d 15, 17 (1st Cir. 1987) (to establish actual conflict, must be some plausible alternative defense strategy inherently in conflict with or not undertaken due to attorney's other loyalties or interests); Commonwealth v. Michel, 381 Mass. 447, 451 (1980) (actual conflict exists when there is tension between the interests of two clients); Commonwealth v. Stote, 456 Mass. 213, 221 (2010).(intimate relationship between appellate defense counsel and prosecutor who worked in the appellate division was not, standing alone, sufficient to establish an actual conflict).

[358] Commonwealth v. Bonefont, 35 Mass. App. Ct. 54 (1993); Commonwealth v. Shraiar, 397 Mass. 16, 24 (1986); Commonwealth v. Walter, 396 Mass. 549, 559 (1986), and cases cited therein; Commonwealth v. Davis, 376 Mass. 777, 782–83 (1978).

[359] Mass. R. Prof. C. 1.7.

[360] Mass. R. Prof. C. 1.10; *see also* Mass. R. Prof. C. 1.9, comment 3; former S.J.C. Rule 3:07, DR 5-105(D); Commonwealth v. Hodge, 386 Mass. 165 (1982); Commonwealth v. Michel, 381 Mass. 447 (1980); United States v. Donahue, 560 F.2d 1039, 1042 (1st Cir. 1977); Commonwealth v. Geraway, 364 Mass. 168 (1973). *See also* Burger v. Kemp, 483 U.S. 776

associates; a new trial was ordered when defense counsel's associate represented a prosecution witness in unrelated matters, even though he was unaware of his partner's representation.[361] Private attorneys assigned to a case by the Private Counsel Division of the Committee for Public Counsel Services are not considered associates of each other or of the Public Counsel Division.[362] The rule is also relaxed for prosecutors who may not necessarily be disqualified because an associate is.[363]

### 2. Survey of Conflict Situations

Among the more common cases presenting potential or actual conflicts are those in which the defense attorney or associate:

1. Represents codefendants, addressed *infra;*
2. Represents two clients with divergent interests;[364]
3. "Maintains an attorney-client or direct and close personal relationship with a material prosecution witness,"[365] addressed *infra;*
4. Simultaneously represents a possible defense witness, addressed *infra;*
5. Is paid by a person with interests that conflict with those of the client;[366]

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(1987) (assumes without deciding that law partners are treated as one attorney); Commonwealth v. Colon, 408 Mass. 419, 430 (1990); Commonwealth v. Allison, 434 Mass. 670, 692 (2001)(office-sharing attorneys who share or divulge client's confidences are subject to conflict of interest rules and are not permitted to represent parties with adverse interests). *Compare* Commonwealth v. Fogarty, 419 Mass. 456 (1995) (fact that defendant's attorney owned a building with an attorney who had represented a witness against defendant held not to establish conflict of interest even where both attorneys had offices in the building). *But see* M.B.A. Opinion 88-2 (even if former government attorney is disqualified from opposing his former agency, his firm may appear if the attorney is "screened off" from participation).

[361] Commonwealth v. Geraway, 364 Mass. 168, 175–76 (1973).

[362] Mass. R. Prof. C. 1.10.. However, public defenders within the Public Defender Division of CPCS are associated as if in the same law firm, *see* Commonwealth v. Egardo, 426 Mass. 48, 49–50 (1997), and may not represent clients with conflicting interests. G.L. c. 211D, § 6(a) prohibits the Public Defender Division from representing codefendants or defendants in separate cases arising from the same incident..

[363] Pisa v. Commonwealth, 378 Mass. 724, 727–28 (1979).

[364] *See, e.g.*, Commonwealth v. Colon, 408 Mass. 419, 430–31 (1990) (one of defendant's co-counsel represented prosecutor in unrelated civil matter); Commonwealth v. Michel, 381 Mass. 447, 455 (1980) (attorney represented defendant in criminal case and wife seeking divorce, with conviction cited in divorce libel). *But see* M.B.A. Opinion 88-1 (permissible for attorney who represents criminal defendants to represent autonomous school board of same municipality).

[365] Commonwealth v. Martinez, 425 Mass. 382 (1997) (new trial ordered where counsel represented a key prosecution witness on other matters and colloquy was insufficient); Commonwealth v. Walter, 396 Mass. 549, 554–55 (1986). *See also* Mass. R. Prof. C. 1.6 *Cf.* Commonwealth v. Croken, 432 Mass. 266 (2000) (intimate relationship between defense counsel and prosecutor in district attorney's office requires hearing on issues of actual conflict and whether potential conflict caused prejudice to defendant).

[366] United States v. Rodriguez, 929 F.2d 747 (1st Cir. 1991) (lawyer alleged to be paid by, and part of, organized crime); United States v. Allen, 831 F.2d 1487 (9th Cir. 1987); Wood v. Georgia, 450 U.S. 261, 269 n.15 (1981). *See* Mass. R. Prof. C. 1.7 (attorney may not accept compensation from another without consent of the client after full disclosure nor permit third party who recommended or paid him to direct or regulate legal services).

6. "Has business reasons for preferring a verdict unfavorable to the defendant he or she represents";[367]

7. Has a personal involvement in the subject matter of the case[368] or might be culpable for the crimes charged against the client;[369]

8. Will testify on behalf of the client or will be called to testify by the prosecution and would testify adversely to the client;[370]

9. Switches sides.[371]

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[367] Commonwealth v. Walter, 396 Mass. 549, 554–55 (1986). *See also* Commonwealth v. Epsom, 399 Mass. 254, 262 (1987) (vigorous cross-examination of witness represented by partner might jeopardize economic interests). In United States v. DiCarlo, 575 F.2d 952, 957 (1st Cir. 1978), the court noted that an attorney may have a pecuniary interest (rather than a client) which creates a per se disabling conflict, citing United States v. Hurt, 543 F.2d 162 (D.C. 1976), but because the interest asserted — a possibility of additional work — was just speculative, it is presumed that counsel honored his professional responsibility.

It is unprofessional conduct to provide representation when counsel's professional judgment reasonably may be affected by business or personal interests (Mass. R. Prof. C. 1.7(b); or to acquire an interest in the litigation (Mass. R. Prof. C. 1.7(b);), or to enter into certain business relationships with the client except on full disclosure (Mass. R. Prof. C. 1.8;); *See* Commonwealth v. Downey III, 65 Mass. App. Ct. 547 (2006) (defense counsel's agreement with television program to wear mikes during murder trial without consent of defendants created an actual conflict of interest as attorneys had "'extra' allegiances to the broadcasting company" that violated their duty of undivided loyalty to their clients.

However, the fact that another client has personal animosity towards the defendant does not in itself constitute a conflict. Commonwealth v. Szczuka, 391 Mass. 666 (1984).

[368] Unless the lawyer reasonably believes the representation will not be affected and the client consents after consultation. Mass. R. Prof. C. 1.7(b)(2); Commonwealth v. Shraiar, 397 Mass. 16, 19 (1986).

[369] Commonwealth v. Shraiar, 397 Mass. 16, 23 (1986).

[370] Commonwealth v. Shraiar, 397 Mass. 16, 21 (1986). *See also supra* notes 242–244; Mass. R. Prof. C. 3.7; former S.J.C. Rule 3:07, DR 5-101(B), governing when a lawyer who might be a witness in the case must refuse employment by a client, and former S.J.C. Rule 3:07, DR 5-102, governing when a lawyer who would be a witness must withdraw from the case; Commonwealth v. Rondeau, 378 Mass. 408, 414–17 (1979) (attorney testifying as alibi witness created conflict which denied effective assistance); Borman v. Borman, 378 Mass. 775 (1979) (party who calls opposing counsel as witness has no right to require him to withdraw as counsel). *Cf.* State v. Lee, 28 S.E.2d 402 (S.C. 1943) (defendant's constitutional right to call witnesses includes right to call prosecutor).

However, no conflict necessarily results when the prosecution merely lists the attorney as a witness, or when the attorney enters into a stipulation of undisputed facts. Commonwealth v. Shraiar, 397 Mass. 16, 21–23 (1986).

The attorney is a competent witness for or against his client. Kendall v. Atkins, 374 Mass. 320, 323–25 (1978) (citing G.L. c. 233, § 20). The case discusses the attorney as witness, stating that while permitted, the calling of an attorney by opposing counsel should be discouraged when facts may be proved in another manner, and if done should provide advance notice so substitute counsel may be present during the testimony.

[371] Pisa v. Commonwealth, 378 Mass. 724, 726 (1979). *See also* Hull v. Celanese Corp., 513 F.2d 568, 572 (9th Cir. 1975) (disqualification required not only when "lawyer did, *in fact,* receive confidential information . . . [but also when] in the course of the former representation the attorney *might* have acquired information related to the subject matter of his subsequent representation); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 565 (2d Cir. 1973) (appearance of impropriety requires prophylactic rule barring counsel's representation when

10. Has an intimate personal relationship with a prosecutor in the office prosecuting the defendant.[372]

The *prosecutor* may not appear in a case with conflicting interests. In particular, the law prohibits the prosecutor from representing the victim in a civil action,[373] receiving any fee or reward for the prosecution,[374] having any other personal interest in the outcome,[375] or prosecuting a case he had previously defended.[376]

### 3. Representation of Codefendants

An actual conflict exists whenever counsel represents two defendants whose interests diverge with respect to a material factual or legal issue or a course of action.[377] Conflicts arising from joint representation may arise in such areas as "plea bargaining, in selecting defenses for individual defendants, in deciding whether to call one of the defendants as a witness, in closing argument, and in sentencing."[378]

The problem goes far beyond the issue of divergent defenses or trial tactics.[379] It is highly likely, for example, that in plea bargaining or in sentencing, counsel's effort

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there is a *possibility* that prior representation of the opposing side led to receipt of privileged material).

However, the fact that defense counsel previously worked as a district attorney does not create an actual conflict. Commonwealth v. Lee, 394 Mass. 209, 218 (1985). Moreover, seeking and accepting (but not starting) a position with the district attorney's office creates a potential, rather than actual conflict of interest and so, in order for the defendant to obtain relief, he must show prejudice. Commonwealth v. Agbanyo, 69 Mass.App.Ct 841. 846 (2007).

[372] *See* Commonwealth v. Croken, 432 Mass. 266 (2000). There the defense counsel and an assistant district attorney in the prosecuting office had an intimate relationship that later culminated in marriage. The Court ordered an evidentiary hearing on the conflict issue, and also stated that "before agreeing to represent the defendant, LaLiberte should have determined whether he reasonably believed his representation would be adversely affected by his relationship with Doe. If he concluded that it would, then he should have withdrawn from the case. If, on the other hand, he determined that he could represent the defendant vigorously, LaLiberte should then have asked the defendant whether he consented to being represented by him in light of his relationship with Doe." *See also* Commonwealth v. Stote, 456 Mass. 213, 225 (2010). Attorneys have a professional obligation under rule 1.7(b) to disclose to their clients any intimate personal relationship that might interfere with the ability to provide the effective assistance of counsel.

[373] Commonwealth v. Tabor, 376 Mass. 811, 817 n.10 (1978).

[374] G.L. c. 12, § 30. The conviction must be reversed even absent a showing of prejudice. Commonwealth v. Tabor, 376 Mass. 811, 819 (1978).

[375] Pisa v. Commonwealth, 378 Mass. 724, 729 (1979).

[376] Pisa v. Commonwealth, 378 Mass. 724, 726 (1979) (improper to prosecute appeal after assisting defense); United States v. Caggiano, 660 F.2d 184 (6th Cir. 1981).

[377] United States v. Hernandez-Lebron, 23 F.3d 600 (1st Cir. 1994); Commonwealth v. Michel, 381 Mass. 447, 451–52 (1980)(joint representation of appellant and co-defendant who became a key prosecution witness by two attorneys from same firm held reversible conflict of interest).

[378] Commonwealth v. Davis, 376 Mass. 777 (1978).

[379] Regarding divergent defenses, *see, e.g.,* Glasser v. United States, 315 U.S. 60 (1942) (representation of codefendants inhibited cross-examination and violated Sixth Amendment); Commonwealth v. Michel, 381 Mass. 447, 453 (1980) (if one client testified it would hurt the

to minimize the liability of one client would aggravate the liability of the other.[380] Who is the less culpable party in the crime, who is the "bad influence," who is the first offender? In plea bargaining, how can an attorney discuss the possibility of one client's cooperation without violating his duty to the other client?[381] These problems are compounded when one defendant or potential defendant is paying for the defense of another.[382]

*Avoiding joint representation that threatens a conflict.* Joint representation in itself does not automatically constitute an actual conflict [383] but usually will ripen into one. Mass. R. Prof. C. 1.7(b)(2) *permits* such representation as an ethical matter if " the lawyer reasonably believes the representation will not be adversely affected and each client consents after consultation." However, comment 7 notes that "the potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to act for more than one co-defendant, or more than one person under investigation by law enforcement authorities for the same transaction." Lawyers appointed under the auspices of the Committee for Public Counsel Services are barred from representing codefendants at all.[384] For retained counsel, there is an ethical obligation to notify the court promptly when any conflict arises;[385] but, as noted above, counsel should ordinarily decline representation of codefendants from the beginning, except in highly unusual situations and then only on investigation showing no likely conflict, and with the consent of each defendant after full disclosure.[386] As detailed below, the court should defer to a defense claim of conflict and is at least required to conduct a colloquy.

### 4. Representation of Defendant and Witness

A conflict exists when an attorney or law firm simultaneously represents in other matters witnesses who are adverse to the client.[387] Although *prior* representation

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other). *Cf.* Burger v. Kemp, 483 U.S. 776 (1987) (because trials were separate, no conflict in arguing lesser culpability of each).

[380] *See, e.g.,* Commonwealth v. Bolduc, 375 Mass. 530, 542–43 (1978) (resentencing ordered because conflict in attributing primary responsibility for crime).

[381] *See* Wood v. Georgia, 450 U.S. 261, 268–69 (1981); Commonwealth v. Michel, 381 Mass. 447, 453 (1980).

[382] Wood v. Georgia, 450 U.S. 261, 269 n.15 (1981) (wrong for attorney to receive payment from one whose criminal liability may turn on his client's testimony).

[383] Burger v. Kemp, 483 U.S. 776 (1987); Commonwealth v. Walter, 396 Mass. 549, 554 n.6 (1986); Commonwealth v. Michel, 381 Mass. 447, 453–54 (1980).

[384] The Public Counsel Division is barred from representing codefendants by G.L. c. 211D, § 6. In November 1987 CPCS instituted a strict policy for Bar Advocates prohibiting representation of codefendants by one attorney.

[385] Cuyler v. Sullivan, 446 U.S. 335, 346–48 (1980).

[386] Mass. R. Prof. C. 1.7(b)(2)(unprofessional conduct to represent clients with conflicting interests, unless adequate representation is possible and each client consents after full disclosure).

[387] *See generally* Mass. R. Prof. C. 1.9 (conflict of interest: former client); *see also* Commonwealth v. Patterson, 432 Mass. 767 (2000) (conflict of interest by defense counsel not automatically inferred from dual representation of defendant and Commonwealth's witness, and is ordinarily obviated by counsel's termination of representation of witness prior to defendant's trial); Commonwealth v. Geraway, 364 Mass. 168 (1973) (new trial even though two associates

of a person "does not forever quarantine a lawyer from encountering that former client in an adversary posture,"[388] a conflict surely exists if the prior matter was related,[389] or if cross-examination of the witness would be inhibited by prior confidential communications.[390] On appeal the court may find that no genuine conflict occurred if the witness did not testify.[391]

A conflict may also result if defense counsel represents a potential *defense* witness who could face pending charges that are related or are in the same county.[392]

When an attorney represents a witness with interests adverse to those of her client, the court must conduct a colloquy parallel to the one required for representation of codefendants, as detailed below.

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were unaware of the connection between the cases); Commonwealth v. Epsom, 399 Mass. 254 (1987); Commonwealth v. Wooldridge, 19 Mass. App. Ct. 162 (1985); Commonwealth v. Hodge, 386 Mass. 165 (1982); Commonwealth v. Cobb, 379 Mass. 456 (1980), *vacated sub nom.* Massachusetts v. Hurley, 449 U.S. 809, *appeal dismissed sub nom.* Commonwealth v. Hurley, 382 Mass. 690 (1981), *appeal reinstated,* 391 Mass. 76 (1984) Commonwealth v. Mosher, 455 Mass. 811, 825 (2010)(No actual conflict found because defense attorney's representation of key prosecution witness in unrelated criminal case terminated when continuance without a finding was entered against the witness – potential conflict did not turn into an actual conflict because defense strategy of "pointing the finger" at witness would have been counterproductive.

[388] Commonwealth v. Wooldridge, 19 Mass. App. Ct. 162, 167 (1985). *See also* M.B.A. Ethics Opinion 75-7 (avoid appearance of impropriety if former client would fear violation of confidentiality by counsel adopting adversary legal employment); M.B.A. Opinion 88-2 (former government attorney may appear on opposite side of his former agency in civil case if does not misuse secrets).

[389] Commonwealth v. Wooldridge, 19 Mass. App. Ct. 162, 168 (1985).

[390] *See* Commonwealth v. Goldman, 395 Mass. 495, 503–05 (1985), and cases cited at 504. While cross-examining the witness, the attorney would at least be "subconsciously" inhibited by attempting to avoid the use of the confidential information, so the "interests of another would impair his professional judgment" Goldman, *supra,* 395 Mass. at 503–05; Commonwealth v. Michel, 381 Mass. 447 (1980); Commonwealth v. Soffen, 377 Mass. 433, 437–38 (1979). However, the defendant has the burden of demonstrating that such confidential information was given, or the examination inhibited, by evidence rather than speculation. Commonwealth v. Filippidakis, 29 Mass. App. Ct. 679, 682–83 (1991); Commonwealth v. Davis, 376 Mass. 777, 781 (1978); Commonwealth v. Smith, 362 Mass. 782, 784 (1973).

Although the exact content of the confidential information may not be revealed to the current client, a knowing waiver of the right to conflict-free counsel is possible. Commonwealth v. Goldman, 395 Mass. 495 (1985). *See also* M.B.A. Ethics Opinion 84-3 (lawyer has duty to maintain confidences of past client even if widely known).

[391] Analyzing its prior cases, the S.J.C. asserted that genuine conflicts had been found where counsel simultaneously represented a prosecution witness who actually gave testimony concerning a material issue, and that the testimony was reasonably foreseeable. Commonwealth v. Walter, 396 Mass. 549, 554–58 (1986).

[392] Mass R. Prof. C. 1.7(b) (potential conflict so grave that attorney should not represent more than one person under investigation for same transaction). *See also* Commonwealth v. Walter, 396 Mass. 549, 555 (1986) (representation of possible defense witness creates potential of conflict but not realized here); Commonwealth v. Wooldridge, 19 Mass. App. Ct. 162, 168 (1985) (possibility of witness being charged is one reason for court's finding of conflict); Wood v. Georgia, 450 U.S. 261, 269 n.15 (1981).

## § 8.6C. TRIAL COURT'S OBLIGATION TO PREVENT CONFLICTS

### 1. Deference to Claim of Conflict

Courts must refrain from "even suggesting" that counsel undertake to concurrently represent potentially divergent interests, and most courts defer to an attorney's view that she may be enmeshed in a conflict because she "is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop."[393] Moreover, an attorney who claims a conflict should not be expected to go into any detail that would violate her duty to maintain the confidences of the client;[394] or if the attorney may ethically reveal information to the court, should provide the information in camera to avoid prejudicial disclosures to the prosecution.[395]

### 2. When Court Inquiry or Colloquy Is Required

A court is required to conduct an inquiry whenever the defendant or defense counsel claims a conflict,[396] or, even if the defense is silent, whenever the court reasonably should know that the possibility of a conflict exists.[397]

Massachusetts has further required a colloquy with the defendant whenever her attorney also represents a codefendant,[398] an adverse witness,[399] or presumably any other apparent divergent interests. The colloquy must ensure that the defendant is adequately informed of and fully understands the risks of joint representation, is

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[393] Holloway v. Arkansas, 435 U.S. 475, 485 (1978). While the Court notes that this is the view of most courts, it also states that judges retain the power to deny a motion for separate appointment if made for dilatory purposes or if they conduct a proper inquiry. *See also* District Court Standards of Judicial Practice: Arraignment, Standard 5:03 (Aug. 1977) (court should respect legitimate claim that codefendants' interests will conflict or at least promote the appearance of divided loyalty). *But see* Cuyler v. Sullivan, 446 U.S. 335, 348 (1980); *Holloway, supra*, 435 U.S. at 482–84 (multiple representation does not violate the Sixth Amendment per se unless it gives rise to a conflict); Commonwealth v. LaFleur, 1 Mass. App. Ct. 327, 330–31 (1973) (mere claim by defense counsel of possible conflict did not require separate appointment).

[394] *Cf.* Holloway v. Arkansas, 435 U.S. 475, 485, 487 n.11 (1978) (noting the significant risk of unfair prejudice without deciding the issue).

[395] Commonwealth v. Davis, 376 Mass. 777, 785 n.9 (1978); Foster v. United States, 469 F.2d 1, 4–5 (1st Cir. 1972).

[396] Holloway v. Arkansas, 435 U.S. 475, 484–87 (1978). *Compare* Commonwealth v. Walter, 396 Mass. 549 (1986) (no colloquy required because, despite claim, there was no conflict).

[397] Wood v. Georgia, 450 U.S. 261, 272–74 (1981) (inquiry triggered by possibility of conflict); Cuyler v. Sullivan, 446 U.S. 335, 347 (1980) (inquiry triggered if court reasonably should know particular conflict exists); United States v. Donahue, 560 F.2d 1039, 1043–44 (1st Cir. 1977) (court has duty to advise defendants of risks from representation by attorneys in same law firm).

[398] Commonwealth v. Davis, 376 Mass. 777, 784–85 (1978); United States v. Donahue, 560 F.2d 1039, 1043–44 (1st Cir. 1977).

[399] Commonwealth v. Wooldridge, 19 Mass. App. Ct. 162, 166 n.3 (1985); Commonwealth v. Connor, 381 Mass. 500, 506 (1980). However, if the court has no reason to be aware of the dual representation, its failure to hold a colloquy is not error. Commonwealth v. Salemme, 11 Mass. App. Ct. 208 (1981).

afforded an opportunity to ask questions concerning the issue, has discussed it with the attorney, and understands that separate counsel may be retained or where appropriate appointed.[400] "Where closely related parties are jointly represented, the court should be cognizant of the possibility of domination or martyrdom by one defendant or the other."[401] If a conflict exists and the defendant wishes to waive the right to a conflict-free attorney, the court must follow the additional requirements of waiver discussed *infra* at § 8.6D.

The colloquy must be on the record, but may be conducted in camera if necessary to avoid prejudicial disclosures to the Commonwealth.[402] If the colloquy procedure is not followed, on appeal the Commonwealth has the burden of demonstrating the improbability of prejudice from the joint representation.[403]

## § 8.6D. WAIVER OF THE RIGHT TO AN ATTORNEY WITH UNDIVIDED LOYALTY

There are advantages to joint representation as well as perils: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack."[404] Moreover, the right to retain counsel of choice implies that a defendant may choose to be represented by an attorney despite the existence of a conflict. Thus, a defendant must be permitted to waive his right to a conflict-free attorney,[405] except in extraordinary cases when the "fair and proper administration of justice" requires otherwise.[406]

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[400] Commonwealth v. Davis, 376 Mass. 777, 784–85 (1978). *See also* United States v. Lopez Andino, 831 F.2d 1164, 1170 (1st Cir. 1987); Commonwealth v. Agbanyo, 69 Mass. App. Ct. 841, 845 (2007)(judge's colloquy with defendant was inadequate because it failed to cover important points,; "the judge neglected to inquire into the defendant's understanding of the potential conflict; to advise the defendant that he had a constitutional right to an attorney free of divided loyalties, to invite the defendant to raise or discuss any concerns that he might have, to inform the defendant that he could consult with another attorney before deciding what to do, or to offer a continuance to permit the defendant to investigate his options or obtain new counsel."; Commonwealth v. Martinez, 425 Mass 382, 393 (1997)(colloquy was inadequate)..

[401] Commonwealth v. Davis, 376 Mass. 777, 785 (1978).

[402] Commonwealth v. Davis, 376 Mass. 777, 785 n.9 (1978); Foster v. United States, 469 F.2d 1, 4–5 (1st Cir. 1972).

[403] Commonwealth v. Davis, 376 Mass. 777, 786 (1978); United States v. Donahue, 560 F.2d 1039, 1042 (1st Cir. 1977); Foster v. United States, 469 F.2d 1, 4–5 (1st Cir. 1972).

[404] Commonwealth v. Davis, 376 Mass. 777, 787 (1978) (quoting Glasser v. United States, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting)).

[405] Commonwealth v. Croken, 432 Mass. 266 (2000); Commonwealth v. Connor, 381 Mass. 500, 504 (1980) (citing Holloway v. Arkansas, 435 U.S. 475, 483 n.5 (1978). *See also* United States v. Driscoll, Criminal Action No. 94-10153-RCL, 1994 U.S. Dist. LEXIS 14319 (October 4, 1994) (denying government motion to disqualify defense counsel who had previously represented other individuals with ties to current case including a government witness); United States v. Lopez Andino, 831 F.2d 1164, 1170 (1st Cir. 1987); Commonwealth v. Davis, 376 Mass. 777, 787 & n.12 (1978) (citing United States v. Garcia, 517 F.2d 272, 277 (5th Cir. 1975) (may be error to deny joint representation)).

[406] Commonwealth v. Goldman, 395 Mass. 495, 505–08 (1985); Commonwealth v. Connor, 381 Mass. 500, 503–05 (1980). *See also* Wheat v. United States, 486 U.S. 153 (1988) (presumptive right to counsel of choice may be overcome by demonstration of conflict); *In re*

*Commonwealth v. Goldman* [407] set out the requirements for such a knowing and intelligent waiver as follows:

1. Courts should not find waiver lightly and should indulge every reasonable presumption against waiver.

2. The court should require full disclosure of the conflict and its ramifications (in camera if necessary to avoid prejudicial disclosures to the Commonwealth),[408] so that the waiver is done with "sufficient awareness of the relevant circumstances and likely consequences."[409]

3. The judge should actively participate in the waiver decision, seeking to "elicit a narrative response from the defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's [conflict and its perils], that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections."[410] A subsequent case has stated that in *some* circumstances, consultation with independent counsel may be a prerequisite to a valid waiver.[411]

4. The waiver should be voluntary, clear, unequivocal, and unambiguous.[412]

5. The judge should consider the background, experience, and conduct of the defendant,[413] and in rare instances *may* take into account not only the rights of the defendant but the court's interests in the fair and proper administration of justice. A

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Grand Jury Proceedings, 859 F.2d 1021 (1st Cir. 1988) (reversing disqualification of defense counsel under *Wheat* standards).

[407] 395 Mass. 495, 507–08 (1985).

[408] Commonwealth v. Davis, 376 Mass. 777, 785 n.9 (1978); Foster v. United States, 469 F.2d 1, 4–5 (1st Cir. 1972).

[409] *See also* Commonwealth v. Michel, 381 Mass. 447, 457 (1980) (no full disclosure); Commonwealth v. Hodge, 386 Mass. 165, 170 (1982) (same). However, where the conflict is due to counsel's receipt of confidential information from an adverse witness through representation or otherwise, informed waiver is possible even though the specific content of the confidence may not be revealed to the client.

[410] *See also* Edwards v. Arizona, 451 U.S. 477, 482 (1981) (waiver must be voluntary, knowing, and intelligent); Commonwealth v. Davis, 376 Mass. 777, 784–85 (1978) (seminal case requiring colloquy before joint representation proceeds); Commonwealth v. Desfonds, 32 Mass. App. Ct. 311 (1992) (waiver not to be found lightly; better to evoke narrative rather than "yes/no" responses in colloquy); Commonwealth v. Boateng, 438 Mass. 498, 510 (2003)(defendant knowingly and voluntarily assented to dual representation; trial counsel represented medical examiner in unrelated civil case). *See*, Agbanyo and Martinez, *infra*, for examples of inadequate colloquys.

[411] Commonwealth v. Jones, 403 Mass. 279, 287 (1988) (not necessary in that case, although "the better practice").

[412] *See also* Tuitt v. Fair, 822 F.2d 166, 173–77 (1st Cir. 1987), *cert. denied*, 484 U.S. 945 (1987) (containing extensive discussion of this issue); Commonwealth v. Jones, 403 Mass. 279, 287 (1988); Commonwealth v. Connor, 381 Mass. 500, 505–06 (1980).

[413] The court must find that the defendant has the intelligence and education necessary to make a rational decision in favor of hazarding the dangers. Commonwealth v. Wooldridge, 19 Mass. App. Ct. 162, 169 (1985); Commonwealth v. Perkins, 450 Mass. 834 (2008) Although trial attorney's agreement with television company to wear a live microphone during trial "was fraught with peril" and created an actual conflict, defendant waived the actual conflict because he gave voluntary, knowing and intelligent consent to counsel's arrangement with the television company in a way that was clear and unambiguous.

different Supreme Judicial Court decision requires the judge to articulate the reasons for the rulings as well as the facts on which he relies.[414]

On appeal, the Commonwealth bears the burden of demonstrating a valid waiver solely from the trial court record, as detailed *supra* at § 8.6A.

## § 8.7 COUNSEL'S RESPONSE TO CLIENT FRAUD ON THE COURT

A lawyer cannot knowingly participate in or permit a fraud on a court to occur. The lawyer cannot knowingly permit a witness for her client to testify falsely;[415] or help a client fabricate a defense to the charges against him;[416] or offer evidence in court that she knows is not what it purports to be.[417]

The lawyer's obligation is somewhat more complicated when it is the lawyer's own client who is committing the fraud on the court. We address below certain common instances of client fraud: planning to commit perjury at trial, providing a false identity upon arrest, and lying about indigency. Preliminarily, it is worth detailing the conflicting ethical duties that arise in such cases.

Client fraud, in general, compels the attorney to attend to several ethical rules, and reconcile her roles as as "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[418] In the first role, a lawyer must "represent a client zealously within the bounds of the law,"[419] which, in criminal cases, specifically includes the ability to controvert an issue with no basis other than to "so defend the proceeding as to require that every element of the case be established."[420] With certain limited exceptions,[421] the lawyer must also not

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[414] Commonwealth v. Conner, 381 Mass. 500, 506 (1980).

[415] Mass. R. Prof. C. 3.3(a)(4).

[416] *See Matter of Foley*, 439 Mass. 324 (2003) (three-year suspension ordered for attorney who assisted client in the preparation of fabricated defense to a criminal complaint, presented the fabricated false story to the prosecutor, and encouraged client to testify falsely in support of the fabricated story.)

[417] *See Matter of Guinane*, 20 Mass. Att'y Disc. Rep. 195 (2004) (one-month suspension for bar advocate who signedclient's name to affidavit in support of motion to suppress evidence under pains and penalties of perjury without client's knowledge or authority and filed motion and affidavit in court; motion heard and denied.)

[418] Mass. R. Prof. C. Preamble (1).

[419] Mass. R. Prof. C. 1.3.

[420] Mass. R. Prof. C. 3.1.

[421] Mass. R. Prof. C. 1.6(b): A lawyer may reveal, and to the extent required by Rule 3.3, Rule 4.1(b), or Rule 8.3 must reveal such information:

> (1) To prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful execution or incarceration of another;
>
> (2) to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

reveal confidential information related to the representation of a client.[422] Comments 5, 5A, and 5B to Rule 1.6 define "confidential information" very broadly. The prohibition against revealing confidential information applies "not merely to matters communicated in confidence by the client but also to virtually all information relating to the representation, whatever its source."[423] Thus, the limitation of former DR 4-101(A) that the information be "embarrassing" or "detrimental" no longer applies.[424]

At the same time, however, Rule 3.3(a)(1) mandates that, "a lawyer not knowingly: (1) make a false statement of material law or fact to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, except as provided in Rule 3.3(e); . . . [or] (4) offer evidence that the lawyer knows to be false, except as provided in Rule 3.3(e)." Indeed, if a lawyer has offered or the lawyer's client or witnesses have given material false testimony of which the lawyer becomes aware, the lawyer is required to "take reasonable remedial measures."[425] That duty continues to the conclusion of the proceeding, including appeals, and applies even if compliance requires disclosure of information otherwise protected by the confidentiality rules.[426]

With the exception of a criminal defendant's testimony in a proceeding in court, the Rules of Professional Conduct resolve these conflicting mandates in favor of the lawyer's duty of candor to the tribunal. It should also be noted, however, that the requirements of the U.S. Constitution and the Massachusetts Constitution Declaration of Rights are not overridden by rules of professional conduct. Thus, an attorney who believes that adherence to a rule violates her client's rights under, for example, the Sixth Amendment must at the very least preserve that issue for appellate review.

## § 8.7A. CLIENT INTENT TO COMMIT PERJURY

Both the Massachusetts Rules of Professional Conduct and the ABA Model Rules of Professional Conduct forbid a lawyer from presenting testimony she knows is perjurious or evidence she knows to be false.[427] The rules adopted by the Supreme Judicial Court differ from the Model Rules in their treatment of the situation where it is the defendant, the lawyer's client, who wants to testify to a defense the lawyer knows is false. Massachusetts Rule 3.3(e)[428] provides that a criminal defense attorney who

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(3) to the extent the lawyer reasonably believes necessary to rectify client fraud in which the lawyer's services have been used, subject to Rule 3.3€;

(4) when permitted under these rules or required by law or court order.

[422] Mass. R. Prof. C. 1.6(a).

[423] Mass. R. Prof. C. 1.6, comment [5].

[424] Mass. R. Prof. C. 1.6, comment [5].

[425] Mass. R. Prof. C. 3.3(a)(4).

[426] *Id*.

[427] Comment 4 to Rule 3.3 of both versions of the Rules provides: "When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes."

[428] Mass. R. Prof. C. 3.3(e) provides:

(e) In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not

knows that her client intends to testify falsely must take specific remedial measures in an effort to prevent fraud on the court. In all situations where a criminal defense lawyer learns of a client's intention to testify falsely at trial, the lawyer must attempt to dissuade the client from committing perjury.[429] If the lawyer discovers the client's intention before accepting the representation, the rule requires the lawyer to refuse to represent the client. Once the representation has commenced, if the lawyer learns of the client's intention before the trial starts and attempts at dissuasion have failed, the lawyer must seek permission from the court to withdraw from the representation. The motion to withdraw to the trial judge should not disclose the perjury or other privileged or prejudicial information unless disclosure is necessary to effect the withdrawal.[430] If disclosure of privileged or prejudicial information is necessary to persuade a judge to rule favorably on the motion to withdraw, the motion should be made *ex parte* to a judge other than the trial judge, with a request for an *in camera* hearing and the impoundment of the record other than the order allowing withdrawal. If withdrawal is still not allowed, the lawyer cannot resolve the problem by preventing the client from testifying.[431] Rather, Rule 3.3(e) permits the lawyer to allow the client to offer the false testimony, but she may not examine the client in a way that would prompt the false testimony, incorporate or rely on the false testimony in closing argument, or argue the false testimony on appeal.

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> be followed. If a lawyer discovers this intention before accepting the representation of the client, the lawyer shall not accept the representation; if the lawyer discovers this intention before trial, the lawyer shall seek to withdraw from the representation, requesting any required permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to withdraw, the lawyer may not prevent the client from testifying. If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals.

[429] The "persuasion should include, at a minimum, advising the client that such a course of action is unlawful, may have substantial adverse consequences, and should not be followed." *See* Comment 8 to M. R .Prof. C. 3.3.

[430] *See Private Reprimand No. PR-92-34*, 8 Mass. Att'y Disc. R. 328 (1992) (defense lawyer appended prejudicial, confidential correspondence from client to motion to withdraw without informing client or seeking client's permission to reveal letters to court; sent copies of other letters from client to judge without client's consent; court cited client's correspondence in finding client's default to be intentional.

[431] Such conduct would violate the client's right to decide for himself whether to testify and his Sixth Amendment right to the assistance of counsel in the presentation of testimony. *See Brooks v. Tennessee*, 406 U.S. 605 (1972); *Ferguson v. Georgia*, 365 U.S. 570 (1961).

The Supreme Judicial Court addressed the issue of a defendant's perjury in *Commonwealth v. Mitchell*.[432] Mitchell had appealed the denial of a motion for a new trial based on ineffective assistance of counsel where his trial counsel, in the midst of the trial, had advised the judge, pursuant to Mass. R. Prof. C. 3.3(e), that Mitchell intended to testify and offer false testimony to the jury despite the lawyer's efforts to persuade him otherwise.[433] On advice from the judge, the lawyer presented Mitchell's testimony in narrative form and made a closing argument consistent with his ethical obligations. The S.J.C. determined that the standard for determining when a lawyer "knows" that a client's testimony will be false is "firm basis in fact." This standard satisfied constitutional requirements because "it requires more than mere suspicion or conjecture on the part of counsel, more than a belief and more information than inconsistent statements by the defendant or in the evidence. Instead, the standard mandates that a lawyer act in good faith based on objective circumstances firmly rooted in fact."[434] The court declined to impose a duty on the lawyer to conduct an independent investigation into the subject of the testimony. The lawyer in *Mitchell* was faced with more than "mere discrepancies in details told to him" by his client; he was faced with a "direct admission … combined with substantial evidence produced by the Commonwealth that corroborated the defendant's admission, including the defendant's incriminating conduct and his inculpatory statements to others."[435] The court found that this was more than enough to satisfy the "firm basis in fact" standard.

The court then considered the mechanism for permitting a defendant whom defense counsel knows will commit perjury to testify at trial. The court noted that each case was likely to present differing circumstances and that no single rule could resolve all of the problems raised by the client's false testimony. At a minimum, however, the lawyer should call the Rule 3.3(e) problem to the court's attention at a sidebar conference in the presence of the prosecutor to request instructions on how to proceed. The defense lawyer should not reveal the specific testimony that she expects to be perjurious. Full exploration of the problem posed by the client's intention to testify falsely should be deferred until a motion for new trial is being considered; only then can the full details be revealed to the court. Because the sidebar "conference [is] a critical stage of the proceedings," the defendant should be present when defense counsel reveals the problem to the trial judge.[436] The defense lawyer should confine her representations about the client's expected perjury to a minimum, balancing the need for disclosure with the obligation to maintain client confidences and the duty of zealous representation at trial. Also, a colloquy with the defendant may be required if the judge is concerned that the client does not clearly understand the situation he has created. The court's decision also acknowledged a trial judge's discretion to vary the approved procedures if the interests of justice or the effective management of the trial required.

[432] 438 Mass. 535 (2003).

[433] There was no error in the fact that the district attorney was present when defense counsel informed the trial judge of his intention to invoke Rule 3.3(e). The lawyer did not identify the testimony he expected to be perjurious. If the prosecutor had not been present, Mitchell's testimony in narrative form would likely have resulted in objections that might have drawn the jury's attention to the procedure ordered by the court.

[434] *Id*. at 546.

[435] *Id*. at 547.

[436] *Id.*

## § 8.7B. COURT PROVIDED WITH FALSE CLIENT IDENTITY OR INCOMPLETE RECORD

### 1. Client Provided False Identity

A client may have used an alias at arrest or arraignment. While a client may go by any name he chooses, if the lawyer learns of the false name from the client or otherwise and if the false name is material to any aspect of the government's case such as where the alias was intended to conceal a prior record or the fact that there are outstanding warrants against the defendant, the lawyer cannot continue to represent the client unless the false name is corrected. The lawyer is required by Mass. R. Prof. C. 3.3(a)(2) and (4) to take reasonable remedial measures, including, if the client refuses to correct the false statement, disclosing the false identity to the court.[437] This obligation exists even if the lawyer withdraws from further representation.[438]

### 2. Probation Records in Error

A related problem occurs when the court is incorrectly informed by a probation officer that the defendant has no prior record or a lesser record than in fact exists. If the client has not provided inaccurate or false information to the probation department, the client has not committed a fraud. In that situation, disclosure of such confidential information by defense counsel is neither required nor permitted under Rule 1.6. If the court in reliance on the information provided by a probation officer mistakenly believes that the client has no criminal record and releases the client or sets a low bail, the lawyer does not violate Rule 3.3 by failing to disclose information about a prior record which the lawyer has learned from the client or through independent investigation of the case.

Under no circumstances, however, can a lawyer who knows of the probation department's error represent to the court, either directly or by silent assent if the court asks for confirmation, that there are no pending or disposed cases other than what was listed by the probation officer.[439] Similarly, the lawyer cannot apply for a lesser sentence or other consideration based on the ground that the client had no prior record.

The situation is different where the client is responsible for the misinformation provided to the court by the probation department. In that circumstance, the lawyer must call on the client to rectify the fraud by providing accurate information, and if the client refuses, disclose the client's fraudulent conduct to the court.

## § 8.7C. INDIGENCY STATUS OBTAINED FRAUDULENTLY

[437] *See* Comment 2A to Mass. R. Prof. C. 3.3. "Rule 3.3(a) is intended to guide the conduct of the lawyer as an officer of the court as a prophylactic measure to protect against contamination of the judicial process. Thus, for example, a lawyer who knows that a client has committed a fraud on a tribunal and has refused to rectify it must disclose the fraud to avoid assisting the client's fraudulent act."

[438] *See* Rosenfeld, *Ethical Obligations of Criminal Defense Counsel*, available at www.mass.gov/obcbbo/defense.htm (April 1999).

[439] *See* Mass. Bar Association Ethics Opinion No. 78-9.

In July 2012, the Supreme Judicial Court determined in *Commonwealth v. Porter*[440] and *Commonwealth v. Fico*[441] that "a defendant seeking appointment of counsel at public expense bears the burden of proving [his] indigency by a preponderance of the evidence." Where a lawyer appointed to represent a criminal defendant learns that her client has obtained indigency status fraudulently, the lawyer has an obligation under Rule 3.3(a)(2) to remonstrate with the client to correct the misinformation the client used to have counsel appointed. If the client refuses, the lawyer must reveal the fraudulent conduct to the court to avoid assisting the client in the perpetration of the fraud.

By putting the burden of proof on defendants, the court's decisions in *Porter* and *Fico* minimize the possibility that the erroneous determination of indigency was due to probation department error instead of fraudulent conduct by the defendant. The decisions also undercut the advice provided in Massachusetts Bar Association Ethics Opinion No. 76-17 that a lawyer who has learned that a client is not in fact indigent can notify the court that she is willing to continue to represent the client without compensation as an alternative to disclosing the client's true circumstances to the court. Eschewing compensation will not circumvent the lawyer's obligation under Rule 3.3 to avoid assisting a criminal or fraudulent act by a client.

The Ethics Opinion prescription against accepting a fee from the client as an alternative to accepting a fee as assigned counsel is still valid. It would be "an improper use of the court appointment system for [the lawyer's] private profit" were the lawyer to use the court appointment as an avenue to secure a fee from the client as a privately retained counsel.[442]

[440] S.J.C.-10924 (July 13, 2012).

[441] S.J.C.-10918 (July 13, 2012)

[442] Massachusetts Bar Association Ethics Opinions No. 76-17 (1976) and No. 91-6.